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# THE
# ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
# ANNOTATIONS.

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**VOLUME XLI.**

# THE ENGLISH AND EMPIRE DIGEST

COMPLETE AND EXHAUSTIVE

## ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

## VOLUME XLI.

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*See* SMALL HOLDINGS AND SMALL DWELLINGS.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

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|---|---|---|
| A. C. (preceded by date) | Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.) | Eng. |
| A. Jur. Rep. | Australian Jurist Reports | Aus. |
| A. L. T. | Australian Law Times | Aus. |
| A. R. | Ontario Appeal Reports, 27 vols., 1876—1900 | Can. |
| Act. | Acton's Reports, Prize Causes, 2 vols., 1809—1841 | Eng. |
| Ad. & El. | Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842 | Eng. |
| Adam | Adam's Justiciary Reports (Scotland), 1893—(current) | Scot. |
| Add. | Addams' Ecclesiastical Reports, 3 vols., 1822—1826 | Eng. |
| Agra | Agra High Court | Ind. |
| Agra F. B. | Agra High Court, Full Bench | Ind. |
| Alc. & N. | Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833 | Ir. |
| Alc. Reg. Cas. | Alcock's Registry Cases (Ireland), 1 vol., 1832—1841 | Ir. |
| Aleyn | Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 | Eng. |
| All. | New Brunswick Reports (Allen) | Can. |
| Alta. L. R. | Alberta Law Reports | Can. |
| Amb | Ambler's Reports, Chancery, 1 vol., 1716—1783 | Eng. |
| And. | Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605 | Eng. |
| Andr. | Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 | Eng. |
| Anst. | Anstruther's Reports, Exchequer, 3 vols., 1792—1797 | Eng. |
| App. Cas. | Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890 | Eng. |
| App. Ct. Rep. | Appeal Court Reports | N.Z. |
| App. D. | South African Law Reports, Appellate Division | S. Af. |
| Architects' L. R. | Architects' Law Reports, 4 vols., 1904—1909 | Eng. |
| Argus L. R. | Argus Law Reports | Aus. |
| Arkley | Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 | Scot. |
| Arm. M. & O. | Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842 | Ir. |
| Arn. | Arnold's Reports, Common Pleas, 2 vols., 1838—1839 | Eng. |
| Arn. & H. | Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841 | Eng. |
| Ashb. | Ashburner's Principles of Equity, 1902 | Eng. |
| Asp. M. L. C. | Aspinall's Maritime Law Cases, 1870—(current) | Eng. |
| Atk. | Atkyns' Reports, Chancery, 3 vols., 1736—1754 | Eng. |
| Ayl. Pan. | Ayliffe's New Pandect of Roman Civil Law | Eng. |
| Ayl. Par. | Ayliffe's Parergon Juris Canonici Anglicani | Eng. |
| B. | Barber's Gold Law | S. Af. |
| B. & Ad. | Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834 | Eng. |
| B. & Ald. | Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822 | Eng. |
| B. & C. | Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830 | Eng. |
| B. & C. R. (preceded by date) | Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.) | Eng. |
| B. & S. | Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870 | Eng. |
| B. C. R. | British Columbia Reports | Can. |
| B. Dig. | Bose's Digest | Ind. |
| B. L. R. | Bengal Law Reports | Ind. |
| B. L. R. A. C. | Bengal Law Reports, Appeal Cases | Ind. |
| B. L. R. P. C. | Bengal Law Reports, Privy Council | Ind. |
| B. L. R. Sup. Vol. | Bengal Law Reports, Supp. Vol. | Ind. |
| B. R. A. | Butterworths' Rating Appeals, 2 vols., 1913—1925 | Eng. |
| B. W. C. C. | Butterworths' Workmen's Compensation Cases, 1907—(current) | Eng. |
| Bac. Abr. | Bacon's Abridgment | Eng. |
| Bail Ct. Cas. | Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 | Eng. |

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| Baild. ... ... ... | Baildon's Select Cases in Chancery (Selden Society, Vol. X.) | Eng. |
| Ball & B. ... ... | Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ... ... ... ... ... ... ... ... | Ir. |
| Bankr. & Ins. R. ... | Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ... | Eng. |
| Bar. & Arn. ... ... | Barron and Arnold's Election Cases, 1 vol., 1843—1846 ... | Eng. |
| Bar. & Aust. ... ... | Barron and Austin's Election Cases, 1 vol., 1842 ... ... | Eng. |
| Barn. Ch. ... ... | Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ... | Eng. |
| Barn. K. B. ... ... | Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 | Eng. |
| Barnes ... ... ... | Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 ... ... ... ... ... ... ... ... | Eng. |
| Batt. ... ... ... | Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 | Ir. |
| Beat. ... ... ... | Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ... | Ir. |
| Beav. ... ... ... | Beavan's Reports, Rolls Court, 36 vols., 1838—1866 ... ... | Eng. |
| Beav. & Wal. ... ... | Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ... ... ... ... ... ... ... ... | Eng. |
| Beaw. ... ... ... | Beawes's Lex Mercatoria ... ... ... ... ... ... | Eng. |
| Bell, C. C. ... ... | T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ... ... | Eng. |
| Bell, Ct. of Sess. ... | R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ... ... ... ... ... ... ... ... | Scot. |
| Bell, Ct. of Sess. fol. ... | R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 ... ... ... ... ... ... ... ... | Scot. |
| Bell, Dict. Dec. ... | S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ... ... ... ... ... ... | Scot. |
| Bell, Sc. App. ... ... | S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 | Scot. |
| Bellewe ... ... ... | Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ... | Eng. |
| Belt's Sup. ... ... | Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 | Eng. |
| Ben. ... .. ... | Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ... | Eng. |
| Benl. ... ... ... | Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627 ... ... ... ... ... ... ... | Eng. |
| Ber. ... ... ... | New Brunswick Reports (Berton) ... ... ... ... | Can. |
| Bing. ... ... ... | Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ... | Eng. |
| Bing. N. C. ... ... | Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ... | Eng. |
| Biss. & Sm. ... ... | Bisset and Smith's Digest ... ... ... ... ... | S. Af. |
| Bitt. Prac. Cas. ... | Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ... ... ... | Eng. |
| Bitt. Rep. in Ch. ... | Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 ... ... ... ... ... ... | Eng. |
| Bl. Com. ... ... | Blackstone's Commentaries ... ... ... ... ... | Eng. |
| Bl. D. & Osb. ... ... | Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ... ... ... ... | Ir. |
| Bli. ... ... ... | Bligh's Reports, House of Lords, 4 vols., 1819—1821 ... ... | Eng. |
| Bli. N. S. ... ... | Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837 ... ... ... ... ... ... ... ... | Eng. |
| Bluett ... ... ... | Bluett's Isle of Man Cases ... ... ... ... ... | I. of M. |
| Bom. ... ... ... | Bombay High Court Reports ... ... ... ... ... | Ind. |
| Bom. A. C. ... ... | Bombay Reports, Appellate Jurisdiction ... ... ... | Ind. |
| Bom. Cr. Ca. ... ... | Bombay Reports, Crown Cases ... ... ... ... | Ind. |
| Bom. O. C. ... ... | Bombay Reports, Original Civil Jurisdiction ... ... ... | Ind. |
| Bos. & P. ... ... | Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 ... ... ... ... ... ... ... ... | Eng. |
| Bos. & P. N. R. ... | Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807 ... ... ... ... ... ... ... | Eng. |
| Bott. ... ... ... | Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827 ... | Eng. |
| Bourke ... ... ... | Bourke's Reports ... ... ... ... ... ... ... | Ind. |
| Br. & Col. Pr. Cas. ... | British and Colonial Prize Cases, 3 vols., 1914—1919 ... ... | Eng. |
| Bract. ... ... ... | Bracton De Legibus et Consuetudinibus Angliæ ... ... | Eng. |
| Bro. Abr. ... ... | Sir R. Brooke's Abridgement ... ... ... ... | Eng. |
| Bro. C. C. ... ... | W. Brown's Chancery Reports, 4 vols., 1778—1794 ... ... | Eng. |
| Bro. Ecc. Rep. ... ... | W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872 ... ... ... ... ... ... ... | Eng. |
| Bro. N. C. ... ... | Sir R. Brooke's New Cases, 1 vol., 1515—1558 ... ... | Eng. |
| Bro. Parl. Cas. ... ... | J. Brown's Cases in Parliament, 8 vols., 1702—1800 ... | Eng. |
| Bro. Supp. to Mor. ... | M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. ... ... ... ... | Scot. |
| Bro. Synop. ... ... | M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 ... ... ... ... ... | Scot. |
| Brod. & Bing. ... ... | Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822 ... ... ... ... ... ... ... ... | Eng. |
| Brod. & F. ... ... | Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 ... ... ... ... ... | Eng. |
| Broun ... ... ... | Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ... | Scot. |
| Brown. & Lush. ... | Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866 ... ... ... ... ... ... ... ... | Eng. |
| Brownl. ... ... | Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624 ... ... ... ... ... ... | Eng. |
| Bruce ... ... ... | Bruce's Decisions, Court of Session (Scotland), 1714—1715 ... | Scot. |

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| Buch. ... ... ... | Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879 ... ... ... ... ... ... | S. Af. |
| Buch. A. C. ... ... | Buchanan's Reports of Appeal Court (Cape) ... ... ... | S. Af. |
| Buchan. ... ... ... | Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813 ... ... ... ... ... ... | Scot. |
| Buck ... ... ... | Buck's Cases in Bankruptcy, 1 vol., 1816—1820 ... ... | Eng. |
| Bull N. P. ... ... | Buller's Nisi Prius (published, London, 1772) ... ... ... | Eng. |
| Bulst. ... ... ... | Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626 ... ... ... ... ... ... ... | Eng. |
| Bunb. ... ... ... | Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 ... | Eng. |
| Burr. ... ... ... | Burrow's Reports, King's Bench, 5 vols., 1756—1772 ... ... | Eng. |
| Burr. S. C. ... ... | Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776 | Eng. |
| Burrell ... ... ... | Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840 | Eng. |
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| C. L. R. ... ... ... | Calcutta Law Reporter ... ... ... ... ... ... | Ind. |
| C. L. T. ... ... ... | Canadian Law Times ... ... ... ... ... ... | Can. |
| C. L. T. Occ. N. ... | Canadian Law Times, Occasional Notes ... ... ... ... | Can. |
| C. P. ... ... ... | Upper Canada Common Pleas ... ... ... ... | Can. |
| C. P. D. ... ... ... | Law Reports, Common Pleas Division, 5 vols., 1875—1880 ... | Eng. |
| C. P. D. ... ... ... | Cape Provincial Division Reports ... ... ... ... | S. Af. |
| C. R. [date] A. C. ... | Canadian Reports, Appeal Cases ... ... ... ... ... | Can. |
| C. T. R. ... ... ... | Cape Times Reports of the Supreme Court of the Cape of Good Hope ... ... ... ... ... ... ... | S. Af. |
| C. W. N.... ... ... | Calcutta Weekly Notes ... ... ... ... ... ... | Ind. |
| Cab. & El. ... ... | Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885 ... ... ... ... ... ... ... | Eng. |
| Cald. Mag. Cas. ... | Caldecott's Magistrates' Cases, 1 vol., 1776—1785 ... ... | Eng. |
| Calth. ... ... ... | Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618 ... ... ... ... ... ... ... ... | Eng. |
| Cam. Cas. . . ... | Cameron's Supreme Court Cases ... ... ... ... ... | Can. |
| Cam. Prac. . . ... | Cameron's Supreme Court Practice ... ... ... ... | Can. |
| Camp. ... ... ... | Campbell's Reports, Nisi Prius, 4 vols., 1807—1816 ... ... | Eng. |
| Can. Com. Cas. ... ... | Commercial Law Reports of Canada, 4 vols., 1901—1905 ... | Can. |
| Can. Crim. Cas. ... | Canadian Criminal Cases, Annotated, 1898—(current) ... | Can. |
| Can. Gaz. ... ... | Canadian Gazette ... ... ... ... ... ... ... | Can. |
| Can. Ry. Cas. ... ... | Canadian Railway Cases ... ... ... ... ... ... | Can. |
| Car. & Kir. ... ... | Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853 | Eng. |
| Car. & M. ... ... | Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842 ... ... ... ... ... ... ... ... | Eng. |
| Car. C. L. ... ... | Carrington's Treatise on Criminal Law ... ... ... ... | Can. |
| Card. Doc. Ann. ... | Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716 ... ... ... ... ... | Eng. |
| Carl. ... ... ... | New Brunswick Reports (Carleton) ... ... ... ... | Can. |
| Carp. Pat. Cas. ... ... | Carpmael's Patent Cases, 2 vols., 1602—1842 ... ... ... | Eng. |
| Cart. ... ... ... | Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ... | Eng. |
| Cart. ... ... ... | Cases on British North America Act (Cartwright) ... ... | Can. |
| Carth. ... ... ... | Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ... | Eng. |
| Cary ... ... ... | Cary's Reports, Chancery, 1 vol. ... ... ... ... ... | Eng. |
| Cas. in Ch. ... ... | Cases in Chancery, fol., 3 parts, 1660—1697 ... ... ... | Eng. |
| Cas. Pract. K. B. ... | Cases of Practice, King's Bench, 1 vol., 1655—1775 ... ... | Eng. |
| Cas. Sett. ... ... | Cases of Settlements and Removals, 1 vol., 1685—1727 ... | Eng. |
| Cas. *temp.* Finch ... | Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680 ... | Eng. |
| Cas. *temp.* King ... | Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733 ... | Eng. |
| Cas. *temp.* Talb. ... | Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737 ... | Eng. |
| Cass. Dig. ... ... | Cassells' Digest ... ... ... ... ... ... ... | Can. |
| Ch. (preceded by date) | Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.) | Eng. |
| Ch. App. ... ... | Law Reports, Chancery Appeals, 10 vols., 1865—1875 ... | Eng. |
| Ch. Cas. in Ch. ... ... | Choyce Cases in Chancery, 1557—1606 ... ... ... ... | Eng. |
| Ch. Ch. ... ... ... | Upper Canada Chancery Chambers Reports ... ... ... | Can. |
| Ch. D. ... ... ... | Law Reports, Chancery Division, 45 vols., 1875—1890 ... | Eng. |
| Ch. Rob. ... ... | Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808 | Eng. |
| Char. Cham. Cas. ... | Charley's Chamber Cases, 2 vols., 1875—1876 ... ... ... | Eng. |
| Char. Pr. Cas. ... ... | Charley's New Practice Reports, 3 vols., 1875—1876 ... ... | Eng. |
| Chip. ... ... ... | New Brunswick Reports (Chipman) ... ... ... ... | Can. |

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| Chit. ... ... ... | Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ... | Eng. |
| Cl. & Fin. ... ... | Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846 ... ... ... ... ... ... ... ... | Eng. |
| Cl. & Sc. Dr. Cas. ... | Clark and Scully's Drainage Cases ... ... ... ... | Can. |
| Clay. ... ... ... | Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650 ... ... ... ... ... ... ... ... | Eng. |
| Clif. & Rick. ... ... | Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884 | Eng. |
| Clif. & Steph. ... ... | Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872 | Eng. |
| Co. A. ... ... ... | Cook's Lower Canada Admiralty Court Cases ... ... ... | Can. |
| Co. Ent. ... ... | Coke's Entries ... ... ... ... ... ... ... | Eng. |
| Co. Inst. ... ... | Coke's Institutes ... ... ... ... ... ... ... | Eng. |
| Co. L. J. ... ... | Colonial Law Journal ... .. ... ... ... ... | N.Z. |
| Co. Litt. ... ... | Coke on Littleton (1 Inst.) ... ... ... ... ... | Eng. |
| Co. Rep. ... ... | Coke's Reports, 13 parts, 1572—1616 ... ... ... ... | Eng. |
| Coch. ... ... ... | Nova Scotia Reports (Cochran) ... ... ... ... ... | Can. |
| Cockb. & Rowe ... | Cockburn and Rowe's Election Cases, 1 vol., 1833 ... ... | Eng. |
| Coll. ... ... ... | Collyer's Reports, Chancery, 2 vols., 1844—1846 ... ... | Eng. |
| Coll. Jurid. ... ... | Collectanea Juridica, 2 vols. ... ... ... ... ... | Eng. |
| Colles ... ... ... | Colles' Cases in Parliament, 1 vol., 1697—1713 ... ... | Eng. |
| Colt. ... ... ... | Coltman's Registration Cases, 1 vol., 1879—1885 ... ... | Eng. |
| Com. ... ... ... | Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ... ... ... ... | Eng. |
| Com. Cas. ... ... | Commercial Cases, 1895—(current) ... ... ... ... | Eng. |
| Com. Dig. ... ... | Comyns' Digest ... ... ... ... ... ... ... | Eng. |
| Comb. ... ... ... | Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 | Eng. |
| Con. & Law. ... ... | Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ... ... ... ... ... ... ... | Ir. |
| Cong. Dig. ... ... | Congdon's Digest ... ... ... ... ... ... ... | Can. |
| Const .. ... ... | Const's edition of Bott's Poor Laws, 3 vols., 1807 ... ... | Eng. |
| Cooke & Al. ... ... | Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ... ... ... ... ... ... ... | Ir. |
| Cooke, Pr. Cas. ... ... | Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1717 | Eng. |
| Cooke, Pr. Reg. ... | Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ... ... ... ... ... ... ... ... | Eng. |
| Coop. G. ... ... | G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ... ... | Eng. |
| Coop. Pr. Cas. ... ... | C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 | Eng. |
| Coop. *temp.* Brough. ... | C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834 ... ... ... ... ... ... ... | Eng. |
| Coop. *temp.* Cott. ... | C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ... ... ... | Eng. |
| Cor. ... ... ... | Coryton's Reports ... ... ... ... ... ... ... | Ind. |
| Corb. & D. ... ... | Corbett and Daniell's Election Cases, 1 vol., 1819 ... ... | Eng. |
| Correspondances Jud. ... | Correspondances Judiciaires ... ... ... ... ... | Can. |
| Couper ... ... ... | Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ... | Scot. |
| Cout. ... ... ... | Coutlees' Unreported Cases ... ... ... ... ... | Can. |
| Cout. Dig. ... ... | Coutlees' Digest ... ... ... ... ... ... ... | Can. |
| Cowp. ... ... ... | Cowper's Reports, King's Bench, 2 vols., 1774—1778 ... ... | Eng. |
| Cox & Atk. ... ... | Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 | Eng. |
| Cox, C. C. ... ... | E. W. Cox's Criminal Law Cases, 1843—(current) ... ... | Eng. |
| Cox, Eq. Cas. ... ... | S. C. Cox's Equity Cases, 2 vols., 1745—1797 ... ... ... | Eng. |
| Cox, M. & H. ... ... | Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852 ... ... ... ... ... ... | Eng. |
| Cr. & J. ... ... | Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832 | Eng. |
| Cr. & M. ... ... | Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834 | Eng. |
| Cr. & Ph. ... ... | Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ... | Eng. |
| Cr. App. Rep. ... ... | Cohen's Criminal Appeal Reports, 1908—(current) ... ... | Eng. |
| Cr. M. & R. ... ... | Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ... ... ... ... ... ... ... | Eng. |
| Craw. & D. ... ... | Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 | Ir. |
| Craw. & D. Abr. C. ... | Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838 | Ir. |
| Cress. Insolv. Cas. ... | Cresswell's Insolvency Cases, 1 vol., 1827—1829 ... ... | Eng. |
| Cripps' Church Cas. ... | Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ... ... | Eng. |
| Cro. Car. ... ... | Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ... ... ... ... ... | Eng. |
| Cro. Eliz. ... ... | Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ... ... ... ... ... | Eng. |
| Cro. Jac. ... ... | Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ... ... ... ... ... | Eng. |
| Cru. Dig. ... ... | Cruise's Digest of the Law of Real Property, 7 vols. ... ... | Eng. |
| Cunn. ... ... ... | Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 | Eng. |
| Curt. ... ... ... | Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ... ... | Eng. |
| D. ... ... ... | Duxbury's Reports of the High Court of the South African Republic ... ... ... ... ... ... ... ... | S. Af. |
| D. C. A. ... ... ... | Dorion's Queen's Bench Reports ... ... ... ... ... | Can. |
| D. L. R. ... ... | Dominion Law Reports ... ... ... ... ... ... | Can. |

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| Dal. | Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 | Eng. |
| Dalr. | Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 | Scot. |
| Dan. | Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 | Eng. |
| Dan. & Ll. | Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 | Eng. |
| Dav. & Mer. | Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 | Eng. |
| Dav. Ir. | Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 | Ir. |
| Dav. Pat. Cas. | Davies' Patent Cases, 1 vol., 1785—1816 | Eng. |
| Day | Day's Election Cases, 1 vol., 1892—1893 | Eng. |
| Dea. & Sw. | Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 | Eng. |
| Deac. | Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 | Eng. |
| Deac. & Ch. | Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 | Eng. |
| Dears. & B. | Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858 | Eng. |
| Dears. C. C. | Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 | Eng. |
| Deas & And. | Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 | Scot. |
| De G. | De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 | Eng. |
| De G. & J. | De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 | Eng. |
| De G. & Sm. | De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 | Eng. |
| De G. F. & J. | De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 | Eng. |
| De G. J. & Sm. | De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 | Eng. |
| De G. M. & G. | De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 | Eng. |
| Delane | Delane's Decisions, Revision Courts, 1 vol., 1832—1835 | Eng. |
| Den. | Denison's Crown Cases Reserved, 2 vols., 1844—1852 | Eng. |
| Dick. | Dickens' Reports, Chancery, 2 vols., 1559—1798 | Eng. |
| Dirl. | Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 | Scot. |
| Dods. | Dodson's Reports, Admiralty, 2 vols., 1811—1822 | Eng. |
| Donnelly | Donnelly's Reports, Chancery, 1 vol., 1836—1837 | Eng. |
| Doug. El. Cas. | Douglas' Election Cases, 4 vols., 1774—1776 | Eng. |
| Doug. K. B. | Douglas' Reports, King's Bench, 4 vols., 1778—1785 | Eng. |
| Dow | Dow's Reports, House of Lords, 6 vols., 1812—1818 | Eng. |
| Dow & Cl. | Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 | Eng. |
| Dow. & L. | Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 | Eng. |
| Dow. & Ry. K. B. | Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 | Eng. |
| Dow. & Ry. M. C. | Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827 | Eng. |
| Dow. & Ry. N. P. | Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 | Eng. |
| Dowl. | Dowling's Practice Reports, 9 vols., 1830—1841 | Eng. |
| Dowl. N. S. | Dowling's Practice Reports, New Series, 2 vols., 1841—1843 | Eng. |
| Dr. & Wal. | Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 | Ir. |
| Dr. & War. | Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 | Ir. |
| Dra. | Draper's King's Bench Reports | Can. |
| Drew. | Drewry's Reports, Chancery, 4 vols., 1852—1859 | Eng. |
| Drew. & Sm. | Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 | Eng. |
| Drinkwater | Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 | Eng. |
| Drury *temp.* Nap. | Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859 | Ir. |
| Drury *temp.* Sug. | Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844 | Ir. |
| Dugd. Orig. | Dugdale's Origines Juridiciales | Eng. |
| Dunl. (Ct. of Sess.) | Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 | Scot. |
| Dunning | Dunning's Reports, King's Bench, 1 vol., 1753—1754 | Eng. |
| Durie | Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 | Scot. |
| Dyer | Dyer's Reports, King's Bench, 3 vols., 1513—1581 | Eng. |
| E. & A. | Upper Canada Error and Appeal | Can. |
| E. & B. | Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 | Eng. |
| E. & E. | Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 | Eng. |
| E. B. & E. | Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 | Eng. |
| E. D. C. | Reports of the Eastern Districts Court (Cape) from 1880 | S. Af. |
| E. D. L. | South African Law Reports, Eastern Districts Local Division | S. Af. |
| E. L. R. | Eastern Law Reporter | Can. |
| E. R. (or Eng. Rep.) | English Reports | Eng. |
| E. R. | Ontario Election Reports | Can. |
| Eag. & Y. | Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 | Eng. |

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| East ... ... ... | East's Reports, King's Bench, 16 vols., 1800—1812 ... ... | Eng. |
| East, P. C. ... ... | East's Pleas of the Crown ... ... ... ... ... | Eng. |
| Ecc. & Ad. ... ... | Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855 | Eng. |
| Eden ... ... ... | Eden's Reports, Chancery, 2 vols., 1757—1766 ... ... | Eng. |
| Edgar ... ... ... | Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725 | Scot. |
| Edw. ... ... ... | Edwards' Reports, Admiralty, 1 vol., 1808—1812 ... ... | Eng. |
| Elchies ... ... ... | Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754 ... ... ... ... ... ... ... ... | Scot. |
| Emden's B. C. ... ... | Emden's Building Contracts, Building Leases and Building Statutes ... ... ... ... ... ... ... | Eng. |
| Eng. Pr. Cas. ... ... | Roscoe's English Prize Cases, 2 vols., 1745—1858 ... ... | Eng. |
| Eq. Cas. Abr. ... ... | Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ... | Eng. |
| Eq. Rep. ... ... | Equity Reports, 3 vols., 1853—1855 ... ... ... ... | Eng. |
| Esp. ... ... ... | Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810 ... ... | Eng. |
| Ex. D. ... ... ... | Law Reports, Exchequer Division, 5 vols., 1875—1880 ... | Eng. |
| Exch. ... ... ... | Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856 ... ... ... ... ... ... ... | Eng. |
| Exch. C. R. ... ... | Exchequer Court Reports ... ... ... ... ... ... | Can. |
| F. (Ct. of Sess.) ... | Fraser, Court of Session Cases (Scotland), 5th series, 8 vols., 1898—1906 ... ... ... ... ... ... ... | Scot. |
| F. ... ... ... | Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880 ... ... ... ... ... ... | S. Af. |
| F. & F. ... ... ... | Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867 | Eng. |
| F. N. D. ... ... | Finnemore's Notes and Digest of Natal Cases, 1863—1867 ... | S. Af. |
| Fac. Coll. ... ... | Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841 ... ... ... ... | Scot. |
| Falc. ... ... ... | Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751 ... ... ... ... ... ... ... | Scot. |
| Falc. & Fitz. ... ... | Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838 | Eng. |
| Fenton ... ... ... | Fenton, Important Judgments ... ... ... ... ... | N.Z. |
| Ferg. ... ... ... | Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817 | Scot. |
| Fitz. Nat. Brev. ... | Fitzherbert's Natura Brevium ... ... ... ... ... | Eng. |
| Fitz-G. ... ... ... | Fitz-Gibbon's Reports, King's Bench, fol., 1 vol., 1727—1731 | Eng. |
| Fl. & K. ... ... | Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842 ... ... ... ... ... ... ... | Ir. |
| Fonbl. ... ... ... | Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ... | Eng. |
| For. ... ... ... | Forrest's Reports, Exchequer, 1 vol., 1800—1801 ... ... | Eng. |
| Forb. ... ... ... | Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713 ... ... ... ... ... ... ... | Scot. |
| Fort. De Laud. ... | Fortesque, De Laudibus Legum Angliæ ... ... ... | Eng. |
| Fortes. Rep. ... ... | Fortescue's Reports, fol., 1 vol., 1692—1736 ... ... ... | Eng. |
| Fost. ... ... ... | Foster's Crown Cases, 1 vol., 1708—1760 ... ... ... | Eng. |
| Fount. ... ... ... | Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712 ... ... ... ... ... ... | Scot. |
| Fox & S. Ir. ... ... | M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825 ... ... ... ... ... ... | Ir. |
| Fox & S. Reg. ... ... | J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895 ... ... ... ... ... ... ... | Eng. |
| Fras. ... ... ... | Fraser (Simon), Election Cases, 2 vols., 1793 ... ... | Eng. |
| Freem. Ch. ... ... | Freeman's Reports, Chancery, 1 vol., 1660—1706 ... ... | Eng. |
| Freem. K. B. ... ... | Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704 ... ... ... ... ... ... ... | Eng. |
| G. ... ... ... | Gregorowski's Reports of the High Court of the Orange Free State from 1883 ... ... ... ... ... ... ... | S. Af. |
| G. & R. ... ... | Nova Scotia Reports (Geldert & Russell) ... ... ... | Can. |
| G. I. Dig. ... ... | General Index Digest ... ... ... ... ... | Can. |
| G. W. D. ... ... | South African Law Reports, Griqualand West Local Division | S. Af. |
| G. W. L. ... ... | South African Law Reports, Griqualand West Local Division | S. Af. |
| Gal. & Dav. ... ... | Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843 | Eng. |
| Gale ... ... ... | Gale's Reports, Exchequer, 2 vols., 1835—1836 ... ... | Eng. |
| Gaz. L. R. ... ... | New Zealand Gazette Law Reports ... ... ... ... | N.Z. |
| Geld. Dig. ... ... | Geldert's Digest ... ... ... ... ... ... ... | Can. |
| Gib. Cod. ... ... | Gibson's Codex Juris Ecclesiastici Anglicani ... ... ... | Eng. |
| Giff. ... ... ... | Giffard's Reports, Chancery, 5 vols., 1857—1865 ... ... | Eng. |
| Gilb. ... ... ... | Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ... | Eng. |
| Gilb. C. P. ... ... | Gilbert's History and Practice of the Court of Common Pleas | Eng. |
| Gilb. Ch. ... ... | Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726 ... ... ... ... ... ... ... ... | Eng. |
| Gilm. & F. ... ... | Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686 ... ... ... ... ... ... ... | Scot. |
| Gl. & J. ... ... | Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828 | Eng. |
| Glanv. ... ... ... | Glanville, De Legibus et Consuetudinibus Regni Angliæ ... | Eng. |
| Glanv. El. Cas. ... ... | Glanville's Election Cases, 1 vol., 1623—1624 ... ... ... | Eng. |
| Glascock ... ... | Glascock's Reports (Ireland), 1 vol., 1831—1832 ... ... | Ir. |

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| Godb. ... ... ... | Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637 ... ... ... ... ... | Eng. |
| Gouldsb. ... ... | Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601 ... ... ... ... ... ... ... | Eng. |
| Gow ... ... ... | Gow's Reports, Nisi Prius, 1 vol., 1818—1820 ... ... ... | Eng. |
| Gr. ... ... ... | Upper Canada Chancery (Grant) ... ... ... ... ... | Can. |
| Griffin's Patent Cases ... | Griffin's Patent Cases, 1884—1887 ... ... ... ... | Eng. |
| Gwill. ... ... ... | Gwillim's Tithe Cases, 4 vols., 1224—1824 ... ... ... | Eng. |
| H. ... ... ... | Hertzog's Reports of the High Court of the South African Republic, 1893 ... ... ... ... ... ... ... | S. Af. |
| H. & C. ... ... ... | Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866 | Eng. |
| H. & N. ... ... ... | Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862 | Eng. |
| H. & Tw. ... ... | Hall and Twells' Reports, Chancery, 2 vols., 1848—1850 ... | Eng. |
| H. & W. ... ... | Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841 ... ... ... ... ... ... ... ... ... | Eng. |
| H. B. R. (preceded by date) | Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (*e.g.*, [1915] H. B. R.) ... ... | Eng. |
| H. C. ... ... ... | Reports of the High Court of Griqualand West ... ... | S. Af. |
| H. E. C. ... ... ... | Hodgin's Election Reports ... ... ... ... ... | Can. |
| H. L. Cas. ... ... | Clark's Reports, House of Lords, 11 vols., 1847—1866 ... | Eng. |
| Hag. Adm. ... ... | Haggard's Reports, Admiralty, 3 vols., 1822—1838 ... ... | Eng. |
| Hag. Con. ... ... | Haggard's Consistorial Reports, 2 vols., 1789—1821 ... ... | Eng. |
| Hag. Ecc. ... ... | Haggard's Ecclesiastical Reports, 4 vols., 1827—1833 ... | Eng. |
| Hailes ... ... ... | Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791 ... ... ... ... ... ... ... ... | Scot. |
| Hale, C. L. ... ... | Hale's Common Law ... ... ... ... ... | Eng. |
| Hale, P. C. ... ... | Hale's Pleas of the Crown, 2 vols. ... ... ... ... | Eng. |
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| Hard. ... ... ... | Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669 ... ... | Eng. |
| Hare ... ... ... | Hare's Reports, Chancery, 11 vols., 1841—1853 ... ... | Eng. |
| Hawk. P. C. ... ... | Hawkins's Pleas of the Crown, 2 vols. ... ... ... ... | Eng. |
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| Hop. & Colt. ... ... | Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878 | Eng. |
| Hop. & Ph. ... ... | Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867 | Eng. |
| Horn & H. ... ... | Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839 | Eng. |
| Hov. Supp. ... ... | Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817 ... ... ... ... ... ... | Eng. |
| How. C. ... ... ... | Howard's Chancery Practice ... ... ... ... | Ir. |
| How. C. S. ... ... | Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland ... ... ... ... ... ... | Ir. |
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| Hud. & B. ... ... | Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831 ... ... ... ... ... | Ir. |
| Hudson's B. C. ... ... | Hudson on Building Contracts, 2 vols. ... ... ... ... | Eng. |
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| I. Eq. R. ... ... | Irish Equity Reports, 13 vols., 1838—1851 ... ... ... | Ir. |

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| I. L. R. (Vol.) Bom. ... | Indian Law Reports, Bombay ... ... ... ... ... | Ind. |
| I. L. R. (Vol.) Calc. ... | Indian Law Reports, Calcutta ... ... ... ... ... | Ind. |
| I. L. R. (Vol.) Lah. ... | Indian Law Reports, Lahore ... ... ... ... ... | Ind. |
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| I. L. R. (Vol.) Ran. ... | Indian Law Reports, Rangoon ... ... ... ... ... | Ind. |
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| Ind. Jur. O. S. ... ... | Indian Jurist, Old Series ... ... ... ... ... ... | Ind. |
| Ir. Cir. Rep. ... ... | Reports of Irish Circuit Cases, 1 vol., 1841—1843 ... ... | Ir. |
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| Ir. L. Rec. 1st ser. ... | Law Recorder (Ireland), 1st series, 4 vols., 1827—1831 ... | Ir. |
| Ir. L. Rec. N. S. ... | Law Recorder (Ireland), New Series, 6 vols., 1833—1838 ... | Ir. |
| Irv. ... ... ... | Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867 ... | Scot. |
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| J. P. Jo. ... ... | Justice of the Peace (Weekly Notes of Cases) ... ... ... | Eng. |
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| James ... ... ... | Nova Scotia Reports (James) ... ... ... ... ... | Can. |
| Jebb & B. ... ... | Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol. 1841—1842 ... ... ... ... ... ... ... | Ir. |
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| Keil. ... ... ... | Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ... | Eng. |
| Kel. ... ... ... | Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707 | Eng. |
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| Kn. & Omb. ... ... | Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ... | Eng. |
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| Knox ... ... ... | Knox's Reports ... ... ... ... ... ... ... | Aus. |
| Konst. & W. Rat. App. | Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912 ... ... ... ... ... ... ... | Eng. |
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| L. R. Ind. App. ... | Law Reports, Indian Appeals, Privy Council, 1873—(current) | Eng. |
| L. R. Ind. App. Supp. Vol. | Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873 ... ... ... ... ... ... | Eng. |
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| L. R. Q. B. ... ... | Law Reports, Queen's Bench, 10 vols., 1865—1875 ... ... | Eng. |
| L. R. Q. B. ... ... | Quebec Reports, Queen's Bench ... ... ... ... ... | Can. |
| L. R. Sc. & Div. ... | Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875 ... ... ... ... ... ... | Eng. |
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| L. T. Jo. ... ... | Law Times Newspaper, 1843—(current) ... ... ... | Eng. |
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| L. Th. ... ... ... | La Themis ... ... ... ... ... ... ... ... | Can. |
| Lane ... ... ... | Lane's Reports, Exchequer, fol., 1 vol., 1605—1611 ... ... | Eng. |
| Lat. ... ... ... | Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ... | Eng. |
| Laws. Reg. Cas. ... | Lawson's Registration Cases, 1895—(current) ... ... ... | Eng. |
| Ld. Raym. ... ... | Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732 ... ... ... ... ... ... | Eng. |
| Le. & Ca. ... ... | Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ... | Eng. |
| Leach ... ... ... | Leach's Crown Cases, 2 vols., 1730—1814 ... ... ... | Eng. |
| Lee ... ... ... | Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ... | Eng. |
| Lee *temp.* Hard. ... | T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1738 ... ... ... ... ... ... ... ... | Eng. |

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| Leg. Rep. | Legal Reporter | Ir. |
| Legge | Legge's Reports | Aus. |
| Leon. | Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615 | Eng. |
| Lev. | Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696 | Eng. |
| Lew. C. C. | Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838 | Eng. |
| Ley | Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 | Eng. |
| Lib. Ass. | Liber Assisarum, Year Books, 1—51 Edw. III. | Eng. |
| Lilly | Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. | Eng. |
| Litt. | Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 | Eng. |
| Lloyd, L. R. | Lloyd's List Law Reports, 1919—(current) | Eng. |
| Lloyd, Pr. Cas. | Lloyd's Reports of Prize Cases, 10 vols., 1914—1924 | Eng. |
| Lofft | Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774 | Eng. |
| Long. & T. | Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842 | Ir. |
| Lords Journals | Journals of the House of Lords | Eng. |
| Lud. E. C. | Luder's Election Cases, 3 vols., 1784—1787 | Eng. |
| Lumley, P. L. C. | Lumley's Poor Law Cases, 2 vols., 1834—1842 | Eng. |
| Lush. | Lushington's Reports, Admiralty, 1 vol., 1859—1862 | Eng. |
| Lut. | Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704 | Eng. |
| Lut. Reg. Cas. | A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 | Eng. |
| Lynd. | Lyndwood, Provinciale, fol., 1 vol. | Eng. |
| M. | Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850 | S. Af. |
| M. & S. | Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817 | Eng. |
| M. & W. | Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847 | Eng. |
| M. C. C. | Mining Commissioner's Cases | Can. |
| M. C. R. | Montreal Condensed Reports | Can. |
| M. H. C. R. | Madras High Court Reports | Ind. |
| M. L. R. (Vol.) K. B. or Q. B. | Montreal Law Reports, King's Bench or Queen's Bench | Can. |
| M. L. R. (Vol.) S. C. | Montreal Law Reports, Superior Court | Can. |
| M. M. Cas. | Martin's Reports of Mining Cases | Can. |
| Mac. | Macassey's New Zealand Reports | N.Z. |
| Mac. & G. | Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852 | Eng. |
| Mac. & H. | Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 | Eng. |
| M'Cle. | M'Cleland's Reports, Exchequer, 1 vol., 1824 | Eng. |
| M'Cle. & Yo. | M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825 | Eng. |
| Macfarlane | Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839 | Scot. |
| Macl. & Rob. | Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839 | Scot. |
| Macph. (Ct. of Sess.) | Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873 | Scot. |
| Macq. | Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865 | Scot. |
| Macr. | Macrory's Patent Cases, 2 parts, 1847—1856 | Eng. |
| Mad. | Madras High Court Reports | Ind. |
| Madd. | Maddock's Reports, Chancery, 6 vols., 1815—1822 | Eng. |
| Madd. & G. | Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.) | Eng. |
| Madox | Madox's Formulare Anglicanum | Eng. |
| Madox, Exch. | Madox's History and Antiquities of the Exchequer, 2 vols. | Eng. |
| Mag. | Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852 | Eng. |
| Man. & G. | Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845 | Eng. |
| Man. & Ry. K. B. | Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830 | Eng. |
| Man. & Ry. M. C. | Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830 | Eng. |
| Man. L. J. | Manitoba Law Journal | Can. |
| Man. L. R. | Manitoba Law Reports | Can. |
| Man. R. *temp.* Wood | Manitoba Reports *temp.* Wood | Can. |
| Mans. | Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914 | Eng. |
| Mar. L. C. | Maritime Law Reports (Crockford), 3 vols., 1860—1871 | Eng. |
| March | March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642 | Eng. |
| Marr. | Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 | Eng. |
| Marsh. | Marshall's Reports, Common Pleas, 2 vols., 1813—1816 | Eng. |
| Marsh | Marshall's Reports | Ind. |
| Mayn. | Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326 | Eng. |
| Meg. | Megone's Companies Acts Cases, 2 vols., 1889—1891 | Eng. |

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| Mer. ... ... ... | Merivale's Reports, Chancery, 3 vols., 1815—1817 ... ... | Eng. |
| Milw. ... ... ... | Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843 | Ir. |
| Mod. Rep. ... ... | Modern Reports, 12 vols., 1669—1755 ... ... ... ... | Eng. |
| Mol. ... ... ... | Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831 ... | Ir. |
| Mont. ... ... ... | Montagu's Reports, Bankruptcy, 1 vol., 1829—1832 ... ... | Eng. |
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| Mont. & B. ... ... | Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833 | Eng. |
| Mont. & Ch. ... ... | Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840 | Eng. |
| Mont. & M. ... ... | Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830 | Eng. |
| Mont. D. & De G. ... | Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844 ... ... ... ... ... ... | Eng. |
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| Mood. & R. ... ... | Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844 | Eng. |
| Mood. C. C. ... ... | Moody's Crown Cases Reserved, 2 vols., 1824—1844 ... ... | Eng. |
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| Moore, K. B. ... ... | Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620 | Eng. |
| Mor. Dict. ... ... | Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808 ... ... ... ... ... ... | Scot. |
| Morr. ... ... ... | Morrell's Reports, Bankruptcy, 10 vols., 1884—1893 ... ... | Eng. |
| Mos. ... ... ... | Moseley's Reports, Chancery, fol., 1 vol., 1726—1730 ... ... | Eng. |
| Mun. Rep. ... ... | Municipal Reports ... ... ... ... ... ... | Can. |
| Murd. Epit. ... ... | Murdoch's Epitome ... ... ... ... ... ... | Can. |
| Murp. & H. ... ... | Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ... | Eng. |
| Murr. ... ... ... | Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830 | Scot. |
| My. & Cr. ... ... | Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841 ... | Eng. |
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| Ridg. *temp.* H. ... ... | Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ... ... ... ... | Eng. |
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| Stockton ... ... ... | Stockton's Vice-Admiralty Report and Digest ... ... ... | Can. |
| Story ... ... ... | Story's Commentaries on Equity Jurisprudence ... ... | Eng. |
| Stra. ... ... ... | Strange's Reports, 2 vols., 1716—1747 ... ... ... ... | Eng. |
| Stu. M. & P. ... ... | Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ... ... ... ... ... ... ... ... | Scot. |
| Stuart ... ... ... | Sessions Cases (Stuart) ... ... ... ... ... ... | Scot. |
| Stuart, Adm. ... ... | Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ... | Can. |
| Stuart, Adm. N. S. ... | Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ... ... ... ... ... ... ... ... | Can. |
| Stuart, K. B. ... ... | Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ... ... ... ... ... ... ... | Can. |
| Sty. ... ... ... | Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ... | Eng. |
| Sw. ... ... ... | Swabey's Report, Admiralty, 1 vol., 1855—1859 ... ... | Eng. |
| Sw. & Tr. ... ... | Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ... ... ... ... ... ... ... | Eng. |
| Swan. ... ... ... | Swanston's Reports, Chancery, 3 vols., 1818—1821 ... ... | Eng. |
| Swin. ... ... ... | Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ... | Scot. |
| Syme ... ... ... | Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ... | Scot. |
| T. & M. ... ... ... | Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 | Eng. |
| T. H. ... ... ... | Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ... ... ... ... ... ... ... | S. Af. |
| T. Jo. ... ... ... | Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ... ... ... ... ... ... | Eng. |
| T. L. ... ... ... | Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ... ... ... ... ... ... ... | S. Af. |
| T. L. R. ... ... ... | The Times Law Reports, 1884—(current) ... ... ... | Eng. |
| T. P. ... ... ... | Reports of the Supreme Court of the Transvaal, 1910—(current) | S. Af. |
| T. P. D. ... ... ... | South African Law Reports, Transvaal Provincial Division ... | S. Af. |
| T. Raym. ... ... | Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ... ... ... ... ... ... ... ... | Eng. |
| T. S. ... ... ... | Reports of the Supreme Court of the Transvaal, 1902—1909 ... | S. Af. |
| Taml. ... ... ... | Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ... ... | Eng. |
| Tas. L. R. ... ... | Tasmanian Law Reports ... ... ... ... ... | Aus. |
| Taunt. ... ... ... | Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ... | Eng. |
| Tax Cas. ... ... | Tax Cases, 1875—(current) ... ... ... ... ... | Eng. |
| Tay. ... ... ... | Taylor's King's Bench Reports ... ... ... ... ... | Can. |
| *Temp.* Wood ... ... | Manitoba Reports *temp.* Wood ... ... ... ... ... | Can. |
| Term Rep. ... ... | Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ... | Eng. |
| Terr. L. R. ... ... | Territories Law Reports ... ... ... ... ... | Can. |
| Thom. ... ... ... | Nova Scotia Reports (Thomson) ... ... ... ... ... | Can. |
| Toth. ... ... ... | Tothill's Transactions in Chancery, 1 vol., 1559—1646 ... | Eng. |
| Town St. Tr. ... ... | Townsend, Modern State Trials ... ... ... ... ... | Eng. |
| Trem. P. C. ... ... | Tremaine Pleas of the Crown, 1 vol., 1667 ... ... ... | Eng. |
| Trist. ... ... ... | Tristram's Consistory Judgments, 1 vol., 1872—1890 ... ... | Eng. |
| Tru. ... ... ... | New Brunswick Reports (Trueman) ... ... ... ... | Can. |
| Tudor, L. C. Merc. Law. | Tudor's Leading Cases on Mercantile and Maritime Law ... | Eng. |
| Tudor, L. C. Real Prop. | Tudor's Leading Cases on Real Property ... ... ... | Eng. |
| Turn. & R. ... ... | Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ... | Eng. |
| Tyr. ... ... ... | Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ... ... | Eng. |
| Tyr. & Gr. ... ... | Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 | Eng. |
| U. C. Jur. ... ... | Upper Canada Jurist ... ... ... ... ... ... | Can. |
| U. C. L. J. N. S. ... | Canada Law Journal, New Series, 1865—(current) ... ... | Can. |

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|---|---|---|
| U. C. L. J. O. S. | Canada Law Journal, Old Series, 10 vols., 1855—1864 | Can. |
| U. C. R. | Upper Canada Reports, Queen's Bench | Can. |
| Udal | Fiji Law Reports (Udal) | Fiji. |
| V. L. R. | Victorian Law Reports | Aus. |
| V. R. | Victorian Reports | Aus. |
| V. R. (Adm.) | Victorian Reports (Admiralty) | Aus. |
| V. R. (Eq.) | Victorian Reports (Equity) | Aus. |
| V. R. (Law) | Victorian Reports (Law) | Aus. |
| Vaugh. | Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 | Eng. |
| Vent. | Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 | Eng. |
| Vern. | Vernon's Reports, Chancery, 2 vols., 1680—1719 | Eng. |
| Vern. & Scr. | Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 | Ir. |
| Ves. | Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 | Eng. |
| Ves. & B. | Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 | Eng. |
| Ves. Sen. | Vesey Sen.'s Reports, 2 vols., 1747—1756 | Eng. |
| Vin. Abr. | Viner's Abridgment of Law and Equity, fol., 22 vols. | Eng. |
| Vin. Supp. | Supplement to Viner's Abridgment of Law and Equity, 6 vols. | Eng. |
| W. | Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 | S. Af. |
| W. A. L. R. | West Australian Law Reports | Aus. |
| W. A'B. & W. | Webb, A'Beckett and Williams' Victorian Reports | Aus. |
| W. & W. | Wyatt and Webb | Aus. |
| W. C. C. | Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 | Eng. |
| W. H. C. | South African Law Reports, Witwatersrand High Court | S. Af. |
| W. Jo. | Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 | Eng. |
| W. L. D. | South African Law Reports, Witwatersrand Local Division | S. Af. |
| W. L. R. | Western Law Reporter | Can. |
| W. L. T. | Western Law Times | Can. |
| W. N. (preceded by date) | Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.) | Eng. |
| W. N. | Calcutta Weekly Notes | Ind. |
| W. R. | Weekly Reporter, 54 vols., 1852—1906 | Eng. |
| W. R. | Sutherland's Weekly Reporter | Ind. |
| W. R. | Weekly Reporter, reporting cases in the Cape Provincial Division | S. Af. |
| W. W. & A'B. | Wyatt, Webb and A'Beckett | Aus. |
| W. W. R. | Western Weekly Reports | Can. |
| Wallis by Lyne | Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 | Ir. |
| Web. Pat. Cas. | Webster's Patent Cases, 2 vols., 1602—1855 | Eng. |
| Welsh, Reg. Cas. | Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 | Ir. |
| Went. Off. Ex. | Wentworth's Office and Duty of Executors | Eng. |
| West | West's Reports, House of Lords, 1 vol., 1839—1841 | Eng. |
| West *temp.* Hard. | West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740 | Eng. |
| West. Tithe Cas. | Western's London Tithe Cases, 1 vol., 1592—1822 | Eng. |
| White | White's Justiciary Reports (Scotland), 3 vols., 1886—1893 | Scot. |
| White & Tud. L. C. | White and Tudor's Leading Cases in Equity, 2 vols. | Eng. |
| Wight | Wightwick's Reports, Exchequer, 1 vol., 1810—1811 | Eng. |
| Will. Woll. & Dav. | Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 | Eng. |
| Will. Woll. & H. | Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 | Eng. |
| Willes | Willes' Reports, Common Pleas, 1 vol., 1737—1758 | Eng. |
| Wilm. | Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 | Eng. |
| Wils. | G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 | Eng. |
| Wils. & S. | Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 | Scot. |
| Wils. Ch. | J. Wilson's Reports, Chancery, 2 vols., 1818—1819 | Eng. |
| Wils. Ex. | J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 | Eng. |
| Win. | Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 | Eng. |
| Wm. Bl. | William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 | Eng. |
| Wm. Rob. | William Robinson's Reports, Admiralty, 3 vols., 1838—1850 | Eng. |
| Wms. Saund. | Williams' Notes to Saunders' Reports, 2 vols. | Eng. |
| Wolf. & B. | Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 | Eng. |
| Wolf. & D. | Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 | Eng. |
| Woll. | Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 | Eng. |
| Wood | Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 | Eng. |
| Y. A. D. | Young's Vice-Admiralty Reports | Can. |

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| Y. & C. Ch. Cas. | ... | Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843 ... ... ... ... ... ... ... ... | Eng. |
| Y. & C. Ex. ... | ... | Younge and Collyer's Reports, Exchequer in Equity, 4 vols, 1833—1841 ... ... ... ... ... ... ... | Eng. |
| Y. & J. ... ... | ... | Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830... | Eng. |
| Y. B. ... ... | ... | Year Books ... ... ... ... ... ... ... ... | Eng. |
| Y. B. (Rolls Series) | ... | Year Books (Rolls Series) ... ... ... ... ... ... | Eng. |
| Y. B. (Sel. Soc.)... | ... | Year Books (Selden Society) ... ... ... ... ... | Eng. |
| Yelv. ... ... | ... | Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ... | Eng. |
| You. ... ... | ... | Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ... | Eng. |

# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv–xxxi, *ante*.)

| | |
|---|---|
| A.-G. | for Attorney-General. |
| Act. | „ Actiengesellschaft. |
| Admlty. | „ Admiralty. |
| Affd. | „ Affirmed. |
| Affg. | „ Affirming. |
| Akt. | „ Aktiengesellschaft; Aktiebolaget; Aktieselskabet. |
| Alta. | „ Alberta. |
| Anon. | „ Anonymous. |
| Apld. | „ Applied. |
| Appct. | „ Applicant. |
| Appln. | „ Application. |
| Appln. | „ Application to Register a Trade Mark. |
| Applt. | „ Appellant. |
| Apprvd. | „ Approved. |
| Arbn. | „ Arbitration. |
| Archbp. | „ Archbishop. |
| Art. | „ Article. |
| Ass. Tax Case | „ Assessed Tax Case. |
| Assce. | „ Assurance. |
| Assocn. | „ Association. |
| B. C. | „ Borough Council. |
| B. C. | „ British Columbia. |
| Bkpcy. | „ Bankruptcy. |
| Bkpt. | „ Bankrupt. |
| Bldg. Soc. | „ Building Society. |
| Bp. | „ Bishop. |
| C. A. | „ Court of Appeal. |
| C. & S. L. Ry. Co. | „ City & South London Railway Co. |
| C. C. A. | „ Court of Criminal Appeal. |
| C. C. R. | „ County Court Rules. |
| C. C. R. | „ Court of Crown Cases Reserved. |
| C. L. P. Act. | „ Common Law Procedure Act. |
| C. L. Ry. Co. | „ Central London Railway Co. |
| C. O. R. | „ Crown Office Rules. |
| C. S. U. C. | „ Consolidated Statutes of Upper Canada. |
| *Ca. sa.* | „ *Capias ad satisfaciandum.* |
| Cale. Ry. Co. | „ Caledonian Railway Co. |
| Ch. | „ Chancery. |
| Ch. Div. | „ Chancery Division. |
| Co. | „ Company. |
| Co-op. Assocn. | „ Co-operative Supply Association. |
| Comrs. | „ Commissioners. |
| Consd. | „ Considered. |
| Corpn. | „ Corporation. |
| Ct. | „ Court. |
| Ct. of Ch. | „ Court of Chancery. |
| Ct. of Eq. | „ Court of Equity. |
| Ct. of R. | „ Court of Review. |
| D. C. | „ Divisional Court. |
| Dbtd. | „ Doubted. |

| | |
|---|---|
| Deft. | for Defendant. |
| Distd. | „ Distinguished. |
| Div. Ct. | „ Divisional Court. |
| Eccl. Comrs. | „ Ecclesiastical Commissioners. |
| Eccl. Ct. | „ Ecclesiastical Court. |
| Ex. Ch. | „ Exchequer Chamber. |
| *Ex p.* | „ *Ex parte.* |
| Exch. | „ Exchequer. |
| Exor. | „ Executor. |
| Exorship. | „ Executorship. |
| Expld. | „ Explained. |
| Extd. | „ Extended. |
| Extrix. | „ Executrix. |
| *Fi. fa.* | „ *Fieri facias.* |
| Folld. | „ Followed. |
| G. & S. W. Ry. Co. | „ Glasgow & South Western Railway Co. |
| G. C. Ry. Co. | „ Great Central Railway Co. |
| G. E. Ry. Co. | „ Great Eastern Railway Co. |
| G. N. of Scotland Ry. Co. | „ Great North of Scotland Railway Co. |
| G. N. Picc. & Brompton Ry. Co | „ Great Northern, Piccadilly & Brompton Railway Co. |
| G. N. Ry. Co. | „ Great Northern Railway Co. |
| G. S. & W. Ry. Co. of Ireland | „ Great Southern & Western Railway Co. of Ireland. |
| G. W. Ry. Co. | „ Great Western Railway Co. |
| Govt. | „ Government. |
| Grdns. | „ Guardians or Guardians of the Poor. |
| H. C. of A. | „ High Court of Australia. |
| H. L. | „ House of Lords. |
| I. R. Comrs. | „ Inland Revenue Commissioners. |
| Insce. | „ Insurance. |
| JJ. | „ Justices. |
| Jud. Act | „ Judicature Act. |
| K. B. Div. | „ King's Bench Division. |
| L. & B. Ry. Co. | „ London & Brighton Railway Co. |
| L. & N. E. Ry. Co. | „ London & North Eastern Railway Co. |
| L. & N. W. Ry. Co. | „ London & North Western Railway Co. |
| L. & S. W. Ry. Co. | „ London & South Western Railway Co. |
| L. & Y. Ry. Co. | „ Lancashire & Yorkshire Railway Co. |
| L. B. | „ Local Board. |
| L. B. & S. C. Ry. Co. | „ London, Brighton & South Coast Railway Co. |
| L. C. | „ Lord Chancellor. |
| L. C. & D. Ry. Co. | „ London, Chatham & Dover Railway Co. |
| L. C. C. | „ London County Council. |
| L. Elec. Ry. Co. | „ London Electric Railway Co. |
| L. G. Board | „ Local Government Board. |
| L.J. | „ Lord Justice. |
| L.JJ. | „ Lords Justices. |
| L. M. & S. Ry. Co. | „ London, Midland & Scottish Railway Co. |
| L. T. & S. Ry. Co. | „ London, Tilbury & Southend Railway Co. |
| M. S. Act | „ Merchant Shipping Act. |
| M. S. & L. Ry. Co. | „ Manchester, Sheffield & Lincolnshire Railway Co. |
| Mags. | „ Magistrates |
| Man. | „ Manitoba. |
| Mentd. | „ Mentioned. |
| Met. Dist. Ry. Co. | „ Metropolitan District Railway Co. |
| Met. Ry. Co. | „ Metropolitan Railway Co. |
| Mid. G. W. Ry. Co. | „ Midland Great Western Railway Co. |
| Mid. Ry. Co. | „ Midland Railway Co. |
| Mtge. | „ Mortgage. |
| Mtgee. | „ Mortgagee. |
| Mtgor. | „ Mortgagor. |
| N. B. | „ New Brunswick. |
| N. B. Ry. Co. | „ North British Railway Co. |
| N. E. Ry. Co. | „ North Eastern Railway Co. |
| N. F. | „ Not Followed. |
| N. P. | „ Nisi Prius. |

| | |
|---|---|
| N. S. | for Nova Scotia. |
| N. W. P. | ,, North-West Provinces. |
| N. W. T. | ,, North-West Territories. |
| Ont. | ,, Ontario. |
| Ord. | ,, Order. |
| Overd. | ,, Overruled. |
| P. C. | ,, Privy Council. |
| P. E. I. | ,, Prince Edward Island. |
| Petn. | ,, Petition or Election Petition. |
| Pltf. | ,, Plaintiff. |
| Q. B. Div. | ,, Queen's Bench Division. |
| *Qu.* | ,, *Quære.* |
| Que. | ,, Quebec. |
| R. C. | ,, Rural Council. |
| R. D. C. | ,, Rural District Council |
| R. S. A. | ,, Rural Sanitary Authority. |
| R. S. C. | ,, Revised Statutes of Canada. |
| R. S. C. | ,, Rules of the Supreme Court, 1883. |
| Refd. | ,, Referred. |
| Regn. of Trade Mk. | ,, Registration of Trade Mark. |
| Regr. of Trade Mks. | ,, Registrar of Trade Marks. |
| Resp. | ,, Respondent. |
| Restg. | ,, Restoring. |
| Revsd. | ,, Reversed. |
| Revsg. | ,, Reversing. |
| Ry. Co. | ,, Rail. Co. or Railway Co. |
| | ,, Same Case. |
| S. C. (name of colony following) | ,, Supreme Court of a Colony. |
| S. E. | ,, Settled Estates. |
| S. E. & C. Ry. Co. | ,, South Eastern & Chatham Railway Co. |
| S. E. Ry. Co. | ,, South Eastern Railway Co. |
| S. P. | ,, Same Point. |
| S.S. | ,, Steamship. |
| Sask. | ,, Saskatchewan. |
| Sched. | ,, Schedule. |
| *Sci. fa.* | ,, *Scire facias.* |
| Sect. | ,, Section. |
| Set. Land Act | ,, Settled Land Act. |
| Settlmt. | ,, Settlement. |
| Soc. | ,, Society. |
| Soc. Anon. | ,, Société Anonyme, etc. |
| Solr. | ,, Solicitor. |
| Trade Mk. | ,, Trade Mark |
| Tram. Co. | ,, Tramways Company. |
| U. C. | ,, Urban Council. |
| U. D. C. | ,, Urban District Council. |
| U. S. A. | ,, United States of America. |
| Union Assmt. Com. | ,, Union Assessment Committee. |
| Urban S. A. | ,, Urban Sanitary Authority. |
| V.-C. | ,, Vice-Chancellor. |
| Workmen's Comp. Act | ,, Workmen's Compensation Act. |
| Y. T. | ,, Yukon Territory. |

# MEANING OF TERMS

## USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra*.

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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*Factories* . . . „ FACTORIES; PUBLIC HEALTH.
*Land Drainage under Settled Land Acts* . „ LAND IMPROVEMENT.
*Negligence* . . „ PUBLIC AUTHORITIES.
*Nuisance* . . . „ NUISANCE.
*Private Drainage* . „ LAND IMPROVEMENT.
*Private Street Works* . „ HIGHWAYS.
*Public Health* . . „ PUBLIC HEALTH.

*Railways* . . . *See* RAILWAYS.
*Sanitary Accommodation* . . . „ PUBLIC HEALTH.
*Underground Pipes and Wires* . . . „ ELECTRIC LIGHTING; GAS; TELEGRAPHS AND TELEPHONES; WATER SUPPLY.
*Waters and Watercourses* . . . „ WATERS AND WATERCOURSES.

# Part I.—Sewers and Drains for Sanitary Purposes.

## SECT. 1.—WHAT CONSTITUTE "SEWERS" AND "DRAINS."

### SUB-SECT. 1.—OUTSIDE THE METROPOLIS.

*A. Drains.*

*See* Public Health Act, 1875 (c. 55), s. 4; Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19.

**1. Reservoirs.**]—A local board of health has no power, under Public Health Act, 1848 (c. 63), ss. 43–46 & 145, to enter land *in invitos*, upon report & notice, for the purpose of making a tank, reservoir or deposit bed, to retain sewage & will be restrained by injunction accordingly.

The word "drain" in Public Health Act, 1848 (c. 63), means a passage for sewage from a single house; the word "sewer" extends to any system of drainage; but neither words include reservoirs or cesspools.—SUTTON *v.* NORWICH CORPN. (1858), 27 L. J. Ch. 739; 31 L. T. O. S. 389; 22 J. P. 353; 6 W. R. 432.

*Annotation:*—**Reld.** Newcastle-upon-Tyne Corpn. *v.* Houseman, Same *v.* Francis, Same *v.* Jackson, Same *v.* Coote (1898), 63 J. P. 85.

**2. Cesspools.**]—SUTTON *v.* NORWICH CORPN., No. 1, *ante*.

**3.** ——.]—MEADER *v.* WEST COWES LOCAL BOARD, No. 19, *post*.

**4. Drain "used for drainage of one building only"—Passage for sewage from single house.**]—SUTTON *v.* NORWICH CORPN., No. 1, *ante*.

**5.** —— **Question of fact—Pair of semi-detached houses.**]—Pltf. & deft. were the owners respectively of two plots of land adjoining a road in which there was a public sewer vested in the local authority. Each of them was also the owner of one-half of the road so far as it ran with his plot. Deft. first acquired his plot, & built thereon a pair of semi-detached houses. The drains from each of the houses joined at a point on deft.'s land, & from that point the sewage was carried by one culvert into the public sewer. Part of the culvert was carried through the portion of the road which then belonged to pltf.'s predecessor in title, & was constructed under circumstances which made its construction a trespass. Pltf., having purchased his plot, & the adjoining half of the road, required deft. to remove the portion of the culvert which lay under the latter:—*Held:* (1) deft.'s pair of semi-detached houses constituted "one building only" within Public Health Act, 1875 (c. 55), s. 4, & the culvert, from the point of junction of the drainage of the two houses, was a "drain" & not a "sewer" within Public Health Act, 1875 (c. 55), s. 4; (2) even if the culvert was a sewer deft. could not by his wrongful act vest in the local authority the part of it which lay in pltf.'s land, & pltf. was entitled to have that part removed.—HEDLEY *v.* WEBB, [1901] 2 Ch. 126; 84 L. T. 526; 65 J. P. 425; 17 T. L. R. 393; *sub nom.* WEBB *v.* KNIGHT, HEDLEY *v.* WEBB, 70 L. J. Ch. 663.

*Annotations:*—*As to* (1) **Distd.** Humphery *v.* Young, [1903] 1 K. B. 44. **Reld.** Woodford U. D. C. *v.* Stark (1902), 86 L. T. 685. *As to* (2) **Consd.** Pakenham *v.* Ticehurst R. D. C. (1903), 67 J. P. 448. **Distd.** Kershaw *v.* Smith, [1913] 2 K. B. 455. **Reld.** Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563. *Generally*, **Reld.** Rickarby *v.* New Forest R. D. C. (1910), 8 L. G. R. 893.

**6.** —— —— ——.]—By Public Health Act, 1875 (c. 55), s. 4, "'Drain' means any drain of & used for the drainage of one building only." No general rule can be laid down as to whether a pair of semi-detached houses are "one building only" within Public Health Act, 1875 (c. 55), s. 4, or not, even though they be under one continuous roof. It is in each case a question of fact.—HUMPHERY *v.* YOUNG, [1903] 1 K. B. 44; 72 L. J. K. B. 6; 87 L. T. 551; 67 J. P. 34; 51 W. R. 298; 19 T. L. R. 20; 1 L. G. R. 142, D. C.

**7. Drain "used for drainage of premises within the same curtilage"—Group of houses around open space of ground—Common access & common accommodation to certain extent—Side channels receiving drainage from cross channels.**]—Eighteen dwelling-houses, with pavements in front of them, stood grouped about an open space of ground. At one side of the space there was a boundary wall. Access could be obtained to the space or court by means of a main entrance from a main thoroughfare through a partially inclosed space of ground, & also by means of two narrow passages between certain of the houses. There was certain common accommodation for the tenant of the houses—two ashpits & thirteen water-closets. The slop water from the sinks of each of these houses was carried by open cross channels cut in the pavement at right angles to each house into open side channels at the side of the pavements, & thence through gullies into the main sewer outside. There was one cross channel for each house, but the side channels drained more than one building:—*Held:* the eighteen dwelling-houses were not premises within the same curtilage within Public Health Act, 1875 (c. 55), s. 4, & therefore the side channels, being used for the drainage of more than one building, were sewers within the meaning of the definition of that word in Public Health Act, 1875 (c. 55), s. 4. A number of houses separately occupied, with common access & to some extent common accommodation, are not premises within the same curtilage within Public Health Act, 1875 (c. 55), s. 4.

I do not think that two separate houses occupied by two separate sets of people, so as to be separate & independent dwelling-houses, can be considered as premises within the same curtilage (PHILLIMORE, J.).—HARRIS *v.* SCURFIELD (1904), 91 L. T. 536; 68 J. P. 516; 20 T. L. R. 659; 2 L. G. R. 974, D. C.

**8.** —— **Separate houses—Occupied by separate sets of people.**]—HARRIS *v.* SCURFIELD, No. 7, *ante*.

**9.** —— —— ——.]—Several houses of different owners stood in a row & were drained in pairs; each house of each pair was drained by a separate pipe into a pipe common to both houses, & each of these common pipes discharged into a line of pipes laid in private ground which discharged into a public sewer. The "common pipes" were admittedly "sewers" within Public Health Act, 1875 (c. 55):—*Held:* the "line of pipes" which discharged into the public sewer was not "a single private drain" within Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, & therefore proceedings could not be taken under

PART I. SECT. 1, SUB-SECT. 1.—A.

a. *Pipe connected with drains of several dwelling-houses.*]—HOLLYWOOD URBAN DISTRICT COUNCIL *v.* GRAINGER, [1913] 2 I. R. 126.—IR.

*Sect.* 1.—*What constitute "sewers" and "drains": Sub-sect.* 1, *A. & B.* (*a*).]

Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, & Public Health Act, 1875 (c. 55), s. 41.—WOOD GREEN URBAN COUNCIL *v.* JOSEPH, [1908] A. C. 419; 77 L. J. K. B. 924; 99 L. T. 733; 72 J. P. 393; 24 T. L. R. 850; 52 Sol. Jo. 726; 6 L. G. R. 980, H. L.

*Annotation*:—**Refd.** Kingston-upon-Hull Corpn. *v.* N. E. Ry., [1915] 1 Ch. 456.

**Drainage of more than one building—At what point drain becomes sewer.**]—*See* Nos. 24-26, *post.*

**10. "Single private drain"—Pipe carrying drainage of two or more houses—Belonging to different owners.**]—By a system of drainage established before 1848, a single brick drain on resp.'s premises conveyed the drainage of his house, & of other houses belonging to different owners, into an adjacent ditch. In 1853, the local authority of the district substituted for the ditch a public sewer, & the brick drain was connected with it. In 1887 a local Act was passed, which provided that where two or more houses or premises were connected with a single private drain which conveyed their sewage into a public sewer, the local authority should have all the powers conferred by Public Health Act, 1875 (c. 55), s. 41. The local authority had adopted Public Health Acts (Amendment) Act, 1890 (c. 50), s. 19, which contains provisions with respect to "single private drains" similar to those in the local Act:—*Held:* the brick drain was not a "single private drain" within the local Act or Public Health Acts (Amendment) Act, 1890 (c. 50), s. 19, because on the passing of Public Health Act, 1848 (c. 63), such drain became, & had ever since been, a sewer vested in the local authority & repairable by them, & therefore they were not entitled to exercise against resp. the powers conferred upon them by Public Health Act, 1875 (c. 55), s. 41.—HILL *v.* HAIR, [1895] 1 Q. B. 906; 64 L. J. M. C. 164; 72 L. T. 629; 59 J. P. 374; 43 W. R. 651; 15 R. 424, D. C.

*Annotations*:—**N.F.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205; Seal *v.* Merthyr Tydfil U. C., [1897] 2 Q. B. 543. **Refd.** R. *v.* Hastings Corpn., [1897] 1 Q. B. 46; Thompson *v.* Eccles Corpn., Haedicke *v.* Friern Barnet U. C., [1905] 1 K. B. 110.

**11.** —— —— ——.]—A drain pipe passing through private property had, from a date prior to 1890, received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority of the district, who had adopted Public Health Acts (Amendment) Act, 1890 (c. 59), gave the owners of the said houses notice under Public Health Act, 1875 (c. 55), s. 41, to repair it, & on failure of the owners to comply with the notice, executed the necessary work themselves, & claimed to recover from the owners the expenses incurred by them in so doing:—*Held:* the pipe in question was a "single private drain" within Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, & the local authority were entitled to recover.—BRADFORD *v.* EASTBOURNE CORPN., [1896] 2 Q. B. 205; 60 J. P. 501; *sub nom.* EASTBOURNE CORPN. *v.* BRADFORD, 65 L. J. Q. B. 571; 74 L. T. 762; 45 W. R. 31; 12 T. L. R. 479; 40 Sol. Jo. 602, D. C.

*Annotations*:—**Folld.** Seal *v.* Merthyr Tydfil U. C., [1897] 2 Q. B. 543. **Apld.** Southwold Corpn. *v.* Crowdy (1903), 1 L. G. R. 899. **Folld.** Jackson *v.* Wimbledon U. C., [1905] 2 K. B. 27. **Apprvd.** Thompson *v.* Eccles Corpn., Haedicke *v.* Friern Barnet U. C., [1905] 1 K. B. 110. **Consd.** Kershaw *v.* Smith, [1913] 2 K. B. 455. **Refd.** R. *v.* Hastings Corpn., [1897] 1 Q. B. 46; Hedley *v.* Webb, [1901] 2 Ch. 126; Pemsel & Wilson *v.* Tucker, [1907] 2 Ch. 191; Wood Green U. C. *v.* Joseph, [1908] A. C. 419; Kingston-upon-Hull Corpn. *v.* N. E. Ry., [1915] 1 Ch. 456. **Mentd.** Westminster Corpn. *v.* Johnson, Westminster Corpn. *v.* Fuller, [1904] 1 K. B. 19; Ystradyfodwg & Pontypridd Main Sewerage Board *v.* Benstead, [1906] 1 K. B. 294.

**12.** —— —— ——.]—A drain pipe passing through private property received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority, who had adopted Public Health Acts (Amendment) Act, 1890 (c. 59), took proceedings against the owners of the said houses under Public Health Act, 1875 (c. 55), s. 41:—*Held:* the pipe in question was a single private drain within Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19.—SEAL *v.* MERTHYR TYDFIL URBAN COUNCIL, [1897] 2 Q. B. 543; 67 L. J. Q. B. 37; 77 L. T. 303; 61 J. P. 551; 13 T. L. R. 509; 41 Sol. Jo. 678, D. C.

*Annotation*:—**Refd.** Thompson *v.* Eccles Corpn., Haedicke *v.* Friern Barnet U. C., [1905] 1 K. B. 110.

**13.** —— —— ——.]—THOMPSON *v.* ECCLES CORPN., HAEDICKE *v.* FRIERN BARNET URBAN COUNCIL, No. 298, *post.*

**14.** —— —— ——.]—WOOD GREEN URBAN COUNCIL *v.* JOSEPH, No. 9, *ante.*

**15.** —— —— —— **Local Act.**]—By a local Act, s. 49 (1), "Where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer, the corpn. shall have all the powers conferred by Public Health Act, 1875 (c. 55), s. 41." Local Act, s. 49 (2), provided that Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, should cease to be in force in the locality, & local Act, s. 49 (3), that the expression "drain" should include a drain used for the drainage of more than one building, whether owned or occupied by the same person or not. Local Act, s. 4, provided that words to which meanings were assigned by Public Health Acts should have those meanings, unless there was something repugnant or inconsistent in the subject or context. By Public Health Act, 1875 (c. 55), s. 4, the word "premises" includes "messuages buildings lands easements & hereditaments of any tenure."

Defts. were the proprietors of a roadway & of a row of cottages on each side of it. The roadway was a *cul de sac.* As the result of a notice under Public Health Act, 1875 (c. 55), s. 23, served on defts. in 1876, they laid a conduit under the whole length of the roadway, a great part of which was outside the limit mentioned in Public Health Act, 1875 (c. 55), s. 23, of 100 feet from the public sewer with which it connects. This conduit was used for surface drainage only, & was fed by conduits from gullies in the backyards of the cottages & by other conduits from gullies in the roadway:—*Held:* there was no sufficient evidence that the roadway had been dedicated to the public, but that, whether it had or not, the conduit under the roadway was a "single private drain" within local Act, s. 49, the conduit being an exclusive & private system of drainage for defts.' cottages & land on each side of the roadway & the roadway itself, the soil of which was vested in defts.

"Premises" in local Act, s. 49, must be taken to mean premises in the same ownership as one or more of the houses connected with the single private drain."—KINGSTON-UPON-HULL CORPN. *v.* NORTH EASTERN RY. CO., [1916] 1 Ch. 31; 113 L. T. 1140; 80 J. P. 57; 60 Sol. Jo. 58; *sub nom.* HULL CORPN. *v.* NORTH EASTERN RY. CO., 84 L. J. Ch. 905; 14 L. G. R. 23, C. A.; *varying*, [1915] 1 Ch. 456.

*Annotation*:—**Refd.** Vine *v.* Wenham (1915), 84 L. J. Ch. 913.

**"Drain or watercourse"—Highway Act, 1835 (c. 50), s. 67.**]—*See* Part II., Sect. 2.

*B. Sewers.*

*(a) In General.*

*See* Public Health Act, 1875 (c. 55), s. 4; Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19.

**16. General rule—"Sewer" given generous interpretation.**]—A sewer made by the owner of some only of the houses in a street not yet a highway, though made for the purpose of draining his own amongst other houses, is not a sewer made by a person "for his own profit" within the exception in Public Health Act, 1875 (c. 55), s. 13.

The word "sewer" in that Act should receive the largest possible interpretation, & a drain is a "sewer" within sect. 13 when more than one house has been connected with it.—ACTON LOCAL BOARD *v.* BATTEN (1884), 28 Ch. D. 283; 54 L. J. Ch. 251; 52 L. T. 17; 49 J. P. 357.

*Annotations:*—**Apld.** Bonella *v.* Twickenham L. B. of Health, Holmes *v.* Twickenham L. B. of Health (1887), 18 Q. B. D. 577. **Apprvd.** Ferrand *v.* Hallas Land & Building Co. [1893] 2 Q. B. 135. **Distd.** Minchead L. B. *v.* Luttrell, [1894] 2 Ch. 178; Webb *v.* Knight, Hedley *v.* Webb (1901), 70 L. J. Ch. 663; Varo *v.* Joy (1920), 124 L. T. 148 **Reld.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205; Sykes *v.* Sowerby U. C., [1900] 1 Q. B. 584.

**17. Question of fact.**]—In an indictment for obstructing a "public sewer" framed under a local Act, which incorporates Towns Improvement Clauses Act, 1847 (c. 34), it is not necessary to show that the channel obstructed is one that communicates directly with a navigable river.

At the trial of such an indictment the evidence showed that the channel obstructed was one through which a natural stream had always flowed, originally in a curve line; that at the particular spot it had been made straight by art, & built over; & that it was used as a drain to carry off offensive matter generally from all the houses near it:—*Held:* the jury were rightly directed to say whether this was a public sewer in fact, without instruction from the judge what a "sewer" in law was.—R. *v.* PARKINSON (1852), 16 J. P. 729.

**18. Any system of drainage.**]—SUTTON *v.* NORWICH CORPN., No. 1, *ante*.

**19. Pipe carrying away sewage.**]—M. built ten houses, laid down a large pipe drain at the back of them, & made a drain into it from each house. The large drain ran into a cesspool on M.'s land, near the houses, & was then carried on for a few yards through M.'s land till it reached the foreshore of a tidal river, & then, after passing for a short distance through the foreshore, discharged into the river. No license to drain through the foreshore had been obtained, & it was not proved that M.'s scheme of drainage had been approved by the local board. After some time the lessee of the foreshore built upon it, & stopped the mouth of the drain, which it was admitted he was entitled to do. The overflow from the cesspool being thus stopped, the cesspool caused a serious nuisance. M. brought his action against the local board to restrain them from permitting the nuisance to continue, alleging that the structure was a "sewer," & the cesspool a "thing belonging thereto," within Public Health Act, 1875 (c. 55), & was therefore vested in the local board, & that they were bound to keep it in order:—*Held:* this was not a sewer within Public Health Act, 1875 (c. 55), for that the continuation through the foreshore, which M. had no right to make, must be left out of account, & then there was nothing left but a set of pipes terminating in a pit on M.'s own ground, &, as they did not carry the sewage away, they could not be considered a sewer.

If we turn to the Act of Parliament [Public Health Act, 1875 (c. 55)], this cesspool is not a drain, & it is not a sewer within the definition of that expression. It might be a work or thing belonging to a sewer within sect. 13 (LINDLEY, L.J.).—MEADER *v.* WEST COWES LOCAL BOARD, [1892] 3 Ch. 18; 61 L. J. Ch. 561; 67 L. T. 454; 40 W. R. 676; 8 T. L. R. 643; 36 Sol. Jo. 592, C. A.

*Annotations:*—**Apld.** Button *v.* Tottenham U. D. C. (1898), 78 L. T. 470; Kinson Pottery Co. *v.* Poole Corpn., [1899] 2 Q. B. 41; Hedley *v.* Webb, [1901] 2 Ch. 126; Butt *v.* Snow (1903), 89 L. T. 302; Pakenham *v.* Ticehurst R. D. C. (1903), 67 J. P. 448. **Distd.** A.-G. *v.* Peacock, [1926] Ch. 241. **Reld.** Hornsey L. B. *v.* Davis, [1893] 1 Q. B. 756.

**20. Cesspool.**]—MEADER *v.* WEST COWES LOCAL BOARD, No. 19, *ante*.

**21. Drain receiving drainage of more than one building.**]—ACTON LOCAL BOARD *v.* BATTEN, No. 16, *ante*.

**22.** ——.]—No doubt, seeing that several houses are drained into this one drain, the drain comes within the definition of a "sewer" in the Act, [Public Health Act, 1875 (c. 55)], & vests in the local board; but that does not decide the question one way or the other. The question is, whether this sewer, I call it a sewer because it does fall within the definition of a sewer, was a sewer of part of the street within sect. 150, & as such was treated by the board as a sewer satisfactory to them under that sect. I have come to the conclusion that this part of the street never was sewered to the satisfaction of the board before they made the sewer, the expenses of which they now seek to charge against the frontagers in this action & for these reasons the action succeeds (ROMER, J.).—HANDSWORTH LOCAL BOARD *v.* TAYLOR (1893), [1897] 2 Ch. 442, n.; 69 L. T. 798.

*Annotation:*—**Reld.** Rishton *v.* Haslingden Corpn., [1898] 1 Q. B. 294.

**23.** —— **Running through private ground.**]—A drain passing through private ground but receiving the drainage of more than one building is a "sewer" within Public Health Act, 1875 (c. 55), s. 4.—TRAVIS *v.* UTTLEY, [1894] 1 Q. B. 233; 63 L. J. M. C. 48; 70 L. T. 242; 58 J. P. 85; 42 W. R. 461, D. C.

*Annotations:*—**Apld.** Hill *v.* Hair (1895), 64 L. J. M. C. 164. **Distd.** Self *v.* Hove Comrs., [1895] 1 Q. B. 685. **Expld.** Beckenham U. D. C. *v.* Wood (1896), 60 J. P. 490. **Distd. & Expld.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205. **Distd.** Hedley *v.* Webb, [1901] 2 Ch. 126. **Consd.** Humphery *v.* Young (1902), 72 L. J. K. B. 6; Wood *v.* Ealing Tenants, [1907] 2 K. B. 390. **Reld.** Seal *v.* Merthyr Tydfil U. D. C. (1897), 77 L. T. 303; Ellis *v.* Bromley R. D. C. (1899), 81 L. T. 224.

**24.** —— **At what point drain becomes sewer—Junction where drainage is received.**]—A pipe or line of pipes receiving the drainage of more than one building not being premises within the same curtilage, although a sewer within Public Health Act, 1875 (c. 55), s. 4, from & below the point where it receives the drainage of more than one such building is a drain & not a sewer within that sect. above that point.

A main sewer may be laid down by the local authority in a new street where no houses are built but where it is intended houses shall be built. Subsequently, the buildings may be commenced at the lower end of the street, & where the drains of one house are connected with the main sewer the connecting pipes will be drains & not sewers, but the sewer itself will no less continue to be a sewer, although it receives only the drainage of that one house. Consequently, a sewer without a drain at all will be a sewer (CAVE, J.).—BECKENHAM URBAN DISTRICT COUNCIL *v.* WOOD (1896), 60 J. P. 490, D. C.

*Annotations:*—**Reld.** Bradford *v.* Eastbourne Corpn. (1896), 60 J. P. 501; Humphery *v.* Young (1902), 72 L. J. K. B. 6.

*Sect.* 1.—*What constitute "sewers" and "drains": Sub-sect.* 1, *B.* (*a*), (*b*) & (*c*)].

**25.** —— —— ——.]—DIMCAN *v.* FULHAM VESTRY (1899), *Times*, Feb. 11.

**26.** —— —— ——.]—HEDLEY *v.* WEBB, No. 5, *ante*.

**27.** —— **Drainage through another's land without owner's consent—Subsequent consent of owner.**]—PAKENHAM *v.* TICEHURST RURAL DISTRICT COUNCIL, No. 64, *post*.

**28.** —— **Cross channels from each building—Open side channel receiving drainage.**]—HARRIS *v.* SCURFIELD, No. 7, *ante*.

**29.** —— **Pipe draining several houses in a row—Connection with sewer by single private drain.**]—JACKSON *v.* WIMBLEDON URBAN COUNCIL, No. 292, *post*.

**30. Pipes laid in new street—Intended to be connected with houses.**]—ACTON LOCAL BOARD *v.* BATTEN, No. 16, *ante*.

**31.** —— ——.]—BECKENHAM URBAN DISTRICT COUNCIL *v.* WOOD, No. 24, *ante*.

**32.** —— ——.]—When a landowner pursuant to the bye-laws of a local authority gives notice of his intention to lay out a new street & to construct therein a line of pipes as a sewer, & his deposited plans are passed, & the line of pipes or sewer is constructed under the supervision of the local authority & is on completion approved & duly authorised to be covered in, such line of pipes, though unused, immediately thereupon becomes a "sewer" which vests in the local authority under Public Health Act, 1875 (c. 55), s. 13, & they have power under sect. 16 of the Act to connect it with their sewerage system.—TURNER *v.* HANDSWORTH URBAN COUNCIL, [1909] 1 Ch. 381; 78 L. J. Ch. 202; 100 L. T. 194; 73 J. P. 95; 7 L. G. R. 255.

**33.** —— **Connection with some of adjacent houses—Houses built after pipes laid.**]—A road having been made by the owners of a building estate about 1859, a 12 inch pipe was laid by them along it from end to end. Houses were built from time to time in the neighbourhood of the road, & some of their owners connected their drains with the 12 inch pipe; but certain of the houses which were first built had a separate system of drainage into cesspools in a wood at the back of their premises. Drainage into the 12 inch pipe commenced at least as early as 1876. The 12 inch pipe discharged into a culvert, & thence into a river. Pltfs.' predecessors, the Wilmslow Local Board of Health, were constituted in 1878, & could in that year have put into operation Public Health Act, 1875 (c. 55), s. 150. There was evidence that in 1882 their surveyor knew of at least one connection of drains with this pipe, & that complaint having been made in 1892 or 1893 as to the outfall of the pipe's contents into the river, the local authority subsequently proposed a scheme of drainage by which the drainage was to be diverted from the 12 inch pipe & carried into septic tanks:—*Held*: the pipe was a sewer within Public Health Act, 1875 (c. 55), s. 4, & had vested in pltfs.

I think the definition of sewer, which is to be found in Public Health Act, 1875 (c. 55), s. 4, is clear, & I think that apart from any other circumstances in the case I should be bound to hold that this was a sewer. . . . It was laid for the purpose both of carrying off the surface water & of draining such houses, when required, as might be built on either side of it (NEVILLE, J.).—WILMSLOW URBAN DISTRICT COUNCIL *v.* SIDEBOTTOM (1906), 70 J. P. 537; 5 L. G. R. 80.

**34. Pipes having no proper outlet—Carrying sewage into cesspool.**]—MEADER *v.* WEST COWES LOCAL BOARD, No. 19, *ante*.

**35.** —— ——.]—The fact that a pipe which has no lawful outlet for sewage receives sewage from a house as well as surface water from a highway is not of itself proof that the pipe is a sewer. If a nuisance arises solely in consequence of a person's own act in sending sewage down such a pipe, he is responsible under Public Health Act, 1875 (c. 55), ss. 94, 95, as a person causing or continuing the nuisance by his "act default or sufferance."—WINCANTON RURAL COUNCIL *v.* PARSONS, [1905] 2 K. B. 34; 74 L. J. K. B. 533; 93 L. T. 13; 69 J. P. 242; 3 L. G. R. 771, D. C.

**36.** —— ——.]—In 1896 a low lying estate near the sea was purchased by D. for the purpose of being developed as a seaside resort, & forty-eight houses were built. The drainage system adopted by D. was disclosed to & approved of by the rural district council of the locality. It provided two methods for dealing with the sewage, the one by means of the ordinary cesspit, & the other by discharging the contents of the drains from the houses along three lines of pipes into settling tanks, & then raising the liquid therefrom to the surface by means of pumping, & finally disposing of it through sub-soil pipes radiating from a distributing chamber. The pumps were driven partly by an automatic windmill & partly by an electric motor. This drainage scheme was completed in 1902 & worked satisfactorily until 1912, when deft. purchased from D. the unsold part of the estate, & subsequently built sixteen further houses. No proper outfall for the solid matter of the sewage had ever been provided. In 1917 the pipes had gradually become blocked, & the pumping was then finally abandoned as useless. In 1918 sewage matter flooded some of the houses, & notice was served on deft. under Public Health Act, 1875 (c. 55), requiring him to abate the nuisance. He endeavoured to do so by inserting on his own land some lines of pipes at certain manholes connected to surface water channels. As the result of a visit from an inspector of the Ministry of Health to the estate a letter was written on Feb. 10, 1921, informing the council that it was their duty, under Public Health Act, 1875 (c. 55), s. 19, to cleanse the pipes, as they were public sewers vested in them. The council denied their liability, & in 1923 an action was brought by the A.-G. at the relation of the council against deft. claiming an injunction to restrain him from continuing a public nuisance caused by the accumulation of sewage of his estate:—*Held*: the case did not come within *Meader* v. *West Cowes Local Board*, No. 19, *ante*, & these lines of pipes laid with the approval of the relators were "sewers" within Public Health Act, 1875 (c. 55), & vested in them at the end of 1902.—A.-G. *v.* PEACOCK, [1926] Ch. 241; 95 L. J. Ch. 180; 134 L. T. 342; 90 J. P. 49; 42 T. L. R. 227; 24 L. G. R. 284.

**37.** —— **Into settling tanks—No proper outfall for solid matter.**]—A.-G. *v.* PEACOCK, No. 36, *ante*.

*See, also*, Sub-sect. 1, B. (*d*) i., *post*.

**38. Overflow sewer.**]—The liquid refuse from a manufactory was carried away in a wooden trough. Prior to 1878 this trough had discharged direct into the river Aire. In 1878 the trough was shortened in order to make room for an iron pipe erected by the local authority, & was made to discharge into the iron pipe. The authority erected this iron pipe to form a continuation of an "overflow" sewer or culvert with the object of discharging the contents thereof into the river at a point rather lower down the river than that at

which the culvert originally discharged. The culvert or "overflow" sewer was generally dry, but on some thirty days in the year it took storm water mixed with sewage, which the ordinary sewers in a neighbouring street could not deal with. The manufacturers were fined for discharging refuse into the river:—*Held:* the conviction must be upheld, on the ground (1) (LORD ALVERSTONE, C.J. & RIDLEY, J.) that, even if the pipe was a sewer for all purposes, the magistrate had properly found that the manufacturers were not using it for the ordinary purposes of a sewer, but as a mere conduit pipe to lengthen their trough; (2) (DARLING, J.). that, even if a sewer, it was not a sewer for all purposes, & the manufacturers were not justified in using it as a sewer for their refuse.

*Qu.:* whether an "overflow" sewer is a sewer into which inhabitants can claim a right to discharge regularly.

*Semble:* a "sewer" is not necessarily a sewer for all purposes.—LEEDS & DISTRICT WORSTED DYERS & FINISHERS' ASSOCN., LTD. *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD (1906), 70 J. P. 480; 5 L. G. R. 72, D. C.

*Annotation:—As to* (1) **Refd.** West Riding Rivers Board *v.* Butterworth & Roberts (1908), 72 J. P. 193.

**39. Surface water channel.**]—WILKINSON *v.* LLANDAFF & DINAS POWIS RURAL COUNCIL, No. 40, *post*.

**40. Whether sewer is sewer for all purposes.**]—At the side of a road, which was vested in a local authority, was an open channel not paved with stone & not very clearly defined on the side toward the centre of the road made for the purpose of carrying off the surface water from the road. In the channel were gullies by which the water passed through pipes into an underground drain. Rain water from the roof & the curtilages of many of the houses in the road including pltf.'s also passed through pipes into the channel. Sewage from one of the houses, not pltf.'s, had escaped into the channel, & had caused an illness of pltf.'s child, & pltf. had thereby incurred expense. In an action by pltf. against the local authority claiming an injunction & damages:—*Held:* the channel was a "sewer" within the definition contained in Public Health Act, 1875 (c. 55), s. 4, & under sect. 19, it was the duty of defts. to cleanse the channel so that it should not be a nuisance or injurious to health.

An injunction was accordingly granted to restrain defts. from permitting any foul or noxious matter to remain in the channel so as to cause a nuisance to pltf., & £30 damages was awarded to him.

*Kinson Pottery Co.* v. *Poole Corporation*, No. 75, *post*, is not a decision that a drain may be a sewer for some of the purposes of Public Health Act, 1875 (c. 55), & not for others.—WILKINSON *v.* LLANDAFF & DINAS POWIS RURAL COUNCIL, [1903] 2 Ch. 695; 73 L. J. Ch. 8; 89 L. T. 462; 68 J. P. 1; 52 W. R. 50; 20 T. L. R. 30; 48 Sol. Jo. 32; 2 L. G. R. 174, C. A.

*Annotations:*—**Expld.** Wincanton R. C. *v.* Parsons, [1905] 2 K. B. 34. **Distd.** Williamson *v.* Durham R. C. (1906), 75 L. J. K. B. 498. **Consd.** Irving *v.* Carlisle R. D. C. (1907), 71 J. P. 212. **Distd.** Bloor *v.* Beckenham U. C., [1908] 2 K. B. 671. **Refd.** Harris *v.* Scurfield (1904), 20 T. L. R. 659; Leeds & District Worsted Dyers & Finishers' Assocn. *v.* West Riding of Yorkshire Rivers Board (1906), 70 J. P. 480; Baldwin's *v.* Halifax Corpn. (1916), 85 L. J. K. B. 1769. **Mentd.** Papworth *v.* Battersea B. C. (1914), 13 L. G. R. 197.

**41.** ——.]—LEEDS & DISTRICT WORSTED DYERS & FINISHERS' ASSOCN., LTD. *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD, No. 38, *ante*.

**Street sewers.**]—*See* HIGHWAYS, Vol. XXVI., pp. 528, 529, Nos. 2267–2269.

*(b) Drains Vested in Highway Authority.*

*See* Public Health Act, 1875 (c. 55), s. 4.

**42. Highway authority becoming also sanitary authority—Local Government Act, 1894 (c. 73).**]—Where before the year 1894 a drain was vested in a highway authority which was not also a sanitary authority, & was consequently not a sewer within the definition in Public Health Act, 1875 (c. 55), s. 4, it did not upon the passing of above Act become a sewer by reason of its becoming vested under above Act, s. 25, in a district council which was both a highway authority & a sanitary authority.—WILLIAMSON *v.* DURHAM RURAL COUNCIL, [1906] 2 K. B. 65; 75 L. J. K. B. 498; *sub nom.* WILLIAMSON *v.* DURHAM RURAL DISTRICT COUNCIL, ECCLESIASTICAL COMRS. *v.* DURHAM RURAL DISTRICT COUNCIL, 95 L. T. 471; 70 J. P. 352; 54 W. R. 491; 50 Sol. Jo. 439; 4 L. G. R. 1163, D. C.

*Annotations:*—**Refd.** Irving *v.* Carlisle R. D. C. (1907), 71 J. P. 212; Pearce *v.* Croydon R. D. C. (1910), 74 J. P. 429.

**43.** ——.]—By the Inglewood Forest Award, dated Oct. 30, 1819, made under a local Inclosure Act, & reciting the general Inclosure Act, 1801 (c. 109), the comrs. set out certain public carriage roads or highways & also certain allotments. There was a provision in the award that each allotment holder should discharge the water from his allotment on to the adjoining allotment. Pltf. brought an action against defts., the rural district council, for failing to cleanse & keep in repair a ditch on one of the roads set out under the award, whereby his fields were damaged. It appeared that defts. had not cleaned out the ditch, & that they had cut grips from the road into the ditch & cleaned out the grips from time to time. The drainage from two cottages on the other side of the road passed under the road through a culvert into the ditch:—*Held:* (1) the road was not an allotment under the award, &, therefore, defts. were not bound to carry off the water from the ditch under the provisions of the award; (2) even if the cottages had been proved not to be within the same curtilage, the ditch was not a sewer.—IRVING *v.* CARLISLE RURAL DISTRICT COUNCIL (1907), 71 J. P. 212; 5 L. G. R. 776, D. C.

**44. Drain belonging to a main road—Unauthorised connection from house.**]—A drain which, at the passing of Public Health Act, 1875 (c. 55), was vested in, & was under the control of, an authority having the management of roads & not being a local authority under Public Health Act, 1875 (c. 55), & which, as being a drain "belonging to a main road" within Local Government Act, 1888 (c. 41), s. 11 (6), is vested in the county council, does not become a "sewer" so as to be vested in the sanitary authority merely by reason of some unauthorised connection being made between a house & the drain. The sanitary authority is, therefore, not liable for damage caused in consequence of such a drain being blocked.—RICKARBY *v.* NEW FOREST RURAL DISTRICT COUNCIL (1910), 74 J. P. 441; 26 T. L. R. 586; 8 L. G. R. 893.

**Highway drains.**]—*See* Part II.

*(c) Watercourses.*

*See* Rivers Pollution Prevention Act, 1876 (c. 75), ss. 3, 20.

**45. Whether convertible into a sewer.**]—SHARP *v.* SMITH (1866), 30 J. P. Jo. 773.

**46.** ——.]—The sewage of certain houses drained unto a sewer, &, after passing through the sewer, was for a period of some years allowed to fall into an open watercourse, which, in its turn,

*Sect.* 1.—*What constitute "sewers" and "drains": Sub-sect.* 1, *B.* (*c*) *&* (*d*) *i.*]

flowed into a brook:—*Held:* under the circumstances of the case, the open watercourse was a sewer within the meaning of Public Health Act, 1875 (c. 55), s. 4.—WHEATCROFT *v.* MATLOCK LOCAL BOARD (1885), 52 L. T. 356.

*Annotation:*—**Refd.** Pakenham *v.* Ticehurst R. D. C. (1903), 67 J. P. 448.

**47.** ——.]—FALCONAR *v.* SOUTH SHIELDS CORPN. (1895), 11 T. L. R. 223, C. A.

*Annotations:*—**Apld.** West Riding of Yorkshire Rivers Board *v.* Gaunt Reuben (1902), 67 J. P. 183. **Refd.** West Riding of Yorkshire Rivers Board *v.* Preston (1904), 92 L. T. 24; Hainesworth *v.* West Riding of Yorkshire Rivers Board (1907), 5 L. G. R. 356, n.; West Riding of Yorkshire Rivers Board *v.* Butterworth (1908), 6 L. G. R. 634; A.-G. *v.* Lewes Corpn., [1911] 2 Ch. 495.

**48.** —— **Flow of water diverted.**]—Under a local Act, 1870, s. 63, the Newcastle corpn. were empowered to constitute a drainage district, & to direct the drainage or sewage thereof to be brought into any drain or sewer already formed or hereafter to be formed, & assess & apportion a due proportion of the cost amongst the owners of land within the district. The word "sewer" for the purpose of this Act was therein interpreted as meaning a culvert or channel for the passage of water, sewage, or refuse, not being a drain as hereinbefore defined, & a drain was defined to mean any drain, pipe, channel, or gutter made & used for the drainage of one building only, or of buildings or land within the same curtilage. Local Act, 1892, s. 131, provided that the assessment under the said sect. should be made on the owners of all kinds of property within the district for the time being assessable to any rate for the relief of the poor, &, should be assessed on the full net annual value of such property, as ascertained by the valuation list for the time being in force, or if there were none, by the rate for the relief of the poor made next before such assessment, & that the amount so assessed should be recoverable by the corpn. in the same manner as private improvement expenses are recoverable from owners under Public Health Act of 1875 (c. 55). The corpn. in constituting the drainage district directed that the sewage should be brought into a tidal stream, which was somewhat polluted by sewage, & made an assessment on the persons who were owners of property in the district at the time of the completion of the works, using the assessment lists then in force:—*Held:* having regard to the language of local Acts, the corpn. were justified in utilising the tidal stream as a sewer.

I think . . . that it is possible to form a "sewer" without the construction of any artificial work. If, for instance, an old ditch on the bed of a watercourse from which all flow of water has been diverted, is utilised for the carriage of sewage matter, such utilisation would be properly described as forming a sewer (BYRNE, J.).—NEWCASTLE-UPON-TYNE CORPN. *v.* HOUSEMAN, SAME *v.* FRANCIS, SAME *v.* JACKSON, SAME *v.* COOTE (1898), 63 J. P. 85; 43 Sol. Jo. 140.

*Annotations:*—**Apld.** Wilkinson *v.* Llandaff & Dinas Powis R. D. C. (1903), 89 L. T. 462. **Mentd.** *Re* Allen & Driscoll's Contract (1904), 2 L. G. R. 512.

**49.** —— ——.]—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* REUBEN GAUNT & SONS, LTD., No. 57, *post.*

**50.** —— **Rivers Pollution Prevention Act, 1876 (c. 75), s. 20.**]—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* YORKSHIRE INDIGO, SCARLET & COLOUR DYERS, LTD. (1902), 67 J. P. 80, D. C.

**51.** —— ——.] — Defts., the owners & occupiers of certain works, had for many years impounded all the waters of a watercourse which had its origin in a well or spring above their works, &, after using the water in their works, returned it loaded with noxious matter to the watercourse lower down. The watercourse was joined a little lower down still by two other watercourses, & ultimately flowed into a river. A large number of houses formerly drained into the watercourse at points below that at which deft.'s effluent was discharged into it. But the great majority of these houses had latterly been disconnected from the watercourse. It was not shown whether the watercourse was natural or artificial:—*Held:* on these facts, the watercourse, as from the point where it received defts.' effluent, was a stream within above Act, & not a "sewer" within Public Health Acts; & defts. had, therefore, been guilty of an offence against above Act, s. 4.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* PRESTON & SONS (1904), 92 L. T. 24; 69 J. P. 1; 3 L. G. R. 289, D. C.

*Annotations:*—**Refd.** West Riding of Yorkshire Rivers Board *v.* Butterworth & Roberts (1908), 72 J. P. 193; A.-G. *v.* Lewes Corpn., [1911] 2 Ch. 495.

**52.** —— ——.]—Resps. applied for an order to restrain applts. under above Act, "to abstain from causing to fall or flow or to be carried into" certain streams which flow through or by certain parishes in the county of Lanark & within resps.' district "any solid or liquid sewage matter." Applts. alleged that the burns & streams in question were not "streams" within above Act, in respect that at the date of the passing of above Act they were mainly used as sewers. There was a definite finding in fact that applts. discharged all their sewage into the burns in question:—*Held:* the burns in question were "streams" & not "watercourses mainly used as sewers" within above Act.—AIRDRIE MAGISTRATES *v.* LANARK COUNTY COUNCIL, COATBRIDGE MAGISTRATES *v.* LANARK COUNTY COUNCIL, [1910] A. C. 286; 79 L. J. P. C. 82; 102 L. T. 437, H. L.

**53.** —— **Bourne course in chalk district.**]—Pltf. was the owner of land in the neighbourhood of Croydon. Defts. permitted the surface drainage from certain roads in their district to flow across pltf.'s land, & claimed the right to do so either on the ground (*a*) that there was a watercourse across the land, or (*b*) on the ground that there was a sewer which ran across pltf.'s land, into which they were entitled to discharge the water in question. It appeared that from time immemorial there had been "bourne flows" of underground water from the chalk, which bourne flows had on divers occasions flooded the land occupied by pltf., & had followed the channel or watercourse which defts. alleged was a watercourse or a sewer. Pltf. claimed damages for trespass & an injunction:—*Held:* upon the facts, that the bourne course was not a watercourse" within Public Health Act, 1875 (c. 55), s. 17); it was not a sewer, & pltf. was, therefore, entitled to damages for trespass & an injunction.—PEARCE *v.* CROYDON RURAL DISTRICT COUNCIL (1910), 74 J. P. 429; 8 L. G. R. 909.

**54.** —— **Underground watercourse.**]—A contract was entered into for the sale of a house & lands adjoining described as a "residential property," but which in fact possessed advantages for the formation of building sites. The contract stated that the property was sold subject to all drainage, sewer, & other easements, if any, affecting the same, &, clause 11, that if any error or misstatement in the particulars or contract should be disclosed, the same should not annul the sale, nor should any compensation be claimed or made in respect thereof by either party. Neither the particulars nor contract, nor the plan annexed,

disclosed or indicated the existence of a natural underground watercourse which ran through the grounds & the lands of adjoining owners in a culvert or piping constructed by the owners of the several lands. The vendors knowing of the existence of the watercourse, did not disclose it to the purchaser, & the purchaser's agents, when inspecting the property prior to the contract, did not see the piping, although it was then exposed to view in a hole in the lawn of the house. The purchaser bought the property primarily as a residence, but with a view in certain events to using it for building purposes. In an action by the vendors for specific performance they waived clause 11 of the contract: —*Held:* the watercourse was not a sewer or drain vested in the local authority.—SHEPHERD *v.* CROFT (1911), 1 Ch. 521; 80 L. J. Ch. 170; 103 L. T. 874.

**55. —— Intermittent stream—Periodical flow of fresh water.**]—The discharge of sewage into the channel of an intermittent stream may have the effect of converting it into a sewer although the natural flow of the pure water is not cut off.

Crude sewage was discharged by a local authority into the channel of an intermittent stream which ran in an old culvert through private land & then in the open air alongside that land to a tidal river, the stream itself being tidal up to the point where the sewage entered. The local authority had not interfered with the natural flow of the stream, which only ran during winter. In the summer the channel conveyed nothing but sewage with the exception of the tidal water with which it was diluted twice a day. Sewage was deposited on the banks of the open channel to such an extent as to constitute a public nuisance when the tide was out, & owing to the defective state of the culvert the land was constantly flooded with pent-up sewage water at spring tides. In an action by the tenant of the land & the A.-G. at his relation for damages & an injunction:—*Held:* notwithstanding the winter flow of fresh water & the daily flow of tidal water the channel was a sewer.—A.-G. *v.* LEWES CORPN., [1911] 2 Ch. 495; 81 L. J. Ch. 40; 105 L. T. 697; 76 J. P. 1; 27 T. L. R. 581; 55 Sol. Jo. 703; 10 L. G. R. 26.

*Annotation:*—**Mentd.** R. *v.* Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

**56. What are sufficient acts of conversion—Question of fact.**]—FALCONAR *v.* SOUTH SHIELDS CORPN. (1895), 11 T. L. R. 223, C. A.

*Annotations:*—**Reld.** West Riding of Yorkshire Rivers Board *v.* Gaunt (1902), 67 J. P. 183; West Riding of Yorkshire Rivers Board *v.* Preston (1904), 92 L. T. 24; Hainesworth *v.* West Riding of Yorkshire Rivers Board (1907), 5 L. G. R. 356, n.; West Riding of Yorkshire Rivers Board *v.* Butterworth (1908), 6 L. G. R. 634; A.-G. *v.* Lewes Corpn., [1911] 2 Ch. 495.

**57. —— Mere pollution—Discharge of sewage—For a number of years.**]—Resps. discharged a manufacturing effluent into a watercourse which they contended had become a channel for the conveyance of sewage:—*Held:* though a stream of which the original supply of water has been cut off, may become a "sewer" into which certain persons may acquire a right of drainage, the mere fact that sewage has been discharged for a number of years into a watercourse, so that the watercourse has been polluted, is not of itself sufficient to turn the watercourse into a sewer.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* REUBEN GAUNT & SONS, LTD. (1902), 67 J. P. 183; 19 T. L. R. 140; 1 L. G. R. 133, D. C.

*Annotations:*—**Consd.** West Riding of Yorkshire Rivers Board *v.* Preston (1904), 92 L. T. 24. **Apprvd.** Airdrie Mags. *v.* Lanark County Council, Coatbridge Mags. *v.* Lanark County Council, [1910] A. C. 286. **Reld.** A.-G. *v.* Lewes Corpn., [1911] 2 Ch. 495.

**58. —— —— ——.**]—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* YORKSHIRE INDIGO, SCARLET & COLOUR DYERS, LTD. (1902), 67 J. P. 80, D. C.

**59. —— —— ——.**]—A.-G. *v.* LEWES CORPN., No. 55, *ante*.

### (*d*) *Works Included in Term "Sewer."*

#### i. *In General.*

*See* Public Health Act, 1875 (c. 55), s. 4.

**60. Reservoir.**]—SUTTON *v.* NORWICH CORPN., No. 1, *ante*.

**61. Cesspool.**]—SUTTON *v.* NORWICH CORPN., No. 1, *ante*.

**62. ——.**]—MEADER *v.* WEST COWES LOCAL BOARD, No. 19, *ante*.

**63. ——.**]—A cesspool was built by applt. on land of which applt. was lessee in possession for the residue of an unexpired term of years. The cesspool formed the ultimate outfall of a drainage system consisting of a pipe along & under a street, into which pipe the drainage of houses on each side of the street was discharged by separate drains. Applt. was owner of six of these houses within Public Health Act, 1875 (c. 55). The drainage system had been constructed by applt. in accordance with plans approved by the corpn. on applt. undertaking (*inter alia*) that the pipe should be a private drain, & that he would repair & cleanse both pipe & cesspool. Petty sessions, on a summons against applt. under the nuisance clauses of Public Health Act, 1875 (c. 55), for not abating a nuisance arising from the cesspool, fined applt. as the person by whose act, default or sufferance the nuisance complained of arose, holding that the case was governed by *Meader* v. *West Cowes Local Board*, No. 19, *ante*. On a case stated:—*Held:* the decision of the justices was right, & the case was governed by *Meader* v. *West Cowes Local Board*. Where a man chooses to deal with drainage which passes through a pipe into a cesspool on his own land, & he fails to cleanse the cesspool, although the pipe may receive the drainage of more than one house, the obligation to cleanse the cesspool is upon him & not upon the local authority. Even if the pipe & cesspool had vested in the local authority under Public Health Act, 1875 (c. 55), as between the local authority & third parties, the liability to cleanse lay on applt. by virtue of his undertaking.—BUTT *v.* SNOW (1903), 89 L. T. 302; 67 J. P. 454; 2 L. G. R. 222, D. C.

**64. —— Converted into catchpit.**]—(1) Sewage was conveyed from two points by pipes or underground drains to an open ditch on the same estate from which there was no outflow:—*Held:* these connections did not constitute a sewer.

(2) A system of drainage by agreement between two landowners was so constituted as to take drainage matter from a cesspool which had formerly overflowed & created a nuisance. Pipes were laid above & below, & the cesspool was converted into a sort of catchpit:—*Held:* the connection none the less constituted a sewer because a still existing cesspool had been converted into a kind of catchpit.

(3) A ditch used for the discharge of sewage matter may be a sewer.

(4) If a man by way of trespass lays down a line of pipes to convey drainage matter on the land of another, & the landowner subsequently consents to such use of his land, a sewer will have been constituted that will vest in the local authority.—PAKENHAM *v.* TICEHURST RURAL DISTRICT COUNCIL (1903), 67 J. P. 448; 2 L. G. R. 19.

*Sect.* 1.—*What constitute "sewers" and "drains": Sub-sect.* 1, *B.* (*d*) *i. & ii.; sub-sect.* 2, *A.* (*a*) *& (b).*]

**65. Open ditch having no outflow—Sewage conveyed by underground drains.**]—PAKENHAM *v.* TICEHURST RURAL DISTRICT COUNCIL, No. 64, *ante.*

**66. Manholes.**] — Defts., a local board of health, prior to 1875, constructed a sewer under a public footpath, the soil of which belonged to pltf. & they made a shaft 30 feet deep into the sewer, with an entrance or manhole upon the footpath, at the point where there was a junction of two sewers. Defts. also gave pltf. notice after 1875 of their intention to make similar manholes into their sewers upon other parts of pltf.'s property:—*Held:* they were parts of the sewer within 11 & 12 Vict. c. 63, s. 45, & could be made without purchasing land for the purpose, & pltf. was only entitled to compensation for the damage arising from making them.—SWANSTON *v.* TWICKENHAM LOCAL BOARD (1879), 11 Ch. D. 838; 48 L. J. Ch. 623; 40 L. T. 734; 43 J. P. 380; 27 W. R. 924, C. A.

*Annotations:*—**Consd.** King's College, Cambridge *v.* Uxbridge R. C., [1901] 2 Ch. 768. **Reid.** Ellis *v.* Bromley R. D. C. (1899), 81 L. T. 224; Metropolitan Water Board *v.* L. B. & S. C. Ry., [1914] 3 K. B. 787. **Mentd.** Sheffield Waterworks Co. *v.* Bingham (1883), 48 L. T. 604.

**67. Conduit leading from cesspool into larger cesspool.**]—B., the owner of certain houses, constructed a series of cesspools for their drainage on his own land. He then constructed a conduit, which conveyed the overflow therefrom to a larger cesspool. He was summoned for constructing these cesspools so as to have an outlet into a sewer, viz. the conduit & the large cesspool, contrary to the local bye-law.

The magistrates were of opinion that the conduit, being used for the drainage of several dwelling-houses occupied by different persons, was a sewer, & that an offence had been committed:—*Held:* the magistrates were wrong, & applt. had not constructed these cesspools contrary to the bye-law.—BUTTON *v.* TOTTENHAM URBAN DISTRICT COUNCIL (1898), 78 L. T. 470; 62 J. P. 423; 19 Cox, C. C. 36. D. C.

*Annotation:*—**Apld.** Butt *v.* Snow (1903), 89 L. T. 302.

*See, also,* Nos. 19–36, *ante.*

**68. Apparatus for disposal of sewage—Engine-house & machinery.**]—An engine-house with pump & machinery, erected partly above & partly below the level of the ground, for lifting & forcing along a rising main the sewage of a district to a common outfall for treatment, is not a "sewer" within Public Health Act, 1875 (c. 55), s. 16, which a local authority is thereby empowered to carry through or under any street, or any land within its district on making compensation to the owner, but is a work for the purpose of "receiving or otherwise disposing of sewage" within s. 27, for which the necessary land must be purchased or leased.—KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL COUNCIL, [1901] 2 Ch. 768; 70 L. J. Ch. 844; 85 L. T. 303; 17 T. L. R. 762.

**69. Ditch for discharge of sewage matter.**]—PAKENHAM *v.* TICEHURST RURAL DISTRICT COUNCIL, No. 64, *ante.*

**70. Works for purification of sewage—Rivers Pollution Prevention Act, 1876 (c. 75).**] — The facilities required by above Act, s. 7, to be given for carrying liquids from factories or manufacturing processes into sewers under the control of a local authority cannot be enforced where, though the pipes are capable of carrying the liquids, the works for purification are not sufficient to deal with the liquids in addition to the sewage within the district. The word "sewers" in the second proviso of s. 7 includes not merely the pipes but the works for purification of the sewage.—BROOK *v.* MELTHAM URBAN COUNCIL, [1909] A. C. 438; 78 L. J. K. B. 719; 100 L. T. 818; 73 J. P. 353; 25 T. L. R. 582; 53 Sol. Jo. 541; 7 L. G. R. 770, H. L.

ii. *Channels Used Solely for Carrying Off Water.*

*See* Public Health Act, 1875 (c. 55), s. 4.

**71. Water carried off by pipes—Effluent—Constructed for temporary purposes.**]—TOTTENHAM LOCAL BOARD OF HEALTH *v.* BUTTON (1886), 2 T. L. R. 828.

**72. —— From road into stream.**]—DURRANT *v.* BRANKSOME URBAN COUNCIL, No. 161, *post.*

**73. —— From highway to gravel pit—For watering cattle.**]—(1) The word "profit" in Public Health Act, 1875 (c. 55), s. 13 (1), is not to be restricted to a direct money payment. Accordingly a sewer which is not made for ordinary drainage purposes, but to enable the land on which it is made to be occupied more profitably, or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, is made for the "profit" of the owner within Public Health Act, 1875 (c. 55), s. 13, & does not vest in the local authority. So *held,* in the case of a line of pipes laid down by the owner of a field adjoining a highway from a ditch bordering the highway to a disused gravel pit in the field for the purpose of supplying water to the cattle fed in the field.

(2) On the authority of *Croft* v. *Rickmansworth Highway Board,* No. 334, *post,* the pit did not form part of the drainage system vested in the local authority, they had no power under Highway Act, 1835 (c. 50), s. 67, to discharge surface water from the road into the pit, & were not entitled to enter upon the field in order to keep open the existing drain, or to make any other for the same purpose.

It is established by *Durrant* v. *Branksome Urban Council,* No. 161, *ante,* that the sewers to which the provisions of Public Health Act, 1875 (c. 55), apply include sewers for the removal of surface water as well as those for carrying off what is ordinarily termed sewage. That being so, the pipes constitute a sewer within the definition contained in Public Health Act, 1875 (c. 55), s. 4 (STIRLING, J.).—CROYSDALE *v.* SUNBURY-ON-THAMES URBAN COUNCIL, [1898] 2 Ch. 515; 67 L. J. Ch. 585; 79 L. T. 26; 62 J. P. 520; 46 W. R. 667; 42 Sol. Jo. 668.

*Annotations:*—*As to* (1) **Apld.** Sykes *v.* Sowerby U. C., [1900 1 Q. B. 584. **Consd.** Yorkshire (W. R.) Rivers Board *v.* Linthwaite U. C. (No. 2) (1915), 84 L. J. K. B. 1610. **Apld.** Vare *v.* Joy (1920), 124 L. T. 148. **Reid.** Thompson *v.* Eccles Corpn. (1904), 68 J. P. 315. *As to* (2) **Reid.** Thomas *v.* Gower R. C., [1922] 2 K. B. 76.

**74. —— From lands adjoining railway.**]—A railway co. whose special Act expressly incorporated Railways Clauses Consolidation Act, 1845 (c. 20), constructed land drains for the purpose of conveying surface water from lands adjoining the railway, & these land drains were, without the knowledge or consent of the co., used by a rural sanitary authority to convey sewage from certain houses within the district of such authority:—*Held:* these drains were "sewers" within Public Health Act, 1875 (c. 55), but they were sewers made & used for the purpose of draining land under a local or private Act of Parliament within the second exception in Public Health Act, 1875 (c. 55), s. 13, & did not vest in the local authority; & consequently the co. were entitled to an injunction to restrain the sanitary authority from so using them.—LONDON & NORTH WESTERN RY. CO. *v.* RUNCORN RURAL COUNCIL, [1898] 1 Ch. 561;

67 L. J. Ch. 324; 78 L. T. 343; 62 J. P. 643; 46 W. R. 484; 14 T. L. R. 331, C. A.

*Annotation:*—**Distd.** Kingston-upon-Hull Corpn. v. N. E. Ry., [1915] 1 Ch. 456.

**75. —— From road into ditch.**]—Applts. were summoned by the sanitary authority of a borough for non-compliance with a notice to abate a nuisance caused by turning slop & scullery water from twelve houses owned by applts., into a drain constructed beside a highway to receive the surface water of the highway, which emptied into an open ditch. According to the plan, deposited with the sanitary authority when the houses were built by applts.' predecessor in title, the houses should have been drained into cesspools, but cesspools to receive the slop & scullery water had not been constructed. No sewer had been constructed by the sanitary authority, by means of which the houses could be drained. The houses were separately occupied, & were not within the same curtilage. The justices made an order to abate the nuisance, by disconnecting the drains of the houses from the surface water drain, & making cesspools for the houses. On a case stated:—*Held:* the sanitary authority were not bound, under Public Health Act, 1875 (c. 55), s. 15, to provide a sewer to drain applts.' houses; the surface water drain, though for some purposes a "sewer," within Public Health Act, 1875 (c. 55), s. 4, was not a sewer into which applts. were entitled to empty their drains; the nuisance was caused by the want of a structural convenience within Public Health Act, 1875 (c. 55), s. 94, & therefore defts. as owners were liable.

It is said that there was default on the part of the sanitary authority because by Public Health Act, 1875 (c. 55), s. 15, they were bound to sewer the district. But that sect. does not mean that they are bound to provide a sewer for every house in the district, for instance for an outlying cottage (CHANNELL, J.).—KINSON POTTERY CO. *v.* POOLE CORPN., [1899] 2 Q. B. 41; 68 L. J. Q. B. 819; 81 L. T. 24; 63 J. P. 580; 47 W. R. 607; 15 T. L. R. 379, D. C.

*Annotations:*—**Apld.** Graham *v.* Wroughton, [1901] 2 Ch. 451. **Distd.** Wilkinson *v.* Llandaff & Dinas Powis R. C., [1903] 2 Ch. 695; Wincanton R. C. *v.* Parsons, [1905] 2 K. B. 34; Bloor *v.* Beckenham U. C., [1908] 2 K. B. 671. **Reid.** Leeds & District Worsted Dyers & Finishers' Assocn. *v.* West Riding of Yorkshire Rivers Board (1906), 70 J. P. 480.

**76. —— From quarry.**]—A drain was made by the owner of a quarry for the purpose of collecting & carrying off surface water coming on to his land & preventing it from running over the quarry. By means of the drain the quarry could be more economically & conveniently worked than if the water were allowed to spread over it:—*Held:* the drain was a sewer made by a person for his own profit within Public Health Act, 1875 (c. 55), s. 13 (1), & did not vest in the local authority of the district.—SYKES *v.* SOWERBY URBAN COUNCIL, [1900] 1 Q. B. 584; 69 L. J. Q. B. 464; 82 L. T. 177; 64 J. P. 340; 16 T. L. R. 225, C. A.

*Annotations:*—**Consd.** Wilkinson *v.* Llandaff & Dinas Powis R. D. C. (1903), 89 L. T. 462. **Apld.** Phillimore *v.* Watford R. C., [1913] 2 Ch. 434; Yorkshire (W. R.) Rivers Board *v.* Linthwaite U. C. (No. 2) (1915), 84 L. J. K. B. 1610. **Consd.** Vare *v.* Joy (1920), 124 L. T. 148. **Reid.** Thompson *v.* Eccles Corpn. (1904), 68 J. P. 315; West Riding of Yorkshire Rivers Board *v.* Butterworth & Roberts (1908), 72 J. P. 193.

**77. —— From houses into quarry.**]—GRAHAM *v.* WROUGHTON, No. 312, *post.*

**78. —— From roofs of houses.**]—WILKINSON *v.* LLANDAFF & DINAS POWIS RURAL COUNCIL, No. 40, *ante.*

**79. Agricultural ditch for draining land.**]—PHILLIMORE *v.* WATFORD RURAL COUNCIL, No. 128, *post.*

**Watercourses.**]—*See* Sub-sect. 1, B. (*c*), *ante.*

SUB-SECT. 2.—IN THE METROPOLIS.

*A. Drains.*

*(a) In General.*

*See* Metropolis Management Act, 1855 (c. 120), s. 250; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 112.

**80. "Drain" used for drainage of premises within the same curtilage — Two blocks of separate tenements—Separated by causeway—Main drain receiving drainage from branch drains.**]—Two blocks of buildings, belonging to the same owner & containing forty-six sets of apartments, were separated by a causeway or yard 20 feet wide, of which one end was closed by a wall & the other opened into a public thoroughfare. Access to one of the blocks was obtained from the causeway. The only access to the other block was from the public thoroughfare. The premises were drained by means of branch drains running from the sets of apartments into a main drain which ran under the causeway & communicated with a sewer. The premises were so constructed as to be enclosed by continuous boundary walls, with the exception of the opening from the causeway into the thoroughfare:—*Held:* having regard to their construction, the two blocks of buildings were "premises within the same curtilage" within Metropolis Management Act, 1855 (c. 120), s. 250, & therefore the main drain used for their drainage was a "drain," & not a "sewer" for the purposes of that Act.—PILBROW *v.* ST. LEONARD, SHOREDITCH, VESTRY, [1895] 1 Q. B. 433; 64 L. J. M. C. 130; 72 L. T. 135; 59 J. P. 68; 43 W. R. 342; 11 T. L. R. 178; 14 R. 181, C. A.

*Annotations:*—**Distd.** Harris *v.* Scurfield (1904), 91 L. T. 536. **Reid.** Woodford U. D. C. *v.* Stark (1902), 86 L. T. 685.

**81. —— Separate buildings on either side of arcade—Central passage roofed & closed by gates—Drainage running down central passage.**]—Deft. was the owner of an arcade consisting of a central passage, with a number of houses & shops on either side, the whole being on the property of deft., & there being no right of way along the passage, which was roofed, & could be closed by gates placed at each end. The drainage of the arcade was by means of a construction which ran down the central passage to a main sewer outside, receiving in its course the drainage of the houses. In an action brought to determine whether deft. was liable to keep the central construction in repair:—*Held:* the central construction was not a "drain of & used for the drainage of one building only, or premises within the same curtilage," & was therefore a "sewer" within Metropolis Management Act, 1855 (c. 120), s. 250, & vested in & to be kept in repair & maintained by the vestry.—ST. MARTIN-IN-THE-FIELDS VESTRY *v.* BIRD, [1895] 1 Q. B. 428; 64 L. J. Q. B. 230; 71 L. T 868; 60 J. P. 52; 43 W. R. 194; 39 Sol. Jo. 131; 14 R. 146, C. A.

*Annotations:*—**Distd.** Pilbrow *v.* St. Leonard Shoreditch Vestry, [1895] 1 Q. B. 433. **Apld.** R. *v.* St. Matthew. Bethnal Green Vestry, [1896] 2 Q. B. 319; Harris *v.* Scurfield (1904), 91 L. T. 536. **Reid.** Webb *v.* Knight, Hedley *v.* Webb (1901), 70 L. J. Ch. 663.

**Effect of disconnection of pipe from main sewer.**]—*See* No. 113, *post.*

*(b) Drainage of Group of Houses by Combined Operation.*

*See* Metropolis Management Act, 1855 (c. 120), ss. 73–76, 250; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 112.

**82. Whether drain or sewer.**]—The owner of a plot of ground within the metropolitan district, on which he was about to build fifteen contiguous

*Sect. 1.—What constitute "sewers" and "drains": Sub-sect. 2, A. (b) & B.*]

houses, sent to the local board notice of his intention to lay down upon it a pipe drain running parallel to the houses, through which the houses would be drained into the main sewer belonging to the Metropolitan Board. The local board signified their approval of the scheme by letter & entered their approval in their books, but made no formal order. The owner completed the drain: —*Held:* (1) although Metropolis Management Act, 1855 (c. 120), s. 74, did not give the board power to order drainage by a combined operation except in the case of existing houses, the general words of s. 76 gave them this power in the case of houses about to be built; their approval of the scheme was an order, & the drain in question was therefore a "drain" & not a "sewer" within s. 250, & did not vest in the local board; (2) Metropolis Management (Amendment) Act, 1862 (c. 102), s. 106, does not apply to an action for an injunction to restrain a nuisance.—BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS (1886), 33 Ch. D. 360; 56 L. J. Ch. 149; 55 L. T. 374; 2 T. L. R. 860, C. A.; *subsequent proceedings* (1887), 37 Ch. D. 272.

*Annotations:—As to* (1) **Apld.** Kershaw *v.* Taylor (1895), 64 L. J. M. C. 222. **Distd.** R. *v.* St. Matthew, Bethnal Green Vestry, [1896] 2 Q. B. 95. **Apld.** Greater London Property Co. *v.* Foot, [1899] 1 Q. B. 972; 238 Old Ford Road, Owner *v.* Foot (1899), 80 L. T. 390. **Folld.** House Property & Investment Co. *v.* Grice (1911), 75 J. P. 395. **Reld.** High *v.* Billings (1903), 89 L. T. 550.

**83.** ——.]—In 1889 the owner of a plot of ground within the metropolitan district, on which he was about to erect a number of houses, sent to the local authority, the vestry, a plan which showed that it was proposed to drain the houses in pairs, one pair being two houses numbered 29 & 27, but the plan did not show any details as to the course or position of the particular drains of each house. The plan was duly passed & approved by a resolution of the vestry. In constructing the drains of Nos. 29 & 27 a connection, not shown on the plan, was made between two gulleys at the backs of the houses, the consequence of which was that waste water from a sink in No. 27 was carried away through the pipe which drained No. 29. There was evidence that the drains of these two houses had been constructed under the supervision of a surveyor of the vestry.

By a voluntary conveyance, in the nature of a deed of family arrangement, the beneficial interest in the leases of the two houses passed from the building owner to his son, & was by him conveyed to the trustees of his marriage settlement.

A nuisance having arisen by reason of the defective condition of the drain of No. 29, it was contended by pltfs., the exors. of the building owner & the trustees of the son's marriage settlement, that the drain of No. 29 was a sewer repairable by the defts., the successors of the vestry:—*Held:* (1) the resolution of the vestry approving the plan was an order for draining the two houses by a combined operation; it might be inferred, from the fact the plan showed no details of the drainage, that these details were to be left to be approved by the surveyor responsible for the supervision of the work; & the proper inference to be drawn from the evidence was that the connection between the gulley of No. 27 & the drain of No. 29 had been so approved & the drain of No. 29 was, therefore, not a sewer; (2) if the connection had been wrongfully made, pltfs., being the representatives of the original wrongdoer, & not being purchasers for value without notice, were estopped as against defts. from alleging that the drain of No. 29 was a sewer.

(3) The provision of sect. 83 of Metropolis Management Act, 1855 (c. 120), s. 83, under which where a drain is found on inspection to have been laid contrary to the directions of the local authority, the offending party is liable in a penalty & the local authority may require the person making the drain to reinstate it in accordance with their directions, are available against the original wrongdoers only & not against his successors in title.—HEAVER *v.* FULHAM BOROUGH COUNCIL, [1904] 2 K. B. 383; 73 L. J. K. B. 715; 91 L. T. 31; 68 J. P. 278; 20 T. L. R. 383; 48 Sol. Jo. 354; 2 L. G. R. 672.

*Annotations:—As to* (1) **Consd.** Harvey *v.* Busby (1906), 95 L. T. 91. **Distd.** Kershaw *v.* Paine (1913), 78 J. P. 149. *As to* (2) **Consd.** Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563. **Reld.** Kershaw *v.* Smith, [1913] 2 K. B. 455.

**84.** ——.]—On a complaint that a pipe in a metropolitan borough was a nuisance & injurious to health, the following documents were produced from the custody of the metropolitan borough council. (*a*) The following application in respect of certain houses, including that in question addressed to the vestry, who were the predecessors of the borough council, & dated Jan. 28, 1858: "Gentlemen, being desirous to have a 9-inch drain made from Alfred Place to communicate with the public sewer in the rear of Richardson Street to enable me to drain the houses Nos. 30 to 35, Nelson Street" (in connection with one of which was the pipe complained of), "also Nos. 11 to 17, Alfred Place, I hereby request you will cause the drain to be made from the sewer to the front line of the said premises upon the payment of the estimated cost thereof"; (*b*) an estimate by the surveyor of the cost of the work applied for; & (*c*) the cash book of the vestry duly audited showing an entry under the date Feb. 8, 1858, of a payment by appct. of this estimated cost of the work. No plan was in evidence as having been deposited with the application, nor was there produced any minute of the vestry sanctioning the application:—*Held:* there was evidence upon which the magistrate could find that the pipe or line of pipes was a drain & not a sewer, & the houses referred to in the application were drained by a combined operation of drainage under the order of the vestry.—HOUSE PROPERTY & INVESTMENT CO. *v.* GRICE (1911), 75 J. P. 395; 9 L. G. R. 758, D. C.

**85.** —— **Deviation from approved plan—Alteration of course of pipe.**]—(1) Where there has been an order of a vestry for the drainage of a block of houses by a combined operation under Metropolis Management Act, 1855 (c. 120), s. 74, a deviation from the approved plan by altering the course of a pipe will not convert the pipe into a "sewer," provided that its character is not altered, & that it drains only the same group of houses as if the plan had been adhered to.

(2) The order of the vestry required by Metropolis Management Act, 1855 (c. 120), s. 250, for draining a group or block of houses by a combined operation need not be a formal order, but deposited plans signed by the surveyor of the vestry are sufficient.—GREATER LONDON PROPERTY CO., LTD. *v.* FOOT, [1899] 1 Q. B. 972; 68 L. J. Q. B. 628; 63 J. P. 420; *sub nom.* 238 OLD FORD ROAD (OWNER OF) *v.* FOOT, 80 L. T. 390; 47 W. R. 541; 15 T. L. R. 311; 43 Sol. Jo. 419, D. C.

*Annotations:—As to* (1) **Distd.** Bullock *v.* Reeve (1900), 84 L. T. 55. **Folld.** Gorringe *v.* Shoreditch Corpn. (1902), 86 L. T. 592. **Distd.** Heaver *v.* Fulham B. C., [1904] 2 K. B. 383. **Consd.** Harvey *v.* Busby (1906), 95 L. T. 91; Harvey *v.* Jaye (1907), 97 L. T. 543. **Reld.** High *v.* Billings (1903), 89 L. T. 550; Wilson's Music & General Printing Co. *v.* Finsbury B. C. (1907), 98 L. T. 574. *Generally,* **Reld.** Frost *v.* Fulham Vestry (1900), 82 L. T. 720.

**86. —— —— Addition of drainage of other premises—Within the same curtilage.**] — Certain houses in B. street in 1853 were drained by a combined scheme under the order of the local authority. In 1889 No. 85, B. street was disconnected from No. 83 & connected to its adjoining house on the other side, No. 87. No order was made by the authority for this, but it was superintended by their officers. In 1900, the owner of No. 85 erected a workshop on the garden, & the drainage from that, including an additional w.c., was connected with the drain of No. 87. This was superintended by resps.' officers, &, although a plan had been approved by resps., the work was not in fact carried out in accordance with that plan:—*Held:* the drain of No. 87 did not become a sewer.—GORRINGE *v.* SHOREDITCH CORPN. (1902), 86 L. T. 592; 66 J. P. 565.

*Annotations:*—**Expld.** Heaver *v.* Fulham B. C., [1904] 2 K. B. 383. **Consd.** Harvey *v.* Busby (1906), 95 L. T. 91; Harvey *v.* Jaye (1907), 97 L. T. 543.

**87. —— —— Reinstatement according to plan.**] — By Metropolis Management Act, 1855 (c. 120), s. 85, as applied by London Government Act, 1899 (c. 14), s. 4, a metropolitan borough council may, if a drain is in bad order, give notice requiring the owner or occupier to do the necessary works, & by Metropolis Management (Amendment Act), 1862 (c. 102), s. 64, if the notice is not complied with, the person offending is liable to a penalty. By s. 250 of the Act of 1855 the word "drain" means any drain used for the drainage of one building only, but also includes "any drain for draining any group or block of houses by a combined operation under the order of any vestry," & the word "sewer" includes all other sewers & drains.

In 1884, on the application of the builder & owner, a metropolitan vestry made an order for the drainage of twelve houses & shops by a combined operation in the manner shown upon an approved plan. The work was done in a manner which seriously deviated from the plan, the houses having been wrongly grouped & a drain from a workshop & four gulleys having been connected to the drains. In 1887 the builder & owner sold one of the houses to a purchaser, who purchased it for valuable consideration without notice that the drainage system was in contravention of the approved plan. The purchaser subsequently assigned it for value to resps., who likewise took it without notice.

In 1912 the borough council ascertained that the drains had not been made in accordance with the approved plan, & they served the original owner & builder, but not resps., with notice under Metropolis Management Act, 1855 (c. 120), s. 83, to alter the drains in accordance with the approved plan. The notice was not complied with, & the council did not work themselves. Subsequently a notice under s. 85 of the Act was served on resps. requiring them to take up the "combined drain" & remove all foul & polluted earth, the line of pipes referred to in this notice as a "combined drain" being that part of the line of pipes which passed under resps.' house, & which also took the drainage of some of the adjoining premises:—*Held:* as the line of pipes had, before service on resps. of the notice under s. 85 of the Act of 1855, been reinstated in accordance with the approved plan, it was at that time a combined drain, &, therefore, resps. could not allege that it was a sewer vested in the local authority.—KERSHAW *v.* SMITH (ALFRED JOHN) & CO., LTD., [1913] 2 K. B. 455; 82 L. J. K. B. 791; 108 L. T. 650; 77 J. P. 297; 11 L. G. R. 519, D. C.

——.]—*See, also,* Nos. 107–112, *post.*

**88. To what houses provisions for combined operation may be applied—Existing houses—Metropolis Management Act, 1855 (c. 120), s. 74.**]—BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS, No. 82, *ante.*

**89. —— Houses about to be built—Metropolis Management Act, 1855 (c. 120), s. 76.**]—BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS, No. 82, *ante.*

**90. Sufficiency of order for combined operation — Sanction of local authority.**] — BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS, No. 82, *ante.*

**91. —— —— Power of approval entrusted to surveyor—Surveyor's report approved by local authority.**]—Resp. having applied to the vestry for permission to lay a drain according to an annexed plan, received from the surveyor to the vestry the following communication: "I have considered your application . . . & have to inform you that, subject to the conditions mentioned below, & which I have placed upon your notice, that work can be proceeded with, & I shall report to that effect to my vestry." The vestry subsequently passed a resolution approving the report of the surveyor:—*Held:* this was a sufficient "order" of the vestry within Metropolis Management Act, 1855 (c. 120), s. 76.—STOKES *v.* HAYDON (1901), 84 L. T. 531; 65 J. P. 756; 19 Cox, C. C. 690, D. C.; *subsequent proceedings,* 65 J. P. p. 757, D. C.

**92. —— —— ——.**] — HEAVER *v.* FULHAM BOROUGH COUNCIL, No. 83, *ante.*

**93. —— Deposited plans signed by surveyor of local authority.**] — GREATER LONDON PROPERTY CO., LTD. *v.* FOOT, No. 85, *ante.*

**94. —— Owner requesting local authority to make drain—Surveyor's estimate—Payment to local authority of estimated cost.**]—HOUSE PROPERTY & INVESTMENT CO. *v.* GRICE, No. 84, *ante.*

*B. Sewers.*

*See* Metropolis Management Act, 1855 (c. 120), s. 250.

**95. Drain used for drainage of more than one building—Unauthorised connection—With drain from another house.**]—The duty imposed by Metropolis Local Management Act, 1855 (c. 120), s. 72, on a district board, to keep the sewers which are by the Act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care & diligence to keep the sewers in a proper condition. If, therefore, a drain, which was originally a private drain, has, by reason of another drain being connected with it, become a "sewer," & therefore by the Act vested in the district board, the board will not be liable for a nuisance caused by the drain, if it is shown that the connection was made illegally without the knowledge of the board, & that before action brought they did not know, & could not by the exercise of reasonable care have discovered, that the drain was a "sewer."—BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS (NO. 2) (1887), 37 Ch. D. 272; 57 L. J. Ch. 579; 58 L. T. 720; 36 W. R. 501; 4 T. L. R. 137.

*Annotations:*—**Reld.** Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431; Geen *v.* Newington Vestry (1898), 46 W. R. 624; Baron *v.* Portslade-by-Sea U. C. (1899), 68 L. J. Q. B. 949; Lambert *v.* Lowestoft Corpn., [1901] 1 K. B. 590.

**96. —— —— ——.**]—KERSHAW *v.* TAYLOR, No. 107, *post.*

**97. —— —— ——.**]—FLORENCE *v.* PADDINGTON VESTRY (1895), 12 T. L. R. 30; 40 Sol. Jo. 51.

*Annotations:*—**Consd.** Klett *v.* Camberwell Vestry (1896), 60 J. P. 411. **Reld.** Greater London Property Co. *v.* Foot (1899), 68 L. J. Q. B. 628; 238 Old Ford Road, Owner *v.* Foot (1899), 47 W. R. 541.

*Sect. 1.—What constitute "sewers" and "drains": Sub-sect. 2, B.*]

**98.** —— —— ——.]—Deft. was the owner of four houses in the metropolis, which were drained into one drain by a combined operation under an order of the sanitary authority. The drain passed under pltf.'s house. Subsequently to the construction of the drain, a pipe which carried off rain water from the roof of pltf.'s house was connected with the drain without an order of the sanitary authority:—*Held:* the rain water pipe was a drain used for the drainage of a building within Metropolis Management Act, 1855 (c. 120), s. 250, & its unauthorised connection with deft.'s drain converted the latter, at the point of junction & onwards, into a sewer.—HOLLAND *v.* LAZARUS (1897), 66 L. J. Q. B. 285; 61 J. P. 262; 13 T. L. R. 207; 41 Sol. Jo. 275.

*Annotations:*—**Follid.** Geen *v.* St. Mary Newington, Vestry, [1898] 2 Q. B. 1; Bullock *v.* Reeve (1900), 84 L. T. 55. **Expld.** Gorringe *v.* Shoreditch Corpn. (1902), 86 L. T. 592. **Apprvd.** Silles *v.* Fulham B. C., [1903] 1 K. B. 829. **Expld.** Heaver *v.* Fulham B. C., [1904] 2 K. B. 383; Kershaw *v.* Paine (1913), 78 J. P. 149. **Refd.** Greater London Property Co. *v.* Foot (1899), 68 L. J. Q. B. 628; Woodthorp *v.* Spencer & Husbands (1899), 63 J. P. 246; Wilkinson *v.* Llandaff & Dinas Powis R. C., [1903] 2 Ch. 695.

**99.** —— —— ——.]—Four houses in the metropolis were in 1874 drained by a combined operation under an order of the vestry. A drain from the stable of an adjoining house was afterwards, without the knowledge of the vestry, connected with this drain, & the drainage from the stable turned into it. Subsequently a nuisance arose owing to the defective drainage of the four houses, & the then owner of the houses, who had not authorised or known of the making of the connection with the drain from the stable, was required by the vestry to abate the nuisance:—*Held:* the unauthorised connection of the drainage from the stable with the drain from the four houses converted the latter into a sewer, & therefore the owner was not liable to abate the nuisance.—GEEN *v.* ST. MARY, NEWINGTON, VESTRY, [1898] 2 Q. B. 1; 67 L. J. Q. B. 557; 62 J. P. 564; 46 W. R. 624.

*Annotations:*—**Consd.** Greater London Property Co. *v.* Foot, [1899] 1 Q. B. 972. **Follid.** Bullock *v.* Reeve (1900), 84 L. T. 55. **Distd.** High *v.* Billings (1903), 89 L. T. 550. **Consd.** Silles *v.* Fulham B. C., [1903] 1 K. B. 829; Harvey *v.* Busby (1906), 95 L. T. 91; Harvey *v.* Jaye (1907), 97 L. T. 543; House Property & Investment Co. *v.* Grice (1911), 75 J. P. 395. **Refd.** Wilson's Music & General Printing Co. *v.* Finsbury B. C. (1907), 98 L. T. 574.

**100.** —— —— **With sewer.**]—The fact that the requisite sanction & approval for the making of a sewer in the metropolis was not obtained from the vestry or Metropolis Board of Works does not prevent it, when made, from being a sewer within the meaning of Metropolis Management Acts, & as such vested in the vestry & repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe to carry off the drainage from them, & connected the pipe with a sewer belonging to the vestry in a neighbouring street. There was no evidence of any notice having been given to the vestry, or of any order having been made by them, or of their sanction or of the approval of the Metropolitan Board of Works having been obtained, under the Metropolis Management Act, 1855 (c. 120), or Metropolis Management (Amendment) Act, 1862 (c. 102):—*Held:* the probable inference of fact was that the pipe was laid with the sanction of the vestry & the approval of the Metropolitan Board of Works required by the Acts; but whether that was so or not the pipe was a sewer within the meaning of Metropolis Management Act, 1855 (c. 120), s. 250, & was consequently vested in the vestry & repairable by them.—ST. MATTHEW, BETHNAL GREEN, VESTRY *v.* LONDON SCHOOL BOARD, [1898] A. C. 190; 67 L. J. Q. B. 234; 77 L. T. 635; 62 J. P. 116, 532; 46 W. R. 353; 14 T. L. R. 68, H. L.; *affg.* S. C. *sub nom.* R. *v.* ST. MATTHEW, BETHNEL GREEN, VESTRY, [1896] 2 Q. B. 319, C. A.

*Annotations:*—**Consd.** Appleyard *v.* Lambeth Vestry (1896), 66 L. J. Q. B. 27; Holland *v.* Lazarus (1897), 66 L. J. Q. B. 285; Kershaw *v.* Paine (1913), 78 J. P. 149. **Refd.** R. *v.* Hastings Corpn. (1896), 66 L. J. Q. B. 80; Geen *v.* St. Mary, Newington, Vestry, [1898] 2 Q. B. 1; Greater London Property Co. *v.* Foot (1899), 68 L. J. Q. B. 628; 238 Old Ford Road, Owner *v.* Foot (1899), 47 W. R. 541; Woodthorp *v.* Spencer & Husbands (1899), 63 J. P. 246; Pakenham *v.* Ticehurst R. D. C. (1903), 67 J. P. 448.

**101.** —— **Premises within the same curtilage.**]—ST. MARTIN-IN-THE-FIELDS VESTRY *v.* BIRD, No. 81, *ante*.

**102.** —— ——.]—PILBROW *v.* ST. LEONARD, SHOREDITCH VESTRY, No. 80, *ante*.

**103.** —— **Pipe carrying off rain water.**]—HOLLAND *v.* LAZARUS, No. 98, *ante*.

**104.** —— ——.]—SILLES *v.* FULHAM BOROUGH COUNCIL, No. 160, *post*.

**105.** —— ——.]—Resp. was the owner of a house forming part of a terrace & drained by a line of pipes into which there also ultimately passed the rain water falling upon part of the roofs of the adjoining houses on each side. There was no record of any order by the local authority for the drainage of the houses by a combined operation:—*Held:* on the authority of *Silles* v. *Fulham Borough Council*, No. 160, *post*, the line of pipes was a sewer & not a drain.—KERSHAW *v.* PAINE (1913), 78 J. P. 149; 12 L. G. R. 297, D. C.

**106.** ——.]—PEMSEL & WILSON *v.* TUCKER, No. 121, *post*.

**107. Drainage of group of houses by combined operation—Unauthorised addition of other houses.**]—Where a person obtained the sanction of a district board to the construction of a drain for carrying the drainage of two houses into the sewer, & improperly, without the sanction of the board, connected four, instead of two, houses with the sewer by the one drain:—*Held:* the drain in question was not a drain for draining a group of houses by a combined operation under the order of a district board, there being no order sanctioning the use of one drain for four houses; as it was used for the drainage of more than one house without such order, it was a "sewer," & not a "drain," within Metropolis Management Act, 1855 (c. 120), s. 250, & a subsequent owner of one of the houses was not estopped by the misconduct of the builder, of which he had no knowledge, from setting up as a defence to a summons against him for a nuisance on his premises arising from such drain, that it was a "sewer," & therefore repairable by the board.—KERSHAW *v.* TAYLOR, [1895] 2 Q. B. 471; 64 L. J. M. C. 245; 73 L. T. 274; 59 J. P. 726; 44 W. R. 28; 14 R. 698, C. A.

*Annotations:*—**Apld.** Florence *v.* Paddington Vestry (1895), 12 T. L. R. 30; R. *v.* St. Matthew, Bethnal Green Vestry, [1896] 2 Q. B. 319. **Consd.** Appleyard *v.* Lambeth Vestry (1896), 66 L. J. Q. B. 27; Bradford *v.* Eastbourne Corpn. [1896] 2 Q. B. 205. **Follid.** Bullock *v.* Reeve (1900), 84 L. T. 55. **Distd.** Hedley *v.* Webb, [1901] 2 Ch. 126. **Expld.** Gorringe *v.* Shoreditch Corpn. (1902), 86 L. T. 592. **Distd.** Heaver *v.* Fulham B. C., [1904] 2 K. B. 383. **Follid.** Harvey *v.* Busby (1906), 95 L. T. 91. **Expld.** Kershaw *v.* Smith, [1913] 2 K. B. 455. **Refd.** Greater London Property Co. *v.* Foot (1899), 68 L. J. Q. B. 628; 238 Old Ford Road, Owner *v.* Foot (1899), 47 W. R. 541; Woodthorp *v.* Spencer & Husbands (1899), 63 J. P. 246; Pakenham *v.* Ticehurst R. D. C. (1903), 67 J. P. 448; Oliver *v.* Camberwell B. C. (1904), 68 J. P. 165.

**108.** —— ——.]—The Metropolitan Commissioners of Sewers had in 1855 approved a combined system of drainage whereby the houses on one side of a street were to be drained in groups of four houses each. Before Jan. 1, 1856, the combined system was carried out, but in one

case there was an alteration from the grouping as sanctioned, as one group consisted of five houses instead of four, two houses having been included from the preceding group & one house being excluded from the group, & drained with the succeeding group. There was no evidence to show that the alteration had been sanctioned. A nuisance existed at one of these houses owing to the defective condition of the pipe draining the group:—*Held:* the deviation from the approved grouping was material, &, as it had not been sanctioned, the pipe draining the group was not a "drain" within Metropolis Management Act, 1855 (c. 120), s. 250, as amended by Metropolis Management Amendment Act, 1862 (c. 102), s. 112, but was a sewer, & therefore the owner of the house was not liable to abate the nuisance.—BULLOCK *v.* REEVE (1900), 70 L. J. Q. B. 42; 84 L. T. 55; 65 J. P. 164; 49 W. R. 93, D. C.

*Annotation:*—**Folld.** Harvey *v.* Jaye (1907), 97 L. T. 543.

**109.** —— ——.]—Three adjoining houses in a street in the metropolis were by an order made by the local authority in 1878 on the application of the then owner ordered to be drained by a combined operation into a line of pipes at the rear of the houses & parallel thereto, & thence into a public sewer; & four other houses in the same street were by an order made in 1879 on the application of the same owner ordered to be drained by a combined operation into the same line of pipes at the rear of the other three houses & thence into the same public sewer. A nuisance existed in a pipe underneath one of the houses of the first group, & it was found that the scheme of the drainage as carried out had been altered by taking one of the houses from the second group & adding it to the first group, & by diverting the drainage of this new group under one of the houses of that group into a sewer in the road in front of the houses. Upon proceedings against the present owner of the house underneath which the nuisance existed:—*Held:* the adding to the first group the drainage of a house not included in that group as sanctioned by the order had converted the combined drain into a sewer, & the pipe in which the nuisance existed was therefore a "sewer" & not a "drain," within Metropolis Management Act, 1855 (c. 120), s. 250, & the owner of the house was not liable to abate the nuisance.—HARVEY *v.* BUSBY (1906), 95 L. T. 91; 70 J. P. 301; 4 L. G. R. 693, D. C.

*Annotation:*—**Folld.** Harvey *v.* Jaye (1907), 97 L. T. 543.

**110.** —— ——.]—A plan for the combined drainage of a number of houses in a road in the metropolis was approved by the local authority, showing that the houses were to be drained in groups of four & five houses, & that each group was to be drained into a pipe at the back of the group with a connecting pipe which was brought under one of the houses of the group & into another line of pipes under the footpath in front of the houses, which at a certain point communicated with the sewer. A nuisance existed in a pipe under one of these houses, & it was found that the drainage as existing had been altered from the scheme as approved. As sanctioned, the group consisted of four houses, & the connecting drain or pipe was brought under the house No. 49. As existing, one house had been taken from the group at one end & two houses added at the other end, the group thus consisting of five houses instead of four as sanctioned, & the drainage was brought out under No. 51 instead of No. 49; but otherwise the drainage of the whole houses passed into the same line of pipes into the sewer at the same point as before. The nuisance arose through the pipe under No. 51 being defective:—*Held:* the alteration in the scheme of drainage of the group, whereby another house was added to the group & the drainage was brought under a different house from that sanctioned by the plan, was a material alteration which converted that which was before a drain into a sewer, & the owner was not liable to abate the nuisance.—HARVEY *v.* JAYE (1907), 97 L. T. 543; 71 J. P. 473; 5 L. G. R. 967, D. C.

**111.** —— **With sanction of Commissioners of Sewers—Interpretation of Metropolis Management Act, 1855 (c. 120).**]—A drain was constructed in the metropolis in 1839 for draining a group of houses by combined operation, & was a "sewer" within Metropolis Management Act, 1853 (c. 120), s. 250, & so repairable by the vestry of the parish, unless constructed before Jan. 1, 1856, "with the sanction or approval of the Metropolitan Comrs. of Sewers" within meaning of Metropolis Management (Amendment) Act, 1862 (c. 102), s. 112:—*Held:* the expression "Metropolitan Comrs. of Sewers" in the latter Act refers to the Metropolitan Comrs. of Sewers created in 1848 by 11 & 12 Vict. c. 112, & does not include Comrs. of Sewers having authority in the metropolis previously to that Act, & the drain was therefore a "sewer" within Metropolis Management Act, 1855 (c. 120), & repairable by the vestry.—APPLEYARD *v.* LAMBETH VESTRY (1897), 66 L. J. Q. B. 347; 76 L. T. 442; 61 J. P. 276; 45 W. R. 370; 13 T. L. R. 289, C. A.

**112.** —— **Power of approval entrusted to surveyor—Insufficient proof of approval or order of local authority.**]—In 1868 the owner of certain houses applied in pursuance of Metropolis Management Act, 1855 (c. 120), for permission to drain the houses by means of a combined drain. The application was filed in a book & signed by the surveyor of the sanitary authority as approved, in pursuance of a resolution passed by such sanitary authority authorising the surveyor "to grant applications for house drainage when they are regular, involving no special point for the consideration of the board." There was no other evidence of the approval of the sanitary authority or of an order:—*Held:* the pipe draining the houses was a sewer & not a drain.—HIGH *v.* BILLINGS (1903), 89 L. T. 550; 67 J. P. 388; 1 L. G. R. 723, D. C.

*Annotation:*—**Consd.** House Property & Investment Co. *v.* Grice (1911), 75 J. P. 395.

——.]—*See, generally,* Sect. 1, sub-sect. 2, A. (*b*), *ante.*

**113. Disconnection of pipe from main sewer—Whether pipe becomes drain.**]—A pipe carrying the sewage of two houses in a metropolitan parish into the main sewer was vested in & repairable by the vestry under Metropolis Management Act, 1855 (c. 120), being a "sewer" within the definition of that word in Metropolis Management Act, 1855 (c. 120), s. 250. Subsequently the owner of one of the houses disconnected his sewage, so that thereafter the pipe was "used for the drainage of one building only" within the definition of "drain" in the same sect.:—*Held:* the pipe did not, upon such disconnection taking place, become a drain repairable by the owner of the house still served by it, but remained a sewer vested in & repairable by the vestry.—ST. LEONARD, SHOREDITCH, VESTRY *v.* PHELAN, [1896] 1 Q. B. 533; 65 L. J. M. C. 111; 74 L. T. 285; 60 J. P. 244; 44 W. R. 427; 40 Sol. Jo. 374, D. C.

*Annotations:*—**Consd.** Appleyard *v.* Lambeth Vestry (1896), 66 L. J. Q. B. 27. **Dstd. & Distd.** Kershaw *v.* Smith, [1913] 2 K. B. 455. **Refd.** Pakenham *v.* Ticehurst R. D. C. (1903), 67 J. P. 448.

*Sect.* 1.—*What constitute "sewers" and "drains": Sub-sect.* 2, *B.*; *sub-sects.* 3 & 4. *Sect.* 2: *Sub-sect.* 1, *A. & B.* (*a*).]

**114. Sewer made without approval of requisite authorities—Whether sewer within Metropolis Management Act, 1855 (c. 120).**]—ST. MATTHEW, BETHNAL GREEN, VESTRY *v.* LONDON SCHOOL BOARD, No. 100, *ante*.

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SUB-SECT. 3.—IN THE CITY OF LONDON.

*See* City of London Sewers Acts, 1848 (c. clxiii); 1851 (c. xci).

**115. City of London Sewers Act, 1848 (c. clxiii), s. 61—"Nearest common sewer."**] — In above sect., dealing with the city of London sewers, "nearest common sewer" means the nearest which the house owner can, by exercising his ordinary proprietary rights, get at, & not necessarily that literally nearest. When an insufficient drain ran under a neighbour's house to the sewer that was literally nearest:—*Held:* the Comrs. of Sewers were entitled to require the owner to construct a drain communicating with a sewer which, though farther off, had no house or other private property intervening.—BATHARD *v.* LONDON SEWERS COMRS. (1889), 54 J. P. 135, D. C.

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SUB-SECT. 4.—IN THE DOMINIONS, DEPENDENCIES, COLONIES, ETC.

*See* Cases *infra*.

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## SECT. 2.—VESTING OF SEWERS IN LOCAL AUTHORITIES.

SUB-SECT. 1.—OUTSIDE THE METROPOLIS.

*A. In General.*

*See* Public Health Act, 1875 (c. 55), s. 13.

**116. Effect of sewer being vested in local authority—What rights conferred—Absolute property in subsoil.**]—The usual clause in local Acts vesting sewers in the sewer authority confers an absolute property in that part of the subsoil occupied by any sewer, & not merely an easement or right of sewerage.—TAYLOR *v.* OLDHAM CORPN. (1876), 4 Ch. D. 395; 46 L. J. Ch. 105; 35 L. T. 696; 25 W. R. 178.

*Annotations:*—**Refd.** Baird *v.* Tunbridge Wells Corpn., [1894] 2 Q. B. 867; *Re* Brewer & Hankins's Contract (1899), 80 L. T. 127; Escott *v.* Newport Corpn., [1904] 2 K. B. 369; Pemsel & Wilson *v.* Tucker, [1907] 2 Ch. 191. **Mentd.** *Re* Boulton's Trusts (1882), 51 L. J. Ch. 493; *Re* New Callas (1882), 47 L. T. 175; Mid. Ry. *v.* Watton (1886), 17 Q. B. D. 30; Northam Bridge Co. *v.* R. (1886), 55 L. T. 759; Richards *v.* Kessick (1888), 57 L. J. M. C. 48; R. *v.* Goole L. B., [1891] 2 Q. B. 212; Hill *v.* Wallasey L. B., [1894] 1 Ch. 133; West Hartlepool Corpn. *v.* Robinson (1897), 75 L. T. 677; Ystradyfodwg & Pontypridd Main Sewerage Board *v.* Bensted, [1906] 1 K. B. 294; Thurrock Grays & Tilbury Joint Sewerage Board *v.* Thames Land Co. (1925), 90 J. P. 1.

**117. —— —— Limited right of ownership.**]—A.-G. *v.* DORKING UNION, No. 308, *post*.

**118. —— —— ——.**]—A local board under Public Health Act, 1875 (c. 55), have only a qualified property in the sewers within their district, & cannot prevent persons who have acquired a prescriptive right to use them from so doing unless they provide other sewers equally effectual.—R. *v.* STAINES LOCAL BOARD (1888), 60 L. T. 261; 53 J. P. 358; 5 T. L. R. 25, D. C.

*Annotations:*—**Refd.** Kirkheaton District L. B. *v.* Ainley, [1892] 2 Q. B. 274; Southall Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205. **Mentd.** Thames Conservators *v.* Gravesend Corpn., [1910] 1 K. B. 442; Waltham Holy Cross U. D. C. *v.* Lee Conservancy Board (1910), 103 L. T. 192; Rochford R. C. *v.* Port of London Authority, [1914] 2 K. B. 916; Berton *v.* Alliance Economic Investment Co., [1922] 1 K. B. 742.

**119. —— —— Interest in land within Land Clauses Acts.**]—The predecessors of pltfs. under certain private Acts constructed a sewer on private land belonging to a railway co. No notice to treat was given to the co., nor was any compensation paid to them by pltfs.' predecessors. Less than twenty years after the construction of the sewer, which had become vested in pltfs., the railway co. constructed an embankment over the sewer, & it subsequently becoming necessary to repair the same pltfs. had to make an open cutting through the embankment in order to obtain access to the sewer:—*Held:* pltfs. were not entitled to compensation under Lands Clauses (Consolidation) Act, 1845 (c. 18), s. 68, or Railways Clauses (Consolidation) Act, 1845 (c. 20), ss. 6, 16, by reason of the railway co. having constructed the embankment over the sewer, inasmuch as pltfs. had not any particular right of access, but simply a right of access to defts.' land to repair the sewer.—BIRKENHEAD CORPN. *v.* LONDON & NORTH WESTERN RY. CO. (1885), 15 Q. B. D. 572; 55 L. J. Q. B. 48; 50 J. P. 84, C. A.

*Annotations:*—**Refd.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205; Thurrock Grays & Tilbury Joint Sewerage Board *v.* Goldsmith (1914), 79 J. P. 17.

**120. Effect of unauthorised connection—Whether sewer on injured owner's property vests in local authority.**]—HEDLEY *v.* WEBB, No. 5, *ante*.

**121. Single private drain vesting in local authority—Effect of Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19.**]—Under part of the premises contracted to be sold ran a drain into which opened the drains of two adjoining houses:—*Held:* this drain was a sewer, & was vested in the local authority under Public Health Act, 1875 (c. 55), s. 13; Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, did not prevent it from vesting; vendor was therefore unable to convey all that he had contracted to sell; & he had not made a good title.—PEMSEL & WILSON *v.* TUCKER, [1907] 2 Ch. 191; 76 L. J. Ch. 621; 97 L. T. 86; 71 J. P. 547.

*B. Statutory Exceptions.*

*(a) Sewers Made for Private Profit.*

*See* Public Health Act, 1875 (c. 55), s. 13.

**122. Sewer made by land owner—Development of land by building houses.**]—ACTON LOCAL BOARD *v.* BATTEN, No. 16, *ante*.

**123. —— ——.**]—BONELLA *v.* TWICKENHAM LOCAL BOARD OF HEALTH, HOLMES *v.* TWICKENHAM LOCAL BOARD OF HEALTH, No. 151, *post*.

**124. —— —— Imposition of voluntary sewerage rate.**]—Sewers made by a landowner for the purpose of draining a town, the greater part of which

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**PART I. SECT. 1, SUB-SECT. 4.**

**b.** *Ditch running partly through United States territory.*]—The fact that a ditch constructed in intended compliance with the provisions of Land Act (C. S. B. C. 1888), s. 41, runs partly through United States territory, does not of itself prevent the ditch from being a good ditch within the Act.—COVERT *v.* PETTIJOHN (1902), 9 B. C. R. 118.—**CAN.**

**c.** *Application of Public Works Act, 1876—To drain which was a natural watercourse.*]—AITCHESON *v.* WAITAKI COUNTY (1878), O. B. & F. 52.—**N.Z.**

**d.** *Burn.*] — GLASGOW, YOKER & CLYDEBANK RY. CO. *v.* MACINDOE (1896), 24 R. (Ct. of Sess.), 160.—**SCOT.**

**e.** *Finance Act, 1921, s. 34—Construction of word "sewer."*]—The word "sewer" used in the above sect. is used in its ordinary limited sense, & not as including the whole sewerage system maintained by a local authority.—SUMMERS (H.M. INSPECTOR OF TAXES, RENFREWSHIRE) *v.* RENFREW COUNTY COUNCIL, [1925] S. C. 118.—**SCOT.**

stood on his lands, & for the use of which sewers he levied & was paid a sewer rate by all persons whose houses were connected with his sewers, are sewers made by him "for his own profit" within the exception in Public Health Act, 1875 (c. 55), s. 13, &, consequently, such sewers do not vest in the local authority.—MINEHEAD LOCAL BOARD *v.* LUTTRELL, [1894] 2 Ch. 178; 63 L. J. Ch. 497; 70 L. T. 446; 42 W. R. 667; 8 R. 379.

*Annotations:*—**Distd.** Vowles *v.* Colmer (1895), 64 L. J. Ch. 414. **Apld.** Croysdale *v.* Sunbury-on-Thames U. C., [1898] 2 Ch. 515. **Consd.** Sykes *v.* Sowerby U. C., [1900] 1 Q. B. 584. **Folld.** Vare *v.* Joy (1920), 124 L. T. 148. **Refd.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205; Thompson *v.* Eccles Corpn. (1904), 68 J. P. 315; Yorkshire (W. R.) Rivers Board *v.* Linthwaite U. C. (1915), 84 L. J. K. B. 1610.

125. —— —— **Intention to be recouped for outlay—Fixed charge for permission to connect drains.**]—Where a landowner is laying out a building estate, & has constructed a sewer for the sole purposes of his own property, but with the intention of being recouped for his outlay, although he makes a fixed charge for the permission to connect drains with his sewer, the sewer will, nevertheless not be made "for his own profit" within exception in Public Health Act, 1875 (c. 55), s. 13 (1), but will vest in the local authority.—VOWLES *v.* COLMER (1895), 64 L. J. Ch. 414; 72 L. T. 389; 13 R. 583.

*Annotations:*—**Distd.** Vare *v.* Joy (1920), 124 L. T. 148. **Refd.** Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569.

126. —— **Merely for sanitary purposes.**] —A sewer made by a landowner for the sole purpose of draining houses erected by him on his own land is not made by him "for his own profit" within the exception in Public Health Act, 1875 (c. 55), s. 13, & consequently such a sewer vests in the local authority.—FERRAND *v.* HALLAS LAND & BUILDING CO., [1893] 2 Q. B. 135; 62 L. J. Q. B. 479; 69 L. T. 8; 57 J. P. 692; 41 W. R. 580; 37 Sol. Jo. 493; 4 R. 430, C. A.

*Annotations:*—**Consd.** Minehead L. B. *v.* Luttrell, [1894] 2 Ch. 178. **Folld.** Vowles *v.* Colmer (1895), 64 L. J. Ch. 414. **Apld.** Croysdale *v.* Sunbury-on-Thames U. C., [1898] 2 Ch. 515. **Consd.** Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569. **Distd.** Vare *v.* Joy (1920), 124 L. T. 148. **Refd.** Beckenham U. D. C. *v.* Wood (1896), 60 J. P. 490; Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205; Sykes *v.* Sowerby U. C., [1900] 1 Q. B. 584; Wilkinson *v.* Llandaff & Dinas Powis R. C., [1903] 2 Ch. 695; Kingston-upon-Hull Corpn. *v.* N. E. Ry., [1915] 1 Ch. 456; Yorkshire (W. R.) Rivers Board *v.* Linthwaite U. C. (1915), 84 L. J. K. B. 1610. **Mentd.** Nash *v.* Hollinshead, [1901] 1 K. B. 700.

127. —— ——.] — RUSSELL *v.* KNIGHT & M'DONALD (1894), *Times*, May 9.

128. —— **Agricultural ditch.**]—An agricultural ditch made by the landowner for the sole purpose of draining his land & fed by surface water alone comes within Public Health Act, 1875 (c. 55), s. 13 (1), as a sewer made by a person for his own profit, & does not vest in the local authority.

By the conveyance on sale to defts. of a piece of land forming part of the site required by them for a pumping outfall for sewage, there was also granted the free right of passage & running of water from the piece of land through a drain or watercourse drawn on a plan to the conveyance, defts. cleansing, repairing, or renewing the same so as not to cause a nuisance. Defts. allowed part of the sewage effluent from their farm to flow on to the lands of pltf. & into the channel or drain in question, & justified it by express or implied grant from their vendor & also under their statutory powers:—*Held:* on the construction of the deed, there was no express or implied grant of the right to discharge the effluent on to pltfs.' land, & pltfs. were entitled to an injunction to restrain defts. from permitting any sewage effluent to be discharged into the ditch or sewer, but the operation of the injunction would be suspended for six months. — PHILLIMORE *v.* WATFORD RURAL COUNCIL, [1913] 2 Ch. 434; 82 L. J. Ch. 514; 109 L. T. 616; 77 J. P. 453; 57 Sol. Jo. 741; 11 L. G. R. 980.

129. —— **To carry off surface & slop water.**]—KINGSTON-UPON-HULL CORPN. *v.* NORTH EASTERN RY. CO., No. 293, *post*.

130. —— **Pipe for carrying off superfluous water.**]—RUSSELL *v.* KNIGHT & M'DONALD (1894), *Times*, May 9.

131. —— **To secure more profitable occupation of land.**]—CROYSDALE *v.* SUNBURY-ON-THAMES URBAN COUNCIL, No. 73, *ante*.

132. —— **To avoid expenditure otherwise necessary.**]—CROYSDALE *v.* SUNBURY-ON-THAMES URBAN COUNCIL, No. 73, *ante*.

133. —— **To divert surface water running on to land.**]—SYKES *v.* SOWERBY URBAN COUNCIL, No. 76, *ante*.

134. —— **To carry off trade refuse.**]—In 1863 a piece of land adjacent to a river was laid out by the owner for the purpose of erecting woollen mills under ground leases granted by him, & he constructed a main sewer or drain for the purpose of carrying off the trade refuse from the mills, when erected, into the river. Subsequently six mills were erected on the land, & later on some hundred water closets in the mills for the use of the employees were connected with the sewer, with the result that a continuous flow of polluting liquid within Rivers Pollution Prevention Act, 1876 (c. 75), s. 4, passed into the river. There was no evidence that the landowner had laid out the land as an ordinary building estate, or that any dwelling houses were connected with the sewer except one, for the drainage of which house into the sewer the owner agreed in 1864 to pay, & did pay to the owner of the sewer, a rental of 5*s.* a year.

In 1891 defts., the local sanitary authority for the district through which the sewer ran, entered into an agreement, for valuable consideration, with the then owners of the sewer, under which defts. acquired a right to use the sewer for the drainage of some houses within their district, subject to the rights of user of the sewer by the mill owners & their employees. Pltfs., the sanitary authority, under Rivers Pollution Prevention Act, 1876 (c. 75), complained that defts. caused & knowingly permitted to flow through the sewer into the river, the aforesaid polluting liquid from the six mills, contrary to sect. 4 of the Act, & the judge granted an injunction forbidding a further commission of the offence:—*Held:* the sewer had been made by the landowner for his own profit within Public Health Act, 1875 (c. 55), s. 13, & consequently did not vest in defts.; defts. were not, by reason of the agreement of 1891, guilty of an offence under Rivers Pollution Prevention Act, 1876 (c. 75), s. 4.—YORKSHIRE W. R. RIVERS BOARD *v.* LINTHWAITE URBAN COUNCIL (No. 2) (1915), 84 L. J. K. B. 1610; 113 L. T. 547; 79 J. P. 433; 13 L. G. R. 772, D. C.

135. —— **With assent of adjoining owners—Expectation of contribution to cost by persons connecting drains—& of increase in value of sewer.**]—Where a landowner made a sewer with the assent of the adjoining owners & the local authority in a private road in the expectation that persons connecting with it would contribute thereto, & in the hope that its value would increase, which would be to his profit when it was taken over by the local authority:—*Held:* the sewer was one made by a person for his own profit, & it did not vest in the.

*Sect.* 2.—*Vesting of sewers in local authorities: Sub-sect.* 1, *B.* (*a*), (*b*) & (*c*); *sub-sects.* 2 & 3. *Sect.* 3: *Sub-sect.* 1, *A.*]

local authority but came within the exception in Public Health Act, 1875 (c. 55), s. 13.—VARE *v.* JOY (1920), 124 L. T. 148; 85 J. P. 29; 18 L. G. R. 712.

**136. Drain running into cesspool.**]—A drain running under the gardens of certain houses into a cesspool held not to be a "sewer made by a person for his own profit," & therefore it vested in the local board.—PINNOCK *v.* WATERWORTH (1887), 3 T. L. R. 563; 51 J. P. Jo. 248.

*Annotation:*—**Refd.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205.

**137. Meaning of "profit"—Whether restricted to direct money payment.**]—CROYSDALE *v.* SUNBURY-ON-THAMES URBAN COUNCIL, No. 73, *ante*.

### (*b*) *Sewers Made Under Special Act for Improving Land.*

*See* Public Health Act, 1875 (c. 55), s. 13.

**138. Under Private Inclosure Act—Brook.**]—A brook, the water of which was supplied by the drainage, natural & artificial, of a considerable area of cultivated soil belonging to private individuals, received at the lower end of it, near a river into which it flowed, the drains of two or three inhabited houses. By General Inclosure Act, 1801 (c. 109), s. 10, the Comrs. are to set out & appoint private roads . . . drains, watercourses, etc., & the same shall be made & supported & kept in repair at the expense of the owners of the lands, directed to be divided & inclosed, in such proportions as the Comrs. shall direct. In 1809, Comrs. acting under a local Inclosure Act by their award set out this brook, among others, as a "public drain or watercourse" & directed that all such drains should be made, scoured, & kept in repair at the expense of the proprietors of the lands, divided & inclosed by virtue of the Act, in equal proportions. They also cleared out the channel of the brook, & in various places widened & deepened it to render it more efficient as a means of draining a portion of the tract of land which was subject to the provisions of their Act. Afterwards two of the landowners, for their own convenience, altered the course of the stream, by cutting artificial channels for short distances. The brook is within the limits of the Local Board of G., & it having become a nuisance, a *mandamus* issued to them to clear, cleanse, empty & keep it:—*Held:* it was not a "sewer" within Public Health Act, 1848 (c. 63), & therefore was not vested in the Local Board of Health under Public Health Act, 1848 (c. 63), s. 43.

*Qu.:* whether, supposing the brook to be a sewer, it was within the exception in Public Health Act, 1848 (c. 63), s. 43, of "sewers made & used for the purpose of draining, preserving, or improving land under any local Act of Parliament."—R. *v.* GODMANCHESTER LOCAL BOARD (1866), L. R. 1 Q. B. 328; 5 B. & S. 936; 35 L. J. Q. B. 125; 14 L. T. 104; 30 J. P. 164; 14 W. R. 375; 122 E. R. 1078, Ex. Ch.

*Annotations:*—**Refd.** Cleckheaton Industrial Self-Help Soc. *v.* Jackson (1866), 14 W. R. 950; L. & N. W. Ry. *v.* Runcorn R. C., [1898] 1 Ch. 34; Pearce *v.* Croydon R. D. C. (1910), 8 L. G. R. 909.

**139. Purposes for which Act must be passed—Whether exclusively for purposes of statutory exception.**]—LONDON & NORTH WESTERN RY. CO. *v.* RUNCORN RURAL COUNCIL, No. 74, *ante*.

**140. To what drains exception applies—Drains made in exercise of powers.**]—LONDON & NORTH WESTERN RY. CO. *v.* RUNCORN RURAL COUNCIL, No. 74, *ante*.

**141. —— Drains made in performance of statutory duties.**]—LONDON & NORTH WESTERN RY. CO. *v.* RUNCORN RURAL COUNCIL, No. 74, *ante*.

### (*c*) *Sewers Under the Authority of Commissioners of Sewers.*

*See* Part III., *post*.

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### SUB-SECT. 2.—IN THE METROPOLIS.

*See* Metropolis Management Act, 1855 (c. 120), ss. 69, 89, 135, 137, 148, sched. D.; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 28; Local Government Act, 1888 (c. 41), s. 40 (8); London Government Act, 1899 (c. 14), s. 4; City of London Sewers Acts, 1848 (c. clxiii); 1851 (c. xci); 1897 (c. cxxxiii).

**142. Rights conferred by vesting statutes—No right as owners of land.**]—The Metropolitan Board of Works & district boards cannot be treated as being clothed with the rights or obligations of the owners of land; their rights & obligations are conferred, imposed & defined by the statute.—STAINTON *v.* WOOLRYCH, STAINTON *v.* METROPOLITAN BOARD OF WORKS & LEWISHAM DISTRICT BOARD OF WORKS (1857), 23 Beav. 225; 26 L. J. Ch. 300; 28 L. T. O. S. 333; 21 J. P. 180; 3 Jur. N. S. 257; 53 E. R. 88; *sub nom.* STAINTON *v.* METROPOLITAN BOARD OF WORKS, 5 W. R. 305.

*Annotations:*—**Refd.** New River Co. *v.* Johnson (1860), 29 L. J. M. C. 93; R. *v.* Metropolitan Board of Works (1863), 32 L. J. Q. B. 105; Milward *v.* Redditch L. B. of Health (1873), 21 W. R. 429.

**143. —— Right of support.**]—METROPOLITAN BOARD OF WORKS *v.* METROPOLITAN RY. CO., No. 263, *post*.

**144. Obligations conferred by vesting statutes—No obligations as owners of land.**]—STAINTON *v.* WOOLRYCH, STAINTON *v.* METROPOLITAN BOARD OF WORKS & LEWISHAM DISTRICT BOARD OF WORKS, No. 142, *ante*.

**145. What sewers vest—Wall protecting land from inundation.**]—(1) A marsh wall or embankment that keeps back the river Thames at high water from inundating the Isle of Dogs, & through which sewers pass which drain the isle at low water, is "a sewer" within Metropolis Management Act, 1855 (c. 120), s. 204, which gives power to the district board of works in whom any sewer is vested to remove any building erected thereon without their consent.

(2) *Qu.:* whether the marsh wall was vested in the district board under sect. 68 & Sched. A., or in the Metropolitan Board of Works under sect. 135, & Sched. D.; but the latter never having exercised any jurisdiction over it, & the district board being *de facto* in the exercise of that jurisdiction:—*Held:* the marsh wall was vested in the district board.

(3) *Semble:* a house, built with foundations placed on the surface, without any digging out, is within sect. 76, which enacts, "that before beginning to lay or dig out the foundation of any house seven days' notice shall be given to the district board."—POPLAR BOARD OF WORKS *v.* KNIGHT (1858), E. B. & E. 408; 28 L. J. M. C. 37; 31 L. T. O. S. 175; 22 J. P. 401; 5 Jur. N. S. 196; 120 E. R. 561.

**146. —— Sewer made without proper authority.**]—ST. MATTHEW, BETHNAL GREEN VESTRY *v.* LONDON SCHOOL BOARD, No. 100, *ante*.

SUB-SECT. 3.—IN THE DOMINIONS, DEPENDENCIES, COLONIES, ETC.

*See* Cases *infra*.

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## SECT. 3.—CONSTRUCTION, ALTERATION AND REPAIR OF SEWERS.

### SUB-SECT. 1.—OUTSIDE THE METROPOLIS.

#### *A. In General.*

*See* Public Health Act, 1875 (c. 55), ss. 15, 18.

**147. Duty to construct—Development of building estate.**]—An owner of land in a rural sanitary district, who proposed to lay it out as a building estate & to erect on it blocks of houses arranged in streets deposited with the local authority plans of the proposed buildings, from which it appeared that each of the houses was to be drained with a separate drain ending in the middle of one of the proposed new streets. The local authority refused to approve the plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, & also the necessary main outfall sewer: —*Held:* the local authority were not entitled to attach such a condition to their approval.

When the houses are going to be occupied or are being occupied, then the district council will be called upon perhaps to make a sewer down the centre of the street. I do not know about that, but they certainly would not be called upon until then to make the outfall (LORD ESHER, M.R.).—R. *v.* TYNEMOUTH RURAL DISTRICT COUNCIL, [1896] 2 Q. B. 451; 65 L. J. Q. B. 545; 75 L. T. 86; 60 J. P. 804; 12 T. L. R. 536; 40 Sol. Jo. 667, C. A.

*Annotations:*—**Reld.** Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569. **Mentd.** Smith *v.* Chorley District Council, [1897] 66 L. J. Q. B. 427; White *v.* Sunderland Corpn. (1903), 88 L. T. 592.

**148. —— Disposal of trade effluents—Rivers Pollution Prevention Act, 1876 (c. 75).**]—The duty of a local authority, under Public Health Act, 1875 (c. 55), s. 15, to make such sewers as may be necessary for effectually draining their district for the purposes of that Act, cannot be enforced by an action for *mandamus* brought by a private person; the only remedy for neglect of the duty is that given by Public Health Act, 1875 (c. 55), s. 299, a complaint to the local government board.

[Rivers Pollution Prevention Act, 1876 (c. 75)] provides that there shall be an outlet in some form or other for what I may call manufactory refuse; but contemplating the case which might readily arise where some manufacturer would be very glad to throw upon the rates the necessity of getting rid of his own refuse, it provides also, with reference to that obligation to get rid of the refuse, that where the drainage system of a district is "only sufficient for the requirements of their district" there shall not be an obligation to get rid of the refuse of a manufacturer who ought to get rid of the refuse which he is himself creating (LORD HALSBURY, C.).—PASMORE *v.* OSWALDTWISTLE URBAN COUNCIL, [1898] A. C. 387; 67 L. J. Q. B. 635; 78 L. T. 569; 62 J. P. 628; 14 T. L. R. 368, H. L.; *affg.* S. C. *sub nom.* PEEBLES *v.* OSWALDTWISTLE URBAN DISTRICT COUNCIL, [1897] 1 Q. B. 625, C. A.

*Annotations:*—**Apld.** Jones *v.* Barking U. D. C. (1898), 15 T. L. R. 92. **Consd.** Baron *v.* Portslade-by-Sea U. C. (1899), 68 L. J. Q. B. 949; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; Brook *v.* Meltham U. C., [1908] 2 K. B. 780; West Riding of Yorkshire Rivers Board *v.* Butterworth & Roberts (1908), 72 J. P. 193. **Reld.** St. Mary Islington Vestry *v.* Hornsey U. D. C. (1899), 80 L. T. 746; Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; Southall, Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742; West Riding of Yorkshire Rivers Board *v.* Gaunt (1902), 67 J. P. 183; Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807; West Riding of Yorkshire Rivers Board *v.* Preston (1904), 92 L. T. 24; Waltham Holy Cross U. D. C. *v.* Lee Conservancy Board (1910), 103 L. T. 192. **Mentd.** Devonport Corpn. *v.* Tozer, [1902] 2 Ch. 182; R. *v.* Stepney Corpn., [1902] 1 K. B. 317; Hulme *v.* Ferranti, [1918] 2 K. B. 426; Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169; R. *v.* Poplar B. C. (No. 1), [1922] 1 K. B. 72; Waghorn *v.* Collison (1922), 127 L. T. 8; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832.

**149. —— Outlying houses.**]—KINSON POTTERY CO. *v.* POOLE CORPN., No. 75, *ante*.

**—— Enforcement.**]—*See* Sub-sect. 1, C., *post*.

**150. Power to alter—Whether including power to stop up.**]—Stamford Brook was originally a natural watercourse draining the districts of Acton & Hammersmith. It was formed in its upper portion of two streams known as West Branch & East Branch, the greater portion of West Branch being entirely within the parish of Acton, which is itself outside the Metropolitan area. The point of junction between East Branch & West Branch, & East Branch itself, & the united streams below the point of junction, were all within the local area which by Metropolis Management Act, 1855 (c. 120), passed, with the sewers comprised in it, into the jurisdiction of the Metropolitan Board of Works. The Metropolitan Board of Works, in pursuance of their statutory duties, intercepted the united streams by a main sewer which carried the flow to a pumping station, instead of to its former natural outfall into the river Thames. Defts., as the urban sanitary authority for the parish of Acton, under the provisions of Public Health Act, 1848 (c. 63), & Public Health Act, 1875 (c. 55), had authorised & carried out a system of drainage under which the sewers of new houses constructed in their district were connected with the West Branch as the main sewer, & the amount of sewage which pltf. board had to dispose of was thus greatly increased:—*Held:* pltfs. were under no obligation to dispose of the extra drainage, & were entitled to an injunction to restrain defts. from causing or authorising any sewage to be discharged through the West Branch, or otherwise into pltfs.' main drainage system, other than sewage discharged by drains in respect of which a prescriptive right existed.

*Qu.:* whether a local sanitary authority has power to stop up or disconnect a drain which it has once authorised to be made.—A.-G. *v.* ACTON LOCAL BOARD (1882), 22 Ch. D. 221; 52 L. J. Ch. 108; 47 L. T. 510; 31 W. R. 153.

*Annotations:*—**Consd.** Charles *v.* Finchley L. B. (1883), 23 Ch. D. 767; A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527; Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378; Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695; L. C. C. *v.* Acton U. D. C. (1902), 18 T. L. R. 689.

**151. —— Costs of alteration—By whom borne—Sewer accepted by local authority.**]—A street, which had been laid out by the owners of a building

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**PART I. SECT. 2, SUB-SECT. 3.**

1. *Drains continued & reclamation by railway company.*]—Certain public drains vested in a city corpn. discharged into the sea. A railway co. under statutory powers, reclaimed adjoining land, & continued these drains to the new sea-boundary. The city council subsequently authorised a considerable volume of additional sewage to be led into the public drains, & for years treated these drains, including their continuations, as public drains. The seaward part of the reclamation became vested in the Crown:—*Held:* the continuation drains were for their whole length public drains, vested in & maintainable & renewable by the city council.—WELLINGTON & MANAWATU RY. CO., LTD. *v.* WELLINGTON CORPN. (1896), 14 N. Z. L. R. 472.—N.Z.

*Sect 3.—Construction, alteration and repair of sewers: Sub-sect. 1, A. & B. (a) & (b).]*

estate, was sufficiently sewered at the time when it vested in the local authority then formed for the district, which was in the year 1868. Subsequently in the year 1884 it became necessary to alter the drainage plan of the district, & thereupon the local authority gave notice under Public Health Act, 1875 (c. 55), s. 150, to the frontagers in the street to make a new sewer, & on their default themselves constructed such sewer & sought to charge the frontagers with the cost thereof:—*Held:* the original sewer was not a sewer made by the owners for their own profit, & had therefore vested in the local authority under Public Health Act; the local authority must be taken to have been satisfied with the sewer; they having signified nothing to the contrary within a reasonable time; under these circumstances they must themselves repair or enlarge the sewer as it became necessary, & consequently the expenses of doing so were not chargeable upon the frontagers.—BONELLA *v.* TWICKENHAM LOCAL BOARD OF HEALTH, HOLMES *v.* TWICKENHAM LOCAL BOARD OF HEALTH (1887), 20 Q. B. D. 63; 57 L. J. M. C. 1; 58 L. T. 299; 52 J. P. 356; 36 W. R. 50; 4 T. L. R. 51, C. A.

*Annotations:*—**Apld.** Ferrand *v.* Hallas Land & Building Co., [1893] 2 Q. B. 135. **Consd.** Hornsey L. B. *v.* Davis, [1893] 1 Q. B. 756; Derby Corpn. *v.* Grudgings, [1894] 2 Q. B. 496. **Distd.** Minehead L. B. *v.* Luttrell, [1894] 2 Ch. 178. **Consd.** Handsworth District Council *v.* Derrington, [1897] 2 Ch. 438; Simmonds *v.* Fulham Vestry, [1900] 2 Q. B. 188. **Apld.** Wilmslow U. D. C. *v.* Sideb-ttom (1906), 70 J. P. 537. **Consd.** Bloor *v.* Beckenham U. C., [1908] 2 K. B. 671. **Refd.** Walthamstow L. B. *v.* Staines, [1891] 2 Ch. 606; Barry & Cadoxton L. B. *v.* Parry (1895), 59 J. P. 421; Croysdale *v.* Sunbury-on-Thames U. C. (1898), 67 L. J. Ch. 585; Rishton *v.* Haslingden Corpn., [1898] 1 Q. B. 294; Sykes *v.* Sowerby U. C., [1900] 1 Q. B. 584; Yorkshire (W. R.) Rivers Board *v.* Linthwaite U. C. (No. 2) (1915), 84 L. J. K. B. 1610. **Mentd.** St. James's Hall Co. *v.* L. C. C., [1901] 2 K. B. 250.

**152. —— Statute giving power to make dock—& to alter & construct sewers.]**—An Act of Parliament authorised the Bristol Dock co. to make a floating harbour, & required them to make a common sewer in a certain direction, & also to alter & reconstruct all or any of the sewers of Bristol at the mouths, so that they might be discharged considerably under the surface of the water in the harbour, & also to make such "other alterations & amendments" in the sewers as should be necessary in consequence of the floating harbour. The sewers constructed under the water of the floating harbour became a nuisance to the neighbourhood:—*Held: mandamus* would lie to compel the co. under the words, "other alterations & amendments," to construct a new sewer, without carrying it under the floating harbour, even at the expense of purchasing land adjacent.—R. *v.* BRISTOL DOCK CO. (1827), 6 B. & C. 181; 9 Dow. & Ry. K. B. 309; 4 Dow. & Ry. M. C. 327; 5 L. J. O. S. M. C. 51; 108 E. R. 420.

*Annotations:*—**Consd.** Lee District Board *v.* L. C. C. (1899), 82 L. T. 306. **Refd.** R. *v.* Marshland Smeeth & Fen District Comrs., *Ex p.* Whittome (1919), 89 L. J. K. B. 116. **Mentd.** R. *v.* S. E. Ry. (1851), 15 Jur. 871; York & North Midland Ry. *v.* R. (1853), 17 Jur. 690; Delamere *v.* R. (1867), L. R. 2 H. L. 419.

**153. Duty to repair—Sewer accepted by local authority.]** — BONELLA *v.* TWICKENHAM LOCAL BOARD OF HEALTH, HOLMES *v.* TWICKENHAM LOCAL BOARD OF HEALTH, No. 151, *ante*.

**154.** ——.]—Public Health Act, 1875 (c. 55), s. 15, provides that every local authority shall keep in repair all sewers belonging to them, & shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.

A complaint was preferred by an inspector of nuisances, against resp., under Public Health Act, 1875 (c. 55), s. 95, for that he, as owner of certain premises, had suffered a nuisance to arise from certain water closets being connected with a drain or sewer. In 1863 there was an open drain receiving surface water & sink drainage from houses near thereto, but not from water closets. The sanitary authority subsequently covered up this drain, & laid down pipes therein for the purpose of receiving the aforesaid water & drainage & made a rate upon the adjoining properties to defray the expense. From time to time water closets in the said houses were, unknown to the authority, connected with this drain, amongst them resp.'s A nuisance was proved to exist, but not that it was caused by resp. alone. No system of drainage was carried out in the district. It was admitted that resp. was entitled to drain into the sewer, but it was contended that, if he thereby caused a nuisance, he could be ordered to disconnect his water closets therefrom. The justices decided that the drain was a sewer vested in the sanitary authority, & that resp. had not exceeded his rights, & that the authority were in default in allowing the sewer to become a nuisance:—*Held:* under Public Health Act, 1875 (c. 55), s. 15, the sanitary authority were bound to deal with the sewage themselves, & they could not shirk the obligation & transfer it to those for whose protection they were called into existence as a local authority.—WYCOMBE UNION *v.* PARSONS (1894), 71 L. T. 428; 10 R. 426, D. C.

**155. —— Right of access to execute repairs—Extent of right.]**—SANDGATE LOCAL BOARD *v.* LENEY (1883), 25 Ch. D. 183, n.

*Annotation:*—**Distd.** Goodhart *v.* Hyett (1883), 25 Ch. D. 182.

**156.** —— —— ——.]—The predecessors of pltfs. under certain private Acts constructed a sewer on private land belonging to a railway co. No notice to treat was given to the co., nor was any compensation paid to them by pltfs.' predecessors. Less than twenty years after the construction of the sewer, which had become vested in pltfs., the railway co. constructed an embankment over the sewer, & it subsequently becoming necessary to repair same, pltfs. had to make an open cutting through the embankment in order to obtain access to the sewer:—*Held:* pltfs. were not entitled to compensation under Lands Clauses Consolidation Act, 1845 (c. 19), s. 68, or Railways Clauses Consolidation Act, 1845 (c. 20), ss. 6, 16, by reason of the railway co. having constructed the embankment over the sewer, inasmuch as pltfs. had not any particular right of access, but simply a right of access to defts.' land to repair the sewer.—BIRKENHEAD CORPN. *v.* LONDON & NORTH WESTERN RY. CO. (1885), 15 Q. B. D. 572; 55 L. J. Q. B. 48; 50 J. P. 84, C. A.

*Annotations:*—**Consd.** Thurrock Grays & Tilbury Joint Sewerage Board *v.* Goldsmith (1914), 79 J. P. 17. **Refd.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205.

**157.** —— —— ——.]—In 1892 T. conveyed to the predecessors of pltfs. as the sanitary authority under Public Health Act, 1875 (c. 55), a piece of land for sewage disposal works, & granted to them the right to lay & construct specified sewers, through land belonging to the vendor, "& from time to time to repair, maintain, renew & improve the same," reinstating the ground. The local board laid through the land an iron effluent outfall sewer, five feet underground. Under an agreement, dated June 14, 1910, C. W., who, in the year 1897, had purchased land through which the sewer had been laid from persons deriving title under T.'s will, subject to the easement for & right of access to the sewer, granted to defts. the right & liberty to deposit refuse on the land.

The defts. had deposited refuse on the land, including portions under which pltfs.' sewer was constructed, their pipe being covered in Aug. 1911. In Oct. 1912, a leakage in the outfall pipe was discovered near defts.' refuse bank. In Aug. 1910, & subsequently, the tipping ground had been inspected by the medical officer, & in Jan. 1911, defts. covenanted not to deposit specified materials, & to prevent those already deposited from being a nuisance, but no suggestion was then made that the deposits were injurious to the sewer. There was evidence that under substituted arrangements pltfs. would shortly discontinue their use of the outfall sewer. Defts. were willing to submit to an injunction restraining them from depositing refuse on the land, but pltfs. asked that defts. be restrained from permitting refuse from remaining on the land so as to prevent their free access for the purpose of repairing & maintaining the sewer. Defts. pleaded laches, acquiescence, & delay on the part of pltfs. :—*Held :* pltfs. were not bound in exercising their right of access to the sewer to take the land in the condition in which it was at the time at which they wished to exercise such right. Defts., by increasing the depth of soil above the pipe, had increased the obligation on pltfs. in exercising their right under the grant in the deed of 1892. The acts of defts. gave rise to a good cause of action.—THURROCK GRAYS & TILBURY JOINT SEWERAGE BOARD *v.* GOLDSMITH (E. J. & W.), LTD. (1914), 79 J. P. 17.

**158. Meaning of "repair"—Keeping in proper repair—Not reconstruction of sewer originally defective.**]—By 18 & 19 Vict. c. 121, s. 22, the local authorities of the district are required to lay down a sewer in such district when necessary, & keep the same in good & serviceable repair :—*Held :* the expression "repair" does not mean the reconstruction of a sewer which has been originally defectively made ; but the keeping the original sewer in proper repair.—R. *v.* EPSOM UNION GUARDIANS (1863), 2 New Rep. 62 ; 8 L. T. 383 ; 27 J. P. 468 ; 11 W. R. 593.

*Annotation :*—**Consd.** Meader *v.* West Cowes L. B., [1892] 3 Ch. 18.

**159. Execution of works by owner—Recovery of expenses from local authority.**]—The owner of a house who was enlarging his premises was required by the local authority's surveyor, amongst other things to take up & relay the back drain of the house, which was in fact a sewer, & to construct an interception chamber or manhole, & these works the owner, upon being told that they must be done, though no actual steps were taken to enforce their execution, agreed to do under protest & did do under the direction & by order of the surveyor of the local authority, but without any legal proceedings being taken against him & without serious threat of such proceedings. The liability in law for carrying out these works rested on the local authority. In an action by the owner to recover the cost of the works, from the local authority on the ground that he was compelled by them to do works which the local authority were compellable by law to do :—*Held :* the owner in the execution of these works was acting as a volunteer & not under compulsion & was therefore not entitled to recover, although without legal proceedings or the threat of such there may be sufficient compulsion to prevent a person being regarded as a volunteer.—ELLIS *v.* BROMLEY RURAL DISTRICT COUNCIL (1899), 81 L. T. 224 ; 63 J. P. 711.

*Annotation :*—**Consd.** Silles *v.* Fulham B. C. (1903), 67 J. P. 273.

**160. —— ——.**]—Defts., a local authority, served upon pltf., the owner of certain houses, a notice stating that they had authorised their sanitary inspector to enter upon the premises respectively for the purpose of examining the drains. The notices were headed "Metropolis Management Act, 1855 (c. 120), s. 82, & Public Health (London) Act, 1891 (c. 76), s. 40." Subsequently defts. served in respect of each house a notice headed "Public Health (London) Act, 1891 (c. 76)," stating that there were certain nuisances upon the premises liable to be dealt with summarily under that Act, & stating that "to effectually abate the above described nuisances & to prevent their recurrence, the following works are recommended." Pltf. carried out the works specified on four of the houses. Defts. served a further notice in respect of each of the other houses, stating that they, by resolution, ordered & required pltf. within twenty-one days from the service of the notice, to execute the works specified in the schedule thereto, & stating further that if pltf. refused or neglected to execute the works, he would become liable to certain penalties. These notices were headed "Metropolis Management Act, 1855 (c. 120), ss. 83, 85 ; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 64." Pltf. thereupon executed the works. In the case of each of the houses, the drain to which the notice referred, carried sewage from one house & rain water from another house. In an action brought by pltf. to recover from defts. the cost of executing the works, the judge held that the drains in question were "sewers" within the definition contained in Metropolis Management Act, 1855 (c. 120), s. 250, & except as to the four houses, the work was done under compulsion. He gave judgment for pltf. for the expenses of the examination of the drains of the four houses, & for the whole of the expenses in respect of the other houses :—*Held :* the decision of the judge was correct.—SILLES *v.* FULHAM BOROUGH COUNCIL, [1903] 1 K. B. 829 ; 72 L. J. K. B. 397 ; 88 L. T. 753 ; 67 J. P. 273 ; 51 W. R. 598 ; 19 T. L. R. 398 ; 1 L. G. R. 643, C. A.

*Annotations :*—**Consd.** Heaver *v.* Fulham B. C., [1904] 2 K. B. 383. **Apld.** Kershaw *v.* Paine (1913), 78 J. P. 149. **Reld.** Wilkinson *v.* Llandaff & Dinas Powis R. C., [1903] 2 Ch. 695 ; Wincanton R. C. *v.* Parsons (1905), 74 L. J. K. B. 533.

**Sewers under streets.**]—*See* HIGHWAYS, Vol. XXVI., pp. 527–529, Nos. 2263–2269.

### *B. Power to carry Sewers through or under Streets or Lands.*

#### (*a*) *Streets.*

*See* Public Health Act, 1875 (c. 55), s. 16, &, *generally*, HIGHWAYS, Vol. XXVI., pp. 268–279, Nos. 79–163.

**What are streets within Public Health Act, 1875 (c. 55), s. 16.**]—*See* HIGHWAYS, Vol. XXVI., p. 270, Nos. 96, 97.

#### (*b*) *Lands.*

*See* Public Health Act, 1875 (c. 55), s. 16.

**161. Meaning of "lands"—Any tenement or hereditament — Land covered with water.**] — (1) Under Public Health Act, 1875 (c. 55), ss. 15–17, a local authority has power to make its sewers discharge into any natural stream or watercourse, or into any canal, pond, or lake, within its district, subject to the restrictions in sect. 17 being observed. The surface water conveyed by surface sewers may be so discharged though it carries down sand & silt, such water not being "sewage or filthy water" within the meaning of sect. 17.

(2) The word "lands" here [Public Health Act, 1875 (c. 55), s. 16] is by the definition clause

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extended so as to mean any tenement or hereditament, & obviously includes land covered with water (LINDLEY, L.J.).—DURRANT *v.* BRANKSOME URBAN COUNCIL, [1897] 2 Ch. 291; 66 L. J. Ch. 653; 76 L. T. 739; 46 W. R. 134; 13 T. L. R. 482; 41 Sol. Jo. 621, C. A.

*Annotations:—As to* (1) **Refd.** Croysdale *v.* Sunbury-on-Thames U. C., [1898] 2 Ch. 515; Sykes *v.* Sowerby District Council (1899), 80 L. T. 392; A.-G. *v.* Birmingham, Tame & Rea Drainage Board, [1908] 2 Ch. 551; Dell *v.* Chesham U. D. C., [1921] 3 K. B. 427; Hesketh *v.* Birmingham Corpn., [1924] 1 K. B. 260.

**162. —— —— Easement.**] — CLECKHEATON URBAN DISTRICT COUNCIL *v.* FIRTH, No. 262, *post.*

**163. Reasonable notice—What amounts to.**]—A notice is reasonable, within Public Health Act, 1848 (c. 63), s. 45, when it specifies the object of an entry on private premises to be the construction of a sewer of certain dimensions, & shows that the entry will be made at a particular point, & that the sewer will go from that point in an oblique direction. It is not necessary that this notice should be accompanied by a map.—CLECKHEATON INDUSTRIAL SELF-HELP SOCIETY *v.* JACKSON (1866), 14 W. R. 950.

**164. —— ——.**]—NEW RIVER CO. *v.* WARE UNION RURAL SANITARY AUTHORITY (1883), 18 L. J. N. C. 20.

**165. —— Whether map necessary.**]—CLECKHEATON INDUSTRIAL SELF-HELP SOCIETY *v.* JACKSON, No. 163, *ante.*

**166. —— Right of authority to withdraw notice — Before commencement of works.**]—A notice under Public Health Act, 1875 (c. 55), s. 16, may be withdrawn by the local authority at any time before the works are commenced.—DAVIS *v.* WITNEY URBAN DISTRICT COUNCIL (1899), 63 J. P. 279; 15 T. L. R. 275, C. A.

**167. Necessity for report of surveyor—That proposed course of sewer "necessary."**] — NEW RIVER CO. *v.* WARE UNION RURAL SANITARY AUTHORITY (1883), 18 L. J. N. C. 20.

**168. —— —— Meaning of "necessary."**]—In Dec. 1887, the surveyor of defts., an urban local authority, died. On Jan. 11, 1888, defts. by resolution appointed A., a civil engineer in their employment, "surveyor to the board until a further permanent surveyor be appointed." On Mar. 21, 1888, A. reported to defts. that it was "desirable & advisable" that their water main should be carried in a particular direction from one point to another, & that it would be "necessary" to lay it through land belonging to pltf., which was within the district. This report was signed, "Your surveyor, A." Four days after its date X. was duly appointed surveyor to defts., & A., who was a candidate for the office, was retained in their service as water-works engineer. The report of Mar. 21 was considered & adopted by the board on Apr. 11, 1888, & in the following month a notice in pursuance thereof was served on pltf. that defts. intended to carry their main through a part of his lands. Upon motion made in an action by pltf. for an injunction to restrain defts. from so doing:—*Held:* (1) the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public"; (2) upon the words of Public Health Act, 1875 (c. 55), s. 16, the person to determine the necessity was the surveyor; & if the ct. found that he had exercised his judgment & come to a conclusion in good faith, the ct. ought not to interfere, even although other courses were shown to be practicable by which the entry on private lands might be avoided; (3) "the surveyor" mentioned in Public Health Act, 1875 (c. 55), s. 16, must, in the case of an urban authority, be the fit & proper person duly appointed to be surveyor under Public Health Act, 1875 (c. 55), s. 189, & no other; & A. was not "the surveyor" of defts. within Public Health Act, 1875 (c. 55), ss. 16, 189; & as the report on which the proceedings of defts. was founded was not the report of "the surveyor," pltf. was entitled to an interlocutory injunction.—LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD (1888), 40 Ch. D. 55; 58 L. J. Ch. 39; 59 L. T. 769; 37 W. R. 121; 5 T. L. R. 1.

*Annotations:—As to* (3) **Refd.** Robinson *v.* Sunderland Corpn. [1899] 1 Q. B. 751; Kendal *v.* Lewisham B. C. (1903), 67 J. P. 236. *Generally,* **Refd.** Jones *v.* Conway & Colwyn Bay Joint Water Supply Board, [1893] 2 Ch. 603. **Mentd.** Stroud *v.* Wandsworth District Board of Works, [1894] 1 Q. B. 64; Roberts *v.* Hopwood, [1925] A. C. 578.

**169. —— —— Conclusiveness of report—On proof of due exercise of judgment.**]—LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD, No. 168, *ante.*

**170. —— —— Surveyor must be duly appointed —Not temporary acting surveyor.**] —LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD, No. 168, *ante.*

**171. Failure to comply with provision for notice or report—Injunction.**]—LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD, No. 168, *ante.*

**172. —— —— Owner of lands not prejudiced.**] —HUTCHINGS *v.* SEAFORD URBAN DISTRICT COUNCIL (1898), 43 Sol. Jo. 41, C. A.

*Annotation:—***Refd.** King's College, Cambridge *v.* Uxbridge R. C. (1901), 70 L. J. Ch. 844.

**173. Right to elect to proceed under local or general Act.**]—Defts. were comrs. under a local Act which empowered them to make drains through private enclosed lands, after giving twenty-eight days' public notice, with power to persons interested to object & to appeal. Defts. were also, as such comrs. by 18 & 19 Vict. c. 121, s. 31, the local authority; & as the local authority were by 18 & 19 Vict. c. 121, s. 2, & by Highway Act, 1835 (c. 50), s. 67, empowered without giving notice to make drains through private enclosed lands adjoining a highway, for the purpose of removing an existing nuisance. A watercourse used as a sewer being a nuisance & a new sewer being necessary to remove the nuisance, defts., without giving notice, made a new sewer through pltf.'s enclosed land adjoining a highway, not in the line of the watercourse:—*Held:* defts. were entitled to act under either the local Act or the general Act at their election; & the making of the sewer in that manner was within their powers under the general Act.

Highway Act, 1835 (c. 50), s. 67, gives authority to the surveyor to "make, etc., all ditches, gutters, drains, or watercourses, & also to make & lay such trunks, tunnels, etc., as he shall deem necessary in & through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds for the damages which he shall sustain thereby (WILLES, J.).—DERBY (EARL) *v.* BURY IMPROVEMENT COMRS. (1869), L. R. 4 Exch. 222; 38 L. J. Ex. 100; 20 L. T. 927; 33 J. P. 424; 17 W. R. 772, Ex. Ch.

**174. Right to lay sewer above ground.**]—By Public Health Act, 1875 (c. 55), s. 16, a local authority is empowered to carry any sewer "into, through, or under" any lands within its district, & the Act provides for compensation to all persons sustaining damage by reason of the exercise of the powers of the Act in relation to any matters as to which they are not themselves in default. A local board under this Act proceeded to carry a sewer

across pltf.'s pleasure grounds on such a level that the bottom of the sewer would be only slightly below the surface, & a permanent embankment about 6 feet high would be made :—*Held :* they were authorised so to do, for the Act did not confine them to carrying a sewer underground.—RODERICK *v.* ASTON LOCAL BOARD (1877), 5 Ch. D. 328 ; 46 L. J. Ch. 802 ; 36 L. T. 328 ; 25 W. R. 403, C. A.

*Annotations :*—**Consd.** Morris *v.* Mynyddislwyn U. C., [1917] 2 K. B. 309. **Reld.** Jones *v.* Conway & Colwyn Bay Joint Water Supply Board, [1893] 2 Ch. 603 ; Glamorganshire Canal Navigation *v.* Nixon's Navigation Co. (1901), 85 L. T. 53 ; Jary *v.* Barnsley Corpn., [1907] 2 Ch. 600. **Mentd.** London & North Western Ry. *v.* Evans, [1893] 1 Ch. 16.

**175. No right to cause nuisance.**] — L., the owner of a meadow, received notice from the rural sanitary authority that they intended to enter & make a sewer under the meadow, & this being objected to they entered forcibly. An action of trespass & injunction being brought by L. on the ground that the sewer would create a nuisance :—*Held :* (1) the order of justices mentioned in Public Health Act, 1875 (c. 55), s. 305, does not apply when proceedings are taken under sect. 10 ; (2) the statute does not authorise a sewer which would cause a nuisance, & injunction granted accordingly, the jury having found that a nuisance would be created.—LAMACRAFT *v.* ST. THOMAS RURAL SANITARY AUTHORITY (1880), 42 L. T. 365 ; 44 J. P. 441, D. C.

**176. Refusal of owner to permit entry — No right to summary order.**]—LAMACRAFT *v.* ST. THOMAS RURAL SANITARY AUTHORITY, No. 175, *ante.*

**177. Saving for navigation & water rights—Interference with towing path—Public Health Act, 1875 (c. 55), s. 327 (3).**]—Defts. resolved to construct a system of surface water drains in their district to discharge into the river Thames by means of an outfall drain, carried into, through, & under the towing path, the soil of which was vested in pltfs., who were a body of persons entitled by virtue of an Act of Parliament to navigate on or use such river, or to receive tolls or dues in respect of the navigation thereon or use thereof. The special case stated that the execution of the works by defts. would temporarily interfere with the traffic upon the towing path, but that it was the intention of defts. to so carry out the works as not at any time to interrupt the traffic over more than one-half of the path, & to avoid, as far as possible, any interference with the towing of vessels :—*Held :* upon that statement, the execution of the works would interfere with the towing path so as to interrupt the traffic thereof within Public Health Act, 1875 (c. 55), s. 327 (3), & under those circumstances, by reason of that sect. defts. had no right to carry the outfall drain into, through, or under the towing path, without first obtaining the licence & permission of pltfs. so to do, & submitting to such restrictions & agreeing to such terms & conditions as pltfs. thought proper to impose.—RIVER THAMES CONSERVATORS *v.* WALTON-UPON-THAMES DISTRICT COUNCIL (1907), 96 L. T. 555 ; 71 J. P. 202 ; 5 L. G. R. 274.

**Whether local authority liable to purchase lands.**] —*See* No. 66, *ante.*

### (c) *Compensation.*

*See* Public Health Act, 1875 (c. 55), s. 308, &, *generally*, COMPULSORY PURCHASE OF LAND, Vol. XI., pp 290 *et seq.*

**Who may claim.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 291, Nos. 2194–2197.

**Assessment.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 141, 291, 292, Nos. 269, 2192, 2198–2206.

—— **Jurisdiction of arbitrator.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 292, No. 2210.

—— **Enforcement of arbitration award.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 293, No. 2212.

**Whether local authority liable to purchase lands.**] —*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 291, 294, Nos. 2190, 2230.

### *C. Enforcement of Duty.*

*See* Public Health Act, 1875 (c. 55), ss. 15, 299.

**178. When mandamus granted.**] — The ct. will not grant a *mandamus* to compel a local board of health, established under Public Health Act, 1848 (c. 63), to make such sewers as may be necessary for the purposes of that Act, it being in the province of the ct. only to compel them to take the matter into consideration.—R. *v.* MAIDENHEAD LOCAL BOARD OF HEALTH (1855), 4 W. R. 117.

**179.** ——.]—R. *v.* LINCOLN CORPN. (1876), 62 L. J. Q. B. 542, n. ; 10 R. 294, n., D. C.

*Annotation :*—**Folld.** R. *v.* Staines Union, R. *v.* Staines L. B. (1893), 62 L. J. Q. B. 540.

**180.** ——.] — The Local Government Board had, under Public Health Act, 1875 (c. 55), s. 299, made orders calling upon two local sanitary authorities to perform their duty within six months in the matter of complaint in each order mentioned by executing works for the proper drainage of their respective districts. Inquiries had been held by an inspector of the board, who found default had been made, but had declined to admit evidence either as to the great difficulties & expenses attending any scheme of drainage for either district, or as to the probable cost of an efficient system of drainage if carried out. The Local Government Board neither proposed nor suggested any definite scheme :—*Held :* a *mandamus* must go calling upon the local authority to perform their duty in the terms of the orders. So long as there had been no legal error or omission of legal form, it was not for the ct. to entertain questions as to whether there had been a due inquiry or whether the findings of the Local Government Board were sufficient or not.—R. *v.* STAINES UNION, R. *v.* STAINES LOCAL BOARD (1893), 62 L. J. Q. B. 540 ; 69 L. T. 714 ; 58 J. P. 182 ; 9 T. L. R. 587 ; 37 Sol. Jo. 683 ; 10 R. 292, D. C.

**181. Complaint to Ministry of Health—Refusal of Ministry to interfere—No right to mandamus to local authority.**]—The builder of certain houses at T. applied to the T. Local Board, under Public Health Act, 1875 (c. 55), s. 15, to make the necessary sewers. In reply the T. Local Board stated that after considering the advice of their engineer on the matter they were of opinion that they had done all that was required by the Act.

Complaint of the alleged default on the part of the Local Board was then made, under sect. 299, to the Local Government Board. An inquiry was held, & the Local Government Board refused to interfere.

On application for a *mandamus* to the T. Local Board to make the sewers :—*Held :* there had been no refusal on the part of the T. Local Board to exercise their discretion, & the application must be refused.—R. *v.* TOTTENHAM LOCAL BOARD (1893), 9 T. L. R. 414, C. A.

——.]—*See* PUBLIC HEALTH, Vol. XXXVIII., pp. 152, 153, No. 23–30.

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**Transfer of duties of Local Government Board to Ministry of Health.**]—*See* Ministry of Health Act, 1919 (c. 21).

*D. Liability for Improper Exercise of Powers and Duties.*

*See* Public Health Act, 1875 (c. 55), s. 19, & *generally*, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 32–50.

**182. How arising—Necessity for negligence.**]—In 1855 a municipal corpn. made a sewer under a road within their district. Many years afterwards the owners of premises abutting on the road erected a brewery, &, in pursuance of Public Health Act, 1875 (c. 55), s. 21, or the corresponding section of the Sanitary Act, 1866, connected the drainage of the brewery cellars with the sewers. In 1891, 1892 & 1893, the cellars were damaged by floodings.

The floodings arose from the fact that by reason of the large increase in recent years in the number of buildings draining into the sewer, when very heavy falls of rain occurred, the sewer was too small to carry off the influx of water, & the pressure forced the contents of the sewer through the connections into the cellars. The system of drainage originally adopted reasonably provided for the district & for the then probable increase of buildings which would have to drain into it. There had been no negligence in constructing or maintaining the sewer, or in not providing a new sewer or sewage system :—*Held :* (1) the corpn. were not liable as strangers & apart from any statutory duty; (2) in the absence of negligence, the corpn. were not liable under Public Health Act, 1875 (c. 55), s. 19.—STRETTON'S DERBY BREWERY CO. *v.* DERBY CORPN., [1894] 1 Ch. 431; 63 L. J. Ch. 135; 69 L. T. 791; 42 W. R. 583; 10 T. L. R. 94; 8 R. 608.

*Annotations :—As to* (2) **Apld.** Lambert *v.* Lowestoft Corpn., [1901] 1 K. B. 590. **Apprvd.** Hesketh *v.* Birmingham Corpn., [1924] 1 K. B. 260.

—— ——.] — *See, also*, NEGLIGENCE, Vol. XXXVI., pp. 26, 34, 101, 118, Nos. 130, 199, 200, 672, 786; PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 23, 24, No. 130.

**183. —— Imperfect construction — Property subsequently let.**]—The owner of property who constructs a sewer upon it in an imperfect manner, & who afterwards lets part of the property to another person, continuing the sewer in its imperfect state, is liable for damage occurring to the property so let, from the insufficient construction of the work.—ALSTON *v.* GRANT (1854), 3 E. & B. 128; 2 C. L. R. 933; 23 L. J. Q. B. 163; 22 L. T. O. S. 221; 18 Jur. 332; 2 W. R. 161; 118 E. R. 1089.

*Annotation :*—**Reld.** Hargroves, Aronson *v.* Hartop (1905), 74 L. J. K. B. 232.

**184. —— Failure to cover mouth of sewer.**]—Pltfs., owners of baths, had a drain from their premises communicating with the main sewer of the town of Cheltenham; there was a flap to pltf.'s drain which prevented any back water coming into it from the town sewer. In 1852 the town comrs. obtained an Act of Parliament to make new sewers, & they then made a sewer considerably deeper than the former one; they made a communication from the drain of pltf.'s premises into their own sewer, but omitted to make any flap. The new sewer was made by contractors with the comrs., & inclosed by puddling, not concrete; heavy storms came, the sewer burst, & the water of the Chelt flowed into the sewer, & ultimately a quantity of sewerage water & filth was forced up pltf.'s drain & into his premises, doing great damage :—*Held :* the circumstances of the case showed defts. were guilty of negligence; & commissioners were liable in this action to pltf. for the injury occasioned.—RUCK *v.* WILLIAMS (1858), 3 H. & N. 308; 27 L. J. Ex. 357; 31 L. T. O. S. 167; 22 J. P. 420; 6 W. R. 622; 157 E. R. 488.

*Annotations :*—**Consd.** Coe *v.* Wise (1864), 5 B. & S. 440. **Distd.** Gordon *v.* St. James, Westminster Vestry (1865), 13 L. T. 511. **Consd.** Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93. **Distd.** Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431. **Reld.** Metcalfe *v.* Hetherington (1890), 5 H. & N. 719; Bagnall *v.* L. & N. W. Ry. (1861), 7 H. & N. 423; Whitehouse *v.* Fellowes (1861), 30 L. J. C. P. 305; Young *v.* Davis (1862), 7 H. & N. 760; G. W. Ry. of Canada *v.* Braid (1863), 1 Moo. P. C. C. N. S. 101. **Mentd.** Taff Vale Ry. *v.* Amalgamated Soc. of Ry. Servants, [1901] A. C. 426.

**185. —— Tapping underground springs—Injunction.**]—Though there is no remedy for the injury caused by sewers tapping underground springs, the ct. will interfere where it is shown that water is abstracted from definite channels flowing above ground.

A canal was supplied from a pond fed by springs, & by streams flowing into it. A local board constructed a sewer with a branch running parallel to one of the streams & under the pond. The sewers tapped the springs so that the pond would no longer hold water, & affected the stream so that a great part of its water was absorbed :—*Held :* the latter injury was a ground for the ct.'s interference.—GRAND JUNCTION CANAL CO. *v.* SHUGAR (1871), 6 Ch. App. 483; 24 L. T. 402; 35 J. P. 660; 19 W. R. 569, L. C.

*Annotations :*—**Consd.** Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Mentd.** Bradford Corpn. *v.* Pickles, [1894] 3 Ch. 53; Salt Union *v.* Brunner Mond, [1906] 2 K. B. 822; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588.

**186. —— Damage caused by excavation.**]—Pltf.'s house was built in 1874. Defts. in 1883, acting under statutory powers, constructed a sewer under a road near pltf.'s house, which, owing to defts.' negligence in the construction of the sewer, was cracked & damaged. The cracks became gradually worse, & continued so doing till Dec. 1888, when pltf. brought an action to recover damages for the injury to his house :—*Held :* although pltf. was not entitled to any right of support for his house by way of easement, yet defts. were bound to use due care in the exercise of their powers, & were therefore liable for negligence. — FAIRBROTHER *v.* BURY RURAL SANITARY AUTHORITY (1889), 37 W. R. 544, D. C.

**187. —— Failure to discover defect in sewer.**]—Under local Acts, the Manchester Improvement Comrs., & then the corpn. of Manchester, were empowered to make sewers, & to use, repair, & cleanse the same. A sewer made some forty years previously burst during a violent storm under a cellar which communicated with pltf.'s house, flooded the rooms, & so caused the house to fall. The bursting of the sewer was caused by defects in its original construction, of which defts. were ignorant, but which they might have discovered by reasonable means :—*Held :* defts. were bound from time to time to inform themselves as to the condition of the sewers, & to use all reasonable means to ascertain whether the sewers wanted cleansing or repairing or were defective, & defts. having omitted to perform their duty were guilty of negligence, & liable to pltf. for the injury to his house.—FLEMING *v.* MANCHESTER CORPN. (1881), 44 L. T. 517; 45 J. P. 423; *revsd.* (1882), *Times*, June 27, C. A.

**188. —— Defective ventilation.**] — SMITH *v.* KING'S NORTON RURAL DISTRICT COUNCIL (1896), 60 J. P. 520.

**189.** ——— ———.]—BROWN *v.* WHICKHAM URBAN DISTRICT COUNCIL (1898), *Times*, July 14.

**190.** ——— ———.] — RUSSELL *v.* ROYSTON URBAN DISTRICT COUNCIL (1913), 77 J. P. Jo. 317.

**191.** ——— **Sewer partly repaired.**] — WHITFIELD *v.* BISHOP AUCKLAND URBAN DISTRICT COUNCIL (1897), 42 Sol. Jo. 67.

**192.** ——— **Failure to cleanse sewer.**] — Public Health Act, 1875 (c. 55), s. 209, in providing for complaint to the Local Government Board where a local authority has made default in the maintenance of existing sewers, does not apply to sect. 19 of the Act, which imposes on local authorities the duty to cleanse sewers vested in them, & consequently does not affect the right of action of a person who has sustained damage through the negligence of a local authority in not cleansing a sewer vested in them.—BARON *v.* PORTSLADE URBAN COUNCIL, [1900] 2 Q. B. 588; 69 L. J. Q. B. 899; 83 L. T. 363; 64 J. P. 675; 48 W. R. 641; 16 T. L. R. 523, C. A.

*Annotations*:—**Consd.** Wilkinson *v.* Llandaff & Dinas Powis R. D. C. (1903), 89 L. T. 462. **Distd.** Harrington *v.* Derby Corpn., [1905] 1 Ch. 205.

**193.** ——— ———.]—WILKINSON *v.* LLANDAFF & DINAS POWIS RURAL COUNCIL, No. 40, *ante*.

**194.** ——— **Sewer of insufficient size.**]—Where municipal authorities under their statutory powers took over the care of a watercourse & made it into a public drain, which proved in course of time to be increasingly insufficient to hold & pass on the mixture of slime & sewage poured into it, with the result that pltf.'s property was flooded thereby:—*Held*: they were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose.—HAWTHORN CORPN. *v.* KANNULUIK, [1906] A. C. 105; 75 L. J. P. C. 7; 93 L. T. 644; 54 W. R. 285; 22 T. L. R. 28, P. C.

*Annotations*:—**Consd.** Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233. **Dbtd.** Hesketh *v.* Birmingham Corpn., [1924] 1 K. B. 260.

**195.** ——— ———.]—Resps., who owned a factory in a low-lying part of a burgh of which applts. were the local authority charged by statute with the duty of effectually draining the burgh, brought an action in the Ct. of Session against applts. for damages in respect of a loss alleged to have been incurred by resps. through the flooding of their premises during a rainstorm owing to the insufficiency & faulty design of applts.' sewers. By their condescendence resps. averred that as the result of this insufficiency & faulty design the sewer into which the factory drained had become surcharged & ejected its contents on to resps.' premises, & that as a consequence of the failure of applt. to perform their statutory duty of providing adequate sewers for the drainage of the burgh resps. had suffered the loss complained of. The defence was that the flooding was caused by the overflow of two natural streams adjoining resps.' premises:—*Held*: (1) it was competent to the ct. upon the pleadings to deal not only with the question of regurgitation, but also with the question of the failure of the sewer to carry off the surface water from resps.' premises; (2) upon the evidence, the inadequacy of applts.' sewers materially contributed to resps.' loss.—BARRHEAD BURGH (PROVOST, ETC.) *v.* BROWNLIE (JAMES) & SON (1925), 89 J. P. 157, H. L.

**196.** ——— ——— **Measure of damages.**] — By reason of the improper construction of a sewer resulting in overflows, pltf.'s house became uncomfortable & an unhealthy place of residence, & in consequence he left it. It was held that he was entitled to recover from the urban district council, as damages, the rent for the quarters for which he was liable to his landlord, & during which he had lost the use of the house, & also damages for the physical discomfort suffered by pltf. & the actual expense to which pltf. had been put in respect of the illness in his family caused by such overflows.—TOUZEAU *v.* SLOUGH URBAN DISTRICT (1896), 60 J. P. 103.

**197.** ——— **Escape of sewage.**]—Owing to an escape of sewage from a sewer vested in an urban district council, the supply of drinking water used by an adjacent hydropathic establishment became polluted, & an outbreak of typhoid fever occurred in the establishment. In an action by the proprietor of the establishment against the urban district council for damages for the pollution of the water supply, the jury found that the pollution was due to negligence on the part of deft. council & that there was no contributory negligence on the part of pltf. & awarded damages to pltf. Pltf. had no proprietary title to the water coming to his establishment through the supply which was so polluted, nor any leave or licence to use the water:—*Held*: pltf. had a good cause of action & was entitled to judgment on the finding of the jury. On appeal, judgment entered for the defts.—FERGUSSON *v.* MALVERN URBAN DISTRICT COUNCIL (1908), 72 J. P. 101; *revsd.*, 72 J. P. 273, C. A.; (1909), 73 J. P. 361, H. L.

**When injunction granted.**] — *See* INJUNCTION, Vol. XXVIII., p. 369, Nos. 43, 46; NUISANCE, Vol. XXXVI., pp. 223–228.

**Liability of highway authority.**] — *See* HIGHWAYS, Vol. XXVI., pp. 398–413.

**Liability for acts of contractor.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 155–167.

**Abatement of nuisance by owner—Recovery of expenses from local authority.**]—*See* NUISANCE, Vol. XXXVI., pp. 231, 232, 234, Nos. 712–718, 733–738.

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### SUB-SECT. 2.—IN THE METROPOLIS.

#### *A. In General.*

*See* Metropolis Management Act, 1855 (c. 120), ss. 69, 135; Metropolis Management (Amendment) Act, 1858 (c. 104); Metropolis Management (Amendment) Act, 1862 (c. 102), ss. 44–51.

**198. Duty to make sewer—London County Council—Discretion as to kind of works.**]—Under Metropolis Management Act, 1855 (c. 120), s. 135, if works are in fact necessary for the effectual sewerage & drainage of any part of the metropolis, the council is bound to execute works for that purpose, having a discretion only as to the kind of works which are to be executed, & that duty will be enforced by *mandamus*.—LEE DISTRICT BOARD *v.* LONDON COUNTY COUNCIL (1899), 82 L. T. 306; *sub nom.* R. *v.* LONDON COUNTY COUNCIL, 64 J. P. 20; 16 T. L. R. 89, C. A.

**199.** ——— ——— ———.]—Under Metropolis Management Act, 1855 (c. 120), s. 135, & Metropolis Management (Amendment) Act, 1858 (c. 104), s. 1, the London County Council as successors of the Metropolitan Board of Works have a discretion to decide what sewers & works are necessary in carrying out their duties with regard to the prevention of the sewage of the metropolis from flowing into the Thames; & therefore they are not bound to construct sewers which would be properly district sewers for the purpose of intercepting the drainage of every house in the metropolis that in 1855 drained into the Thames.—WESTMINSTER CORPN. *v.* LONDON COUNTY COUNCIL, [1906] 2 K. B. 379; 75 L. J. K. B. 549; 94 L. T. 791; 70 J. P. 390; 54 W. R. 616; 22 T. L. R. 593; 50 Sol. Jo. 526; 4 L. G. R. 655.

*Sect. 3.—Construction, alteration and repair of sewers: Sub-sect. 2, A. & B. (a) & (b), C. & D.*]

**200. —— Borough councils—Discretion as to time & manner of making.**]—The vestry of a parish comprised within Metropolis Management Act, 1855 (c. 120), having, under sect. 69, obtained the necessary approval of the Metropolitan Board of Works to the construction by them of such sewers as may be requisite for the drainage of the parish, has, under that sect., a discretion with respect to the exigencies of one portion of the parish as compared with others, & are entitled to a reasonable time for the beginning & completion of the works; & a writ of *mandamus* ordering the immediate construction of sewers, etc., in a particular part of the parish is defective, unless it shows on the part of the vestry a present duty, & a non-compliance therewith.—R. *v.* ST. LUKE'S, CHELSEA, VESTRY (1862), 1 B. & S. 903; 31 L. J. Q. B. 50; 5 L. T. 744; 26 J. P. 85; 8 Jur. N. S. 308; 10 W. R. 293; 121 E. R. 949.

*Annotations:*—**Refd.** R. *v.* St. George, Hanover Square, Vestry, [1895] 2 Q. B. 275; Lee District Board *v.* L. C. C. (1899), 82 L. T. 306.

**201. —— —— Submission of plans to London County Council—Refusal to submit for reasons unconnected with making of sewer.**]—The making & branching of sewers within the district of a vestry or district board is, by Metropolis Management Act, 1862 (c. 104), s. 47, made subject to the sanction in writing of the vestry or district board being first obtained. But a vestry or district board cannot, s. 48 enacts, give such sanction without the approval of the Metropolitan Board of Works:—*Held:* it was no answer to a *manadmus* requiring a district board to submit to the Metropolitan Board of Works plans & sections of sewers laid before them in pursuance of s. 47, to answer that that board have refused to sanction the making of the roads in which the proposed sewers are intended to be laid; &, therefore, the district board, having no other objection, it was their duty, under s. 48, to submit the plans & sections to the Metropolitan Board of Works.—R. *v.* WANDSWORTH BOARD OF WORKS, *Ex p.* CHILDS (1885), 49 J. P. 806, D. C.

**202. Power to alter—Borough councils—Liability to provide new drains.**]—Where the vestry or district board of a parish or district, under the powers conferred on them by Metropolis Management Act, 1855 (c. 120), substitute a new sewer in a course different from that of an old one, & think proper to divert house drainage, not in itself defective or insufficient, from the latter to the former, they are bound under sect. 69 to provide new drains for the old ones so diverted, & cannot call upon the owners of the premises, under sect. 73 to pay the expense of such new drains.—ST. MARYLEBONE VESTRY *v.* VIRET (1865), 19 C. B. N. S. 424; 34 L. J. M. C. 214; 13 W. R. 1064; 144 E. R. 851; *sub nom.* MARYLEBONE VESTRY *v.* VIRET, 12 L. T. 673; 11 Jur. N. S. 907.

*Annotation:*—**Apld.** St. Martin-in-the-Fields Vestry *v.* Ward, [1897] 1 Q. B. 40.

**203. —— —— Costs of alteration—By whom borne.**]—ST. MARYLEBONE VESTRY *v.* VIRET, No. 202, *ante*.

**204. —— —— —— ——.**]—Where, in consequence of the provision by a vestry under Metropolis Management Act, 1855 (c. 20), s. 69, of a new sewer in substitution for an old one into which a house was previously drained, it became necessary to make a new drain connecting the house with the new sewer:—*Held:* sect. 73 of the Act did not apply, & the vestry could not under that sect. recover the expense of making the new drain from the owner of the house.—ST. MARTIN-IN-THE-FIELDS VESTRY *v.* WARD, [1897] 1 Q. B. 40; 66 L. J. Q. B. 97; 75 L. T. 349; 61 J. P. 19; 45 W. R. 81; 13 T. L. R. 40; 41 Sol. Jo. 64, C. A.

**205. Duty to repair.**]—ST. MATTHEW, BETHNAL GREEN VESTRY *v.* LONDON SCHOOL BOARD, No. 100, *ante*.

**206. —— Liability of commissioners under local Act.**]—The Comrs. for executing Crown Estate Paving Act, 1851 (c. 95), were, as successors of Comrs. under an Act of 1824, authorised & empowered to repair & maintain the streets within a certain area, including a street one-half of the breadth of which is now in the Metropolitan Borough of St. M. & the other half in the Metropolitan Borough of St. P. Their predecessors had been, under the Act of 1824, Comrs. of Sewers for the same area; a sewer under the half of the street in St. M. had been repairable by them, but under an Act of 1848 became vested in & repairable by the Metropolitan Comrs. of Sewers, & ultimately vested in & was repairable by the borough council of St. M. In Dec. 1909, the sewer having perished for want of repair fell in & the road above it subsided. In Mar. 1910, the Comrs. called upon the council to repair the sewer, & on their default repaired it & made good the road, completing the work in the month of May following. In July of the same year they paid the expenses incurred by them in executing the work, & demanded repayment from the council; & in the following Sept. they commenced an action against the council to recover the amount of the expenses:—*Held:* the Comrs. were, in the discharge of their statutory duty, obliged to repair the sewer & they were therefore entitled to recover the amount so expended from the council as money paid at the council's request.—HART *v.* ST. MARYLEBONE BOROUGH COUNCIL (1912), 76 J. P. 257; 10 L. G. R. 502.

*Annotation:*—**Mentd.** R. *v.* Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

### *B. Power to carry Sewer through or under Streets or Lands.*

#### (*a*) *In General.*

*See* Metropolis Management Act, 1855 (c. 120), ss. 69, 135; Metropolis Management (Amendment) Act, 1858 (c. 104), ss. 2, 27–29; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 34.

**207. Works on soil of River Thames—Necessity for consent of Admiralty.**] — The Metropolitan Board of Works have no power under Metropolis Local Management Act, 1855 (c. 120), s. 135, to erect any works on the bed or soil of the Thames, without first obtaining the consent of the Admlty., pursuant to Metropolitan Management (Amendment) Act, 1858 (c. 104), s. 27, of the conservators of the river, pursuant to sect. 28: & consequently they were liable to an action at the suit of the owner of a vessel which sustained damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by them.—BROWNLOW *v.* METROPOLITAN BOARD OF WORKS (1864), 16 C. B. N. S. 546; 4 New Rep. 173; 33 L. J. C. P. 233; 12 W. R. 871; 143 E. R. 1241, Ex. Ch.

*Annotations:*—**Refd.** L. C. C. *v.* Port of London Authority, [1914] 2 Ch. 362. **Mentd.** Coe *v.* Wise (1864), 5 B. & S. 440; Mersey Dock Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93.

**208. —— Necessity for consent of conservators.**]—BROWNLOW *v.* METROPOLITAN BOARD OF WORKS, No. 207, *ante*.

**209. —— —— Certificate of Port of London Authority.**]—By Metropolis Management Act,

1855 (c. 120), s. 135, the Metropolitan Board of Works, to whose powers & obligations the London County Council have now succeeded, were required to make such sewers as they might think necessary for preventing all or any part of the sewage of the metropolis from flowing or passing into the river Thames in or near the metropolis & to cause such sewers & works to be completed on or before Dec. 31, 1860, & also to make all such other sewers & works & such diversions or alterations of any existing sewers or works vested in them under that Act as they might from time to time think necessary for the effectual sewerage & drainage of the metropolis.

By Metropolis Management Amendment Act, 1858 (c. 104), s. 28, "In order to preserve the navigation of the river Thames, the plans of any work to be constructed under the authority of this Act upon the banks, bed, or shore of the river Thames, which may interfere with the free navigation of the river, shall be approved by the conservators of the river Thames in writing signed by their secretary, before such works are commenced, certifying that the works according to such plans will not interfere with the navigation of the river Thames":—*Held:* sect. 28 of the Act of 1858 was a subsisting enactment, therefore, the London County Council were entitled by virtue of the Acts of 1855 & 1858 to construct works in, over, or under the bed of the river Thames, & the Port of London Authority, who had succeeded to the powers & obligations of the conservators of the river Thames, were bound to consider, pursuant to sect. 28 of the Act of 1858, any plans of works which might be submitted to them by the London County Council, & if they were of opinion that such works or any of them would not interfere with the navigation of the river Thames to approve the plans for the same & give their certificate accordingly, & as to any works the plans of which might have been so approved, & as to which the certificate above mentioned had been given the London County Council were not bound to obtain any further licence from the Port of London Authority.—LONDON COUNTY COUNCIL *v.* PORT OF LONDON AUTHORITY, [1914] 2 Ch. 362; 84 L. J. Ch. 20; 30 T. L. R. 406; 12 L. G. R. 911.

### (*b*) *Compensation.*

*See* Metropolis Management Act, 1855 (c. 120), s. 225, &, *generally*, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 295 *et seq.*

**When right arises.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 134, 295, Nos. 211, 2245–2247.

**Assessment.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 295, No. 2248.

**Whether local authority liable to purchase lands.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 295, Nos. 2243, 2244.

### *C. Enforcement of Duty.*

*See* Metropolis Management Act, 1855 (c. 120), s. 138, &, *generally*, CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

**210. Mandamus — Whether prerogative writ issued.**]—R. *v.* ST. GILES, CAMBERWELL, VESTRY, No. 214, *post.*

**211. —— To whom directed—London County Council.**]—Under Metropolis Management Act, 1855 (c. 120), s. 135, when the necessity has arisen to execute works for the effectual drainage of a district, it is the duty of the London County Council to execute works for the purpose of draining the district, & that duty will be enforced by *mandamus*. The words "such sewer as they from time to time think necessary" only gives a discretion as to the kind of works which shall be executed. The sewage, in a sewer vested in the council, having escaped into local sewers & caused a nuisance:—*Held:* all due care or diligence had not been used, & a *mandamus* should issue commanding the London County Council to keep so much of the sewer as runs through the district so as not to be a nuisance.—LEE DISTRICT BOARD *v.* LONDON COUNTY COUNCIL (1899), 82 L. T. 306; *sub nom.* R. *v.* LONDON COUNTY COUNCIL, 64 J. P. 20; 16 T. L. R. 89, C. A.

**212. —— What must be shown—Lapse of reasonable time.**]—R. *v.* ST. LUKE'S, CHELSEA, VESTRY, No. 200, *ante.*

**213. —— —— Approval of London County Council.**]—R. *v.* ST. LUKE'S, CHELSEA, VESTRY, No. 200, *ante.*

**214. —— —— No other satisfactory remedy available.**]—The ct. will not grant a prerogative writ of *mandamus* commanding a local authority to repair & maintain a sewer vested in them in a case where another remedy exists which is equally convenient & appropriate.—R. *v.* ST. GILES, CAMBERWELL, VESTRY (1897), 66 L. J. Q. B. 337; 61 J. P. 217; *sub nom.* R. *v.* CAMBERWELL VESTRY, 45 W. R. 335; 13 T. L. R. 162; 41 Sol. Jo. 227, D. C.

**215. —— What may be ordered—Submission of plans to London County Council.**]—R. *v.* ST. MARY, ISLINGTON, VESTRY, *Ex p.* WILLIAMS ON BEHALF OF MIDLAND RY. CO. (1898), 42 Sol. Jo. 612, D. C.

**216. Control by London County Council—Supervision only—No power to order local authority to make sewer.**]—Certain houses in the metropolis being drained directly into the Thames, the London County Council, in order to prevent the continued pollution of the river, made an order upon the vestry of the parish in which the houses were situate to make a new sewer according to a specified plan to carry the drainage of the houses into the nearest main sewer:—*Held:* the council had no power to make the order.—R. *v.* ST. GEORGE, HANOVER SQUARE, VESTRY, [1895] 2 Q. B. 275; 64 L. J. Q. B. 715; 73 L. T. 62; 59 J. P. 535; 44 W. R. 16; 11 T. L. R. 504; 15 R. 504, D. C.

### *D. Liability for Improper Exercise of Powers and Duties.*

*See, generally*, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 32–50.

**217. How arising—Necessity for negligence.**]—In the absence of negligence on their part, a vestry or local board is not responsible for any injury resulting to an individual from the disrepair of a sewer. Metropolis Local Management Act, 1855 (c. 120), s. 72, imposes upon the vestry or local board the duty of properly cleansing the sewers vested in them by the Act. Under the premises of pltf. was an old drain which by reason of other houses draining into it had become a "sewer." This drain having become choked, the soil therefrom flowed into the cellar of pltf., a publican, & did damage. In an action against the vestry, founded upon a breach of the duty imposed upon them by sect. 72, but not charging negligence, the jury found that the existence of the drain was unknown to defts.: that its existence might have been known to them by the exercise of reasonable care & inquiry: but that the obstruction of the drain was unknown to defts., & could not by the exercise of reasonable care have been known to them:—*Held:* upon these findings

*Sect.* 3.—*Construction, alteration and repair of sewers: Sub-sect.* 2, *D.; sub-sect.* 3.]

defts., were entitled to the verdict; & the declaration disclosed no cause of action.—HAMMOND *v.* ST. PANCRAS VESTRY (1874), L. R. 9 C. P. 316; 43 L. J. C. P. 157; 30 L. T. 296; 38 J. P. 456; 22 W. R. 826.

*Annotations:*—**Consd.** Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517. **Folld.** Bateman *v.* Poplar District Board of Works (No. 2) (1887), 37 Ch. D. 272. **Consd.** Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431; Baron *v.* Portslade-by-Sea U. C. (1899), 68 L. J. Q. B. 949. **Apld.** Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563. **Reld.** Humphries *v.* Cousins (1877), 2 C. P. D. 239; Bateman *v.* Poplar District Board of Works (1886), 33 Ch. D. 360; Price *v.* South Metropolitan Gas Co. (1895), 65 L. J. Q. B. 126. **Mentd.** Queenborough Corpn. *v.* Smeed, Dean (1904), 68 J. P. 244.

**218.** —— ——.]—BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS (NO. 2), No. 95, *ante*.

—— ——.] — *See, also*, NEGLIGENCE, Vol. XXXVI., p. 21, No. 99.

**219.** —— **Failure to cleanse sewer.**]—An action maintained against a board of works for not keeping a sewer cleaned, whereby it become choked up, & the overflow therefrom ran into pltf.'s premises. *Qu.:* whether the defence of contributory negligence on the part of pltf. though admissible under the general issue, can be established under Metropolis Management Act, 1855 (c. 120).—MEEK *v.* WHITECHAPEL BOARD OF WORKS (1860), 2 F. & F. 144, N. P.

*Annotations:*—**Dbtd.** Hammond *v.* St. Pancras, Vestry (1874), L. R. 9 C. P. 316. **Reld.** Papworth *v.* Battersea Corpn., [1914] 2 K. B. 89.

**220.** —— ——.]—HAMMOND *v.* ST. PANCRAS, VESTRY, No. 217, *ante*.

**221.** —— **Nuisance.**] — The authority over sewers, & the drainage powers given by Parliament to local boards, do not authorise the committal of a nuisance by the boards in their exercise of such powers.—A.-G. *v.* HACKNEY LOCAL BOARD (1875), L. R. 20 Eq. 626; 44 L. J. Ch. 545; 33 L. T. 244.

*Annotations:*—**Consd.** Chapman, Morsons *v.* Auckland Union (1889), 23 Q. B. D. 294. **Reld.** Flower *v.* Low Leyton L. B. (1877), 5 Ch. D. 347. **Mentd.** Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40; Bhagchand Dagdusa Gujrathi *v.* Secretary of State for India in Council (1927), 43 T. L. R. 617.

**222. Defences — Contributory negligence.**] — MEEK *v.* WHITECHAPEL BOARD OF WORKS, No. 219, *ante*.

—— **Inevitable accident.**]—*See* NEGLIGENCE, Vol. XXXVI., p. 103, No. 692; NUISANCE, Vol. XXXVI., p. 220, No. 616.

**Liability of highway authority.**]—*See* HIGHWAYS, Vol. XXVI., pp. 398–413.

**Liability for acts of contractor.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 155–167.

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SUB-SECT. 3.—IN THE DOMINIONS, DEPENDENCIES, COLONIES, ETC.

*See* Cases *infra*.

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**PART I. SECT. 3, SUB-SECT. 3.**

**g.** *Negligence in construction, repair or maintenance—Whether action lies.*]—Where an Act of Parliament authorises certain works & makes no provision for compensation to persons injured by those works, no right of action accrues provided the works are carried out with proper care & skill; but if they are carried out negligently, then a right of action does accrue to those persons injured, such injury being caused by the negligent construction of the works.—GRAHAM *v.* BOARD OF WATER SUPPLY & SEWERAGE (1891), 12 N. S. W. L. R. 287; 8 N. S. W. W. N. 77.—**AUS.**

**h.** —— ——.]—ESSENDON CORPN. *v.* MCSWEENEY (1914), 17 C. L. R. 524.—**AUS.**

**k.** —— ——.] — Defts. a municipal authority, so negligently constructed & maintained a drain, which was intended to carry the storm water from a road on to & through pltfs.' land, that water accumulated on her land to her injury, & that injury was aggravated by the fact that the water was contaminated with sewage which, without default on the part of defts. entered the drain:—*Held:* the jury was properly directed that they might award damages for the aggravation of the injury beyond what they might have awarded apart from the aggravation.—WILLOUGHBY CORPN. *v.* HALSTEAD (1916), 22 C. L. R. 352; 33 N. S. W. W. N. 68.—**AUS.**

**l.** —— ——.]—FARRELL *v.* LONDON TOWN COUNCIL (1855), 12 U. C. R. 343.—**CAN.**

**m.** —— ——.]—REEVES *v.* TORONTO CORPN. (1861), 21 U. C. R. 157.—**CAN.**

**n.** —— ——.]—WARD *v.* HALIFAX CORPN. (1873), 9 N. S. R. (3 G. & O.) 264.—**CAN.**

**o.** —— ——.]—Pltf. was lessee of premises which were drained by a sewer made by the landlord in the street, with the assent of the corpn., who paid half the cost of constructing it. The corpn. used it with the landlord's consent as part of the drainage system of the city, & connected it with two large drains of more than double its capacity. In consequence of the accidental bursting of a water pipe near it, a greater quantity of water was discharged into it than it could carry off, & pltf.'s cellar was flooded & his goods damaged:—*Held:* defts. were guilty of negligence.—COGHLAN *v.* OTTAWA CORPN. (1876), 1 A. R. 54.—**CAN.**

**p.** —— ——.]—DARBY *v.* CROWLAND TOWNSHIP CORPN. (1876), 38 U. C. R. 338.—**CAN.**

**q.** —— ——.]—Where pltf.'s horse was injured by falling into a deep uncovered drain by the side of a road in the suburbs of the city:—*Held:* the drains being proved to be well constructed, & of a kind (uncovered) usual in the suburbs, the city was not liable.—MACKINLAY *v.* HALIFAX CORPN. (1877), 11 N. S. R. (2 R. & C.), 305.—**CAN.**

**r.** —— ——.] — NORTHWOOD *v.* RALEIGH TOWNSHIP CORPN. (1882), 3 O. R. 347.—**CAN.**

**t.** —— ——.]—DUCK *v.* TORONTO CORPN. (1884), 5 O. R. 295.—**CAN.**

**a.** —— ——.]—LAW *v.* NIAGARA FALLS CORPN., BAMFIELD *v.* NIAGARA FALLS CORPN. (1884), 6 O. R. 467.—**CAN.**

**b.** —— ——.]—JENNISON *v.* EAST HANTS MUNICIPALITY (1885), 6 R. & G. 71; 6 C. L. T. 141.—**CAN.**

**c.** —— ——.]—WELSH *v.* ST. CATHARINES CORPN. (1886), 13 O. R. 369.—**CAN.**

**d.** —— ——.]—PRESTON *v.* CAMDEN TOWNSHIP (1887), 14 A. R. 85.—**CAN.**

**e.** —— ——.] — An action lies against a municipal corpn. where, by means of their works in grading their streets or otherwise, they cause surface water to be discharged upon the lands of a neighbouring proprietor to his damage, if by the exercise of proper care in performing the work such injury might have been avoided.—DERINZY *v.* OTTAWA CORPN. (1888), 15 A. R. 712.—**CAN.**

**f.** —— ——.] — SAGE *v.* WEST OXFORD TOWNSHIP (1892), 22 O. R. 678.—**CAN.**

**aa.** —— ——.]—BRYCE *v.* LOUTIT (1894), 21 A. R. 100.—**CAN.**

**bb.** —— ——.]—A municipal corpn. having properly constructed a sewer in a street in the municipality according to a general plan of drainage adopted by them, are not liable to the owner of houses subsequently erected on the street, because the sewer has not been constructed sufficiently deep to allow a proper fall to the drains from the houses.—JOHNSTON *v.* TORONTO CORPN. (1894), 25 O. R. 312.—**CAN.**

**cc.** —— ——.]—SEYMOUR *v.* MAIDSTONE TOWNSHIP (1897), 24 A. R. 370. —**CAN.**

**dd.** —— ——.]—OSTROM *v.* SILLS (1898), 28 S. C. R. 485.—**CAN.**

**ee.** —— ——.] — MCCRIMMON *v.* YARMOUTH TOWNSHIP (1900), 27 A. R. 636.—**CAN.**

**ff.** —— ——.] — BASKERVILLE *v.* FRANKLIN RURAL MUNICIPALITY (Man.) (1906), 3 W. L. R. 547.—**CAN.**

**gg.** —— ——.]—BOYD *v.* TORONTO (1911), 18 O. W. R. 897; 2 O. W. N. 902; 23 O. L. R. 421.—**CAN.**

**hh.** —— ——.]—BALDWIN *v.* WIDDIFIELD (1912), 22 O. W. R. 267; 3 O. W. N. 1348; 3 D. L. R. 880.—**CAN.**

**kk.** —— ——.]—In an action for damages for injury done to pltf.'s cellar & goods therein by water coming from the deft.'s sewer:—*Held:* water percolated from deft.'s main sewer through the connecting trench into the cellar; & defts. were liable, either for a trespass, or for negligence in constructing the sewer, consisting in leaving the earth in such a loose condition as to allow water to percolate into the cellar.—DAVIDSON *v.* LETHBRIDGE CORPN. (Alta.) (1912), 21 W. L. R. 273; 2 W. W. R. 317; 4 D. L. R. 523.—**CAN.**

**ll.** —— ——.] — DUNNE *v.* ST. ANNE RURAL MUNICIPALITY (Man.) (1914), 29 W. L. R. 197; 6 W. W. R. 1415; 20 D. L. R. 987.—**CAN.**

**mm.** —— ——.]—RUDDY *v.* MILTON (1914), 26 O. W. R. 406; 6 O. W. N. 253; 16 D. L. R. 879.—**CAN.**

**nn.** —— ——.]—PARSONS *v.* EASTNOR

TOWNSHIP (1915), 8 O. W. N. 444; 34 O. L. R. 110; 23 D. L. R. 790.—**CAN.**

**b.** ——— ———.]—If the drainage work authorised by the statute is carried out negligently & there is no statutory remedy given to a person injured thereby, an action will lie.—HEMPHILL *v.* MCKINNEY (1915), 33 W. L. R. 688; 21 B. C. R. 561.—**CAN.**

**c.** ——— ———.]—In an action for damages because of the flooding of pltf.'s cellar by water from deft. city's sewers:—*Held:* the sewer system was properly designed & installed & there was no negligence on the part of the city with respect thereto.—MCDONALD *v.* WINNIPEG CORPN. (Man.), [1927] 3 W. W. R. 276.—**CAN.**

**d.** ——— ———.]—In an action for damages for flooding of farm lands by a drain or ditch constructed on a township line between two municipalities:—*Held:* pltf. could not succeed, since he had failed to prove that deft. municipalities or either of them made the ditch or were under a statutory or common-law duty to maintain & repair it.—STEWART *v.* TACHE & SPRINGFIELD MUNICIPALITIES (Man.), [1927] 1 D. L. R. 515; [1927] 1 W. W. R. 417.—**CAN.**

**e.** ——— ———.]—TAIERI COUNTY COUNCIL *v.* HALL (1883), 1 N. Z. L. R. 360 (S. C.).—**N.Z.**

**f.** ——— ———.]—WELLINGTON CORPN. *v.* EASSON (1912), 32 N. Z. L. R. 397.—**N.Z.**

**g.** ——— ———.]—FORTESQUE *v.* TE AWAMATER BOURGH, [1918] N. Z. L. R. 991.—**N.Z.**

**h.** ——— ———.]—PIRIE & SONS *v.* ABERDEEN MAGISTRATES (1871), 9 Macph. (Ct. of Sess.), 412; 43 Sc. Jur. 190.—**SCOT.**

**k.** ——— ———.]—ST. GEORGE CO-OPERATIVE SOCIETY, LTD. *v.* GLASGOW CORPN., [1921] S. C. 872; 58 Sc. L. R. 568; [1921] 2 S. L. T. 178.—**SCOT.**

**l.** ——— ———.]—A municipality acting under statutory authority constructed drains & thereby diverted rain water from its natural course. After a heavy fall of rain the water overflowed the drains & caused damage to lower lying property:—*Held:* the municipality was not liable, unless the construction of the drains placed a greater burden on such property either as regards the quantity, velocity or direction of the water, which in the ordinary course of nature would have flown over the property.—JOHANNESBURG MUNICIPALITY *v.* JOLLY, [1915] T. P. D. 429.—**S. AF.**

**m.** ——— ——— *Obstruction.*]—MCGILLIVRAY *v.* MILLIN (1867), 27 U. C. R. 62.—**CAN.**

**n.** ——— ——— ———.]—MCCONKEY *v.* BROCKVILLE CORPN. (1886), 11 O. R. 322.—**CAN.**

**o.** ——— ——— ———.]—OLAND *v.* MACKINTOSH (N. S.) (1910), 9 E. L. R. 230.—**CAN.**

**p.** ——— ——— *Liability of third person.*]—SCROGGIE *v.* GUELPH CORPN. (1875), 36 U. C. R. 534.—**CAN.**

**q.** ——— ——— *Necessity for strict proof.*]—NOBLE *v.* TORONTO CORPN. (1882), 46 U. C. R. 519.—**CAN.**

**r.** ——— ——— *Act of God.*]—MCARTHUR *v.* COLLINGWOOD CORPN. (1885), 9 O. R. 368.—**CAN.**

**t.** ——— ——— ———.]—Where a drain is out of repair & lands are injured by water overflowing from it, the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shown that even if the drain had been in repair the same injury would have resulted.—MACKENZIE *v.* WEST FLAMBOROUGH TOWNSHIP (1898), 26 A. R. 198.—**CAN.**

**aa.** ——— ——— ———.]—FAULKNER *v.* OTTAWA CORPN. (1909), 41 S. C. R. 190.—**CAN.**

**bb.** ——— ——— ———.]—SUM KUM WO *v.* NEW WESTMINSTER CITY (1910), 15 W. L. R. 512.—**CAN.**

**cc.** ——— ——— ———.]—Where *vis major* is set up as a defence to an action for damages for the injury to or destruction of property caused by the deliberate overloading of a sewer system, deft. municipality, in order to escape liability must prove that the damage to pltf. would have been the same if the sewer system had not been overloaded, & that the *vis major* was of such a character that it would be unreasonable to expect deft. municipality to control it.—BROWN *v.* R. (Sask.) (1914), 29 W. L. R. 537; 7 W. W. R. 228; 20 D. L. R. 470.—**CAN.**

**dd.** ——— ——— *Failure of engineer to inspect works.*]—O'BYRNE *v.* CAMPBELL (1888), 15 O. R. 339.—**CAN.**

**ee.** ——— ——— *Measure of damages.*]—KENNY *v.* ST. CLEMENTS RURAL MUNICIPALITY (Man.) (1913), 21 W. L. R. 432.—**CAN.**

**ff.** *Liability for nuisance.*]—If in the construction of a sewerage work under Part 3, Metropolitan Water & Sewerage Act a method of construction is adopted (as for instance, blasting) which is not expressly authorised by the Act, or shown to be necessary for the construction of the work, & a nuisance is thereby created, which causes injury to neighbouring property, the owner of the property so injured has a remedy by action at law or suit in equity.—STUBBS *v.* MCSWEENEY (1897), 18 N. S. W. L. R. (L.) 50.—**AUS.**

**gg.** ———.]—WOOLARD *v.* BURNABY CORPN. (B. C.) (1905), 2 W. L. R. 402.—**CAN.**

**hh.** ———.]—CLOSE *v.* WOODSTOCK CORPN. (1892), 23 O. R. 99.—**CAN.**

**kk.** *Liability for trespass.*]—Where the owner of property, in carrying out sewerage works pursuant to a plan drawn by officers of the Melbourne & Metropolitan Board of Works, erects ventilating pipes on the exterior of one of the walls of his premises in such a way as to overhang his neighbour's land, he is liable for trespass.—LAWLOR *v.* JOHNSTON, [1905] V. L. R. 714.—**AUS.**

**ll.** ———.]—VAN-EGMOND *v.* SEAFORTH CORPN. (1883), 6 O. R. 599.—**CAN.**

**mm.** ———.]—TRURO CORPN. *v.* ARCHIBALD (1901), 31 S. C. R. 380.—**CAN.**

**nn.** ———.]—SNOW *v.* TORONTO CORPN. (1919), 44 O. L. R. 623; 15 O. W. N. 316.—**CAN.**

**oo.** ———.]—There is nothing in Municipal Corpns. Act, 1876, to permit a corpn. to make a drain through private land, or to take the land for the purpose of making a drain, where the effect will be to cause the waters of foreign drainage-basins to flow over & at certain times to flood pltf.'s land.—BANK OF NEW ZEALAND *v.* BLENHEIM CORPN. (1886), 4 N. Z. L. R. 10 (S. C.).—**N.Z.**

**pp.** *Time for action.*]—To a declaration charging negligence in the construction & maintenance of drains, in order to drain the street of a town, whereby the drains were choked & the sewage matter overflowed into pltf.'s premises, defts. pleaded that the cause of action did not accrue within three months:—*Held:* bad, as R. S. O. 1877, c. 174, s. 491, did not apply.—SULLIVAN *v.* BARRIE CORPN. (1880), 45 U. C. R. 12.—**CAN.**

**qq.** *Necessity for petition—Before construction of sewer.*]—*Re* BROCK & TORONTO CORPN. (1880), 45 U. C. R. 53.—**CAN.**

**rr.** *Action to compel corporation to complete drain—Who are necessary parties—Attorney-General.*]—To an action on a drainage by-law to compel a municipal corpn. to complete a drain, & also to restrain a misapplication of moneys assessed, & for an account, the A.-G. is not a necessary party.—SMITH *v.* RALEIGH TOWNSHIP CORPN. (1882), 3 O. R. 405.—**CAN.**

**tt.** ——— *Whether mandamus lies.*]—WHITE *v.* GOSFIELD TOWNSHIP (1882), 2 O. R. 287; *affd.* (1884), 10 A. R. 555.—**CAN.**

**aaa.** ——— ———.]—CRYSLER *v.* SARNIA TOWNSHIP (1887), 15 O. R. 180.—**CAN.**

**bbb.** ——— ———.]—SOMBRA TOWNSHIP *v.* CHATHAM TOWNSHIP (1892), 21 S. C. R. 305.—**CAN.**

**ccc.** ——— ———.]—DAGE-NAIS *v.* TRENTON CORPN. (1895), 24 O. R. 343.—**CAN.**

**ddd.** ———.]—Where an award has been made under Ditches & Watercourses Act, 1883, the only remedy for the non-completion of the work in accordance with the award is that provided by sect. 13 of the Act.—HEPBURN *v.* ORFORD TOWNSHIP (1890), 19 O. R. 585.—**CAN.**

**eee.** *Contract for work to be completed to engineer's satisfaction—Failure of contractor to satisfy engineer—Right of corporation to do work themselves.*]—MANGAN *v.* WINDSOR CORPN. (1894), 24 O. R. 675.—**CAN.**

**fff.** *Liability of municipality to pay compensation—To owner.*]—*Re* HODGSON & BOSANQUET TOWNSHIP CORPN. (1886), 11 O. R. 589—**CAN.**

**ggg.** ——— ———.]—*Re* MCLELLAN & CHINGUACOUCY TOWNSHIP (1900), 27 A. R. 355.—**CAN.**

**hhh.** ——— ———.]—Before entering on land for the purpose of putting a sewer through it, the city of Vancouver must, under their Act of incorporation, compensate the owner of the land through which it is proposed to lay the sewer.—ARNOLD *v.* VANCOUVER CORPN. (1904), 10 B. C. R. 198.—**CAN.**

**kkk.** ——— ———.]—WIGLE *v.* GOSFIELD SOUTH TOWNSHIP (1901), 1 O. L. R. 519; 21 C. L. T. 231.—**CAN.**

**lll.** ——— ———.]—A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair whether caused by the flooding of his land by the waters of the drain, or by failure to carry off the water which came upon the land in the course of nature.—CRAWFORD *v.* ELLICE TOWNSHIP (1899), 26 A. R. 484.—**CAN.**

**mmm.** ———.]—CALEDONIAN RY. CO. *v.* PERTH DISTRICT COMMITTEE (1901), 3 F. (Ct. of Sess.) 1025.—**SCOT.**

**nnn.** *Time for payment of debentures—Whether Drainage Act, s. 83, applies to cost of "extending, improving or altering."*]—SUTHERLAND-INNES CO. *v.* ROMNEY TOWNSHIP (1898), 19 C. L. T. 381; 26 A. R. 495.—**CAN.**

**ooo.** *Proceedings to restrain owner from constructing ditch—Whether involving question of title to land.*]—WATERS *v.* MANIGAULT (1900), 30 S. C. R. 304.—**CAN.**

**ppp.** *Alteration of report & plans—When allowable after adoption.*]—Before the report, plans, & assessment of the engineer for a drainage scheme have been adopted by the council, it can refer them back to him for further consideration or for amendment, but after they have been adopted it cannot of its own motion change or amend them; & if the drainage scheme is carried out with a material change the municipality are not protected, & are liable to make good any damages resulting from the work.—PRIEST *v.* FLOS TOWNSHIP (1901), 21 C. L. T. 113; 1 O. L. R. 78.—**CAN.**

**qqq.** *Part of drainage work out of repair—Necessity for initiating township to repair.*]—*Re* ROCHESTER TOWN-

SECT. 4.—**SEWERING OF STREETS NOT REPAIRABLE BY INHABITANTS AT LARGE.**

SUB-SECT. 1.—OUTSIDE THE METROPOLIS.

*See* HIGHWAYS, Vol. XXVI., pp. 527–529, Nos. 2263–2269.

**Apportionment & recovery of expenses.**]—*See* HIGHWAYS, Vol. XXVI., pp. 520–552.

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SUB-SECT. 2.—IN THE METROPOLIS.

**223. Sewer originally constructed by private owner—Subsequent reconstruction by local authority—Liability of private owner for reconstruction.**]—Resp., within the limits of Metropolis Management Acts & with the sanction of the Metropolitan Board of Works, constructed a sewer for the drainage of the M. road, in which he owned certain houses, & which was a "new street" within above-mentioned Acts. Afterwards applts. took up the sewer constructed by resp., & in place thereof laid down another for the drainage of the neighbourhood:—*Held:* resp. was not liable to pay any portion of the cost of the sewer laid down by applts.—FULHAM BOARD OF WORKS *v.* GOODWIN (1876), 1 Ex. D. 400; 35 L. T. 907; 41 J. P. 134.

*Annotations:*—**Apld.** Bonella *v.* Twickenham L. B. of Health, Holmes *v.* Twickenham L. B. of Health (1887), 20 Q. B. D. 63. **Consd.** Handsworth District Council *v.* Derrington, [1897] 2 Ch. 438. **Reld.** Barry & Cadoxton L. B. *v.* Parry (1895), 64 L. J. Q. B. 512; Simmonds *v.* Fulham, Vestry, [1900] 2 Q. B. 188.

**Apportionment & recovery of expenses.**]—*See* HIGHWAYS, Vol. XXVI., pp. 489–500.

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SECT. 5.—**SEWAGE DISPOSAL.**

SUB-SECT. 1.—IN GENERAL.

*See* Public Health Act, 1875 (c. 55), ss. 17, 299.

**224. Contract for disposal—Enforcement.**]—A local board of health entered into an agreement with a sewage co., in pursuance of which they afterwards granted a lease to the co. of the sewage works of a town, & of a plot of land, for a term of fourteen years, the co. covenanting that they would during the term keep the outfall of the works, with the engines, pumps, & apparatus, in proper working order, so as to admit of the free flow of the sewerage through the sewers communicating with the works, & so that the same might not at any time be stopped. To a bill by the local board against the co., complaining that the co.'s works were insufficient to treat the sewerage successfully, that they were pumping only a portion of the sewerage out of the sewers, & were damming up or heading back the residue in the sewers, so as to be a nuisance to the inhabitants of the town, & that pltfs. were being threatened with proceedings, & praying for an injunction to restrain defts. from permitting the sewage to remain in the sewers, so as to be a nuisance or damage to pltfs., & from damming up or heading back the sewage in the sewers, defts. demurred, on the grounds that the ct. could not superintend the proper performance of the works; that pltfs. had alleged no special damage; & that it was not the practice of the ct. to restrain the infringement of a public right at the suit of a corpn., except at the instance or in the presence of the A.-G. Demurrer overruled; & injunction granted.—NUNEATON LOCAL BOARD *v.* GENERAL SEWAGE CO. (1875), L. R. 20 Eq. 127; 44 L. J. Ch. 561.

*Annotations:*—**Reld.** Wallasey L. B. *v.* Gracey (1887), 36 Ch. D. 593. **Mentd.** Strelley *v.* Pearson (1880), 43 L. T. 155.

**225. Diversion into overcharged sewer—Damage to private individual—Whether action maintainable or subject of compensation.**]—The diversion by a local authority, in the execution of their statutory powers, of sewage from one drain or sewer into another already surcharged with sewage, whereby damage is occasioned to an individual occupier of premises, is not a mere act of omission in the performance of duties imposed by Public Health Act, 1875 (c. 55), & therefore only a subject for compensation under Public Health Act, 1875 (c. 55), s. 308, but is the commission of a legal wrong, in respect of which the occupier can maintain an action for the damage sustained.—DENT *v.* BOURNEMOUTH CORPN. (1897), 66 L. J. Q. B. 395.

*Annotation:*—**Consd.** Hesketh *v.* Birmingham Corpn., [1924] 1 K. B. 260.

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SUB-SECT. 2.—DISCHARGE OF SEWAGE INTO STREAMS AND SEA.

*See, generally,* Public Health Act, 1875 (c. 55), s. 17; Rivers Pollution Prevention Act, 1876 (c. 75); Rivers Pollution Prevention Act, 1893 (c. 31).

**226. Right to discharge sewage into stream—Sewage—Stream already polluted—No additional**

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SHIP & MERSEA TOWNSHIP (NO. 2) (1901), 2 O. L. R. 435; 21 C. L. T. 558.—**CAN.**

r. *Whether consent of proprietors of lands necessary—When local authority proceeds under Public Health (Scotland) Act, 1897.*]—A local authority having laid sewer pipes upon the surface of the bed of a stream, certain proprietors entitled to notice, who considered that they were prejudiced by the pipes being on the surface instead of under the surface, raised an action in which they demanded the removal of the pipes, on the ground (*inter alia*) that the notice required by Burgh Police (Scotland) Act, 1892, s. 217, had not been given—*Held:* under 1907 Act, a burgh, in the construction of sewers, can proceed either under 1892 Act, or 1897 Act, & the local authority having decided to proceed under 1897 Act, they were not bound to obtain the consent of the proprietors as required by 1892 Act.—MONTGOMERIE & CO., LTD. *v.* HADDINGTON (PROVOST & MAGISTRATES OF), [1908] A. C. 170.—**SCOT.**

t. *Necessity for report of engineer—If cost of works will exceed $800.*]—JOHNSTON *v.* TILBURY EAST TOWNSHIP (1911), 20 O. W. R. 747; 3 O. W. N. 405; 25 O. L. R. 242.—**CAN.**

a. *Construction of waterworks & sewers—Separate contracts—Resolutions of council—Formal agreement—Cancellation of one contract—Effect on the other—Right to cancel.*]—MUNICIPAL CONSTRUCTION CO. *v.* REGINA CORPN. (1912), 20 W. L. R. 405; 1 W. W. R. 958; 5 Sask. L. R. 405.—**CAN.**

b. *Complaint of non-repair — By ratepayer to township council—Resolution of council requiring engineer to make a survey & report—Report of engineer recommending new scheme of work & assessment—Adoption by council.*]—*Re* LABUTE & TILBURY NORTH TOWNSHIP (1919), 44 O. L. R. 522; 47 D. L. R. 97; 15 O. W. N. 277.—**CAN.**

c. *Action to restrain corporation from carrying out drainage scheme—Special Act detaching district after passing of resolution—To make drainage works.*]—CLAPP *v.* SANDWICH EAST TOWNSHIP (1922), 52 O. L. R. 180.—**CAN.**

d. *Duty of corporation to repair—During "lifetime" of work.*]—*Re* SCOTT & WINDSOR CORPN. (1923), 53 O. L. R. 565.—**CAN.**

e. *Rights of private landowners—To have every drain & culvert kept in order.*]—MCGREGOR *v.* WANGANUI COUNTY COUNCIL (1899), 17 N. Z. L. R. 422.—**N.Z.**

f. *Right of local authority acting under Public Health Act, 1897—Without reference to procedure under Burgh Police Act.*]—BROWN *v.* KIRKCUDBRIGHT MAGISTRATES (1905), 8 F. (Ct. of Sess.) 77.—**SCOT.**

g. *Improvement of drainage works—Whether under category of maintenance or repairs.*]—In drainage-works an operation which is an improvement may nevertheless come within category of maintenance or repairs.—HORSESHOE LAND DRAINAGE BOARD TRUSTEES *v.* SLUGGISH RIVER LAND DRAINAGE BOARD TRUSTEES (1907), 26 N. Z. L. R. 545.—**N.Z.**

PART I. SECT. 5, SUB-SECT. 2.

h. *Right to discharge sewage into stream—Sewage—Stream already polluted.*]—PORTOBELLO MAGISTRATES *v.* EDINBURGH MAGISTRATES (1882), 10

pollution.]—The only prohibition contained in Public Health Act, 1875 (c. 55), s. 17, so far as regards natural streams, is against conveying into any natural stream such sewage or filthy water as will prejudicially affect the purity of the stream. Therefore, where sewage or other filthy water is conveyed into an already polluted stream, no offence is committed against the section unless the stream is thereby made fouler than it was before.—A.-G. *v.* BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD, [1910] 1 Ch. 48; 79 L. J. Ch. 137; 101 L. T. 796; 74 J. P. 57; 26 T. L. R. 93; 54 Sol. Jo. 198; 8 L. G. R. 110, C. A.; *on appeal*, [1912] A. C. 788, H. L.

*Annotations:*—**Refd.** A.-G. *v.* Kerr & Ball (1914), 79 J. P. 51. **Mentd.** Countess Warwick S.S. Co. *v.* Le Nickel Soc. Anon., Anglo Northern Trading Co. *v.* Emlyn, Jones & Williams (1917), 87 L. J. K. B. 309; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1; Robinson *v.* R., [1921] 3 K. B. 183.

—— —— —— ——.] — *See, further*, EASEMENTS, Vol. XIX., p. 158, No. 1087–1092.

**227. —— Watercourse flowing in defined natural channel—Ending by filtration into chalk bed.**]—The implied statutory authority conferred by Public Health Act, 1875 (c. 55), s. 17, on a local authority to convey uncontaminated water along a natural stream or watercourse applies to a watercourse which, after flowing in a defined natural channel for a certain distance, comes lower down on to a chalk bed, where the water gradually filters into & is absorbed by the chalk.—MAXWELL-WILLSHIRE *v.* BROMLEY RURAL COUNCIL (1917), 87 L. J. Ch. 241; 82 J. P. 12; 16 L. G. R. 414.

**228. Right to discharge sewage into sea—Whether right exists at common law.**]—HOBART *v.* SOUTHEND-ON-SEA CORPN., No. 257, *post*.

**229.** —— ——.]—Oyster ponds or "layings" had existed as far back as living memory went upon the foreshore of an arm of the sea. The purpose for which these ponds were used was the storage of oysters, which were brought from elsewhere & laid down in the ponds in order to be fattened for the market. Certain ponds of this kind, which were enclosed by boards or concrete, were & for more than twenty years had been used in the manner above mentioned by pltf. who had purchased them in 1879 from others, who had for a period of between twenty & thirty years previously so used them. There was some evidence that the foreshore had formed part of the waste of a manor the lord of which had a several fishery thereon.

Defts. were an urban district council which had been constituted in 1914 their district being carved out of that of a previously existing rural sanitary authority. A sewer had been made in the district by the rural sanitary authority, from which an inconsiderable quantity of sewage had been discharged into the sea near the oyster ponds. Defts. made certain new sewers & connected them with the first-mentioned sewer, & the quantity of sewage discharged from that sewer was thereby greatly increased. The sewage so discharged caused a nuisance to pltf.'s oyster ponds through pollution of the same with sewage to an extent which rendered them unfit for use. In an action by pltf. against defts. in respect of the nuisance so caused: —*Held:* defts. not having any right to discharge sewage into the sea so as to cause a nuisance & having by their acts of commission caused such a discharge of sewage were wrong doers; & therefore the action was maintainable.—FOSTER *v.* WARBLINGTON URBAN COUNCIL, [1906] 1 K. B. 648; 75 L. J. K. B. 514; 94 L. T. 876; 70 J. P. 233; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735, C. A.

*Annotations:*—**Folld.** Owen *v.* Faversham Corpn. (1908), 73 J. P. 33. **Consd.** Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393.

**230.** —— ——.]—In answer to an action by the owner of an oyster fishery for an injunction to restrain a municipal corpn. from discharging untreated sewage into tidal waters so as to pollute pltf.'s oyster beds, defts. pleaded that they had a right both at common law & prescription to discharge their sewage into the sea:—*Held:* defts. had no right to discharge sewage into the sea so as to cause a nuisance, & an injunction ought to be granted.—OWEN *v.* FAVERSHAM CORPN. (1908), 73 J. P. 33, C. A.

—— **Liability for damage to fisheries.**]—*See* FISHERIES, Vol. XXV., pp. 34–36, Nos. 328–338.

**Prescriptive rights to discharge.**]—*See* EASEMENTS, Vol. XIX., pp. 156–158, Nos. 1072–1076.

**231. Action to restrain—By Attorney-General.**]—A.-G. *v.* DORCHESTER CORPN., No. 249, *post*.

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SUB-SECT. 3.—DISPOSAL BY LOCAL AUTHORITIES OF SEWAGE FROM OUTSIDE AREAS.

**232. Intercepting sewer for several parishes—Additional parish incorporated in urban sanitary district using sewer—Duty to receive additional sewage.**]—Under the powers contained in a private Act of Parliament an intercepting sewer was built to carry away the drainage of certain parishes & was vested in a board of management. The Act provided, that if at any time any local board should be constituted for any district in which any part of the sewers authorised should be situate, having powers with respect to the sewage of such district, & to levy sewer rate therein, every such local board should be at liberty, by notice to the sewers board, to participate in the benefits & liabilities of this Act, & all provisions of the Act should be applicable to them & their district in like manner in all respects as they were applicable to any other of the local authorities & their districts. By an order of the county council made under the provisions of Local Government Act, 1888 (c. 41), the area of a certain parish which was not originally within the purview of the Act was transferred & incorporated in an urban sanitary district, which discharged its sewage into the intercepting sewer:—*Held:* the urban sanitary authority were entitled to discharge the drainage of the added area into the intercepting sewer.—BRIGHTON INTERCEPTING & OUTFALL SEWERS BOARD *v.* HOVE CORPN. (1904), 68 J. P. 565; 20 T. L. R. 760; 2 L. G. R. 1255, H. L.; *affg.* S. C. *sub nom.* HOVE CORPN. *v.* BRIGHTON INTERCEPTING & OUTFALL SEWERS BOARD (1903), 67 J. P. 335, C. A.

**233. District in metropolitan area—Whether binding agreement to receive sewage from extra metropolitan area can be made.**]—Under Metropolis Management (Amendment) Act, 1862 (c. 102), the vestry of a parish within the metropolitan area

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R. (Ct. of Sess.) 130; 20 Sc. L. R. 92.—**SCOT.**

k. —— ——.]—DOWNIE *v.* MORAY (EARL) (1825), 4 Sh. (Ct. of Sess.) 167; 1 Fac. Coll. 1.—**SCOT.**

l. —— ——.]—A proprietor erected upon his land, dwelling houses, into which he introduced water pipes from a water co.'s works, & by means of drains conveyed the sewage into a streamlet which passed through a subjacent property:—*Held:* whatever right the proprietor might have to lead into the streamlet the ordinary surface water arising from his lands, he had no right to discharge therein sewage water.—MONTGOMERY & FLEMING *v.* FINDLAY (1853), 15 Dunl. (Ct. of Sess.) 853; 25 Sc. Jur. 499; 2 Stuart, 519.—**SCOT.**

m. ——.]—TIPPERARY NO. 1 RURAL DISTRICT COUNCIL *v.* SCULLY (1918), 53 I. L. T. 29.—**IR.**

*Sect. 5.—Sewage disposal: Sub-sects. 3, 4 & 5.]*

cannot, even with the consent of the London County Council, enter into a binding agreement to receive sewage from a district without the metropolitan area.

Where pltfs., the vestry of a parish within the metropolitan area, made an arrangement with certain landowners of a district without the metropolitan area, now represented by defts., the urban district council, whereby the discharge of some sewage from defts.' district into a sewer belonging to pltfs. had been permitted for many years, & this additional sewage had increased so as periodically to choke up pltfs.' sewer:—*Held:* this arrangement operated in law merely as a revocable licence, & pltfs., being a public body with public duties to perform, were not estopped or precluded by laches or acquiescence from bringing an action for an injunction to restrain defts. from using the sewer; but having regard to the conduct of pltfs. & to the difficulty in which an injunction would place defts. by compelling them to close their sewers, the ct. ought only to make a declaration that defts. were not entitled to send sewage from their district into pltfs.' sewer without the consent of pltfs.—ST. MARY, ISLINGTON, VESTRY *v.* HORNSEY URBAN COUNCIL, [1900] 1 Ch. 695; 69 L. J. Ch. 324; 82 L. T. 580; 48 W. R. 401; 16 T. L. R. 286; 44 Sol. Jo. 327, C. A.

*Annotations:*—**Apld.** L. C. C. *v.* Acton U. D. C. (1900), 17 T. L. R. 157. **Reld.** East Barnet Valley U. C. *v.* Stallard (1909), 79 L. J. Ch. 103; Liverpool Corpn. *v.* Coghill, [1918] 1 Ch. 307.

**234. —— —— Acquisition of prescriptive right impossible since 1855.**]—Before the passing of Metropolis Management Act, 1855 (c. 120), certain houses in the Acton district drained into the Stamford Brook sewers, which connected with the metropolitan drainage system. By London County Council (Acton Sewage) Act, 1898, s. 3 (1) (*a*), the Acton Urban Council were to pay to the London County Council in respect of the future use of the metropolitan main drainage system a sum based upon the rateable value of the property within their district which drained into the metropolitan system, other than houses or buildings which had acquired a prescriptive right to drain into the Stamford Brook sewers:—*Held:* as no house could since the passing of Metropolis Management Act, 1855 (c. 120), acquire by prescription a right to drain into a sewer discharging into the metropolitan drainage system, in ascertaining the sum to be paid the rateable value of houses connected with the Stamford Brook sewers before Metropolis Management Act, 1855 (c. 120), alone came within the exemption.—LONDON COUNTY COUNCIL *v.* ACTON URBAN DISTRICT COUNCIL (1902), 18 T. L. R. 689, C. A.

**235. Districts outside metropolitan area—Contract to receive sewage from another area—Proviso that second area should not allow outside connections—Subsequent Act allowing such connections.**]—By a deed dated 1874, local board A. agreed with local board B. to allow B. to cause the sewers of B. to communicate with a sewer of A., provided that the sewage of other places should not be permitted by B. to pass into the sewers of B. so as to discharge into the sewer of A. Persons in other places constructed sewers, connected with sewers of B., & discharging through them into the sewer of A. B. made no attempt to restrain them. A. claimed an injunction restraining B. & the persons in other places from causing or permitting the flow of sewage from any of such other places into sewers of B. so as to discharge as aforesaid:—*Held:* by the effect of the Public Health Act, 1875 (c. 55), s. 22, the contract made by the proviso in the deed of 1874 was discharged, & the persons in other places had a right to connect with the sewer of B. without making any application to A.—NEWINGTON LOCAL BOARD *v.* COTTINGHAM LOCAL BOARD (1879), 12 Ch. D. 725; 48 L. J. Ch. 226; 40 L. T. 58.

*Annotation:*—**Consd.** New Windsor Corpn. *v.* Stovell (1884), 27 Ch. D. 665.

**236. —— —— Construction.**]—By an agreement of Nov. 22, 1895, made between pltfs. (the urban council) & defts. (the rural council) it was provided that defts. should not permit surface water to be carried from their district into pltfs.' sewers, but should provide means for the treatment of all surface & storm water in their district & such storm & surface water should be conveyed away & dealt with by defts. in such manner as should be satisfactory to the surveyors of defts. & pltfs. respectively. Defts. subsequently drained certain surface waters into pltfs.' sewers. Litigation arose between the parties, & ultimately, on Sept. 25, 1913, an agreement was entered into between them which contained the following clause: "The T. Urban D.C. to allow the water, which is alleged to be surface water, already turned into their sewers by the R.D.C. to be continued to be so turned in in perpetuity, but the R.D.C. undertake not to permit further surface water to enter the T.U.D.C. sewers other than that above mentioned." The whole agreement was expressed to be made subject to a new sewerage scheme of pltfs. receiving the sanction of the Local Government Board. In due course this sanction was obtained. Owing to the outbreak of war the carrying out of that scheme was in abeyance, & it was not until after the armistice that the question of defts.' rights under the agreement came into prominence. Disputes arose to the number of houses of defts. which were discharging surface water in 1913, & pltfs., holding the view that the discharge of surface water by defts. was being carried out in such a manner as to constitute a breach of the agreement of 1895, as varied by the agreement of 1913, commenced the present proceedings in which they claimed that by reason of defts.' breaches of the agreement as so varied they were relieved of their obligation of receiving into their sewers the sewage or surface water from certain houses therein referred to, & alternatively, they claimed an injunction to restrain defts. from discharging any surface water into pltfs.' sewers except as therein specified:—*Held:* in the circumstances an injunction must be granted restraining defts. from permitting surface water from their district to enter pltfs.' sewers except from such premises as were on Sept. 25, 1913, discharging surface water into the sewers.—TYLDESLEY URBAN DISTRICT COUNCIL *v.* LEIGH RURAL DISTRICT COUNCIL (1925), 23 L. G. R. 243.

**237. —— Contract with private owner—Binding on successors of local authority.**]—Under Public Health Act, 1848 (c. 63), s. 48, the owner of land adjoining a district by deed agreed with the local board to do certain works & pay £10 a year, & the board gave him leave to drain through their drain all sewage from the property & houses then belonging to the landowner & from any houses thereafter to be erected on the property. Many more houses were afterwards erected, & the urban sanitary authority, which had succeeded the local board, were under a new Act of Parliament prevented from passing as before the sewage through the drain into the Thames:—*Held:* (1) the deed was not *ultra vires*, & the board could bind their successors as to the sewage of houses not then in

existence; (2) though the board were trustees for the ratepayers they had exercised their discretion, & the agreement did not appear at the time improvident, & its turning out badly for them did not affect it; (3) the law being altered so as to prevent the discharge of sewage into the Thames was no ground for setting aside the deed.—NEW WINDSOR CORPN. *v.* STOVELL (1884), 27 Ch. D. 665; 54 L. J. Ch. 113; 51 L. T. 626; 33 W. R. 223.

*Annotations:—As to* (1) **Refd.** A.-G. *v.* Hastings Corpn. (1902), 67 J. P. 165. *Generally.* **Mentd.** Milner's Safe Co. *v.* G. N. & City Ry., [1907] 1 Ch. 208; Municipal Mutual Insce. *v.* Pontefract Corpn. (1917), 116 L. T. 671.

**238. —— —— Discretion of local authority.**]—NEW WINDSOR CORPN. *v.* STOVELL, No. 237, *ante*.

**239. —— —— Subsequent Act rendering cost of disposal greater.**] — NEW WINDSOR CORPN. *v.* STOVELL, No. 237, *ante*.

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SUB-SECT. 4.—CONSTRUCTION OF WORKS AND ACQUISITION OF LAND.

*See* Public Health Act, 1875 (c. 55), ss. 16, 27, 32–34, 299.

**240. Lease of land to local authority for drainage purposes—Liability of local authority—To distribute sewage over land.**]—O. agreed to grant to a local board a lease of land for the purpose of an outfall for drainage, & " to allow the use of the land below the level of the outfall for drainage purposes." O. was to have the benefit of the sewage matter, paying nothing therefor. The board erected a sewage tank with an outlet, but without any works for distributing the sewage over O.'s land:—*Held:* the words in the agreement did not give the board a right to indiscriminately pour their sewage on the land, & they must use proper means for distributing the sewage over the land in a manner to benefit it, & not injure it for agricultural purposes.—WITHAM LOCAL BOARD *v.* OLIVER (1884), 1 T. L. R. 60.

**241. Necessity for acquisition of land—Under statutory powers—Before entry for construction of works.**]—SUTTON *v.* NORWICH CORPN., No. 1, *ante*.

**242. —— —— ——.**] — KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL COUNCIL, No. 68, *ante*.

**243. —— —— Pumping station for sewage works.**]—KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL COUNCIL, No. 68, *ante*.

**Restriction as to user of land acquired.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 120, No. 134.

**Injurious affection of other land in same ownership.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 135, No. 216.

**Necessity for consent for owner.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 291, No. 2189.

**Right to compensation.**] — *See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 138, No. 253.

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SUB-SECT. 5.—POLLUTION.

*See, generally,* Metropolis Management Act, 1855 (c. 120), s. 135; Metropolis Management Act, 1858 (c. 104), ss. 1, 24, 31, 32; Public Health Act, 1875 (c. 55), s. 17, 32; Rivers Pollution Prevention Act, 1876 (c. 75); Rivers Pollution Prevention Act, 1893 (c. 31); WATERS & WATERCOURSES.

**244. Liability of local authority—Agreement to cease pollution — Breach of agreement.**] — W. occupied bleaching works on the O. under a lease. The improvement comrs. of H. who had adopted 21 & 22 Vict. c. 98, & thereby were constituted the local board of health for H. commenced a system of drainage for H. in 1862, & the sewage flowing through the C. stream into the O. polluted its waters so that they could not be used for bleaching purposes. In 1868 W. filed his bill, praying for an injunction to restrain the comrs. from permitting the sewage to flow into the O. The suit was compromised & by an agreement, dated Mar. 1, 1869, the comrs. agreed to pay W. a certain sum for damages & that they would not, after Mar. 31, permit the sewage of H. to flow through the drains under their control into the O. The comrs. adopted the irrigation system of the disposal of their sewage, which proved wholly inadequate. Sewage flowed down the C. stream into the O. & also the overflow from the irrigation farm. W. was obliged to take other bleaching works as the waters of the O. were so polluted by the drainage that he could not use them. He therefore filed his bill against the comrs. praying for an injunction in the terms of the agreement, & for an inquiry as to damages sustained by him. Relying on the performance of the agreement, W. took a new lease of the bleaching works:—*Held:* W. was entitled to an injunction, & an inquiry as to damages as prayed by his bill.—WOOD *v.* HIGH & LOW HARROGATE IMPROVEMENT COMRS. (1874), 22 W. R. 763.

**245. —— Power to cut off unauthorised communication—Public Health Act, 1875 (c. 55), s. 21.**] —An injunction will lie against a sanitary authority to restrain them from permitting a natural watercourse to be polluted by sewage, discharged at a point within their district, when the sanitary authority has power either at common law or by statute to secure the cessation of the nuisance without constructing a new system of drainage, & without resorting to any legal proceedings to obtain an injunction on their own part.

A. was the owner of a house, & land in front of which ran a natural watercourse. The Finchley local board, having previously drained surface water through a pipe into the watercourse, in 1880 gave permission to B. to make a connection from his premises to their surface water drain. B., without permission, constructed a further connection with the drain, so as to carry sewage from a cesspool on his premises through the drain into the watercourse, thus polluting the water, & causing a nuisance to A.:—*Held:* inasmuch as the Finchley local board had a right at common law to close the unauthorised communication, & were also empowered to do so under above sect., & were under no necessity to construct a new system of drainage or to commence proceedings for an injunction against B., an injunction ought to be granted at the instance of A. to restrain them from permitting the continuance of the nuisance.—CHARLES *v.* FINCHLEY LOCAL BOARD (1883), 23

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**PART I. SECT. 5, SUB-SECT. 4.**

n. *Expropriation of easement instead of purchase of land.*]—*Re* DAVIS & TORONTO CORPN. (1891), 21 O. R. 243. —CAN.

**PART I. SECT. 5, SUB-SECT. 5.**

o. *Liability of local authority.*]—Pltf. being a manufacturer entitled to the use of a certain stream of water, defts., a corporate body of Poor Law Guardians, polluted it with sewage:—*Held:* they were liable as much as a private individual would be, for the tort to the property so committed. —LEVINGSTON *v.* LURGAN UNION GUARDIANS (1868), 18 L. T. 338.—IR.

p. *Action to restrain—By private individual—Statutory right of inhabitants to use sewers.*]—WALLACE *v.* M'CARTAN, [1917] 1 I. R. 377.—IR.

*Sect. 5.—Sewage disposal: Sub-sect. 5. Sect. 6.]*

Ch. D. 767; 52 L. J. Ch. 554; 48 L. T. 569; 47 J. P. 791; 31 W. R. 717.

*Annotations:*—**Distd.** A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527; Ogilvie *v.* Blything Union R. S. A. (1891), 65 L. T. 338. **Consd.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378.

**246. —— Damage to machinery.**]—JAMES *v.* BEDWELLTY URBAN DISTRICT COUNCIL (1916), 80 J. P. Jo. 192.

**247. Action to restrain—By Attorney-General.**]—A.-G. *v.* TUNSTALL LOCAL BOARD OF HEALTH, [1875] W. N. 66.

**248. —— ——.**]—A.-G. *v.* WILLESDEN DISTRICT COUNCIL (1896), 12 T. L. R. 528.

**249. —— ——.**]—The A.-G. can maintain an action to restrain a local authority from discharging sewage into a natural stream contrary to Public Health Act, 1875 (c. 55), s. 17, as being an infringement of a public Act of Parliament.—A.-G. *v.* DORCHESTER CORPN. (1906), 94 L. T. 682; 70 J. P. 281; 22 T. L. R. 480; 50 Sol. Jo. 438; 4 L. G. R. 675, C. A.

**250. —— ——.**]—By Public Health Act, 1875 (c. 55), s. 17, it is enacted that "Nothing in this Act shall authorise any local authority to make or use any sewer, drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity & quality of the water in such stream or watercourse, or in such canal, pond or lake." *Semble:* the words "such as would affect or deteriorate the purity & quality of the water" apply to "excrementitious" as well as to "other foul or noxious matter." The above provision is contravened if the purity & quality of the water in a stream is deteriorated at the point of discharge of a sewer; it is not necessary to show deterioration to the stream in general.

In an action by the A.-G. at the relation of the owner of lands affected, upon it being established that, owing to defects in the sewerage system of a local authority, sewage containing excrementitious & other foul or noxious matter was discharged into a stream & polluted the water at the outfall, there was granted against the local authority, in favour of the A.-G., an injunction in the terms of Public Health Act, 1875 (c. 55), s. 17; &, in favour of the relator, an injunction restraining the local authority from discharging sewage at the outfall so as to cause a nuisance to the relator by pollution of the stream.—A.-G. *v.* RINGWOOD RURAL DISTRICT COUNCIL (1928), 92 J. P. 65.

**251. —— —— Pollution requiring comprehensive scheme to abate.**]—The corpn. of a borough, acting as a local board of health, constructed a sewage system which resulted in a gradually increasing nuisance to pltfs. & the public generally. It being represented on their behalf that the evil could only be dealt with effectually by a comprehensive scheme, & that no such scheme could prudently be adopted pending a Parliamentary inquiry into the whole subject, the ct. granted an immediate injunction against any extension of the system, & restrained the continuance of the existing nuisance from & after the expiration of one year from the filing of the bill.—A.-G. *v.* HALIFAX CORPN. (1869), 39 L. J. Ch. 129; 21 L. T. 52; 17 W. R. 1088.

*Annotation:*—**Folld.** North Staffordshire Ry. Co. *v.* Tunstall L. B. of Health (1870), 39 L. J. Ch. 131.

**252. —— —— ——.**]—NORTH STAFFORDSHIRE RY. CO. *v.* TUNSTALL LOCAL BOARD OF HEALTH (1870), 39 L. J. Ch. 131.

**253. —— —— Suspension of injunction—To allow works to be constructed.**] — A.-G. *v.* FINCHLEY LOCAL BOARD (1887), 3 T. L. R. 356.

—— —— —— ——.]—*See, also*, No. 258, *post*.

**254. —— By private individual.**]—DOWNING *v.* FALMOUTH UNITED SEWERAGE BOARD (1888), 4 T. L. R. 552.

**255. —— —— Statutory right of inhabitant to use sewers.**]—A private individual is entitled to an injunction to restrain a local authority from allowing sewage to escape from its sewer to his injury, notwithstanding the statutory right of the inhabitants of the authority's district to send their sewage into its sewers.—JONES *v.* LLANRWST URBAN COUNCIL, [1911] 1 Ch. 393; 80 L. J. Ch. 145; 103 L. T. 751; 75 J. P. 68; *sub nom.* ISGOED-JONES *v.* LLANRWST URBAN DISTRICT COUNCIL, 27 T. L. R. 133; 55 Sol. Jo. 125; 9 L. G. R. 222.

*Annotations:*—**Mentd.** *Re* Portor, Amphlett & Jones (1912), 81 L. J. Ch. 544; *Re* Roney, [1914] 2 K. B. 529; White *v.* London General Omnibus Co. (1914), 58 Sol. Jo. 339 Seal *v.* Turner, [1915] 3 K. B. 194.

—— **Presumption of damage.**]—*See* NUISANCE, Vol. XXXVI., p. 163, Nos. 57, 59.

**256. —— Whether available where householders have prescriptive rights—Remedy by complaint to Ministry of Health.**] — The river Derwent was polluted by sewage from (*a*) old sewers into which householders of Derby had for more than twenty years discharged their sewage; (*b*) sewers inherited by defts., the corpn. of Derby, from their predecessors, into which householders had by virtue of their statutory rights made connections; (*c*) sewers laid by defts. themselves; (*d*) additional sewage arising from the conversion of privies into water closets under directions given by defts. Pltfs. owned Elvaston Castle & estate, situated on the river about 5½ miles below Derby, & brought this action for an injunction to restrain defts. from polluting the river so as to cause a nuisance; damages for the silting up of a lake fed from the river by a watercourse which had to be stopped up in 1902; the loss of a water wheel which had been worked by the watercourse, & the expense of replacing it by an engine; pollution to a well into which water percolated from the lake; depreciation of a house on the bank of the river & to the castle; the expense of obtaining a new water supply; & for injury to the fishing. In 1898 an order was made in the Derbyshire county ct., in an action brought by the county council, that defts. should abstain from polluting the river contrary to Rivers Pollution Prevention Act, 1876 (c. 75). By a local Act, defts. obtained the necessary powers, & they had now commenced to construct sewage works for the whole of their area:—*Held:* inasmuch as the householders had obtained in the first two classes of sewage prescriptive rights which could not be interfered with by defts., an order had been made under Rivers Pollution Act of 1876 (c. 75), & defts. were taking steps to remove the nuisance, no injunction ought to be granted; pltfs.' remedy against them in that respect was by complaint to the Local Government Board under Public Health Act, 1875 (c. 55), s. 299.—HARRINGTON (EARL) *v.* DERBY CORPN., [1905] 1 Ch. 205; 74 L. J. Ch. 219; 92 L. T. 153; 69 J. P. 62; 21 T. L. R. 98; 3 L. G. R. 321.

*Annotations:*—**Distd.** Hobart *v.* Southend-on-Sea Corpn. (1906), 75 L. J. K. B. 305. **Consd.** Hesketh *v.* Birmingham Corpn. (1922), 93 L. J. K. B. 461. **Reld.** Foster *v.* Warblington U. D. C. (1905), 70 J. P. 233; Hague *v.* Doncaster R. D. C. (1908), 100 L. T. 121; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Mentd.** R. *v.* Marshland, Smeeth &

Fen District Comrs., [1920] 1 K. B. 155; Kennard *v.* Cory, [1922] 1 Ch. 265; Huyton & Roby Gas Co. *v.* Liverpool Corpn., [1926] 1 K. B. 146.

**257.** —— ——.]—At common law there is no right to discharge sewage into the sea so as to cause nuisance to another, neither does any such right exist under Public Health Act, 1848 (c. 63), or Public Health Act, 1875 (c. 55). If the sewage pollutes an oyster bed in a fishery this amounts to an injury to the bed within Sea Fisheries Act, 1868 (c. 45), s. 53, & where a local fisheries committee have made a bye-law under Sea Fisheries Regulation Act, 1888 (c. 54), prohibiting the deposit or discharge of any substance detrimental to sea fish or sea fishing, such pollution is also illegal as a breach of the bye-law. Even if householders have a prescriptive right to discharge their sewage into existing sewers, an injunction may, notwithstanding *Harrington (Earl)* v. *Derby Corpn.*, No. 256, *ante*, be granted to restrain a nuisance by pollution arising from the sewage if, on the facts of the case, it does not appear that any interference with such rights will result from the injunction.—HOBART *v.* SOUTHEND-ON-SEA CORPN. (1906), 75 L. J. K. B. 305; 94 L. T. 337; 70 J. P. 192; 54 W. R. 454; 22 T. L. R. 307; 4 L. G. R. 757; settled, *on appeal*, 22 T. L. R. 530, C. A.

*Annotations:*—**Consd.** Foster *v.* Warblington U. C., [1906] 1 K. B. 648. **Apld.** Owen *v.* Faversham Corpn. (1908), 73 J. P. 33.

**258. Mandamus to compel works—Comprehensive scheme required.**]—A peremptory *mandamus* was issued on the application of the Local Government Board against a corpn. requiring them to execute various sewage works. The *mandamus* not having been obeyed, writs of attachment were granted against certain members of the corpn., such writs to lie in the office for a limited period, which from time to time had been extended. The corpn. applied that, having satisfied the Local Government Board that the sewage works were in process of execution with due diligence, the time should be still further extended. The ct. ordered that the writs should still lie in the office, & the matter should stand over generally with liberty to apply.—R. *v.* WORCESTER CORPN. (1905), 69 J. P. 296; 3 L. G. R. 468, D. C.

**259. Liability of private owner—Sewer vested in local authority.**]—The mere fact that a sewer has vested in a local authority under Public Health Act, 1875 (c. 55), s. 13, does not make the local authority *ipso facto* liable for the discharge of sewage matter from the sewer into a brook.

A number of cottages of which defts. were lessees drained into sewage disposal works of which a firm of builders were lessees. Crude sewage escaped from the disposal works into a brook & injured the cattle of pltf., a riparian owner. In an action against defts. for damages & an injunction pltf. adduced evidence that at the time the sewage escaped defts. were in control of the disposal works. The plans for the cottages had been passed by the local authority "subject to the drainage being carried out to the satisfaction of the surveyor." There was no evidence that the surveyor had ever given a certificate as to his satisfaction. Pltf. obtained judgment for £50:—*Held:* assuming the disposal works & their pipes were sewers vested in the local authority under Public Health Act, 1875 (c. 55), s. 13, as there was evidence that the crude sewage was discharged into the brook by the act or default of defts., & the judge had so found, there was no reason to interfere with the judgment of the county ct. judge.—TITTERTON *v.* KINGSBURY COLLIERIES (1911), 104 L. T. 569; 75 J. P. 295; 9 L. G. R. 405, D. C.

**Performance of statutory duties—Exemption from liability.**]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 22–32.

—— **Liability for non-feasance.**]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 32–38.

—— **Liability for misfeasance.**]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 38–45.

—— —— **Delegation of work to contractor.**]—*See* MASTER & SERVANT, Vol. XXXIV., p. 165, No. 1285.

**Liability for nuisance.**] — *See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 41–43, 45, 47, 48, 50, Nos. 244, 247–249, 255, 263, 276, 279–291.

—— **Remedies.**]—*See* NUISANCE, Vol. XXXVI., pp. 202–239.

—— —— **Summary abatement.**]—*See* NUISANCE, Vol. XXXVI., p. 178, No. 234.

—— **Grant of injunction.**]—*See* INJUNCTION, Vol. XXVIII., pp. 361, 362, Nos. 4–6; NUISANCE, Vol. XXXVI., pp. 223–228.

—— **Breach of injunction.**]—*See* EXECUTION, Vol. XXI., p. 593, Nos. 1742–1747.

**Liability for negligence.**] — *See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 38, 40, 41, Nos. 226, 238, 241.

**Prescriptive right to pollute.**]—*See* EASEMENTS, Vol. XIX., pp. 156–158, Nos. 1074–1096.

**Pollution of fisheries.**]—*See* FISHERIES, Vol. XXV., pp. 34–36, Nos. 330–338.

**Pollution of canals.**] — *See* RAILWAYS, Vol. XXXVIII., pp. 402, 403, Nos. 942, 946.

**Rivers Pollution Prevention Acts.**]—*See* WATERS & WATERCOURSES.

**Summary proceedings under Conservancy Acts.**]—*See* WATERS & WATERCOURSES.

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SECT. 6.—**SEWAGE WORKS OUTSIDE DISTRICT.**

*See* Metropolis Management Act, 1862 (c. 102), s. 58; Public Health Act, 1875 (c. 55), ss. 16, 27, 32–34.

**260. Necessity to follow statutory provisions.**]—Where a local authority has the consent of the local authority of an adjoining district to make sewers, or lay down water mains on land in such adjoining district, they can only do so subject to the provisions of Public Health Act, 1875 (c. 55), ss. 32, 33, 34, applicable to such work.—JONES *v.* CONWAY & COLWYN BAY JOINT WATER SUPPLY BOARD, [1893] 2 Ch. 603; 62 L. J. Ch. 767; 69 L. T. 265; 41 W. R. 616; 9 T. L. R. 469; 37 Sol. Jo. 494; 2 R. 504, C. A.

**261. Work for sewage purposes — Cleaning, levelling & cementing bottom of pool.**]—The cleaning, levelling, & cementing the bottom of a pool, into which the effluent from sewage works flows:—*Held:* to be a work for sewage purposes within Public Health Act, 1875 (c. 55), s. 32.—WIMBLEDON LOCAL BOARD *v.* CROYDON RURAL SANITARY AUTHORITY (1886), 32 Ch. D. 421; 56 L. J. Ch. 159; 55 L. T. 106; 2 T. L. R. 635, C. A.

*Annotation:*—**Mentd.** Boyce *v.* Gill (1891), 64 L. T. 824.

**262. Effect of failure to give notice.**]—Where an urban sanitary authority constructed a sewer

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**PART I. SECT. 6.**

q. *Extension through adjoining municipality.*]—One municipality cannot extend a sewer through land within the bounds of a contiguous municipality, without the consent of the latter, or without taking the statutory steps, even although the lands have been purchased by the former municipality from the private owners.—HAMILTON CORPN. *v.* BARTON TOWNSHIP CORPN. (1891), 20 S. C. R. 173.—**CAN.**

*Sect. 9.—The provision of drains: Sub-sects. 2 & 3. Sect. 10: Sub-sects. 1 & 2.]*

were properly convicted for constructing the new drain not in accordance with the directions of resps.—LONDON SCHOOL BOARD *v.* FULHAM BOROUGH COUNCIL (1903), 90 L. T. 116; 68 J. P. 117; 2 L. G. R. 409, D. C.

**277. Make of drain pipe—Power of local authority to prescribe.**]—Defts., in exercise of the powers given to them by Metropolis Local Management Act, 1855 (c. 120), s. 76, served pltf. with a notice requiring him, in the construction of the drainage to certain houses then building by him in their district, to use pipes of stoneware of the best quality. Pltf. proposed to use pipes of Aylesford manufacture as coming within the description of stoneware mentioned in the notice. To this defts. objected, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used, & they refused, unless this were complied with, to make an opening into the main sewer for pltf.'s drainage. Pltf. thereupon made the opening himself, & completed his drainage by means of Aylesford pipes:—*Held:* the evidence of scientific men as to the comparative merits of the two manufactures being conflicting, the Act gave the vestry the right to determine which of the two materials should be used; & the ct. therefore refused an application by pltf. for a perpetual injunction to restrain defts. from entering upon pltf.'s premises for the purpose of taking up the drainage works constructed by him with the Aylesford pipes.—AUSTIN *v.* ST. MARY, LAMBETH VESTRY (1858), 27 L. J. Ch. 677; 4 Jur. N. S. 1032.

**278. Insertion of vent pipe—Power of local authority to require.**]—Applt. was summoned by resps., the Westminster corpn., for non-compliance with bye-law 8 of the bye-laws made by the London County Council under Metropolis Management Act, 1855 (c. 120), s. 202, which requires that every person who shall erect a new building shall provide at least two untrapped openings to the drains, one on the house side of the trap which has to be placed between the drain of the building & the sewer, & the other as far distant from the first opening as may be practicable. He was also summoned for non-compliance with an order of resps. made under Metropolis Management Act, 1855 (c. 120), s. 74, for the drainage of the premises in question by a combined operation. The order provided that it was made subject to the provision of an additional vent pipe to be taken above the roof of one of the premises. This vent pipe was the same thing as the untrapped outlet opening required by bye-law 8 above referred to. Applt. contended that he was not bound to provide this additional vent pipe on the grounds that it was not within the words "other connected works & apparatus" in Metropolis Management Act, 1855 (c. 120), s. 76, & that resps. had no power to make a requirement dealing with a matter regulated by the bye-laws of the London County Council & going beyond those bye-laws:—*Held:* though applt. had, in fact, provided the two untrapped openings required by the bye-law, resps. had power to require by their order the provision of the additional vent pipe, & the order was binding on applt.—LORDEN *v.* WESTMINSTER CORPN. (1909), 73 J. P. 126; 7 L. G. R. 446, D. C.

**279. New or newly built house—Drainage by combined operation.**]—BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS, No. 82, *ante*.

**280. —— Application of regulations to territorial drill hall.**]—A building consisting of an armoury, storehouse, & drill hall of a volunteer corps, which is vested in the commanding officer of the corps & is intended for the use of the corps only, is not exempt from the operation of the sanitary provisions of Metropolis Management Act, 1855 (c. 120), on the ground that it is occupied & used solely for the purposes of the Crown.—WESTMINSTER VESTRY *v.* HOSKINS, [1899] 2 Q. B. 474; *sub nom.* ST. MARGARET'S & ST. JOHN'S VESTRY *v.* HOSKINS, 68 L. J. Q. B. 840; 81 L. T. 390; 63 J. P. 725; 47 W. R. 649; 15 T. L. R. 414; 43 Sol. Jo. 571, D. C.

*Annotation:*—**Refd.** Hornsey U. C. *v.* Hennell, [1902] 2 K. B. 73.

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SUB-SECT. 3.—IN THE DOMINIONS, DEPENDENCIES, COLONIES, ETC.

*See* Cases *infra*.

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## SECT. 10.—MANAGEMENT AND REPAIR OF DRAINS.

### SUB-SECT. 1.—IN GENERAL.

*See* Public Health Act, 1875 (c. 55), ss. 41, 91–111; Public Health Acts (Amendment) Act, 1890 (c. 19).

**281. Inspection of drain—Application by inspector of nuisances.**]—The written application necessary to found the jurisdiction of a local authority under Public Health Act, 1875 (c. 55), s. 41, may proceed from the inspector of nuisances employed by such local authority.—WOOD GREEN URBAN COUNCIL *v.* JOSEPH, [1907] 1 K. B. 182; 74 L. J. K. B. 954; 93 L. T. 434; 69 J. P. 464; 3 L. G. R. 1147, D. C.; *on appeal*, [1907] 1 K. B. p. 189, C. A., [1908] A. C. 419, H. L.

*Annotation:*—**Mentd.** Kingston-upon-Hull Corpn. *v.* N. E. Ry., [1915] 1 Ch. 456.

**282. Notice of intention to enter—Purpose of notice.**]—The drainage of two adjoining houses was carried into a public sewer by a single private drain. The sanitary inspector of applts., the local authority, on the application of the occupier of one of the houses, applied the smoke test to the drains of that house & found that something was wrong. Applts. subsequently served a notice on resp., the owner of the adjoining house, requiring him, in conjunction with the owners of the house where the smoke test had been applied, to take up & relay the drain within one month. The work not having been done, applts. did it & apportioned the costs in respect of resp.'s house at £23 9*s.* 2*d.* Applts. had given no notice under Public Health Act, 1875 (c. 55), s. 41, to the occupier of resp.'s house of their intention to enter the house where they applied the smoke test & examine the drain, & no evidence of emergency was given. Resp. did not pay the £23 9*s.* 2*d.* On a complaint preferred by applts. against resp. that the £23 9*s.* 2*d.* had not been paid:—*Held:* twenty-four hours' notice to the occupier of resp.'s house of the intention of applts. to enter the house where the smoke test was applied & examine the drain was not a condition precedent to the right of applts.

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**PART I. SECT. 9, SUB-SECT. 3.**

*r. Effective drainage sufficient—Discharge into inadequate sewer immaterial.*]—MOLLOY *v.* GRAY (1889), 24 L. R. Ir. 258.—**IR.**

**PART I. SECT. 10, SUB-SECT. 1.**

*t. Repairs executed by sanitary authority—Apportionment of expenses—Unnecessary substitution of new drain.*]—GLASGOW CORPN. *v.* M'OMISH, [1898] A. C. 432.—**SCOT.**

to recover the apportioned expenses from resp., inasmuch as the object of the twenty-four hours' notice required by Public Health Act, 1875 (c. 55), s. 41, part I., is to enable the surveyor to enter when his entry, but for that notice, would be a trespass. The notice is not to enable the owner, who might ultimately be liable, to come & see the result of opening the drain, inasmuch as it is not to the owner it has to be given, but to the occupier.—BROMLEY CORPN. *v.* CHESHIRE, [1908] 1 K. B. 680; 77 L. J. K. B. 332; 98 L. T. 243; 72 J. P. 34; 6 L. G. R. 156, D. C.

**283. Notice to repair—Must be reasonable.**]—A drain, which received the drainage of several houses, being in bad condition, the local authority served notices under Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, & Public Health Act, 1875 (c. 55), s. 41, upon the owners of the houses, requiring each owner within seven days to do the whole of the work necessary to remedy the defects in the drain. The local authority subsequently executed the work themselves & apportioned the expenses so incurred among the owners. Upon one of the owners refusing to pay the sum apportioned to him, the local authority took proceedings before a ct. of summary jurisdiction to recover the same. The ct. dismissed the complaint of the local authority:—*Held:* under Public Health Acts (Amendment) Act, 1890 (c. 59), s. 7, the local authority had a right of appeal against the order of the ct. of summary jurisdiction to quarter sessions, but the appeal must be dismissed on the ground that the notice was an unreasonable notice.—HORNSEY CORPN. *v.* KERSHAW (1909), 73 J. P. 335.

**284. Determination of what works necessary—Review of determination of local authority.**]—By Public Health Act, 1848 (c. 63), s. 54, the surveyor of the local board of health may examine any drain, water closet, privy, cesspool, or ash pit, & if it is in bad order & condition the board shall cause notice in writing to be given to the owner or occupier of the premises, requiring him to do the necessary works; & if such notice be not complied with, the party shall be liable to a penalty for every day during which he makes default:—*Held:* the discretion to determine what works are necessary to be done is vested in the board, &, on a proceeding before justices to recover the penalty under Public Health Act, 1848 (c. 63), s. 129, they have no jurisdiction to review its determination.—HARGREAVES *v.* TAYLOR (1863), 3 B. & S. 613; 1 New Rep. 472; 32 L. J. M. C. 111; 8 L. T. 149; 27 J. P. 325; 9 Jur. N. S. 1053; 11 W. R. 562; 122 E. R. 230.

**285. Repairs executed by sanitary authority—Recovery of expenses—Mode of recovery.**]—It is a condition precedent to service by post under Public Health Act, 1875 (c. 55), s. 267, of a notice disputing an apportionment of expenses for work executed by a sanitary authority, that the letter giving the notice should be prepaid, & where there was no evidence that the letter giving such notice was prepaid:—*Held:* (1) the notice of dispute was bad; (2) pltfs., who had given notice to an owner to do what was necessary to abate a nuisance, were acting within their powers in proceeding by summons under Public Health Acts Amendment Act, 1890 (c. 59), & Public Health Act, 1875 (c. 55), s. 41, to recover the expenses incurred by them in executing the necessary works.—WALTHAMSTOW URBAN DISTRICT COUNCIL *v.* HENWOOD, [1897] 1 Ch. 41; 66 L. J. Ch. 31; 75 L. T. 375; 61 J. P. 23; 45 W. R. 124; 41 Sol. Jo. 67.

**286. —— Apportionment of expenses — Notice disputing — Must be prepaid.**]—WALTHAMSTOW URBAN DISTRICT COUNCIL *v.* HENWOOD, No. 285, *ante*.

**Repairs executed by owner—Where sanitary authority liable—Where expenses recoverable.**]—*See* CONTRACT, Vol. XII., pp. 529–531, Nos. 4410–4420.

**287. Drain improperly constructed by owner—Liability of successor in title for alteration.**]—HEAVER *v.* FULHAM BOROUGH COUNCIL, No. 83, *ante*.

**288. Liability for nuisance — Houses drained into common cesspit.**]—MEADER *v.* WEST COWES LOCAL BOARD, No. 19, *ante*.

**289. —— Owners' failure to provide structural convenience.**]—KINSON POTTERY CO. *v.* POOLE CORPN., No. 75, *ante*.

**290. Appeal by local authority.**] — HORNSEY CORPN. *v.* KERSHAW, No. 283, *ante*.

**Liability in execution of statutory duties.**]—*See, generally*, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 15–57.

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SUB-SECT. 2.—SINGLE PRIVATE DRAINS.

*See* Public Health Act, 1875 (c. 55), s. 41; Public Health (Amendment) Act, 1890 (c. 59), s. 19.

**291. Liability for repairs.**]—Public Health Act, 1875 (c. 55), s. 41, empowers a local authority, on written application made to them stating that a drain is a nuisance or injurious to health, to enter the premises, &, if the drain appears to be in bad condition, or to require alteration or amendment, to give notice to the owner or occupier to do the necessary works.

A local Act, 1885, s. 148, in cases where two or more houses are connected with a single private drain which conveys their drainage into a public sewer, gives the corpn. all the powers conferred by Public Health Act, 1875 (c. 55), s. 41.

The owner of several houses connected with a single drain conveying their drainage into a public sewer applied for a *mandamus* to the corpn. to repair & maintain the drain. No application had been made under Public Health Act, 1875 (c. 55), s. 41:—*Held:* Local Act, 1885, did not empower the corpn. to require the owner to repair & maintain the drain, & the corpn. were liable to repair & maintain it.—R. *v.* HASTINGS CORPN., [1897] 1 Q. B. 46; 66 L. J. Q. B. 80; 75 L. T. 377; 60 J. P. 759; 45 W. R. 109; 13 T. L. R. 25; 41 Sol. Jo. 50, D. C.

*Annotations:*—**Consd.** Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807. **Refd.** Seal *v.* Merthyr Tydfil U. D. C. (1897), 77 L. T. 303; Wood Green U. C. *v.* Joseph (1905), 74 L. J. K. B. 954.

**292. ——.**]—A pipe at the rear of certain houses belonging to the same owner received the drainage of those houses, & of no other houses, & then discharged into a manhole. The drainage of other houses belonging to different owners also discharged by a common drain into the manhole. The drainage of all the houses was then conveyed from the manhole by a single private drain into a public sewer. A nuisance having arisen in the pipe at the rear of the first-named houses, the local authority gave notice to the owner of the houses to remedy the defect:—*Held:* the pipe was a sewer, & not a "single private drain" within Public Health Acts Amendment Act, 1890 (c. 59), s. 19, & the local authority were bound to remedy the defect. The fact that the sewage from the houses, before it reached the public sewer, traversed the single private drain did not make the owner of the houses liable to

*Sect.* 10.—*Management and repair of drains: Subsects.* 2 & 3.]

make good the defect in the pipe at the rear of his houses.—JACKSON *v.* WIMBLEDON URBAN COUNCIL, [1905] 2 K. B. 27; 74 L. J. K. B. 641; 92 L. T. 553; 69 J. P. 225; 53 W. R. 485; 21 T. L. R. 479; 49 Sol. Jo. 416; 3 L. G. R. 586, C. A.

*Annotations:*—**Distd.** Thompson *v.* Eccles Corpn. (1904), 73 L. J. K. B. 497. **Consd.** Wood Green U. C. *v.* Joseph, [1907] 1 K. B. 182.

**293.** ——.]—(1) Kingston-upon-Hull Corporation Act, 1903 (c. ccxlvi), s. 49 (1), enacts that "where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer" the corpn. shall have the powers conferred by Public Health Act, 1875 (c. 55), s. 41; by sub-sect. 2 that Public Health Acts Amendment Act, 1890 (c. 59), s. 19, shall cease to be in force within the city, & by sub-sect. 3 that for the purposes of this sect. the expression "drain" includes a "drain used for the drainage of more than one building whether owned or occupied by the same person or not." By Public Health Act, 1875 (c. 55), s. 4, "drain" means "any drain of & used for the drainage of one building only, or premises within the same curtilage, & made merely for the purpose of communicating therefrom with a . . . sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed":—*Held:* the true meaning of sect. 49 is that where the drainage pipe provided in common for a group of houses or properties is as exclusive & private in relation to those properties as the statutorily defined "drain" is in relation to the single house which it serves, then the liability of the owner or owners of those properties for nuisance arising from that common drainage is analogous to or corresponds with the liability of the owner of a single house for the statutory drain serving that house only.

(2) Defts. were the owners of a roadway, being a cul de sac, having twenty cottages on one side & ten on the other & communicating with their back yards only. As the result of a notice under Public Health Act, 1875 (c. 55), s. 23, served on them in 1876, defts. laid a conduit or 12 inch pipe under the whole length of the roadway, the greater part of which was outside the limit mentioned in sect. 23 of 100 feet from the public sewer with which it communicated. This conduit was used only for surface water, including slops from the back yards of the cottages. The smaller conduits from the gullies in these back yards were 4 inch pipes, & met as a rule in pairs just within the curtilages of the cottages & were then carried by 6 inch conduits into the main conduit. As the result of another notice under Public Health Act, 1875 (c. 55), s. 94, served on them in 1877, defts. dealt with the surface water of the roadway by constructing seven gullies along the length of the roadway with 6 inch conduits leading into the main conduit. The land on which the roadway was built, the cottages on each side, & the land at the closed end had throughout been the property of defts. Pltfs., purporting to act under Kingston-upon-Hull Corporation Act, 1903 (c. ccxlvi), s. 49, & Public Health Act, 1875 (c. 55), s. 41, had recently required defts. to abate a nuisance in respect of the drainage of the cottages & roadway, & having executed the necessary works themselves now claimed a declaration of charge upon the property for the costs of the work in connection with the main conduit. The question was whether the main conduit was a "single private drain" within Kingston-upon-Hull Corporation Act, 1903 (c. ccxlvi), s. 49, & as incidental thereto two further questions were raised: (*a*) whether the roadway had ever been dedicated to the public as a highway, & (*b*) whether the conduit was vested in pltfs. or fell within the exceptions contained in Public Health Act, 1875 (c. 55), s. 13, as being made either for private profit or under defts.' railway Acts:—*Held:* the case did not fall within the exceptions contained in Public Health Act, 1875 (c. 55), s. 13.—KINGSTON-UPON-HULL CORPN. *v.* NORTH EASTERN RY. CO., [1915] 1 Ch. 456; 112 L. T. 584; 79 J. P. 221; 59 Sol. Jo. 318; *sub nom.* HULL CORPN. *v.* NORTH EASTERN RY. CO., 84 L. J. Ch. 329; 13 L. G. R. 587; *on appeal*, [1916] 1 Ch. 31, C. A.

*Annotation:*—*Generally*, **Mentd.** Vine *v.* Wenham (1915), 84 L. J. Ch. 913.

**294.** —— **Part of drain admitted to be a sewer.**]—WOOD GREEN URBAN COUNCIL *v.* JOSEPH, No. 9, *ante*.

**295.** —— **Notice to one owner.**]—Two houses belonging to different owners were connected with a public sewer by a single private drain. The local authority of the district, who had adopted Public Health Act, 1890 (c. 59), served upon one of the owners a notice, under Public Health Act, 1875 (c. 55), addressed to both, requiring them to abate a nuisance arising from the drain by doing certain works, & stating that, unless the nuisance were abated, the local authority would proceed to enforce the abatement & to recover costs & penalties. The owner upon whom such notice was served accordingly did the work, & brought an action against the local authority to recover the cost as money paid by her at their request:—*Held:* the notice given by defts. to pltf. was not a request to do the work which would support the action; no such request could be implied, because defts. were not themselves compellable to do the work, & under sect. 41 of the Act of 1875 & sect. 19 of the Act of 1890 could have compelled the owners to do it, & therefore defts. were not liable.—SELF *v.* HOVE COMRS., [1895] 1 Q. B. 685; 64 L. J. Q. B. 217; 72 L. T. 234; 59 J. P. 103; 43 W. R. 300; 39 Sol. Jo. 265; 15 R. 283, D. C.

*Annotations:*—**Dbtd. & Distd.** Hill *v.* Hair, [1895] 1 Q. B. 906. **Folld.** Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205. **Distd.** Klett *v.* Camberwell Vestry (1896), 60 J. P. 411. **Expld.** R. *v.* Hastings Corpn., [1897] 1 Q. B. 46; North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972. **Consd.** Proctor *v.* Islington Corpn. (1902), 18 T. L. R. 505. **Apprvd.** Thompson *v.* Eccles Corpn., Haedicke *v.* Friern Barnet U. C., [1905] 1 K. B. 110. **Refd.** Seal *v.* Merthyr Tydfil U. D. C. (1897), 77 L. T. 303.

**296.** —— **Repairs involving trespass—Validity of notice.**]—Five houses of which three belonged to one owner & two to another were connected with the public sewer by a single private drain. The drain being a nuisance & injurious to health, the local authority served on each of the two owners a notice under Public Health Act, 1875 (c. 55), s. 41, & Public Health Act, 1890 (c. 59), s. 19, addressed to them jointly requiring them to relay the whole of the drain:—*Held:* the fact that neither of the owners could relay the part of the drain situate in the other's premises without committing a trespass was no objection to the validity of the notice & on non-compliance with the notice the local authority might execute the work & recover the expenses from the owners under the last-mentioned sect.—LANCASTER *v.* BARNES DISTRICT COUNCIL, [1898] 1 Q. B. 855; 67 L. J. Q. B. 744; 78 L. T. 355; 62 J. P. 405; 46 W. R. 623, D. C.

*Annotation:*—**Refd.** Reeve *v.* Sadler (1903), 1 L. G. R. 441.

**297.** —— **Defect of structural character.**]—Under Public Health Act, 1875 (c. 55), s. 41, the

local authority may require a defect in a drain, or, where Public Health Acts Amendment Act, 1890 (c. 59), is in force, is a "single private drain," to be remedied where that defect causes a nuisance, though the defect is of a structural character & arises from want of repair.—SOUTHWOLD CORPN. *v.* CROWDY (1903), 67 J. P. 278; 1 L. G. R. 899.

*Annotation:*—**Refd.** Thompson *v.* Eccles Corpn., [1904] 2 K. B. 1.

**298. —— Owner of property where nuisance found—Notice to neighbouring owners unnecessary.**]—A drain pipe passing through private property, & receiving & conveying to a public sewer the drainage of several houses belonging to different owners, is a "single private drain" within Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19. A notice to the owner of one of the houses on whose land a nuisance, arising from the defective state of such a drain pipe, is found to exist, to abate the same & to execute certain works for that purpose, is a sufficient notice to throw upon him the duty of abating the nuisance, &, upon his default, to entitle the local authority to recover from him the expenses incurred by them in so doing. In such a case no notice need be given to the other owners, & the provisions of Public Health Acts (Amendment) Act, 1890 (c. 59), s. 19, as to apportionment of the expenses incurred by the local authority in executing the necessary works are not applicable.—THOMPSON *v.* ECCLES CORPN., HAEDICKE *v.* FRIERN BARNET URBAN COUNCIL, [1905] 1 K. B. 110; 74 L. J. K. B. 130; 91 L. T. 750; 69 J. P. 45; 53 W. R. 211; 21 T. L. R. 49; 3 L. G. R. 20, C. A.

*Annotations:*—**Consd.** Jackson *v.* Wimbledon U. C., [1905] 2 K. B. 27. **Distd.** Wood Green U. C. *v.* Joseph, [1907] 1 K. B. 182. **Refd.** Wilson's Music & General Printing Co. *v.* Finsbury B. C., [1908] 1 K. B. 563; Kingston-upon-Hull Corpn. *v.* N. E. Ry., [1916] 1 Ch. 31.

**What is a "single private drain."**]—*See* Part I., Sect. 1, *ante*.

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SUB-SECT. 3.—IN THE METROPOLIS.

*See* Metropolis Management Act, 1855 (c. 120), ss. 82–85; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 64; Public Health (London) Act, 1891 (c. 76), ss. 2, 15, 42, 142, sched. IV.

**299. Defective drain — Notice to remedy — Validity of.**]—A., the sanitary inspector of S., a metropolitan parish, gave a notice in his own name, as inspector, to H., an owner of a house, to reconstruct drains, etc., in three days, & afterwards, on default, A. did the work, & the S. vestry took out a summons against H. to recover the expenditure. No resolution of the vestry or of any committee thereof to give the notice was proved, but only a meeting of three members of a sub-committee, who were proved to have met & resolved that the inspector should enter & execute the works himself:—*Held:* the notice given by the inspector was bad, & the statute not being complied with the summons against H. was properly dismissed.—ST. LEONARD VESTRY *v.* HOLMES (1885), 50 J. P. 132, D. C.

*Annotations:*—**Distd.** R. *v.* Chapman, *Ex p.* Arlidge, [1918] 2 K. B. 298. **Refd.** Bowyer, Philpott & Payne *v.* Mather, [1919] 1 K. B. 419.

**300.** —— —— ——.]—The previous approval of a metropolitan vestry to a resolution of its public health committee, duly appointed under Metropolis Management Act, 1855 (c. 120), s. 58, whereby notice is served on the owner or occupier of premises to put a drain into proper condition, under Metropolis Management Act, 1855 (c. 120), s. 85, is not necessary for the authorisation of such notice, provided that the action taken by the committee be one which can properly be ratified by the vestry.—FIRTH *v.* STAINES, [1897] 2 Q. B. 70; 66 L. J. Q. B. 510; 76 L. T. 496; 61 J. P. 452; 45 W. R. 575; 13 T. L. R. 394; 41 Sol. Jo. 494, D. C.

*Annotations:*—**Apld.** R. *v.* Chapman, *Ex p.* Arlidge, [1918] 2 K. B. 298. **Refd.** Bowyer, Philpott & Payne *v.* Mather, [1919] 1 K. B. 419.

**301.** —— —— ——.]—S. being the owner of certain premises, resps. on Feb. 5 served a notice on him under Public Health (London) Act, 1891 (c. 76), requiring him to abate a certain nuisance, being a defective drain. On Feb. 19 another notice was served requiring him to abate the nuisance & relay the drain. On Mar. 20 the public health committee of resps. caused a notice to be served on him under Metropolis Management Act, 1855 (c. 120), & Metropolis Management Act, 1862 (c. 120), that the drain was defective, & requiring him to amend the same & to execute the works that the notice set out in detail. In Apr. S. executed certain repairs to the drain, but not those in the notice of Mar. 20. On June 18 the committee reported to resps. that they had had the report of the inspector before them & had given directions for the statutory notices to be served on S., & they recommended that a notice be served on applt. under Metropolis Management Act, 1855 (c. 120), requiring him to execute such works as were necessary to amend the drain which was in bad order, & that in the event of non-compliance proceedings should be taken. On June 18 resps. by resolution adopted this recommendation, & on July 14 a notice was served on S. requiring him to amend the drain, & for that purpose to execute the works that this notice set out in detail:—*Held:* the notice of July 14 was not a notice of an order, & S. could not be convicted for non-compliance.—SWINBOURN *v.* HAMMERSMITH BOROUGH COUNCIL (1903), 88 L. T. 596; 67 J. P. 258; 2 L. G. R. 280, D. C.

**302. Nuisance from defective drain—Liability of builder executing repairs.**]—Public Health (London) Act, 1891 (c. 76), s. 42, provides that, "If a water closet or drain is so constructed or repaired as to be a nuisance or injurious or dangerous to health, the person who undertook or executed such construction or repair shall, unless he shows that such construction or repair was not due to any wilful act, neglect, or default, be liable to a fine," & then there is a proviso that when a person is charged with an offence under this sect. he may have brought before the ct. any other person, being his agent, servant or workman, whom he charges as the actual offender, & if he can prove that this other person committed the offence without his knowledge or consent, he shall be exempt from the fine, & the other person may be summarily convicted:—*Held:* the builder, who is employed by the owner to repair a drain, & who so repairs it as to be a nuisance & injurious to health, may be proceeded against under the sect. in the first instance, as he is the person who undertook or executed the repairs within the sect.—YOUNG *v.* FOSTEN (1893), 69 L. T. 147; 58 J. P. 8; 41 W. R. 589; 37 Sol. Jo. 496; 5 R. 430, D. C.

**303. —— Leaking drain.**]—On a complaint written upon an anonymous postcard, the inspector of a sanitary authority in London on Mar. 24, 1906, visited certain premises but found no evidence of a nuisance. On May 17, 1906, the sanitary authority having served the occupier of these premises with a notice under Metropolis Management Act, 1855 (c. 120), s. 82, & Public

*Sect.* 10.—*Management and repair of drains: Sub-sect.* 3. *Sect.* 11: *Sub-sect.* 1.]

Health (London) Act, 1891 (c. 76), s. 40, entered on the premises & opened up the ground, when it was found that the drain there was made with clay joints, which clay had entirely perished. Subsequently, notices having been served on the owner of the premises to abate a nuisance, under Public Health (London) Act, 1891 (c. 76), on his failing to comply with the notices, a summons was taken out, & in Oct. the magistrate, finding that there was "a leaking drain," made an order upon him to abate the nuisance under Public Health (London) Act, 1891 (c. 76), s. 4:—*Held:* the magistrate having found that there was "a leaking drain," had not merely found that there was a defective drain but that there was a leaking drain which was a nuisance within the meaning of Public Health (London) Act, 1891 (c. 76), s. 4.—FARMER *v.* LONG (1907), 72 J. P. 91; 6 L. G. R. 368.

**304. Nuisance from drain acting properly—Liability of owner or occupier.**] — A detached portion of the parish of C. had no separate main drainage system, but certain houses therein were drained by means of pipes carrying the sewage into cesspools, the overflow pipes from which communicated with main pipes within such detached portion. The drainage of the houses, including such communications, was constructed with the sanction of the C. vestry, as the local authority under the Metropolis Management Act, 1855 (c. 120). The main pipes communicated with watercourses within the adjoining district of the F. local board, & the sewage from the cesspools passed through the main pipes into the watercourses, & caused a nuisance in such adjoining district. The F. local board brought an information & action, to which the owners & occupiers of the houses were not parties, against the C. vestry, for an injunction to restrain them from permitting, authorising, or directing any sewage to pass from the detached portion of C. into the watercourses so as to cause a nuisance:—*Held:* inasmuch as the cesspools & drains were acting properly qua cesspools & drains, no proceedings could be successfully taken by the C. vestry against the owners or occupiers of the houses under Metropolis Management Act, 1855 (c. 120), s. 85; & as the cause & effect of the nuisance were not both within the area of the jurisdiction of the C. vestry, it was doubtful whether proceedings could be taken by them against the owners or occupiers of the houses under 18 & 19 Vict. c. 121.—A.-G. *v.* CLERKENWELL VESTRY, [1891] 3 Ch. 527; 60 L. J. Ch. 788; 65 L. T. 312; 40 W. R. 185.

*Annotations:*—**Folld.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378. **Refd.** *Re* M'Intosh & Pontypridd Improvement Co. (1891), 8 T. L. R. 128; Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431; Yorkshire West Riding Council *v.* Holmfirth Urban S. A., [1894] 2 Q. B. 842; Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; East Barnet Valley U. C. *v.* Stallard, [1909] 2 Ch. 555.

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## SECT. 11.—CONNECTION OF DRAINS WITH SEWERS.

### SUB-SECT. 1.—OUTSIDE METROPOLIS.

*See, now,* Public Health Act, 1925 (c. 71), ss. 37, 38.

*See, also,* Public Health Act, 1875 (c. 55), ss. 21, 22, Public Health Acts (Amendment) Act, 1890 (c. 59), s. 18, 1907 (c. 53), ss. 13, 38; Rivers Pollution Prevention Act, 1876 (c. 75), s. 7.

**305. Right to drain into sewer.**] — Public Health Act, 1875 (c. 55), s. 17, does not affect the right conferred by sect. 21 upon the owner or occupier of premises within the district of a local board, to drain into the existing sewers of the board, & it is for the board to see that their sewers are so arranged that they do not contravene sect. 17.

Pltfs., who were owners of premises within the district of deft. local board, had, eight years before action, connected a drain with defts.' sewer, which was formerly an open watercourse, & still emptied into a natural stream. Proceedings having been taken against the board to restrain the fouling of the stream, the board gave notice to pltfs. under Public Health Act, 1875 (c. 55), s. 21, of their intention to cut off their drain:—*Held:* pltfs.' right to drain into the sewer was absolute, the board was bound to see that sewage was not conveyed into the stream without first being freed from noxious matter, & the board must be restrained by injunction from cutting off pltfs.' drain.—AINLEY *v.* KIRKHEATON LOCAL BOARD (1891), 60 L. J. Ch. 734; 55 J. P. 230; 7 T. L. R. 323; 35 Sol. Jo. 315; *subsequent proceedings, sub nom.* KIRKHEATON DISTRICT LOCAL BOARD *v.* AINLEY SONS & Co., [1892] 2 Q. B. 274, C. A.

*Annotations:*—**Apld.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378. **Refd.** Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; West Riding of Yorkshire Rivers Board *v.* Gaunt (1902), 19 T. L. R. 140.

**306.** ——.]—In an action by a landowner against a corpn., the urban sanitary authority for the borough of D., for an injunction to restrain them from discharging or allowing to be discharged sewage upon his lands from the sewers vested in them so as to cause a nuisance, defts. set up a prescriptive right based on the presumption of a lost grant by pltf.'s predecessors in title to trustees for the benefit of the inhabitants of the borough to drain all sewage from any tenements built or to be built within the borough, & to discharge the same on pltf.'s lands. This claim of right failed. It was proved, however, that there were a number of houses in the borough in respect of which prescriptive rights had been acquired to pass sewage into & along the sewers, & that there were other houses the connections of which with the sewers had been made with the consent or by the acquiescence of defts.:—*Held:* a householder has an absolute right under Public Health Act, 1875 (c. 55), s. 21, to connect his drains with a sewer, subject only to the regulations prescribed by the local authority in whom the sewer is vested as to the manner in which the connections are to be made, & therefore an injunction could not be granted to restrain defts. from allowing any future connections to be made with their sewers.—BROWN *v.* DUNSTABLE CORPN., [1899] 2 Ch. 378; 68 L. J. Ch. 498; 80 L. T. 650; 63 J. P. 519; 47 W. R. 538; 15 T. L. R. 386; 43 Sol. Jo. 508.

*Annotations:*—**Apld.** East Barnet Valley U. C. *v.* Stallard [1909] 2 Ch. 555. **Refd.** Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; St. Mary Islington Vestry *v.* Hornsey U. C. (1900), 69 L. J. Ch. 324; Southall Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742; West Riding of Yorkshire Rivers Board *v.* Gaunt (1902), 19 T. L. R. 140; Faber *v.* Gosworth U. D. C. (1903), 88 L. T. 549; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; Waltham Holy Cross U. D. C. *v.* Lee Conservancy Board (1910), 103 L. T. 192.

**307.** ——.]—KINSON POTTERY Co. *v.* POOLE CORPN., No. 75, *ante.*

**308.** —— **Prescriptive right.**] — Pltf., the owner of land bounded by a stream, into which was discharged a sewer within the district of a rural sanitary authority, alleged that the sewer was vested in the sanitary authority, that the sewer was being used not only by persons who

had a prescriptive right to discharge their drains into it, but by persons who had no such right, & that such user had become a public & private nuisance, which was constantly increasing. He prayed an injunction to restrain defts. from causing or permitting the sewage of the district to be conveyed through the sewer into the stream, other than sewage so conveyed by prescriptive right before the commencement of the action. It was in evidence that defts. had been endeavouring ever since the passing of Public Health Act, 1872 (c. 79), to provide a system of drainage for the district, but hitherto without success :—*Held :* assuming the above allegations, which defts. denied, to be true, pltf. had no right to an injunction. Inasmuch as defts. could not prevent owners with prescriptive rights from using the sewer, & could not stop up the sewer as against them.

The vesting of the sewers in the local authority gives them a very limited right of ownership . . . the vesting is not an absolute right of ownership but a modified & limited right of ownership, & it does not in my opinion give them a right to stop up the sewer (JESSEL, M.R.).—A.-G *v.* DORKING UNION (1882), 20 Ch. D. 595 ; 51 L. J. Ch. 585 ; 46 L. T. 573 ; 30 W. R. 579, C. A.

*Annotations :*—**Apld.** A.-G. *v.* Acton L. B. (1882), 22 Ch. D. 221 **Distd.** Charles *v.* Finchley L. B. (1883), 23 Ch. D. 767. **Apld.** R. *v.* Staines L. B. (1888), 60 L. T. 261. **Consd.** Warwick & Birmingham Canal Navigation Co. *v.* Burman (1890), 63 L. T. 670 ; A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527. **Apld.** Ogilvie *v.* Blything Union R. S. A. (1892), 67 L. T. 18. **Distd.** Yorkshire West Riding Council *v.* Holmfirth U. S. A., [1894] 2 Q. B. 842. **Consd.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378 ; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205. **Distd.** Foster *v.* Warblington District Council, [1906] 1 K. B. 648 ; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Refd.** Kirkheaton L. B. *v.* Ainley, [1892] 2 Q. B. 274 ; Bradford *v.* Eastbourne Corpn., [1896] 2 Q. B. 205 ; Peebles *v.* Oswaldtwistle U. D. C. [1897] 1 Q. B. 384 ; Baron *v.* Portslade-by-Sea U. C. (1900), 69 L. J. Q. B. 899 ; West Riding Rivers Board *v.* Butterworth & Roberts (1907), 98 L. T. 47. **Mentd.** Hall *v.* Ewin (1887), 37 Ch. D. 74 ; Berton *v.* Alliance Economic Investment Co. (1921), 38 T. L. R. 187

**309.** —— ——.]—R. *v.* STAINES LOCAL BOARD, No. 118, *ante.*

**310.** —— ——.]—The provision of Public Health Act, 1875 (c. 55), s. 13, that all existing & future sewers within the district of a local authority, subject to the exceptions therein mentioned, " shall vest in & be under the control of such local authority " does not make the sewers absolutely theirs so as to render them to all intents & purposes the same as if they were private owners of the sewers.

An action was brought against a sanitary authority to restrain the pollution of a ditch running through the main street of a town past pltf.'s lands into the sea. The ditch was covered over as it passed through the town, but was afterwards an open stream, & had been for many years seriously polluted. Pltf. claimed an injunction to restrain defts., as the owners of the covered part of the ditch & as the sanitary authority of the district, from permitting any sewage or other noxious matter to come on to her lands or into her part of the ditch. In 1877 the attention of defts. was called to the condition of the houses in two new streets, & they required the owners of those houses to improve their drains. The owners accordingly ran two drains down the two streets & made communications with the main sewer. These drains were made for the purpose of carrying off surface water, & were not connected with any surface water & were not connected with any privies, but in addition to the surface water the slops of the houses were allowed to be thrown down the drains. In 1885, in consequence of a complaint made to defts., notices were directed to be served upon the occupiers to divert all polluting matter from the sewer, & the inspector of nuisances was ordered to inspect all drains entering into the main sewer. The notices so served were all effective in causing an abatement of the nuisance except four. Subsequent directions of defts. as to cleansing the sewer were duly carried out, the effect of which was to diminish the pollution of it to some extent. The defence was, that defendants had done everything in their power to prevent any nuisance from being occasioned to pltf. or her property ; & that they were not responsible for the nuisance :—*Held :* defts. had been diligent, & had done all they could to abate the nuisance ; & it was almost inevitable that some prescriptive rights of drainage should have been acquired, with which defts. had no authority to interfere. Therefore defts. had no right physically to disconnect the drains so as to abate the nuisance ; & the action could not be maintained.—OGILVIE *v.* BLYTHING UNION RURAL SANITARY AUTHORITY (1891), 65 L. T. 338 ; *affd.* (1892), 67 L. T. 18, C. A.

*Annotation :*—**Refd.** Southall Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742.

**311.** —— ——.]—Where a local authority have for some years allowed effluents produced in the course of a trade or manufacture to be discharged into their sewers they are not justified under the provisions of Rivers Pollution Prevention Act, 1876 (c. 75), c. 7, in cutting off the connection made with their sewer merely because the nature of the trade effluent is such that it renders the disposal by irrigation or otherwise of the sewage matter less efficient than it might otherwise be.—EASTWOOD BROTHERS, LTD. *v.* HONLEY URBAN COUNCIL, [1901] 1 Ch. 645 ; 70 L. J. Ch. 313 ; 84 L. T. 169 ; 49 W. R. 308 ; 45 Sol. Jo. 292, C. A.

*Annotations :*—**Expld.** Brook *v.* Meltham U. C., [1908] 2 K. B. 780. **Distd.** Liverpool Corpn. *v.* Coghill, [1918] 1 Ch. 307. **Refd.** Southall Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742 ; West Riding of Yorkshire Rivers Board *v.* Gaunt (1902), 67 J. P. 183 ; West Riding of Yorkshire Rivers Board *v.* Preston (1904), 92 L. T. 24 ; West Riding Rivers Board *v.* Butterworth & Roberts (1907), 98 L. T. 47.

**312.** —— **Notice of intention.**] — A drain, which ran along a highway past a village & emptied itself into a disused quarry at the foot of pltf.'s garden, had been used for many years to carry surface water, & also slop water, from some of the houses adjoining the highway. This drain was originally a highway drain, but was now a sewer vested in the rural sanitary authority under Public Health Act, 1875 (c. 55). The solid sewage matter from the houses in the village drained into cesspools ; but recently one of the householders, purporting to act under Public Health Act, 1875 (c. 55), s. 21, without any notice to the local authority, constructed a water-closet & discharged the solid sewage matter therefrom into this drain by means of a communication which he already had with the drain for the purpose of carrying off his slop water, therefore causing a nuisance to pltf. :—*Held :* he ought to be restrained by injunction on the ground that the conditions imposed by Public Health Act, 1875 (c. 55), s. 21, as to notice & otherwise had not been complied with.—GRAHAM *v.* WROUGHTON, [1901] 2 Ch. 451 ; 70 L. J. Ch. 673 ; 84 L. T. 744 ; 65 J. P. 710 ; 49 W. R. 643 ; 17 T. L. R. 573 ; 45 Sol. Jo. 595, C. A.

*Annotation :*—**Consd.** Leeds & District Worsted Dyers & Finishers Assocn. *v.* West Riding of Yorkshire Rivers Board (1906), 70 J. P. 480.

*Sect.* 11.—*Connection of drains with sewers: Sub-sects.* 1, 2 & 3. *Sect.* 12: *Sub-sects.* 1, 2 & 3. *Sect.* 13.]

**313. —— Subject to regulations of local authority.**]—BROWN *v.* DUNSTABLE CORPN., No. 306, *ante*.

**314. Interference with right of local authority—Where drain made by consent.**]—CLEGG *v.* CASTLEFORD LOCAL BOARD, [1874] W. N. 229.

**315.** —— ——.] — A.-G. *v.* ACTON LOCAL BOARD, No. 150, *ante*.

**316.** —— ——.]—Where a local authority for valuable consideration permit an owner of premises without their district to connect the drains of those premises with their sewers, or where they themselves make the connection, without imposing terms upon the owner under Public Health Act, 1875 (c. 55), s. 22, they cannot afterwards impose terms for the continuance of that connection.

A residential property, of which the dwelling-house was without the district of pltf. authority, but the lodge was within the district, had a system of drainage whereby the drainage from the house went into a cesspool with an overflow drain leading to a pond, the cesspool & pond being both within pltfs.' district, & the drainage from the lodge joined the overflow drain before it reached the pond. The pond having become a nuisance, the owner, at the instance of pltfs., connected the overflow drain by a 9-inch pipe direct with a storm-water drain in pltfs.' district. Pltfs., without consulting the owner, subsequently connected the storm-water drain with a soil sewer, & ultimately connected the 9-inch pipe direct with the sewer. Deft. having bought the property, pltfs. required him to agree terms under Public Health Act, 1875 (c. 55), s. 22, for the continuance of this connection or provide other means for the disposal of his sewage, & claimed an injunction to restrain him from permitting the drainage of that part of his property which was without their district to discharge into their sewers until terms were settled:—*Held:* the connection having been already made, sect. 22 no longer applied, & pltfs.' claim failed.—EAST BARNET VALLEY URBAN COUNCIL *v.* STALLARD, [1909] 2 Ch. 555; 79 L. J. Ch. 103; 101 L. T. 642; 74 J. P. 9; 26 T. L. R. 22; 54 Sol. Jo. 30; 8 L. G. R. 192, C. A.

—— ——.]—*See, also*, No. 325, *post*.

**317. —— Connection made without consent.**]—CHARLES *v.* FINCHLEY LOCAL BOARD, No. 245, *ante*.

**318. Connecting pipe laid through private property—Necessity for owner's consent.**]—RUSSELL *v.* KNIGHT & M'DONALD (1894), *Times*, May 9.

**319.** —— ——.]—In a private way or passage on land of defts. there was a pipe laid by defts. which carried off the drainage of a number of houses belonging to them, & which was accordingly a sewer vested in the local authority. Pltf., who was the owner of a house & garden adjoining the private passage, desired to drain his house into the sewer, &, at his request the local authority connected a drain, which pltf. had put down on his own property, with the sewer by means of a short length of pipe laid in the passage:—*Held:* although the sewer was vested in the local authority, & although Public Health Act, 1875 (c. 55), s. 21, gives the owner of premises a right to cause his drains to empty into the sewers of the local authority neither the local authority nor pltf. was entitled, without defts.' consent, to lay the connecting pipe in their property.—WOOD *v.* EALING TENANTS, LTD., [1907] 2 K. B. 390; 76 L. J. K. B. 764; 97 L. T. 520; 71 J. P. 456; 5 L. G. R. 1055, D. C.

**320. Construction of inspection chamber in footpath.**]—The right given to the owner or occupier of any premises within the district of a local authority, under Public Health Act, 1875 (c. 55), s. 21, to cause his drains to empty into the sewers of that authority on condition of his giving the required notice & of complying with the regulations of that authority does not entitle such owner or occupier to break up the surface of a footway in a public highway for the purpose of constructing therein an inspection chamber in a drain which had already been connected with a public sewer. *Semble:* at a time of making a connection between a drain & sewer under sect. 21, an inspection chamber may be provided subject to the owner or occupier complying with the regulations of the local authority.—A.-G. & STAINES URBAN DISTRICT COUNCIL *v.*, ASHBY (1907), 97 L. T. 479; 71 J. P. 387; 23 T. L. R. 498; 5 L. G. R. 1192; *on appeal* (1908), 72 J. P. 449; 6 L. G. R. 1058, C. A.

**Liability for contractor.**]—*See* MASTER & SERVANT, Vol. XXXIV., p. 165, No. 1279.

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SUB-SECT. 2.—IN THE METROPOLIS.

Metropolis Management Act, 1855 (c. 120), ss. 78, 79.

*See* Metropolis Management (Amendment) Acts, 1862 (c. 102), s. 61; 1890 (c. 66), ss. 4, 5.

**321. Prescriptive right of discharge into sewer—Absence of—Necessity for consent of sanitary authority.**]—Metropolis Management Act, 1855 (c. 120), vested in pltfs. an open sewer, called the Stamford Brook. Metropolis Management (Amendment) Act, 1862 (c. 102), s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in pltfs., without their previous consent in writing; provided that any person might, with such consent, at his own expense, make or branch any drain into any such sewer in such manner as pltfs. should direct. After the passing of Metropolis Management Act, 1855 (c. 120), pltfs. allowed four old cottages belonging to defts. on land just outside the metropolitan area & bounded by the Stamford Brook, to continue to drain through an 18-inch brick drain into Stamford Brook. They subsequently, at the request of defts., who paid half the cost, covered in the brook & converted it into a main sewer. When they did this, they made a drain-eye in the newly covered in sewer as a communication for the 18-inch drain.

Defts. afterwards built other cottages on the same land, & claimed the right to use the 18-inch drain for the purpose of draining the new cottages through the communication into the sewer:—*Held:* as defts. had not proved any prescriptive right to use the 18-inch drain for the sewage of the new cottages, nor obtained the written consent of pltfs. for that purpose under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 61, they were not entitled to use the 18-inch drain for any other purposes than those for which they used it when the brook was covered in.—METROPOLITAN BOARD OF WORKS *v.* LONDON & NORTH WESTERN RY. CO. (1881), 17 Ch. D. 246; 50 L. J. Ch. 409; 44 L. T. 270; 29 W. R. 693, C. A.

*Annotations:*—**Apd.** A.-G. *v.* Acton L. B. (1882), 22 Ch. D. 221; L. C. C. *v.* Acton U. D. C. (1900), 17 T. L. R. 157 **Consd.** Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695.

**322. —— Drains outside metropolitan area.**]—LONDON COUNTY COUNCIL *v.* ACTON URBAN DISTRICT COUNCIL, No. 234, *ante*.

**323. Connection effected by sanitary authority—Recovery of expenses.**]—A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made & coated with gravel & ballasted. The footpaths were made with gravel & kerbed with granite. The houses on either side of the road were not completed & inhabited, but the road was open for carriages & foot passengers. It was lighted by the parish, but had not been taken to as a public road. The vestry made branches from the drains into a sewer which belonged to them & ran along the centre of the road, & for that purpose they opened the road & footway. The builder declined to repay to the vestry the expenses incurred thereby:—*Held:* the vestry had opened a part of the pavement of a street & were entitled under Metropolis Management Act, 1855 (c. 120), s. 78, to recover the expenses incurred by them.—ST. JOHN HAMPSTEAD VESTRY *v.* HOOPEL (1885), 15 Q. B. D. 652; 54 L. J. M. C. 147; 49 J. P. 741; 33 W. R. 903; 1 T. L. R. 584, D. C.

**324. —— Liability for defect.**]—DEVONSHIRE (DUKE) *v.* ST. MARY, ISLINGTON, VESTRY (1895), 59 J. P. 745.

**325. Right of local authority to cut off—Authorised connection.**]—A nuisance was caused in watercourses within the district of the sanitary authority for B. by the discharge of sewage from cesspools within the district of the sanitary authority for C., by means of connecting pipes, laid with the sanction of that authority, which carried the sewage through main pipes laid in private roads in the C. district to the watercourses in question:—*Held:* the authority for C. had not power to stop up or cut off the communications between the cesspools & the main pipes.—A.-G. *v.* CLERKENWELL VESTRY, [1891] 3 Ch. 527; 60 L. J. Ch. 788; 65 L. T. 312; 40 W. R. 185.

*Annotations:*—**Apld.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378; Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; East Barnet Valley U. C. *v.* Stallard, [1909] 2 Ch. 555. **Refd.** *Re* M'Intosh & Pontypridd Improvement Co. (1891), 8 T. L. R. 128; Stretton's Derby Brewery Co. *v.* Derby Corpn., [1894] 1 Ch. 431; Yorkshire West Riding Council *v.* Holmfirth Urban S. A., [1894] 2 Q. B. 842.

*See, also,* No. 245, *ante.*

SUB-SECT. 3.—IN THE DOMINIONS, DEPENDENCIES, COLONIES, ETC.

*See* Cases *infra.*

## SECT. 12.—PROTECTION OF SEWERS AND DRAINS.

SUB-SECT. 1.—OUTSIDE THE METROPOLIS.

**Damage to pipes by dangerous & extraordinary traffic.**]—*See* HIGHWAYS, Vol. XXVI., p. 433, Nos. 1515, 1516.

**Summary proceedings in respect of injury to sewers.**]—*See* NUISANCE, Vol. XXXVI., pp. 229, 230, Nos. 703, 705, 710.

**Building over sewer.**]—*See* Public Health Act, 1875 (c. 55), s. 26.

SUB-SECT. 2.—IN THE METROPOLIS.

*See* Metropolitan Police Act, 1839 (c. 47), s. 60; Metropolis Management Act, 1855 (c. 120), ss. 101, 204–207; Metropolis Management (Amendment) Act, 1862 (c. 102), ss. 27, 45, 68, 69; London County Council (General Powers) Acts, 1890 (c. ccxliii), s. 39; 1893 (c. ccxxi), s. 23; 1894 (c. ccxii), ss. 8, 9, 10–15.

**326. Prohibition of erection of building obstruction or encroachment over sewer—Meaning of "sewer"—Embankment preventing inundation.**]—POPLAR BOARD OF WORKS *v.* KNIGHT, No. 145, *ante.*

**327. —— Meaning of "building"—House built without foundations.**]—POPLAR BOARD OF WORKS *v.* KNIGHT, No. 145, *ante.*

**328. —— Meaning of "obstruction" or "encroachment"—Stacking of timber.**]—The London County Council in 1912 constructed a sewer for the drainage of the Metropolis, the sewer being situated at a depth of 20 feet under a certain wharf & adjacent land which were subsequently acquired by Vigers Bros., who stacked timber on the land over the sewer. The Council required Vigers Bros. to take out a licence from them under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 68, but Vigers Bros. declined to do so, as the Council demanded a rent of £10 a year. The Council then took proceedings against Vigers Bros. under s. 68 for having placed an obstruction over the sewer without the previous consent in writing of the Council. It was admitted that the sewer was not endangered by the stacks of timber, & that the stacks could be removed in half a day if access to the sewer was required:—*Held:* the stacks of timber constituted an obstruction or encroachment upon or over the sewer within Metropolis Management Amendment Act, 1862 (c. 102), s. 68.—VIGERS BROTHERS *v.* LONDON COUNTY COUNCIL, [1919] 1 K. B. 56; 88 L. J. K. B. 256; 120 L. T. 29; 83 J. P. 6; 35 T. L. R. 27; 16 L. G. R. 898, D. C.

**329. Prohibition of placing "soil, rubbish or filth" in sewer—Scavengers sweeping mud.**]—Scavengers having swept mud to the side of a street & forced it by means of water through a grating into a sewer, were convicted of an offence against Metropolis Management Act, 1855 (c. 120), s. 205:—*Held:* "mud" came within the meaning of the words in sect. 205 & the conviction was right.—METROPOLITAN BOARD OF WORKS (SOLICITORS) *v.* EATON, COOKE *v.* METROPOLITAN BOARD OF WORKS (SOLICITORS) (1884), 50 L. T. 634; 48 J. P. 611, D. C.

SUB-SECT. 3.—IN THE DOMINIONS, DEPENDENCIES, COLONIES, ETC.

*See* Cases *infra.*

## SECT. 13.—OFFENSIVE DITCHES.

**330. Duty to cleanse—Made offensive by sewage—Ditch on boundary of two sanitary**

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**PART I. SECT. 11, SUB-SECT. 3.**

a. *Right to drain into sewer—Combined surface water drain & sewer.*]—LEWIS *v.* ALEXANDER & PUDDICOMBE (1895), 24 S. C. R. 551.—**CAN.**

b. *Necessity for permission of local authority—Mandamus to compel issue of permit—Payment of frontage fees condition precedent.*]—*Exp.* EDGETT (1903), 36 N. B. R. 224.—**CAN.**

c. *Interference with right by local authority—Restriction of drainage of liquids liable to interfere with disposal of sewage.*]—COWIE & SON *v.* DUFFTOWN COMRS. (1901), 3 F. (Ct. of Sess.) 257.—**SCOT.**

d. —— ——.]—GUTHRIE, CRAIG, PETER & CO. *v.* BRECHIN MAGISTRATES (1888), 15 R. (Ct. of Sess.) 385.—**SCOT.**

**PART I. SECT. 12, SUB-SECT. 3.**

e. *Prohibition of erection of building, bridge, fence or other structure or obstruction—Meaning of "structure"—Double gate.*]—GADSDEN *v.* GIBBS (1920), 27 C. L. R. 190.—**AUS.**

f. *Use of drain as common sewer—Liability of householder.*]—LEWIS *v.* ALEXANDER (1895), 24 S. C. R. 551.—**CAN.**

g. —— ——.]—LONDON CORPN. *v.* LEWIS (1896), Cout. 162.—**CAN.**

*Sect.* 13.—*Offensive ditches. Part II. Sects.* 1 *&* 2. *Part III. Sect.* 1: *Sub-sect.* 1.]

**authorities.**]—A ditch ran along a highway which divided two rural sanitary districts. The ditch was situated in N., but a nuisance was caused in greater part by sewage from premises in W. The W. sanitary authority applied to justices for an order on the N. authority to cleanse the ditch as being in their area :—*Held :* the justices were right in ordering W. to cleanse the ditch.—WOBURN UNION *v.* NEWPORT PAGNELL UNION (1887), 51 J. P. 694, D. C.

*See, also*, No. 336, *ante ;* HIGHWAYS, Vol. XXVI., p. 323, No. 565.

# Part II.—Highway Drains.

## SECT. 1.—IN GENERAL.

**331. Obstruction of highway drain—Turnpike Roads Act, 1822 (c. 126), s. 118.**]—R., having an orchard opening into a turnpike road, made an access across a ditch at the side of the road, & in which he put pipes, but these obstructed the water flow :—*Held :* R. was properly convicted under above sect.—RHODES *v.* THOMAS (1867), 31 J. P. 117.

**Whether drains converted into sewers—Effect of Local Government Acts.**]—*See* Part I., Sect. 1, sub-sect. 1, B. (*b*), *ante.*

**Duty of adjoining owner.**]—*See* HIGHWAYS, Vol. XXVI., p. 387, Nos. 1153–1155.

## SECT. 2.—POWERS, DUTIES AND LIABILITIES OF HIGHWAY AUTHORITIES.

*See* Highway Act, 1835 (c. 50), ss. 67, 68 ; Public Health Act, 1875 (c. 55), ss. 4, 13, 149 ; Local Government Acts, 1888 (c. 41), s. 11 (1) (6) ; 1894 (c. 73), s. 25.

**332. Construction or maintenance of drains & watercourses—On lands of adjoining owner.**]—DERBY (EARL) *v.* BURY IMPROVEMENT COMRS., No. 173, *ante.*

**333. —— —— Right of entry on lands—Tender of satisfaction not condition precedent.**]—By Highway Act, 1835 (c. 50), s. 67, surveyors, or way-wardens, are empowered to make drains on lands adjoining any highway upon paying the owner for the damages sustained thereby, to be settled & paid as the damages for getting materials in inclosed lands are therein directed to be settled & paid. The power of getting such materials is given by sect. 54, the surveyor making such satisfaction for the materials, & also for the damage done to such lands as shall be settled & ascertained by order of the justices at a special session for the highways. Tender of satisfaction for damage done in making a drain, is not a condition precedent to the right of entry on the land.—PETERS *v.* CLARSON (1844), 7 Man. & G. 548 ; 1 New Mag. Cas. 55 ; 1 New Sess. Cas. 519 ; 8 Scott, N. R. 384 ; 13 L. J. M. C. 153 ; 3 L. T. O. S. 181 ; 8 Jur. 648 ; 135 E. R. 220.

**334. —— —— What amounts to "drain or watercourse"—Dumb-well.**]—A dumb-well, viz., a well into which waste water flows through a pipe & thence percolates into the soil, is not a "drain or watercourse" within Highway Act, 1835 (c. 50), s. 67, & cannot be made or used by the highway board in lands adjoining the highway.—CROFT *v.* RICKMANSWORTH HIGHWAY BOARD (1888), 39 Ch. D. 272 ; 58 L. J. Ch. 14 ; 60 L. T. 34 ; 4 T. L. R. 706, C. A.

*Annotations :*—**Apld.** Croysdale *v.* Sunbury-on-Thames U. C., [1898] 2 Ch. 515. **Distd.** A.-G. *v.* Copeland, [1902] 1 K. B. 690. **Reld.** Meader *v.* West Cowes L. B., [1892] 3 Ch. 18.

**335. —— —— —— Disused pit.**]—CROYSDALE *v.* SUNBURY-ON-THAMES URBAN COUNCIL, No. 73, *ante.*

**336. —— —— —— Absence of defined channel.**]—The highway authority of a rural district had, for a time beyond living memory, maintained a pipe running through a bank which divided the highway from deft.'s land adjoining & had discharged, through the pipe & on to deft.'s land, water which collected on the highway. There was no defined channel on deft.'s land into which the water so discharged could flow. Deft. having stopped up the pipe, an injunction was claimed to restrain him from continuing the obstruction. On appeal from the refusal of the injunction :—*Held :* the fact that the pipe was not connected with a defined channel into which the water conveyed by it could flow did not prevent its being a drain within Highway Act, 1835 (c. 50), s. 67 ; & in view of the length of time during which the drain had been used, a legal origin ought to be presumed for the right claimed of passing water through the drain on to deft.'s land.—A.-G. *v.* COPELAND, [1902] 1 K. B. 690 ; 71 L. J. K. B. 472 ; 86 L. T. 486 ; 66 J. P. 420 ; 50 W. R. 490 ; 18 T. L. R. 394, C. A.

*Annotation :*—**Consd.** Thomas *v.* Gower R. C., [1922] 2 K. B. 76.

**337. —— —— —— Overflow pipe to irrigation gutter.**]—Pltf. was the owner of two adjoining fields, one bounded on the south by B. road, & both let on a yearly tenancy. The L. brook flowed from springs to B. road after receiving other water. It was then carried under part of pltfs. field to a chamber C. & thence through pltf.'s fields. These fields had until the year 1899, been irrigated with sewage by means of an artificial dyke or gutter constructed to communicate with a sewer at a manhole in B. road. The control of the irrigation system was by pltf., & her rights thereto were preserved by a local Improvement Act passed in 1855. Pltf. alleged that surface water from deft.'s sewers had been diverted from the L. brook pipe at chamber C by means of an overflow pipe inserted at a date which according to the evidence was uncertain, into the irrigation gutter, & a ditch between the two fields so as to flood her fields. For the purposes of the action defts. disclaimed any easement or right over

**PART II. SECT. 1.**

**h.** *Ditch constructed by adjoining owner—Right of highway authority to obstruct.*]—ROBERTSON *v.* HIGH RIVER CORPN. (Alta.) (1907), 6 W. L. R. 767.—**CAN.**

**PART II. SECT. 2.**

**3321.** *Construction or maintenance of drains & watercourses—On lands of adjoining owner.*]—HARRISON *v.* HARRISON (1883), 16 N. S. R. (4 R. & G.) 338.—**CAN.**

**3321i.** —— ——.]—JOHNSTONE *v.* OXFORD ROAD BOARD (1877), 3 N. Z. Jur. N. S. 124.—**N.Z.**

pltf.'s land or to any construction thereon, but under Highway Act, 1835 (c. 50), they claimed the right to prevent interference with or obstruction of the overflow pipe:—*Held:* the overflow pipe to the irrigation gutter was not such a gutter or drain as was included in Highway Act, 1835 (c. 50), s. 67, & pltf. was entitled to obstruct or interfere with it as her own property without defts.' consent or authority. The right of sewage irrigation still remaining exercisable the Public Health Act, 1875 (c. 55), s. 327, prevented the local authority who were exercising the powers of a highway authority under Public Health Act, 1875 (c. 55), s. 144, from controlling pltf. in her user of the irrigation gutter.—BALLARD *v.* LEEK URBAN COUNCIL (1917), 87 L. J. Ch. 146; 117 L. T. 12; 81 J. P. 232.

**338. Discharge of water on adjoining lands.**]—Highways Act, 1835 (c. 50), s. 67, does not empower the surveyor of highways to discharge water from the highway on to the lands of adjoining occupiers either as an easement or otherwise.—THOMAS *v.* GOWER RURAL COUNCIL, [1922] 2 K. B. 76; 91 L. J. K. B. 666; 127 L. T. 333; 86 J. P. 147; 38 T. L. R. 598; 20 L. G. R. 567, D. C.

**339. —— Absence of defined channel at outlet of drain—Presumption of legal origin.**]—A.-G. *v.* COPELAND, No. 336, *ante*.

**340. Liabilities of highway authorities—Flooding caused by obstruction in main road drain—Drain vested in County Council—Local Government Act, 1888 (c. 41), s. 11 (6).**]—RICKARBY *v.* NEW FOREST RURAL DISTRICT COUNCIL, No. 44, *ante*.

**341. —— —— Meaning of "main road drain."**]—RICKARBY *v.* NEW FOREST RURAL DISTRICT COUNCIL, No. 44, *ante*.

——.]—*See* HIGHWAYS, Vol. XXVI., pp. 403, 404, 407, 408, 450, Nos. 1265, 1287–1290, 1660.

# Part III.—Sewers under Commissioners of Sewers.

## SECT. 1.—THE COMMISSIONERS.

### SUB-SECT. 1.—IN GENERAL.

*See* Land Drainage Acts, 1861 (c. 133), 1918 (c. 17), 1926 (c. 24).

**342. Origin of commission—For defence against sea.**]—Commission of sewers to defend the kingdom against the sea is very ancient, & even by special prescription in some cases; but sewers for melioration of land are by Act of Parliament (HOLT, C.J.).—SHANDRIGAMY (VILL) *v.* SHOLEDAM (VILL) (1699), 12 Mod. Rep. 331; Holt, K. B. 643; 88 E. R. 1358.

**343. —— For improvement of land.**]—SHANDRIGAMY (VILL) *v.* SHOLEDAM (VILL), No. 342, *ante*.

**344. Status of commissioners—Court of record.**]—OLDBERY (INHABITANTS) *v.* STAFFORD (1663), 1 Sid. 145; 82 E. R. 1022.

**345. —— ——.**]—NEWCASTLE (DUKE) *v.* CLARK, No. 407, *post*.

**346. Delegation of powers—Powers must be exercised in concert.**]—Where a board constituted by an Act of Parliament are authorised by it to delegate any of their powers to a committee the powers so conferred upon the committee, must be exercised by them acting in concert; & it is not competent to the committee to apportion amongst themselves the duties so delegated to them; & one of them acting alone, pursuant to such apportionment cannot justify his acts under the Act of Parliament.—COOK *v.* WARD (1877), 2 C. P. D. 255; 46 L. J. Q. B. 554; 36 L. T. 893; 25 W. R. 593, C. A.

*Annotation:*—**Distd.** Agnew *v.* Manchester Corpn. (1902), 67 J. P. 174.

**347. "Directly or indirectly interested or concerned in any contract."**]—City of London Sewers Act, 1848 (c. clxiii), s. 42, which prohibits, under pain of avoidance of the contract, any Comr. of Sewers or member of the corpn. from being "directly or indirectly interested or concerned

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**338 i.** *Discharge of water on adjoining lands.*]—A shire council has no power under Local Government Act, 1874, so to form & drain a street as designedly to concentrate & increase the flow of drainage & storm water in a natural watercourse across the road into adjoining land, without making provision for carrying the water through & out of such land.—CARSLAKE *v.* CAULFIELD SHIRE (PRESIDENT) (1891), 17 V. L. R. 560.—**AUS.**

**338 ii.** ——.]—WIGLE *v.* GOSFIELD SOUTH TOWNSHIP (1912), 21 O. W. R. 483; 3 O. W. N. 708; 2 D. L. R. 619; 25 O. L. R. 646.—**CAN.**

**339 i.** —— *Absence of defined channel at outlet of drain—Presumption of legal origin.*]—KING'S COUNTY COUNCIL *v.* KENNEDY, [1910] 2 I. R. 544.—**IR.**

**k.** *Liability of highway authorities—Flooding caused by obstruction of main road drain.*]—A municipal corpn. will not be held liable for damages suffered by a citizen from an overflow of water into his basement caused by a sudden thaw or heavy rains & a stoppage of the drains constructed for the purpose of carrying away the surplus water, unless the municipal officials have had time enough after notice of the obstruction to remove it.—PORTAGE FRUIT CO. *v.* PORTAGE LA PRAIRIE CORPN. (Man.) (1913), 25 W. L. R. 438.—**CAN.**

**l.** —— *Flooding caused by negligent reconstruction of drain.*] — D'ARCY *v.* INVERELL MUNICIPAL COUNCIL (1925), 25 S. R. N. S. W. 102; 42 N. S. W. W. N. 20.—**AUS.**

**m.** —— *Flooding caused by failure to finish drain.*]—A Road Board, appointed under statute, constructed but left unfinished a public drain, which caused water to flow into & on to the land of a neighbouring proprietor, &, in the winter season, to render access to his premises difficult. In an action for damages it was set up as a defence that the drain had been begun when pltf. was chairman of the board; that on a new board being appointed they declined to finish the drain:—*Held:* the Board was a continuous body, irrespective of changes, & as such were liable.—STONE *v.* ASHFORD (1885), 7 Nfld. L. R. 89.—**NFLD.**

### PART III. SECT. 1, SUB-SECT. 1.

**n.** *Status of commissioners — Corporation.*]—The Board of Comrs. of Sewers, elected under Con. Stat. 1903, c. 159, by proprietors of marsh lands of duly constituted districts under the Act, is a corpn. created by the legislature for certain specific purposes & the loss of the governing body of such a corpn. by failure of the proprietors to elect comrs., or by the death or resignation of those elected, does not necessarily dissolve the corpn.—DOWNEY *v.* HOPEWELL PARISH SEWERS COMRS. (1917), 45 N. B. R. 90; 36 D. L. R. 644.—**CAN.**

**o.** ——.]—Statutory Improvement Comrs. under Police Improvement Act (Scotland), 1862, are not invested with judicial or even *quasi*-judicial authority. They are to act according to the best of their judgment for the promotion of the objects prescribed; & in the performance of their duty they may enter into reasonable negotiations & contracts, which will bind them, & hold good permanently, unless subsequently displaced under the statutory provisions.—SMEATON *v.* ST. ANDREWS MAGISTRATES (1871), 2 L. R. Sc. & Div. 107.—**SCOT.**

**346 i.** *Delegation of powers—Powers must be exercised in concert.*]—MCCLELLAN *v.* DOWNEY, [1923] S. C. R. 522.—**CAN.**

**p.** *Appointment of commissioners.*—DAVIDSON *v.* LAWRENCE (1867), 7 N. S. R. (1 G. & O.) 32.—**CAN.**

**q.** —— *Presumption of validity of appointment.*]—BAKER *v.* MCFARLANE (1870), 8 N. S. R. (2 G. & O.) 94.—**CAN.**

**r.** —— ——.]—Comrs. of sewers appointed under Act of Assembly, acting in that capacity, is *primâ facie* evidence of being comrs.—KNAPP *v.* KING (1874), 15 N. B. R. (2 Pug.) 309.—**CAN.**

**t.** —— *Swearing in.*]—By 1 Rev. Stat. c. 17, Comrs. of Sewers shall be sworn into office within one week after their election, or shall be deemed to

*Sect.* 1.—*The commissioners: Sub-sects.* 1, 2 & 3.]

in any contract" entered into by or on behalf of the Comrs., is not confined to construction contracts, but applies to every contract. But such a contract is not avoided by a Comr. or member of the corpn. subsequently becoming a shareholder in such co.—CITY OF LONDON ELECTRIC LIGHTING CO. *v.* LONDON CORPN., [1903] A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310; 67 J. P. 437; 52 W. R. 158; 19 T. L. R. 694; 2 L. G. R. 93, H. L.

*Annotation:*—**Refd.** Norton *v.* Taylor, [1906] A. C. 378.

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SUB-SECT. 2.—JURISDICTION AND ADJUDICATION.

*See* Sewers Acts, 1833 (c. 22), ss. 7–9, 45, 60; 1841 (c. 45), ss. 11, 12; Land Drainage Act, 1861 (c. 133), s. 15; Land Drainage Act, 1918 (c. 17).

**348. Jurisdiction—Committal for contempt.**]—OLDBERY (INHABITANTS) *v.* STAFFORD (1663), 1 Sid. 145; 82 E. R. 1022.

**349. —— To impose fine—After certiorari delivered.**]—An attachment lies against comrs. of sewers for imposing a fine after a *certiorari* delivered.—SMITH'S CASE (1670), 1 Mod. Rep. 44; 1 Vent. 66; 86 E. R. 719; *sub nom.* ANON., T. Raym. 186; *sub nom.* R. *v.* LLUELLIN, 2 Keb. 635; *sub nom.* R. *v.* SMITH, 1 Lev. 288.

*Annotation:*—**Refd.** Cross *v.* Smith (1702), 2 Ld. Raym. 836.

**350. —— Area of jurisdiction.**]—Commission of sewers extends only to navigable streams unless within 2 miles of London.—YEAW *v.* HOLLAND (1770), 2 Wm. Bl. 717; 96 E. R. 421.

*Annotation:*—**Distd.** Dore *v.* Gray (1788), 2 Term Rep. 358.

**351. —— ——.**]—The comrs. of sewers have jurisdiction over a sewer communicating with a navigable stream, or with the sea, above the point where the tide ebbs & flows, if the place, over which the jurisdiction is exercised, be or be likely to be benefited by it.—DORE *v.* GRAY (1788), 2 Term Rep. 358; 100 E. R. 193.

*Annotations:*—**Mentd.** Stafford *v.* Hamston (1821), 2 Brod. & Bing. 691; Russell *v.* Ledsam (1845), 14 M. & W. 574; R. *v.* Williams (1850), 14 J. P. 75; *Ex p.* Lloyd (1851), 1 Sim. N. S. 248; Edwards *v.* Hodges (1855), 15 C. B. 477.

**352. —— ——.**]—The power of comrs. of sewers is not confined to navigable streams, nor, it should seem, to streams immediately necessary or useful in navigation, but they may decree the abatement or removal of a nuisance in a stream that serves merely as a watercourse. Where, therefore, a wear, described as appurtenant to a common sewer, was heightened & enhanced, so as to obstruct the passage of the waters, & to cause the overflowing of lands adjacent:—*Held:* the comrs. had jurisdiction to order the wear to be abated to its former level.—R. *v.* NOTTINGHAM SEWERS COMRS. (1827), 5 L. J. O. S. M. C. 92.

**353. —— ——.**]—NEW ROMNEY CORPN. *v.* NEW ROMNEY SEWERS COMRS., No. 434, *post.*

**354. —— Abatement of nuisance.**]—R. *v.* NOTTINGHAM SEWERS COMRS., No. 352, *ante.*

**355. —— Making of regulations—On granting permission to build sewers.**]—*Semble:* the Comrs. of Sewers have power to make a regulation, that all persons who shall obtain leave to build sewers or levels leading to other property in the City of Westminster, in which the buildings of the petitioner come within 30 feet of a boundary, are to carry such sewers to the outside of such boundary line.

But where upon such petition being granted, a copy of the book of regulations of the Comrs. of Sewers, containing such regulation, was given to petitioner, & he acted upon the leave given, but refused to build the sewer in accordance with the regulation, the ct. refused a rule for a *certiorari* to remove a presentment of a jury, held under the directions of the Ct. of Sewers, by which the petitioner was fined £3,000 for disobedience to such regulation.—ANON. (1846), 8 L. T. O. S. 293.

**356. Adjudication—When final.**]—The Comrs. of Sewers are not entitled, under 57 Geo. 3, c. xxix, s. 80, to adjudge the whole of a piece of land to be necessary to be taken for the widening of a street, & to take it in pursuance of such adjudication—when in fact only a portion of the land physically obstructs such widening—with the object of reselling the remainder of the land at an increased price, & so enabling a scheme for widening the street to be carried out, the "necessity" contemplated by the Act being a purely physical

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have refused:—*Held:* the Act was imperative, & a comr. elected on Aug. 2 could not be legally sworn in on Sept. 8, the office at that time being vacant; & his joining with the other comrs. in making an assessment rendered it void.—R. *v.* HOPEWELL SEWERS COMRS. (1872), 14 N. B. R. (1 Pug.) 161.—**CAN.**

a. *Disqualification—Interest in lands to be assessed.*]—*Re* GERMANTOWN LAKE DISTRICT SEWERS COMRS., *Ex p.* CALHOUN (1863), 11 N. B. R. (5 All.) 454.—**CAN.**

b. —— ——.]—The intention of Act 32 Vict. c. 73, being to remove the disqualification of Comrs. of Sewers, by reason of their being interested in the lands of the district to be assessed, it necessarily includes the interest of a comr. arising from relationship to a proprietor of such lands.—*Ex p.* PECK (1871), N. B. Dig. 169.—**CAN.**

c. —— *Contract with commissioners.*]—K., a comr. of sewers for the Germantown lake district, became contractor for the execution of certain work executed under their direction, & afterwards sat & voted with the other comrs., when they decided that the work had been satisfactorily performed, & ordered an assessment on the landowners to pay for it:—*Held:* the assessment was bad.—R. *v.* GERMANTOWN LAKE DISTRICT SEWERS COMRS. (1869), 12 N. B. R. (1 Han.) 343.—**CAN.**

d. *Petition for drainage scheme—Sufficiency of—Unreasonable delay of report by engineer.*]—*Re* MCKENNA & OSGOODE TOWNSHIP (1906), 8 O. W. R. 713; 13 O. L. R. 471.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 2.**

e. *Jurisdiction—Of drainage referee—Referred action.*]—Upon reference of an action to a referee under Drainage Trials Act of Ontario, 54 Vict. c. 51, the referee has full power to deal with the case as he thinks fit, & to make, of his own motion, all necessary amendments to enable him to decide according to the very right & justice of the case.—ELLICE TOWNSHIP *v.* HILES, ELLICE TOWNSHIP *v.* CROOKS (1894), 23 S. C. R. 429.—**CAN.**

f. —— ——.]—The drainage referee is not an official referee, & an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee.—MCCLURE *v.* BROOKE TOWNSHIP, BRYCE *v.* BROOKE TOWNSHIP (1902), 23 C. L. T. 40; 5 O. L. R. 59; 1 O. W. R. 835.—**CAN.**

g. —— —— *To set aside bye-law.*]—*Re* MERSEA TOWNSHIP & ROCHESTER TOWNSHIP, *Re* GOSFIELD NORTH TOWNSHIP & ROCHESTER TOWNSHIP (1895), 22 A. R. 110.—**CAN.**

h. —— —— *To amend report of engineer.*]—The drainage referee has jurisdiction with the consent of the engineer & upon evidence given, to amend the engineer's report by charging against the municipalities for "injuring liability" assessments erroneously charged against them by the engineer for "outlet liability."—*Re* ROCHESTER TOWNSHIP & MERSEA TOWNSHIP (1899), 26 A. R. 474.—**CAN.**

k. —— —— *To refer back engineer's report for amendment.*]—The drainage referee cannot upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment.—ADELAIDE & WARWICK TOWNSHIPS *v.* METCALFE TOWNSHIP (1900), 27 A. R. 92.—**CAN.**

l. —— —— *To vary assessments.*]—*Re* CHATHAM TOWNSHIP & DOVER TOWNSHIP (1904), 24 C. L. T. 307, 8 O. L. R. 132; 3 O. W. R. 882.—**CAN.**

m. —— —— ——.]—*Re* GOSFIELD SOUTH TOWNSHIP & GOSFIELD NORTH TOWNSHIP (1917), 39 O. L. R. 93; 35 D. L. R. 119.—**CAN.**

n. —— —— *Claim for damages for injuries by drainage works.*]—Whether a claim for damages for injuries sustained in consequence of a drainage work by a landowner who is assessed for part of the cost, & to set off such damages against the assessment, is made by appln. for arbitration

necessity; though, if it really appears to them that the whole will actually be required for the improvement, the correctness of their adjudication cannot be questioned.—GARD *v.* LONDON SEWERS COMRS. (1885), 28 Ch. D. 486; 54 L. J. Ch. 698; 52 L. T. 827; 1 T. L. R. 208, C. A.

*Annotations:*—**Apld.** Lynch *v.* London City Sewers Comrs. (1886), 32 Ch. D. 72. **Refd.** Teuliere *v.* St. Mary Abbotts, Kensington, Vestry (1885), 30 Ch. D. 642; Gordon *v.* St. Mary Abbotts, Kensington, Vestry, [1894] 2 Q. B. 742; Fernley *v.* Limehouse Board of Works (1899), 68 L. J. Ch. 344; Denman *v.* Westminster Corpn., Cording *v.* Westminster Corpn., [1906] 1 Ch. 464; Davies *v.* London City Corpn., [1913] 1 Ch. 415. **Mentd.** A.-G. *v.* London Parochial Charities' Trustees, [1896] 1 Ch. 541; Clanricarde *v.* Congested Districts Board for Ireland (1914), 79 J. P. 481; Conron *v.* L. C. C., [1922] 2 Ch. 283.

**357. —— Validity of—Disqualification of commissioner by reason of interest.]** — FOBBING SEWERS COMRS. *v.* R., No. 452, *post.*

**Removal of orders by certiorari—Proceedings after order for removal—Attachment for contempt.]**—*See* CROWN PRACTICE, Vol. XVI., pp. 401, 416, 451, 466, 471, Nos. 2451, 2750, 3210, 3353, 3421, 3435, 3507.

*See, further,* COURTS, Vol. XVI., pp. 204, 205, Nos. 1125–1134.

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SUB-SECT. 3.—PROCEDURE.

*See* Sewers Acts, 1833 (c. 22), ss. 11, 12; 1841 (c. 45), s. 7; Land Drainage Act, 1861 (c. 133), ss. 33, 47; Land Drainage Act, 1918 (c. 17).

**358. Presentment by jury.]**—CUSTODES LIBERTAT. *v.* OUTWELL, NEWTON & TYD (INHABITANTS) (1649), Sty. 178, 184, 191; 82 E. R. 627, 631, 637.

*Annotations:*—**Refd.** R. *v.* Somerset Sewers Comrs. (1805), 7 East, 71; Birkett *v.* Crozier (1827), 3 C. & P. 63; Emmerson *v.* Saltmarshe (1837), 7 Ad. & El. 266.

**359.** ——.]—A jury, impanneled to inquire & present at a ct. of Comrs. of Sewers, presented, that A. was benefited by the sewers; & he received a summons to show cause why he should not pay; he neglected to traverse the presentment, & a distress was levied for the amount of the rate:—*Held:* these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, & not traversed, justified the Comrs. in issuing the warrant of distress.

The presentment need not contain the name of every person benefited; if it find "All Fore street" to be benefited, that is enough to include every one having a house there; & any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, & that he is aggrieved by the presentment.—WARREN *v.* DIX (1805), 3 C. & P. 71; 172 E. R. 328, N. P.

**360.** ——.]—R. *v.* SOMERSET SEWERS COMRS. (1805), 7 East, 71; 3 Smith, K. B. 105; 103 E. R. 28.

*Annotations:*—**Apld.** R. *v.* Hatfield Chase Sewers Comrs. (1849), 13 J. P. 284. **Distd.** R. *v.* Godfrey (1850), 14 J. P. 590. **Refd.** R. *v.* Warton (1862), 31 L. J. Q. B. 265.

**361.** ——.]—The jury, who are summoned by the sheriff to make the presentment before Comrs. of Sewers, should come from the body of the county & not from the district over which the Comrs. have jurisdiction; & where the precept to the sheriff was to summon "good & lawful men of your country, & resident within the Tower Hamlets" that being the district over which the Comrs. had jurisdiction it was held bad; & a presentment made by that jury & all the subsequent proceedings founded on it, declared to be void.—BIRKETT *v.* CROZIER (1827), 3 C. & P. 63; Mood. & M. 119; 172 E. R. 324, N. P.

*Annotations:*—**Distd.** R. *v.* Godfrey (1850), 14 J. P. 590. **Refd.** Taylor *v.* Loft (1853), 8 Exch. 269.

**362.** ——.]—At a court of Comrs. of Sewers holden under Sewers Act, 1833 (c. 22), s. 11, sixteen of the jurors returned by the sheriff appeared, & the chairman nominated two others from qualified persons present. A presentment was made by the jury so constituted against defts. who pleaded to the presentment & upon trial were found guilty:—*Held:* the objection to the jury was matter of plea in abatement, but was no ground for quashing the presentment after verdict. —R. *v.* HATFIELD CHASE PARTICIPANTS (1850), 4 New Mag. Cas. 98; 15 L. T. O. S. 181; *sub nom.* R. *v.* GODFREY, 14 J. P. 590.

**363.** ——.]—In the year 1819, a level was taken & survey made of lands in Bilsby in Lincolnshire, liable to be rated to a drain called the Boy Grift, & the ct. of sewers directed a precept to the sheriff, requiring him to summon jurors *de corpore comitatus*, to appear at a certain place & time, & make a presentment. The sheriff having, under this precept summoned a jury from the hundred of Calceworth, in the county in May, 1819, they made a presentment, that the Boy Grift was ruinous, & that certain works therein were absolutely necessary; & that lands in the occupation of various persons, including pltf., received benefit or avoided danger by the drainage, & ought, therefore, to bear the charges thereof; & they accordingly, assessed a rate which the comrs. confirmed. No appeal was made against this presentment or assessment, & in 1823, a special law of sewers was enrolled, containing the presentment & from that time to the year 1837, all rates were made under such law. No level had been taken or survey made since 1819, nor had any presentment of a jury been made since 1837. In 1840, a new commission of sewers issued, & at the first ct. held under it, it was ordered "that all laws,

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or by action, is immaterial; in either event the drainage referee has jurisdiction to deal with it.—THACKERY *v.* RALEIGH TOWNSHIP (1898), 25 A. R. 226.—**CAN.**

o. —— —— *Claim for damages for variation in specification of works.*]—BURKE *v.* TILBURY NORTH TOWNSHIP CORPN. (1906), 8 O. W. R. 457, 862; 13 O. L. R. 225.—**CAN.**

p. —— —— *Claim by contractor for works executed.*]—BANK OF OTTAWA *v.* ROXBOROUGH TOWNSHIP (1909), 18 O. L. R. 511; 13 O. W. R. 1175.—**CAN.**

q. —— —— —— *Permission for drainage work to cross railway.*]—GRAND TRUNK & CANADIAN PACIFIC RY. COS. *v.* ROCHESTER TOWNSHIP (1910), 30 Can. Ry. Cas. 131.—**CAN.**

r. —— *Of drainage engineer—Taking oath essential.*]—*Re* COLCHESTER NORTH & GOSFIELD NORTH TOWNSHIPS (1900), 20 C. L. T. 207; 27 A. R. 281.—**CAN.**

t. —— *Of engineer under Ditches & Watercourses Acts.*]—TURTLE *v.* EUPHEMIA TOWNSHIP (1900), 31 O. R. 404.—**CAN.**

a. —— —— *Whether declaration of ownership & "friendly meeting" conditions precedent."*]—MAISONNEUVE *v.* ROXBOROUGH TOWNSHIP (1899), 30 O. R. 127.—**CAN.**

b. —— —— *Necessity for assent of majority of owners affected.*]—In the absence of a resolution of the municipal council such as is provided for by Ditches & Watercourses Act, 1887, s. 6 (*b*), the question whether the engineer has jurisdiction to make an award depends upon whether before the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested.—OSGOODE TOWNSHIP *v.* YORK (1895), 24 S. C. R. 282.—**CAN.**

c. —— *Of fence-viewer — Nature of benefit of drainage scheme to landowners.*]—*Re* ROBERTS & HOLLAND (1871), 5 P. R. 346.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 3.**

d. *Appeals from drainage referee.*]—The rules applicable to appeals from the High Ct. to the Ct. of Appeal are to be applied, as far as possible, to appeals from reports of the drainage referee under Drainage Act, 57 Vict. c. 56 (O).—*Re* RALEIGH & HARWICH TOWNSHIPS (1896), 18 P. R. 73.—**CAN.**

e. —— *From engineer under Ditches & Watercourses Acts—Time for.*]—OTTO *v.* ROGER & KELLY (1917), 39 O. L. R. 127; 35 D. L. R. 339; 13 O. W. N. 58.—**CAN.**

f. —— —— ——.]—Ditches &

Acts, deeds, constitutions, & ordinances of sewers held for the county of Lincoln, & which had not been repealed, altered, or superseded should be confirmed & stand in full force." In 1846, at a meeting of the comrs. the dike reeve required them to authorise him to make a rate according to the above-mentioned survey by level, & without any presentment of a jury which the comrs. authorised him to do. In 1847 & 1848 similar rates were made, without any presentment of a jury. Pltf. having refused to pay these rates, the comrs. issued a distress warrant, under which his goods were taken, whereupon he brought an action of trespass:—*Held:* (1) the confirmation of the special law of 1823 by the order of the new comrs. in 1841, rendered the presentment of 1819 operative & applicable to the rates in question, & they were valid; (2) it was no objection to the presentment that the sheriff summoned the whole of the jury from the hundred of Calceworth.—TAYLOR *v.* LOFT (1853), 8 Exch. 269; 22 L. J. Ex. 131; 20 L. T. O. S. 248; 17 J. P. 134; 155 E. R. 1347.

**364.** ——.]—Where a presentment of a jury has been made that A. was the owner & occupier of certain lands, & liable to repair a certain sea wall, & a change of ownership from A. to W. has occurred in the lands during the continuance of the same commission, the comrs. cannot make an order under Sewers Act, 1833 (c. 22), s. 13, on W. to repair without a fresh presentment of a jury.—R. *v.* WARTON (1862), 2 B. & S. 719; 31 L. J. Q. B. 265; 27 J. P. 37; 9 Jur. N. S. 325; 121 E. R. 1239.

*Annotation:*—**Followed.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449.

**365.** ——.]—FOBBING SEWERS COMRS. *v.* R., No. 452, *post.*

**366.** —— **Order void unless founded on presentment.**]—An order of Comrs. of Sewers is void unless it is founded on a presentment showing the existence of some public let, impediment, or annoyance. A rate for the repair of a wall is bad, unless the want of repair appears upon the proceedings to have been found by a jury.—R. *v.* MATTHIAS (1838), 2 Jur. 13.

—— **Certiorari to remove presentment.**]—*See* CROWN PRACTICE, Vol. XVI., pp. 416, 427, 430, 431, 452, Nos. 2753, 2865, 2913, 2915, 3225.

**367. Power to impose fines & penalties—Jurymen.**]—A local Act of Parliament, enacting that for the better & more effectual execution of the Act, to all the lands, etc., within a certain district, previously within the jurisdiction of the General Comrs. of Sewers, & the works, drains, sewers, etc., thereof, shall be subject only to the control, etc., & jurisdiction of local comrs. there appointed, & not to the control, direction, survey, or order of any comrs. of sewers, does not discharge the inhabitants of the district from their liability to serve on juries at the sessions of sewers, without an express provision: nor will this ct. discharge the estreats of fines, imposed by the sessions, & levied on such inhabitants for refusing to attend when summoned.—*Ex p.* OWST (1821), 9 Price, 117; 147 E. R. 40.

**368.** —— ——.]—Where A. was fined by Comrs. of Sewers for refusing to be resworn upon a standing jury, the ct. discharged the fine, it being admitted, that it was not usual to reswear the jury, except upon the issuing of a new commission.—*Ex p.* TAYLOR (1829), 3 Y. & J. 91; 148 E. R. 1106.

**369.** —— **Owners & occupiers of land.**]—Cognisance that the owners & occupiers of lands within the lordship of M. had immemorially repaired a jetty, which defended the sea coast, in the lordship & parish of M.; that, the jetty being out of repair, a ct. of sewers was held & a jury impanelled, who presented, finding the prescription as above, & that the owners & occupiers ought forthwith to repair. That notice was given to the owners & occupiers to appear at the next ct., to plead to the inquisition; that they appeared by L., & pleaded not guilty. That the traverse was tried, & the owners & occupiers found guilty by a jury, who amerced them in £200, which the comrs. confirmed, & set the amercement on them, & respited the levying thereof, of which they had notice. That, at an adjourned ct., it was ordered that, unless the owners & occupiers repaired within fourteen days, the £200 should be levied. That, at a subsequent ct., the repairs not being proceeded with, N. was appointed to demand & receive the amercement, & afterwards did demand it, but the owners & occupiers refused to pay. That, at an adjourned ct., the clerk was ordered to give notice that, unless the amercement were paid before a day named, a warrant would be issued to levy it by distress & sale; that such notice was given, but the owners & occupiers did not pay. That, at a subsequent ct., a warrant was made by six comrs., directing persons therein mentioned to levy the £200 by distress & sale of the goods, etc., of the owners & occupiers; that pltf., at the time of the presentment, & thence to the time when, etc., was an owner & occupier; that deft. by virtue of the warrant demanded the £200 of him, &, on his refusal, the jetty being still unrepaired, deft., as a constable mentioned in the warrant, & bailiff of the comrs., well acknowledged, etc.:—*Held:* a good cognisance, the amercement might be on the owners & occupiers of the lordship generally, yet the levy on the individual.—RAMSEY *v.* NORNABELL (1840), 11 Ad. & El. 383; 3 Per. & Dav. 253; 9 L. J. Q. B. 138; 113 E. R. 461.

**370.** —— ——.]—*Ex p.* LUDLOW (1844), 3 L. T. O. S. 208.

**371.** —— ——.]—R. *v.* BAKER, No. 393, *post.*

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## SECT. 2.—WORKS.

*See* Sewers Act, 1833 (c. 22), ss. 22, 23; Land Drainage Act, 1861 (c. 133), ss. 3, 16, 17, 54–58; Land Drainage Act, 1918 (c. 17); Land Drainage Act, 1926 (c. 24).

**372. Power to execute works—On lands vested in other commissioners.**]—By a local Act, trustees were appointed for the purpose of the more effectual drainage, by means of a steam engine, of a fen district in Lincolnshire, called the Bourn North Fen & the Dyke Fen, & by local Act,

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Watercourses Act, 1894, s. 22 (6), which require the judge of the county ct. to hear & determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory.—*Re* MCFARLANE *v.* MILLER (1895), 26 O. R. 516.—**CAN.**

*g. Costs—Of reference to drainage referee.*]—MOKE *v.* OSNABRUCK TOWNSHIP (1900), 19 P. R. 117.—**CAN.**

*h. Reference of action to drainage referee—By master.*]—MCKIM *v.* EAST LUTHER TOWNSHIP (1900), 20 C. L. T. 399; 19 P. R. 248.—**CAN.**

**PART III. SECT. 2.**

*k. Power to execute works—On requisition of two-thirds of adjoining owners.*]—HALIFAX CORPN *v.* EDWARDS (1878), 12 N. S. R. (3 R. & C.) 104.—**CAN.**

*l. —— Without consent of adjoining owners.*]—HALIFAX CORPN. *v.* SEETON (1878), 12 N. S. R. (3 R. & C.) 245.—**CAN.**

*m.* —— ——.]—The intention of the legislature would appear to be to

s. 62, it was enacted that every engine, machine, building & work, to be erected & made by the trustees under the powers of the Act, & all engines, machinery, buildings, etc., sewers, drains, watercourses, etc., & other works already made & provided for the drainage of the Bourn North Fen & Dyke Fen, & which should be thereafter made & provided for such purpose, & the right to & property in them, should be & they were thereby vested in the trustees; with a proviso, that nothing in the Act contained should extend to or affect any engines, machinery, etc., sewers, drains, watercourses, etc., & other works already made, or then existing or provided for the drainage of the said fens, & then vested in & under the control of certain comrs., appointed under a former Inclosure & Drainage Act, called the Black Sluice Comrs. Local Act, s. 64, enacted that it should be lawful for the trustees upon any land in Bourn North Fen & Dyke Fen, not vested in the Black Sluice Comrs., to make & erect a steam engine, with all proper machinery, with proper & convenient buildings, sluices, pits & other necessary works; & to make & from time to time maintain, repair & improve, as occasion might require the sluices, bridges, cuts, sewers, & other works, already or thereafter to be made in, upon & through the said fens, for effectually draining the same, out of the funds, to be raised under the authority of the Act, & making compensation for damage:—*Held:* the trustees had no power, under this Act, to widen a drain under the control of Black Sluice Comrs., from the width of 18 to 40 feet, for the purpose of a reservoir, to bring a sufficient supply of water to their steam engine, thereby cutting away upwards of 3 acres of the land vested in the comrs. although such widening was itself an improvement of the drainage; & they had no power to make any reservoir on the land vested in the comrs., although the making of a reservoir was necessary to the proper working of the engine for the purposes of the drainage, & none could be made without cutting into some of the banks or drains vested in the comrs.—SMITH *v.* BELL (1842), 10 M. & W. 378; 2 Ry. & Can. Cas. 877; 152 E. R. 517.

**373. Power to alter course of river.**]—(1) Comrs. of sewers cannot make a new river.

(2) When an old sewer is newly to be made or cleansed, some small alteration in respect of the natural change of the current may be made.

(3) When an old wall by the violence of the water, is broken down, another wall, in case of inevitable necessity, may be made to defend the level. But if the danger may be avoided by the reparation of the old wall, a new one ought not to be erected.

(4) None can be taxed towards the repairs, etc., but those who have prejudice or damage, etc., by the nuisance, & who may have benefit by the repair.—ISLE OF ELY CASE (1609), 10 Co. Rep. 141 a; 77 E. R. 1139.

*Annotations:—As to* (4) **Refd.** R. *v.* Hampden (1637), 3 State Tr. 826; Soady *v.* Wilson (1835), 4 Nev. & M. K. B. 777; Ramsey *v.* Nornabell (1840), 11 Ad. & El. 383. *Generally,* **Refd.** Hudson *v.* Tabor (1877), 2 Q. B. D. 290. **Mentd.** Emmerson *v.* Saltmarshe (1837), 7 Ad. & El. 266; Neave *v.* Wrather (1842), 7 Jur. 168; A.-G. *v.* Tomline (1880), 14 Ch. D. 58.

**374. Power to open new sewer or drain.**]—Statutory power was given to the corpn. of R. to make sewers, provided that it should not be lawful for them to cause any new sewer to open or drain into the river R. at any point above the Town Mill Weir. The corpn. had made a large new sewer nearly on the site of an old sewer, but larger & deeper, which would open a drain into the river above the weir, & several drains had been made into it which could not have been made in the old sewer. Pltfs., who were the owners of the Town Mill Weir, filed this bill for relief, & an injunction was granted to restrain defts. from allowing any additional sewer to be opened into the new sewer, or any other river sewer to open or drain into the river R. at any point above the Town Mill Weir.—HOLT *v.* ROCHDALE CORPN. (1870), L. R. 10 Eq. 354; 39 L. J. Ch. 761; 23 L. T. 43; 35 J. P. 6; 18 W. R. 885.

**375. Power to deposit mud on adjoining banks.**]—By a local Act, s. 32, the mud & earth taken out of the rivers cleansed by the Middle Level Comrs. under the powers of that Act, is where the rivers are embanked, to be laid in such place as the Comrs. think proper, &, where the rivers are not embanked, to be laid impartially on the banks of the rivers, as the Comrs. direct, or in some cases on one of such banks.

By s. 59 of the same Act the Comrs. have power to enter upon the lands of any person adjoining or near the rivers, & to take or dig earth therefrom, & to do such other acts as may be necessary to carry the purposes of the Act into effect, making satisfaction to the parties thereby injured:—*Held:* in the case of a river that was not embanked, s. 32 gave the Comrs. no compulsory powers for the deposit of mud & earth, but s. 59 gave them such powers subject to the obligation to pay compensation.—*Re* MOULTON & MIDDLE LEVEL COMRS. (1907), 97 L. T. 391; 71 J. P. 402; 5 L. G. R. 961.

**376. Power to remove obstruction to drainage.**]—Defts., who were the owners of an ancient water mill, in order to obtain the maximum of power from their water wheel, raised the height of their mill dam or weir by placing on the top thereof an enhancement of cement, concrete, plank & posts. Pltfs., who were constituted under an Order under the Land Drainage Act, 1861 (c. 133), & Land Drainage Act, 1918 (c. 17), & had the powers of Comrs. of Sewers, & were the drainage board within whose district the mill, mill pond & river at that point were situated, called upon defts. to remove the enhancement. Defts. refused to do so. Pltfs. thereupon, without first obtaining & finding of two justices at petty sessions that the removal of the enhancement was necessary for the effectual drainage of land within the jurisdiction of the Comrs. & without having compensation for the injury caused by such removal assessed as provided by Land Drainage Act, 1861 (c. 133), ss. 17–20, entered upon deft.'s land on several occasions & themselves removed the enhancement, but defts. on each occasion restored it. Pltfs., without having made an order under Land Drainage Act, 1861 (c. 133), s. 33, then brought an action against defts., alleging that the enhancement held back

empower Comrs. of Sewers to act in making ordinary repairs, or in any sudden emergency, without consultation with or the consent of the proprietors, but that these proprietors should not be taxed for the construction of any new work not immediately essential to the preservation or interests of common property, without their consent to such work being first obtained. — BURNHAM *v.* DAVISON (1884), 17 N. S. R. (5 R. & G.) 388.—**CAN.**

**374 i.** *Power to open new sewer or drain.*]—PERTH LOCAL BOARD OF HEALTH *v.* MALEY (1904), 1 C. L. R. 702.—**AUS.**

**375 i.** *Power to deposit mud on adjoining banks.*]—SMITH *v.* CHAYTOR (1895), 13 N. Z. L. R. 565.—**N.Z.**

n. *Deepening drains on neighbouring lands.*] — LAMONTAGNE *v.* WOODLANDS MUNICIPALITY (Man.) (1912), 21 W. L. R. 881; 5 D. L. R. 524.—**CAN.**

o. *Inspection of works by engineer—Works improperly constructed by contractor—Whether right to inspect barred by lapse of time.*]—ROSE *v.* MORRISBURG VILLAGE CORPN. (1896), 28 O. R. 245.—**CAN.**

*Sect. 2.—Works. Sects. 3, 4 & 5.]*

the water in the river causing the meadows adjacent thereto to be flooded & causing washouts in the banks & that it would interfere with the duty of pltfs. effectively to drain their district. Defts. pleaded that the statement of claim disclosed no cause of action, that the weir had existed at the same height for twenty years, & they counter-claimed damages for trespass. The jury found that defts. were not entitled to the depth of water in the mill pond which they claimed, but that they were entitled to a greater depth of water than pltfs. said :—*Held :* (1) Land Drainage Act, 1861 (c. 133), did not give pltfs. any right to go upon defts.' land & remove the enhancement to the weir without first obtaining a finding of the justices that its removal was necessary for the effectual drainage of pltfs.' district & having compensation assessed, as was provided by Land Drainage Act, 1861 (c. 133), ss. 17–20, nor had the pltfs. any right by Statute passed before 1861 or at common law, to go upon defts.' land & remove the obstructions, & therefore pltfs. had committed a trespass ; (2) Sewers Act, 1833 (c. 22), s. 47, did not vest the weir, or the banks, or the bed of the river, or the meadows adjacent thereto in pltfs. so as to give them proprietary rights therein, & therefore pltfs. had no right to maintain an action against defts. for a breach of such proprietary rights ; (3) neither Land Drainage Act, 1861 (c. 133), s. 16, nor any statute passed before 1861, conferred upon pltfs., as Comrs. of Sewers the right to bring an action, without any previous proceedings, to enforce the removal of an obstruction to the drainage of their district when such obstruction was a mill dam or weir, & further if Land Drainage Act, 1861 (c. 133), s. 16, did give a right to bring an action it was a right subject to the restrictions contained in Land Drainage Act, 1861 (c. 133), ss. 17–20.—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING CO. (1920) LTD., [1927] 2 K. B. 566 ; 96 L. J. K. B. 1074 ; 137 L. T. 754 ; 91 J. P. 167 ; 43 T. L. R. 824 ; 25 L. G. R. 415.

**377. Duty to fence sewer.**]—Comrs. of Sewers used for the purpose of their sewerage an ancient tidal ditch which ran along the side of a public highway :—*Held :* the Comrs. were under no obligation to fence the sewer, so as to protect persons frequenting the highway.—CORNWELL *v.* METROPOLITAN SEWERS COMRS. (1855), 10 Exch. 771 ; 3 C. L. R. 417 ; 19 J. P. 313 ; *sub nom.* CORNWELL *v.* METROPOLITAN SEWERS COMRS., JAUNCEY *v.* METROPOLITAN SEWERS COMRS., 24 L. T. O. S. 244.

*Annotation :*—**Refd.** Fisher *v.* Prowse, Cooper *v.* Walker (1862), 2 B. & S. 770.

**378. Pollution of watercourses — Prohibition against fouling without consent of commissioners—Proviso exempting persons having legal right.**]—A private Act of Parliament enacted that " No person shall without the consent of the comrs. . . . open any new drain or other work into any of the drainage works of the comrs. . . . & no person shall cause any filthy or unwholesome water, or washings of manufactories or mines, or other foul or poisonous liquid to flow into any watercourse within the jurisdiction of the comrs." & imposed penalties for the violation of the prohibitions. The sect. contained a proviso that " This sect. shall not apply to any person having a legal right to cause such water, washing, or liquid as aforesaid to flow into any existing river, stream, or watercourse." Before & at the time of the passing of the Act the sewage of a town flowed into a tidal river within the jurisdiction of the comrs. The urban sanitary authority proposed to remodel their system of drainage, & to make a new outfall into the river, in place of those previously existing :—*Held :* assuming the tidal river to be a watercourse within the Act, the case fell within the above-mentioned proviso, & the comrs. had no power to prevent the carrying out of the new drainage works. The exemption in the proviso is not to be restricted to the precise amount or manner of pollution going on at the time of the passing of the Act.—SOMERSETSHIRE DRAINAGE COMRS. *v.* BRIDGWATER CORPN. (1899), 81 L. T. 729, H. L.

*Annotation :*—**Refd.** Foster *v.* Warblington U. C. (1906), 75 L. J. K. B. 514.

**379. Navigation cut — Whether " public or parish drain."**]—The Eau Brink Cut had always been used for the drainage of a large tract of country, & as a public navigable river, in lieu of the former course of the river Ouse. There never had been any drain or ditch available for the purpose of conveying road materials, or leading to or near the said roads, unless the Eau Brink Cut was to be considered as such. The trustees had for many years used the cut for the conveyance of road materials without paying any toll :—*Held :* the Eau Brink Cut was not a drain within the meaning of the words " public or parish drain " in 4 Geo. 3, c. lv, s. 35.—COULTON *v.* AMBLER (1844), 13 M. & W. 403 ; 14 L. J. Ex. 10 ; 9 J. P. 153 ; 153 E. R. 168.

**380. Deepening drains on neighbouring lands—Sufficiency of notice & plans.**] — A landowner entered upon the neighbouring land of pltfs., & began to deepen a natural watercourse running through it. On being remonstrated with he served notice on pltfs. under Land Drainage Act, 1861 (c. 133), of his intention to treat the watercourse as a drain, & to put a pipe underneath it ; & he sent a sectional plan with the notice. Pltfs. brought an action for damages for trespass & to restrain deft. from proceeding on the notice :—*Held :* the notice & plan were insufficient ; under Land Drainage Act, 1861 (c. 133), the justices had no exclusive jurisdiction to decide as to the validity of the notice, but the High Ct. could restrain proceedings on an invalid notice.—HEDLEY *v.* BATES (1880), 13 Ch. D. 498 ; 49 L. J. Ch. 170 ; 42 L. T. 41 ; 28 W. R. 365.

*Annotations :*—**Refd.** New Romney Corpn. *v.* New Romney Sewers Comrs., [1892] 1 Q. B. 840. **Mentd.** Stannard *v.* St. Giles Camberwell Vestry (1882), 20 Ch. D. 190 ; Barlow *v.* St. Mary Abbott's, Kensington Vestry (1883), 31 W. R. 514 ; North London Ry. *v.* G. N. Ry. (1883), 11 Q. B. D. 30 ; Hayward *v.* East London Waterworks Co. (1884), 28 Ch. D. 138 ; The Recepta, [1893] P. 255 ; The Teresa (1894), 71 L. T. 342 ; Grand Junction Waterworks Co. *v.* Hampton U. C., [1898] 2 Ch. 331 ; St. James' Hall *v.* L. C. C. (1900), 83 L. T. 98 ; *Re* Connolly, Wood *v.* Connolly, [1911] 1 Ch. 731.

## SECT. 3.—PURCHASE OF LANDS.

*See* Sewers Act, 1833 (c. 22), ss. 24–27, 47 ; Lands Clauses Consolidation Act, 1845 (c. 18), s. 7 ; Land Drainage Act, 1861 (c. 133), ss. 21–28 ; Land Drainage Act, 1918 (c. 17) ; COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 295, 297, 298, Nos. 2252, 2253, 2273, 2299, 2300.

## SECT. 4.—VESTING OF PROPERTY.

*See, generally,* Sewers Act, 1833 (c. 22), ss. 10, 47.

**381. Sewers Act, 1833 (c. 22), ss. 10, 47—Lands under " view, cognisance or management."**]—Above

Act, s. 47, enacts, that "the property of & in all lands, tenements, hereditaments, buildings, erections, works, & other things, which shall have been or shall hereafter be purchased, obtained, erected, constructed, or made by or by order of, or which shall be within or under the view, cognisance, or management of, any comrs. of sewers, with the several conveniences, etc., shall be & the same are hereby vested in the comrs. of sewers" :—*Held:* above Act, s. 47, had not the effect of vesting in the comrs. of sewers the property in all lands under their "view, cognisance, or management."—STRACEY *v.* NELSON (1844), 12 M. & W. 535; 13 L. J. Ex. 97; 2 L. T. O. S. 351; 8 J. P. 70, 677; 152 E. R. 1310.

*Annotations:*—**Consd.** Coverdale *v.* Charlton (1878), 4 Q. B. D. 104. **Folld.** Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1; Salisbury & Fordingbridge Drainage District Board *v.* Southern Tanning Co. 1920, Ltd., [1927] 2 K. B. 566. **Refd.** Somersetshire Drainage Comrs. *v.* Bridgwater Corpn. (1899), 81 L. T. 729; Samaradiwakara *v.* De Saram, [1911] A. C. 753. **Mentd.** Medway Navigation Co. *v.* Romney (1861), 7 Jur. N. S. 846; Hinde *v.* Chorlton (1866), L. R. 2 C. P. 104; Mulcahy *v.* R. (1867), 15 W. R. 446; Wadmore *v.* Dear (1871), L. R. 7 C. P. 212; Winch *v.* Thames Conservators (1872), 41 L. J. C. P. 241.

**382.** —— ——.]—An ancient bank existed on A.'s land fronting on a navigable tidal river. There was evidence that there was another bank between the bank in question & the river. A. cut a hole in the bank in question & an extraordinary high tide flowed through & damaged pltfs.' lands. There was no evidence of any prescriptive liability on A. to keep the bank in repair. In an action against A. to recover damages for wrongfully cutting a hole in a bank vested in & within the jurisdiction of the Comrs. of Sewers for the district under above Act:—*Held:* above Act, s. 10, did not vest the bank in the Comrs. for the purpose of being kept up for the public benefit unless the Comrs. took the bank within their jurisdiction under above Act, s. 47, & as there was no evidence of that, pltfs.' claim failed.—WEST NORFOLK FARMERS' MANURE CO. *v.* ARCHDALE (1856), 16 Q. B. D. 754; 55 L. J. Q. B. 230; 54 L. T. 561; 50 J. P. 500; 34 W. R. 401; 2 T. L. R. 406, C. A.

*Annotation:*—**Refd.** Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1.

**383.** —— ——.]—Sandhills formed by the forces of nature above highwater mark, adjoining the shore at M. which served as a protection against the inroads of the sea, were subject to the jurisdiction of the Comrs. of Sewers, who, from time to time, repaired the same & on which they refused to allow the erection of any permanent structure without their licence. The Comrs., however, made no claim to the ownership of the sandhills except in places where they had erected toolsheds & where they had executed works of a permanent character. Pltfs., as the owners of adjoining inlands, claimed to be the owners of the sandhills. The conveyance to them of the adjoining inlands made no mention of the sandhills, but they had exercised certain acts of ownership thereon:—*Held:* although the sandhills were under the "view, cognisance, or management" of the Comrs. of Sewers within the meaning of that expression in above Act, s. 47, that sect. did not vest the property in the sandhills in the Comrs.—NESBITT *v.* MABLETHORPE URBAN COUNCIL, [1918] 2 K. B. 1; 87 L. J. K. B. 705; 118 L. T. 805; 82 J. P. 161; 16 L. G. R. 313, C. A.

*Annotation:*—**Folld.** Salisbury & Fordingbridge Drainage District Board *v.* Southern Tanning Co. (1920), Ltd., [1927] 2 K. B. 566.

**384.** —— ——.]—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING CO. (1920) LTD., No. 376, *ante*.

## SECT. 5.—LIABILITY TO REPAIR, CLEANSE, ETC.

*See* Statute of Sewers, 1531 (c. 5), s. 3; Sewers Act, 1833 (c. 22), s. 15; Land Drainage Act, 1861 (c. 133), ss. 34–37.

**385. Liability by custom.**]—Where the owner of marsh lands was bound by the custom of a sewage level to repair the sea walls fronting his own estate, & by an extraordinary flood tide the wall was damaged, the ct. refused a *mandamus* to the Comrs. of Sewers to reimburse him for the expense of the repairs, it appearing by affidavit that the wall had been previously presented for irrepair, & was out of repair at the time the accident happened.—R. *v.* ESSEX SEWERS COMRS. (1823), 1 B. & C. 477; 2 Dow. & Ry. K. B. 700; 1 L. J. O. S. K. B. 169; 107 E. R. 177.

*Annotations:*—**Refd.** Henley *v.* Lyme Regis Corpn. (1829), 3 Moo. & P. 278; R. *v.* Leigh (1839), 10 Ad. & El. 398; Morland *v.* Cook (1868), L. R. 6 Eq. 252; Hudson *v.* Tabor (1877), 2 Q. B. D. 290; Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449.

**386.** ——.]—Extent of liability of a frontager to repair a sea wall whether arising by tenure, prescription, or custom can only be ascertained by usage.—R. *v.* ESSEX SEWERS COMRS. (1885), 14 Q. B. D. 561; *sub nom.* R. *v.* FOBBING SEWERS COMRS., 54 L. J. M. C. 89; 52 L. T. 587; 49 J. P. 404; 33 W. R. 650; 1 T. L. R. 309, C. A.; *affd. sub nom.* FOBBING SEWERS COMRS. *v.* R. (1886), 11 App. Cas. 449, H. L.

*Annotations:*—**Consd.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972; Baker *v.* Parry (1905), 3 L. G. R. 684.

**387.** —— **Transfer to Metropolitan Board of Works.**]—PLUMSTEAD BOARD OF WORKS *v.* KENT SEWERS COMRS. (1877), 41 J. P. Jo. 388, D. C.

**388. Liability ratione tenuræ.**]—A liability may exist at law to repair sea walls *ratione tenuræ*, even though the damage may be occasioned by tempest, without any default in the obligor.

To prove the liability of deft. to repair a sea wall *ratione tenuræ*, minutes of the Ct. of Sewers, commencing seventy years back, containing orders on the then holders of the estate to repair the wall in question, were held admissible.

*Semble:* such liability is only limited by the ability of the party liable, or the value of the lands granted.

A landowner may be liable, by prescription, to repair sea walls, though destroyed by extraordinary tempest. On presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist ordinary weather & tides: but it is a question, to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also. Orders of the Comrs. of Sewers, requiring land owners to repair & alter

**PART III. SECT. 5.**

p. *Liability of commissioners.*]—It is the duty of the comrs. of a dyking district under Drainage, Dyking & Irrigation Act, R.S.B.C., 1911, c. 69, s. 18 (1), now 1913, c. 18, s. 52, to construct the works in the manner directed by the statute & to operate & maintain them in a proper state of repair. They should anticipate usual events & ordinary conditions & should make adequate provision against flooding of neighbouring lands.—MORRISON *v.* DEWDNEY DYKING DISTRICT COMRS. (B. C.) (1922), 65 D. L. R. 409; [1922] 3 W. W. R. 250.—CAN.

sea walls, may be given in evidence as adjudications by a ct. of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time, as seventy years, the ct. will presume that such orders were executed.—R. *v.* LEIGH (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357; 113 E. R. 152.

*Annotations:*—**Consd.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Mentd.** R. *v.* Bedfordshire (1855), 1 Jur. N. S. 208; R. *v.* Duncan (1881), 44 L. T. 521.

**389.** ——.]—R. *v.* ESSEX SEWERS COMRS., No. 386, *ante*.

**390. Liability by prescription—Damage due to inevitable accident.**]—If one is bound by prescription to repair a wall, etc., against the flowing of the sea, & there is no default in him, but by reason of the sudden & unusual increase of water the wall is broken, the Comrs. of Sewers ought to tax all who hold lands or tenements, or common of pasture, etc., or have or may have any loss, damage, etc., according to the quantity of their lands. If any fault is in him, & the danger is not inevitable, but he may well repair it, the Comrs. may charge him only to repair it. If through his fault the danger becomes inevitable, or he cannot repair it, by which all are charged, etc., every one charged may have an action on the case against him.—KEIGHLEY'S CASE (1609), 10 Co. Rep. 139 a; 77 E. R. 1136.

*Annotations:*—**Consd.** Soady *v.* Wilson (1835), 3 Ad. & El. 248. **Apld.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Refd.** R. *v.* Leigh (1839), 10 Ad. & El. 398; Hudson *v.* Tabor (1877), 2 Q. B. D. 290. **Mentd.** R. *v.* Hampden (1637), 3 State Tr. 826; Ryder *v.* Ryder (1861), 30 L. J. P. M. & A. 44; Nitro-Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katharine Docks Co. (1878), 9 Ch. D. 503.

**391.** —— ——.]—R. *v.* LEIGH, No. 388, *ante*.

**392.** ——.]—R. *v.* ESSEX SEWERS COMRS., No. 386, *ante*.

**393. Necessity for notice by commissioners.**]—A mtgor. not in actual possession, but in receipt of the rents & profits of lands charged with repair of a sea bank, is liable for default of reparation. Notwithstanding Sewers Act, 1833 (c. 22), s. 15, the Comrs. of Sewers, under Statute of Sewers, 1531 (c. 5), s. 3, have power to repair a sea bank, & fine the person whose lands are charged with the repairs, without giving him any notice; therefore a presentment which does not allege notice to repair, but states that the costs & charges of repairing amount to a certain sum, & a judgment thereon ordering that payment, are good.—R. *v.* BAKER (1867), L. R. 2 Q. B. 621; 36 L. J. Q. B. 242; 31 J. P. 692; 15 W. R. 1144.

**394. Liability of mortgagor in receipt of rents & profits—Though not in actual possession.**]—R. *v.* BAKER, No. 393, *ante*.

**395. Construction of private Act.**] — By a private inclosure Act, certain comrs. were required to make, appoint & stake out all "the public bridges, roads & highways" within a certain township, & also set out or appoint "such private ways or roads, hedges, fences, ditches, bridges, causeways, banks, sluices, drains, sewers, cloughs, etc., within the township as they should think convenient," the Act providing "that all such public roads, bridges, sewers & drains should be made, repaired, & kept in repair in such manner as the other public highways, bridges, sewers & drains within the township were by law to be repaired & kept in repair." The Act went on to provide that all such private ways, etc., should be supported & repaired by all or any of the proprietors of lands within the township in such manner as the comrs. should by their award appoint, & required the comrs. by their award to describe "all manner of public highways, bridges, sewers & drains," & all private ways, cloughs, banks, bridges, sewers & drains," within the inclosed lands. The comrs., by their award, appointed, amongst others, two public sewers, & directed that they should be kept in repair & preserved of a certain width & depth by the owners & proprietors of the inclosed lands according to an acreage rate. The owners & proprietors contributed to the repair of these two sewers during eighty years after the Act:—*Held:* a presentment that one of these sewers ought to be made of an increased gauge & repaired by the proprietors of the inclosed lands according to an acreage rate, without disclosing any liability upon the part of these owners *ratione tenuræ*, or by reason of benefit, was illegal, as the Act did not alter the law regulating the repair of public sewers, & the award, if it purported to do so, was *ultra vires*, & any one distrained upon in pursuance of the presentment might maintain trespass without appealing from the order of the comrs.—BIGLIN *v.* WYLIE (1867), 36 L. J. Q. B. 307; 31 J. P. 771.

**396. Liability long asserted & acknowledged—Presumption of legal origin.**]—Where the liability of a frontager to keep the sea wall on his land in repair at his sole expense has long been asserted, & has long been submitted to on his part, it will be presumed to have originated under a local custom or *ratione tenuræ* or in some other legal way, unless & until it is proved that it cannot have had a legal origin. If in order to presume a legal origin it is necessary to presume a grant from the Crown, the ct. will presume such a grant.—LONDON & NORTH WESTERN RY. CO. *v.* FOBBING LEVELS SEWERS COMRS. (1896), 66 L. J. Q. B. 127; 75 L. T. 629; 41 Sol. Jo. 128, D. C.

**397. Whether liable to repair bridge.**] — By Somersetshire Drainage Act, 1877 (c. xxxvi), applts. exercised an exclusive jurisdiction over the arterial drainage of separate & distinct river valleys in Somersetshire, including the valley of the river Parrett. Resps. were a drainage district board & had exclusive jurisdiction over the non-arterial drainage of the lands in the district of the Parrett reaching to & including the Langport Bridge. That bridge had existed from early times & carried the high road connecting Exeter, Taunton, Bath, & other populous places. Before 1839 the bridge consisted of nine arches so constructed as to impede the flow of water down stream, & until 1839, the bridge & the roadway over it were repaired by the Langport corpn. In Mar. 1839, an agreement was made between that corpn. & the "company of Proprietors of the Parrett Navigation," a co. which was incorporated by the Parrett Navigation Act, 1836 (c. ci), hereinafter called "the co.," whereby the corpn. agreed to pay £500 towards the expenses to be incurred by the co. in building a new bridge over the Parrett. The co. erected the new bridge, & the money was duly paid. Parrett Navigation Act, 1839 (c. xxxvii), s. 16, empowered the co. to make & levy certain tolls on all goods carried to or through or beyond Langport Bridge if the co. pulled down the old bridge & rebuilt it with not more than three arches, so as to allow a freer & easier passage of the water & so as to give a carriageway & a footway of a certain width, provided that "after the completion of the bridge the co. shall at all times thenceforth, at their own costs & charges, keep the bridge & the roadway over the same in good & sufficient repair." By Somersetshire Drainage Act, 1877 (c. xxxvi), ss. 117, 118, the whole undertaking of the co., together with all

its powers & liabilities, was transferred to applts., & by sect. 121 they were empowered to use the undertaking for the drainage of lands within their jurisdiction & to abandon the user of the undertaking for the purpose of navigation together with the power of levying tolls. By sect. 2, the expression " drainage work " was defined as including " all works which the comrs. or district boards have power to execute or acquire authority over under this Act." By sect. 32 the powers of the comrs. & of the district boards extended to " maintenance of existing works " & included the repairing of all bridges :—*Held :* the repair of the roadway over the bridge was not " drainage work " within the Act of 1877, & applts. were not entitled to recover the cost of repairing it from resps.—SOMERSETSHIRE DRAINAGE COMRS. *v.* LANGPORT DRAINAGE DISTRICT BOARD (1919), 89 L. J. K. B. 273 ; 122 L. T. 378 ; 84 J. P. 19 ; 18 L. G. R. 87, D. C.

**398. Duty to cleanse—" Drain, stream or watercourse "—Underground drain.**]—Resp.'s land having been injured through the neglect of applt. to cleanse an underground drain running through his land, proceedings were taken under Land Drainage Act, 1847 (c. 38). An objection having been taken that Land Drainage Act, 1847 (c. 38), applied only to open watercourses, & that the proceedings should have been taken under Land Drainage Act, 1861 (c. 133), s. 3, by which compensation is payable to the person whose land is entered upon & opened for the purpose of making & cleansing drains :—*Held :* the words " drain, stream, or watercourse " include an underground drain, & proceedings in respect of injury arising from neglect to cleanse & scour such a drain were rightly taken under Land Drainage Act, 1847 (c. 38).—BOWES *v.* WATSON (1879), 42 L. T. 27 ; 44 J. P. 364 ; 28 W. R. 394, D. C.

**399. —— Breach of duty—Whether liable for damage to mill.**]—Resp. was the owner of a water mill, & applt. was the occupier of adjacent land through or along which the water passed after it had gone over the mill wheel. A quantity of silt formed in the stream where it passed applt.'s land, & in consequence of applt. declining to cleanse & scour the channel at that point the water was penned back so as partially to submerge the mill wheel. Proceedings having been taken by resp. under Land Drainage Act, 1847 (c. 38) :—*Held :* the provisions of the Act were confined to injury done to the land itself, & did not apply where the injury complained of was injury to a mill.—FINCH *v.* BANNISTER, [1908] 2 K. B. 441 ; 77 L. J. K. B. 718 ; 99 L. T. 228 ; 72 J. P. 203 ; 24 T. L. R. 435 ; 52 Sol. Jo. 354 ; 6 L. G. R. 534, C. A.

## SECT. 6.—LEGAL PROCEEDINGS BY AND AGAINST COMMISSIONERS.

*See* Land Drainage Act, 1861 (c. 133), ss. 16-20.

**400. Right to bring action—Land Drainage Act, 1861 (c. 133), s. 16.**]—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING CO. (1920) LTD., No. 376, *ante.*

**401. Whether injunction granted—Against Commissioners.**]—BOX *v.* ALLEN (1727), 1 Dick. 49 ; 21 E. R. 186.

*Annotation :*—**Consd.** A.-G. *v.* Forbes (1836), 2 My. & Cr. 123.

**402. —— ——.**]—Injunction against the Act of Comrs. of Sewers, reducing the height of water in a river, dissolved ; there being a much shorter remedy by *certiorari* in the Ct. of K. B. ; who interfere with great caution.—KERRISON *v.* SPARROW (1815), 19 Ves. 449 ; Coop. G. 305 ; 34 E. R. 583, L. C.

*Annotation :*—**Consd.** A.-G. *v.* Forbes (1836), 2 My. & Cr. 123.

**403. —— ——.**]—Injunction, at the instance of the Parliamentary Comrs. for cleansing & improving the river Witham & its navigation, & the drainage of the adjacent lands, against the erection or use of a steam engine by Parliamentary trustees for draining a particular district, applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, & also on the ground of apprehended injury to the drainage of the lands within the jurisdiction of the Comrs., refused.—RIPON (EARL) *v.* HOBART (1834), 3 My. & K. 169 ; Coop. *temp.* Brough. 333 ; 3 L. J. Ch. 145 ; 40 E. R. 65, L. C.

*Annotations :*—**Refd.** Fletcher *v.* Bealey (1885), 28 Ch. D. 688. **Mentd.** Shrewsbury & Birmingham Ry. *v.* L. & N. W. Ry. (1850), 3 Mac. & G. 70 ; Isenberg *v.* East India House Estate Co. (1863), 3 De G. J. & Sm. 263 ; M'Murray *v.* Cadwell (1889), 6 T. L. R. 76 ; A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87 ; Litchfield-Speer *v.* Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407.

**404. —— ——.**] — The Comrs. [Comrs. of Sewers] possess a jurisdiction founded on Acts of Parliament & they have a right, within due limits of their authority, to do all necessary acts in the execution of their functions. Nevertheless, if they so execute what they conceive to be their duty, as to create or occasion a public nuisance, this ct. has an undoubted right to interpose (LORD COTTENHAM, C.).—A.-G. *v.* FORBES (1836), 2 My. & Cr. 123 ; 40 E. R. 587, L. C.

*Annotations :*—**Mentd.** Thorne *v.* Taw Vale Ry. & Dock Co. (1850), 13 Beav. 10 ; Soltau *v.* De Held (1851), 2 Sim. N. S. 133.

**405. —— ——.**]—Where Comrs. of Sewers, under an Act of Parliament, are proceeding to pave & make sewers to the injury of property, in a case not within the Act, this ct., unless expressly excluded, has jurisdiction to interfere, although, by the Act, jurisdiction is given to the justices at sessions, whose judgment is not to be removed by *certiorari* or otherwise into any of Her Majesty's Cts. of Record at Westminster or elsewhere.—BIRLEY *v.* CHORLTON-UPON-MEDLOCK (CONSTABLES & BURGESSES) (1841), 3 Beav. 499 ; 49 E. R. 196.

**406. —— At instance of Commissioners.**]—This ct. has jurisdiction to entertain a bill at the suit of the Comrs. of Sewers appointed under Statute of Sewers, 1531 (c. 5), notwithstanding that such Comrs. are a Ct. of Record.—CROSSMAN *v.* BRISTOL & SOUTH WALES RY. CO. (1863), 1 Hem. & M. 531 ; 11 W. R. 981 ; 71 E. R. 233.

*Annotations :*—**Consd.** Salisbury & Fordingbridge Drainage District Board *v.* Southern Tanning Co. (1920), Ltd., [1927] 2 K. B. 566. **Refd.** Nesbitt *v.* Mablethorpe U. D. C., [1918] 2 K. B. 1. **Mentd.** St. Mary, Battersea, Vestry *v.* County of London & Brush Provincial Electric Lighting Co., [1899] 1 Ch. 474.

**407. Power to sue—Action for trespass.**]—(1) The Comrs. of Sewers cannot maintain an

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**PART III. SECT. 6.**

**401 l.** *Whether injunction granted—Against Commissioners.*]—When Comrs. appointed by a statute, exceed the authority given them, & thereby infringe on, or violate private rights, the ct. has jurisdiction to restrain them by injunction.—FOSTER *v.* HORNSBY (1853), 2 I. Ch. R. 426 ; 5 Ir. Jur. 279.—**IR.**

q. *Liability for negligence—Negligent & expensive construction of works.*]—STUBBER *v.* HORNSBY (1853), 2 I. Ch. R. 449 ; 5 Ir. Jur. 281.—**IR.**

r. —— *Flooding caused by failure to maintain works.*]—BOHAN *v.* CLEMENTS, [1920] 2 I. R. 117.—**IR.**

t. *Mandamus to commissioners—To assess lands—Expiration of term of*

*Sect. 6.—Legal proceedings by and against commissioners.*]

action of trespass against the comrs. of a harbour, for breaking down a wall or dam, erected by the former, as such comrs., across a navigable river, as the authority to be exercised by them on behalf of the public, does not vest in them such a property or possessory interest, as will enable them to maintain such action.

(2) The price [for timber taken for purposes of constructing & repairing works] is not given by the comrs. individually, but it is given before them as a court of record, in which they are bound to act (DALLAS, C. J.).

(3) The commission . . . constitutes the comrs. a ct. & gives them every power incident to a ct. of oyer & terminer. They may compel obedience to their orders; they may compel the sheriffs by their mandatory writs to summon a jury of twelve men for the purpose of inquiry; they are enabled to appoint ministerial officers; they may nominate a collector for the purpose of collecting money & proper officers for hearing & taking an account of the receipts & payments. So that the comrs. themselves do not act ministerially, but the officers whom they appoint (PARK, J.).—NEWCASTLE (DUKE) *v.* CLARK (1818), 8 Taunt. 602; 2 Moore, C. P. 665; 129 E. R. 518.

*Annotations:*—**Consd.** Crossman *v.* Bristol & South Wales Union Ry. (1863), 1 Hem. & M. 531; Salisbury & Fordingbridge Drainage District Board *v.* Southern Tanning Co. (1920), Ltd., [1927] 2 K. B. 566. **Refd.** Dyson *v.* Collick (1822), 5 B. & Ald. 600; Hollis *v.* Goldfinch (1823), 1 B. & C. 205; Stracey *v.* Nelson (1844), 13 L. J. Ex. 97; Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244; Rolls *v.* St. George, Southwark, Vestry (1880), 49 L. J. Ch. 691.

**408. Liability for negligence—Notice of cause of action—Sufficiency of.**]—By a local Act relating to the Comrs. of Sewers for Westminster, it was provided that no pltf. should recover in any action brought for any thing done in pursuance of the general Acts for sewers, or that Act, unless notice in writing was given to defts. specifying the cause of such action. A notice stated that defts., who were contractors under the comrs., made, altered, etc., certain sewers, etc., running under, through, or adjoining, or near to pltf.'s house, in so negligent, incautious, unskilful, improvident, & improper a manner, that it fell down; & by the declaration & proof given, it appeared that the sewer did not run close to pltf.'s house, but close to five other houses adjoining thereto, & that the house was damaged, & fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, & which had been insufficiently shored up by defts. during the continuance of the work:—*Held:* this notice sufficiently described the cause of action.—JONES *v.* BIRD (1822), 5 B. & Ald. 837; 1 Dow. & Ry. K. B. 497; 106 E. R. 1397.

*Annotations:*—**Distd.** Stainton *v.* Woolrych, Stainton *v.* Metropolitan Board of Works & Lewisham District Board of Works (1857), 23 Beav. 225. **Consd.** Smith *v.* West Derby L. B. (1878), 3 C. P. D. 423. **Refd.** Boulton *v.* Crowther (1824), 2 B. & C. 703; Hall *v.* Smith (1824), 2 Bing. 156; Mersey Docks Trustees *v.* Gibbs, Mersey Docks Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93. **Mentd.** Partridge *v.* Scott (1838), 3 M. & W. 220; Martins *v.* Upcher (1842), 3 Q. B. 662; Wilkinson *v.* Gray (1844), 2 L. T. O. S. 348; White *v.* Peto (1888), 58 L. T. 710.

**409. —— Commissioners acting in bonâ fide performance of duty.**]—In order to render comrs. acting in the *bonâ fide* performance of a public duty liable to an action for an injury to an individual resulting from an act so done by them, it must appear that they have been guilty of negligence or want of skill in the conduct of it.

In case against comrs. of sewers for an injury done to pltfs.' premises by the construction of an adjoining sewer, the cause was referred to an arbitrator, who found, that there were two modes of making a sewer practised in London, the one by what is called tunnelling, the other by what is called open cutting; that, in this case, a deep sewer could not be made either by the one method or the other without risk of damage to the adjoining buildings; that the amount of risk varied according to the nature of the soil, which here was of a nature to make the risk considerable; that the probability of damage accruing was in some degree less where the sewer was made by open cutting than by tunnelling; that the sewer was made by the mode of tunnelling, that the comrs., in directing it to be made, & in the making of it, were acting *bonâ fide* in the honest discharge of their duty as comrs.; that the sewer was fit & proper to be made for the convenient drainage of the city of London, & was made in a workmanlike, skilful, & proper manner in all respects, provided that the comrs. were justified in making it by the mode of tunnelling; & that, in consequence of the making of the sewer, pltf.'s house was damaged to a certain amount. It did not appear that pltfs. had had any notice of the progress of the work or of the mode of doing it:—*Held:* the comrs. were not responsible for the injury so occasioned.—GROCERS' CO. *v.* DONNE (1836), 3 Bing. N. C. 34; 2 Hodg. 120; 3 Scott, 356; 5 L. J. C. P. 307; 132 E. R. 322.

*Annotations:*—**Distd.** Stainton *v.* Woolrych, Stainton *v.* Metropolitan Board of Works & Lewisham District Board of Works (1857), 23 Beav. 225. **Refd.** Metcalf *v.* Hetherington (1855), 24 L. J. Ex. 314; Herring *v.* Metropolitan Board of Works (1865), 19 C. B. N. S. 510.

**410. —— Works sanctioned by commissioners—Obstructing navigation.**]—The Comrs. of Sewers having obstructed a watercourse which pltf. claimed a right to navigate made him an offer of compensation, which he refused, & sued for more. Defts., by their pleas, denied the right, & also the obstruction: after abortive attempts during four years to proceed with a reference of the action, the ct. refused the Comrs. leave to plead a third plea, which would defeat the action, unless the Comrs. renewed, & pltf. refused, the offer of compensation made at first.—MEDLEY *v.* PRITCHARD (1840), 6 Bing. N. C. 442; 8 Scott, 684; 133 E. R. 171.

**411. —— —— Though requisite number not present.**]—By 3 & 4 Vict. c. 55, s. 5, no act of the Comrs. of the Dartford Creeks shall be valid, unless made or done at a meeting under the Act; & all the powers of the Act shall be executed by the majority of the Comrs. present at a meeting, not less than three being present. By sect. 12 the Comrs. shall & may be sued in the name of their clerk. The Comrs. passed resolutions that their engineer should prepare specifications with a view to the performance of a contract for certain works, & that tenders should be invited for the same. At a meeting, at which seven Comrs. were present, they unanimously agreed to accept a tender sent by B. Three Comrs. only were named in the contract with B., which was prepared by their

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*office—Liability of successors to writ.*]—Where the term of office of a Board of Comrs. of Sewers, appointed under Con. Stats. of New Brunswick, 1903, c. 159, had expired between the date of argument of a motion for a *mandamus* against the Board, to compel them to make an assessment upon certain marsh lands, & the date of judgment upon such motion, it was held that the writ might go against their successors in office.—*Ex p.* DIXON (N. B.) (1911), 10 E. L. R. 383. —CAN.

a. *Liability for acts outside jurisdiction—Without proof of negligence.*]—MALLEY *v.* HORNSBY (1853), 3 I. C. L. R. 381; 6 Ir. Jur. 5.—IR.

secretary, & by none of them was it signed. B. did the works specified in the contract (*inter alia*), a bank, which he erected of insufficient materials. Water was prematurely admitted, which sunk the bank & damaged pltf.'s land:—*Held:* the contract was made in execution of the office of the Comrs., & work done under that contract was work done by them as Comrs., for which they might properly be sued in the name of their clerk; but the bank which failed being a part of the works specified & described in the contract, B. the contractor, & not the Comrs., was liable for the damage done to pltf.—ALLEN *v.* HAYWARD (1845), 7 Q. B. 960; 4 Ry. & Can. Cas. 104; 15 L. J. Q. B. 99; 5 L. T. O. S. 409; 10 Jur. 92; 115 E. R. 749.

*Annotations:*—**Refd.** Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244; Ruck *v.* Williams (1858), 3 H. & N. 308; Hole *v.* Sittingbourne & Sheerness Ry. (1861), 6 H. & N. 488; Brownlow *v.* Metropolitan Board of Works & Aird (1862), 8 Jur. N. S. 891. **Mentd.** Rich *v.* Basterfield (1847), 16 L. J. C. P. 273.

**412. —— Special remedy provided by Act.**]—By various statutes comrs. were appointed for the purposes of draining certain low lying lands with powers of rating the owners thereof to defray expenses necessary for perfecting the drainage.

One of the statutes provided that if any person should sustain damage or injury in his lands by any neglect or default of the comrs. by reason of any alteration made by them on account of the works to be made by virtue of the Act, then, if the comrs. & the party injured should not agree touching the damages, the comrs. should ascertain the damages by a jury to be empanelled & returned as therein provided & give judgment for the party aggrieved as therein directed:—*Held:* this enactment did not apply where liability was disputed, & the jurisdiction of the ct. was not ousted thereby.—BOYNTON *v.* ANCHOLME DRAINAGE & NAVIGATION COMRS., [1921] 2 K. B. 213; 90 L. J. K. B. 75; 124 L. T. 54; 85 J. P. 33; 18 L. G. R. 610, C. A.

*Annotations:*—**Refd.** Sheppard *v.* Glossop Corpn., [1921] 3 K. B. 132; Huyton & Roby Gas Co. *v.* Liverpool Corpn., [1926] 1 K. B. 146.

**413. —— Negligence of servants.**]—By an Act of Parliament, Drainage Comrs. were to make & maintain a cut & sluice; the sluice burst, owing to the negligence of the servants of the Comrs., & damage having ensued to pltf.'s land he brought an action against the Comrs. in the name of their clerk:—*Held:* the Comrs. were not exempt from liability by reason of their being Comrs. for a public purpose; & the duty being imposed upon them of maintaining the sluice, they were liable for the damage caused by the negligent performance of that duty by their servants.—COE *v.* WISE (1866), L. R. 1 Q. B. 711; 7 B. & S. 831; 37 L. J. Q. B. 262; 14 L. T. 891; 30 J. P. 484; 14 W. R. 865, Ex. Ch.

*Annotations:*—**Refd.** Harrison *v.* G. N. Ry. (1864), 3 H. & C. 231; Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93; Worral Waterworks Co. *v.* Lloyd (1866), L. R. 1 C. P. 719; Wilson *v.* Halifax Corpn. (1868), L. R. 3 Exch. 114; Birch *v.* St. Marylebone Vestry (1869), 20 L. T. 697; Holborn Union *v.* St. Leonard Shoreditch, Vestry (1876), 2 Q. B. D. 145; Gibraltar Sanitary Comrs. *v.* Orfila (1890), 15 App. Cas. 400; Jersey *v.* Uxbridge Sanitary Authority, [1891] 3 Ch. 183; Tozeland *v.* West Ham Union, [1907] 1 K. B. 920; Liebig's Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213. **Ment'd.** River Wear Comrs. *v.* Adamson (1877), 37 L. T. 543; Colley *v.* L. & N. W. Ry. & G. W. Ry. (1880), 42 L. T. 807.

**414. Erection of works for protection of land from inroads of sea—Works causing increased flow against adjoining lands—Liability to compensate adjoining owners.**]—Where comrs. of sewers acting *bonâ fide* for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against, & injure the adjoining land not within the levels:—*Held:* they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection; for that all owners of land exposed to the inroads of the sea, or comrs. of sewers acting for a number of land owners, have a right to erect such works as are necessary for their own protection, even although they may be prejudical to others.—R. *v.* PAGHAM, SUSSEX SEWERS COMRS. (1828), 8 B. & C. 355; 2 Man. & Ry. K. B. 468; 108 E. R. 1075; *sub nom.* R. *v.* BOGNOR SEWERS COMRS., 6 L. J. O. S. K. B. 338.

*Annotations:*—**Consd.** Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429; Gerrard *v.* Crowe, [1921] 1 A. C. 395. **Refd.** R. *v.* Trafford (1831), 1 B. & Ad. 874; A.-G. *v.* Londsdale (1868), L. R. 7 Eq. 377; Hudson *v.* Tabor (1877), 2 Q. B. D. 290; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. **Mentd.** Smith *v.* Kenrick (1849), 7 C. B. 515.

**415. In whose name Commissioners sued.**]—ALLEN *v.* HAYWARD, No. 411, *ante*.

**416. ——.**]—Under 11 & 12 Vict. c. 112, which enacts that the Metropolitan Comrs. of Sewers may sue & be sued, "in the name of the clerk for the time being," as explained by 12 & 13 Vict. c. 93, s. 15, which enacts, that the chief clerk to the Comrs. shall be called the secretary; & the word "clerk" in any of the Acts relating to the Comrs. shall include "secretary"; the Comrs. must sue & be sued in the name of their secretary.—CLEMENTS *v.* POLLARD (1855), 10 Exch. 817; 3 C. L. R. 420; 19 J. P. 314; 156 E. R. 671.

**417. Dispute between sewers board & local authority—Provision in Act referring to county court judge—Mandamus to hear & determine.**]—By a local Act the main object of which was the diverting of the sewage of Brighton from the existing storm outfalls & carrying it to a distance from the town, it was enacted that "any dispute which might from time to time arise between the sewers board & any local authority with respect to carrying into effect the provisions of the Act or incidental thereto might, at the instance of either party, be referred to the judge for the time being of the Sussex county ct., who should hear & determine such dispute, & whose decision should be final & conclusive." A dispute having arisen between the sewers board & the Hove Comrs., one of the Local Authorities, with respect to the mode of carrying out the provisions of the Act, & the sewers board requiring it to be referred to the county ct. judge:—*Held:* the county ct. judge was bound to hear & determine the matter & that *mandamus* was the proper course to compel him to do so, & not a rule or order under County Courts Act, 1856 (c. 108), s. 43, this not being a matter within this ordinary jurisdiction, but a special duty imposed upon him by statute.—*Re* BRIGHTON SEWERS ACT (1882), 9 Q. B. D. 723, D. C.

**418. Mandamus to commissioners—To levy rate—Retrospective rate.**]—EASTON & CO. *v.* NAR VALLEY DRAINAGE COMRS. (1892), 8 T. L. R. 649, D. C.

**419. —— Sufficiency of return—Mandamus to levy rate—Return that commission expired shortly after writ.**]—It is a good return to a *mandamus* commanding comrs. of sewers to make a rate to re-imburse an expenditor that they had before the writ issued made a rate by which he would be re-imbursed, & that their commission expired within so short a time after the service of the writ, that they could not make a fresh rate.—R. *v.* TENDRING LEXDEN & WINSTREE SEWERS COMRS.

*Sect. 6.—Legal proceedings by and against commissioners. Part IV. Sects. 1 & 2: Sub-sect. 1.]*

(1727), 2 Ld. Raym. 1479 ; 92 E. R. 461 ; *sub nom.* R. *v.* ESSEX SEWERS COMRS., 2 Stra. 763.

*Annotation :*—**Mentd.** R. *v.* L. & N. W. Ry. (1851), 16 Q. B. 864.

**420. —— —— Order to execute works "forthwith"—Return alleging compliance at all times.**]—A statute directed that a sum of money should be paid to certain comrs., who were therewith to execute all such works, etc., as should from time to time be deemed necessary, proper, or expedient for putting certain banks & bridges in a permanent state of stability & security, & for constructing the forelands & slopes of the banks, as far as practicable, upon one uniform system. By *mandamus*, reciting this clause, & that the money had been paid to the comrs., they were ordered to proceed to put the banks forthwith in a permanent state of stability & security, & to construct the forelands & slopes of the banks, as far as practicable, upon one uniform system. Return, that the comrs. had from time to time, at all times from the passing of the Act hitherto, proceeded to execute all such works " as should be, or were, from time to time deemed necessary, proper, or expedient for putting the banks in a permanent state of stability & security, & for constructing the forelands & slopes of the banks, as far as practicable, upon one uniform system " :—*Held :* an insufficient return, & a peremptory *mandamus* awarded.—R. *v.* OUZE BANK COMRS. (1835), 3 Ad. & El. 544 ; 111 E. R. 521.

*Annotation :*—**Refd.** R. *v.* Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

**421. —— Alternative remedy available.**]—The Conservators of Bedford Level moved for a *mandamus* to landowners to amend & heighten certain banks within the level, which they were liable to repair *ratione tenuræ*, & which were alleged, but not admitted, to be in a dangerous state. Writ refused, inasmuch as 15 Car. 2, c. 17, s. 5, gave the conservators, within the level, the authority of comrs. of sewers, & therefore they had a sufficient remedy in their own hands.—R. *v.* GAMBLE (1839), 11 Ad. & El. 69 ; 3 Per. & Dav. 122 ; 9 L. J. Q. B. 2 ; 113 E. R. 339.

*Annotations :*—**Refd.** R. *v.* Bristol Dock Co. (1841), 5 J. P. 546 ; R. *v.* Leicester Union, [1899] 2 Q. B. 632.

**422. —— To pay sum awarded as compensation—Necessity for previous demand.**]—*Re* METROPOLITAN SEWERS COMRS. (1853), 17 J. P. Jo. 438.

**423. —— Costs—Costs of showing cause against original rule—Treble costs.**]—A *mandamus* was directed to a comr. under a local Drainage Act, commanding him to swear into office a person claiming to have been appointed such comr. He returned that claimant was not duly appointed ; & obtained judgment upon issue joined on a traverse of such return.

By local Act, s. 52, if judgment is given against pltf. in any action, suit or information commenced or prosecuted against any person for any thing done in pursuance of the Act, such person is to have treble costs :—*Held :* the judgment for deft. in such proceeding by *mandamus* did not entitle him to treble costs, as neither his refusal to swear in claimant nor the making the return to the writ was a thing done in pursuance of the Act.—R. *v.* KELK (1841), 1 Q. B. 660 ; 1 Gal. & Dav. 127 ; 10 L. J. Q. B. 188 ; 5 Jur. 888 ; 113 E. R. 1284.

*Annotations :*—**Refd.** R. *v.* Fall (1811), 1 Q. B. 636. **Mentd.** Elwell *v.* Birmingham Canal Co (1846), 6 L. T. O. S. 431.

# Part IV.—Sewers Rate.

## SECT. 1.—IN GENERAL.

**Commissioners of sewers, generally.**] — *See* Part III., *ante.*

**Jurisdiction of commissioners.**]—*See* Part III., Sect. 1, sub-sect. 2, *ante.*

**Mandamus to Commissioners to levy rate.**]—*See* Nos. 418, 419, *ante.*

**Regulations as to rating.**]—*See* Land Drainage Acts, 1861 (c. 133), s. 38 ; 1918 (c. 17), ss. 4 & 5.

**Special expenses rate.**]—*See* RATES & RATING, Vol. XXXVIII., pp. 576, 577, Nos. 1122–1130.

## SECT. 2.—GENERAL SEWERS RATE.

### SUB-SECT. 1.—PURPOSES.

*See* Land Drainage Acts, 1861 (c. 133), s. 38 ; 1918 (c. 17), s. 4.

**424. Expenses of "works done or to be done."**]—(1) Comrs. of sewers may make a rate to defray the expenses of works already done.

(2) In order to justify such a rate it is not necessary that there should have been a previous presentment by a jury of those works.

(3) It is no valid objection to such a rate, that it is made to defray previous law expenses of the commission, *bonâ fide* incurred by the comrs. in the discharge of their duty.

(4) Nor that the rate is in the alternative to defray the expenses of works done or to be done ; for the word "or" must be read "and."—R. *v.* TOWER HAMLETS SEWERS COMRS. (1830), 1 B. & Ad. 232 ; 9 L. J. O. S. M. C. 30 ; 109 E. R. 773.

*Annotations :*—*As to* (1) **Refd.** Easton *v.* Nar Valley Drainage Comrs. (1892), 8 T. L. R. 649. *As to* (3) **Apld.** A.-G. *v.* Thomson, [1913] 3 K. B. 198. **Refd.** A.-G. *v.* Norwich Corpn. (1837), 2 My. & Cr. 406. *As to* (4) **Refd.** R. *v.* Sibly (1884), 54 L. J. M. C. 23 ; R. *v.* White (1884), 14 Q. B. D. 358.

**425. Expenses previously incurred — Works already executed.**]—R. *v.* TOWER HAMLETS SEWERS COMRS., No. 424, *ante.*

**426. —— Works preliminary to proposed scheme—Scheme disapproved by proprietors of lands.**]—By Land Drainage Act, 1861 (c. 133), s. 29, previously to commencing new works, when they involve an expenditure of more than £1,000, the comrs. of sewers shall cause plans of the proposed works & an estimate of the expense thereof to be made, & shall publish their intention to execute such works two months before commencing the same. By s. 31, if within such period of two

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**PART IV. SECT. 1.**

*b. Validity of assessment — Necessity for notice by assessors.*]—R. *v.* ST. JOHN CORPN. (1856), 8 N. B. R. (3 All.) 361.—**CAN.**

*c. —— Assessment without inspection.*]—In assessing certain lands under Drainage, Dyking & Irrigation Act, the comrs. fixed upon a uniform rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, & without making a personal inspection :—*Held :* the assessment so made was good.—BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LTD. *v.* FETHERSTONE (1907), 13 B. C. R. 190.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 1.**

*425 i. Expenses previously incurred —Works already executed.*]—LENNOX DRAINAGE BOARD *v.* GALE (1915), 17 W. A. L. R. 180.—**AUS.**

months the proprietors of one-half of the area of the land to be rated declare their dissent, the comrs. shall take no further steps; but if no such declaration is made the comrs. may commence the work, & repay, out of the rates to be levied by them within the area, all expenses incurred. By s. 38, rates may be levied by the comrs. for defraying all costs incurred by them, & a rate levied for the purpose of defraying the expense of new works involving an expenditure of more than £1,000, shall be deemed to be a special rate, & a tax on the owners of property; but other rates shall be payable by the same persons in respect of the same property as they are now by law payable. By s. 67 all powers by the Act vested in comrs. of sewers may be exercised by a drainage board.

The drainage board for a district incurred expenses in making surveys & plans for certain proposed works. The estimates for the proposed works amounted to more than £1,000. The proprietors of one-half of the land dissented from the execution of these works, which were never carried out. The board made a general rate on the occupiers of land in the district, in order to pay for the expenses of the surveys & plans:—*Held:* the occupiers, & not the owners, were chargeable, under ss. 31 & 38, with these expenses; & the rate was properly made on the present value of the land.—GRIFFITHS *v.* LONGDON & ELDERSFIELD DRAINAGE BOARD (1871), L. R. 6 Q. B. 738; 41 L. J. Q. B. 25; 25 L. T. 126; 36 J. P. 245; 19 W. R. 1162.

*Annotation:*—**Refd.** Knight *v.* Langport District Drainage Board, [1898] 1 Q. B. 588.

**427. —— Money borrowed for drainage purposes.**]—There is no rule of law which prohibits a retrospective rate. In every case of rating the question is, whether the Act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective.

A public local Act for draining the lands of Holderness, in the East Riding of the county of York, contained no prohibition against a retrospective rate. The comr. under that Act borrowed money, on which interest became due, for the purposes of the works directed by the Act:—*Held:* a rate made to pay off the debt thus incurred, was under the provisions of that Act, a valid rate.—HARRISON *v.* STICKNEY (1848), 2 H. L. Cas. 108; 12 J. P. 564; 9 E. R. 1033, H. L.

*Annotations:*—**Apld.** Easton *v.* Nar Valley Drainage Comrs. (1892), 8 T. L. R. 649; R. *v.* Leigh R. C., [1898] 1 Q. B. 836. **Refd.** Waddington *v.* London Union Grdns. (1858), E. B. & E. 391; A.-G. *v.* Church (1864), 2 Hem. & M. 697; R. *v.* Wigan (1874), L. R. 9 Q. B. 317; Stratton *v.* Metropolitan Board of Works (1874), 31 L. T. 689; Jersey *v.* Uxbridge Union R. S. A. (1891), 64 L. T. 858; Croydon Corpn. *v.* Croydon R. C., [1908] 2 Ch. 321.

**428. —— Legal expenses.**] — R. *v.* TOWER HAMLETS SEWERS COMRS., No. 424, *ante*.

**429. —— —— Opposition to Parliamentary bill—Levy enforced by mandamus.**] — If a bill depending before Parliament for the drainage of a district is likely to injure a neighbouring level, the comrs. of sewers for that level may legally incur costs in endeavouring to procure a rejection or modification of the bill; such opposition, if undertaken prudently & *bonâ fide*, being within Sewers Act, 1833 (c. 22), s. 16, a "litigation or controversy arising out of the duties imposed" on the comrs. by the Statutes of Sewers. Although the comrs might not be compellable by *mandamus* to oppose such bill, they may lay a gross rate, under Sewers Act, 1841 (c. 45), s. 1, to pay the expenses of a past *bonâ fide* opposition to such bill; the rate to be afterwards apportioned according to sect. 2, & a *mandamus* lies to compel them to make a rate, if they have no other fund, for repayment of costs incurred by their clerk under their authority in such opposition.—R. *v.* NORFOLK SEWERS COMRS. (1850), 15 Q. B. 549; 4 New Mag. Cas. 119; 20 L. J. Q. B. 121; 15 L. T. O. S. 391; 15 Jur. 121; 14 J. P. Jo. 365; 117 E. R. 567.

**430. Expenses arising from negligent exercise of powers—Compensation & damages.**]—Where a local Act of Parliament incorporates comrs. for the execution of works, & confers on them rating powers for the purposes of the Act, the implication will be, unless the contrary clearly appear, that it is within their powers to levy a rate in order to provide for a liability arising through negligence in the execution of the works.

A drainage Act incorporated comrs., who were to take over certain existing & to execute certain new drainage works within their district.:—*Held:* the limitation of the amount to be expended in sect. 38 applied to the expenditure on & incident to the works themselves, not to liabilities to pay damages arising from negligence of the comrs.' servants in carrying out the works; & the comrs. had power under sects. 40 & 41 to make rates for the purpose of meeting such liabilities, although their capital expenditure had already reached the amount mentioned in sect. 38.—R. *v.* SELBY DAM DRAINAGE COMRS., [1892] 1 Q. B. 348; 61 L. J. Q. B. 372; 66 L. T. 17; 56 J. P. 356, C. A.

**431. Expenses of improving navigation of river.**]—Comrs. of sewers cannot make an assessment for the erection of a tumbling-bay & lock on a navigable river.—R. *v.* WESTHAM ESSEX (INHABITANTS) (1713), 10 Mod. Rep. 159; 88 E. R. 674.

**432. Administrative expenses — Where contribution to drainage works by local authority—Construction of Local Act.**]—The words "any drainage rate in para. viii of Article 11 of the Order set out in the Schedule to Land Drainage (Ouse) Provisional Order Confirmation Act, 1920 (c. lxxii), do not include a rate for the ordinary administrative & general expenses, but cover only a rate for the expenses of the execution & maintenance of works together with any fraction of

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**428 i. ——** *Legal expenses.*]—*Re* BISHOP DYKE (1887), 20 N. S. R. (8 R. & G.), 263.—**CAN.**

**d. ——** *Right to levy rate before amount of liability exactly ascertained.*]—*Re* TRECOTHIC MARSH (1905), 38 N. S. R. 23.—**CAN.**

**430 i.** *Expenses arising from negligent exercise of powers—Compensation & damages.*]—Under R. S. O., c. 226, s. 3 (3), lands in one municipality from which water has been caused to flow upon & injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed & charged for the construction & maintenance of a drainage work required to relieve the injured lands from such water.—ORFORD TOWNSHIP *v.* HOWARD TOWNSHIP (1900), 27 A. R. 223; 20 C. L. T. 206.—**CAN.**

**430 ii. —— ——.**]—The assessment for damages & costs recovered by a person complaining of a defective system of drainage must be made only against the lands included in the drainage scheme complained of. Lands included in an amended scheme undertaken after the right to damages has accrued & claim has been made are not liable.—*Re* MCCLURE & BROOKE TOWNSHIP (1905), 11 O. L. R. 115; 6 O. W. R. 1021.—**CAN.**

**430 iii. —— ——.**]—*Re* ORFORD & ALDBOROUGH TOWNSHIPS (1912), 22 O. W. R. 853; 3 O. W. N. 1517; 27 O. L. R. 107; 7 D. L. R. 217.—**CAN.**

**e. ——** *Extra expenses due to misapplication of funds.*]—Where a sum amply sufficient to complete drainage works as designed & authorised by the bye-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, & was applied in a manner & for a purpose not authorised by their bye-law, such municipality cannot afterwards, by another bye-law, levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted.—SOMBRA TOWNSHIP *v.* CHATHAM TOWNSHIP (1897), 28 S. C. R. 1.—**CAN.**

*Sect. 2.—General sewers rate: Sub-sects. 1, 2 & 3.]*

administrative & general expenses allocated under para. iii.—WHEELER *v.* OUSE DRAINAGE BOARD (1923), 129 L. T. 90; 87 J. P. 137; 39 T. L. R. 537; 68 Sol. Jo. 62; 21 L. G. R. 475, D. C.

**Expenses of repair of sea walls.**]—*See* Nos. 449–456, *post.*

SUB-SECT. 2.—AREAS IN WHICH RATE MAY BE LEVIED.

**433. Within limits specified in commission—Or local Act.**]—BRUNGY *v.* LEE (1649), Sty. 178; 82 E. R. 626.

**434.** —— ——.]—Under the N. commission of sewers of 1832 the jury presented that certain marsh lands mentioned in a schedule should be taxed, & all other marsh lands, which receive benefit from the banks, etc., towards repairs. The corpn. of N. buildings were not included in the schedule. A map was referred to dated 1832 as containing all lands within the level, & the corpn. buildings were not included:—*Held:* this was sufficient evidence that the corpn. buildings never were within the taxable area.—NEW ROMNEY CORPN. *v.* NEW ROMNEY SEWERS COMRS., [1892] 1 Q. B. 840; 61 L. J. Q. B. 558; 56 J. P. 662, 756; 8 T. L. R. 196; *affd.*, [1892] 1 Q. B. 849, C. A.

**435.** —— —— **Area added to borough.**]—By a commission dated Apr. 19, 1[illegible]58, comrs. were appointed for the lower level of the county of Gloucester to repair certain ditches, banks, & other defences by the sea coast, which were in a bad state of repair, & power was given to them to "tax assess charge distrain & punish" persons within the area after the quantity of their lands as to the comrs. might seem most convenient.

By the British Corporation Acts of 1895, 1901, 1902, 1904, the city of Bristol was extended so as to include certain parts of county parishes which were included in the area of the comrs., & over which the comrs. had power to levy rates for drainage & other purposes:—*Held:* the fact that the lands had been brought within the extended city did not upon the construction of the Acts referred to, take them out of the jurisdiction of the comrs., or exempt them from a tax or rate assessed by the comrs.—BRISTOL CORPN. *v.* CANNING (1906), 95 L. T. 183; *sub nom.* BRISTOL CORPN. *v.* SEWERS COMRS. FOR LOWER LEVEL OF GLOUCESTER COUNTY, 70 J. P. 528.

**436.** —— **Assessment on town at large.**]—Under Statute of Sewers, 1531 (c. 5), s. 3, & a commission framed according to it, a sewers rate assessed in gross on a township at large is bad, though laid only for defraying the expenses of the commission, & though the rate has been, in previous instances, so assessed, & submitted to by the township in question.—EMMERSON *v.* SALTMARSHE (1837), 7 Ad. & El. 266; 2 Nev. & P. K. B. 446; Will. Woll. & Dav. 618; 1 J. P. 235; 112 E. R. 472; *sub nom.* EMERSON *v.* SALTMARSH, 6 L. J. K. B. 235; 1 Jur. 476.

*Annotations:*—**Refd.** Ramsey *v.* Nornabell (1840), 11 Ad. & El. 383; Tracey *v.* Taylor (1842), 3 Q. B. 966; R. *v.* Norfolk Sewers Comrs. (1850), 15 Q. B. 549; Wheeler *v.* Ouse Drainage Board (1923), 129 L. T. 90.

**437. Division of commissioners' district—Separate divisions specially benefited.**]—Where, in a large district, placed under one set of comrs. of sewers by the same commission, there were six separate lines of sewers, by which six several levels or divisions, into which the district was divided, were separately drained, & no one level derived benefit from the sewers in the others:—*Held:* the comrs. ought to make a separate rate upon each level or division, for the maintenance of the sewers by which it was drained, & not one equal rate upon the whole district for the maintenance of all the sewers within it.—R. *v.* TOWER HAMLETS SEWERS COMRS. (1829), 9 B. & C. 517; 2 Man. & Ry. M. C. 323; 4 Man. & Ry. K. B. 365; 7 L. J. O. S. K. B. 131; 109 E. R. 193.

*Annotations:*—**Apld.** Soady *v.* Wilson (1835), 3 Ad. & El. 248. **Consd.** St. Katharine Dock Co. *v.* Higgs (1845), 10 Q. B. 641. **Apld.** Imperial Gas Co. *v.* Head & Metropolitan Board of Works (1863), 27 J. P. 485. **Consd.** R. *v.* Head (1863), 3 B. & S. 419; Hammersmith Bridge Co. *v.* Hammersmith Overseers (1871), L. R. 6 Q. B. 230. **Refd.** R. *v.* Tower Hamlets Sewers Comrs. (1842), 3 Q. B. 670; Pew *v.* Metropolitan Board of Works (1865), 6 B. & S. 235; Griffiths *v.* Longdon Drainage Board (1871), L. R. 6 Q. B. 738; Somersetshire Drainage Comrs. *v.* Langport Drainage District Board (1919), 89 L. J. K. B. 273.

**438. Combination of separate districts.**]—Comrs. of Sewers have power to join several levels, formerly assessed separately, for the purpose of drainage; & a level which derives benefit from the drainage after the union, although it derived no benefit from the junction itself, is liable to be rated in respect of the whole united district.—ST. KATHARINE DOCK CO. *v.* HIGGS (1847), 10 Q. B. 641; 16 L. J. Q. B. 377; 11 Jur. 991; 116 E. R. 243, Ex. Ch.

*Annotation:*—**Refd.** Harrison *v.* Stickney (1848), 2 H. L. Cas. 108.

**439.** ——.]—Before the passing of Metropolis Management Act, 1855 (c. 120), the Comrs. of Sewers, acting under 11 & 12 Vict. c. 112, had borrowed money, of which £67,000 had been expended on drainage works for the benefit of the Surrey & Kent Sewerage District formed under the powers given to the Comrs. The district comprised parts of nineteen parishes, & in one of them C. £519 had been expended on works locally situate there, & the whole benefit derived amounted to £1,074 6*s.* 10*d.*:—*Held:* nevertheless, the proper mode of raising the money to defray the liabilities of the Comrs. of Sewers was to apportion the

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**PART IV. SECT. 2, SUB-SECT. 2.**

**433 i.** *Within limits specified in commission—Or local Act.*]—WICKWIRE *v.* GOULD (1878), R. E. D. 245; 3 R. & C. 469.—**CAN.**

**438 i.** *Combination of separate districts.*]—WEST NISSOURI MUNICIPAL CORPN. *v.* NORTH DORCHESTER MUNICIPAL CORPN. (1887), 14 O. R. 294.—**CAN.**

**438 ii.** ——.]—Where it is essential for the purpose of draining an area, a drainage work may include such branch drains as may be necessary, & the main drain & branches may be repaired, & enlarged in case of necessity, under one joint scheme & joint assessment, a separate scheme & separate assessment for the main drain & for each branch not being necessary.—*Re* ROCHESTER TOWNSHIP & MERSEA TOWNSHIP (1899), 26 A. R. 474.—**CAN.**

*f. Area deriving benefit—Effect of separation of part of township—Liability based on acreage.*]—*Re* POINT EDWARD VILLAGE & SARNIA TOWNSHIP (1879), 44 U. C. R. 461.—**CAN.**

*g.* —— *Effect of addition of part of township to adjoining authority—Liability of original township out of general funds.*]—*Re* SARNIA TOWNSHIP & SARNIA CORPN. (1882), 1 O. R. 411.—**CAN.**

*h.* —— *Duty of township to raise sum awarded.*]—Where an award has been made as to drainage work under R. S. O. 1877, c. 174, ss. 535, 539, 540, the township to be benefited must pass a bye-law under sect. 539 to raise the sum awarded against them, & cannot refuse payment until the work is completed.—CHATHAM CORPN *v.* SOMBRA CORPN. (1879), 44 U. C. R. 305.—**CAN.**

*k.* —— *Nature of benefit to be specified in award.*]—THURLOW TOWNSHIP CORPN. *v.* SIDNEY TOWNSHIP CORPN. (1882), 1 O. R. 249.—**CAN.**

*l.* —— *Primary liability of initiating municipality.*]—The scheme of Municipal Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, & if benefit is disproved, the attempted charge falls, & is not to be reimposed elsewhere.—*Re* ROMNEY & TILBURY WEST TOWNSHIPS (1891), 18 A. R. 477.—**CAN.**

*m.* —— *Liability of area into which works extended by adjoining*

amount of such liabilities among the different parishes in the sewerage district, according to the rateable value of the property in each, & then to make a rate for such proportion upon C. & the other parishes respectively. — PEW *v.* METROPOLITAN BOARD OF WORKS (1865), 6 B. & S. 235; 5 New Rep. 508; 34 L. J. M. C. 97; 12 L. T. 140; 29 J. P. 231; 11 Jur. N. S. 346; 13 W. R. 580; 122 E. R. 1183.

*Annotation:*—**Consd.** Knight *v.* Langport District Drainage Board, [1898] 1 Q. B. 588.

**440.** ——.] — Where a town or district is divided into separate drainage districts under Towns Improvement Clauses Act, 1847 (c. 34), a general sewer rate under sect. 29, made for the purpose of maintaining & cleaning sewers, may be levied generally upon the whole drainage area, & need not be levied separately in respect of the separate drainage districts. — SURBITON URBAN DISTRICT COUNCIL *v.* UPJOHN (1910), 102 L. T. 736; 74 J. P. 314; 8 L. G. R. 786, D. C.

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SUB-SECT. 3.—PERSONS RATEABLE.

**441. Persons deriving benefit.**] — ANSELM *v.* BARNARD (1670), 2 Keb. 675; 84 E. R. 425.

**442.** ——.]—The comrs. of sewers cannot assess a person in respect of drains which communicate with other drains that fall into the great sewer, if the level of his drains is so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises, & if he be not, & it does not appear that he is likely to be, benefited by the works done upon the sewer.—MASTERS *v.* SCROGGS (1815), 3 M. & S. 447; 105 E. R. 678.

*Annotations:*—**Apld.** Stafford *v.* Hamston (1821), 2 Brod. & Bing. 691. **Consd.** R. *v.* Tower Hamlets Sewers Comrs. (1829), 4 Man. & Ry. K. B. 365.

**443.** ——.]—The decree of the comrs. of sewers is not conclusive against a party residing within the district over which they preside; but such party may prove, in an action brought against deft. for taking his goods to satisfy the rate, that he derives no benefit from the sewer on account of which he is rated.—STAFFORD *v.* HAMSTON (1821), 2 Brod. & Bing. 691; 5 Moore, C. P. 608; 129 E. R. 1133.

*Annotations:*—**Consd.** R. *v.* Tower Hamlets Sewers Comrs. (1829), 9 B. & C. 517. **Apld.** Biglin *v.* Wylie (1867), 36 L. J. Q. B. 307. **Refd.** Birkett *v.* Crozier (1827), 3 C. & P. 63.

**444.** —— **Occupation by Crown servant—Free of rent.**]—A tenement situate in the King's dockyard, deriving a benefit from the public sewers, & occupied by an officer of Govt., who paid no rent, is liable to be rated to the sewers.—NETHERTON *v.* WARD (1819), 3 B. & Ald. 21; 106 E. R. 571.

*Annotations:*—**Expld.** Tracey *v.* Taylor (1842), 3 Q. B. 966. **Refd.** R. *v.* Tower Hamlets Sewers Comrs. (1829), 9 B. & C. 517.

**445.** —— **Benefit indirect.**] — (1) Under the Statutes of Sewers, every person, whose property derives benefit from the works of the comrs., is liable to be rated, although the benefit be not immediate. Thus, where a case stated that the eastern wing of Somerset House was drained by the Board of Works, & had no communication with the common sewer running under the body of Somerset House, & being under the jurisdiction of the comrs., & that the buildings derived no benefit from that sewer, except the general advantage of being accessible, & of the approaches & neighbouring public ways being properly drained & cleansed: it was held that the occupiers of the eastern wing were rateable for the common sewer. *Semble:* in an action of trespass against the comrs. for levying a rate, if it appeared that they had jurisdiction, the ct. would not inquire whether the rate was proportioned to the benefit received from the sewage by the party rated.

(2) Under 52 Geo. 3, c. xlviii, s. 7, the party rated to the poor as the occupier of premises, is to be considered as the occupier for the purpose of assessment to the sewers rate, although, in point of fact, the occupancy is questioned.—SOADY *v.* WILSON (1835), 3 Ad. & El. 248; 1 Har. & W. 256; 4 Nev. & M. K. B. 777; 111 E. R. 407.

*Annotations:*—*As to* (1) **Consd.** Neave *v.* Weather (1842) 3 Q. B. 984; St. Katharine Dock Co. *v.* Higgs (1845), 10 Q. B. 641. **Apld.** Hammersmith Bridge Co. *v.* Hammersmith Overseers (1871), L. R. 6 Q. B. 230; Baker *v.* Parry (1905), 3 L. G. R. 684. **Refd.** New Romney Corpn. *v.* New Romney Sewers Comrs., [1892] 1 Q. B. 840.

**446.** —— ——.]—Metropolis Management Act, 1855 (c. 120), s. 164, provides that where any property was, at the time (1848) of issuing the first commission under 11 & 12 Vict. c. 112, entitled to exemption from sewer rate, such exemption shall be allowed in levying any sewer rate under this Act; & sect. 76 of 11 & 12 Vict. c. 112, also preserves the old exemptions. The H. suspension-bridge over the Thames, in a metropolitan district, was built with approaches or roads under an Act of Parliament, & is open to the public on payment of tolls. The bridge itself drains directly into the river, but the approaches or roads now drain into a sewer made in 1854, but they were sufficiently drained before through a barrel-drain, which could still be used into the river. A sewer rate having been assessed on the bridge & the approaches, the bridge co. appealed, on the ground that the bridge, as distinct from the approaches, was entitled to exemption as deriving no benefit from the sewer:—*Held:* though the bridge did not derive any direct or immediate benefit from the sewer, a property such as the bridge & roads did derive "the general benefit & advantage of being accessible, & of its approaches & neighbouring public ways being properly drained & cleansed" within the principle of *Soady* v. *Wilson*, No. 445, *ante*, &, consequently, on the authority of that case, the property would

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*municipality—Where works carried out by county council.*]—STEPHEN TOWNSHIP *v.* MCGILLIVRAY TOWNSHIP (1891), 18 A. R. 516.—**CAN.**

n. —— ——.] — *Re* HARWICH & RALEIGH TOWNSHIPS (1894), 21 A. R. 677.—**CAN.**

o. —— ——.] — Under 57 Vict. c. 56, s. 75, a township municipality which has constructed a drain within its own boundaries, connecting, however, with a drain constructed as an independent work by an adjoining municipality, has power, without the petition of the ratepayers, to provide for the necessary repairs to both drains, & to assess the adjoining municipality for its proportion of the cost.—*Re* STONEHOUSE & PLYMPTON (1897), 24 A. R. 416.—**CAN.**

p. —— ——.] — ELIZABETHTOWN TOWNSHIP *v.* AUGUSTA TOWNSHIP (1902), 32 S. C. R. 295.—**CAN.**

q. ——.]—CHATHAM TOWNSHIP *v.* DOVER TOWNSHIP (1886), 12 S. C. R. 321.—**CAN.**

r. ——.]—SANDWICH SOUTH MUNICIPALITY *v.* MAIDSTONE MUNICIPALITY (1914), 26 O. W. R. 704; 6 O. W. N. 538; 17 D. L. R. 835.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 3.**

**441 i.** *Persons deriving benefit.*]—*Re* BYRNE & ROCHESTER TOWNSHIP CORPN., 17 O. R. 354.—**CAN.**

**441 ii.** ——.]—HAY LAKE DRAINAGE DISTRICT *v.* KIEL (Alta.), [1927] 2 D. L. R. 591.—**CAN.**

**441 iii.** ——.]—BRITISH SOCIETY *v.* PINSENT (1879), 6 Nfld. L. R. 168.—**NFLD.**

**445 i.** —— *Benefit indirect.*] — FARQUARHSON *v.* DRAINAGE COUNCIL (Alta.), [1924] 2 D. L. R. 349; [1924] 1 W. W. R. 1122.—**CAN.**

t. *Exemptions of particular industries — Whether "sewage rate" covered by exemption from "taxation."*] —NOVA SCOTIA CAR WORKS *v.* HALIFAX CORPN. (1913), 12 E. L. R. 282; 47 S. C. R. 406; 11 D. L. R. 55.—**CAN.**

*Sect. 2.—General sewers rate: Sub-sects. 3 & 4.]*

not have been exempt from sewer rate before 1848; & therefore the bridge as well as the roads was liable to the sewer rate.—HAMMERSMITH BRIDGE Co. *v.* HAMMERSMITH OVERSEERS (1871), L. R. 6 Q. B. 230; 40 L. J. M. C. 79; 24 L. T. 267; 35 J. P. 518; 19 W. R. 750.

**447. —— Equal distribution of liability.]**—Comrs. of sewers ought to tax equally all who are in danger of being damnified by non-repair of banks, etc.—ROOKE'S CASE (1598), 5 Co. Rep. 99 b; 77 E. R. 209.

*Annotations:*—**Consd.** Keighley's Case (1610), 10 Co. Rep. 139 a. **Apld.** Hetley *v.* Boyer (1614), Cro. Jac. 336. **Expld.** R. *v.* Tower Hamlets Sewers Comrs. (1829), 9 B. & C. 517. **Consd.** Hammersmith Bridge Co. *v.* Hammersmith Overseers (1871), L. R. 6 Q. B. 230. **Refd.** R. *v.* Leigh (1839), 10 Ad. & El. 398; Morrell *v.* Martin (1841), 3 Man. & G. 381. **Mentd.** Terry *v.* Huntington (1668), Hard, 480; London City *v.* Vanacker (1698), 1 Ld. Raym. 496; Cowper *v.* Cowper (1734), 2 P. Wms. 720; R. *v.* Peters (1758), 1 Burr. 568; Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177; Haywood *v.* Cope (1858), 25 Beav. 140; Ryder *v.* Ryder (1861), 30 L. J. P. M. & A. 44; Sharp *v.* Wakefield, [1891] A. C. 173; R. *v.* Yorkshire West Riding County Council (1896), 65 L. J. M. C. 136; R. *v.* Kennedy (1902), 50 W. R. 633; R. *v.* Woodhouse, etc. Leeds JJ. (1906), 75 L. J. K. B. 745; Frome United Breweries Co. *v.* Bath JJ., [1926] A. C. 586.

**448. —— ——.]**—A sewers rate ought to be assessed equally, according to their value, on all lands & tenements within the drainage district which derive any benefit from the drainage works & not differentially in proportion to the amount of the benefit which they respectively derive.—KNIGHT *v.* LANGPORT DISTRICT DRAINAGE BOARD, [1898] 1 Q. B. 588; 67 L. J. Q. B. 432; 78 L. T. 260; 62 J. P. 245; 46 W. R. 392; 14 T. L. R. 253; 42 Sol. Jo. 309, D. C.

**449. —— Repair of sea wall.]**—ISLE OF ELY CASE, No. 373, *ante*.

**450. —— —— Extraordinary damage.]** — KEIGHLEY'S CASE, No. 390, *ante*.

**451. —— —— ——.]**—R. *v.* ESSEX SEWERS COMRS., No. 385, *ante*.

**452. —— —— ——.]**—(1) A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of Comrs. of Sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain & repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm & high tide. This part of the wall was previously in good repair & in a proper condition to resist the flow of ordinary tides & the force of ordinary storms:—*Held:* in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level.

(2) The presentment of a jury at a ct. of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea wall fronting the land so as to prevent the influx of the waters. In 1881–1882 the Comrs. of Sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the aforesaid extraordinary storm & high tide. These orders were made "upon reading the presentment" of 1861. One of the Comrs. who made the orders was personally interested as an owner of lands within the level:—*Held:* the orders were bad & must be quashed: (*a*) because Sewers Act, 1833 (c. 22), s. 13, which enables orders to be made upon a previous presentment does not authorise an order upon a person who has become owner of the land since the presentment; (*b*) because the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm; (3) if the Comrs. had made the orders under the powers of Land Drainage Act, 1861 (c. 133), s. 33, they must themselves have found as a fact A.'s liability; if they had exercised such a jurisdiction they would have been acting judicially, & in that case the orders would have been invalidated by the fact that one of the Comrs. was disqualified by reason of interest.—FOBBING SEWERS COMRS. *v.* R. (1886), 11 App. Cas. 449; 56 L. J. M. C. 1; 34 W. R. 721; 2 T. L. R. 750; *sub nom.* FOBBING SEWERS COMRS. *v.* ABBOTT, 55 L. T. 493; 51 J. P. 227, H. L.; *affg.* S. C. *sub nom.* R. *v.* ESSEX SEWERS COMRS. (1885), 14 Q. B. D. 561, C. A.

*Annotations:*—*As to* (1) **Apld.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972; Baker *v.* Parry (1905), 3 L. G. R. 684.

**453. —— —— Damage not due to individual neglect.]**—KEIGHLEY'S CASE, No. 390, *ante*.

**454. —— —— ——.]**—If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the comrs. of sewers may order a new one, even in a different form, if necessary, to be erected at the expense of the whole level.—R. *v.* SOMERSET SEWERS COMRS. (1799), 8 Term Rep. 312; 101 E. R. 1407.

*Annotations:*—**Consd.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Refd.** Nitro-Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katharine Docks Co. (1878), 9 Ch. D. 503.

**455. —— —— ——.]**—R. *v.* ESSEX SEWERS COMRS., No. 385, *ante*.

**456. —— —— Owners of undamaged portion.]** — Prior to 1853, a sea wall had been constructed to protect the C. level against incursions of the tide, but that sea wall did not extend along the entire front of the level. There was a gap about half a mile wide in front of the C. & R. moors. The sea wall for the protection of the land lying to the east & west of these two moors, was turned round inland northward. The tide came over the two moors, & was kept from the two parts of the level which lay to the east & west of the moors by these side or wing walls. The moors were waste land subject to certain rights of pasture. In 1853, the moors were inclosed under the provisions of Enclosure Act, 1845 (c. 118), & by the award they were apportioned among the persons entitled to rights of common on them, & it was thereby provided that the owners should, amongst other things, construct & maintain a sea wall in the gap. The owners of the enclosures constructed a sea wall accordingly, & thenceforth there was a continuous defence against the incursions of the tide throughout the whole length of the C. level. In 1903, there occurred an extraordinary flood & tempest which seriously damaged large portions of the old wall lying to the west of the new wall constructed under the enclosure award. The Comrs. of Sewers made a rate to cover the costs of the repair of the sea wall so damaged:—*Held:* the owners of the enclosures were liable to the rate; inasmuch as at the time when the damage was done the enclosed land received benefit from the old walls, & it was immaterial that those walls as originally constructed were of no benefit to that land.—BAKER *v.* PARRY (1905), 3 L. G. R. 684.

**457. —— Occupiers of mines.]**—A body of comrs. was created by statute for the purpose of underground & surface drainage of a mining area

with power to levy rates upon occupiers of mines. Power was also given them to borrow money upon mtge. of the produce of future rates, & this power was exercised. Owing to financial & other difficulties the comrs. ceased to carry on drainage operations in 1919. In 1926 they levied a rate upon defts. as occupiers of mines in their area. In an action by the comrs. for the amount of the rate:—*Held:* they were entitled to levy the rate notwithstanding the cessation of drainage operations.—SOUTH STAFFORDSHIRE MINES DRAINAGE COMRS. *v.* ELWELL & SONS (1927), 91 J. P. 153; 43 T. L. R. 775; 25 L. G. R. 473, C. A.

**458. Persons in rateable occupation.**]—SOADY *v.* WILSON, No. 445, *ante*.

**459.** ——.]—Chelsea Hospital, & the lands attached to it, are the property, partly of the Crown, & partly of trustees for the benefit of the pensioners. Part of the buildings of the hospital are occupied by officers concerned in the government & superintendence of the hospital; the residue is occupied only by the pensioners:—*Held:* no sewers rate could be imposed in respect of such residue, there being no rateable occupier.—NEAVE *v.* WEATHER (1842), 3 Q. B. 984; 3 Gal. & Dav. 221; 12 L. J. Q. B. 32; 7 Jur. 108; 114 E. R. 786; *sub nom.* NEARE *v.* WALKER, 7 J. P. 143.

*Annotations:*—**Refd.** St. Katharine Dock Co. *v.* Higgs (1845), 10 Q. B. 641; Biglin *v.* Wylie (1867), 36 L. J. Q. B. 307.

**460.** ——.]—The Bridewell for Westminster was erected, under a local Act, & fitted up, & the land on which it was built purchased, by comrs. at the expense of the county rate, & appropriated to the reception of criminals & of prisoners under the local ct. of requests. The building, & its fittings up, furniture, etc., were vested in the justices of Westminster. The powers of the comrs. of sewers were expressly saved. The building derived benefit from the sewage. The governor resided in one part of the building; but no one resided in the other part, except the persons confined there, & the turnkey & matron, who were required by law to reside, & whose duty it was to take care of the prisoners. The Bridewell was the Queen's prison:—*Held:* in respect of the part last mentioned no sewers rate could be imposed, there being no occupier.—TRACEY *v.* TAYLOR (1842), 3 Q. B. 966; 3 Gal. & Dav. 14; 12 L. J. Q. B. 26; 7 J. P. 112; 7 Jur. 170; 114 E. R. 770.

*Annotations:*—**Folld.** Neave *v.* Weather (1842), 3 Q. B. 984. **Refd.** St. Katharine Dock Co. *v.* Higgs (1845), 10 Q. B. 641.

**461.** ——.]—GRIFFITHS *v.* LONGDON & ELDERSFIELD DRAINAGE BOARD, No. 426, *ante*.

**462.** ——.]—A land drainage rate levied by the River Dee Drainage Board, a Board constituted under the provisions of Land Drainage Acts, 1861 (c. 133); 1918 (c. 17), upon an occupier of land within the district of the Board, & having become due & payable within twelve months next before the making of a receiving order against him & still due at that date, is a local rate entitled to preferential payment within Bankruptcy Act, 1914 (c. 59), s. 33 (1) (*a*).—*Re* ELLWOOD, [1927] 1 Ch. 455; *sub nom. Re* ELLWOOD, *Ex p.* RIVER DEE DRAINAGE BOARD *v.* HOOSON, 96 L. J. Ch. 170; 136 L. T. 696; [1927] B. & C. R. 53, D. C.

**Liability as between landlord & tenant.**]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 116, 295, 296, 304, Nos. 2498, 4408, 4413, 4484.

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SUB-SECT. 4.—BASIS OF ASSESSMENT.

**463. Upon whole township.**]—An assessment by Comrs. of Sewers upon a whole township is bad, unless it be afterwards apportioned; & therefore they cannot commit an inhabitant for non-payment.—HETLEY *v.* BOYER (1614), Cro. Jac. 336; 79 E. R. 287.

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**465.** ——.]—SEWERS COMRS. *v.* NEWBURG (1677), 3 Keb. 827; 84 E. R. 1036.

**466.** ——.]—HULL LEVEL CASE (1740), 2 Stra. 1127; 93 E. R. 1078.

*Annotations:*—**Refd.** R. *v.* Tower Hamlets Sewers Comrs. (1830), 1 B. & Ad. 232; Emmerson *v.* Saltmarshe (1837), 7 Ad. & El. 266.

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**468.** ——.]—By Metropolis Management Act, 1855 (c. 120), s. 170, the Metropolitan Board of Works are directed in apportioning the expenses of the Board amongst the different parts of the metropolis, to have regard to the annual value of the property "in the several parts of the metropolis," &, in the case of expenditure on works of

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**PART IV. SECT. 2, SUB-SECT. 4.**

**467** 1. *Rateable value.*]—*Ex p.* ALDWELL *v.* TORONTO CORPN. (1858), 7 C. P. 104.—**CAN.**

a. *According to benefit—Proportionate liability of frontage & other land.*]—When a sewer is being constructed by a municipal corpn. under the local improvement system, & land not fronting on the street in question is benefited, as well as land fronting thereon, the proper method of assessment is to determine what proportion of the coast the land fronting on the street shall bear, & what proportion the land not so fronting shall bear, & to assess the proportion payable by each class according to the total frontage of that class, & not according to the benefit received by the lots in that class *inter se*.—*Re* ROBERTSON & CHATHAM CORPN. (1899), 26 A. R. 554; 19 C. L. T. 380.—**CAN.**

b. —— *Injuring or outlet liability—Assessment according to circumstances.*]—SUTHERLAND-INNES CO. *v.* ROMNEY TOWNSHIP (1900), 30 S. C. R. 495.—**CAN**

c. ——.]—CORBETT *v.* PIPES (1911), 9 E. L. R. 127, 532.—**CAN.**

*Sect. 2.—General sewers rate: Sub-sects. 3 & 4.*]

not have been exempt from sewer rate before 1848; & therefore the bridge as well as the roads was liable to the sewer rate.—HAMMERSMITH BRIDGE Co. *v.* HAMMERSMITH OVERSEERS (1871), L. R. 6 Q. B. 230; 40 L. J. M. C. 79; 24 L. T. 267; 35 J. P. 518; 19 W. R. 750.

**447.** —— **Equal distribution of liability.**]—Comrs. of sewers ought to tax equally all who are in danger of being damnified by non-repair of banks, etc.—ROOKE'S CASE (1598), 5 Co. Rep. 99 b; 77 E. R. 209.

*Annotations:*—**Consd.** Keighley's Case (1610), 10 Co. Rep. 139 a. **Apld.** Hetley *v.* Boyer (1614), Cro. Jac. 336. **Expld.** R. *v.* Tower Hamlets Sewers Comrs. (1829), 9 B. & C. 517. **Consd.** Hammersmith Bridge Co. *v.* Hammersmith Overseers (1871), L. R. 6 Q. B. 230. **Refd.** R. *v.* Leigh (1839), 10 Ad. & El. 398; Morrell *v.* Martin (1841), 3 Man. & G. 381. **Mentd.** Terry *v.* Huntington (1668), Hard, 480; London City *v.* Vanacker (1698), 1 Ld. Raym. 496; Cowper *v.* Cowper (1734), 2 P. Wms. 720; R. *v.* Peters (1758), 1 Burr. 568; Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177; Haywood *v.* Cope (1858), 25 Beav. 140; Ryder *v.* Ryder (1861), 30 L. J. P. M. & A. 44; Sharp *v.* Wakefield, [1891] A. C. 173; R. *v.* Yorkshire West Riding County Council (1896), 65 L. J. M. C. 136; R. *v.* Kennedy (1902), 50 W. R. 633; R. *v.* Woodhouse, etc. Leeds JJ. (1906), 75 L. J. K. B. 745; Frome United Breweries Co. *v.* Bath JJ., [1926] A. C. 586.

**448.** —— ——.]—A sewers rate ought to be assessed equally, according to their value, on all lands & tenements within the drainage district which derive any benefit from the drainage works & not differentially in proportion to the amount of the benefit which they respectively derive.—KNIGHT *v.* LANGPORT DISTRICT DRAINAGE BOARD, [1898] 1 Q. B. 588; 67 L. J. Q. B. 432; 78 L. T. 260; 62 J. P. 245; 46 W. R. 392; 14 T. L. R. 253; 42 Sol. Jo. 309, D. C.

**449.** —— **Repair of sea wall.**]—ISLE OF ELY CASE, No. 373, *ante*.

**450.** —— —— **Extraordinary damage.**]—KEIGHLEY'S CASE, No. 390, *ante*.

**451.** —— —— ——.]—R. *v.* ESSEX SEWERS COMRS., No. 385, *ante*.

**452.** —— —— ——.]—(1) A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of Comrs. of Sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain & repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm & high tide. This part of the wall was previously in good repair & in a proper condition to resist the flow of ordinary tides & the force of ordinary storms:—*Held:* in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level.

(2) The presentment of a jury at a ct. of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea wall fronting the land so as to prevent the influx of the waters. In 1881–1882 the Comrs. of Sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the aforesaid extraordinary storm & high tide. These orders were made "upon reading the presentment" of 1861. One of the Comrs. who made the orders was personally interested as an owner of lands within the level:—*Held:* the orders were bad & must be quashed: (*a*) because Sewers Act, 1833 (c. 22), s. 13, which enables orders to be made upon a previous presentment does not authorise an order upon a person who has become owner of the land since the presentment; (*b*) because the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm; (3) if the Comrs. had made the orders under the powers of Land Drainage Act, 1861 (c. 133), s. 33, they must themselves have found as a fact A.'s liability; if they had exercised such a jurisdiction they would have been acting judicially, & in that case the orders would have been invalidated by the fact that one of the Comrs. was disqualified by reason of interest.—FOBBING SEWERS COMRS. *v.* R. (1886), 11 App. Cas. 449; 56 L. J. M. C. 1; 34 W. R. 721; 2 T. L. R. 750; *sub nom.* FOBBING SEWERS COMRS. *v.* ABBOTT, 55 L. T. 493; 51 J. P. 227, H. L.; *affg.* S. C. *sub nom.* R. *v.* ESSEX SEWERS COMRS. (1885), 14 Q. B. D. 561, C. A.

*Annotations:*—*As to* (1) **Apld.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972; Baker *v.* Parry (1905), 3 L. G. R. 684.

**453.** —— —— **Damage not due to individual neglect.**]—KEIGHLEY'S CASE, No. 390, *ante*.

**454.** —— —— ——.]—If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the comrs. of sewers may order a new one, even in a different form, if necessary, to be erected at the expense of the whole level.—R. *v.* SOMERSET SEWERS COMRS. (1799), 8 Term Rep. 312; 101 E. R. 1407.

*Annotations:*—**Consd.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Refd.** Nitro-Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katharine Docks Co. (1878), 9 Ch. D. 503.

**455.** —— —— ——.]—R. *v.* ESSEX SEWERS COMRS., No. 385, *ante*.

**456.** —— —— **Owners of undamaged portion.**]—Prior to 1853, a sea wall had been constructed to protect the C. level against incursions of the tide, but that sea wall did not extend along the entire front of the level. There was a gap about half a mile wide in front of the C. & R. moors. The sea wall for the protection of the land lying to the east & west of these two moors, was turned round inland northward. The tide came over the two moors, & was kept from the two parts of the level which lay to the east & west of the moors by these side or wing walls. The moors were waste land subject to certain rights of pasture. In 1853, the moors were inclosed under the provisions of Enclosure Act, 1845 (c. 118), & by the award they were apportioned among the persons entitled to rights of common on them, & it was thereby provided that the owners should, amongst other things, construct & maintain a sea wall in the gap. The owners of the enclosures constructed a sea wall accordingly, & thenceforth there was a continuous defence against the incursions of the tide throughout the whole length of the C. level. In 1903, there occurred an extraordinary flood & tempest which seriously damaged large portions of the old wall lying to the west of the new wall constructed under the enclosure award. The Comrs. of Sewers made a rate to cover the costs of the repair of the sea wall so damaged:—*Held:* the owners of the enclosures were liable to the rate; inasmuch as at the time when the damage was done the enclosed land received benefit from the old walls, & it was immaterial that those walls as originally constructed were of no benefit to that land.—BAKER *v.* PARRY (1905), 3 L. G. R. 684.

**457.** —— **Occupiers of mines.**]—A body of comrs. was created by statute for the purpose of underground & surface drainage of a mining area

with power to levy rates upon occupiers of mines. Power was also given them to borrow money upon mtge. of the produce of future rates, & this power was exercised. Owing to financial & other difficulties the comrs. ceased to carry on drainage operations in 1919. In 1926 they levied a rate upon defts. as occupiers of mines in their area. In an action by the comrs. for the amount of the rate :—*Held :* they were entitled to levy the rate notwithstanding the cessation of drainage operations.—SOUTH STAFFORDSHIRE MINES DRAINAGE COMRS. *v.* ELWELL & SONS (1927), 91 J. P. 153 ; 43 T. L. R. 775 ; 25 L. G. R. 473, C. A.

**458. Persons in rateable occupation.**]—SOADY *v.* WILSON, No. 445, *ante*.

**459.** ——.] — Chelsea Hospital, & the lands attached to it, are the property, partly of the Crown, & partly of trustees for the benefit of the pensioners. Part of the buildings of the hospital are occupied by officers concerned in the government & superintendence of the hospital ; the residue is occupied only by the pensioners :—*Held :* no sewers rate could be imposed in respect of such residue, there being no rateable occupier.—NEAVE *v.* WEATHER (1842), 3 Q. B. 984 ; 3 Gal. & Dav. 221 ; 12 L. J. Q. B. 32 ; 7 Jur. 168 ; 114 E. R. 786 ; *sub nom.* NEARE *v.* WALKER, 7 J. P. 143.

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**460.** ——.] — The Bridewell for Westminster was erected, under a local Act, & fitted up, & the land on which it was built purchased, by comrs. at the expense of the county rate, & appropriated to the reception of criminals & of prisoners under the local ct. of requests. The building, & its fittings up, furniture, etc., were vested in the justices of Westminster. The powers of the comrs. of sewers were expressly saved. The building derived benefit from the sewage. The governor resided in one part of the building ; but no one resided in the other part, except the persons confined there, & the turnkey & matron, who were required by law to reside, & whose duty it was to take care of the prisoners. The Bridewell was the Queen's prison :—*Held :* in respect of the part last mentioned no sewers rate could be imposed, there being no occupier.—TRACEY *v.* TAYLOR (1842), 3 Q. B. 966 ; 3 Gal. & Dav. 14 ; 12 L. J. Q. B. 26 ; 7 J. P. 112 ; 7 Jur. 170 ; 114 E. R. 779.

*Annotations :*—**Folld.** Neave *v.* Weather (1842), 3 Q. B. 984. **Refd.** St. Katharine Dock Co. *v.* Higgs (1845), 10 Q. B. 641.

**461.** ——.]—GRIFFITHS *v.* LONGDON & ELDERSFIELD DRAINAGE BOARD, No. 426, *ante*.

**462.** ——.]—A land drainage rate levied by the River Dee Drainage Board, a Board constituted under the provisions of Land Drainage Acts, 1861 (c. 133) ; 1918 (c. 17), upon an occupier of land within the district of the Board, & having become due & payable within twelve months next before the making of a receiving order against him & still due at that date, is a local rate entitled to preferential payment within Bankruptcy Act, 1914 (c. 59), s. 33 (1) (*a*).—*Re* ELLWOOD, [1927] 1 Ch. 455 ; *sub nom. Re* ELLWOOD, *Ex p.* RIVER DEE DRAINAGE BOARD *v.* HOOSON, 96 L. J. Ch. 170 ; 136 L. T. 696 ; [1927] B. & C. R. 53, D. C.

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**PART IV. SECT. 2, SUB-SECT. 4.**

**467 i.** *Rateable value.*]—*Ex p.* ALDWELL *v.* TORONTO CORPN. (1858), 7 C. P. 104.—**CAN.**

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**c.** ——.]—CORBETT *v.* PIPES (1911), 9 E. L. R. 127, 532.—**CAN.**

*Sect.* 2.—*General sewers rate: Sub-sects.* 4 *&* 5. *Sect.* 3.]

drainage, to the benefit derived from such expenditure "by the several parts of the metropolis affected thereby." By Metropolis Management Act, 1855 (c. 120), s. 181, the money necessary to discharge the liabilities of the Metropolitan Comrs. of Sewers is to be raised in like manner as the expenses of the Board. The Metropolitan Comrs. of Sewers had, whilst acting under the expired statute, 11 & 12 Vict. c. 112, borrowed £200,000, out of which they had expended £67,000 on drainage works for the benefit of the Surrey & Kent Sewerage District, which had been formed by them under the powers given in 11 & 12 Vict. c. 112, s. 34, & comprised nineteen parishes & parts of parishes. On the passing of Metropolis Management Act, 1855 (c. 120), the Metropolitan Board had to provide for the payment of the liabilities of the Metropolitan Comrs. of Sewers, &, acting under Metropolis Management Act, 1855 (c. 120), ss. 171, 181, they apportioned the £67,000 amongst the parishes in the Surrey & Kent Sewerage District, according to the rateable value of the property in those parishes respectively, & not according to the proportion of the sum expended in them, or to the benefit derived by them respectively from the expenditure, & made a rate accordingly upon each parish :—*Held :* the rate so made was valid.—PEW *v.* METROPOLITAN BOARD OF WORKS (1865), 6 B. & S. 235 ; 5 New Rep. 508 ; 34 L. J. M. C. 97 ; 12 L. T. 140 ; 29 J. P. 231 ; 11 Jur. N. S. 346 ; 13 W. R. 580 ; 122 E. R. 1183.

*Annotation :*—**Refd.** Knight *v.* Langport District Drainage Board, [1898] 1 Q. B. 588.

**469.** ——.]—GRIFFITHS *v.* LONGDON & ELDERSFIELD DRAINAGE BOARD, No. 426, *ante.*

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SUB-SECT. 5.—COLLECTION AND RECOVERY OF RATE.

*See* Sewers Acts, 1841 (c. 45), ss. 2, 3 ; 1849 (c. 50), ss. 7, 8.

**Recovery by distress.**] — *See* DISTRESS, Vol. XVIII., pp. 414, 419, 420, Nos. 1541, 1576–1590.

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SECT. 3.—**SPECIAL SEWERS RATE.**

*See* Land Drainage Act, 1861 (c. 133), s. 38 ; Land Drainage Act, 1918 (c. 17), s. 14.

**470. Equal distribution of liability—Liability not based on individual benefits.**]—KNIGHT *v.* LANGPORT DISTRICT DRAINAGE BOARD, No. 448, *ante.*

**471. Expenses of preliminary works — Before levy of special rate.**]—GRIFFITHS *v.* LONGDON & ELDERSFIELD DRAINAGE BOARD, No. 426, *ante.*

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**PART IV. SECT. 2, SUB-SECT. 5.**

*d. Grounds for non-payment — Absence of certificate of collector.*]—HALIFAX CORPN. *v.* HARTLEN (1894), 26 N. S. R. (14 R. & G.) 263.—**CAN.**

*i. Whether chargeable on land.*] — *Re* ARMSTRONG (1886), 12 O. R. 457.—**CAN.**

*l.* ——.]—WICKE MUNICIPAL CORPN. *v.* ELLICE TOWNSHIP (1906), 11 O. L. R. 422 ; 7 O. W. R. 425.—**CAN.**

**PART IV. SECT. 3.**

*g. Expenses prior to formation of special district.*]—INVERARITY *v.* FORFARSHIRE COUNTY COUNCIL, [1906] A. C. 351.—**SCOT.**

# SEXTON.

*See* BURIAL AND CREMATION ; ECCLESIASTICAL LAW.

# SHACK, COMMON OF.

*See* COMMONS AND RIGHTS OF COMMON.

# SHAFTS.

*See* BOUNDARIES, FENCES, AND PARTY-WALLS ; MINES, MINERALS, AND QUARRIES.

# SHARES AND SHAREHOLDERS.

*See* COMPANIES ; SHIPPING AND NAVIGATION ; STOCK EXCHANGE.

# SHEEP.

*See* ANIMALS; DISTRESS.

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# SHEFFIELD MARKS.

*See* TRADE MARKS, TRADE NAMES, AND DESIGNS.

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# SHELL-FISH.

*See* FISHERIES.

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# SHELLEY'S CASE, RULE IN.

*See* REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS; WILLS.

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# SHERIFFS AND BAILIFFS.


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*Bailiffs of Manors* . *See* COPYHOLDS.
*County Court Bailiffs* . „ COUNTY COURTS.
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*Interpleader by Sheriffs* *See* INTERPLEADER.
*Public Authorities Protection* . . . „ PUBLIC AUTHORITIES.
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# Part I.—Sheriffs.

## SECT. 1.—NATURE OF OFFICE.

**1. Origin of office.**]—CHUNE *v.* PYOT (1616), 1 Roll. Rep. 237; 81 E. R. 458.

**2. Royal office.**]—PELHAM'S CASE (1583), Sav. 43; 123 E. R. 1002.

*Annotation :*—**Refd.** R. *v.* Larwood (1694), 1 Ld. Raym. 29.

**3. Grant of part of duties to another invalid.**]—If the King grants to another the office of the clerk of the county ct., or shire clerk of the county of S., with all fees, etc., for life; this is void against the sheriff of S., when he is made sheriff; because the county ct., & the entering of all proceedings in it, are inseparably incident to the office of sheriff; & this is the ct. of the sheriff, though the suitors are judges: & the sheriff is the immediate officer to the ct., & ought to answer for the records of the ct., if they are embezzled.

So the custody of the gaols of counties is inseparable from the sheriff; & therefore if the King grants the custody of such gaol to another, it is void; for the sheriff being the immediate officer of the King's Cts., & answerable for escapes, & subject to amerciaments, ought to have the appointment of such gaolers for whom he will answer.—MITTON'S CASE (1584), 4 Co. Rep. 32 b; 76 E. R. 965.

*Annotations :*—**Consd.** Harding *v.* Pollock (1829), 6 Bing. 25. **Refd.** Burchier *v.* Wiseman (1595), Noy. 51; Lambert & Olliot *v.* Bessey (1680), T. Raym. 421; Woodward *v.* Fox (1691), 2 Vent. 267.

**4. Precedence of sheriff during office.**]—CHUNE *v.* PYOT (1616), 1 Roll. Rep. 237; 81 E. R. 458.

**5.** ——.]—The law gives to the justices of assize during their circuits the aid & control of the high sheriff of each county, as to whom it is laid down, that, "as the keeper of the King's peace, both by common law & special commission, he is the first man in the County, & superior in rank to any nobleman therein during his office.

The practice in this respect is in accordance with the law: for, "the high sheriffs themselves of every shire are in person to attend upon the justices or judges of the assize & gaol & delivery in, & through, their circuits, & shall give their attendance for the due executing of the commandments & progresses of the said judges in matters concerning the execution of their offices & ministration of justice," etc. (*Dalton's Sheriff, p.* 369) (WILLES, J.).—*Ex p.* FERNANDEZ (1861), 10 C. B. N. S. 3; 30 L. J. C. P. 321; 4 L. T. 324; 7 Jur. N. S. 571; 9 W. R. 832; 142 E. R. 349.

*Annotations :*—**Mentd.** Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376; R. *v.* Maidenhead Corpn. (1882), 8 Q. B. D. 339; R. *v.* Central Criminal Court JJ. (1883), 11 Q. B. D. 479; *Re* Davies (1888), 21 Q. B. D. 236; Gordon *v.* Gordon, [1904] P. 163; Scott *v.* Scott, [1912] P. 241; R. *v.* Central Criminal Court JJ., *Ex p.* L. C. C., [1925] 2 K. B. 43.

**Who is "Sheriff" within Bankruptcy Acts.**]—*See* BANKRUPTCY, Vol. V., p. 818, No. 6948.

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## SECT. 2.—APPOINTMENT AND QUALIFICATIONS.

### SUB-SECT. 1.—IN GENERAL.

*See* Sheriffs Act, 1887 (c. 55), ss. 3–7, scheds. I, II.

**6. Oath of office.**]—COKE'S CASE (1625), Cro. Car. 26; 79 E. R. 628.

**Exemption from service.**]—*See* Sect. 3, *post.*

### SUB-SECT. 2.—HIGH SHERIFFS OF COUNTIES AT LARGE.

*See* Sheriffs Act, 1887 (c. 55), ss. 3–6, 31, 32, 37.

**Exemption from service—Field officers of Territorial Army.**]—*See* Territorial & Reserve Forces Act, 1907 (c. 9), s. 23 (4).

—— **Officers of Regular Forces.**] — *See* Municipal Corporations Act, 1882 (c. 50), s. 253; Army Act, s. 146.

—— **Officers of Post-Office.**]—*See* Post Office Act, 1908 (c. 48), s. 43.

—— **Officers of Inland Revenue.**]—*See* Inland Revenue Regulation Act, 1890 (c. 21), s. 8.

—— **Officers of Customs.**]—*See* Customs Consolidation Act, 1876 (c. 36), s. 9.

—— **Persons having held office as sheriff within three years.**]—*See* Sheriffs Act, 1887 (c. 55), s. 5.

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### SUB-SECT. 3.—SHERIFFS OF COUNTIES OF CITIES AND TOWNS.

*See* Sheriffs Act, 1887 (c. 55), s. 36; Municipal Corporations Act, 1882 (c. 50), s. 170.

**7. Validity of appointment—Effect of saving clause in charter.**]—GLOUCESTER TOWN CASE (1593), Poph. 16; 79 E. R. 1138.

**8. Exemption from office—Service as sheriff of county within three years.**]—R. *v.* BRISTOL SHERIFFS (1826), 5 B. & C. 429, n.; 108 E. R. 160; *sub nom.* R. *v.* GOLDNEY & SAVAGE, 8 Dow. & Ry. K. B. 245.

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### SUB-SECT. 4.—SHERIFFS OF CITY OF LONDON.

*See* Sheriffs Act, 1887 (c. 55), s. 33.

**9. Dual office—Right of one sheriff to act alone.**]—RICH *v.* PLAYER (1683), 2 Show. 286; Skin. 104; 89 E. R. 943.

*Annotations :*—**Apld.** R. *v.* Warrington (1692), 12 Mod. Rep. 22; Letsom *v.* Bickley (1816), 5 M. & S. 144. **Distd.** Thompson *v.* Farden (1840), 1 Man. & G. 535.

**10.** —— ——.]—A replevin bond may be taken & assigned by any officer who has power to grant replevins :—*Held :* one of the sheriffs of London has such power, without his companion, & may therefore take, & assign, replevin bonds.—THOMPSON *v.* FARDEN (1840), 8 Dowl. 813; 1 Man. & G. 535; 1 Scott, N. R. 275; 9 L. J. C. P. 284; 4 Jur. 608; 133 E. R. 443.

**11.** —— **Validity of writ directed to "Sheriff of London."**]—A writ directed to the Sheriff of London is good, as the two sheriffs are but one officer.—CLUTTERBUCK *v.* WISEMAN (1832), 2 Cr. & J. 213; 2 Tyr. 276; 1 L. J. Ex. 81; 149 E. R. 92.

**12. Commencement of office—Date of taking oath.**]—WILKINSON *v.* SALTER, No. 383, *post.*

**13. Election expenses—Excess of statutory allowance—Grounds for relief.**]—*Ex p.* BAMBERGER (1909), 73 J. P. Jo. 337, D. C.

**14. Jurisdiction confined to London.**]—PLATT *v.* LONDON (SHERIFFS) (1550), 1 Plowd. 35; 75 E. R. 57.

*Annotations :*—**Refd.** Rigeway's Case (1594), 3 Co. Rep. 52 a; Marshalsea Case (1613), 10 Co. Rep. 68 b; Griffith *v.* Walker (1752), 1 Wils. 336; Alsept *v.* Eyles (1792), 2 Hy. Bl. 108; Williams *v.* Mostyn (1838), 1 Horn. & H. 217. **Mentd.** Admiralty Case (1609), 13 Co. Rep. 51; Harrison *v.* Burwell (1670), 2 Vent. 9; R. *v.* O'Connell (1843), 2 L. T. O. S. 248; Ford *v.* Beech (1848), 11 Q. B. 852.

*Sect.* 2.—*Appointment and qualifications: Sub-sect.* 5. *Sects.* 3, 4 & 5. *Part II. Sect.* 1: *Sub-sect* 1.]

SUB-SECT. 5.—BAILIFFS OF FRANCHISES.

*See* Part III.

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SECT. 3.—**LIABILITY FOR REFUSAL TO SERVE.**

**15. Subpœna in Chancery.**]—A *subpœna* against one that will not take upon him the office of a sheriff of a city being chosen thereto.—LITCHFIELD BAILIFFS *v.* OTELY (1581), Ch. Cas. in Ch. 151; 21 E. R. 89.

**16. Whether information lies.**]—A.-G. *v.* READ, No. 25, *post.*

**17.** ——.]—R. *v.* LARWOOD, No. 26, *post.*

**18.** ——.]—R. *v.* SHACKLINGTON (1735), Andr. 201, n.; 95 E. R. 362.

*Annotation*:—**Folld.** R. *v.* Grosvenor (1743), 2 Stra. 1193.

**19.** —— **Where civil remedy.**]—R. *v.* GROSVENOR (1743), 2 Stra. 1193; 1 Wils. 18; 93 E. R. 1121.

**20.** ——.]—The payment of the fine fixed by 9 Geo. 1, c. 9, s. 3, to be discharged from serving the office of Sheriff of Norwich, does not exempt the person paying it for more than a year, unless the corpn. agree that he shall be discharged for a longer time. The ct. granted an information against the person refusing to take on him the office of sheriff because the vacancy of the office occasioned a stop of public justice, & the year would be nearly expired before an indictment could be brought to trial.—R. *v.* WOODROW (1788), 2 Term Rep. 731; 100 E. R. 393.

*Annotation*:—**Mentd.** R. *v.* Thetford Corpn. (1807), 8 East, 270.

**21. Payment of fine—Recovery.**]—*Indebitatus assumpsit* will lie for a fine for not holding the office of sheriff.—YORK CORPN. *v.* TOUNE (1699), 1 Ld. Raym. 502; 5 Mod. Rep. 444; 87 E. R. 754.

**22.** —— **Validity of bye-law.**]—The bye-law of the City of London, that the election of sheriffs shall be on Midsummer Day, or, in case of vacancy, on such day as the Ct. of Aldermen shall appoint, & that the person elected, being a freeman, shall not be discharged from serving the office unless he swear before the Ct. of Aldermen that he is not worth £10,000 & verify the oath by six compurgators; & that if any freeman so elected shall not, on being proclaimed on the hustings before the lord mayor & six aldermen, or, in the mayor's absence, before eight aldermen, attend the next ct. & declare his acceptance of the said office, & give bond in £1,000 to perform it, he shall forfeit £400 to be recovered in the Mayor's Ct. of the city is a good bye-law.—LONDON CITY *v.* VANACRE, (1699), Carth. 480; Holt, K. B. 431; 1 Ld. Raym. 496; 5 Mod. Rep. 438; 12 Mod. Rep. 269; 1 Salk. 142; 88 E. R. 1314.

*Annotations*:—**Consd.** R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404. **Refd.** Hesketh *v.* Braddock (1766), 3 Burr. 1847. **Mentd.** City of London *v.* Wood (1701), 12 Mod. Rep. 669; Bosworth *v.* Herne (1738), Lee *temp.* Hard. 405; Vintners' Co. *v.* Passey (1757), 1 Burr. 235; R. *v.* Westwood (1830), 7 Bing. 1; Eastern Archipelago Co. *v.* R. (1853), 2 E. & B. 856; London Joint Stock Bank *v.* London Corpn. (1875), 1 C. P. D. 1; Mercer *v.* Denne, [1905] 2 Ch. 538.

**23.** —— **Effect of payment.**]—R. *v.* WOODROW, No. 20, *ante.*

**24. Mandamus.**]—R. *v.* SMYTH (1858), 31 L. T. O. S. 170; 6 W. R. 720; 22 J. P. Jo. 68, Ex. Ch.

**25. Exemption from liability—Statutory disability—Duty to remove.**]—An information lies against a person for not taking upon him the office of sheriff, although at the time of his election he is under sentence of excommunication, & thereby rendered incapable of receiving the sacrament required by 25 Car. 2, c. 2; for it is incumbent on such person to remove the disability.—A.-G. *v.* READ (1678), 2 Mod. Rep. 299; 86 E. R. 1083.

*Annotations*:—**Refd.** R. *v.* Larwood (1694), 1 Ld. Raym. 29; Evans *v.* Harrison (1762), Wilm. 130.

**26.** —— ——.]—To an information for not serving the office of sheriff in a corpn. a plea setting forth Corporation Act, & then averring that deft. was at the time of his election a Protestant Dissenter, & had not received the sacrament within a year of which he gave notice to the electors, is bad.

No body can be exempt from the office of sheriff but by Act of Parliament or letters patent (*per* CUR.).—R. *v.* LARWOOD (1694), 1 Ld. Raym. 29; Comb. 315; Skin. 574; 1 Salk. 167; 4 Mod. Rep. 269; Carth. 306; 12 Mod. Rep. 67; 3 Salk. 133; 91 E. R. 916.

*Annotations*:—**Consd.** Evans *v.* Harrison (1762), Wilm. 130. **Refd.** City of London *v.* Vanacre (1699), 12 Mod. Rep. 270; R. *v.* Aldborough (1712), 10 Mod. Rep. 100; R. *v.* Grosvenor (1743), 1 Wils. 18; R. *v.* Walker (1817), 6 M. & S. 277; R. *v.* Westwood (1830), 7 Bing. 1.

**27.** —— ——.]—To debt on a bye-law brought by the Chamberlain of London in the Mayor's Ct. of the City, against a person for refusing the office of sheriff the Ct. of King's Bench, on the record being removed, will not permit a suggestion to be entered thereon, that deft. is a Dissenter & disabled by the statute from serving the office he not having received the sacrament, etc.—BOSWORTH *v.* WHITEMAN (1739), 7 Mod. Rep. 300; 87 E. R. 1253.

**28.** —— ——.]—A freeman of the city of London is elected one of the sheriffs, but refusing to take the office, on account of his being a Dissenter, & as such not having received the sacrament according to the rites of the Church of England, within a year before his election, an action is brought against him for the penalty incurred by such refusal, & a judgment recovered. The action being brought in the Sheriffs' Ct., a writ of error was brought in the Ct. of Hustings, where the judgment was affirmed. But deft. having obtained a special commission of errors, the judge's delegates reversed both the judgments; & on a writ of error in Parliament, this judgment of reversal was affirmed.—HARRISON *v.* EVANS (1767), 3 Bro. Parl. Cas. 465; 1 E. R. 1437; *affg.* S. C. *sub nom.* EVANS *v.* HARRISON, Wilm. 130.

*Annotations*:—**Mentd.** Atcheson *v.* Everitt (1776), 1 Cowp. 382; Kemp *v.* Wickes (1809), 3 Phillim. 264; A.-G. *v.* Bradlaugh (1885), 14 Q. B. D. 667; Bowman *v.* Secular Soc., [1917] A. C. 406; Bourne *v.* Keane, [1919] A. C. 815.

**29.** —— **Property qualification conveyed away.**]—W. P. made a secret conveyance of several estates to his daughter, who was married, & had a portion, & was jointured. He kept possession of the estates & the deeds, & afterwards by will devised these estates:—*Held:* the devise good; the conveyance being kept secret, & he continuing in possession of the estate.

There was evidence that he made the conveyance to avoid being sheriff of London, by putting the legal interest out of himself, & thinking by that means he might swear to his want of qualification; but it appeared he did not take the oath, but paid

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PART I. SECT. 3.

**16 i.** *Whether information lies.*]—Where a sheriff, duly appointed, refuses to act or take the oath of office, the appropriate remedy is by information *ex officio* or indictment, & a mandamus will not be granted.—R. *v.* PARKER-HUTCHINSON, R. *v.* GERRARD (1891), 32 L. R. Ir. 142.—IR.

the fine for not serving the office.—BIRCH *v.* BLAGRAVE (1755), Amb. 264; 27 E. R. 176, L. C.

*Annotations:*—**Consd.** Cecil *v.* Butcher (1821), 2 Jac. & W. 565. **Reld.** Doe d. Roberts *v.* Roberts (1819), 2 B. & Ald. 367; Groves *v.* Groves (1829), 3 Y. & J. 163; Childers *v.* Childers (1857), 26 L. J. Ch. 643; *Re* Way's Trusts (1864), 2 De G. J. & Sm. 365.

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SECT. 4.—**TENURE OF OFFICE.**

*See* Sheriffs Act, 1887 (c. 55), s. 3 (2) (3).

**30. Continuance until notice of discharge.**]—BOUCHER *v.* WISEMAN, No. 40, *post.*

**31. Effect of succession to peerage—Office not determined.**]—Succession to a peerage *tempore parliamenti*, does not determine the office of sheriff.

—MORDANT'S CASE (1583), Cro. Eliz. 12; 78 E. R. 278.

**32. Effect of death of one of two sheriffs—Right of other sheriff to act.**]—JONES *v.* PUGH (1691), 2 Salk. 465; 91 E. R. 401; *sub nom.* JONES *v.* BEW, Carth. 213; 4 Mod. Rep. 16; 12 Mod. Rep. 10; *sub nom.* JONES *v.* BEAN, 1 Show. 288.

*Annotations:*—**Reld.** Trelawny *v.* Winchester (Bp.) (1757), 1 Burr. 219; Bell *v.* Holtby (1873), L. R. 15 Eq. 178.

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SECT. 5.—**RIGHTS AND LIABILITIES.**

**Powers, duties & liabilities.**]—*See* Part V., *post.*

**Disqualifications.**]—*See* Part IV., Sect. 1, *post.*

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# Part II.—Under-Sheriffs, Deputies, Bailiffs and Officers.

SECT. 1.—**UNDER-SHERIFFS.**

SUB-SECT. 1.—NATURE OF OFFICE.

**33. Sheriff's deputy.**]—NORTON *v.* SIMMES (1614), Hob. 12; Moore, K. B. 856; 80 E. R. 163.

*Annotations:*—**Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Reld.** Hutchins *v.* Player (1663), O. Bridg. 272; Parker *v.* Kett (1701), 12 Mod. Rep. 466; Samuel *v.* Evans (1788), 2 Term Rep. 569; Short *v.* Hubbard (1824), 9 Moore, C. P. 667. **Mentd.** Lane *v.* Cotton (1701), 12 Mod. Rep. 472; Mitchel *v.* Reynolds (1711), 1 P. Wms. 181; Chesman *v.* Nainby (1727), 2 Stra. 739; Fitz-patrick *v.* Strong (1727), Gilb. Ch. 251; Layng *v.* Paine (1745), Willes, 571; Camden *v.* Anderson (1798), 1 Bos. & P. 272; Kerrison *v.* Cole (1807), 8 East, 231; Collins *v.* Gwynne (1831), 5 Moo. & P. 276; Wallis *v.* Day (1837), 6 L. J. Ex. 92; Payne *v.* Brecon Corpn. (1858), 3 H. & N. 572.

**34. Must act in name of high sheriff.**]—Though an under-sheriff must act in the name of the high sheriff, because the writs are directed to the high sheriff, & for other particular reasons; yet any other deputy may act either in his own name or the name of his principal (HOLT, C.J.).—PARKER *v.* KETT (1701), 1 Salk. 95; Holt, K. B. 221; 1 Ld. Raym. 658; 12 Mod. Rep. 467; 1 Com. 84; 91 E. R. 88.

*Annotations:*—**Mentd.** R. *v.* Lisle (1738), Andr. 163; Andrews *v.* Emmot (1788), 2 Bro. C. C. 297; Mountford *v.* Gibson (1804), 4 East, 441; R. *v.* Bedford Level Corpn. (1805), 6 East, 356; Langley *v.* Sneyd, Alcock *v.* Sneyd (1822), 7 Moore, C. P. 165; Woolley *v.* Clark (1822), 1 Dow. & Ry. K. B. 409; Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Doe d. Hornby *v.* Glenn (1834), 3 Nev. & M. K. B. 837; Thomson *v.* Harding (1853), 2 E. & B. 630; Bridges *v.* Garrett (1869), L. R. 4 C. P. 580.

**35. Authority to execute writ—Directed to sheriff.**]—A writ on the Statute of Northampton, directed to the sheriff by his name of office, may be executed by the under-sheriff.—LEVETT *v.* FARRAR (1593), Cro. Eliz. 294; 78 E. R. 547.

**36. Authority to execute deeds—Assignment of lease taken in execution.**]—Where an assignment of a lease by deed, taken in execution, was made in the name & under the seal of office of the sheriff, by A., acting as under-sheriff:—*Held:* such assignment was sufficiently proved, without proving, further the appointment of A. as under-sheriff, & he had power by deed to execute deeds in the name of the sheriff.—DOE d. JAMES *v.* BRAWN (1821), 5 B. & Ald. 243; 106 E. R. 1181.

*Annotations:*—**Reld.** Doe d. Bowley *v.* Barnes (1843), 8 Q. B. 1037; Wood *v.* Rowcliffe (1846), 6 Hare, 183.

**37. —— Bill of sale.**]—Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff.—WOOD *v.* ROWCLIFFE (1846), 6 Hare, 183; 11 Jur. 707; 67 E. R. 1132; *on appeal* (1847), 2 Ph. 382, L. C.

*Annotations:*—**Mentd.** Carrington *v.* Pell (1849), 3 De G. & Sm. 512; Daniell *v.* Daniell (1849), 3 De G. & Sm. 337; Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230; Lamb *v.* Attenborough (1862), 1 B. & S. 831; Baines *v.* Swainson (1863), 4 B. & S. 270; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Lowther *v.* Harris, [1927] 1 K. B. 393.

**38. Duty on death of high-sheriff.**]—An under-sheriff, if the sheriff should die during his year of office, is responsible, under Estreats Act, 1716 (c. 15), s. 8, for the execution of the office of sheriff until another is appointed, to the same extent as if he were the sheriff; &, consequently, an action for money had & received will lie against him or his exors. to recover the proceeds of a sale of goods taken in execution under a writ of *fi. fa.* before the death of the sheriff.—GLOUCESTERSHIRE BANKING CO. *v.* EDWARDS (1887), 20 Q. B. D. 107; 57 L. J. Q. B. 51; 58 L. T. 463; 36 W. R. 116; 4 T. L. R. 112, C. A.

**39. Proof of office—Acting under-sheriff signing as under-sheriff.**]—Jury Act, 1825 (c. 50), s. 46, imposes penalties upon "the sheriff or under-sheriff," for an improper insertion or omission of names from the special jury list. In an action for such penalties, the declaration describing deft. as being "the acting under-sheriff," it was proved that deft. was the person who in the county acted as under-sheriff, so far as receiving writs, making returns, appearing in public, etc.; but that a Mr. T. was the appointed under-sheriff, pursuant to Lighting & Watching Act, 1833 (c. 90), s. 5. It also appeared that deft. had on one occasion signed his name as under-sheriff, although he stated at the same time that he was not the under-sheriff, but that Mr. T. was, & in an affidavit had stated himself to be the acting under-sheriff:—*Held:* there was no evidence of deft.'s liability, & pltf. was properly nonsuited.—WILLIAMS *v.* THOMAS (1849), 4 Exch. 479; 7 Dow. & L. 177; 19 L. J. Ex. 50; 14 L. T. O. S. 182; 13 J. P. 781; 154 E. R. 1301.

**Powers & liabilities.**]—*See* Part V., *post.*

**Disqualifications.**]—*See* Part IV., Sect. 2, *post.*



30 l. *Continuance until notice of discharge.*]—BOTSFORD *v.* HENDERSON (1860), 9 N. B. R. (4 All.) 516.—CAN.

*Sect.* 1.—*Under-sheriffs: Sub-sect.* 2. *Sects.* 2 & 3. *Part III.*]

SUB-SECT 2.—APPOINTMENT AND TENURE OF OFFICE.

*See* Sheriffs Act, 1887 (c. 55), ss. 23, 27.

**40. Validity of condition in appointment—Restraint of powers.**]—The office of sheriff continues until he has regular notice of his discharge.

In the appointment of under-sheriff, an exception that he shall not meddle with writs above such a value, is repugnant & void.—BOUCHER *v.* WISEMAN (1595), Cro. Eliz. 440; 78 E. R. 680.

*Annotations*:—**Mentd.** Hawkins *v.* Cutts (1622), Hut. 49; Baily *v.* Bunning (1666), 2 Keb. 32.

**41.** —— ——.]—NORTON *v.* SIMMES, No. 33, *ante*.

**42.** —— ——.]—CHAMBERLAINE *v.* GOLDSMITH (1609), 2 Brownl. 280; 123 E. R. 942.

**43. Validity of promise to withdraw candidature.**]—A promise, by one of two candidates for the office of under-sheriff, in consideration that the other will desist, is good.—PARKER *v.* BROWN (1621), Cro. Jac. 612; 79 E. R. 522.

**44. One only may be appointed—Validity of inquisition before two.**]—An inquisition taken before two under-sheriffs extraordinary set aside, for the high sheriff can appoint no more than one under-sheriff extraordinary.—DENNY *v.* TRAPNELL (1768), 2 Wils. 378; 95 E. R. 872.

*Annotation*:—**Refd.** R. *v.* Sheffield Ry. (1839), 11 Ad. & El. 194.

**45. Tenure of office—Determinable at pleasure of sheriff.**]—NORTON *v.* SIMMES, No. 33, *ante*.

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SECT. 2.—DEPUTIES.

*See* Sheriffs Act, 1887 (c. 55), ss. 24-27.

**46. Appointment need not be by deed.**]—A deputy may be appointed without deed; but an assignee cannot.—CLECOTT *v.* DENNYS (1587), Cro. Eliz. 67; 78 E. R. 327.

**47. Who may appoint—Under-sheriff—On execution of writ of inquiry of damages.**]—WALLACE *v.* HUMES (1740), Barnes, 231; 94 E. R. 891.

**48.** —— ——.]—DAVIS *v.* SKYLLINS (1741), Barnes, 232; 94 E. R. 891.

**49. Authority of deputy—Where sheriff required to act in person—Execution of writ.**]—Writs, viz. of partition, which command a sheriff to do an act in his own person, cannot be executed by deputy; & the fact may be inquired into before the return is filed.—CLAY'S CASE (1582), Cro. Eliz. 10; 78 E. R. 276.

**50.** —— **Exercise of ministerial functions of sheriff.**]—The sheriff may execute an *accedas ad curiam* by his bailiff, although the words of the writ require his personal attendance. The ministerial office of a sheriff may be exercised by deputy. The execution of writs often varies from the literal direction of them.—LACY *v.* HARRIS (1672), Freem. K. B. 52; 89 E. R. 41.

**Effect of delivery of writ to deputy.**]—*See* EXECUTION, Vol. XXI, pp. 440, 441, Nos. 239, 240.

SECT. 3.—BAILIFFS AND OFFICERS.

*See* Sheriffs Act, 1887 (c. 55), ss. 26, 27.

**51. Nature of office.**]—If a sheriff's officer takes money from a person *colore officii* for anything done in the course of his duty, & to which money he is not entitled by law, an action lies against the sheriff, though there is no evidence of the money coming to his hands. The office of a sheriff's bailiff is particular & personal, & there can be no such thing as partnership between two such officers, so as that the act of one shall bind the other; beside, the principle of law in torts is against it.—JONS *v.* PERCHARD (1794), 2 Esp. 507; 170 E. R. 436, N. P.

**52. Who may be appointed—Infant.**]—*Semble*: an infant cannot be a bailiff or sheriff's officer.—CUCKSON *v.* WINTER (1828), 2 Man. & Ry. K. B. 313: 6 L. J. O. S. K. B. 309.

**53. Indemnity to sheriff — Construction.**] — STOUGHTON *v.* DAY (1647), Aleyn, 10; Sty. 18; 82 E. R. 887.

*Annotations*:—**Distd.** Weston *v.* Mason, Weston *v.* Chapman (1765), 3 Burr. 1725. **Mentd.** Arlington *v.* Merricke (1672), 2 Saund. 411; Wright *v.* Russell (1774), 3 Wils. 530; Barclay *v.* Lucas (1784), 1 Term Rep. 291, n.

**54.** —— ——.]—WESTON *v.* MASON, WESTON *v.* CHAPMAN (1765), 3 Burr. 1725; 97 E. R. 1067.

*Annotation*:—**Refd.** Adamson *v.* Jarvis (1827), 4 Bing. 66.

**55.** —— **Validity.**]—It is not contrary to the policy of the law, that the sheriff should stipulate with his bailiff, as the price of the latter's office, that he shall indemnify the sheriff against the responsible consequences of his, the sheriff's, office, arising out of the bailiff's acts, proper as well as improper.

Covenant by bailiff, & sureties, to sheriff, on his appointment, to give regular instructions for return of all process, to pay the costs of defending any action, or prosecuting or opposing any motion, concerning any matter, wherein the bailiff should act, to indemnify the sheriff & under-sheriff from all damages, loss, costs, & charges, sustained, etc., by reason of any return to any writ, etc., made by the sheriff at the request of the bailiff; & from & against all actions, costs, etc., for or by reason of the executing, not executing, returning, or not returning, or misreturning, of any writ, etc., or any other cause whatsoever, occasioned by the act or default of the bailiff. A warrant on a writ of *fi. fa.*, was directed to the bailiff, which the sheriff was ruled to return; several applications were made by the sheriff to the ct., with a view to his obtaining time & indemnity, in which expenses were incurred; & finally, as correctly instructed by the bailiff, he returned *nulla bona*, for which an action was brought against the sheriff, & costs were incurred therein:—*Held*: the bailiff & sureties were liable to remunerate & indemnify the sheriff; the covenant extending, not only to the consequences of wrongful, but of rightful acts of the bailiff.—FAREBROTHER *v.* WORSLEY (1831), 1 Cr. & J. 549; 1 Tyr. 424; 9 L. J. O. S. Ex. 166; 148 E. R. 1541.

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PART II. SECT. 1, SUB-SECT. 2.

a. *Evidence of appointment—Acting in capacity of sheriff.*]—Where the affidavit indorsed on a sheriff's deed of land sold under execution, as to the regularity of the proceedings, pursuant to 4 Will. 4, c. 22, appears to have been made by the deputy sheriff:—*Held*: the authority of such deputy may be proved by evidence of his acting in that capacity, although his appointment was under a written deputation, which is not produced.—DOE d. BARLOW *v.* HATFIELD (1841), 1 Kerr, 417.—**CAN.**

PART II. SECT. 2.

b. *Authority of deputy—Exercise of office of bailiff.*]—It was objected that the father of the person who acted as bailiff was the duly appointed bailiff, & the son had no authority to act for him; but the evidence showed that the father being an aged man, the son was in fact the acting bailiff, & was clearly recognised & treated as such by the plaintiff's attorney.—DOUGALL *v.* WADDELL (1877), 28 C. P. 191.—**CAN.**

c. *Bond for performance of duty—Agreement for extension of time.*]—HAMILTON *v.* ANDERSON (1846), 2 U. C. R. 452.—**CAN.**

PART II. SECT. 3.

d. *Sureties — Release — By failure of principal to execute covenant.*]—*Held*: the surety of a division ct. bailiff under C. S. U. C. c. 19, s. 25, is not relieved from liability under his covenant by neglect of his principal to execute such covenant.—MILLER *v.* TUNIS (1860), 10 C. P. 423.—**CAN.**

e. *Appointment for particular process.*]—An appointment by the sheriff, under 22 Vict. c. 5, s. 2, of a

**56. Bailiff of borough court — Not necessarily bailiff of borough.**]—WATKINS *v.* WEST, No. 729, *post.*

**57. Right of one to act alone—Charter providing for appointment of two.**]—Where two bailiffs are to be chosen by charter, & one only is chosen, the latter cannot act alone.—R. *v.* SMART (1768), 4 Burr. 2241; 98 E. R. 168.

**58.** —— ——.]—By charter of Queen Elizabeth the corpn. of Bath elected annually from its own body two persons to be bailiffs for one whole year. The charter also gave to the corpn. the franchise of a gaol, & directed that the bailiffs should be keepers of it.

Since Municipal Corporations Act, 1835 (c. 76), the town council has only appointed one bailiff.

On application for a *mandamus* to the bishop to licence the appointee of the town council:—*Held:* a single bailiff was well appointed by the town council; such bailiff was the keeper of the gaol within Prisons Act, 1839 (c. 56), s. 15.—R. *v.* BATH & WELLS (BP.) (1843), 5 Q. B. 147; Dav. & Mer. 173; 12 L. J. Q. B. 324; 1 L. T. O. S. 337; 7 J. P. 478; 7 Jur. 766; 114 E. R. 1204.

*Annotations:*—**Reld.** Hammond *v.* Peacock (1847), 1 Exch. 41; R. *v.* Lancaster (1847), 10 Q. B. 962.

**59. Right to appoint deputy.**] — The sheriff's bailiff cannot make a deputy (PATTESON, J.).—JACKSON *v.* HILL (1839), as reported in 10 Ad. & El. 477; 113 E. R. 181.

**60. Duty to attend sessions—Summoning jury.**]—The bailiffs of the liberty had regularly attended quarter sessions, & made returns of the jurors resident within the liberty:—*Held:* the bailiff of the liberty was bound in obedience to the precept of the sheriff, to summon the jury within the liberty, to attend quarter sessions.

The ct. of quarter sessions made an order, that A. & the acting bailiff of the lordship of H. be fined £10 for refusing contrary to the duty of his office, & to ancient usage, to summon the jury from the lordship to attend at quarter sessions, he, A. having been duly required so to do by warrant from the sheriff:—*Held:* this order was good, although it did not appear that the bailiff was summoned to attend at sessions, it being his duty to do so without summons.—R. *v.* JARAM (1825), 4 B. & C. 692; 7 Dow. & Ry. K. B. 163; 3 Dow. & Ry. M. C. 361; 107 E. R. 1218.

**61. Sureties—Discharge only with consent of sheriff & other sureties.**]—MARTIN *v.* WENHAM, No. 661, *post.*

**62.** —— **Action by sheriff—Delivery of warrant to sheriff.**]—In a declaration of covenant brought by a sheriff against a surety for one of his officers, who had not arrested a person under their warrant, it is necessary to aver that the warrant was delivered by the sheriff to such officer; & it seems that such warrant should have been directed to him.—DES ANGES *v.* PRIESTLEY (1819), 3 Moore, C. P. 246.

—— **Liability of sureties.**]—*See* GUARANTEE, Vol. XXVI., pp. 85, 161, Nos. 596, 1210.

**Duty to return mandamus.**]—*See* CROWN PRACTICE, Vol. XVI., p. 337, No. 1573.

**County court bailiffs.**]—*See* COUNTY COURTS, Vol. XIII., pp. 450, 451, 453–455, Nos. 21–25, 35–54.

**Bailiffs of franchises.**]—*See* Part III., *post.*

**Bailiffs appointed to levy distress.**]—*See* DISTRESS, Vol. XVIII., pp. 330–333, Nos. 636–675.

**Disqualifications.**]—*See* Part IV., Sect. 2, *post.*

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# Part III.—Bailiffs of Franchises.

*See* Sheriffs Act, 1887 (c. 55), ss. 34, 35.

**63. Qualification — Sufficiency of residence.**]—Deft. having prior connections with a borough town, previous to his election to the office of bailiff, for which residence is a necessary qualification, took a house at first for four years, but afterwards, at his landlord's request, for one, & slept there one night before the election, & did not return again for near a month afterwards, when he stayed two days, but retained possession of his house under his lease the whole time: the taking of the house appearing to the ct. to be *bonâ fide*:—*Held:* a sufficient legal residence to satisfy the qualification required.—R. *v.* SARGENT (1793), 5 Term Rep. 466; 101 E. R. 262.

*Annotations:*—**Distd.** R. *v.* Richmond (1796), 6 Term Rep. 560. **Reld.** Whithorn *v.* Thomas (1844), 14 L. J. C. P. 38; Ganendro Mohun Tagore *v.* Rajah Juttendro Mohun Tagore (1874), L. R. 1 Ind. App. 387. **Mentd.** R. *v.* Stapleton (1853), 22 L. J. M. C. 102.

**64.** —— ——.]—An information in nature of *quo warranto* granted in order to try whether a residence in a borough previous to an election which required residence were *bonâ fide*, or not; it appearing that deft., though in treaty for a house in the borough, had only hired lodgings there, & had resided there a very few nights in his journey to & from other places.—R. *v.* RICHMOND (DUKE) (1796), 6 Term Rep. 560; 101 E. R. 703.

*Annotation:*—**Mentd.** Whithorn *v.* Thomas (1844), 7 Man. & G. 1.

**65. Election.**] — R. *v.* THORNTON (1803), 4 East, 294; 1 Smith, K. B. 109.

*Annotation:*—**Reld.** R. *v.* Devonshire, R. *v.* Willyams (1823), 1 B. & C. 609.

**66.** —— **Issue of quo warranto.**]—R. *v.* RANDALL (1847), 11 J. P. Jo. 421; *subsequent proceedings, sub nom.* R. *v.* ALDBOROUGH BURGESSES, 11 J. P. Jo. 438.

**67. Entry into liberty—By sheriff's officer—Action by bailiff.**]—The bailiff of a liberty need not state his title specially in an action against a sheriff's officer for entering his bailiwick.—CAREY *v.* CALLEIS (1692), 1 Show. 367; 89 E. R. 645; *sub nom.* CARY *v.* CALLICE, Comb. 198.

**68.** —— —— **Application to commit.**]—*Ex p.* CARPENTER (1759), 1 Dick. 334; 21 E. R. 297.

**69. Liability—For acts of servant.**]—Where a servant of a bailiff of a franchise was sworn to serve a process, & by deputation from the bailiff he ought not to have served a process, but to such a sum; & he serves a process of a greater sum without any warrant, & after levies the money, & parts with it; the bailiff shall be chargeable.—ANON. (1627), Het. 12; 124 E. R. 302.

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bailiff to execute a particular process for a particular individual, is not an appointment within the meaning of that Act, & is invalid. A sheriff has no authority to constitute a special bailiff to execute a writ until the writ be actually in his custody.—R. *v.* RYAN (1863), 4 Nfld. L. R. 752.—NFLD.

**70. —— For escape — Prisoner delivered to sheriff.**]—The bailiff of a liberty who has the return & execution of writs is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, & there deliver him into the custody of the sheriff.

Instead of delivering the prisoner into the custody of the sheriff, he should have kept him within his own bailiwick; & then he should have made his return to the sheriff, which the sheriff would have returned to this ct. Deft. receives all the profits arising from the execution of writs within his privilege, & therefore he is liable to all the disadvantages attending it (GROSE, J.).—BOOTHMAN *v.* SURRY (EARL) (1787), 2 Term Rep. 5; 100 E. R. 3.

*Annotations:*—**Consd.** Contant *v.* Chapman (1842), 2 Q. B 771. **Refd.** Jackson *v.* Taylor (1836), 2 Har. & W. 135; Platel *v.* Dowse (1838), 5 Scott, 549.

# Part IV.—Disqualification of Sheriffs and Officers.

## SECT. 1.—SHERIFFS.

*See* Sheriffs Act, 1887 (c. 55), s. 17.

**71. Whether eligible as Member of Parliament.**]—ABINGDON BOROUGH CASE (1775), 1 Doug. El. Cas. 419.

*Annotation:*—**Refd.** Northallerton Borough Case (1869), 1 O'M. & H. 167.

**72. —— For another county.**] — SOUTHAMPTON TOWN CASE (1776), 4 Doug. El. Cas. 87.

**73. Whether eligible to act as magistrate.**]—1 Mary, sess. 2, c. 8, s. 2, which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise, in any county where he shall be sheriff, during the time of his exercising the office of sheriff, has not been affected by any subsequent addition to the duties of justices of the peace, & continues to disqualify a justice from acting as such while he holds office as sheriff.—*Ex p.* COLVILLE (1875), 1 Q. B. D. 133; 45 L. J. M. C. 108; 24 W. R. 456; *sub nom. Ex p.* DERBYSHIRE SHERIFF, 39 J. P. Jo. 761.

## SECT. 2.—UNDER-SHERIFFS AND OFFICERS.

**Disqualification from holding license to retail intoxicating liquor.**]—*See* Beerhouse Act, 1830 (c. 64), s. 2; Refreshment House Act, 1860 (c. 27), s. 8; Licensing (Consolidation) Act, 1910 (c. 24), s. 35 (1).

**Exemption from jury service.**]—*See* Juries Act, 1870 (c. 77), s. 9, sched.

# Part V.—Powers, Duties, and Liabilities.

## SECT. 1.—SHERIFF AS CONSERVATOR OF THE PEACE.

*See* Sheriffs Act, 1887 (c. 55), s. 8.

**74. Duty to preserve peace of county — Recovery of expenses.**]—The sheriff is bound to preserve the peace of the county. If he is put to any extraordinary expense in this way let him represent the matter when he passes his accounts in the Exchequer, or directly to His Majesty's Govt. (LAURENCE, J.).—WATHEN *v.* SANDYS (1811), 2 Camp. 640; 170 E. R. 1279.

**75. Right to carry arms.**]—The sheriff or any of his ministers may for the better execution of justice carry with them offensive or defensive weapons, & are not restrained by the general prohibition of 33 Hen. 8, c. 6.—SEINT JOHN'S CASE (1592), 5 Co. Rep. 71 b; 77 E. R. 162; *sub nom.* GARDENER'S CASE, Cro. Eliz. 821.

*Annotations:*—**Refd.** Terry *v.* Huntington (1668), Hard. 480; Goldswain's Case (1778), 2 Wm. Bl. 1207. **Mentd.** R. *v.* Burnaby (1703), 1 Com. 131; *Ex p.* Higgins (1843), 10 Jur. 838.

**76. ——.**]—ARMES CASE (1596), Poph. 121; 79 E. R. 1227.

*Annotations:*—**Refd.** R. *v.* Wigan (1749), 1 Wm. Bl. 47; Bristol Riots (1832), 3 State Tr. N. S. 1; Phillips *v.* Eyre (1870), 10 B. & S. 1004.

**77. Right to call on posse comitatus.**]—The sheriff by this writ may resist them who would do waste; &, if necessary, may arrest them, or make a warrant to others to do it, or he may take the *posse comitatus* to help him.—FOLIAMB'S CASE (1601), 5 Co. Rep. 115 b; 77 E. R. 235.

*Annotation:*—**Refd.** Miller *v.* Knox (1838), 4 Bing. N. C. 574.

## SECT. 2.—RIGHTS AND DUTIES OF SHERIFFS AT ASSIZES.

*See* Sheriffs Act, 1887 (c. 55), s. 9.

**78. Duty to attend.**]—*Ex p.* FERNANDEZ, No. 5, *ante*.

**79. —— Penalty for default.**] — R. *v.* TICHBORNE (1892), *Times*, Dec. 7.

**80. Duty to execute orders of court.**]—*Ex p.* FERNANDEZ, No. 5, *ante*.

**81. —— Right to depute to proper person.**]—As in Children Act, 1908 (c. 67), there is no person specifically charged with the duty of administering the punishment of whipping in the case of a child convicted on indictment & ordered to be whipped & sentenced to detenton in a place of detention, the duty devolves upon the sheriff as the officer who has the general duty of executing the orders of cts. of justice. The sheriff, may, however, depute the performance of this duty to a proper person.—R. *v.* LYDFORD, [1914] 2 K. B. 378; 83 L. J. K. B. 589; 110 L. T. 781;

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**PART V. SECT. 2.**

**80 i.** *Duty to execute orders of court.*]—It is a contempt of the Ct. of King's Bench, punishable by fine, for a sheriff not to carry into effect a sentence pronounced by the Ct. of Oyer & Terminer; they will act on the information of one of the judges of the ct., & will fine on such information. The sickness of the criminal, & that it would cause his death, is no justification for the sheriff not acting, & carrying it into effect; he should have applied to the Lord Lieutenant, or the judges.—R. *v.* KERONS (1799), Rowe, 397.—IR.

78 J. P. 213; 30 T. L. R. 349; 58 Sol. Jo. 363; 24 Cox, C. C. 142; 10 Cr. App. Rep. 62, C. C. A.

**82. Right to address grand jury—Contempt of court.**]—*Re* SURREY SHERIFF (1860), 2 F. & F. 234, N. P.

## SECT. 3.—RIGHTS AND DUTIES OF SHERIFFS AS TO JURIES.

*See, generally*, JURIES, Vol. XXX., pp. 209 *et seq.*

**Rights as to summoning of jury.**]—*See* JURIES, Vol. XXX., p. 214, Nos. 15–18.

**Jury for assessment of compensation under Lands Clauses Acts.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 203–211, Nos. 823–961.

## SECT. 4.—RIGHTS AND DUTIES OF SHERIFFS AT ELECTIONS.

*See, generally*, ELECTIONS, Vol. XX., pp. 1 *et seq.*

**83. Right to act as returning officer — Constituency comprising more than one borough—Sheriff of county borough having smaller population.**]—The borough of Carmarthen was by a Charter of 1764, created a county of itself. From early times it had been a parliamentary borough & down to 1832 had returned a Member to Parliament. By the Representation of the People Act, 1832 (c. 45), the borough of Llanelly was appointed to share with the borough of Carmarthen in the election of a Member of Parliament for Carmarthen. The writ for the election of such member continued as before to be directed to the sheriff of the county of the town of Carmarthen. In 1913, Llanelly became a municipal borough. According to the last census, taken in 1911, the population of Llanelly exceeded in number that of Carmarthen, & upon that ground the town clerk of Llanelly claimed to be entitled to receive from the revising barristers for Carmarthen & Llanelly the revised lists of voters for the boroughs contending that under Redistribution of Seats Act, 1885 (c. 23), s. 12 (4), the mayor of Llanelly was the person to whom the writs of election ought to be directed:—*Held:* by the common law the sheriff of Carmarthen had the right to act as returning officer, his right was not taken away by Municipal Corporations Act, 1882 (c. 50), s. 244 & Redistribution of Seats Act, 1885 (c. 23), s. 12 (4), inasmuch as they did not apply to boroughs which were counties of themselves & consequently the town clerk of Carmarthen was the person entitled to receive the revised lists of voters.—R. *v.* RICHARDS, R. *v.* WILLIAMS, [1915] 3 K. B. 402; 80 J. P. 33; 31 T. L. R. 581; *sub nom.* R. *v.* RICHARDS, R. *v.* WILLIAMS, *Ex p.* LLANELLY CORPN., 84 L. J. K. B. 2217; 113 L. T. 977, C. A.

**84. Duty to return precept.**] — *Semble:* it is the sheriff's duty to return the precept.—WEBB *v.* SMITH (1838), 4 Bing. N. C. 373; 1 Arn. 145; 6 Scott, 147; 7 L. J. C. P. 191; 2 J. P. 300; 132 E. R. 830.

## SECT. 5.—JUDICIAL FUNCTIONS OF SHERIFF.

*See* Sheriffs Act, 1887 (c. 55), s. 18.

**Assessment of compensation under Lands Clauses Acts.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 203–211, Nos. 823–961.

## SECT. 6.—EXECUTION OF PROCESS.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, EXECUTION, Vol. XXI., pp. 415 *et seq.*; R. S. C., Ords. 42, 43, r. 14.

**85. Nature of sheriff's duty.**]—The duty of a sheriff in respect of executing the writs of *fi. fa.*, etc., sent to him by the clerk of the peace after each quarter sessions, with the roll of fines & amerciaments for the purpose of levying the same, is not purely ministerial; & as it is his duty to attend sessions, he is not necessarily free from blame if he executes a writ according to the roll in a case in which a fine has been paid.—WILDES *v.* MORRIS (1852), 22 L. J. M. C. 4; 20 L. T. O. S. 140; 16 Jur. 1115; *sub nom.* MORRIS *v.* WILDES, 17 J. P. 119; *sub nom.* WYLES *v.* MORRIS, 1 W. R. 65.

**86.** ——.]—(1) The sheriff had, in his office, two writs issued at different times against B.: one at the suit of A., which, for certain reasons of form, was invalid; the other at the suit of L., which was a valid writ. Warrants were granted on both writs; B. was arrested on A.'s writ. B. applied for his discharge, & on the hearing before a judge, the sheriff claimed to detain B. on L.'s writ. The judge ordered his discharge. In an action for negligence brought by L. against the sheriff, the direction given to the jury was, that there had been no arrest at L.'s suit; that the judge's order discharging B. from custody was no justification to the sheriff; that whether the sheriff had acted negligently in arresting B. on A.'s invalid writ was a question of fact, & also that the jury must say whether the sheriff knew, or without negligence might have known that

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**PART V. SECT. 4.**

f. *Liability for false return—Necessity for proof of malice.*]—STILES *v.* GILBERT (1859), 9 N. B. R. (4 All.) 421.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 1.**

g. *Service of process.*]—The process of the ct. can only be served by the sheriff or his officers.—WHITEHEAD *v.* FOTHERGILL (1830), Dra. 200.—**CAN.**

h. ——.]—TOBIN *v.* ENGLISH (1850), 3 Nfld. L. R. 159.—**NFLD.**

k. *Necessity to produce warrant.*]—In trespass against a sheriff for seizing goods in execution it is not enough to call the bailiff who made the seizure, & prove by him that he had a warrant, without producing it or satisfactorily excusing its non-production.—LOWES *v.* JARVIS (1839), 5 O. S. 134.—**CAN.**

l. *Form of execution.*]—R. *v.* ROBERTS (1895), 27 N. S. R. 381.—**CAN.**

m. *Proceeds of execution in hands of sheriff—Retention to satisfy execution against person entitled.*]—The ct. will not order the sheriff to retain in his hands money which he has levied on an execution at the suit of pltf., in order to satisfy an execution against pltf. at the suit of one of defts. in the sheriff's hands at the same time.—BRADLEY *v.* HOPLEY & GAULT (1828), 1 N. B. R. (Chip.) 147.—**CAN.**

n. —— *Right of prior creditors to interest.*]—A sheriff made money upon a number of writs against the same debtor, & held it during a contest between the various execution creditors for priority:—*Held:* the creditors obtaining priority were not entitled to interest upon their respective claims out of the fund.—BURNHAM *v.* WALTON (1886), 3 Man. L. R. 204.—**CAN.**

o. *Affidavit of preliminaries to execution on real estate—Time for.*]—The affidavit of the sheriff under the 4 Wm. 4, c. 22, as to the preliminary steps having been duly taken before the sale of real estate seized in execution, must be made at the same time as the deed of conveyance.—DOE d. BUSTIN *v.* DONNELLY (1845), 5 N. B. R. (3 Kerr) 66.—**CAN.**

p. *Sale by sheriff — Power to sell land in lots.*]—A sheriff may sell land under an execution, in separate lots, & at any time between the hours named in 27 Geo. 3, c. 12.—DOE d. ROBERTS *v.* WATSON (1850), 1 All. 675.—**CAN.**

q. —— —— *Equity of redemption in mortgaged chattels.*]—It is clearly the sheriff's duty, notwithstanding the use of the word "may" in Bills of

*Sect.* 6.—*Execution of process: Sub-sects.* 1, 2, 3, 4 & 5.]

A.'s writ was a void writ:—*Held:* this direction was right.

(2) Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having, at the same time, duties to perform towards those against whom such writs are directed. (3) An unlawful arrest, for which an action for false imprisonment would lie against the sheriff, is no arrest at all, & gives no lawful custody of the party arrested to the sheriff (CROWDER, J.).—HOOPER *v.* LANE (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

*Annotations:—As to* (1) **Expld.** Bateman *v.* Freston (1861), 3 E. & E. 578. **Distd.** *Re* Freston, *Ex p.* Freston (1861), 3 De G. F. & J. 612. **Apld.** Ockford *v.* Freston, Chapman *v.* Freston (1861), 6 H. & N. 466. *Generally*, **Reld.** Warburg *v.* Tucker (1858) 4 Jur. N. S. 1142. **Mentd.** Tyne Improvement Comrs. *v.* General Steam Navigation Co. (1866), 8 B. & S. 66; *Re* London Celluloid Co. (1888), 39 Ch. D. 190.

**87. Duty to take force—To overcome resistance reasonably anticipated.**]—It is the duty of the sheriff, when charged with the execution of a writ of *capias*, under Judgments Act, 1838 (c. 110), s. 3, to take with him such a force as will enable him to overcome any resistance which he could reasonably anticipate.—HOWDEN *v.* STANDISH (1848), 6 C. B. 504; 6 Dow. & L. 312; 18 L. J. C. P. 33; 12 L. T. O. S. 148; 13 J. P. 169; 12 Jur. 1052; 136 E. R. 1345.

**88. Duty to retake escaped prisoner — Imprisonment for non-payment of fine.**]—A person convicted of a crime by a ct. of competent jurisdiction is sentenced to pay a fine, & is committed in execution until that fine be paid. Although the officer to whose custody he is committed voluntarily permit him to escape before payment of the fine, yet it is afterwards his bounden duty to retake him.—BUTT *v.* JONES (1819), Gow, 99, N. P.

**89. Whether sheriff may take security—From plaintiff in replevin.**]—A justice of the peace may take money *in deposito* for surety of the peace; but the sheriff cannot receive money from a pltf. in replevin by way of pledges.—MOYSER *v.* GRAY (1636), Cro. Car. 446; 79 E. R. 987; *sub nom.* ANON., W. Jo. 378.

**90. Duty of bailiff to make affidavit of service.**]—A bailiff is bound to make affidavit of the service of process when required.—R. *v.* RUDGE (1763), 1 Wm. Bl. 432; 96 E. R. 246.

**91. Delay of sale — Indemnity to execution creditor.**]—An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of ct., even by consent, where the person who so undertakes is neither party nor attorney in the suit.—LYALL *v.* LAMB (1833), 4 B. & Ad. 468; 110 E. R. 531.

**92. Negligence of sheriff—Service of summons—Liability of plaintiff in suit.**] — HARRISON *v.* WARDLE (1833), 5 B. & Ad. 146; 2 Nev. & M. K. B. 703; 110 E. R. 746.

*Annotation:*—**Mentd.** Rider *v.* Edwards (1841), 3 Man. & G. 202.

**93. Notice discharging bailiff — Return of warrant to sheriff—Indorsement "not to be returned"—Effect of.**]—A. & B. both place writs against C. in the hands of the sheriff, who issues warrants thereon to bailiffs, specially named by pltf. in each action. On the change of sheriffs, the warrants are returned, & A. not being satisfied with the conduct of his bailiff, intimates to him, that his warrant shall not be renewed to him, whereupon he returns it to the sheriff, indorsed "not to be returned to me." B.'s warrant is reissued to his former bailiff, who, shortly after, takes C. thereunder. Search was then made, according to the custom of the sheriff's office, for any detainers that there might be against C.; & A.'s writ being overlooked through the inadvertence of the clerk, he is discharged at once. Not long after this, A. applies for a new warrant against C. which being granted, he is taken at his suit, & compelled to find bail, etc., for which he brings an action of trespass against the sheriff: —*Held:* (1) the sheriff is liable, for he was bound to execute the writ in the first instance, by detaining C. when arrested at the suit of B., & having voluntarily suffered him to go at large on that occasion; the subsequent arrest at the suit of A. is unjustifiable; (2) the notice from A. to the bailiff, & the endorsement on the warrant by that officer, on returning the writ to the office, did not amount either to an express or implied countermand of the writ; but the result of them was, that the sheriff was bound to take proceedings thereon as if no directions had been originally given with it.—BRYANT *v.* CARROLL (1839), 3 J. P. 386.

**94. What is sufficient authority for sheriff—Order of judges of assize.**]—*Qu.:* whether the

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Sale Act, to seize & sell the equity of redemption in mtged. chattels when such equity is valuable. — MASSEY MANUFACTURING CO. *v.* CLEMENT (1893), 9 Man. L. R. 359.—**CAN.**

r. *Notice to sheriff of property to be seized—Sufficiency.*]—O'NEILL *v.* HAMILTON (LONDON DISTRICT SHERIFF) (1848), 4 U. C. R. 294.—**CAN.**

t. *Right of sheriff to seize goods attached.*]—Pltf. obtained execution against A., whose goods were then under seizure upon an attachment. The sheriff, under Common Law Procedure Act, 1856, s. 53, having sued & obtained payment of a sum due by one of A.'s debtors:—*Held:* such money was not liable to pltf.'s execution, but went to the attaching creditors.—CANN *v.* THOMAS (1858), 17 U. C. R. 9.—**CAN.**

a. *Right of sheriff to pay money into court.*]—*Held:* a sheriff has no legal right to pay into ct. money made upon a writ in his office.—GLADSTONE *v.* FRENCH (1859), 9 C. P. 30.—**CAN.**

b. *Right of sheriff to attack mortgage.*]—A mtgee., under a mtge. by a firm, having taken possession of goods, they were seized by the sheriff, under an attachment against one of the partners as an absconding debtor, & afterwards delivered by the sheriff to the assignee in insolvency of such partner:—*Held:* the sheriff had no right, either as representing the attaching creditor or the assignee in insolvency of one of the partners, to take the goods out of the possession of the mtgee.; he was liable for the full amount of the pltf.'s interest in them; & that his having handed them over to the assignee could form no ground for reducing the damages.—PATERSON *v.* MAUGHAN (1876), 39 U. C. R. 371.—**CAN.**

c. *Execution by sheriff of venue of original action—Or by sheriff of place of arrest.*]—GAVAZA *v.* BLACK (1878), 12 N. S. R. (3 R. & C.) 129.—**CAN.**

d. *Duty of sheriff to take security.*]—In replevin a county ct. judge made an order when the writ was granted, directing the sheriff to seize the goods & hold them subject to requisition by pltf. to replevy to him. The sheriff seized the goods, but did not take a bond as directed by R. S. O. 1877, c. 53, s. 11:—*Held:* this order did not do away with the necessity of taking a bond, & the seizure was set aside, with costs to be paid by the sheriff.—LAWLESS *v.* RADFORD (1881), 9 P. R. 33.—**CAN.**

e. *Abandonment by sheriff—Goods claimed & left in possession of wife of debtor.*]—BRITTLEBANK *v.* GRAY-JONES, THOMPSON & NELSON, CLAIMANTS (1887), 1 Terr. L. R. 75.—**CAN.**

f. *Sheriff acting as liquidator—Waiver of irregularity.*]—In a replevin action the writ was directed to a sheriff, who was the sole liquidator of pltfs., & as such instituted the action:—*Held:* this was at most an irregularity, & it was too late for deft. to raise the objection after appearance.—ALPHA OIL CO. *v.* DONNELLY (1888), 12 P. R. 515.—**CAN.**

g. *Execution without positive instructions to levy.*]—An execution had been in the sheriff's hands a little before an attachment, but he did not receive positive directions to levy immediately under the execution, but under the attachment he did:—*Held:* this execution did not bind personal property against the attachment.—

order of the judges of assize is not a sufficient authority for the sheriff to act upon.—R. *v.* TRAILL (1840), as reported in 4 Per. & Dav. 325; 4 J. P. 778.

**95. Excessive levy under replevin bond — Liability of sheriff's assignee to refund—Surplus due to second execution creditor.**]—Where more is levied under a replevin bond than the assignee of the sheriff is entitled to, the ct. will not grant a rule to make the assignee refund, though the overplus is alleged to be due to a second execution creditor of same deft.—BOWSER *v.* LLOYD (1841), 9 Dowl. 1029; 5 Jur. 826.

**Validity of promise to indemnify sheriff.**]—*See* CONTRACT, Vol. XII., p. 177, Nos. 1316, 1320.

**Coroner to act where sheriff interested.**]—*See* CORONERS, Vol. XIII., pp. 236, 237, Nos. 51–64.

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SUB-SECT. 2.—ISSUE AND DELIVERY OF WRIT.

*See, generally,* EXECUTION, Vol. XXI., pp. 557, 580, Nos. 1306–1310, 1559–1564.

**96. To whom issued — Where two sheriffs.**]—Where there are two sheriffs, & one is challenged, the *venire* must go to the other, & not to the coroner.—R. *v.* WARRINGTON (1691), 12 Mod. Rep. 22; Carth. 214; Comb. 191; Holt, K. B. 166; 4 Mod. Rep. 65; 1 Salk. 152; 1 Show. 327; 88 E. R. 1138.

*Annotations:*—**Folld.** Letsom *v.* Bickley (1816), 5 M. & S. 144. **Distd.** Thompson *v.* Farden (1840), 1 Man. & G. 535.

**97.** —— ——.]—*Testatum capias* directed to the coroner, where one of the two sheriffs of Bristol was party to the suit, held irregular; for it ought to have gone to the other.

The precedents seem sufficient to establish the practice, that where there are two sheriffs & one of them is interested, the process ought to go to the other (*per* CUR.).—LETSOM *v.* BICKLEY (1816), 5 M. & S. 144; 105 E. R. 1004.

**98. Delivery to deputy sheriff — Whether equivalent to delivery to sheriff.**]—A delivery of a writ to the sheriff's agent in town, is equivalent to a delivery to the gaoler for the purpose of charging deft. in execution.—WILLIAMS *v.* WARING (1835), 2 Cr. M. & R. 354; 1 Gale, 268; 5 Tyr. 1128; 150 E. R. 152.

**Effect of delivery—Whether debtor's property bound from time of delivery.**]—*See* EXECUTION, Vol. XXI., pp. 525–527, Nos. 989–1002.

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SUB-SECT. 3.—THE ENTRY.

*See* EXECUTION, Vol. XXI., pp. 477–479, 543, 581, 582, Nos. 567–592, 1180–1184, 1577–1584.

**Entry for purpose of levying distress.**]—*See* DISTRESS, Vol. XVIII., pp. 333–335, Nos. 676–704.

**Entry to effect arrest on writ of attachment for contempt.**]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 77, 78, Nos. 947–949.

**Entry for purpose of executing criminal process.**]—*See* CRIMINAL LAW, Vol. XIV., p. 189, Nos. 1688–1693.

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SUB-SECT. 4.—INTERPLEADER PROCEEDINGS.

*See, generally,* INTERPLEADER, Vol. XXIX., pp. 463–470, 480, 488, 489, Nos. 121–186, 298, 384–392, 397, 398.

**Evidence of fulfilment of conditions.**]—*See* INTERPLEADER, Vol. XXIX., pp. 477, 478, Nos. 269–273.

**Costs & charges.**]—*See* INTERPLEADER, Vol. XXIX., pp. 498–501, 511, Nos. 501–531, 623.

**Deposit or security by claimant—Necessity for request by high bailiff.**]—*See* INTERPLEADER, Vol. XXIX., p. 507, No. 587.

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SUB-SECT 5.—INTERFERENCE WITH EXECUTION OF PROCESS.

**99. Criminal liability—Resisting lawful arrest.**]—R. *v.* BACKHOUSE (1771), Lofft, 61; 98 E. R. 533.

**100.** —— **Attachment—Obstruction of sheriff.**]—*Ex p.* LANCASTER, *Ex p.* GOSLING (1895), *Times*, Feb. 11.

**101.** —— —— **Retaking possession—Of goods.**]—Where the sheriff had seised the goods of a deft.

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MITCHELL *v.* RAYMUR, 3 Murd. Epit. 235.—**CAN.**

h. *Property taken in execution in excess of judgment—No notice of sale—Right of owner of property to refuse title deeds to purchaser.*]—Where property was taken by the deputy sheriff in execution to an amount far exceeding the amount of the judgments & was afterwards sold at auction without due notice of sale:—*Held:* the party against whom the judgments had been given was not bound to deliver up the title deeds to the purchaser on the application of the deputy sheriff.—HARBOR GRACE (DEPUTY SHERIFF) *v.* PYNN (1819), 1 Nfld. L. R. 148.—**NFLD.**

k. *Right of bailiff to use reasonable degree of force.*]—MEREDITH *v.* SANJIBANI DASI (1914), I. L. R. 42 Calc. 313.—**IND.**

l. *Right of sheriff to assistance of police.*]—The sheriff, in his sole discretion, has the right to require the protection & assistance of the constabulary, as part of the power of the county, in the execution of the writ of *fi. fa.* of the superior cts., whether by night or day.—A.-G. *v.* KISSANE (1893), 32 L. R. Ir. 220, 255.—**IR.**

**PART V. SECT. 6, SUB-SECT. 2.**

m. *Service of writ—Writ of ca. re.*]—A writ of *ca. re.* not bailable must be served by the sheriff or his officer, though the deputy sheriff be a party to the suit.—RUTTAN *v.* ASHFORD (1834), 3 O. S. 302.—**CAN.**

n. —— *Where sheriff interested party.*]—Pltf., as assignee of the estate of H., an insolvent, brought replevin, the writ being directed to & served by the sheriff, who was also an inspector of the estate:—*Held:* the sheriff, as inspector, was interested in the suit, & the writ of replevin was set aside.—FAIRWEATHER *v.* NEVERS (1875), 2 Pug. 524.—**CAN.**

o. *Priority of writs.*]—Where one of several writs first reaches the sheriff, it has priority, & he has no power to deprive it of such priority, & transfer it to another by first executing a writ delivered to him later.—DWARKANATH SHAW *v.* PRANKRISTO PAUL CHOWDHRY (1865), Bourke, 260.—**IND.**

p. ——.]—In considering which of two writs of attachment in execution of a decree is to have priority over the other, the time when the writs are lodged in the office of the sheriff is the criterion by which priority is to be determined, & not the time when such writs reach the hands of that officer.—NARSINGDAS MULTANCHAND *v.* NAHANUBAI, SUMARMAL JOHARIMAL *v.* NAHANUBAI (1870), 7 Bom. O. C. 183.—**IND.**

**PART V. SECT. 6, SUB-SECT. 3.**

q. *Entry under writ of ven. ex.*]—A sheriff under a writ of *ven. ex.* has no right to enter upon a person's land & sell his goods there by public auction; & a purchaser who enters at the same time as the sheriff is a trespasser as well as the sheriff.—MCMARTIN *v.* MCPHERSON (1839), 3 Ont. Dig. 6404.—**CAN.**

r. *Licence to enter premises—Goods left on premises for sale subject to payment before date of sale—Right to revoke licence.*]—Where the sheriff had seized goods under a *fi. fa.* & allowed them to remain on deft.'s premises on the understanding that they should be sold there on a future day if the money were not paid before, the licence thus given to enter on the premises & sell the goods accordingly, cannot be revoked by deft.—MCGILLIS *v.* MCMARTIN (SHERIFF) (1843), 1 U. C. R. 145.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 5.**

t. *Criminal liability — Rescue of goods.*]—HAYWOOD *v.* HAY (1882), 46 U. C. R. 562.—**CAN.**

a. —— *Seizure by bailiff under distress for rent of goods previously seised by sheriff.*]—BEATTY *v.* RUMBLE (1891), 21 O. R. 184.—**CAN.**

b. *Contempt of court — Resisting*

*Sect. 6.—Execution of process: Sub-sects. 5 & 6, A. & B. (a).*]

under a *fi. fa.*, & left a man in possession, who was subsequently turned out of possession by a claimant to the goods, the ct. would not interfere by attachment against the party for a contempt of the process of the ct., but left the sheriff to his ordinary remedy, it being his duty to hold possession.—BEAGLE *v.* STANDISH (1847), 2 New Pract. Cas. 373; 9 L. T. O. S. 229.

**102.** —— —— —— ——.] — An attachment for contempt will lie against the alleged owner of goods which are seized by the sheriff's officer, for forcibly taking them out of the possession of the officer, who claims to retain them until an interpleader summons has been disposed of.—COOPER *v.* ASPREY (1863), 3 B. & S. 932; 32 L. J. Q. B. 209; 8 L. T. 355; 9 Jur. N. S. 1198; 11 W. R. 641; 122 E. R. 349; *sub nom. Re* GREEN, 2 New Rep. 120.

**103.** —— —— —— **Of land.**] — LACON *v.* DE GROAT (1893), 10 T. L. R. 24, D. C.

**104.** —— —— —— ——.] — *Re* HIGG'S MORTGAGE, GODDARD *v.* HIGG, [1894] W. N. 73.

**105.** —— —— **Further execution by officer of inferior court.**]—A., a sheriff's officer, having seized certain goods under a *fi. fa.* issuing out of this ct.; B. an officer of the Palace ct., subsequently came upon the premises & seised under another *fi. fa.* the same goods, & carried them away. Under these circumstances the ct. refused to grant the sheriff summary relief, by way of attachment or otherwise, against B., it appearing that B. had not used more force, etc., than was necessary, & there appearing to be a dispute between the two officers, whether at the time of the second seizure A. was in possession of the goods in point of law.—WHITE *v.* CHAPPLE (1847), 4 C. B. 628; 2 New Pract. Cas. 289; 16 L. J. C. P. 233; 9 L. T. O. S. 225; 11 Jur. 543; 136 E. R. 654.

*Annotation:*—**Expld.** A. W. *v.* Cooper & Hall, [1925] 2 K. B. 816.

—— **Homicide in resisting legal process.**]—*See, generally,* CRIMINAL LAW, Vol. XV., pp. 784–787, Nos. 8436–8485.

**Interference with arrest for civil debt.**]—*See* No. 213, *post.*

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SUB-SECT. 6.—RETURN TO WRIT.

*A. In General.*

*See* R. S. C., Ord. 52, rr. 11, 12.

**106. Whether necessary to validity of process.**]—HOE'S CASE (1600), 5 Co. Rep. 89 b; 77 E. R. 191; *sub nom.* HOE *v.* BELTON, Moore, K. B. 468.

*Annotations:*—**Refd.** Rowland *v.* Veale (1774), 1 Cowp. 18; *Re* Hobson (1886), 55 L. J. Ch. 754.

**107. Indorsement of return — Return by new sheriff—Validity of indorsement by old sheriff.**]—A writ returned by the new sheriff, with a return indorsed by the old sheriff, & signed "A. late sheriff," is good.—BETHYLL *v.* PARRY (1630), Cro. Car. 189; 79 E. R. 766.

**108.** —— —— **Necessity for indorsement by old sheriff—Liability of returning sheriff for irregularity.**]—Where a writ is delivered to the late sheriff, & executed by him, & the return to the writ happens in the time of a new sheriff, the new sheriff must return it with the late sheriff's return indorsed thereon, in order to the ct.'s proceeding to enforce obedience to the writ; but if the new sheriff return *cepi corpus* by mistake, & an attachment afterwards issue against the late sheriff for not bringing in the body, this is irregular, as the ct. can only look to him who made the return. But where the rule to bring in the body was had Nov. 12 & no objection made to the attachment till Jan. 27 following, it was held that the party came too late.—R. *v.* MIDDLESEX (LATE SHERIFF) (1804), 4 East, 604; 102 E. R. 962; *sub nom.* R. *v.* MIDDLESEX (SHERIFF), PEARSON *v.* PUGH, 1 Smith, K. B. 286.

*Annotation:*—**Refd.** Yuroth *v.* Hopkins (1835), 1 Gale, 141.

**109. Filing of return—Necessity for filing with proper officer.**]—GREGORY *v.* HURRILL, No. 172, *post.*

**110.** —— **Duty of sheriff.**] — JONES *v.* WILLIAMS, No. 131, *post.*

**111.** —— **Time for filing—During vacation.**]—If a rule on the sheriff to return the writ in this ct. expires in vacation, the sheriff must nevertheless file his return in vacation within one day after the rule expires.—R. *v.* MIDDLESEX SHERIFF, THOMPSON *v.* POWELL (1814), 5 Taunt. 647; 1 Marsh. 270; 128 E. R. 845.

**112.** —— —— **Before rule nisi for issue of sci. fa.**]—(1) Pltfs. having recovered judgment for about £11,000 against the Somerset & Dorset Ry. co., in which deft. was a shareholder, issued execution against the co., & no sufficient assets being found, a rule *nisi* was obtained for a *sci. fa.* against deft. The sheriff's return of *nulla bona* was filed on showing cause against the rule, & the rule was made absolute; & it now appeared that while the writs of *fi. fa.* were in the hands of the sheriff, the Devon & Somerset co. were in possession of office furniture of the value of about £150, which might have been taken in execution: —*Held:* the jurisdiction of the ct. to order the *sci. fa.* to issue arose as soon as it was shown that the co.'s property on which execution might be levied was not sufficient to satisfy the judgment, & the ct. would then exercise its discretion & order the *sci. fa.* to issue or not, according as the available property of the co. was inconsiderable or considerable, in comparison with the judgment-debt.

(2) It is not necessary that the return of the sheriff should be filed before the rule *nisi* is granted; but, *semble*, it must be before the rule is made absolute.—ILFRACOMBE RY. CO. *v.* POLTIMORE (1868), L. R. 3 C. P. 288; 37 L. J. C. P. 86; 18 L. T. 85; 16 W. R. 460.

**113.** —— —— **Before rule for sci. fa. made absolute.**]—ILFRACOMBE RY. CO. *v.* POLTIMORE, No. 112, *ante.*

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*sheriff in executing sale under interpleader order.*]—Persons, interfering with the sheriff when carrying out a sale under an interpleader order are guilty of contempt of ct. whether the sheriff be a trespasser or not.—R. *v.* CAMPBELL (1893), 14 N. S. W. L. R. (L.) 532; 10 N. S. W. W. N. 137.—**AUS.**

e. —— *Removing goods in custody.*]—Where goods are in the custody of the law, taking them away by third persons, even if they have a good title to them, is a contempt of ct.—*Re* HOGG & CHRISTIE (1901), 19 N. Z. L. R. 856.—**N.Z.**

d. *Justification — Sheriff exceeding powers — Whether justification for assault.*]—If a sheriff appointed to act during the absence of the sheriff of the district in executing a writ of possession exceeds his powers, that will not justify an assault committed upon him while in the process of executing the writ. The appropriate remedy of the party aggrieved is an action against the sheriff.—R. *v.* PEDDLE (1907), 26 N. Z. L. R. 972.—**N.Z.**

PART V. SECT. 6, SUB-SECT. 6.—A.

e. *Time for return — Extension of time—Where interpleader order pending.*]—Where an interpleader order is pending, the ct. will in its discretion enlarge the time for returning writs in the sheriff's hands.—WALKER *v.* NILES (1870), 3 Ch. Ch. 59.—**CAN.**

f. *Amendment of return — After action for escape.*]—After an action for an escape in execution, the sheriff will not be allowed to amend his return to the writ by showing that the debtor was privileged from arrest, so as to

**114. Time for return — Writ returnable "immediately."**]—(1) Where a writ is made returnable "immediately," the meaning is, that it should be returned immediately after execution of the writ, allowing a reasonable time for such execution. Therefore, where a writ of attachment issued on June 22, & the suit became abated on June 24, & was not revived till the following Nov., the return of the writ in Jan. was held sufficient.

(2) After an arrest of a questionable nature in a house prisoner surreptitiously got out of the house & was arrested in the high road:—*Held:* the second arrest was legal.—SNOWBALL *v.* DIXON (1841), 4 Y. & C. Ex. 511; 10 L. J. Ex. Eq. 56.

**115. —— Premature return — Jurisdiction of court to order.**]—Strictly speaking, no writ can be returned before it is returnable, although a judge may order the sheriff to return what he has done upon it, & so in some sense to return the writ (LORD DENMAN, C.J.).—LEWIS *v.* HOLMES (1847), 10 Q. B. 896; 16 L. J. Q. B. 430; 10 L. T. O. S. 246; 12 J. P. 135; 11 Jur. 945; 116 E. R. 339.

*Annotation:*—**Refd.** Levy *v.* Hamer (1850), 5 Exch. 518.

**116. Amendment of return — On what terms leave granted.**]—A sheriff having arrested deft. under a *capias*, two days after the return of the writ, & then returned *cepi corpus*, pltf. caused an attachment to be issued against him. The ct. allowed him to amend his return, & set aside the attachment, on payment of costs.—BENTON *v.* BENTON (1828), 6 L. J. O. S. C. P. 58.

**117. —— ——.**] — BASTEN *v.* WALKER (1843), 1 L. T. O. S. 150.

**118. Whether return conclusive—When wrong on face of it.**]—The sheriff's return is not conclusive when it is wrong on the face of it.—*Re* SOUTH (1874), 9 Ch. App. 369; 43 L. J. Ch. 441; 30 L. T. 347; 22 W. R. 460, L. JJ.

*Annotations:*—**Consd.** *Re* Harrison & Bottomley, [1899] 1 Ch. 465. **Refd.** Johns *v.* Pink, [1900] 1 Ch. 296.

**119. Effect of return to sci. fa.—Whether bail may show inability to bring principal into court—Bail summoned late on return day.**]—The ct. set aside proceedings in *sci. fa.* against bail because they were summoned only an hour before the ct. rose on the return-day. The sheriff's return or *scire feci* does not estop the bail from showing that they were summoned so late on the return-day that they could not bring in their principal before the rising of the ct.—WEBB *v.* HARVEY (1788), 2 Term Rep. 757; 100 E. R. 408.

*Annotations:*—**Consd.** Clarke *v.* Bradshaw (1800), 1 East, 86. "There was certainly a mistake in the report of the case of *Webb* v. *Harvey* in stating that the notice to the bail was before the rising of the Court on the return day" (LORD KENYON, L.J.). **Refd.** Lewis *v.* Pine (1833), 1 Cr. & M. 771.

**120. Return directed to sheriffs of London — Purporting to be return of both—Action against surviving sheriff—Return presumed to be return of defendant.**]—In an action against a surviving sheriff of London, a return to a writ directed to the sheriffs of London, purporting to be the return of both, must be taken conclusively to be the return of deft.—CARLILE *v.* PARKINS (1822), 3 Stark. 163; 171 E. R. 809.

**121. Grant of lordship with return of all writs "by bailiff"—Whether bailiff may return in his own name.**]—By charter of James I., a lordship was granted to the Earl of Worcester, with the return of all writs "by his bailiff, for that purpose to be deputed." A mandate of the sheriff of Glamorganshire was directed to the bailiff of the lord; & it was held, that a return, made by him in his own name, without stating himself to be a deputy, was a good return; it appearing, by the practice in the lordship, that mandates were always so directed, & the return uniformly made by the bailiff in his own name.—NEWLAND *v.* CLIFFE (1832), 3 B. & Ad. 630; 1 L. J. K. B. 179; 110 E. R. 230.

*Annotation:*—**Consd.** Platel *v.* Dowse (1838), 1 Arn. 38.

**Issue of several writs in succession—Necessity for return to earlier writ.**]—*See* EXECUTION, Vol. XXI., pp. 436, 437, Nos. 179–199.

**Return to fi. fa.**]—*See* EXECUTION, Vol. XXI., pp. 528–539, Nos. 1014–1140.

**Return to venditoni exponas.**]—*See* EXECUTION, Vol. XXI., pp. 555, 556, Nos. 1283–1294.

**Return to ca. sa.**]—*See* EXECUTION, Vol. XXI., p. 582, Nos. 1585–1592.

**Return to elegit.**]—*See* EXECUTION, Vol. XXI., pp. 558, 559, 566, Nos. 1335–1346, 1419.

### *B. Duty to Return Writ.*

#### (*a*) *In General.*

*See, now*, R. S. C., Ord. 52, rr. 11, 12.

**122. Rule to make return—Particular return.**]—We never make a rule upon a sheriff to make a particular return (HOLT, C.J.).—ANON. (1700), 12 Mod. Rep. 423; 88 E. R. 1425.

**123. —— Warrants on writs granted to bailiffs nominated by plaintiffs—Indemnities to sheriff indorsed on writs.**]—ROYSTON *v.* REED (1739), Barnes, 411; 94 E. R. 980.

**124. —— Whether service on under-sheriff's agent sufficient.**]—If a rule be obtained against the sheriff to return a writ, service on the under-sheriff's agent in town, is not sufficient.—R. *v.* COLES (1780), 2 Doug. K. B. 420; 99 E. R. 270.

**125. —— Issue in vacation—Whether regular.**]—A rule, calling on a sheriff to return a writ, issued in the vacation, though tested in the succeeding term, is irregular; & an attachment, grounded upon it, will be set aside by the ct. on motion.—R. *v.* CORNWALL SHERIFF (1787), 1 Term Rep. 552; 99 E. R. 1246.

**126. —— —— Whether single rule sufficient.**]—One rule is sufficient to make a judge's order for returning a writ in vacation a rule of ct. pursuant to Reg. Gen. M. 3 Will. 4, No. 13, & also to call on a sheriff to show cause why an attachment should not issue against him for disobeying such order.—KENSIT *v.* BULTEEL (1833), 4 Tyr. 59.

**127. —— Discharge.**]—A *ca. sa.* having issued on which the sheriff sent his mandate to the bailiff of a liberty, who obtained time to make his return after which the sheriff returned *cepi corpus*:—*Held:* the bailiff was entitled to have the rule to make a return discharged.—JACKSON *v.* TAYLOR (1836), 2 Har. & W. 135.

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oblige pltf. to have recourse to the original deft.—HERVEY *v.* SHERWOOD (1840), 3 Ont. Dig. 6426.—**CAN.**

g. —— *After discontinuance of sale by consent.*]—FORD *v.* STORY (1851), 1 P. R. 18.—**CAN.**

h. —— *Mistake in return.*]—The sheriff had returned to a *fi. fa.* that the money had been levied upon another writ, having reasons so to believe, but it appeared that part had not been made. The ct. allowed him to amend.—LEE *v.* NEILSON (1857), 14 U. C. R. 506.—**CAN.**

k. *Whether return conclusive.*] — The sureties cannot be relieved after the sheriff's return to a *fi. fa.* by showing that the money was not in fact made, even although an issue be raised upon the pleadings whether the money was actually made or not.—PHELP *v.* MCDONNELL (1841), 6 O. S. 258.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 6.—B. (a).**

l. *Rule to make return — Place of issue.*]—A rule to return a *fi. fa.* cannot issue out of the office of the deputy-clerk of the Crown in an outer district.—ANON. (1830), Dra. 224.—**CAN.**

m. —— *Successive writs — Refusal*

*Sect. 6.—Execution of process: Sub-sect. 6, B. (a) & (b).]*

**128. —— Directed to "sheriff" — Return by "late sheriff."**]—In order to obtain an attachment against the "late" sheriff, for not returning a writ, it is not sufficient that the order was directed to "the sheriff," although the "late sheriff" had returned the writ, but not in due time.—R. *v.* CORNWALL SHERIFF (1839), 7 Dowl. 600; 2 Will. Woll. & H. 62; 3 Jur. 386.

**129. —— Obtained more than six months after expiration of office—Waiver by agent of under-sheriff.**]—A sheriff having been ruled to return a writ more than six months after the expiration of his office, the London agent of his under-sheriff obtained an order for a week's further time to return the writ:—*Held:* obtaining the rule after six months was merely an irregularity, & such irregularity was waived by obtaining the order for further time to return the writ.—WALKER *v.* DAVIS (1858), 3 H. & N. 374; 157 E. R. 515; *sub nom.* WALKER *v.* DAVIES, *Re* SAMUEL, 27 L. J. Ex. 387; *sub nom.* WALTER *v.* DAVIES, *Ex p.* GLAMORGAN FORMER SHERIFF, 31 L. T. O. S. 169.

**130. Right to call for return — Conduct disentitling party.**]—There are many cases in which pltf. is not entitled to call for the return of a writ; as where he has taken an assignment of the bail bond, or has otherwise so conducted himself as to show that he is contented. Thus, when he has acted as his own bailiff, or when, after an arrest, he has met deft. & accepted a sum in discharge of all claims, can he call for a return of the writ? Put the case of the bkpcy. of deft., & pltf. becoming his assignee, could he sue the sheriff & obtain a separate compensation? The merits are the same here (TINDAL, C.J.).—HEPWORTH *v.* SANDERSON (1831), 8 Bing. 19; 1 Moo. & S. 64; 1 L. J. C. P. 15; 131 E. R. 307.

*Annotation:*—**Refd.** Jackson *v.* Taylor (1836), 2 Har. & W. 135.

**131. —— When writ void.**] — A writ set aside for irregularity may be good as to the sheriff & all persons acting under him, & bad as to the persons who sued it out. What, then, does the act of pltf., in ruling the sheriff to return the writ, amount to? It amounts simply to this: that although the writ may be void for some purposes, yet pltf. may, if he desire it, make use of it for others. For instance, he may wish to question the propriety of the sheriff's charges for executing it, & may have ruled him to return it, in order to ground an application to the ct., or perhaps to bring an action for extortion. It is enough to say, that he may make some use of a void writ.

The filing of record is not the act of the party, but it is the mode in which the sheriff makes his return. He returns the writ into the proper office, where it is filed of record as a matter of course. The filing of record does not affirm the existence of a void writ (PARKE, B.).—JONES *v.* WILLIAMS (1841), 8 M. & W. 349; 9 Dowl. 702; 10 L. J. Ex. 253; 5 Jur. 895; 151 E. R. 1073.

*Annotations:*—**Mentd.** Nash *v.* Swinburne (1842), 3 Man. & G. 853; Doe d. Harrison *v.* Hampson (1847), 4 C. B. 745; *Re* Lilley & Harvey (1849), 14 Q. B. 403; Widgery *v.* Tepper, Hall *v.* Tepper (1877), 6 Ch. D. 364; Taylor *v.* Roe, [1894] 1 Ch. 413.

**132. —— After expiration of term of office.**]—By the true construction 20 Geo. 2, c. 37, s. 2, a sheriff is not liable to be called upon to return process unless within six lunar months after the expiration of his office, & the day on which he goes out of office is to be reckoned as part of the six months.—R. *v.* ADDERLEY (1780), 2 Doug. K. B. 463; 99 E. R. 295.

*Annotations:*—**Consd.** Yorath *v.* Hopkins (1835), 5 Tyr. 794. **Refd.** Castle *v.* Burditt (1790), 3 Term Rep. 623; Glassington *v.* Rawlins (1803), 3 East, 407; Lester *v.* Garland (1808), 15 Ves. 248; Webb *v.* Fairmaner (1838), 6 Dowl. 549; *Re* Whitby, *Ex p.* Whitby (1839), 8 L. J. Bcy. 55; Young *v.* Higgon (1840), 6 M. & W. 49; *Re* North, *Ex p.* Hasluck, [1895] 2 Q. B. 264.

**133. —— —— Necessity for rule of court.**]—A sheriff is not liable to an attachment for not returning a writ if not called upon by a rule of ct. within six months after the expiration of his office; notwithstanding he was requested by the party to return it before the six months were expired.—R. *v.* JONES (1787), 2 Term Rep. 1; 100 E. R. 1.

**134. —— —— ——.**] — A writ of *fi. fa.* was delivered to a sheriff, to be executed, on Dec. 20, 1833, returnable on Dec. 30. The sheriff went out of office in the Feb. following. On June 14 a rule to return the writ was served upon the new sheriff, & the writ not having been returned, another rule to return the writ was served upon the under-sheriff of the late sheriff on Nov. 12, which, however, was more than six months after the later sheriff had gone out of office:—*Held:* an attachment against the late sheriff for not making a return could not be supported, he not having been duly ruled to return the writ.—YRATH *v.* HOPKINS (1835), 2 Cr. M. & R. 250; 150 E. R. 109; *sub nom.* YAROTH *v.* HOPKINS, 3 Dowl. 711; *sub nom.* YORATH *v.* HOPKINS, 5 Tyr. 794; *sub nom.* YUROTH *v.* HOPKINS, 1 Gale, 141; 4 L. J. Ex. 196.

*(b) Liability for Non-Return and Delay.*

**135. Civil liability.**]—If a writ be delivered to the under-sheriff to make a summons, & he deceitfully neglects to return the writ, an action will lie against him; for perhaps the sheriff had not notice of it, & he shall be intended under-sheriff at the time of the return.—MARSH *v.* ASTRY (1590), Cro. Eliz. 175; 1 Leon. 146; 78 E. R. 432.

*Annotation:*—**Refd.** Lane *v.* Cotton (1700), 1 Salk. 17.

**136. ——.**] — *Qu.:* if a sheriff is liable to an action for not returning a *capias utlagatum* or, whether he shall be attached for the contempt.—CLERK'S CASE (1602), Cro. Eliz. 873; 78 E. R. 1098.

*Annotations:*—**Refd.** Fotherby's Case (1627), Cro. Car. 62; Crompton *v.* Ward (1721), 1 Stra. 429.

**137. —— Action by personal representative.**]—An exor. or administrator may maintain an action on the case against a sheriff for not returning a *fi. fa.* on account of his testator.—SPURSTON *v.* PRINCE (1633), Cro. Car. 297; 79 E. R. 860.

**138. —— Necessity for notice to sheriff.**] — R. *v.* ESSEX SHERIFF, No. 149, *post.*

**139. —— What damages recoverable.**] — R. *v.* ESSEX SHERIFF, No. 149, *post.*

**140. Criminal liability—Attachment.**]—CLERK'S CASE, No. 136, *ante.*

**141. —— ——.**]—Attachment shall go against under-sheriff for not returning a writ.—KILDERTON *v.* WILKENSON (1701), 12 Mod. Rep. 454; 88 E. R. 1447.

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*of first creditor to take return nulla bona—Direction to sheriff to return to second writ.*]—GLEASON *v.* GLEASON (1867), 4 P. R. 117.—**CAN.**

n. —— *Effect of Drought Area Relief Act.*]—HENLINE *v.* WALLACE (Alta.), [1923] 3 D. L. R. 791; [1923] 2 W. W. R. 816.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 6.—B. (b).**

**139 l.** *Civil liability—What damages recoverable.*] — PACAUD *v.* MCEWAN (1871), 30 U. C. R. 550.—**CAN.**

**140 l.** *Criminal liability — Attachment.*]—Where the rule to return a writ of *fi. fa.* had been taken out & served in June, 1833, the ct., in Michaelmas Term 5 Wm. 4, refused an attachment on the ground of delay.—LOUCKS *v.* FARRARD (1835), 4 O. S. 5.—**CAN.**

o. —— —— *Terms of discharge—Payment of costs to time of return.*]—A rule to return a *ca. re.* was issued in

**142.** —— ——.] — **Bailiffs of liberties & sheriffs, what punishment for not returning writs.** The ct. can make a rule for them to make a return, & for disobeying that, bring them into contempt (*per* CUR).—ANON. (1710), 11 Mod. Rep. 272; 88 E. R. 1035.

**143.** —— ——.]—An attachment lies against an under-sheriff for not returning a writ.—MAKEPAINT *v.* DISTON (1722), 11 Mod. Rep. 366; 88 E. R. 1093.

**144.** —— ——.]—A sheriff having received a writ against a person residing in a local jurisdiction, within his bailiwick, directed his precept to the bailiff of that jurisdiction, requiring him to execute the process. The sheriff was ruled to return the writ & he returned that the officer of the local jurisdiction had not returned it to him. On a motion for an attachment, the ct., upon an affidavit, that the office of the *Custos Brevium* had been searched without finding the writ returned a rule granted for it.

The party is, therefore, entitled to an attachment against the sheriff, who ought in the meantime to have compelled the officer of the local jurisdiction to do his duty (*per* CUR.).—ANON. (1823), 1 L. J. O. S. K. B. 160.

**145.** —— ——.]—BROOKSBANK *v.* LOWE (1849), 12 L. T. O. S. 354.

**146.** —— —— **Terms of discharge.**] — When an attachment is granted against the bailiff of a liberty, for not returning a writ, upon what terms the ct. will discharge it.—R. *v.* SYMPSON (1733), 2 Barn. K. B. 330; 94 E. R. 533.

**147.** —— —— ——.] — SAXTON *v.* WEST (1794), 2 Anst. 479; 145 E. R. 941.

**148.** —— —— ——.] — The writ was returnable on the morrow of All Souls. Deft. surrendered to the sheriff's officer on Nov. 3, & to prison on Nov. 5. Pltf. issued a rule for bringing in the body, to which the sheriff returned *cei corpus et paratum habeo*. An attachment having thereupon been directed against the sheriff, the ct. set it aside on payment of all costs.—R. *v.* WILTS SHERIFF (1824), 1 Bing. 423; 8 Moore, C. P. 518; 2 L. J. O. S. C. P. 64; 130 E. R. 170.

**149.** —— —— ——.]—An attachment having issued against a sheriff, for having by mistake omitted to return a *capias*, pursuant to a baron's order in vacation, under Reg. Gen. M. 3, W. 4, No. 13, till half an hour after the opening of the office on the day after the proper return day, the ct. set it aside, though bail above were not perfected, on payment of costs & of such further damages, if any, as the master might find pltf. to have sustained from the sheriff's omission.

A sheriff may move to set aside an attachment against him, after it has issued to the coroner.

Where a pltf. intends to make a sheriff liable for damages occasioned by his not having returned a writ of *capias* in proper time, he should, if in vacation, give him notice of his intention, & will then be entitled to recover all such damages as occur between his giving such notice & receiving information from the sheriff that the defect is cured.—R. *v.* ESSEX SHERIFF (1836), 1 M. & W. 720; Tyr. & Gr. 629; 150 E. R. 623.

**150.** —— —— **Return before being served with rule.**]—The sheriff having been served in proper time with a rule to return the writ of *test. fi. fa.* which expired on the last day of term, is attachable at the rising of the ct. on that day if no return be made before; & the rule for the attachment is regular, though he make his return on a subsequent day in vacation before he was actually served with the rule; & though immediately after such service he tendered the sum levied, deducting his poundage.—R. *v.* SURRY SHERIFF (1809), 11 East, 591; 103 E. R. 1134.

*Annotation:*—**Folld.** R. *v.* Shropshire Sheriff (1844), 9 Jur. 12.

**151.** —— —— **Tender of sum levied immediately after being served with rule.**]—R. *v.* SURRY SHERIFF, No. 150, *ante*.

**152.** —— —— **Failure to return due to mistake.**] —R. *v.* ESSEX SHERIFF, No. 149, *ante*.

**153.** —— —— **Necessity for showing original order—At time of serving copy.**]—In order to obtain an attachment against the sheriff for not returning a writ pursuant to a judge's order, the original order must be shown at the time of serving a copy of it.—GRANGER *v.* FRY (1836), 5 Dowl. 21.

**154.** —— —— **Writ not transferred by predecessor.**]—A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor in office, notwithstanding the provisions of Fines Act, 1833 (c. 99), s. 7.—THOMAS *v.* NEWNAM (1842), 2 Dowl. N. S. 33.

**155.** —— —— ——.]—Where a writ has not been transferred to a sheriff by his predecessor, such sheriff is not liable to an attachment for not returning the writ.—HOLMES *v.* ELNITTS (1842), 6 Jur. 994.

**156.** —— —— **Time for rule not expired.**]— R. *v.* SHROPSHIRE SHERIFF (1844), 3 L. T. O. S. 140; 9 Jur. 12.

**157.** —— —— **Motion to set aside—Irregularity.**]—R. *v.* MIDDLESEX SHERIFF (1847), 11 J. P. Jo. 820.

**158.** —— **Motion for committal — Whether damage must be proved.**]—An attachment issued against defts. in the County Palatine for not making an affidavit of documents. The sheriff, after caption, let defts. out on bail, they having filed the affidavit. The sheriff being afterwards ordered to return the writ, made default, &, on a motion that he should return the writ or stand committed:—*Held:* it was not competent for the sheriff to object to the first order, on the ground that it ought to have been directed to the Chancellor of the County Palatine of Lancaster & not to the sheriff; &, the ct. would not, on this occasion, allow him to enter into the merits to show that pltfs. had not been prejudiced by the irregularity, but a return must be made.—SUGDEN *v.* HULL (1860), 28 Beav. 263; 54 E. R. 367.

**159.** —— —— **Objection on ground of misdirection of order.**]—SUGDEN *v.* HULL, No. 158, *ante*.

**160. Instructions to sheriff to proceed with execution—Whether waiver of right to attach sheriff.**]—A pltf. does not waive his right to an attachment against the sheriff for not duly returning a writ of *fi. fa.*, by directing him, after the expiration of the rule to return the writ, to proceed with the execution, which had been suspended by an adverse claim.—HOWITT *v.* RICKABY (1841), 9 M. & W. 52; 1 Dowl. N. S. 389; 11 L. J. Ex. 73; 152 E. R. 23.

**Writ of fieri facias.**]—*See* EXECUTION, Vol. XXI., p. 535, Nos. 1103–1108.

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Trinity Term. In July following the writ appeared to have been in the hands of pltf.'s agent, & in Aug. the attachment issued. The ct. discharged it on paying costs up to the time it was returned, although a trial had been lost.—R. *v.* SHERWOOD (1834), 3 O. S. 305.—**CAN.**

p. *Writ of fieri facias—Action against sheriff & sureties.*]—In an action against a sheriff & his sureties, on their covenant, for not returning a *fi. fa.* & the money made thereon, it is necessary to set out the judgment.—BIDWELL *v.* MCLEAN (1840), 5 O. S. 890.—**CAN.**

*Sect. 6.—Execution of process: Sub-sect. 6, B. (c), C. (a) & (b), & D. (a), (b) & (c) i.*]

*(c) Justification for Non-Return and Delay.*

**161. Delivery to justices having duty to levy writ—Failure of justices to act on writ.**]—In following up a writ of execution to its consummation, under the Statute of Hue & Cry, 8 Geo. 2, c. 16, which the subsequent statute of 19 Geo. 2, c. 34, refers to & adopts as the mode of proceeding in case of a penalty recovered by the exor. of a Revenue officer killed in the pursuit of smugglers, against the inhabitants of the hundred, or of a lath in Kent, it is sufficient for the sheriff, to whom the writ had been delivered, to return, even after the expiration of sixty days given him by the Act to return the writ, that he had delivered it to the justices of the peace of the hundred, etc., who are charged with the duty of directing the levy on the inhabitants, & that they had done nothing upon it: & the ct. will not thereupon attach the sheriff for not returning the writ; but the next proceeding is against the magistrates, to oblige them to do their duty.—WRIGHT *v.* LATH OF ST. AUGUSTINE, KENT (INHABITANTS) (1811), 13 East, 544; 104 E. R. 482.

**162. Return to Chancellor of County Palatine—By sheriff of county.**]—If a rule of ct. orders the sheriff of the County Palatine of Lancashire to return a *test. ca.*, or the mandate of the Chancellor thereon, which mandate directs the return to be made to the Chancellor of the County Palatine, the sheriff is not guilty of a contempt if he makes a return of the mandate to the chancellor instead of to this ct.—R. *v.* LANCASHIRE SHERIFF, HART *v.* DUKES (1840), 7 Dowl. 765; 4 Jur. 87.

**163. No wilful default.**]—R. *v.* GLAMORGAN SHERIFF (1851), 17 L. T. O. S. 41.

**164. Loss of writ in office—Proof of delivery to proper place—With indorsement of return.**]—The ct. set aside an attachment against the sheriff for not returning a writ of *distringas*, upon his showing that he had delivered it with return indorsed thereon, to the clerk at the treasury office of the ct., although subsequently it could not be found on the file of writs in the office.—R. *v.* WILTS SHERIFF, *Re* OSBORNE *v.* HALL (1852), 18 L. T. O. S. 273.

*C. Sufficiency of Return.*

*(a) In General.*

**165. Return must specify things attached.**]—The sheriff's return must specify the things attached.—LAWRENCE *v.* NETHERSALE (1583), Cro. Eliz. 13; 78 E. R. 279.

**166. What is sufficient return—Goods rescued on exposure to sale.**]—A *sci. fa.* lies against a sheriff upon a return to a *fi. fa.* that he has levied the goods, & that on exposing them to sale they were rescued; but not on a return that he levied, & that the goods remain in his hands *pro defectu emptorum*.—SLY *v.* FINCH (1618), Cro. Jac. 514; 79 E. R. 439.

*Annotations:*—**Refd.** Mildmay *v.* Smith (1672), 2 Saund. 343; Langdon *v.* Wallis (1698), 1 Lut. 582.

**167. —— Goods remaining in sheriff's hands—Failure to secure purchasers.**]—SLY *v.* FINCH, No. 166, *ante*.

**168. —— Inability to enforce execution.**]—BUSH *v.* CHAMBERLAIN (1661), 1 Keb. 99; 83 E. R. 835.

**169. —— Nulla bona—Writ of extent issued against debtor's property.**]—UPPOM *v.* SUMNER (1779), 2 Wm. Bl. 1251, 1294; 96 E. R. 737, 758.

*Annotations:*—**Apld.** Rorke *v.* Dayrell (1791), 4 Term Rep. 402. **Consd.** Giles *v.* Grover (1832), 9 Bing. 128. **Refd.** R. *v.* Wells (1807), 16 East, 278; Thurston *v.* Mills (1812), 16 East, 254; R. *v.* Sloper & Allen (1818), 6 Price, 114; *Re* Henley (1878), 9 Ch. D. 469.

**170. —— —— ——.**]—R. *v.* JOBLING (1849), 4 Exch. 483; 19 L. J. Ex. 14; 154 E. R. 1303; *sub nom.* R. *v* JOPLIN, 14 L. T. O. S. 205; 13 J. P. Jo. 764.

**171. —— Non est inventus—Procured by plaintiff against principal—Principal in sheriff's custody on criminal charge.**]—A return by the sheriff of *non est inventus* procured by pltf. against the principal, in order to ground proceedings against the bail, is irregular, if the principal be at that time in custody of the same sheriff on a criminal charge; & the ct. set aside the proceedings against the bail with costs where pltf. knew that the principal was in such custody at the time of such return.—WARD *v.* BRUMFIT (1813), 2 M. & S. 238; 105 E. R. 371.

*Annotation:*—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**172. —— Mere indorsement of words of return—Writ remaining in sheriff's office.**]—A writ sued out, in order to save Stat. Limitations, must be returned & filed with the proper officer. The mere indorsement by the sheriff of the words of his return, the writ itself remaining in the sheriff's office, will not be sufficient.—GREGORY *v.* HURRILL (1826), 5 B. & C. 341; 8 Dow. & Ry. K. B. 270; 4 L. J. O. S. K. B. 262; 108 E. R. 127.

*Annotation:*—**Consd.** Harnett *v.* Fisher, [1927] 1 K. B. 402.

**173. —— Inability to find defendant.**]—"Deft. is not to be found in my bailiwick" is a bad return to a writ of *capias*.—R. *v.* KENT SHERIFF, POTTER *v.* SIMPSON (1837), 2 M. & W. 316; Murp. & H. 13; 6 L. J. Ex. 104; 1 Jur. 44; 150 E. R. 777.

**174. —— Pending action—Return setting out subsequent proceedings.**]—(1) An argumentative return to a writ of *recordari facias loquelam* is bad. The sheriff should make a direct & positive return.

(2) The sheriff should, if the plaint be still pending, return that only, & not any subsequent proceedings.

(3) A return, setting out a plaint in replevin & subsequent proceedings, but from which it did not appear whether the plaint was still pending or was concluded, & which left this question to the ct. to determine, was held bad.

(4) Unless the sheriff amend such a return, an attachment will lie against him.—WRIGHT *v.* LEWIS (1840), 4 Jur. 391.

**175. —— —— Return not showing whether action is still pending.**]—WRIGHT *v.* LEWIS, No. 174, *ante*.

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**PART V. SECT. 6, SUB-SECT. 6.—C. (a).**

q. *What is sufficient return—Goods attached "as" property of absent debtor.*]—Where sheriff's return stated that he had attached goods "as" the property of the absent debtor:—*Held:* not to be a return warranting the ct. in assuming jurisdiction. To give the ct. jurisdiction the return should state positively that the sheriff has attached goods or estate of the absent debtor.—RATCHFORD *v.* CHIPMAN (1843), 3 N. S. R. (2 Thom.) 235.—**CAN.**

r. —— ——.]—MURISON *v.* BOYD (1845), 3 N. S. R. (2 Thom.) 247.—**CAN.**

t. —— *Uncertain return.*]—A return of a sheriff to a writ of *fi. fa.*, that he has taken from deft. a horse claimed by deft.'s son, & placed it in charge of H., from whose custody he said it was stolen, & that nothing else was found with deft., is bad for uncertainty.—KETCHUM *v.* MUZEROLL (1854), 8 N. B. R. (3 All.) 347.—**CAN.**

a. —— *Return showing writ unexecuted without legal excuse.*]—A sheriffs return to a writ of *fi. fa.* goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, & that the execution debtor, the garnishee had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach & a summons to pay over, but no order absolute:—*Held:* the return was insufficient in substance, because it

**176. —— Argumentative return.**] — WRIGHT *v.* LEWIS, No. 174, *ante*.

**177. —— Goods claimed by third party — Direction by plaintiff to deliver up.**]—Upon a writ of *fi. fa.*, the sheriff's return, that he had seized certain goods which were claimed by a third party, &, thereupon, he applied to the ct., under Interpleader Act, 1831 (c. 58), & an order was made for the trial of an issue, whether the goods were the property of claimant; that, afterwards, pltf. directed him to deliver up possession of the goods to claimant:—*Held:* insufficient.—CLEAVER *v.* FISHER (1842), 2 Dowl. N. S. 292.

**178. —— Further claim by creditor after executor—Inability to ascertain whether claim is good.**]—Where a sheriff, after being ruled to make a return to a writ of *fi. fa.* made a return, that he had sold the goods seized, & had received for them sufficient to satisfy the moneys directed to be levied; but that he afterwards had notice from the landlord that two quarters' rent was due, amounting to a larger sum; that he had applied to the landlord, but had not been permitted by him to have evidence of his claim; & that though he, the sheriff, had used due diligence he was unable to ascertain whether the landlord had any just claim in respect of the rent, this ct. quashed the return for the insufficiency, & allowed an attachment to issue.—HALL *v.* CRAWLEY (1863), 11 W. R. 344.

**Writ of fieri facias.**]—*See* EXECUTION, Vol. XXI., pp. 531–535, Nos. 1052–1102.

*(b) Liability for Insufficiency.*

**179. Attachment.**]—PRICE *v.* SCHOMBERG (1755), Barnes, 425; 94 E. R. 986.

**180. —— Unless return amended.**] — WRIGHT *v.* LEWIS, No. 174, *ante*.

*D. Liability for False Return.*

*(a) In General.*

**181. Issue of writ against entailed estate — Whether issue in tail bound—Remedy against sheriff.**]—DAY *v.* GILFORD (1661), 1 Sid. 54; 1 Keb. 141; T. Raym. 19; 1 Lev. 41; 82 E. R. 966.

*Annotations:*—**Consd.** Atwood *v.* Beach (1722), 8 Mod. Rep. 113. **Refd.** Turner *v.* Davies (1670), 2 Wms. Saund. 137; Treviban *v.* Lawrence (1704), 2 Ld. Raym. 1048; Earle *v.* Hinton (1726), 2 Stra. 732; Staffordshire Banking Co. *v.* Emmott (1867), L. R. 2 Exch. 208.

**182. Information at suit of Crown.**]—Where a sheriff returned that he had seized & taken into his possession certain property, found by inquisition to be the property of a party taken under a special *capias utlagatum:* the ct. refused, on affidavit of the falsity of that return, to call on the sheriff to show cause why he should not enter & take possession of it.

*Semble:* the sheriff was liable to an information at the suit of the Crown for a false return.—R. *v.* MILLS (1840), 4 Jur. 467.

*(b) Fine.*

**183. General rule.**] — The sheriff amerced £5 for return *non est inventus*, upon an attachment having been in presence of the party.—STRADLING *v.* PEMBROKE (EARL) (1559), Cary, 44; 21 E. R. 24.

**184.** ——.]—ANON. (1561), Moore, K. B. 23; Dal. 39; 72 E. R. 415.

**185.** ——.]—If an officer make an ill return he shall be amerced, & we will not allow him to quash the ill return & make another; & if, upon disallowance of one return, he makes a second bad, an attachment shall go.—ANON. (1700), 12 Mod. Rep. 410; 88 E. R. 1415.

*(c) Action for Damages.*

*i. In General.*

**186. What averments are necessary — Cause of action.**]—PARKER *v.* FENN & BLOXAM (1788), 2 Esp. 476; 170 E. R. 425, N. P.

**187. —— Notice to sheriff of defendant's presence in his bailiwick.**]—In an action against a sheriff for a false return to a *ca. sa.* it is not necessary to aver in the declaration that the sheriff had notice from pltf. that deft. was within his bailiwick, so that he might arrest him.—HEREFORD (DEAN & CHAPTER) *v.* MACKNAMARA (1824), 5 Dow. & Ry. K. B. 95.

*Annotation:*—**Consd.** Dyke *v.* Duke (1838), 4 Bing. N. C. 197.

**188. What must be proved—Special damage.**]—Case against the sheriff. The declaration alleged that a *fi. fa.*, on a judgment recovered by pltf. against P., issued, & was delivered to deft., who seized P.'s goods, & by sale thereof levied the sum indorsed on the writ, but did not render it to pltf., & falsely returned that the goods remained in his hands for want of buyers; by means whereof pltf. lost the means of obtaining the money indorsed. Deft. pleaded three pleas, all alleging that the judgment was obtained on a warrant of attorney, & not on a *cognovit actionem* signed after declaration filed, nor in an adverse action. One of the pleas alleged that P. became a bkpt., & a flat issued against him before the sale; & that an assignee was appointed. Another plea alleged that pltf. had notice of the bkpcy. before the sale, & deft. before the return; & that deft. in his return, after stating that the goods remained in his hands for want of buyers, added that the assignees had claimed the goods. Another of the pleas alleged that the warrant of attorney was given to pltf. by way of fraudulent preference. On special demurrer, assigning for cause that the pleas were argumentative traverses of deft.'s

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showed that the writ remained unexecuted without legal excuse.—GENGE *v.* FREEMAN (1891), 14 P. R. 330.—**CAN.**

b. —— *Failure of purchaser to complete.*] — AHEARNE *v.* AHEARNE (1850), 16 L. T. O. S. 25.—**IR.**

c. *Remedy for insufficient return.*] —An insufficient return to a *fi. fa.* is no return, & the course is to move for an amendment, not to quash the return.—R. *v.* MCLEOD (1839), Ont. Dig. 6428.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 6.—C. (b).**

**179 i.** *Attachment.*]—Where there was an informal return, the ct. refused an attachment in the first instance. — BAYMAN *v.* STRUTHER (1823), Tay. 39. —**CAN.**

**PART V. SECT. 6, SUB-SECT. 6.—D. (a).**

d. *Jurisdiction — District courts.*] — The district cts., under 8 Vict. c. 13, s. 5, have no jurisdiction in an action on the case for a false return.—BELL *v.* JARVIS (SHERIFF) (1850), 6 U. C. R. 423.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 6.—D. (b).**

**183 i.** *General rule.*] — When the sheriff being ruled to return a writ under a conditional fine, does actually return the writ; the ct. will not, if the return is bad, make the fine absolute, but will compel him to amend his return.—HARTON *v.* BALLINROBE UNION GUARDIANS (1848), 11 I. L. R. 24.—**IR.**

**PART V. SECT. 6, SUB-SECT. 6.—D. (c) i.**

**188 i.** *What must be proved—Special damage.*]—DAVIS *v.* HAMILTON (1840), 6 O. S. 111.—**CAN.**

e. *False return by deputy sheriff after death of sheriff — Liability of sureties.*]—Where a sheriff dies, & after his death his deputy makes a false return to a writ, the remedy is against the sureties given by the deputy to the sheriff, & not against the sureties given by the sheriff him-

*Sect. 6.—Execution of process: Sub-sect. 6, D. (c) i., ii. & iii.]*

being guilty of the grievances alleged, & omitted to show that pltf. had not sustained, & could not possibly sustain, damage:—*Held:* the pleas were all good, as showing that pltf. had suffered no damage by the false return; it was not necessary to aver expressly that no damage could possibly arise; & they were not argumentative pleas of not guilty, but negatived the suggestion of damage arising upon deft.'s admitted breach of duty.—WYLIE *v.* BIRCH (1843), 4 Q. B. 566; 3 Gal. & Dav. 629; 12 L. J. Q. B. 260; 1 L. T. O. S. 169; 7 Jur. 626; 114 E. R. 1011.

*Annotations:*—**Apld.** Levy *v.* Hale (1859), 29 L. J. C. P. 127. **Consd.** Lloyd *v.* Harrison (1865), 6 B. & S. 36. **Reld.** Allen *v.* Flood, [1898] A. C. 1.

**189.** —— ——.]—To a writ of *venditioni exponas*, the sheriff made a return, in which he accounted for the proceeds of the goods by applying part thereof in the payment of rent due to the landlord of the premises wherein the goods were seized, & by retaining the residue for charges which he had a right to make, with the exception of a sum claimed for possession-money, to which the sheriff was not entitled. The premises, however, in which the seizure was made consisted of two houses held under separate landlords, & besides the sum so paid for rent to one of such landlords, there was owing for rent to the other landlord a sum exceeding the value of the proceeds. In an action against the sheriff for a false return:—*Held:* the sheriff was not estopped by his return from showing that such rent was due, & by reason of 8 Ann. c. 14, requiring the sheriff to pay one year's rent out of the proceeds pltf. had sustained no damage by the false return, & had, therefore, no cause of action.—LEVY *v.* HALE (1859), 29 L. J. C. P. 127; 1 L. T. 132; 6 Jur. N. S. 702; *sub nom.* LEVI *v.* HALE, 8 W. R. 126.

*Annotation:*—**Reld.** Stimson *v.* Farnham (1871), L. R. 7 Q. B. 175.

**190.** —— ——.]—Pltf., an execution creditor, delivered a writ of *fi. fa.* to the sheriff, who proceeded to execute it by seizing goods upon the premises & apparently the property of the execution debtor, but which were then, in fact, in possession of the holder of a bill of sale to whom they had been previously assigned. The sheriff remained on the premises until dismissed by pltf.'s attorney, &, being directed to return the writ, made a return, that he had seized goods of debtor & kept them until ordered by pltf.'s attorney to withdraw from possession. To an action brought by pltf. against the sheriff for not levying under the writ, & for a false return, deft. pleaded (*inter alia*) *nulla bona*, & at the trial, set up, as his sole defence the bill of sale, which the jury found to be valid; & a verdict was entered for deft.:—*Held:* actual damage was necessary to support the action; deft. was not estopped by his return from proving that the goods seized did not belong to the debtor; as they were found to be the property of the assignee they were not available for sale under the execution; & therefore pltf. had sustained no damage from the conduct of the sheriff, & could not maintain the action.

I am of opinion that this rule must be discharged. The action is founded on tort, for a wrong done by the sheriff in making this return, which was in one sense a false return. Now the rule respecting such actions against a sheriff is, that, not only must a wrongful act have been committed, but damage must have been thereby caused, in order to entitle the person injured to maintain the action (COCKBURN, C.J.).—STIMSON *v.* FARNHAM (1871), L. R. 7 Q. B. 175; 41 L. J. Q. B. 52; 25 L. T. 747; 20 W. R. 183.

**191.** —— **Malice.**]—BRASYER *v.* MACLEAN, No. 196, *post.*

**192. When sheriff may pay into court money deposited with him—Failure to send money with return.**]—Deft. was arrested on Oct. 26, & deposited the amount of the debt & £10 for costs, with the sheriff in lieu of bail, under 43 Geo. 3, c. 46, s. 2. On Nov. 10 the sheriff was ruled to return the writ, & on Nov. 17 his agent filed a return, stating the arrest & deposit of the money, & that it had been paid into ct. Owing to an inadvertence in sending up the writ without the money it had not been so paid, & in consequence of the absence of the under-sheriff from home, it was not paid in previous to Nov. 23 on which day pltfs. commenced an action against the sheriff for a false return. The sheriff having obtained a rule *nisi* why he should not be at liberty to pay the money into ct., & why it should not remain in ct. as though it had been paid in due time, the ct. made the rule absolute on payment of costs.—HALL *v.* CHAMPNEYS (1836), Tyr. & Gr. 496.

**193.** —— **Action for false statement that money had been paid into court.**]—A sheriff, against whom an action for falsely returning that money deposited with him by a deft. in lieu of bail had been paid into ct., had been brought, was allowed to pay into ct. in the original action the money so deposited, though pltf. had been delayed two months by the sheriff's neglect.—HALL *v.* JONES (1836), 4 Dowl. 712.

ii. *When Action Lies.*

**194. General rule.**]—Action against sheriff for false return.—STEWARD *v.* FLOYD (1699), 12 Mod. Rep. 311; 88 E. R. 1343.

**195.** ——.]—In an action against a sheriff for a false return & for an excessive levy & for not paying over the residue, the ct. refused to allow the sheriff to pay money into ct. with costs, though it appeared that the sheriff had by mistake retained money to pay hop duty to the Crown which was subsequently discovered to have been paid, & had also made charges for possession & other charges usually made, but in strictness not allowable.

Pltf. complains of misconduct in the sheriff or his officers; he has a right vested in him to recover damages for the injury he has thereby sustained & he ought to be at liberty to try that action (*per* CUR.).—WOODGATE *v.* BALDOCK (1833), 2 Dowl. 256.

**196.** ——.]—A return of reserve to a writ of *capias ad respondendum* is not traversable, but if a sheriff makes a false return, an action will lie against the sheriff at the suit of a party injured thereby, though such return was not made maliciously.—BRASYER *v.* MACLEAN (1875), L. R. 6 P. C. 398; 44 L. J. P. C. 79; 33 L. T. 1; 39 J. P. 756, P. C.

**197. Action against bailiffs—Return by bailiffs before writ to sheriff is returnable—After bailiff removed from office.**]—An action will not lie

self.—MCLEOD *v.* BOULTON (1845), 2 U. C. R. 44.—**CAN.**

*t. Measure of damages—False return non est inventus.*]—In an action on the case against a sheriff for a false return of *non est inventus*, the measure of damages is the actual value of the custody to pltf.; & it lies on pltf. to give evidence from which the jury may calculate that value, independently of the amount in the writ.—CAHILL *v.* VERNER (1853), 2 I. C. L. R. 549; 4 Ir. Jur. 283.—**IR.**

against the bailiffs of a franchise for a false return made before the writ to the sheriff is returnable, & after they are amoved from their office; for it is void, & as no return.—PALMER *v.* POTTER (1596), Cro. Eliz. 512; 78 E. R. 761.

**198. Return stating arrest—Defendant allowed out of custody.**]—An action on the case will not lie against a sheriff for returning *cepi corpus et paratum habeo* when he had let the party to bail; & he may demur, or he may plead the 23 Hen. 6, c. 10, in bar, though he cannot give it in evidence on the general issue.—PARKER *v.* WELBY (1670), 1 Mod. Rep. 57; 1 Sid. 439; 2 Keb. 657; 1 Vent. 85; 86 E. R. 728; *sub nom.* BENSON *v.* WELBY, 2 Saund. 154.

*Annotations:*—**Refd.** Bullythorp *v.* Turner (1744), Willes, 475; Samuel *v.* Evans (1788), 2 Term Rep. 569.

**199.** —— ——.]—The sheriff having arrested a party, permitted him to go at large without taking a bail bond, returned *cepi corpus*, & before the expiration of the rule to bring in the body put in bail:—*Held:* he was not liable either to an action for an escape, or false return.—PARIENTE *v.* PLUMBTREE (1799), 2 Bos. & P. 35; 126 E. R. 1141.

*Annotation:*—**Consd.** Allingham *v.* Flower (1800), 2 Bos. & P. 246.

**200. Wrongful return of "nulla bona."**]—UPPOM *v.* SUMNER (1779), 2 Wm. Bl. 1251, 1294; 96 E. R. 737, 758.

*Annotations:*—**Apld.** Rorke *v.* Dayrell (1791), 4 Term Rep. 402. **Consd.** R. *v.* Giles (1820), 8 Price, 293; Giles *v.* Grover (1832), 9 Bing. 128. **Refd.** R. *v.* Wells (1807), 16 East, 278; Thurston *v.* Mills (1812), 16 East, 254; R. *v.* Sloper & Allen (1818), 6 Price, 114. **Mentd.** *Re* Henley (1878), 9 Ch. D. 469.

**201.** ——.]—MILES *v.* RAWLYNS, ETC. (1803), 4 Esp. 194; 170 E. R. 688, N. P.

**202.** ——.]—Execution creditor is entitled to recover against the sheriff in an action for a false return, he having handed the proceeds of the sale over to the assignees & returned *nulla bona* to the sheriff's *fi. fa.*—GODSON *v.* SANCTUARY (1832), 4 B. & Ad. 255; 1 Nev. & M. K. B. 52; 2 L. J. K. B. 19; 110 E. R. 451.

*Annotations:*—**Mentd.** Whitmore *v.* Robertson (1841), 11 L. J. Ex. 43; Lackington *v.* M'Lachlan (1842), 5 Scott, N. R. 874; Skey *v.* Carter (1843), 11 M. & W. 571; Whitmore *v.* Greene (1844), 2 Dow. & L. 174; R. *v.* Middlesex JJ. (1845), 5 Dow. & L. 109.

**203. Return tending to infringe rights of Crown—Goods subject to prior execution.**]—An information in the nature of an action for a false return against a sheriff who had returned that he had seized the goods, etc., into the hands of His Majesty, subject to certain prior executions, which return had the effect of depriving the Crown of the fruits of its prerogative, priority cannot be supported if the return should be substantially true, although it might be bad in point of law. The proper course in such a case would be, to procure the return to be quashed by motion for that purpose.—GILES *v.* R. (1823), 11 Price, 594; 147 E. R. 575, Ex. Ch.; *revsg.* S. C. *sub nom.* R. *v.* GILES (1820), 8 Price, 293.

*Annotations:*—**Refd.** Giles *v.* Grover (1832), 9 Bing. 128. **Mentd.** King *v.* Simmonds (1848), 1 H. L. Cas. 754; Edwards *v.* R. (1854), 9 Exch. 628.

**Return to Parliamentary writ—Double return.**]—*See* ELECTIONS, Vol. XX., p. 115, Nos. 923, 924.

—— **False return.**]—*See* ELECTIONS, Vol. XX., pp. 115, 116, Nos. 926–928.

**Action by personal representative.**]—*See* EXECUTORS, Vol. XXIII., p. 296, Nos. 3619, 3620.

iii. *Defences.*

**204. Property not belonging to execution debtor—Previous transfer to assignees in bankruptcy.**]—MILES *v.* RAWLYNS (1803), 4 Esp. 194; 170 E. R. 688, N. P.

**205.** —— **Prior execution.**]—Declaration by execution creditor against sheriff, for falsely returning *nulla bona* to a *fi. fa.*, alleged that the sheriff seized goods of great value, to wit, of the value of the moneys included in pltf.'s writ, & then levied the same thereout. Plea, that F. had sued out a prior writ of *fi. fa.* which was delivered to sheriff before pltf.'s writ, & remained unexecuted in sheriff's hands; & sheriff, after seizing the goods under pltf.'s writ, & before they were sold under the same, seized them under F.'s writ, &, sold them for the utmost price, etc.; but for a sum insufficient to pay the sum indorsed on F.'s writ, & paid the sum to F.:—*Held:* plea bad, on special demurrer, as an argumentative traverse of the allegation, that the sheriff had levied the moneys indorsed on pltf.'s writ; such levy consisting in a sale, the proceeds of which would be applicable to pltf.'s writ.—DREWE *v.* LAINSON (1840), 11 Ad. & El. 529; 3 Per. & Dav. 245; 9 L. J. Q. B. 69; 113 E. R. 516.

*Annotations:*—**Apld.** Heenan *v.* Evans (1841), 3 Man. & G. 398; Shattock *v.* Carden (1851), 6 Exch. 725. **Mentd.** Giles *v.* Giles (1846), 9 Q. B. 164.

**206.** ——.]—GIBBONS *v.* HUNTER (1845), 6 L. T. O. S. 128.

**207. Colourable appointment of debtor as servant of foreign minister.**]—It is not a sufficient justification to the sheriff for refusing to execute process, that the individual against whose person or goods it issues has the appointment of domestic servant to a foreign minister at our ct., & that notice of this has been stuck up at the sheriff's office, unless the appointment be *bonâ fide;* & in an action against the sheriff for a false return, pltf. may show that the appointment was merely colourable.—DELVALLE *v.* PLOMER (1811), 3 Camp. 47; 170 E. R. 1301, N. P.

*Annotation:*—**Refd.** Lloyd *v.* Harrison (1865), 6 B. & S. 36.

**208. Proof that debtor possesses certain goods—Prior execution to amount of greater value—Previous return of nulla bona.**]—In an action for a false return of *nulla bona* to a *fi. fa.* if pltf. show debtor to be possessed of certain goods, it is no

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**PART V. SECT. 6, SUB-SECT. 6.—D. (c) ii.**

200 i. *Wrongful return of "nulla bona."*]—MEAD *v.* HAMILTON (1835), 2 U. C. R. 135.—**CAN.**

200 ii. ——.]—CLANDINAN *v.* DICKSON (1852), 9 U. C. R. 266.—**CAN.**

200 iii. ——.]—YOUNG *v.* BABY (1855), 4 C. P. 537.—**CAN.**

200 iv. ——.]—A return of *nulla bona*, where there are goods, is only an irregularity to be excepted to by deft., if pltf. is abusing the process of the ct. by proceeding against the lands before having exhausted the goods.—ONTARIO BANK *v.* KERBY (1865), 16 C. P. 35.—**CAN.**

g. —— *Return to writ against share of partnership—Insolvency of partnership making return immaterial.*]—FLINTOFF *v.* DICKSON (1853), 10 U. C. R. 428.—**CAN.**

h. *Return of failure to execute writ.*]—The ct. upheld a verdict for a sheriff sued for a false return to a *fi. fa.*, holding that he could not be said, either in law or in fact, to have been guilty of culpable negligence in not executing the writ; he had tried several times before the return day to execute it, but could not gain admittance to the house.—FINNIGAN *v.* JARVIS (1851), 8 U. C. R. 210.—**CAN.**

k. *Return that goods rescued—Where goods left on premises of father-in-law of debtor.*]—BENNETT *v.* STEPHENSON (1860), 4 Nfld. L. R. 444.—**NFLD.**

**PART V. SECT. 6, SUB-SECT. 6.—D. (c) iii.**

l. *Acceptance of return — With knowledge of falsity.*]—Case for false return of *nulla bona* to a *fi. fa.* Plea, that pltf. accepted such return knowing it to be untrue, & issued a *fi. fa.* lands upon it:—*Held:* no defence.—MARKLE *v.* THOMAS (SHERIFF) (1856), 13 U. C. R. 363.—**CAN.**

m. *Previous execution of greater value.*]—MEIN *v.* HALL (1863), 13 C. P. 518.—**CAN.**

n. *Sale under previous writ.*]—

*Sect.* 6.—*Execution of process: Sub-sect.* 6, *D.* (*c*) *iii.; sub-sect.* 7, *A. & B.*]

defence for the sheriff to show a prior execution to an amount of greater value, if to that execution the sheriff also returned *nulla bona*. Nor, if the sheriff has the proceeds of the goods in his hands, is it any defence to show that the *fi. fa.*, on the return of which the action is brought, was delivered at the sheriff's office at a quarter past 5 o'clock on the day on which it is returnable.—TOWNE *v.* CROWDER (1826), 2 C. & P. 355; 172 E. R. 160, N. P.

**209. Sheriff holding proceeds of goods — Writ delivered late on day for return.**]—TOWNE *v.* CROWDER, No. 208, *ante*.

**Return to writ of fieri facias.**]—*See* EXECUTION, Vol. XXI., pp. 532–534, 538, 539, Nos. 1066–1088, 1127–1137.

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SUB-SECT. 7.—ARREST ON CIVIL PROCESS.

*A. In General.*

*See, now*, Debtors Act, 1869 (c. 62); R. S. C., Ord. 69.

**210. Procedure on arrest—Necessity for production of warrant.**]—A sheriff's officer, in making an arrest on mesne process need not show his warrant until the party submit to the arrest & demand to see it.—HODGES *v.* MARKS (1618), Cro. Jac. 485; 79 E. R. 414.

*Annotations*:—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Mentd.** Layton *v.* Grindall (1709), 2 Salk. 643.

**211. Sheriff under obligation to arrest.**]—DARLYE'S CASE (1631), Het. 175; 124 E. R. 433.

**212. —— Though creditor arrange for further time.**]—*Re* A SOLICITOR OF THE SUPREME COURT (1895), 39 Sol. Jo. 601.

**213. Hindering bailiff from effecting arrest — Contempt of court.**]—To hinder a bailiff from arresting a man is a contempt of the ct.—POWELL *v.* BALL (1704), 6 Mod. Rep. 210; 87 E. R. 963.

**214. Form of warrant.**] — GRICE *v.* ALLEN (1741), Barnes, 414; 94 E. R. 981.

**215. ——.**] — Warrants of commitment are held valid, although the authority under which they were granted is not therein set forth.—R. *v.* GOODALL (1754), 1 Keny. 122; Say. 129; Dunning, 25; 96 E. R. 938.

**216. ——.**] — Where a *capias* was directed to the "sheriffs" of Middlesex, instead of "sheriff": —*Held*: an irregularity.—JACKSON *v.* JACKSON (1834), 1 Cr. M. & R. 438; 3 Dowl. 182; 5 Tyr. 136; 4 L. J. Ex. 32; 149 E. R. 1152.

**217. Arrest on civil process of prisoner detained on criminal charge.**]—GRANGER *v.* MOORE (1837), Murp. & H. 20; *sub nom.* GRAINGER *v.* MOORE, 1 Jur. 43.

**218. Second arrest on same charge — Voluntarily permitted to escape.**] —A bailiff who has arrested a prisoner on mesne process may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest.—ATKINSON *v.* MATTESON (1787), 2 Term Rep. 172; 100 E. R. 93.

*Annotation*:—**Expld.** Fuller *v.* Prest (1797), 7 Term Rep. 109.

**219. —— Discharge from first arrest on account of irregularity.**]—The rule that a party is not to be arrested twice for the same demand, only holds where the first arrest has been a regular one; if, therefore, deft. be discharged from custody on account of irregularity in the proceedings, he may afterwards be taken into custody in a regular manner.—NYAS *v.* NOY (1838), 2 Jur. 547.

**220. —— Escape from questionable arrest.**]—SNOWBALL *v.* DIXON, No. 114, *ante*.

**221. Writ returnable "non est inventus"—Duty of sheriff.**]—When a *ca. sa.* is indorsed with a direction "to be returned *non est inventus*," the meaning is that the sheriff is not to search for debtor; but, if debtor surrenders himself, the sheriff must detain him, & he is then entitled to his poundage under 29 Eliz. c. 4 (*a*).—MAGNAY *v.* MONGER (1843), 4 Q. B. 817; 1 Dav. & Mer. 24; 12 L. J. Q. B. 306; 7 J. P. 546; 7 Jur. 625; 114 E. R. 1105; *sub nom.* MAGNAY *v.* MORGAN, 1 L. T. O. S. 253.

*Annotations*:—**Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Baker *v.* St. Quintin (1844), 12 M. & W. 441.

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SNARR *v.* WADDELL (SHERIFF) (1864), 24 U. C. R. 165.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—A.**

*o. Form of warrant—Indorsement with amount of debt.*]—The sheriff's warrant to a bailiff to arrest must be indorsed with the amount of the debt claimed & costs in like manner as the writ is required to be.—STEELE *v.* LAMEUX (1836), 5 O. S. 154.—**CAN.**

*p. —— Arrest on mesne process—Necessity for annexing affidavit of debt to process.*]—An arrest by a constable on mesne process directed to the sheriff is not legal by 2 Geo. 4, c. 139, unless the affidavit of the debt be annexed to the process.—ROSS *v.* WEBSTER (1849), 5 U. C. R. 570.—**CAN.**

**218** 1. *Second arrest on same charge—Voluntarily permitted to escape.*]—HESKETH *v.* WARD (1867), 17 C. P. 667.—**CAN.**

*q. —— Escape after surrender by bail.*]—A prisoner on bail to the limits, having been rendered to the sheriff, made his escape while the officer in whose custody he was placed was otherwise engaged:—*Held*: the sheriff was justified in re-taking & committing him to close custody.—SCATCHERD *v.* ANDREWS (1858), 8 C. P. 473.—**CAN.**

*r. —— ——.*]—ARNOLD *v.* ANDREWS (1859), 8 C. P. 467.—**CAN.**

*t. Writ returnable "non est inventus"—Arrest of debtor—Liability of bail not revived on escape of debtor.*]—Where a sheriff is requested to return *non est inventus*, he need not seek the debtor, but if he do, & arrest him, the bail are discharged: & if the debtor escape, no matter from what cause, their liability does not revive.—READ *v.* HILTS (1847), 4 U. C. R. 175.—**CAN.**

*a. Sufficiency of warrant.*] — A *capias* addressed to the sheriff of the united counties of York & Peel, & directing him to take deft., "if he shall be found in your county," is sufficient, the latter sentence being surplusage.—BRETT *v.* SMITH (1855), 1 P. R. 309.—**CAN.**

*b. ——.*]—A *capias* issued on an affidavit which does not set forth sufficient grounds is not void, but voidable.—ORWITZ *v.* MCKAY (1898), 31 N. S. R. 243.—**CAN.**

*c. Grounds for arrest—Intention of debtor to leave province.*]— O'MULLIN *v.* WALLACE (1890), 22 N. S. R. (10 R. & G.) 151.—**CAN.**

*d. —— ——.*]—MCLAUGHLIN CARRIAGE CO. *v.* FADER (1901), 34 N. S. R. 534.—**CAN.**

*e. Jurisdiction to order arrest—Commissioners.*]—SYDNEY & LOUISBURG COAL & RAILWAY CO. *v.* KIMBER (1891), 23 N. S. R. (11 R. & G.) 338.—**CAN.**

*f. —— ——.*]—SPIKE *v.* GOLDING (1895), 27 N. S. R. (15 R. & G.) 379.—**CAN.**

*g. Arrest by subsequent detainer after illegal arrest.*]—A subsequent detainer lodged against a deft. illegally arrested, without collusion with the other creditors, is good, & the sheriff is bound to detain the prisoner in custody.—PAGE *v.* WILLIAMS (1851), 1 I. C. L. R. 499; 3 Ir. Jur. 323.—**IR.**

*h. Duty of sheriff to take bail—Bail must be sufficient.*]—The sheriff is, in cases of arrest in personal actions, bound to take sufficient bail when it is obtainable, & such bail need not be submitted to the ct. in the first instance.—BANK OF BRITISH NORTH AMERICA *v.* SEVERAL DEFENDANTS (1848), 3 Nfld. L. R. 14.—**NFLD.**

*k. —— ——.*]—JACKSON *v.* CAMPBELL (1855), 1 N. S. R. (1 Thom.) 18.—**CAN.**

*l. Duty of constable to take bail.*] —A constable who arrests under a comr.'s writ may refuse to take bail, & if he does take bail the sheriff may reject them as the constable's duty under such a writ is only to deliver deft. to the sheriff; but if the sheriff accept them, the bail bond is good.—PRICE *v.* SULLIVAN (1842), 6 O. S. 640.—**CAN.**

*m. Bail bond — Validity of.*] — A bail bond is irregular in a case where the action was commenced by process not bailable, & the arrest made on bailable process after appearance

**222. —— Effect of surrender of debtor.**]—MAGNAY *v.* MONGER, No. 221, *ante*.

—— **Arrest before return to fi. fa.**]—*See* EXECUTION, Vol. XXI., p. 436, No. 190.

**223. Two writs issued at different times against same party—Right of arrest on valid writ—Prisoner discharged on invalid writ.**]—HOOPER *v.* LANE, No. 86, *ante*.

**224. Who may be arrested—Corporation aggregate.**]—Process of foreign attachment cannot be enforced by distress against the garnishee, but only by arrest of his person. It cannot, therefore, be enforced at all against a corpn. aggregate, which is by its nature incapable of being arrested.—LONDON CORPN. *v.* LONDON JOINT STOCK BANK (1881), 6 App. Cas. 393; 50 L. J. Q. B. 594; 45 L. T. 81; 29 W. R. 870, H. L.; *affg.* S. C. *sub nom.* LONDON JOINT STOCK BANK *v.* LONDON CORPN. (1880), 5 C. P. D. 494, C. A.; (1875), 1 C. P. D. 1.

*Annotations:*—**Refd.** St. Leonard's Shoreditch Grdns. *v.* Franklin (1878), 47 L. J. Q. B. 727; *Re* Price, *Ex p.* Sear (1881), 17 Ch. D. 74; Martin *v.* Nadel, [1906] 2 K. B. 26. **Mentd.** Vickers *v.* Stevens & La Conception Gold Mining Co. (1881), 44 L. T. 679; R. *v.* Tyler & International Commercial Co., [1891] 2 Q. B. 588; Robson *v.* Smith (1895), 72 L. T. 559.

—— **Privilege from arrest.**]—*See* Sub-sect. 8, *post*.

*B. What Constitutes Arrest.*

**225. Corporal touching.**]—An arrest must be by corporal seizing or touching deft.'s body; & therefore if a bailiff only pronounce words of arrest, & show his warrant, & deft. escape, the ct. will not grant an attachment for a rescue; for he was not legally arrested.—GENNER *v.* SPARKS (1704), 6 Mod. Rep. 173; 1 Salk. 79; 87 E. R. 928.

*Annotations:*—**Expld.** Williams *v.* Jones (1736), Lee *temp.* Hard. 298. **Consd.** Hampshire Sheriff *v.* Godfrey (1739), 7 Mod. Rep. 288. **Apld.** Russen *v.* Lucas (1824), Ry. & M. 26. **Consd.** Nicholl *v.* Darley (1828), 2 Y. & J. 399. **Apprvd. & Folld.** Sandon *v.* Jervis (1859), E. B. & E. 942. **Refd.** Rich *v.* Woolley (1831), 7 Bing. 651; Grainger *v.* Hill (1838), 1 Arn. 42; Brown *v.* Chapman (1848), 6 C. B. 365.

**226.** ——.]—*Semble*, in order to constitute an arrest, the warrant must be produced; but the closest watching of deft. is not sufficient.

Formerly, it was necessary, that there should be some actual corporal touching, in order to constitute an arrest. But, there may be an arrest now without any such touching (WILLIAMS, J.).—ROBINS *v.* HENDER (1835), 3 Dowl. 543; *sub nom.* HENDER *v.* ROBINS, 1 Har. & W. 204.

*Annotation:*—**Refd.** Galliard *v.* Laxton (1862), 2 B. & S. 363.

**227.** ——.]—Actual contact with the person is not necessary to constitute an arrest.—GRAINGER *v.* HILL (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769; *sub nom.* GRANGER *v.* HILL, 2 Jur. 235.

*Annotations:*—**Consd.** Warner *v.* Riddiford (1858), 4 C. B. N. S. 180. **Refd.** De Medina *v.* Grove (1847), 10 Q. B. 172. **Mentd.** Powell *v.* Hoyland (1851), 6 Exch. 67; Parton *v.* Hill (1864), 4 New Rep. 103; Assets Development Co. *v.* Close No. 2 (1901), 46 Sol. Jo. 12; Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600.

**228. —— Defendant submitting.**]—HOMER *v.* BATTYN (1739), Bull. N. P. 62.

*Annotations:*—**Apld.** Grainger *v.* Hill (1838), 1 Arn. 42. **Refd.** Nicholl *v.* Darley (1828), 2 Y. & J. 399; Bird *v.* Jones (1845), 7 Q. B. 742.

**229.** —— ——.]—Though a man is not touched, yet if he knew there is a process against him, & submit to it, it is an arrest (LEE, C.J.).—HAMPSHIRE (SHERIFF) *v.* GODFREY (1739), 7 Mod. Rep. 288.

**230. —— With intention of keeping—Seizing coat.**]—*Semble:* the giving a writ of *capias* to deft. by a sheriff's officer, telling him to go with him, which is not acquiesced in by deft. is no arrest.—WILLIAMS *v.* GRIFFITH (1849), 3 Exch. 584; 6 Dow. & L. 449; 18 L. J. Ex. 195; 13 L. T. O. S. 164; 13 J. P. 397; 154 E. R. 978.

**231. —— Without power of bodily restraint.**]—A sheriff's officer, having a writ of *ca. sa.* against pltf., put his hand through a broken pane in the window of pltf.'s house, & touched him. In an action for false imprisonment:—*Held:* a valid arrest, though the officer had not at the time the power of bodily restraint.—SANDON *v.* JERVIS (1859), E. B. & E. 942; 28 L. J. Ex. 156; 32 L. T. O. S. 375; 5 Jur. N. S. 860; 7 W. R. 290; 120 E. R. 760, Ex. Ch.

*Annotations:*—**Consd.** Nash *v.* Lucas (1867), L. R. 2 Q. B. 590. **Refd.** Thomas *v.* Rawlings (1859), 28 L. J. Ex. 347.

**232. Words of arrest—Production of warrant.**]—GENNER *v.* SPARKS, No. 225, *ante*.

**233. —— Accompanied by acquiescence.**]—HOMER *v.* BATTYN (1739), Bull. N. P. 62.

*Annotations:*—**Apld.** Grainger *v.* Hill (1838), 1 Arn. 42. **Refd.** Nicholl *v.* Darley (1828), 2 Y. & J. 399; Bird *v.* Jones (1845), 7 Q. B. 742.

**234.** —— ——.]—Words such as "I arrest you" *per se* will not constitute an arrest; but if, after the words of arrest, the party goes with the officer, & so acquiesces, it is an arrest.—RUSSEN *v.* LUCAS (1824), 1 C. & P. 153; Ry. & M. 26; 171 E. R. 1141, N. P.

**235. Delivery of writ to sheriff's office—Whether good arrest of sheriff's bailiff.**]—R. *v.* SPRETBURY (1731), 2 Barn. K. B. 60; 94 E. R. 356.

**236. Locking up in room.**]—It does not follow that an arrest cannot be made without touching the person; for if a bailiff comes into a room, & tells deft. he arrests him, & locks the door, that is an arrest, for he is in custody of the officer (LORD HARDWICKE, C.J.).—WILLIAMS *v.* JONES (1736), Lee *temp.* Hard. 298; 2 Stra. 1049; 95 E. R. 193.

*Annotations:*—**Consd.** Rowe *v.* Tutte (1737), Willes, 14; Tottage *v.* Petty (1737), Lee *temp.* Hard. 358. **Refd.** Titley *v.* Foxall (1758), Willes, 688; Emmett *v.* Lyne (1805), 1 Bos. & P. N. R. 255.

**237.** ——.]—WILLIAMS *v.* GRIFFITH, No. 230, *ante*.

**238. Giving instructions to call.**]—Where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A.,

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entered.—DOUGLASS *v.* POWELL (1831), 2 O. S. 253.—**CAN.**

n. —— *Amount of—Right to security for double amount on writ.*]—NEEDHAM *v.* NEEDHAM (1881), 29 Gr. 117.—**CAN.**

o. —— *Discharge by surrender of prisoner—Necessity for certificate of sheriff.*]—LINLEY *v.* CHEESEMAN (1829), Dra. 53.—**CAN.**

p. —— ——.]—MCDONALD *v.* MCDONALD (1857), 1 Ch. Ch. 22.—**CAN.**

q. —— ——.]—LAING *v.* SLINGERLAND (1888), 17 O. R. 392.—**CAN.**

r. —— —— *Attempt to surrender.*]—READ *v.* SCOVILL & WILSON (1858), 16 U. C. R. 453.—**CAN.**

t. —— —— *Time for.*]—POTTS *v.* BAIRD (1877), 7 P. R. 113.—**CAN.**

a. —— *Notice to be first given to execution creditor.*]—MILLS *v.* JAMES (1848), 5 U. C. R. 216.—**CAN.**

b. —— *Right to set aside allowance—Where subsequent recognisances unauthorised.*]—MACFARLANE *v.* MACWHIRTER (1868), 8 C. P. 76.—**CAN.**

c. —— *Transfer of.*]—ROUE *v.* PRENDERGAST (1880), 13 N. S. R. (1 R. & G.) 385.—**CAN.**

d. —— *Action by sheriff—Necessity for proof of actual pecuniary damage.*]—KINGSMILL (SHERIFF) *v.* GARDINER (1843), 1 U. C. R. 223.—**CAN.**

e. —— —— *Right to sue where prisoner received into close custody.*]—CAMPBELL *v.* HENAN (1836), 2 N. B. R. (Ber.) 133.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—B.**

f. *Promise to put in bail—After informing party of writ.*]—PERRIN *v.* JOYCE (1841), 6 O. S. 300.—**CAN.**

g. *Execution of bail bond.*]—A bailable *capias* having issued, the deputy sheriff went to deft. & asked him to find bail. They both then went in search of bail, & a bail bond was executed:—*Held:* an arrest.—MORSE *v.* TEETZEL (1855), 1 P. R. 369.—**CAN.**

*Sect. 6.—Execution of process: Sub-sect. 7, B., C., D., E. & F.*]

& asked him to fix a time to call & give bail, & A. accordingly fixed a time, attended, & gave bail:—*Held:* this was not an arrest.—BERRY *v.* ADAMSON (1827), 6 B. & C. 528; 9 Dow. & Ry. K. B. 558; 108 E. R. 546.

*Annotations:*—**Apld.** Amor *v.* Blofield (1832), 9 Bing. 91. **Consd.** Bates *v.* Pilling (1834), 2 Cr. & M. 374. **Reld.** George *v.* Radford (1828), 3 C. & P. 464; Reece *v.* Griffiths (1829), 5 Man. & Ry. K. B. 120; Brown *v.* Chapman (1848), 6 C. B. 365.

**239. Obtaining promise to call.**]—An officer employed to arrest a man goes with his warrant to his house, & tells him that he has a writ against him. He does not actually take him into custody, or touch him, but takes his word that he will attend & give bail in a day or two. He then goes away receiving a gratuity from the party against whom he had the writ, & goes at his desire to his attorney, & desires him to put in bail which is accordingly done. This is no arrest.—GEORGE *v.* RADFORD (1828), 3 C. & P. 464; Mood. & M. 244; 172 E. R. 503, N. P.

**240. Obtaining undertaking to appear.**]—Here there was neither arrest nor holding to bail; for, instead of a bail bond, deft.'s attorney gave an undertaking to appear, & afterwards, upon a defect being pointed out in pltf.'s affidavit to hold to bail, deft. was allowed to enter a common appearance. He, therefore, has not been subjected to the inconvenience of an unjust arrest (TINDAL, C.J.).—AMOR *v.* BLOFIELD (1832), 9 Bing. 91; 2 Moo. & S. 156; 1 L. J. C. P. 169; 131 E. R. 549.

*Annotation:*—**Consd.** Bates *v.* Pilling (1834), 2 Cr. & M. 374.

**241. Necessity for production of warrant.**]—ROBINS *v.* HENDER, No. 226, *ante*.

**242. Notice to sheriff's officer not to execute writ—Writ remaining in sheriff's hands—Defendant subsequently arrested at instance of third party.**]—A *ca. sa.* having issued & been delivered to the sheriff, who, by the direction of pltf.'s attorneys, issued a warrant to M., his officer, notice was afterwards given to M. by pltf.'s attorneys, not to execute the writ, but it remained in the sheriff's hands. Deft. having been arrested by the same officer subsequently, at the suit of a third person: —*Held:* deft. could not insist, under these circumstances that he had ever been in custody under the first writ.—HOWARD *v.* CAUTY (1844), 2 Dow. & L. 115; 13 L. J. Q. B. 294; 8 Jur. 984.

*Annotations:*—**Reld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Futcher *v.* Hinder (1858), 32 L. T. O. S. 132.

**243. Handing writ to defendant—With order to proceed with officer—Order not obeyed.**]—WILLIAMS *v.* GRIFFITH, No. 230, *ante*.

### *C. Who May Arrest.*

**244. Bailiff to whom warrant addressed—Whether all must execute warrant.**]—LASHBROOKE'S CASE (1635), Hut. 127; 123 E. R. 1149.

*Annotations:*—**Apld.** Lee *v.* Vessey (1856), 1 H. & N. 90. **Reld.** Britton *v.* Cole (1697), 1 Ld. Raym. 305.

**245.** ——.]—An arrest under a *ca. sa.* by a bailiff, to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, & deft. will be discharged out of custody.—RHODES *v.* HULL (1857), 26 L. J. Ex. 265.

**246. Bailiff's deputy.**]—ANON. (1695), 12 Mod. Rep. 73, 76; 88 E. R. 1173, 1175.

**247.** —— **Son—Bailiff near at hand.**]—FENTON'S CASE (1774), Lofft, 524; 98 E. R. 781.

**248.** —— ——.]—A bailiff & his son were watching at the house of a debtor, one at the back door, & the other at the front, to arrest him under a *ca. sa.* & debtor having left the house by the back door, the son immediately followed him, without giving notice to his father & took him into custody, & by representing to a police officer that debtor had committed the felony, he was taken to the police station; the bailiff who had the warrant in his possession, afterwards came to the police station, & conveyed debtor to the sheriff's prison: —*Held:* the arrest was illegal.

*Qu.:* whether the original arrest, by the son, would have been lawful, if he had not charged debtor with felony.—HUMPHERY *v.* MITCHELL (1836), 2 Bing. N. C. 619; 2 Hodg. 72; 3 Scott, 44; 5 L. J. C. P. 186; 132 E. R. 239.

**249.** —— **Bailiff acting for bailiff to whom warrant directed.**]—RHODES *v.* HULL, No. 245, *ante*.

**250. Bailiff irregularly named in warrant—Name inserted after warrant directed.**]—The sheriff having directed a warrant to A. & all his other officers to arrest B., A. afterwards inserted that of C.:—*Held:* the warrant was illegal, & the arrest by C. consequently void.—HOUSIN *v.* BARROW (1794), 6 Term Rep. 122; 101 E. R. 469.

*Annotations:*—**Reld.** Boyd *v.* Durand (1809), 2 Taunt. 161; Rafferty *v.* The People (1873), 12 Cox, C. C. 617.

**251. Sheriffs.**]—It seems that if a writ be directed to the sheriffs of Chester in the first instance, instead of the chamberlain, & they cause the party to be arrested under it, he cannot apply to have it set aside, as the sheriffs are the proper officers to execute the writ.—OSBORNE *v.* HANCOCK (1827), 5 L. J. O. S. C. P. 74.

### *D. Privilege from Arrest.*

*See* Sub-sect. 8, *post*.

### *E. Time of Arrest.*

**252. In the night.**]—(1) An arrest in the night, whether at the suit of the King or of a subject, is lawful.

(2) An arrest on a Sunday is good, no judicial acts can be done on a Sunday, ministerial may.—MACKALLEY'S CASE (1611), 9 Co. Rep. 61 b, 65 a; Cro. Jac. 279; 77 E. R. 824; *sub nom.* ANON., Jenk. 291.

*Annotations:*—*As to* (2) **Reld.** Waite *v.* Stoke Hundred (1618), Cro. Jac. 496; Swann *v.* Broome (1764), 3 Burr. 1595. *Generally*, **Mentd.** Heydon's Case (1613), 11 Co. Rep. 5 a; Hodges *v.* Marks (1615), Cro. Jac. 485; R. *v.* Cary (1616), 3 Bulst. 206; Hollowayes' Case (1628), W. Jo. 198; Gwinne *v.* Poole (1692), 2 Lut. App. 1560; City of London *v.* Wood (1701), 12 Mod. Rep. 669; R. *v.* Plummer (1701), Kel. 109; Harvy *v.* Broad (1704), 2 Salk. 626; Jackson *v.* Humphreys (1707), 1 Salk. 273; R. *v.* Tooley (1709), 2 Ld. Raym. 1296; Smith *v.* Bouchier (1734), Cunn. 89; O'Brian's Case (1844), 1 Den. 9; R. *v.* Davies (1861), 8 Cox, C. C. 486; Galliard *v.* Laxton (1862), 2 B. & S. 363; Barnacott *v.* Passmore (1887), 51 J. P. 821.

**253. On Sunday.**]—MACKALLEY'S CASE, No. 252, *ante*.

**254.** ——.]—Arrest on a Sunday, void.—WILSON *v.* TUCKER (1695), 1 Salk. 78; 91 E. R.

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**PART V. SECT. 6, SUB-SECT. 7.—C.**

**244*i.** *Bailiff to whom warrant addressed—Whether all must execute warrant.*]—When the warrant to arrest is addressed to two bailiffs as if jointly, one may, nevertheless, arrest.—HETHERINGTON *v.* WHELAN (1846), 1 C. L. Ch. 153.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—E.**

h. *With due diligence.*]—Where a bailable *ca. sa.* is delivered to the sheriff, he is bound to proceed with due diligence in the arrest.—O'CONNOR *v.* HAMILTON (SHERIFF) (1848), 4 U. C. R. 243.—**CAN.**

74; *sub nom.* WILSON *v.* GUTTERY, 5 Mod. Rep. 95.

**255.** ——.]—If a bailiff arrest a person without warrant on a Sunday, & detain him by virtue of a warrant procured the next day, the ct. will grant an attachment against the officer, but will not discharge prisoner, for he may have an action for the false imprisonment.—LIDFORD *v.* THOMAS (1704), 6 Mod. Rep. 96; 87 E. R. 853.

**256.** ——.]—One who is convicted on a penal statute cannot be apprehended on a Sunday, for non-payment of the penalty.—R. *v.* MYERS (1786), 1 Term Rep. 265; 99 E. R. 1086.

*Annotations:*—**Reld.** Rawlins *v.* Ellis (1846), 16 M. & W. 172. **Mentd.** R. *v.* Curwon (1817), 8 Taunt. 57; *Re* Dicas (1831), 9 L. J. O. S. Ch. 183.

**257.** ——.] — LYFORD *v.* TYRREL (1794), 1 Anst. 85; 145 E. R. 807.

*Annotations:*—**Apld.** A.-G. *v.* Golder (1823), 12 Price, 335. **Reld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**258.** ——.] — (1) E., having been dismissed from the office of town clerk of the borough of L., was, at the instance of the town council, convicted before two justices, under Poor Law Amendment Act, 1834 (c. 76), s. 60, of wilfully refusing to deliver accounts, books, etc., after notice; & thereupon the justices issued their warrant for the imprisonment of E. in the common gaol of the county of S., within which L. was situate; which was delivered to P., who arrested E. on a Sunday, & on the next day delivered him to the keeper of the gaol at S. It was held that this was substantially a civil proceeding, & the arrest therefore illegal under Sunday Observance Act, 1677 (c. 7), s. 6, & that the detention was not made legal by the delivery to the keeper, after the arrest, of another warrant upon the same conviction. These two warrants having been returned to a *habeas corpus ad subjiciendum*, the ct. received an affidavit that the arrest took place on a Sunday, & ordered prisoner to be discharged from custody under the two warrants. Before the keeper received the order, another warrant was delivered to him for the imprisonment of E., upon his conviction by two justices for not delivering to the council, acting as paving comrs. under a local Act, accounts, books, etc.:—*Held:* this, being substantially a proceeding by the same parties, did not warrant the detention.

(2) After the keeper received the order, but E. not having been discharged, the sheriff of S. lodged with the keeper his warrant, under a *ca. sa.* at the suit of H. against E.:—*Held:* E. might be lawfully detained under the *ca. sa.* no collusion appearing between the sheriff or H. & the town council.—*Re* EGGINGTON (1853), 2 E. & B. 717; 22 L. T. O. S. 77, 118; 118 E. R. 936; *sub nom.* R. *v.* EGGINTON, 2 W. R. 10, 76; *sub nom.* *Ex p.* EGGINGTON, 2 C. L. R. 385; 23 L. J. M. C. 41; 18 J. P. 165; 18 Jur. 224; *subsequent proceedings, sub nom.* EGGINGTON *v.* LICHFIELD CORPN. (1855), 5 E. & B. 100.

*Annotations:*—*As to* (1) **Reld.** Swan *v.* Dakins (1855), 16 C. B. 77; Jones *v.* Howell (1859), 29 L. J. Ex. 19: R. *v.* Whitecross Street Prison, R, *v.* Newgate Gaol (1865), 6 B. & S. 371; Bancroft *v.* Mitchell (1867), 8 B. & S. 558. *As to* (2) **Reld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Bateman *v.* Freston (1861), 3 E. & E. 578; *Ex p.* Freston (1861), 3 De G. F. & J. 612.

**259.** —— **After escape.**]—H. may be taken on an escape warrant on Sunday.—PARKER *v.* MORE (1704), 6 Mod. Rep. 95; 2 Salk. 626; 91 E. R. 529; *sub nom.* MOORE'S CASE, 2 Ld. Raym. 1028; 3 Salk. 148.

*Annotation:*—**Reld.** R. *v.* Gumley (1728), 2 Stra. 811.

**260.** —— ——.] — RAYNER *v.* STAMP (1727), Cooke, Pr. Cas. 33; 125 E. R. 940.

*Annotation:*—**Reld.** Brookes *v.* Warren (1779), 2 Wm. Bl. 1273.

**261.** —— —— **Voluntary escape.**] — FEATHERSTONEHAUGH *v.* ATKINSON (1735), Barnes, 373; 94 E. R. 961.

*Annotations:*—**Reld.** Brookes *v.* Warren (1779), 2 Wm. Bl. 1273; Filewood *v.* Clements (1838), 1 Will. Woll. & H. 165.

**262.** —— —— ——.]—A. was arrested at the suit of B., & discharged, the sheriff not knowing that there was also a detainer in his office at the suit of C.; on the Sunday following he was arrested at C.'s suit & discharged by the ct., by virtue of Sunday Observance Act, 1677 (c. 7), s. 6. The arrest on the Sunday was considered as an original taking & not as a retaking after an escape. After a voluntary escape, the sheriff cannot retake a prisoner.—ATKINSON *v.* JAMESON (1792), 5 Term Rep. 25; 101 E. R. 14.

*Annotation:*—**Reld.** Filewood *v.* Clements (1838), 1 Will. Woll. & H. 165.

**263.** —— **Arrest on Sunday on criminal process—Detention till & arrest on civil process on Monday.**]—Where, by the contrivance of pltf.'s attorney, a party had been arrested on a Sunday on criminal process, for the purpose of effecting his arrest on civil process, & he was detained in custody till Monday, & then arrested on the civil process, the ct. ordered him to be discharged out of custody.

*Qu.:* whether a party can be arrested a third time for the same cause of action.—WELLS *v.* GURNEY (1828), 8 B. & C. 769; 7 L. J. O. S. K. B. 99; 108 E. R. 1229.

*Annotation:*—**Reld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

### *F. Place of Arrest.*

**264. Royal palaces — Westminster.**] — BOGO DE CLARE'S CASE (1290), 4 Co. Inst. 24; 4 Prynne's Register of Parliamentary Writs, p. 819.

*Annotations:*—**Reld.** Benyon *v.* Evelyn (1664), O. Bridg. 324; Burdett *v.* Abbot (1811), 14 East, 1; Combe *v.* De la Bere (1882), 22 Ch. D. 316.

**265.** —— ——.] — DE NYERFORD *v.* WARREN (EARL) (1293), 3 Co. Inst. 141; *sub nom.* DE NEYRFORD'S CASE, 4 Prynne's Register of Parliamentary Writs, p. 1189.

*Annotations:*—**Consd.** A.-G. *v.* Dakin (1867), L. R. 2 Exch. 290. **Reld.** Combe *v.* De la Bere (1882), 22 Ch. D. 316.

**266.** —— —— **House of Commons.**] — *The* sheriff returned to a writ of *venditioni exponas* that he had the money to be rendered to pltf. A rule was then obtained calling upon the sheriff to pay over the money. In answer to the rule it was shown that the House of Commons had committed him for contempt in levying the money, & had ordered him to refund it to defts., & that he had also been served with an order of the Insolvent Ct., requiring him to pay over the money to the provisional assignee of the estate of pltf., who was an insolvent. The ct. made the rule absolute; & the sheriff not having complied with it, a second rule was made absolute against him for an attachment, although he was still in custody of the serjeant-at-arms for the contempt of the House of Commons.—STOCKDALE *v.* HANSARD (1840), 11 Ad. & El. 253; 3 State Tr. N. S. 723, 950; 3 Per. & Dav. 330; 9 L. J. Q. B. 75; 4 Jur. 68, 70; 113 E. R. 411; *sub nom.* R. *v.* EVANS, STOCKDALE *v.* HANSARD, 8 Dowl. 522; 9 L. J. Q. B. 82.

*Annotations:*—**Reld.** R. *v.* Gossett (1840), 3 Per. & Dav. 349; Swan *v.* Dakins, *Ex p.* Dakins (1855), 16 C. B. 77.

**267.** —— **During absence of Royal Family — Including domestics.**]—ELDERTON'S CASE (1703), 2 Ld. Raym. 978; 6 Mod. Rep. 73; Holt, K. B. 590; 3 Salk. 284; 90 E. R. 1226.

*Annotations:*—**Consd.** Winter *v.* Miles (1809), 10 East, 578. **Reld.** Privilege of Place (1705), 2 Salk. 546; Anon. (1730), 1 Barn. K. B. 393; R. *v.* Talbot (1730), 11 Mod. Rep. 415; R. *v.* Goodall (1754), Say. 129; A.-G. *v.* Dakin (1870), L. R. 4 H. L. 338.

*Sect. 6.—Execution of process: Sub-sect. 7, F. & G.*]

**268. —— Kensington.**]—Kensington Palace being kept in a constant state of preparation to receive the King, with his officers, servants & guards residing & doing duty there at all times, & some of the Royal Family having apartments there, is privileged as a Royal Palace against the intrusion of the sheriff for the purpose of executing process against the goods of a person having the use of certain apartments therein.—WINTER *v.* MILES (1809), 10 East, 578; 1 Camp. 475, n.; 103 E. R. 895.

*Annotations:*—**Distd.** A.-G. *v.* Dakin (1870), L. R. 4 H. L. 338. **Refd.** Bell *v.* Jacobs (1828), 4 Bing. 523; Combe *v.* De la Bere (1882), 22 Ch. D. 316.

**269. —— ——.**]—A distress cannot be levied for sewers' rates within the precincts of a Royal Palace, occupied as the residence of the Sovereign; & Kensington Palace is within this description.—A.-G. *v.* DONALDSON (1842), 10 M. & W. 117; 11 L. J. Ex. 338; 152 E. R. 406.

*Annotations:*—**Refd.** A.-G. *v.* Dakin (1870), L. R. 4 H. L. 338; *Re* Bonham, *Ex p.* Postmaster-General (1879), 10 Ch. D. 595. **Mentd.** Cooper *v.* Hawkins (1903), 73 L. J. K. B. 113.

**270. —— Verge of palace.**]—An arrest within the verge of the Palace is no ground for discharging deft. out of custody.—SPARKS *v.* SPINK (1817), 7 Taunt. 311; 129 E. R. 125.

*Annotations:*—**Apld.** Bell *v.* Jacobs (1828), 4 Bing. 523. **Refd.** Combe *v.* De la Bere (1882), 22 Ch. D. 316.

**271. —— Hampton Court Palace.**]—There is a distinction between a Royal Palace & a Royal Palace which is also a Royal residence.

Hampton Court Palace is a Royal Palace, but not a Royal residence, & therefore is not exempt from execution, within it, of civil process. Where, therefore, a *fi. fa.* had been levied in some of the apartments in the Palace:—*Held:* the sheriff was not liable to an information for intrusion.—A.-G. *v.* DAKIN (1870), L. R. 4 H. L. 338; 39 L. J. Ex. 113; 23 L. T. 1; 35 J. P. 167; 18 W. R. 1111, H. L.

*Annotation:*—**Consd.** Combe *v.* De la Bere (1882), 22 Ch. D. 316.

**272. —— Liability of officer effecting arrest.**]—An indictment will not lie against an officer of the Palace Ct. for arresting a person not of the King's household, within the King's Palace, against whom a writ has issued out of that ct., though no leave to make the arrest has been obtained from the board of Green Cloth.—R. *v.* STOBBS (1790), 3 Term Rep. 735; 100 E. R. 830.

*Annotations:*—**Refd.** Bell *v.* Jacobs (1828), 4 Bing. 523; Combe *v.* De la Bere (1882), 22 Ch. D. 316.

**273. The Temple.**]—BROWN *v.* BURLACE (1697), Holt, K. B. 590; 12 Mod. Rep. 155; 3 Salk. 285; Skin. 684; 90 E. R. 1226.

**274. Law Courts.**]—A copy of a bill of Middlesex was served on deft., whilst he was attending the sittings in a cause wherein he was deft. Upon motion against the attorney for contempt it was contended to be right because it was not an arrest which restrained him of his liberty. But the ct. said, that the privilege was designed as well to prevent any interruption of the business of the ct. & it was equally a contempt. They would have committed the attorney if he had not consented to waive the proceedings & pay costs.—COLE *v.* HAWKINS (1738), 2 Stra. 1094; Andr. 275; 93 E. R. 1054.

*Annotations:*—**Refd.** Newton *v.* L. B. & S. C. Ry. (1849), 19 L. J. Q. B. 12; Hare *v.* Hyde (1851), 15 Jur. 315; Poole *v.* Gould (1856), 1 H. & N. 99.

**275. —— Westminster Palace Yard.**]—It is a contempt to make an arrest in Palace Yard *sedente curiâ.*—LONG'S CASE (1677), 2 Mod. Rep. 181; 86 E. R. 1012.

*Annotation:*—**Refd.** Privilege of Place (1705), 2 Salk. 546.

**276. —— Verge of court.**]—A man arrested within the verge of the ct. is not entitled to be discharged, an arrest in a franchise being only a breach of the privilege of the lord of the franchise.—KIRKPATRICK *v.* KELLY (1781), 3 Doug. K. B. 30; 99 E. R. 522.

**277. The Tower.**]—An arrest within the Tower would be bad. But the Deputy Governor is not privileged as such.—BATSON *v.* M'LEAN (1815), 2 Chit. 51.

*Annotation:*—**Consd.** A.-G. *v.* Dakin (1870), L. R. 4 H. L. 338.

**278. ——.**]—No doubt an arrest in the Tower, without proper process, is bad, if the authorities there choose to object; but it does not follow that deft. may take the objection, & be discharged from the arrest (PARK, J.).—BELL *v.* JACOBS (1828), 4 Bing. 523; 1 Moo. & P. 309; 6 L. J. O. S. C. P. 82; 130 E. R. 870.

**279. Gaol.**]—It is no objection to an arrest, that it takes place in a gaol, if deft. is there for his own purposes.—LOVEITT *v.* HILL (1836), 4 Dowl. 579.

**280. Police courts.**]—*Semble:* civil process cannot be executed within the precincts of a police office; & that a magistrate is justified in ordering the constables to take into custody all persons who should molest a man within the precincts of his office; but, at all events, in issuing such an order, the magistrate is acting as such, & is entitled to all the benefits & privileges intended to be conferred upon justices in the execution of their duty, by the Act of Parliament. A policeman acting under such an order is not justified in rescuing the man from the sheriff's officer, if arrested in the street, or on the first step of the pavement, for it is an excess not within the scope of the original order.—BENNETT *v.* BROUGHTON & AVERY (1838), 2 J. P. 759, N. P.; *subsequent proceedings* (1839), 3 J. P. 50.

*Annotations:*—**Refd.** Martins *v.* Upcher (1842), 3 Q. B. 662; Morgan *v.* Leach (1842), 7 J. P. 242; Breese *v.* Jerdein (1843), 4 Q. B. 585.

**281. Must be within jurisdiction of sheriff.**]—HARRINGTON *v.* HENSON (1845), 6 L. T. O. S. 168.

**Evidence of place of arrest.**]—*See* EVIDENCE, Vol. XXII., p. 51, Nos. 284, 285.

### *G. Custody of Prisoner.*

*See, generally,* PRISONS, Vol. XXXVII., pp. 556 *et seq.*; Sheriffs Act, 1887 (c. 55), s. 14.

**282. In what gaol prisoner to be confined—Nearest gaol.**]—A person arrested must be carried to the next gaol.—ANON. (1704), 6 Mod. Rep. 96; 87 E. R. 853.

**283. —— Prisoner escaped & retaken.**]—BINMORE *v.* BOWLER (1731), 1 Barn. K. B. 437; 94 E. R. 294.

**284. —— Information of intended escape.**]—

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**PART V. SECT. 6, SUB-SECT. 7.—G.**

k. *In what gaol prisoner to be confined—Gaol named in warrant.*]—SHAMSONESSA BEGUM *v.* LOVE (1885), I. L. R. 11 Calc. 527.—**IND.**

l. *Custody on mesne process.*]—A deft. rendered by his bail after the return of *non est inventus* to the *ca. sa.*, is not in custody on mesne process, nor is he charged in execution so as to obtain the weekly allowance.—LYMAN *v.* VANDECAR (1838), 1 Ont. Dig. 408.—**CAN.**

m. *Right of constable to allow debtor to go at large.*]—*Semble:* a constable may legally allow a debtor, whom he has arrested, to go at large so long as before the return of the writ he deliver him to the sheriff.—ROSS *v.* WEBSTER (1849), 5 U. C. R. 570.—**CAN.**

n. *Right of sheriff to copy of bail piece.*]—Where a deft. is arrested by a sheriff under a *ca. re.*, & after verdict is surrendered by his bail to the same

In an action against the Sheriff of Surrey & the keeper of the county prison for causing a debtor to be confined in a cell on the felons' side of the gaol, it appeared that defts. had so done in consequence of an anonymous communication said to have been made to one of the turnkeys, that pltf. meditated an escape; & that the matter had been made known to the visiting magistrates, who declined to interfere; but it did not appear that any investigation had been made as to the source whence the information was obtained:—*Held:* there was no sufficient proof of reasonable or probable cause on the part of defts. to justify the course they adopted.—FURNIVAL *v.* STRINGER (1834), as reported in 4 Moo. & S. 578.

**285. Duty of officer—To take care that prisoner is forthcoming.**]—(1) It is the duty of the officers employed to make an arrest to take care that the party is forthcoming (*per* CUR.).

(2) An officer, who is employed to arrest a party, does not do his duty by merely leaving him in custody in a lock-up house (GASELEE, J.).—DE VAUX *v.* SEWELL (1827), 3 C. & P. 182; 172 E. R. 378.

**286. —— Whether mere custody of prisoner in lock-up.**]—DE VAUX *v.* SEWELL, No. 285, *ante*.

**287. Custody in prison within twenty-four hours—Failure of defendant to nominate safe & convenient dwelling house.**]—Debtors' Imprisonment Act, 1758 (c. 28), s. 1, enacts, that no sheriff, etc., shall carry any person by him arrested to prison within twenty-four hours from the time of the arrest, unless the party arrested shall refuse to be carried to some safe & convenient dwelling-house of his own nomination, within a city, etc., other than the dwelling-house of the party himself, & within the country, etc., or liberty in which the person was arrested:—*Held:* the omission of the party to name such dwelling-house entitled the officer to carry him direct to prison.—PITT *v.* MIDDLESEX SHERIFF, HAMILTON *v.* JONES (1830), 1 Dowl. 201; 4 Moo. & P. 726.

*Annotation:*—**Refd.** Gordon *v.* Laurie (1846), 11 Jur. 98.

**288. —— ——.**]—By Debtors' Imprisonment Act, 1758 (c. 28), s. 1, it is enacted, that no sheriff's officer shall carry any person arrested by him to gaol within twenty-four hours from the time of such arrest, unless such person shall refuse to be carried to some safe & convenient dwelling-house of his own nomination or appointment; & by sect. 12 a penalty is imposed on any officer offending against the Act. In an action brought for the penalty, for taking a party to gaol within twenty-four hours, contrary to the statute:—*Held:* the officer who made the arrest, ought to have required the party arrested to nominate some convenient dwelling-house to be taken to; for the latter could not be said to have refused till the proposal had been made; & a mere omission by him to nominate a place, did not justify carrying him immediately to gaol.—SIMPSON *v.* RENTON (1833), 5 B. & Ad. 35; 2 Nev. & M. K. B. 52; 2 L. J. K. B. 157; 110 E. R. 705.

*Annotation:*—**Refd.** Gordon *v.* Laurie (1846), 9 Q. B. 60.

**289. —— ——.**]—In an action against the sheriff, for a penalty under Debtors' Imprisonment Act, 1758 (c. 28), ss. 1, 12, for taking pltf., when arrested, within twenty-four hours, to prison, pltf. not having refused to be carried to a safe & convenient dwelling-house of her own nomination, deft. pleaded that he informed pltf. that she might be carried to a safe, etc.; that pltf. thereupon consented to be carried to the dwelling-house of L.; deft. carried her thither accordingly, & offered to permit her to remain there for the rest of the twenty-four hours, but pltf. then requested to be taken to prison. On motion for judgment *non obstante veredicto*:—*Held:* (1) a good plea, the circumstances being equivalent to a refusal; (2) issue being joined on the allegation of the consent to go to L.'s house, the consent to be proved was not such consent as a person would give who had the option of being at large; but the question was, whether pltf. consented to go to the particular house, as a person would consent, who was obliged to be in confinement somewhere; (3) the fact of the sheriff suggesting L.'s house, did not prevent the consent from being free, within the meaning of the issue. The sheriff is entitled to exercise a reasonable discretion in determining whether a house, nominated by prisoner under arrest, as a safe & convenient dwelling-house, be a safe house for the custody of prisoner.

(4) If prisoner request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute.—SILK *v.* HUMPHERY (1836), 4 Ad. & El. 959; 111 E. R. 1044.

*Annotation:*—*As to* (1) **Refd.** Gordon *v.* Laurie (1846), 7 L. T. O. S. 204.

**290. —— Nomination by defendant of own dwelling-house.**]—(1) Carrying an arrested party to public-houses within twenty-four hours from the arrest without lodging him in gaol within that time, is not a beginning to "carry to gaol" within Debtors' Imprisonment Act, 1758 (c. 28), s. 1.

(2) *Semble:* if a party is arrested in mesne process, & when called on by the officer to name a safe, etc., dwelling-house to which he will be carried, names his own house, to which the officer objects pursuant to sect. 1 of the Act, he cannot be carried to any tavern, etc., with his free consent.—SUMMERS *v.* MOSELEY (1834), 2 Cr. & M. 477; 4 Tyr. 158; 3 L. J. Ex. 128; 149 E. R. 849.

**291. —— Refusal to nominate safe & convenient dwelling-house—What amounts to refusal—Necessity for proposal.**]—A sheriff's warrant against pltf., directed to deft., a sheriff's officer, & W. was delivered to deft. to be executed. Deft. employed L., an assistant, to make the arrest, who accordingly arrested pltf., & told pltf. "he must go with him to the Granby," to which pltf. replied "very well." He was then taken to a public-house called the Granby & kept there till the following morning, when L. delivered pltf. to W. who, it appeared was also an assistant to deft., & who, within twenty-four hours from the time of the arrest, put pltf. on a coach for the purpose of taking him to prison, & took him there accordingly. At the time that pltf. was put upon the coach, deft. was present, & saw pltf. on the coach. In an action on Debtors' Imprisonment Act, 1758 (c. 28), to recover penalties for taking pltf. to the tavern without his free & voluntary consent, & for taking him to prison within twenty-four hours:—*Held:* (1) deft. was liable for the act of W. in taking pltf. to prison within the twenty-four hours; (2) to justify the officer in taking him to the tavern,

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sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail piece before receiving the prisoner into custody.—GRIERSON *v.* CORBETT (1881), 8 P. R. 517.—CAN.

o. *Power of sheriff to detain prisoner—For reasonable time.*]—The warrant of arrest in execution of decree empowers the sheriff only to arrest deft. in execution, & detain him for such reasonable time as is sufficient to allow of his being brought before the ct., & having an opportunity of applying for his discharge; the detention of such prisoner by the sheriff after such reasonable time, without further authority of law, is illegal.—*Re* SUMBOO CHUNDER HALDAR, *Re* DURGAPERSAUD MITTER, *Re* HAKHAL DOSS (1864), Bourke, 59.—IND.

*Sect. 6.—Execution of process: Sub-sect. 7, G. & H. (a) & (b) i. & ii.*]

the consent of the party arrested to be taken there was necessary, & the mere submission or acquiescence of pltf. to the dictation of the officer was insufficient; (3) the beginning to carry, & not the arrival at the prison, is to be considered as the carrying to prison; (4) the neglect of the party arrested to nominate some safe & convenient dwelling-house to which he might be taken, did not justify the officer in taking pltf. to prison within twenty-four hours, & it was the duty of the officer to call upon the party to nominate some house to which he might be taken, & pltf. could not be said to have "refused to be carried to some safe & convenient dwelling-house" until the officer had asked him to nominate.—DEWHIRST *v.* PEARSON (1833), 1 Cr. & M. 365; 1 Dowl. 664; 3 Tyr. 242; 2 L. J. Ex. 143; 149 E. R. 440.

*Annotations:—As to* (3) **Refd.** Summers *v.* Moseley (1834), 2 Cr. & M. 477. *As to* (4) **Apld.** Simpson *v.* Renton (1833), 5 B. & Ad. 35. **Refd.** Gordon *v.* Laurie (1846), 9 Q. B. 60.

**292.** —— —— —— ——.]—SIMPSON *v.* RENTON, No. 288, *ante*.

**293.** —— —— ——.]—SILK *v.* HUMPHERY, No. 289, *ante*.

**294.** —— —— ——.]—Under Debtors' Imprisonment Act, 1758 (c. 28), s. 1, a sheriff's officer making an arrest must not carry the party to prison within twenty-four hours, unless such party has first been informed that he may, if he will, be carried to a safe & convenient dwelling-house of his own nomination, & has refused to nominate. It is not a refusal, if the party, without being so informed, asks if he may go to a spunging-house, &, being told that there are none, makes no further proposal, & suffers himself to be taken to one of two prisons previously named by the officer. In an action for penalties under the statute, the declaration alleging that pltf. was carried to Whitecross Street prison without his free & voluntary consent, although he did not refuse, etc., to which not guilty was pleaded; the evidence being that pltf. went to prison under the circumstances above stated; & there being proof that he went there for the purpose of enabling himself to recover damages; particularly, that he had told his creditor after the arrest that if an arrangement were declined he would go to Whitecross Street prison:—*Held:* the judge directed the jury properly on the issue joined, by desiring them to say whether pltf. went to prison for want of being informed of his right to go to a house of his own nomination, or whether he elected, for purposes of his own, to go to prison.—GORDON *v.* LAURIE (1846), 9 Q. B. 60; 16 L. J. Q. B. 98; 7 L. T. O. S. 204; 11 Jur. 98; 115 E. R. 1198.

**295.** —— **Safety & convenience of house nominated—Discretion of sheriff.**]—SILK *v.* HUMPHERY, No. 289, *ante*.

**296.** —— **Judgment debtor.**]—A judgment debtor arrested by virtue of an order of commitment under Debtors Act, 1869 (c. 62), s. 5, is not a person arrested by virtue of an "attachment for debt" within Sheriffs Act, 1887 (c. 55), s. 14 (1). Such debtor may, therefore, notwithstanding that enactment, be taken to prison within twenty-four hours of his arrest.—MITCHELL *v.* SIMPSON (1890), 25 Q. B. D. 183; 59 L. J. Q. B. 355; 63 L. T. 405; 55 J. P. 36; 38 W. R. 565; 6 T. L. R. 341, C. A.

*Annotations:—***Refd.** *Re* Edye (1891), 39 W. R. 198; Iles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Watson, *Ex p.* Watson, Johnston *v.* Watson (1892), 67 L. T. 519; *Re* Smith, Hands *v.* Andrew, [1893] 2 Ch. 1; Bailey *v.* Plant (1900), 2 W. C. C. 160. **Mentd.** Gilbert *v.* Gilbert & Bougher (1927), 96 L. J. P. 137.

**297. Custody in tavern—With consent—After nomination by defendant of own dwelling-house.**]—SUMMERS *v.* MOSELEY, No. 290, *ante*.

**298.** —— **Necessity for free consent.**]—(1) To a penal action on Debtors' Imprisonment Act, 1758 (c. 28), ss. 1, 12, against the sheriff for carrying a party arrested by him to a tavern, without his free & voluntary consent, deft. pleaded that he did not carry pltf. to a tavern without his free & voluntary consent, *modo et formâ:—Held:* on issue joined thereon, as the plea admitted an arrest by deft., & as the evidence showed the arrest to have been made by the same officer who carried pltf. to the tavern, there was no necessity for further connecting deft. with the act of the officer by proof of the warrant.

(2) While the officer was illegally carrying the party to gaol within twenty-four hours after arrest, the prisoner, to avoid being taken to gaol, consented to go to a tavern, & there draw up an agreement for the purpose of getting discharged:—*Held:* a consent so obtained was not free & voluntary within Debtors' Imprisonment Act, 1758 (c. 28), & the plea was properly negatived by the jury.—BARSHAM *v.* BULLOCK (1839), 10 Ad. & El. 23; 2 Per. & Dav. 241; 113 E. R. 9.

*Annotation:—As to* (1) **Apld.** Reed *v.* Thoyts (1840), 6 M. & W. 410.

**299. Enlargement of time for return to writ—Prisoner ill.**]—Where deft. had been arrested on a *ca. sa.*, but was too ill to be removed from his house without danger to his life, the ct. enlarged the time for returning the writ, but could not afford the sheriff any relief against the extra costs of keeping up the caption.—JONES *v.* ROBINSON (1843), 11 M. & W. 758; 12 L. J. Ex. 415; 1 L. T. O. S. 315; 7 Jur. 657; 152 E. R. 1010.

### *H. Discharge.*

#### *(a) In General.*

**300. Application for discharge — Sufficiency of evidence.**]—An action was commenced against deft. whilst she was a *feme sole;* but after service of the writ, & before declaration, she married. Pltf. proceeded to final judgment, & took her in execution. On motion to discharge her out of custody, the affidavit stated the above facts, & also that no settlement was made upon the marriage; but it did not state that she had no separate property:—*Held:* the affidavit was insufficient, & she was not entitled to be discharged.—EVANS *v.* CHESTER (1837), 2 M. & W. 847; Murp. & H. 243; 6 L. J. Ex. 194; 1 Jur. 778; 150 E. R. 1001.

*Annotation:—***Refd.** Norris *v.* Seed (1849), 3 Exch. 782.

**301.** —— **Admissibility of additional evidence.**]—Although on an application to rescind a judge's order made under Judgments Act, 1838 (c. 110), for the arrest of deft., or for refusing to discharge him out of custody, either party, on cause being shown, may produce additional affidavits; yet those used before the judge at chambers ought to be brought before the ct.—HEATH *v.* NESBITT (1843), 11 M. & W. 669; 12 L. J. Ex. 408; 1 L. T. O. S. 260; 7 Jur. 586; 152 E. R. 973.

**302. By what court discharge ordered.**]—Deft. arrested by *quo minus*, while protected by the privilege of Common Pleas as a suitor there, may



*p. By what court discharge ordered—Commissioners.*]—CUTLIP *v.* CALDWELL (1879), 13 N. S. R. (1 R. & G.) 74.—CAN.

be discharged by either ct.—WALKER *v.* WEBB (1797), 3 Anst. 941; 145 E. R. 1088.

*Annotations:*—**Consd.** Walters *v.* Rees (1819), 4 Moore C. P. 34. **Reld.** Plomer *v.* Macdonough (1847), 1 De G. & Sm. 232; Kimpton *v.* L. & N. W. Ry. (1854), 9 Exch. 766.

**303.** ——.]—If a party coming to attend the trial of his cause, is arrested, the judge at *nisi prius* will grant a *habeas corpus* to discharge him; & will put off the trial until he is released, without payment of costs, if any collusion can be shown to exist between the opposite party & creditor who arrested him; otherwise only upon payment of costs.—SOLOMON *v.* UNDERHILL (1808), 1 Camp. 229; 170 E. R. 939, N. P.

**304.** ——.]—The application to discharge must be to the ct., of which the proceeding is a contempt.—LIST'S CASE (1813), 2 Ves. & B. 373; 35 E. R. 361; *sub nom. Re* CUMMING, *Ex p.* LIST, 2 Rose, 24, L. C.

*Annotations:*—**Apld.** Franklyn *v.* Colqhoun (1816), 1 Madd. 580. **Consd.** *Ex p.* Watkins (1837), 6 L. J. Ch. 225. **Apld.** Plomer *v.* Macdonough (1847), 1 De G. & Sm. 232. **Reld.** *Re* Pittman, Dodd *v.* Holbrook (1865), 35 L. J. Ch. 175; McGeath *v.* Geraghty (1866), 15 W. R. 127.

**305.** ——.]—Party arrested whilst attending judicial proceedings may be discharged either by the ct. in which such proceedings are pending, or by that issuing the process upon which the caption is effected.—A.-G. *v.* SKINNERS' CO., *Ex p.* WATKINS (1837), 8 Sim. 377; Coop. Pr. Cas. 1; 6 L. J. Ch. 225; 1 Jur. 236; 59 E. R. 150.

**306.** ——.]—Where an insolvent, on his return from attending the Ct. of Bkpcy. on his own petition for protection, under 5 & 6 Vict. c. 116, was arrested under an attachment of the Ct. of Ch., his application to the Ct. of Ch. to be discharged was held improper, & refused.—PLOMER *v.* MACDONOUGH (1847), 1 De G. & Sm. 232; 16 L. J. Bcy. 14; 9 L. T. O. S. 351; 63 E. R. 1046.

**307. Party entitled to discharge—Escape.**]—Escape warrant superseded, because the party was entitled to be discharged at the time of the escape.—WEBB *v.* THOMPSON (1720), 1 Stra. 401; 93 E. R. 593.

**308. —— Reasonable time allowed to search for other warrants.**]—When a discharge comes from pltf. in an action for deft. in custody on mesne process at his suit, the officer shall have a reasonable time afterwards to search the office; nor is the officer obliged to search till a discharge comes.—TAYLOR *v.* BRANDER (1793), 1 Esp. 44; 170 E. R. 275, N. P.

**309.** —— ——.]—Deft., who was in custody at C., received an order on a Saturday for his discharge: this was forwarded to the undersheriff at W.: on the next day, Sunday, the gaoler received a warrant of detainer under a writ of *ca. sa.*, which had been issued the day before:—*Held:* the sheriff was entitled to detain deft. for a reasonable time after the receipt of the order, for the purpose of searching his office for writs, & deft. was not entitled to his discharge under Sunday Observance Act, 1677 (c. 7), s. 6, on the ground that the service of the warrant on Sunday was void.—SAMUEL *v.* BULLER (1847), 1 Exch. 439; 17 L. J. Ex. 54; 10 L. T. O. S. 168; 11 Jur. 978; 154 E. R. 187.

*Annotation:*—**Reld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**310. Discharge of party attending trial of his cause—Postponement of time of cause till release Costs.**]—SOLOMON *v.* UNDERHILL, No. 303, *ante*.

**311. Discharge at instance of assignor of debt—Right of assignee against assignor.**]—Deft. by deed assigned his debts to pltf. with a power of attorney to sue in his name. Pltf. sued H., who owed deft. £250, in deft.'s name, & held him to bail on affidavit that he was about to leave the country. By direction of deft., who was the nominal pltf. in that action, the sheriff discharged H. Pltf. then brought this action against deft. for breach of the implied covenant in the deed of assignment to do nothing in derogation of it:—*Held:* the declaration was good, & a plea justifying the discharge of H. on the ground that pltf., without the consent or knowledge of deft., had held him to bail for more than the £250, was bad.—GERARD *v.* LEWIS (1867), L. R. 2 C. P. 305; 36 L. J. C. P. 173; 15 L. T. 663; 15 W. R. 581.

*Annotation:*—**Reld.** *Re* Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82.

**312. Discharge at expiration of one year.**]—Where a person has been committed to prison for contempt of ct., & the writ of attachment expressly states that it does not authorise imprisonment for more than one year, the sheriff ought to discharge the prisoner at the end of a year's imprisonment without applying for an order authorising him so to do.—*Re* EDWARDS, BROOKE *v.* EDWARDS, (1882), 21 Ch. D. 230; 51 L. J. Ch. 943; 30 W. R. 656.

### (*b*) *Grounds for Discharge.*

#### i. *Bankruptcy.*

*See* BANKRUPTCY, Vol. V., pp. 815–826, 1183, 1184, Nos. 9561–9565.

#### ii. *Death of Plaintiff.*

**313. No administration taken out.**]—The ct. will discharge deft. out of custody who is in execution at the suit of pltf. some time since deceased, on whose part no will has been proved, nor any administration granted, & whose family, on notice of a motion for the above purpose, declines interfering.—BROUGHTON *v.* MARTIN (1797), 1 Bos. & P. 176; 126 E. R. 844.

*Annotation:*—**Distd.** Fothergill *v.* Walton (1828), 4 Bing. 711.

**314.** ——.]—The ct. will discharge deft. out of custody in execution after pltf.'s death, if it appear that the next of kin do not intend to take out administration, on service of the rule *nisi* on the next of kin.—PARKINSON *v.* HORLOCK (1806), 2 Bos. & P. N. R. 240; 127 E. R. 618.

*Annotation:*—**Distd.** Fothergill *v.* Walton (1828), 4 Bing. 711.

**315. —— Attorneys intending to take out administration.**]—The ct. refused to discharge out of custody deft. who was detained upon final process, on the ground of the death of pltf., where the latter had left children, & his attorneys, who claimed to have a special lien upon the judgment, stated their intention to take out administration.—COX *v.* PRITCHARD (1851), 2 L. M. & P. 298; 20 L. J. Q. B. 353; 17 L. T. O. S. 67; 15 Jur. 427.

**316. Administratrix disclaiming interest.**]—Where administration had been taken out, the ct. refused, without the authority of the administratrix, to discharge deft. out of execution after the death of pltf., although his administratrix & his assignees, he having been a bkpt., disclaimed all interest in the action.—FOTHERGILL *v.* WALTON (1828), 4 Bing. 711; 1 Moo. & P. 743; 6 L. J. O. S. C. P. 178; 130 E. R. 943.

**317. Executors not assenting to discharge.**]—The ct. will not discharge deft. out of custody in execution at the suit of pltf., although the application was not made until eighteen months after the death of the latter; it appearing that he had appointed exors. who were still alive, & had not assented to the discharge.—DUNSFORD *v.* GOULDSMITH (1823), 8 Moore, C. P. 145.

*Annotation:*—**Apld.** Fothergill *v.* Walton (1828), 4 Bing. 711.

*Sect. 6.—Execution of process: Sub-sect. 7, H. (b ii., iii., iv., v. & vi.)*

**318. Effect of presumed death of plaintiff — No will or grant of administration found.**]—Deft. was taken in execution upon a *ca. sa.* at the suit of pltf., in June, 1841; in Aug. in the same year, pltf. left England, & was shortly afterwards seen at St. Petersburgh, but had never been heard of since. Upon an affidavit of these facts, & showing reasonable ground to induce them to believe that pltf. was dead, & alleging that proper search had been made, & no trace of a will or grant of administration found, the ct., in 1849, ordered deft. to be discharged from custody, without regard to any supposed lien of the attorney for costs.—CAMP *v.* POTE (1849), 8 C. B. 375; 14 L. T. O. S. 204; 137 E. R. 554.

*Annotation:*—**Refd.** Cox *v.* Pritchard (1850), 15 Jur. 427.

iii. *Irregularity of Proceedings.*

**319. General rule.**]—HOOPER *v.* LANE, No. 86, *ante*.

**320. Failure to deliver writ to sheriff.**] — R. *v.* COLGATE (1663), 1 Sid. 165; 82 E. R. 1034.

*Annotation:*—**Refd.** Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376.

**321. Arrest made without warrant.**] — Pltf.'s agent & the sheriff arrest deft., & afterwards procure a *ca. sa.* to warrant it, both are fined for this. But as pltf. was innocent, the ct. kept the deft. in execution.—THURLAND'S CASE (1564), 2 Dyer, 244 b; 73 E. R. 540.

*Annotations:*—**N.F.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Ockford *v.* Freston, Chapman *v.* Freston (1861), 6 H. & N. 466.

**322.** ——.]—An attachment, for non-payment of money to A., having issued against B. from this ct., & the process being in the hands of an officer who had not been able to serve B. therewith. B. was met by A. in the street, & carried by violence to the chambers of C., who was A.'s attorney, & there detained while the original process was sent for & served upon him; the officer also was sent for, but not by A., & on B.'s leaving the chambers of C. he was arrested. The ct. held this arrest illegal, & discharged B.—BIRCH *v.* PRODGER (1804), 1 Bos. & P. N. R. 135; 127 E. R. 410.

*Annotations:*—**Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** A.-G. *v.* Dorkings (1822), 11 Price, 156.

**323.** ——.] — A seaman, who had been taken from on board a fishing lugger at sea, by the crew of a revenue cutter, & landed, & delivered into civil custody, without legal warrant or authority; & who was, whilst in such custody, charged with a *capias* on an information for smuggling, under which he was removed to Newgate by *habeas corpus*, at the instance of the Crown, & committed thence to the Fleet by this Court—ordered by the ct. to be discharged unconditionally, on motion.

The delay which had occurred in making the application held to be no objection to a motion of this nature in such a case.—A.-G. *v.* GOLDER (1823), 12 Price, 335; 147 E. R. 739.

*Annotation:*—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**324.** —— **Liability to re-arrest.**] — A party who has been arrested under colour of a *ca. sa.*, but discharged by a judge's order, on the ground that the sheriff's officer had no warrant at the time of the taking, may be arrested again under the same writ.—PLOMER *v.* BALL (1837), 5 Ad. & El. 823; 111 E. R. 1378.

*Annotation:*—**Apld.** Andrews *v.* Walton (1849), 14 Jur. 260.

**325.** —— ——.]—A party, in contempt for non-payment of costs, was arrested on a writ by the sheriff of Middlesex while he was privileged; he was discharged voluntarily from that arrest by the other side, & the writ remained in the hands of the sheriff. The party was afterwards arrested, for the same matter, on a writ by the sheriffs of London:—*Held:* this latter arrest was regular.—ANDREWES *v.* WALTON (1849), 1 Mac. & G. 380; 2 H. & Tw. 154; 19 L. J. Ch. 249; 14 Jur. 260; 47 E. R. 1636, L. C.

**326.** —— ——.] — COLLINS *v.* YEWENS (1839), 10 Ad. & El. 570; 2 Per. & Dav. 439; 8 L. J. Q. B. 332; 3 Jur. 951; 113 E. R. 216.

*Annotations:*—**Distd.** Wright *v.* Stanford (1841), 11 L. J. Q. B. 42. **Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Barrack *v.* Newton, Bicknall *v.* Newton, Williams *v.* Newton (1841), 10 L. J. Q. B. 182; Thomas *v.* Harris (1842), 6 Jur. 734; Ockford *v.* Freston, Chapman *v.* Same (1861), 6 H. & N. 466.

**327.** —— ——.]—RICHARDS *v.* YEWENS (1839), 10 Ad. & El. p. 574; 2 Per. & Dav. 444; 113 E. R. 218.

*Annotation:*—**Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**328. Warrant altered by officer.**]—S., a sheriff's officer, arrested deft., not then having any warrant, & took him to a lock-up house. At that time there was a warrant in the sheriff's office, directed to another officer, to arrest deft. at the suit of pltf. S. went to the sheriff's office, & representing that he had an opportunity of arresting deft., got his own name inserted in that warrant. It appeared that this was in accordance with the practice of the office, & it was sworn that the sheriff was ignorant that deft. had at that time been already arrested. S. took the warrant, & arrested deft. at the suit of pltf.:—*Held:* deft. was not entitled to be discharged.—ROBINSON *v.* YEWENS (1839), 5 M. & W. 149; 7 Dowl. 377; 2 Horn & H. 38; 8 L. J. Ex. 166; 3 Jur. 776; 151 E. R. 64.

*Annotations:*—**Consd.** Barrack *v.* Newton (1841), 1 Q. B. 525. **Distd.** *Ex p.* Partington (1845), 13 M. & W. 679. **Expld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Dbtd.** Ockford *v.* Freston, Chapman *v.* Same (1861), 6 H. & N. 466. **Refd.** Aldridge *v.* Stanford (1841), 3 Man. & G. 409; Egginton's Case (1853), 2 E. & B. 717; Bateman *v.* Freston (1861), 3 E. & E. 578.

**329. Plaintiff's name omitted in capias.**] — HODD *v.* LANGBRIDGE (1837), Will. Woll. & Dav. 379; 1 Jur. 608.

**330. Illegal arrest by person other than sheriff.**] —If, while a *ca. sa.* at the suit of pltf. is lying in the hands of the sheriff, deft. is illegally taken into custody at the suit of another person, the *ca. sa.* attaches, & the sheriff cannot discharge deft.—ARUNDEL *v.* CHITTY (1832), 1 Dowl. 499.

*Annotations:*—**Refd.** Pearson *v.* Yewens (1839), 5 Bing. N. C. 489; Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**331.** ——.] — Deft. was arrested at the suit of L. by S., who had a warrant from the late sheriff, but none from the present. There was at that time another writ against deft., in the sheriff's office, at the suit of R.: the warrant on which, from the present sheriff, was in the hands of N. N. delivered this warrant to S. & the under-sheriff altered it by inserting the name of S. & detained

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**PART V. SECT. 6, SUB-SECT. 7.—H. (b) iii.**

**321 i.** *Arrest made without warrant.*]—The ct. refused to discharge a prisoner from custody upon the — that the gaoler, having taken before a magistrate without warrant, had suffered a voluntary escape.—ROBINSON *v.* HALL (1827), Tay. 453.—**CAN.**

q. *Order not showing jurisdiction.*]—*Re* BALTIMORE (1893), 25 N. S. R. (13 R. & G.) 106.—**CAN.**

r. *Order made without jurisdiction.*]—An order under which deft. was arrested & brought before a comr. under Collection Act, did not conform to the statute, & was insufficient. The comr. nevertheless made an order against him, under which he was imprisoned:—*Held:* as the sheriff had no power to take the deft. before

deft. at the suit of pltf :—*Held :* deft. was entitled to be discharged from custody at the suit of pltf. —PEARSON *v.* YEWENS (1839), 5 Bing. N. C. 489 ; 7 Dowl. 451 ; 2 Arn. 16 ; 7 Scott, 435 ; 8 L. J. C. P. 255 ; 3 J. P. 324 ; 3 Jur. 386 ; 132 E. R. 1187.

*Annotations :*—**Distd.** Robinson *v.* Yewens (1839), 5 M. & W. 149 ; *Ex p.* Partington (1845), 13 M. & W. 679. **Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Aldridge *v.* Stanford (1841), 3 Man. & G. 409 ; Ockford *v.* Freston, Chapman *v.* Same (1861), 6 H. & N. 466.

**332. Effect of detainers by other parties—Before writ set aside.**]—A party arrested upon a *ca. sa.* afterwards set aside for irregularity, cannot be discharged out of custody, if before the setting aside the irregular *ca. sa.* detainers have been lodged against him by other parties, not connected with the person who sued out the original writ.—WRIGHT *v.* STANFORD (1841), 11 L. J. Q. B. 42 ; 6 Jur. 130.

**333. Where sheriff not liable to action.**] — No doubt the sheriff is protected if he acts in obedience to the writ ; that is so whether there is a judgment or not, or whether the judgment is irregular & capable of being set aside, with that the sheriff has no concern, he is justified if he obeys the writ. But it seems to me that there is no sense in the distinction that a man not liable to arrest has a right to his discharge if the sheriff is in fault, but has no right if the sheriff is not blameable. Why should a person, who is not liable to arrest, but has been arrested under circumstances which do not render the sheriff liable to an action be subject to a detainer any more than a person who has been arrested under circumstances which render the sheriff responsible ? The illegality of the custody is the same in both cases ; the man ought not to have been arrested, & is entitled to his discharge (POLLOCK, C.B.).—OCKFORD *v.* FRESTON, CHAPMAN *v.* FRESTON (1861), 6 H. & N. 466 ; 30 L. J. Ex. 89 ; 3 L. T. 705 ; 9 W. R. 315 ; 158 E. R. 192 ; *sub nom.* OCKFORD *v.* PRESTON, CHAPMAN *v.* PRESTON, 7 Jur. N. S. 78.

*Annotations :*—**Refd.** *Re* Freston, *Ex p.* Freston (1861), 3 L. T. 832 ; Pooley *v.* Whethan (1880), 43 L. T. 267.

iv. *Misnomer.*

**334. Misnomer of defendant — Christian name.**] —If deft. be arrested by a wrong Christian name, the ct. will discharge him on motion, & the sheriff is liable to an action.—WILKS *v.* LORCK (1810), 2 Taunt. 399 ; 127 E. R. 1133.

*Annotations :*—**Distd.** Kingston *v.* Llewellyn (1820), 4 Moore, C. P. 317. **Refd.** Morley *v.* Law (1820), 4 Moore, C. P. 369. **Mentd.** Griffith *v.* Ricketts (1846), 15 L. J. Ch. 230.

**335.** —— ——.] — If there is a misnomer of the Christian name of deft. in a writ of attachment, though amended by order of a judge after arrest, the ct. will discharge him out of custody. He cannot be detained, but he may be retaken on the amended writ.—R. *v.* BURGESS (1838), 1 Will. Woll. & H. 46 ; 2 Jur. 396.

**336.** —— —— **Waiver of irregularity.**] — By a writ of *capias ad respondendum*, the sheriff was directed to take Messrs. C. & D. without mentioning their Christian names. They afterwards signed a bail bond in their Christian & surnames, which was duly executed :—*Held :* a waiver of the irregularity in the writ.—KINGSTON *v.* LLEWELLYN (1820), 1 Brod. & Bing. 529 ; 4 Moore, C. P. 317 ; 129 E. R. 827.

**337.** —— **Surname.**] — Where deft. was described in a writ of *capias*, issued under Judgments Act, 1838 (c. 110), s. 3, as " Mortlock," & in the copy served upon him as " Mortlake " ; the ct. refused to discharge him out of custody, on the ground of the variance.—MACDONALD *v.* MORTLOCK (1845), 2 Dow. & L. 963 ; 14 L. J. Q. B. 244 ; 10 Jur. 432.

*Annotation :*—**Refd.** Moore *v.* Magan (1846), 16 M. & W. 95.

**338. Misnomer of plaintiffs.**] — Deft. is not entitled to be discharged out of custody, on the ground of his having been arrested upon a warrant, in which the names of pltfs. are not conformable to the writ, if deft. be not misled by the mistake ; & therefore where the arrest took place on a warrant which required deft. to answer A. B. & two others :—*Held :* he was not entitled to be discharged.—WILLIAMS *v.* LEWIS (1819), 1 Chit. 611.

v. *Payment.*

**339. Right to discharge on payment.**]—Pltf. is bound to accept from deft. in custody under a *ca. sa.* the debt & costs, when tendered in satisfaction of his debt, & to sign an authority to the sheriff to discharge deft. out of custody ; & an action on the case will lie against pltf. for having maliciously refused so to do ; & the refusal to sign the discharge is sufficient *primâ facie* of malice in the absence of circumstances to rebut the presumption.—CROZER *v.* PILLING (1825), 4 B. & C. 26 ; 6 Dow. & Ry. K. B. 129 ; 3 L. J. O. S. K. B. 131 ; 107 E. R. 969.

*Annotations :*—**Consd.** Hounsfield *v.* Drury (1839), 11 Ad. & El. 98. **Refd.** Lewis *v.* Morris (1834), 2 Cr. & M. 712 ; Saxon *v.* Castle (1837), 6 Ad. & El. 652 ; Drury *v.* Hounsfield (1840), 11 Ad. & El. 100 ; Savory *v.* Chapman (1840), 11 Ad. & El. 829 ; De Medina *v.* Grove (1846), 10 Q. B. 152 ; Moore *v.* Guardner (1847), 16 M. & W. 595 ; Hemming *v.* Hale (1859), 7 C. B. N. S. 487 ; Phillips *v.* Genera Omnibus Co. (1880), 50 L. J. Q. B. 112 ; Lee *v.* Dangar, Grant (1892), 61 L. J. Q. B. 780 ; Cubitt *v.* Gamble (1919), 35 T. L. R. 223.

**340.** —— **Necessity for consent of plaintiff.**] — The discharge by the sheriff of a deft. taken in execution, upon payment of debt & costs, without the consent of pltf., is, it seems, illegal.—LEWIS *v.* MORRIS (1834), 2 Cr. & M. 713 ; 4 Tyr. 907 ; 4 L. J. Ex. 264 ; 149 E. R. 947.

**Discharge on payment of sum sworn to—Officer subsequently obliged to pay more—Recovery from prisoner.**]—*See* CONTRACT, Vol. XII., p. 526, No. 4384.

vi. *Other Cases.*

**341. Tender of sufficient bail bond.**] — SMITH *v.* HALL, No. 666, *post.*

**342. Arrest before expiry of time for putting in bail.**]—Where a sheriff's officer, who had forborne to arrest deft. upon his promising to put in good bail, afterwards, on hearing that such bail would not be forthcoming, himself put in bail without the consent of deft., & then, accompanied by the bail so put in, took deft. into custody the day before deft.'s time for putting in bail expired, the ct. discharged deft., & made the sheriff's officer pay costs.—TAYLOR *v.* EVANS (1823), 1 Bing. 367 ;

a comr. under the first order, the comr. was without jurisdiction to make any order against him. He was therefore discharged. — FORSYTH *v.* OZON (1897), 40 N. S. R. 219.—CAN.

t. *Defective affidavit to hold to* [illegible] *to return of deposit in lieu of bail.*]—A deft. discharged from arrest on a *capias*, on the ground that the affidavit to hold to bail did not set forth sufficiently any cause of action, is entitled to a return of money deposited in lieu of bail.—PETERS *v.* CHARLOT (1918), 45 N. B. R. 314 ; 39 D. L. R. 407.—CAN.

PART V. SECT. 6, SUB-SECT. 7.—H. (b) vi.

341 i. *Tender of sufficient bail bond.*] —PERRIN *v.* BOWES (1859), 2 P. R. 348.—CAN.

341 ii. ——.]—RICHARDSON *v.* HAMILTON (1859), 7 Gr. 281.—CAN.

*Sect.* 6.—*Execution of process: Sub-sect.* 7, *H.* (*b*) *vi.*, *&* (*c*), *&* *J.* (*a*) *&* (*b*).]

8 Moore, C. P. 398; 2 L. J. O. S. C. P. 22; 130 E. R. 148.

*Annotation*:—**Refd.** Evans *v.* Sweet (1824), 9 Moore, C. P. 556.

**343. Discontinuance of writ — Necessity for notice to sheriff.**]—If a first writ is discontinued, & the costs are taxed & paid, it is not necessary that pltf. should give the sheriff notice of such discontinuance, or serve the rule on him before arresting deft. on a fresh writ; & the ct. refused to discharge deft. from such second arrest, on the ground that the discontinuance of the first action was incomplete on account of that omission. But they would have relieved against any actual damage sustained by deft.—PRICE *v.* DAY (1835), 1 Cr. M. & R. 937; 3 Dowl. 463; 5 Tyr. 456; 4 L. J. Ex. 118; 149 E. R. 1361.

**344. Defendant surrendering in discharge of attachment against goods—Proceedings for attachment abandoned—Defendant detained under process issued while in custody.**]—Pltf. having obtained final judgment in a cause in the Ct. of Exch., afterwards proceeded for the same cause of action by foreign attachment in the Lord Mayor's Ct. in London, against deft.'s goods; deft. surrendered himself into custody in discharge of the attachment; & on the following day, whilst he was so in custody, pltf. issued a *ca. sa.*, under which deft. was detained:—*Held:* the *ca. sa.* was not irregular; & pltf. having abandoned his proceedings in the Lord Mayor's Ct., & deft. having in consequence obtained judgment of *non pros* thereon, there was no ground for his discharge under the equitable jurisdiction of the ct.—CHAMBERLAYNE *v.* GREEN (1842), 9 M. & W. 790; 11 L. J. Ex. 307; 6 Jur. 400; 152 E. R. 335.

### (*c*) *Effect of Discharge.*

**345. Liability to re-arrest.**]—A party discharged from arrest on giving security, cannot be arrested again if the security turn out to be worthless, unless he has been guilty of fraud.—WILSON *v.* HAMER (1831), 8 Bing. 54; 1 Moo. & S. 120; 1 L. J. C. P. 41; 131 E. R. 320.

*Annotation*:—**Refd.** Hamber *v.* Cooper (1835), 2 Cr. M. & R. 148.

**346.** ——.]—PLOMER *v.* BALL, No. 324, *ante*.

**347.** ——.]—A practising barrister was arrested on mesne process, on returning from ct. to his chambers, there being at the time three writs of *ca. sa.* against him at the sheriff's office. He thereupon applied to a judge for his discharge, on the ground of his having been arrested while privileged, but made no application to be discharged in respect of the writs of *ca. sa.* The judge having ordered him to be discharged, the sheriff detained him in custody on the writs of *ca. sa.*:—*Held:* the sheriff was justified in so doing.—WATSON *v.* CARROL (1839), 4 M. & W. 592; 1 Horn & H. 427; 8 L. J. Ex. 97; 3 J. P. 117; 3 Jur. 149; 150 E. R. 1557.

*Annotation*:—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**348.** ——.]—Deft. arrested on a *ca. sa.*, & discharged by reason of irregularity, may be taken on a second *ca. sa.* upon the same judgment.—MERCHANT *v.* FRANKIS (1842), 3 Q. B. 1; 2 Gal. & Dav. 473; 114 E. R. 407.

**349.** ——.]—Deft., who had been arrested & taken to the Q. B. prison on a writ of *ca. sa.* out of the Palace Court, had been discharged out of custody on the ground of privilege as a barrister & as a witness:—*Held:* he might be subsequently arrested on the same judgment.—PHILLIPS *v.* PRICE (1843), 12 L. J. Q. B. 348; 1 L. T. O. S. 293.

**350. Right of detainer under another process issued for same matter.**]—Where deft. was arrested under an attachment out of the Ct. of Ch. for non-payment of costs, & a *capias utlagatum* out of this ct., at the suit of the same party who was pltf. in the equity suit, was on the same day lodged with the sheriff; & the arrest under the attachment was afterwards set aside by the Ct. of Ch., for irregularity:—*Held:* deft. was entitled to be discharged as to the *capias utlagatum* also.—HALL *v.* HAWKINS (1839), 4 M. & W. 590; 1 Horn & H. 448; 8 L. J. Ex. 87; 3 Jur. 106; 150 E. R. 1556.

*Annotation*:—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443.

**351. Effect on subsequent independent proceedings—Discharge ordered on lapse of time.**]—The proceeding by warrant, under Absconding Debtors' Arrest Act, 1851 (c. 52), is only auxiliary to that by *capias* under Judgments Act, 1838 (c. 110), & the validity of the *capias* is independent of the proceedings under the warrant.

Where, therefore, deft. has been arrested under a warrant, & is discharged at the end of the seven days, he may be arrested again on a *capias* issued under a judge's order made on a sufficient affidavit, although it was sworn before the lapse of the seven days.—WILLIAMS *v.* GIBBONS (1863), 4 B. & S. 617; 3 New Rep. 70; 33 L. J. Q. B. 33; 9 L. T. 328; 10 Jur. N. S. 236; 12 W. R. 70; 122 E. R. 591.

### *J. Liability for Escape.*

### (*a*) *In General.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**352. Liability of sheriff to action for damages.**]—RICHBELL *v.* GODDARD (1592), Cro. Eliz. 271; 78 E. R. 526.

*Annotation*:—**Refd.** Mathews *v.* Spicer (1728), 1 Barn. K. B. 57.

**353.** ——.]—BENNION *v.* WATSON (1598), Cro. Eliz. 625; 78 E. R. 865.

**354.** ——.]—HERTFORD *v.* GERNON (1600), Cro. Eliz. 767; 78 E. R. 998.

**355.** ——.]—WEAVER *v.* CLIFFORD (1603), Cro. Jac. 3; Yelv. 42; 79 E. R. 2.

*Annotation*:—**Apld.** Higginson *v.* Martin & Hadley (1678), 2 Mod. Rep. 195.

**356.** ——.]—BURTON *v.* EYRE (1611), Cro. Jac. 288; 79 E. R. 247.

**357.** ——.]—ALLEN *v.* ROBINSON (1661), 1 Sid. 22; 82 E. R. 946.

**358.** ——.]—BENSON *v.* WELBY (1670), 2 Saund. 150; 85 E. R. 887; *sub nom.* PARKER *v.* WELBY, 2 Keb. 657; 1 Mod. Rep. 57; 1 Sid. 439; 1 Vent. 85.

*Annotations*:—**Refd.** Bullythorpe *v.* Turner (1744), Willes, 475. **Mentd.** Samuel *v.* Evans (1788), 2 Term Rep. 569.

**359.** ——.]—BASSET *v.* SALTER (1676), 2 Mod. Rep. 136; 1 Freem. K. B. 213; 86 E. R. 985.

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**PART V. SECT. 6, SUB-SECT. 7.—H. (c).**

**a.** *Liability to re-arrest—On second execution issued on same judgment.*]—MCLEOD *v.* FORSYTH (1902), 40 N. S. R. 389.—**CAN.**

**b.** —— *Where party discharged by mistake—Necessity for notice to party to renew attachment.*]—When a party has been arrested under an attachment, & mistakenly discharged by the sheriff, any application to renew the attachment must be made upon notice to the party.—CUNNINGHAM *v.* M'CAMBIE (1837), Sau. & Sc. 427.—**IR.**

**PART V. SECT. 6, SUB-SECT. 7.—J. (a).**

**c.** *Liability of sheriff to action.*]—HUNTLEY *v.* SMITH (SHERIFF) (1848), 4 U. C. R. 181.—**CAN.**

**d.** ——.]—Action of debt against a sheriff for an escape cannot be main-

**360.** ——.]—SLIPPER *v.* MASON (1702), 2 Ld. Raym. 788; 1 Lut. 121; 92 E. R. 26.
*Annotation:*—**Mentd.** Savil *v.* Roberts (1697), 1 Salk. 13.

**361.** ——.]—SOLLY *v.* GREATHEAD (1805), 11 Ves. 170; 32 E. R. 1053, L. C.
*Annotation:*—**Folld.** *Re* Mozley, Moore *v.* Moore (1858), 25 Beav. 8.

**362.** ——.]—HOOKHAM *v.* MONCKTON (1822), 6 Moore, C. P. 497.

**363.** ——.] — COLLARD *v.* HARE (1831), 5 Sim. 10; 1 L. J. Ch. 180.

**364.** ——.] — BLOWER *v.* HOLLIS (1833), 1 Cr. & M. 393; 3 Tyr. 356; 2 L. J. Ex. 176; 149 E. R. 452.
*Annotation:*—**Mentd.** Attwood *v.* Taylor (1840), 1 Man. & G. 279.

**365.** ——.]—*Re* MOZLEY, MOORE *v.* MOORE (1858), 25 Beav. 8; 27 L. J. Ch. 385; 30 L. T. O. S. 362; 22 J. P. 128; 4 Jur. N. S. 250; 6 W. R. 288; 53 E. R. 538.

**366. Conditions precedent to action—Custody.**]—WINDSOR CORPN. CASE (1584), Cro. Eliz. 26; 78 E. R. 292.

**367. —— Debt due from prisoner to creditor.**]—ALEXANDER *v.* MACAULEY (1792), 4 Term Rep. 611; 100 E. R. 1204.
*Annotation:*—**Refd.** Nightingale *v.* Wilcockson (1829), 5 Man. & Ry. K. B. 169.

**368. —— Damage or delay to plaintiff.**] — PLANCK *v.* ANDERSON (1792), 5 Term Rep. 37; 101 E. R. 21.
*Annotations:*—**Folld.** Williams *v.* Mostyn (1838), 1 Horn & H. 217. **Distd.** Clifton *v.* Hooper (1844), 6 Q. B. 468.

**369.** —— ——.]—WILLIAMS *v.* MOSTYN (1838), 4 M. & W. 145; 7 Dowl. 38; 1 Horn & H. 217; 7 L. J. Ex. 289; 2 J. P. 440; 2 Jur. 643; 150 E. R. 1379.
*Annotations:*—**Consd.** Clifton *v.* Hooper (1844), 6 Q. B. 468. **Refd.** Randell *v.* Wheble (1839), 2 Per. & Dav. 602; Wintle *v.* Freeman (1841), 11 Ad. & El. 539; Wylie *v.* Birch (1843), 4 Q. B. 566; Rogers *v.* Parker (1856), 25 L. J. C. P. 220; Lloyd *v.* Harrison (1865), 6 B. & S. 36.

**370.** —— ——.]—HEMMING *v.* HALE (1859), 7 C. B. N. S. 487; 1 F. & F. 453; 29 L. J. C. P. 137; 6 Jur. N. S. 554; 8 W. R. 46; 141 E. R. 905.

*(b) What amounts to Escape.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**371. Permitting prisoner to go out of jurisdiction.**]—PLATT *v.* LONDON (SHERIFFS) (1550), 1 Plowd. 35; 75 E. R. 57.
*Annotations:*—**Consd.** Alsept *v.* Eyles (1792), 2 Hy. Bl. 108. **Refd.** Rigeway's Case (1594), 3 Co. Rep. 52 a; Admiralty Case (1609), 13 Co. Rep. 51; Marshalsea Case (1613), 10 Co. Rep. 68 b; Griffith *v.* Walker (1752), 1 Wils. 336; Williams *v.* Mostyn (1838), 3 Horn & H. 217. **Mentd.** Harrison *v.* Burwell (1670), 2 Vent. 9; R. *v.* O'Connell (1843), 2 L. T. O. S. 248; Ford *v.* Beech (1848), 11 Q. B. 852.

**372. Permitting deviation from direct route.**]—BOYTON'S CASE (1592), 3 Co. Rep. 43 a; 76 E. R. 733; *sub nom.* BURTON *v.* ANDREWES, Moore, K. B. 299.
*Annotations:*—**Consd.** Gambier *v.* Larkin (1735), 2 Com. 553; Boothman *v.* Surry (1787), 2 Term Rep. 5. **Apld.** Nias *v.* Davis (1847), 4 C. B. 444. **Refd.** Stonehouse *v.* Mullins (1730), 2 Stra. 873; Hawkins *v.* Plomer (1776), 2 Wm. Bl. 1048; Williams *v.* Mostyn (1838), 4 M. & W. 145. **Mentd.** Acton's Case (1603), 4 Co. Rep. 117 a.

**373. Omission of second execution in indenture—Sheriff delivering over prisoner to successor.**]—WESTBY'S CASE (1597), 3 Co. Rep. 71 b; 76 E. R. 790; *sub nom.* WESBYS *v.* SKINNER, Cro. Eliz. 365, Ex. Ch.
*Annotation:*—**Consd.** R. *v.* Middlesex, Late Sheriff (1804), 4 East, 604.

**374. Allowing prisoner to go at large—After death of sheriff—Before appointment of new sheriff.**]—WESTBY'S CASE, No. 373, *ante*.

**375.** ——.]—ANON. (1667), Hard. 476; 145 E. R. 555.
*Annotation:*—**Refd.** Hawkins *v.* Plomer (1776), 2 Wm. Bl. 1048.

**376.** ——.] — HAWKINS *v.* PLOMER (1776), 2 Wm. Bl. 1048; 96 E. R. 616.
*Annotations:*—**Consd.** Benton *v.* Sutton (1797), 1 Bos. & P. 24. **Refd.** Nias *v.* Davis (1847), 4 C. B. 444.

**377.** ——.] — LEVETT *v.* LETTENEY (1784), cited 11 Ves. 170; 32 E. R. 1053.
*Annotations:*—**Apld.** Solly *v.* Greathead (1805), 11 Ves. 170. **Distd.** Collard *v.* Hare (1831), 5 Sim. 10. **Consd.** *Re* Mozley, Moore *v.* Moore (1858), 25 Beav. 8.

**378. —— Accompanied by follower of sheriff's officer.**]—BENTON *v.* SUTTON (1797), 1 Bos. & P. 24; 126 E. R. 757.
*Annotation:*—**Refd.** Haines *v.* East India Co. (1856), 6 Moo. Ind. App. 467.

**379. —— Accompanied by sheriff's officer.**]—BENTON *v.* SUTTON, No. 378, *ante*.

**380. —— —— Prisoner in custody outside sheriff's bailiwick.**]—NIAS *v.* DAVIS (1847), 4 C. B. 444; 9 L. T. O. S. 150; 11 Jur. 472; 136 E. R. 580.
*Annotations:*—**Mentd.** Hartfield *v.* Rotherfield, R. *v.* St. Andrew, Holborn (1852), 17 Q. B. 746; Powell *v.* Guest (1864), 18 C. B. N. S. 72.

**381. —— On ground of ill health.**]—HAINES *v.* EAST INDIA CO. (1856), 11 Moo. P. C. C. 39; 6 Moo. Ind. App. 467; 28 L. T. O. S. 165; 5 W. R. 159; 14 E. R. 609, P. C.

**382.** ——.] — *Re* MOZLEY, MOORE *v.* MOORE (1858), 25 Beav. 8; 27 L. J. Ch. 385; 30 L. T. O. S. 362; 22 J. P. 128; 4 Jur. N. S. 250; 6 W. R. 288; 53 E. R. 538.

**383. Entrusting prisoner with keys.**]—WILKINSON *v.* SALTER (1736), Lee *temp.* Hard. 310; 95 E. R. 200.
*Annotation:*—**Consd.** Filewood *v.* Clements (1838), 1 Will. Woll. & H. 165.

**384. Demolition of gaol by rioters.**]—ELLIOTT *v.* NORFOLK (DUKE) (1792), 4 Term Rep. 789; 100 E. R. 1303.

**385. Failure to take bail bond.**] — JONES *v.* EAMER (1796), 3 Anst. 675; 145 E. R. 1004.
*Annotation:*—**Dbtd.** Pariente *v.* Plumbtree (1799), 2 Bos. & P. 35.

**386.** ——.]—FULLER *v.* PREST (1797), 7 Term Rep. 109; 101 E. R. 881.
*Annotations:*—**Folld.** R. *v.* Surrey, Sheriff (1797), 7 Term Rep. 239. **Distd.** Pariente *v.* Plumbtree (1799), 2 Bos. & P. 35. **Consd.** Allingham *v.* Flower (1800), 2 Bos. & P. 246. **Folld.** Birn *v.* Bond (1816), 6 Taunt. 554; Collins *v.* Snuggs (1821), 6 Moore, C. P. 111. **Distd.** R. *v.* Surrey, Sheriff, Showell *v.* Young (1835), 2 Cr. M. & R. 698.

**387.** ——.]—R. *v.* SURREY (SHERIFF) (1797), 7 Term Rep. 239; 101 E. R. 952.
*Annotations:*—**Distd.** R. *v.* Surrey, Sheriff, Showell *v.* Young (1835), 2 Cr. M. & R. 698. **Refd.** R. *v.* Middlesex, Sheriff (1814), 3 M. & S. 299.

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tained in this province under 1 Ric. 2, c. 12, which is not applicable to this province.—WILSON *v.* JONES (1850), 6 N. B. R. (1 All.) 658.—**CAN.**

**e.** ——.]— HOSKIN *v.* RABIDON (1858), 1 Ch. Ch. 133.—**CAN.**

**f.** *Conditions precedent to action—Debt due from prisoner to creditor.*] O'REILLY *v.* MOODIE (SHERIFF) (1848), 4 U. C. R. 266.—**CAN.**



**g.** *Release of prisoner — On discharge by attorney receiving debt.*]—An attorney, merely as such, cannot discharge a deft. in execution, certainly not without receiving the debt; & the sheriff so acting on his authority will be liable as for an escape.—BROCK *v.* MCLEAN (SHERIFF) (1826), Tay. 310.—**CAN.**

**h.** —— ——.] — STOCKING *v.* CAMERON (1842), 6 O. S. 475.—**CAN.**

**k.** *Refusal to produce prisoner.*]—Where a sheriff refuses to produce a prisoner in his custody, twenty-four hours after notice, it is an escape.—WRAGG *v.* JARVIS (SHERIFF) (1836), 4 O. S. 317.—**CAN.**

**l.** *Prisoner going beyond limits.*]—CHESLEY *v.* MCMILLAN (1839), 1 Ont. Dig. 393. - **CAN.**

**m.** *Debtor absconding after fraudulent & pretended surrender.*]—KENNEDY *v.* BRODIE (1846), 4 U. C. R. 189.—**CAN.**

**n.** *Bond not allowed within time—Prisoner remaining within limits.*]—DOUGALL *v.* MOODIE (1860), 19 U. C. R. 568.—**CAN.**

**o.** *Failure to commit prisoner on bail to close custody—On failure of*

*Sect. 6.—Execution of process: Sub-sect. 7, J. (b), (c), (d) & (e) i., ii., iii., iv., v., vi. & vii.]*

**388.** ——.]—PARIENTE *v.* PLUMBTREE (1799), 2 Bos. & P. 35; 126 E. R. 1141.
*Annotation :*—**Consd.** Allingham *v.* Flower (1800), 2 Bos. & P. 246.

**389.** ——.]—MOSES *v.* NORRIS (1815), 4 M. & S. 397; 105 E. R. 881.

**390.** ——.]—BIRN *v.* BOND (1816), 6 Taunt. 554; 128 E. R. 1150.

**391. Release of prisoner—On payment of debt to sheriff—Before payment over to creditor.**]—SLACKFORD *v.* AUSTEN (1811), 14 East, 468; 104 E. R. 680.
*Annotations :*—**Consd.** Crozer *v.* Pilling (1825), 4 B. & C. 26. **Refd.** Woods *v.* Finnis (1852), 7 Exch. 363; Hemming *v.* Hale (1859), 29 L. J. C. P. 137.

**392.** —— —— **Failure to pay over moneys to assignees of creditor.**]—WOODEN *v.* MOXON (1816), 6 Taunt. 490; 2 Marsh. 186; 128 E. R. 1125.

**393.** —— **Mistake of sheriff.**]—FILEWOOD *v.* CLEMENTS (1838), 1 Will. Woll. & H. 165; 2 Jur. 544.

**394.** —— **Arrangement between debtor & creditor's attorney—Attorney without authority.**]—CONNOP *v.* CHALLIS (1848), 2 Exch. 484; 6 Dow. & L. 48; 17 L. J. Ex. 319; 11 L. T. O. S. 245; 12 J. P. Jo. 443; 154 E R. 582.
*Annotation :*—**Mentd.** Lovegrove *v.* White (1871), 40 L. J. C. P. 253.

**395.** —— **By gaoler.**]—BROWN *v.* COMPTON (1800), 8 Term Rep. 424; 101 E. R. 1469.
*Annotations :*—**Refd.** Delafield *v.* Freeman (1829), 3 Moo. & P. 704. **Mentd.** Morrell *v.* Martin (1841), 3 Man. & G. 581.

**396. Keeping prisoner in lock-up house.**]—HOULDITCH *v.* BIRCH (1812), 4 Taunt. 608; 128 E. R. 469.

**397. Prisoner breaking away from officer.**]—NICHOLL *v.* DARLEY (1828), 2 Y. & J. 399; 148 E. R. 974.

**398. Permitting prisoner to be absent from gaol—To give evidence before revising barrister.**]—WILLIAMS *v.* MOSTYN (1838), 4 M. & W. 145; 7 Dowl. 38; 1 Horn & H. 217; 7 L. J. Ex. 289; 2 J. P. 440; 2 Jur. 643; 150 E. R. 1379.
*Annotations :*—**Consd.** Clifton *v.* Hooper (1844), 6 Q. B. 468. **Refd.** Randell *v.* Wheble (1839), 2 Per. & Dav. 602; Wintle *v.* Freeman (1841), 11 Ad. & El. 539; Wylie *v.* Birch (1843), 4 Q. B. 566; Rogers *v.* Parker (1856), 25 L. J. C. P. 220; Lloyd *v.* Harrison (1865), 6 B. & S. 36.

### (c) *Who may be Liable.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**399. Appointment of new sheriff—Prisoner delivered by indenture—One execution omitted in indenture.**]—WESTBY'S CASE (1597), 3 Co. Rep. 71 b; 76 E. R. 790; *sub nom.* WESBYS *v.* SKINNER, Cro. Eliz. 365, Ex. Ch.
*Annotation :*—**Refd.** R. *v.* Middlesex, Late Sheriff (1804), 4 East, 604.

**400.** —— **Escape before delivery to new sheriff.**]—CHANDLER *v.* THOMPSON (1620), Hob. 265; 80 E. R. 411.
*Annotations :*—**Refd.** R. *v.* Middlesex, late Sheriff (1804), 4 East, 604. **Mentd.** Lawson *v.* Crofts (1661), 1 Keb. 157; Elstab *v.* Thorowgood (1697), 1 Ld. Raym. 283.

**401.** —— ——.]—R. *v.* MIDDLESEX (LATE SHERIFF) (1804), 4 East, 604; 102 E. R. 962; *sub nom.* R. *v.* MIDDLESEX (SHERIFF), PEARSON *v.* PUGH, 1 Smith, K. B. 286.
*Annotation :*—**Refd.** Yuroth *v.* Hopkins (1835), 1 Gale, 141.

**402.** —— ——.]—DAVIDSON *v.* SEYMOUR (1827), Mood. & M. 34, N. P.

**403.** —— **Escape while in custody of new sheriff.**]—KING *v.* ANDREWS (1615), Cro. Jac. 380; 79 E. R. 325.
*Annotation :*—**Refd.** Roberts *v.* Herbert (1660), 1 Sid. 5.

**404. Personal representatives of sheriff.**]—LANGTON *v.* WALLIS (1698), 1 Ld. Raym. 399; 1 Lut. 582; 91 E. R. 1166.
*Annotations :*—**Refd.** Clerk *v.* Withers (1704), 2 Ld. Raym. 1072; Slackford *v.* Austen (1811), 14 East, 468; Garland *v.* Carlisle (1837), 11 Bli. 421.

### (d) *Who may sue.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**405. Personal representative.**]—PLATT *v.* LONDON (SHERIFFS) (1550), 1 Plowd. 35; 75 E. R. 57.
*Annotations :*—**Refd.** Rigeway's Case (1594), 3 Co. Rep. 52 a; Marshalsea Case (1613), 10 Co. Rep. 68 b; Griffith *v.* Walker (1752), 1 Wils. 336; Alsopt *v.* Eyles (1792), 2 Hy. Bl. 108; Williams *v.* Mostyn (1838), 4 M. & W. 145. **Mentd.** Admiralty Case (1609), 13 Co. Rep. 51; Harrison *v.* Burwell (1670), 2 Vent. 9; R. *v.* O'Connell (1843), 2 L. T. O. S. 248; Ford *v.* Beech (1848), 11 Q. B. 852.

**406.** ——.]—BARRET *v.* WINCHCOMB (1614), Cro. Jac. 360; 1 Roll. Rep. 78; 79 E. R. 309.
*Annotation :*—**Mentd.** Lane *v.* Cotton (1700), 1 Salk. 17.

**407.** ——.]—SLINGSBY *v.* LAMBERT (1615), Cro. Jac. 394; 79 E. R. 337; *sub nom.* LAMBERT & SLINGBY'S CASE, Godb. 262.

**408. Nominal plaintiff in ejectment.**]—DOE *v.* JONES (1814), 2 M. & S. 473; 105 E. R. 457.

**409. Attorney having lien for costs—Release by authority of creditor.**]—MARTIN *v.* FRANCIS (1819), 2 B. & Ald. 402; 106 E. R. 413.
*Annotation :*—**Refd.** Marr *v.* Smith (1821), 4 B. & Ald. 466.

### (e) *Defences to Action.*

#### i. *Confinement in Prison.*

*See* Sheriffs Act, 1887 (c. 55), s. 16 (2), &, *generally*, PRISONS, Vol. XXXVII., pp. 556 *et seq.*

#### ii. *Conduct of Plaintiff.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**410. Consent of plaintiff—Before escape.**]—SCOTT *v.* PEACOCK (1692), 1 Salk. 271; 91 E. R. 237.
*Annotation :*—**Refd.** Ravenscroft *v.* Eyles (1766), 2 Wils. 294.

**411.** —— **After escape.**]—SCOTT *v.* PEACOCK, No. 410, *ante*.

**412.** ——.]—HAINES *v.* EAST INDIA CO. (1856), 11 Moo. P. C. C. 39; 6 Moo. Ind. App. 467; 28 L. T. O. S. 165; 5 W. R. 159; 14 E. R. 609, P. C.

**413. Fraud of party interested in judgment—Assignee.**]—HISCOCKS *v.* JONES (1829), Mood. & M. 269.

**414. Issue of second writ by plaintiff—Addressed to different sheriff.**]—WOODMAN *v.* GIST (1838), 2 Jur. 942.

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*prisoner to file recognisance.*]—CALCUTT *v.* RUTTAN (1856), 13 U. C. R. 220.—**CAN.**

p. *Bond taken in wrong form.*]—The sheriff cannot admit a debtor to the limits except by statute, & where he does so on a bond not in accordance with the Act he is liable as for a voluntary escape.—KINGAN *v.* HALL (SHERIFF) (1864), 23 U. C. R. 503.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—J. (c).**

q. *Sureties of sheriff.*]—In covenant against a sheriff's sureties, the breach assigned was that the sheriff arrested a debtor & afterwards allowed him to escape. Deft. pleaded that the gaol was accidently destroyed by fire, & so the debtor escaped:—*Held:* bad, for not denying that the fire occurred through the negligence or default of the sheriff or his deputy.—CORKERY *v.* GRAHAM (1845), 1 U. C. R. 315.—**CAN.**

r. *Bailiff—Action by sheriff.*]—An action on the case lies in favour of a sheriff against a bailiff for negligence in allowing a prisoner to escape, in consequence of which the sheriff is sued by the creditor, & a verdict recovered against him for nominal damages.—RUTTAN (SHERIFF) *v.* SHEA (1848), 5 U. C. R. 210.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—J. (e) ii.**

t. *Waiver—By service of declaration on sheriff & recovery of verdict.*]—R. *v.* PERTH (SHERIFF) (1858), 2 P. R. 298.—**CAN.**

**415. Fraud of plaintiff — Procuring arrest of privileged person.**]—MERRY *v.* CHAPMAN (1839), 10 Ad. & El. 516 ; 3 Per. & Dav. 25 ; 113 E. R. 195.
*Annotation :*—**Mentd.** R. *v.* Barton (1840), 4 Jur. 431.

**416. Negligence of plaintiff — Giving order apparently authorising discharge.**]—HODGES *v.* PATERSON (1857), 26 L. J. Ex. 223 ; 29 L. T. O. S. 98.

**417. —— Whether defence must be specially pleaded.**]—HODGES *v.* PATERSON, No. 416, *ante*.

iii. *Irregularity in Proceedings.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**418. Error in process.**]—BUSHE'S CASE (1590), Cro. Eliz. 188 ; 78 E. R. 444.

**419.** ——.]—CONIER'S CASE (1597), Cro. Eliz. 576 ; 78 E. R. 820.

**420.** ——.]—BURTON *v.* EYRE (1611), Cro. Jac. 288 ; 79 E. R. 247.

**421.** ——.] — SHIRLEY *v.* WRIGHT (1702), 2 Ld. Raym. 775 ; Holt, K. B. 761 ; 7 Mod. Rep. 30 ; 2 Salk. 700 ; 92 E. R. 17.
*Annotations :*—**Consd.** Parsons *v.* Loyd (1772), 3 Wils. 341. **Refd.** Anon. (1731), 2 Barn. K. B. 23 ; Hawkins *v.* Plomer (1776), 2 Wm. Bl. 1048 ; Contant *v.* Chapman (1842), 2 Q. B. 771 ; Blanchenay *v.* Burt (1843), 4 Q. B. 707.

**422.** ——.] — PIGGOTT *v.* WILKES (1820), 3 B. & Ald. 502 ; 106 E. R. 745.

**423. Arrest out of time.**]—SHAW *v.* CUTTERIS (1601), Cro. Eliz. 850 ; 78 E. R. 1076.
*Annotations :*—**Refd.** Jennings *v.* Harley (1602), Cro. Eliz. 909 ; Wolf *v.* Davison (1695), 1 Salk. 319.

**424.** ——.] — WOLFE *v.* DAVISON (1696), 5 Mod. Rep. 195 ; Comb. 373 ; 1 Salk. 319 ; 87 E. R. 604.

**425. Execution founded on judgment of court having no jurisdiction.**]—SQUIB *v.* HOLT (1675), Freem. K. B. 193 ; 2 Mod. Rep. 29 ; 89 E. R. 137.
*Annotations :*—**Refd.** Higginson *v.* Martin (1677), Freem. K. B. 322 ; Higginson *v.* Sheif (1708), 1 Com. 153 ; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

iv *Recapture.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**426. Whether a defence—Recapture must be on fresh pursuit.**]—RIGEWAY'S CASE (1594), 3 Co. Rep. 52 a ; 76 E. R. 753 ; *sub nom.* GRILLS *v.* RIDGEWAY, Cro. Eliz. 439.
*Annotations :*—**Refd.** Arden *v.* Goodacre (1851), 11 C. B. 371 **Mentd.** Bonham's Case (1610), 8 Co. Rep. 113 b ; Brickhead *v.* York (Archbp.) (1617), Hob. 197 ; Terry *v.* Huntington (1668), Hard. 480 ; Bank of England *v.* Morice (1734), Kel. W. 165.

**427.** —— ——.] — BONAFOUS *v.* WALKER (1787), 2 Term Rep. 126 ; 100 E. R. 69
*Annotations :*—**Refd.** Chambers *v.* Jones (1809), 11 East, 406 ; Ruthven *v.* Brown (1826), 2 C. & P. 535.

**428.** —— —— **Before commencement of action.**]—BALL *v.* BRIGGS (1692), 12 Mod. Rep. 31 ; 88 E. R. 1145.

**429.** —— —— ——.] — WHITING *v.* REYNEL (1623), Cro. Jac. 657 ; 79 E. R. 568.
*Annotations :*—**Refd.** Stonehouse *v.* Mallins (1730), 1 Barn. K. B. 354 ; Chambers *v.* Jones (1809), 11 East, 406.

**430.** —— —— ——.]—STONEHOUSE *v.* MALLINS (1730), 1 Barn. K. B. 354 ; 2 Stra. 873 ; 94 E. R. 239.

**431.** —— **Prisoner out of sight.**]—RIGEWAY'S CASE, No. 426, *ante*.

**432.** —— **Voluntary escape.**] — WHITING *v.* REYNEL, No. 429, *ante*.

**433.** —— ——.]—WILKINSON *v.* SALTER (1736), Lee *temp.* Hard. 310 ; 95 E. R. 200.
*Annotation :*—**Consd.** Filewood *v.* Clements (1838), 1 Will. Woll. & H. 165.

**434.** —— **Plea must allege detention until time of action.**]—CLENCH *v.* MULLENS (1742), cited in 11 East, at p. 409.
*Annotation :*—**Refd.** Chambers *v.* Jones (1809), 11 East, 406.

**435.** —— ——.] — R. *v.* BRIGGS (*circa* 1704), Lilly's Entries 151.
*Annotation :*—**Refd.** Chambers *v.* Jones (1809), 11 East, 406.

v. *Rescue.*

*See* Sub-sect. 7, K, *post*.

vi. *Return of Prisoner.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**436. General rule—Equivalent to recapture on fresh pursuit.**]—CHAMBERS *v.* GAMBIER (1736), 2 Com. 554 ; 92 E. R. 1205.
*Annotations :*—**Refd.** Hawkins *v.* Plomer (1776), 2 Wm. Bl. 1048 ; Bonafous *v.* Walker (1787), 2 Term Rep. 126 ; Chambers *v.* Jones (1809), 11 East, 406.

**437.** —— ——.] — BONAFOUS *v.* WALKER (1787), 2 Term Rep. 126 ; 100 E. R. 69.
*Annotations :*—**Refd.** Chambers *v.* Jones (1809), 11 East, 406 ; Ruthven *v.* Brown (1826), 2 C. & P. 535.

**438.** —— ——.]—LEWIS *v.* MORLAND (1818), 2 B. & Ald. 56 ; 106 E. R. 288.
*Annotations :*—**Consd.** Plummer *v.* Savage (1818), 6 Price, 126. **Refd.** Blower *v.* Hollis (1833), 1 Cr. & M. 393 ; Brown *v.* Jarvis (1836), 1 M. & W. 704 ; Cobbett *v.* Hudson (1849), 18 L. J. Q. B. 233.

vii. *Other Cases.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**439. Release upon writ of privilege from House of Commons.**]—SKEWYS *v.* CHAMOND (1544), 1 Dyer, 59 b ; 73 E. R. 131 ; *sub nom.* ANON., Jenk. 118.
*Annotations :*—**Refd.** Blumfield's Case (1596), 5 Co. Rep. 86 b ; Rutland's Case (1606), 6 Co. Rep. 52 b ; Marshalsea Case (1613), 10 Co. Rep. 68 b ; Benyon *v.* Evelyn (1664), O'Bridg. 324 ; Gwinne *v.* Poole (1692), 2 Lut. 1560 ; R. *v.* Knowles (1693), 12 Mod. Rep. 55 ; Brass Crosby's Case (1771), 3 Wils. 188 ; Burdett *v.* Abbott (1811), 14 East, 1 ; Cassidy *v.* Steuart (1841), 2 Man. & G. 437.

**440. Order of justices — Not authorised by statute.**]—ORBY *v.* HALES (1694), 1 Ld. Raym. 3 ; 91 E. R. 899.
*Annotation :*—**N.F.** Brown *v.* Compton (1800), 8 Term Rep. 424.

**441.** —— ——.]—BROWN *v.* COMPTON (1800), 8 Term Rep. 424 ; 101 E. R. 1469.
*Annotations :*—**Distd.** Delafield *v.* Freeman (1829), 3 Moo. & P. 704. **Refd.** Morrell *v.* Martin (1841), 3 Man. & G. 581.

**442. Removal by habeas corpus.**] — HOLDROID *v.* LIDDEL (1697), 1 Ld. Raym. 241 ; 91 E. R. 1057.

**443. Release on production of certificate — Of registration of deed under Bankruptcy Acts.**]—

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**PART V. SECT. 6, SUB-SECT. 7.—J. (e) iii.**

**418 i.** *Error in process.*]—SMILEY *v.* CURRIE (1908), 5 E. L. R. 536.—**CAN.**

**a.** *Judgment obtained without consideration.*]—PAYNE *v.* MCLEAN (1826), Tay. 325.—**CAN.**

**b.** *Arrest without warrant.*] — A sheriff is not liable for an escape where a bailiff arrests without a warrant, although he has the writ in his possession : nor on a count for not arresting under such circumstances.—FALCONRIDGE *v.* HAMILTON (1838), 3 Ont. Dig. 6390.—**CAN.**

**c.** *Arrest under void writ.*]—Where a sheriff arrested under mesne process from a district ct. in an action of trespass, & afterwards suffered the debtor to escape :—*Held :* he was not liable, the writ being void.—SMITH *v.* JARVIS (1839), 3 Ont. Dig. 6390.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—J. (e) vii.**

**442 i.** *Removal by habeas corpus.*]—It is not illegal to issue a writ of *habeas corpus* to bring up a debtor in custody on an attachment for the non-payment of costs, & the sheriff cannot therefore justify an escape from the attachment on the ground that the debtor was brought up by *habeas corpus* by pltf., & that it would have been illegal for the sheriff afterwards to detain him, & so he was permitted to leave his custody.—GRAHAM *v.* KINGSMILL (1843), 6 O. S. 584.—**CAN.**

**d.** *Insufficiency of gaol.*] — In an

*Sect. 6.—Execution of process: Sub-sect. 7, J. (e) vii., (f), (g) i., ii. & iii., (h) & (j), & K.]*

WILLIAMS *v.* ROSE (1867), L. R. 3 Exch. 5; 37 L. J. Ex. 12; 17 L. T. 253; 32 J. P. 39; 16 W. R. 316.

*Annotations:*—**Apld.** Dignam *v.* Baily (1868), L. R. 3 Q. B. 178; Allen *v.* Carter (1870), L. R. 5 C. P. 414. **Distd.** Dignam *v.* Baily (1870), L. R. 6 Q. B. 47. **Refd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621.

**444. —— —— Whether mere production sufficient justification.**]—DIGNAM *v.* BAILY (1868), L. R. 3 Q. B. 178; 8 B. & S. 744; 37 L. J. Q. B. 71; 17 L. T. 471; 16 W. R. 359; *subsequent proceedings* (1870), L. R. 6 Q. B. 47, Ex. Ch.

*Annotations:*—**Consd.** Godwin *v.* Stone (1869), L. R. 4 Exch. 331. **Refd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621; Allen *v.* Carter (1870), L. R. 5 C. P. 414.

**445. —— —— ——.**]—ALLEN *v.* CARTER (1870), L. R. 5 C. P. 414; 39 L. J. C. P. 212; 22 L. T. 586.

**446. —— —— —— Proof of debt contracted or accrued due before registration.**]—DIGNAM *v.* BAILY (1870), L. R. 6 Q. B. 47; 10 B. & S. 891; 40 L. J. Q. B. 68; 23 L. T. 706; 19 W. R. 325, Ex. Ch.

### (*f*) *Measure of Damages.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**447. Amount of injury actually sustained.**]—R. *v.* LEICESTERSHIRE (SHERIFF) (1850), 9 C. B. 659; 1 L. M. & P. 414; 14 Jur. 1026; 137 E. R. 1051; *sub nom.* ARDEN *v.* BINGHAM, 14 L. T. O. S. 420; *subsequent proceedings*, 11 C. B. 367.

**448. —— With costs.**]—SCOTT *v.* HENLEY (1832), 1 Mood. & R. 227, N. P.

**449. —— How ascertained—Sum indorsed on writ—Together with fees of execution.**]—BONAFOUS *v.* WALKER (1787), 2 Term Rep. 126; 100 E. R. 69.

*Annotations:*—**Refd.** Chambers *v.* Jones (1809), 11 East, 406; Ruthven *v.* Brown (1826), 2 C. & P. 535.

**450. —— —— Sheriff charged with whole debt—Onus on sheriff to prove that less would have been recovered.**]—*Re* MOZLEY, MOORE *v.* MOORE (1858), 25 Beav. 8; 27 L. J. Ch. 385; 30 L. T. O. S. 362; 22 J. P. 128; 4 Jur. N. S. 250; 6 W. R. 288; 53 E. R. 538.

**451. Value of custody at moment of escape.**]—ARDEN *v.* GOODACRE (1851), 11 C. B. 371; 2 L. M. & P. 383; 20 L. J. C. P. 184; 18 L. T. O. S. 208; 15 Jur. 776; 138 E. R. 516; *sub nom.* ARDING *v.* GOODACRE, 17 L. T. O. S. 64, 158.

*Annotations:*—**Consd.** Macrae *v.* Clarke (1866), L. R. 1 C. P. 403. **Refd.** Hemming *v.* Hale (1859), 7 C. B. N. S. 487; *Re* Essex Sheriff, Terrell *v.* Fisher (1862), 10 W. R. 796

**452. Amount of debt proved—Not amount sworn to.**]—GABEL *v.* PERCHARD (1795), 2 Anst. 522; 145 E. R. 954.

**453. What may be considered—Aggravation of loss by plaintiff's conduct.**]—ARDEN *v.* GOODACRE, No. 451, *ante*.

**454. —— Power of plaintiff to diminish loss by diligence.**]—ARDEN *v.* GOODACRE, No. 451, *ante*.

**455. —— Debtor's own resources.**]—MACRAE *v.* CLARKE (1866), L. R. 1 C. P. 403; Har. & Ruth. 479; 35 L. J. C. P. 247; 14 L. T. 408; 12 Jur. N. S. 708; 14 W. R. 655.

**456. —— All reasonable probabilities of discharge of debt.**]—MACRAE *v.* CLARKE, No 455, *ante*.

**457. Amount of injury doubtful—Right to bring action to ascertain amount.**]—R. *v.* LEICESTERSHIRE (SHERIFF), No. 447, *ante*.

### (*g*) *Practice and Proof.*

#### i. *In General.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**458. Application of Statute of Limitations.**]—JONES *v.* POPE (1666), 1 Sid. 305; 1 Wms. Saund. 37; 2 Keb. 93; 1 Lev. 191; 82 E. R. 1122.

*Annotations:*—**Dbtd.** Stonehouse *v.* Mallins (1730), 1 Barn. K. B. 354. **Refd.** Hawkins *v.* Plomer (1776), 2 Wm. Bl. 1048; Paget *v.* Foley (1836), 5 L. J. C. P. 258; Williams *v.* Griffith (1849), 3 Exch. 584; Cork & Bandon Ry. *v.* Goode (1853), 13 C. B. 826.

**459. Parties—Both sheriffs of London.**]—ANON. (1704), 6 Mod. Rep. 95; 87 E. R. 853.

**460. Stay of proceedings.**]—HORN *v.* MULLINS (1731), 1 Barn. K. B. 439; 94 E. R. 295.

**461. ——.**]—BROOKHOUSE *v.* DERBYSHIRE (SHERIFF) (1826), 5 B. & C. 244; 108 E. R. 91.

#### ii. *Pleading.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**462. What must be pleaded—Warrant under seal.**]—BARKLY *v.* KEMPSTOW (1589), Cro. Eliz. 123; 78 E. R. 381.

*Annotation:*—**Refd.** Goddard *v.* Vanderheyden (*circa* 1766), 2 Bos. & P. 8, n.

**463. —— Damage to plaintiff.**]—BARKLY *v.* KEMPSTOW, No. 462, *ante*.

**464. —— Place of arrest.**]—EDEN *v.* LLOYD (1602), Cro. Eliz. 877; 78 E. R. 1101.

**465. —— ——.**]—JENKINS *v.* HANCOCK (1661), 1 Sid. 30; 82 E. R. 951.

**466. —— Place where prisoner delivered.**]—APPLETON *v.* BURR (1592), Cro. Eliz. 289; 78 E. R. 542.

**467. —— Non-appearance at return of writ.**]—APPLETON *v.* BURR, No. 466, *ante*.

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action for an escape on final process, a plea of the insufficiency of the gaol is void.—ROWAN *v.* MCDONELL (1839), 1 Ont. Dig. 238.—**CAN.**

*e. Release under bond.*]—An action for an escape will not lie when a valid bail bond has been taken. Such action must be brought against the sheriff, & not against the bailiff, unless the act complained of amounts in effect to a rescue.—WILSON *v.* MCCULLOUGH (1838), 5 O. S. 680.—**CAN.**

*f.* ——.]—PRINCE EDWARD ISLAND BANK *v.* MCGOWAN (1870), 1 P. E. I. 304.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—J. (f).**

**447 i.** *Amount of injury actually sustained.*]—In a proceeding against a sheriff for an escape after arrest on an attachment for non-payment of money, the ct. will, following the English practice, hold the sheriff liable in damages only, & not for the full amount endorsed on the writ.—WALL *v.* HOOPER (1875), 1 V. L. R. (L.) 185.—**AUS.**

**451 i.** *Value of custody at moment of escape.*]—HARKIN *v.* RABIDON (1858), 1 Ch. Ch. 133.—**CAN.**

**451 ii.** ——.]—MCRAE *v.* DUNLOP (1882), 15 N. S. R. (3 R. & G.) 315.—**CAN.**

**451 iii.** ——.]—The true measure of damages in an action on the case in which a pltf. seeks to recover from the sheriff damages by reason of the escape from his custody of a party held under a *capias ad respondendum*, is the value of the custody of the party at the time of the escape.—SHEA *v.* TALBOT (SHERIFF) (1882), 6 Nfld. L. R. 405.—**NFLD.**

*g. What may be considered—Debtor's own resources.*]—KINLOCH *v.* HALL (SHERIFF) (1865), 25 U. C. R. 141.—**CAN.**

*h.* —— *All reasonable probabilities of discharge of debt.*]—In an action against a sheriff for an escape, the jury in assessing the damages may take into consideration not only deft.'s own resources, but all reasonable probabilities founded on his position in life that the debt would have been discharged.—MCMANUS *v.* WELLS (1890), 29 N. B. R. 449.—**CAN.**

*j.* —— ——.]—SANDILANDS *v.* TOMPKINS, [1912] App. D. 171.—**S. AF.**

*k. Prisoner returning to custody—Value of detention during absence.*]—If a prisoner in execution on final process escapes, & afterwards returns into custody, the proper measure of damages is not necessarily the whole debt, but such sum as the jury think the detention of the debtor's body would have been worth during his absence. If there is no actual loss proved, pltf. is entitled to nominal damages.—KELLY *v.* JONES (1852), 7 N. B. R. (2 All.) 465.—**CAN.**

*l. Amount of debt sworn to—Not amount recovered on final judgment.*]—TAYLOR *v.* MCEWAN (1867), 27 U. C. R. 126.—**CAN.**

**468.** —— ——.]—STOVIN *v.* PERRING (1801), 2 Bos. & P. 561 ; 126 E. R. 1439.

**469.** —— **Whether whole record must be stated.**]—EDEN *v.* LLOYD, No. 464, *ante*.

**470.** —— **Jurisdiction of bailiff.**]—MINN *v.* HYNTON (1633), Cro. Car. 329 ; 79 E. R. 888.

iii. *Evidence.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**471. Proof of escape—What amounts to.**]—FAIRLIE *v.* BIRCH (1813), 3 Camp. 397 ; 170 E. R. 1423, N. P.

**472.** —— ——.]—NECK *v.* HUMPHERY (1835), 3 Ad. & El. 130 ; 1 Har. & W. 419 ; 4 Nev. & M. K. B. 707 ; 111 E. R. 362.

**473. What must be shown—Recovery of judgment—& execution thereon.**]—JONES *v.* POPE, No. 458, *ante*.

**474.** —— ——.] — WILLIAMS *v.* GRIFFITH (1849), 3 Exch. 584 ; 6 Dow. & L. 449 ; 18 L. J. Ex. 195 ; 13 L. T. O. S. 164 ; 13 J. P. 397 ; 154 E. R. 978.

**475.** —— **Commencement of proceedings—While prisoner in custody under former debt.**]—JACKSON *v.* HUMPHREYS (1706), 1 Salk. 273 ; 11 Mod. Rep. 69 ; Holt, K. B. 280 ; 91 E. R. 239.

*Annotation :*—**Refd.** Ford *v.* Leche 1837), 6 Ad. & El. 699.

**476. Proof of delivery of writ to sheriff.**]—BLATCH *v.* ARCHER (1774), 1 Cowp. 63 ; 98 E. R. 969.

*Annotations :*—**Apld.** Morgan *v.* Brydges (1818), 2 Stark. 314. **Refd.** Hill *v.* Middlesex, Sheriff (1816), 7 Taunt. 8.

**477. Averment of indorsement of writ for bail—By virtue of affidavit—Necessity for production of affidavit.**]—WEBB *v.* HERNE (1798), 1 Bos. & P. 281 ; 126 E. R. 904.

*Annotations :*—**Refd.** Arundell *v.* White (1811), 14 East, 216 ; Casburn *v.* Reid (1818), 2 Moore, C. P. 60 ; Nightingale *v.* Wilcoxson (1829), 10 B. & C. 202 ; Mullett *v.* Hunt (1833), 2 L. J. Ex. 287.

**478.** —— —— **Production of office copy of affidavit.**]—CASBURN *v.* REID (1818), 2 Moore, C. P. 60.

*Annotation :*—**Refd.** Wilcoxon *v.* Nightingale (1828), 4 Bing. 501.

**479. Admission by defendant in former action—Admissible against sheriff.**] — WILLIAMS *v.* BRIDGES (1817), 2 Stark. 42 ; 171 E. R. 566.

**480. Allegation that suit commenced & pending—Proof by production of order for attachment—Together with decree & taxing master's certificate.**]—BLOWER *v.* HOLLIS (1833), 1 Cr. & M. 393 ; 3 Tyr. 356 ; 2 L. J. Ex. 176 ; 149 E. R. 452.

*Annotation :*—**Refd.** Attwood *v.* Taylor (1840), 1 Man. & G. 279

**481. Sheriff estopped by statement on return.**]—COOK *v.* ROUND (1835), 1 Mood. & R. 512.

(*h*) *Indemnity against Escape.*

**482. Consideration for indemnity — Warrant delivered to specified person.**]—DABRIDGECOURT *v.* SMALBROOKE (1590), Cro. Eliz. 178 ; Owen, 97 ; 78 E. R. 435.

**483.** —— **Prisoner permitted to remain in defendant's house.**]—BENSKIN *v.* FRENCH (1662), 1 Keb. 483 ; 1 Sid. 132 ; 83 E. R. 1066 ; *sub nom.* BENSON *v.* FRENCH, 1 Lev. 98.

*Annotation :*—**Refd.** Rogers *v.* Reeves (1786), 1 Term Rep. 418.

**484. Pleadings.**]—CUBITT *v.* THOMPSON (1850), 5 Exch. 811 ; 1 L. M. & P. 672 ; 20 L. J. Ex. 49 ; 16 L. T. O. S. 173 ; 155 E. R. 355.

(*j*) *Position of Prisoner.*

*See* Sheriffs Act, 1887 (c. 55), s. 16.

**485. Liability to action—By sheriff.**] — RIGEWAY'S CASE (1594), 3 Co. Rep. 52a ; 76 E. R. 753 ; *sub nom.* GRILLS *v.* RIDGEWAY, Cro. Eliz. 439.

*Annotations :*—**Refd.** Bonham's Case (1610), 8 Co. Rep. 113 b ; Bank of England *v.* Morice (1734), Kel. W. 165 ; Arden *v.* Goodacre (1851), 11 C. B. 371. **Mentd.** Brickhead *v.* York (Archbp.) (1617), Hob. 197.

**486.** —— —— **Form of declaration.**] — NORWICH (SHERIFFS) *v.* BRADSHAW (1587), Cro. Eliz. 53 ; 78 E. R. 314.

*Annotation :*—**Refd.** Arden *v.* Goodacre (1851), 11 C. B. 371.

**487.** —— —— **Effect of entry of satisfaction.**]—SALTESTON *v.* PAYNE (1591), Cro. Eliz. 237 ; 78 E. R. 493.

**488.** —— —— **Prisoner taken out of jurisdiction by under-bailiff.**]—SCAVAGE *v.* BEAUCHAMP (1593), Cro. Eliz. 293 ; 78 E. R. 547.

**489.** —— **By bailiff.**]—ATTERTON *v.* HARWARD (1594), Cro. Eliz. 349 ; 78 E. R. 597.

*K. Rescue.*

*See, generally*, CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

**490. Liability of rescuers to action.**]—MAY *v.* PROBY (1617), Cro. Jac. 419 ; 3 Bulst. 198 ; 1 Roll. Rep. 388 ; 79 E. R. 358 ; *sub nom.* MAY *v.* LONDON (VISCOUNT), Moore, K. B. 852.

*Annotations :*—**Distd.** Crompton *v.* Ward (1720), 11 Mod. Rep. 346. **Refd.** Hodges *v.* Marks (1618), Cro. Jac. 485 ; Hill *v.* Montague (1675), Freem. K. B. 409 ; Howden *v.* Standish (1848), 6 C. B. 504. **Mentd.** Hill *v.* Bigge (1841), 3 Moo. P. C. C. 465.

**491.** —— **Who may sue—Arrest under warrants of several creditors.**]—HODGES *v.* MARKS (1618), Cro. Jac. 485 ; 79 E. R. 414.

*Annotations :*—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Mentd.** Layton *v.* Grindall (1709), 2 Salk. 643.

**492.** —— —— **Any person damnified.**]—CONGHAM'S CASE (1629), Hut. 98 ; 123 E. R. 1127.

**493. Liability of rescuers to attachment.**]—MAY *v.* PROBY, No. 490, *ante*.

**494.** ——.] — R. *v.* DUNBARR (1724), 8 Mod. Rep. 240 ; 88 E. R. 172.

**495.** ——.] — GREGORY *v.* ONSLOW (1772), Lofft, 35 ; 98 E. R. 519.

**496.** —— **Necessity for return to writ.**]—ANON. (1705), 2 Salk. 586 ; 91 E. R. 492.

*Annotation :*—**Refd.** Blackwell *v.* Tatlow (1833), Coop. *temp.* Brough. 186.

**497.** —— ——.]—SHEATHER *v.* HOLT (1722), 1 Stra. 531 ; 93 E. R. 681.

*Annotation :*—**Refd.** Blackwell *v.* Tatlow (1833), Coop. *temp.* Brough. 186.

**498.** —— ——.]—MYER *v.* YELLOP (1725), 8 Mod. Rep. 342 ; 88 E. R. 245.

**499. Whether defence to action against sheriff for escape.**]—MAY *v.* PROBY, No. 490, *ante*.

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**PART V. SECT. 6, SUB-SECT. 7.—J. (j).**

**485 i.** *Liability to action—By sheriff.*]—Where a sheriff suffers a voluntary escape, he cannot afterwards sue the debtor for the amount which he has had to pay for his escape.—RUTTAN *v.* ASHFORD (1841), 6 O. S. 280.—**CAN.**

m. —— *By bailiff.*] — SUMNER *v.* KIRKPATRICK & CAMPBELL (1853), 10 U. C. R. 483.—**CAN.**

n. *Liability of sureties of prisoner to action—By sheriff.*]—A sheriff may sue bail to the limits for the escape of a debtor before he has been sued or paid the money for which the debtor was in execution.—RUTTAN *v.* WILSON (1839), 1 Ont. Dig. 395.—**CAN.**

o. —— ——.]—CAMERON *v.* McLEOD (1840), 1 Ont. Dig. 392.—**CAN.**

p. —— —— *Right of sheriff to recover costs of action by execution creditor.*]—CORBETT (SHERIFF) *v.* LAKE (1849), 5 U. C. R. 454.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—K.**

**496 i.** *Liability of rescuers to attachment—Necessity for return to writ.*]—An attachment for a rescue not granted without a return from the sheriff of the rescue.—HAMMOND *v.* COSGRAVE (1829), 2 Ir. L. Rec. 1st ser. 471.—**IR.**

*Sect. 6.—Execution of process: Sub-sect. 7, K., L. & M. (a), (b) & (c); sub-sect. 8, A. & B. (a), (b), (c), (d), (e) & (f) i.]*

**500.** ——.] — CROMPTON *v.* WARD (1721), 11 Mod. Rep. 346; 1 Stra. 429; 88 E. R. 1081.

*Annotation :*—**Consd.** Howden *v.* Standish (1848), 6 C. B. 504.

*L. Failure to Arrest.*

**501. Liability of sheriff to action for damages.**]—BECKFORD *v.* MONTAGUE (1796), 2 Esp. 474; 170 E. R. 425, N. P.

**502.** —— **Pleadings.**] — RANDELL *v.* WHEBLE (1839), 10 Ad. & El. 719; 2 Per. & Dav. 602; 9 L. J. Q. B. 254; 113 E. R. 272.

*Annotation :*—**Refd.** Wintle *v.* Freeman (1841), 1 Gal. & Dav. 93.

**503.** —— ——.] — WILLIAMS *v.* GRIFFITH (1849), 3 Exch. 584; 6 Dow. & L. 449; 18 L. J. Ex. 195; 13 L. T. O. S. 164; 13 J. P. 397; 154 E. R. 978.

**504.** —— **Whether proof of damage necessary.**] —BARKER *v.* GREEN (1824), 2 Bing. 317; 9 Moore, C. P. 584; 3 L. J. O. S. C. P. 3; 130 E. R. 327.

*Annotations :*—**Distd.** Brown *v.* Jarvis (1836), 2 Gale, 97. **Dbtd.** Williams *v.* Mostyn (1838), 4 M. & W. 145. **Distd.** Wylie *v.* Birch (1843), 4 Q. B. 566.

**505.** —— ——.]—BROWN *v.* JARVIS (1836), 1 M. & W. 704; 5 Dowl. 281; 2 Gale, 97; Tyr. & Gr. 1033; 5 L. J. Ex. 271; 150 E. R. 617.

*Annotations :*—**Distd.** Williams *v.* Mostyn (1838), 1 Horn & H. 217. **Apld.** Randell *v.* Wheble (1839), 10 Ad. & El. 719.

**506.** —— —— **Arrest on mesne process.**]—CURLING *v.* EVANS (1841), 10 L. J. C. P. 320.

**507.** —— —— **Arrest on final process.**]—CLIFTON *v.* HOOPER (1844), 6 Q. B. 468; 14 L. J. Q. B. 1; 4 L. T. O. S. 92; 8 Jur. 958; 115 E. R. 175.

*Annotations :*—**Distd.** Hobson *v.* Thellusson (1867), 8 B. & S. 476. **Mentd.** Pryce *v.* Belcher (1847), 4 C. B. 866.

**508.** —— **Measure of damages.**] — R. *v.* DEVON (SHERIFF) (1830), 1 B. & Ad. 159; 8 L. J. O. S. K. B. 385; 109 E. R. 746.

**509.** —— ——.] — CLIFTON *v.* HOOPER, No. 507, *ante*.

**510.** —— —— **Action for not arresting & for escape.**]—WILLIAMS *v.* GRIFFITH, No. 503, *ante*.

**511.** —— **Defence — Defendant exempt from arrest.**] — MIDDLESEX'S (SHERIFF) CASE (1706), 2 Ld. Raym. 1246; 92 E. R. 321.

**512.** —— —— ——.]—ADAMS *v.* OSBALDESTON (1832), 3 B. & Ad. 489; 1 L. J. K. B. 163; 110 E. R. 177.

**513.** —— —— **Failure to supply description.**]—DYKE *v.* DUKE (1838), 4 Bing. N. C. 197; 1 Arn. 11; 5 Scott, 536; 7 L. J. C. P. 75; 2 Jur. 65; 132 E. R. 764.

**514.** —— —— **Discharge on ground of invalidity of writ—Arrest on prior invalid writ.**]—HOOPER *v.* LANE, No. 86, *ante*.

**515.** —— **Costs.**] — GUEST *v.* ELWES (1837), 2 Nev. & P. K. B. 230; Will. Woll. & Dav. 499; 6 L. J. K. B. 225; 1 Jur. 452.

*M. Wrongful Arrest.*

*(a) In General.*

*See, generally*, TRESPASS.

**516. When action lies—Sheriff with notice of supersedeas.**]—PRINCE *v.* ALLINGTON (1603), Cro. Eliz. 918; 78 E. R. 1139.

*Annotations :*—**Refd.** Bessey *v.* Lambert (1682), T. Raym. 467; Wolf *v.* Davison (1695), 1 Salk. 319.

**517.** —— **Ex-sheriff failing to deliver supersedeas to new sheriff.**]—CALTHROP *v.* PHILLIPS (1677), 2 Mod. Rep. 217; 86 E. R. 1035.

**518.** —— **Arrest by bailiff after return of writ.**] —ANON. (1702), 7 Mod. Rep. 52; 87 E. R. 1089.

**519.** —— **Continuance of arrest—After tender of sufficient bail.**]—SMITH *v.* HALL (1675), 2 Mod. Rep. 31; 86 E. R. 924.

—— **Defendant exempt from arrest.**] — *See* Sub-sect. 8, *post*.

—— **Arrest of wrong person.**]—*See* Sub-sect. 7, M. *(b)*, *post*.

**520. Evidence—Warrant directed to sheriff.**]—SLACK *v.* BRANDER (1793), 1 Esp. 42; 170 E. R. 273, N. P.

**521. New trial — When granted.**]—PRICE *v.* PEEK (1834), 1 Bing. N. C. 380; 1 Scott, 205; 4 L. J. C. P. 76; 131 E. R. 1164.

**522. Effect of illegal arrest—Whether privileged from arrest on valid warrant.**] — COLLINS *v.* YEWENS, No. 326, *ante*.

*(b) Arrest of Wrong Person.*

*See, generally*, TRESPASS.

**523. Liability of sheriff to action for damages.**] —ANON. (undated), Keil. 129; 72 E. R. 298.

**524.** —— **Process issued in wrong name.**]—CARRIDGE *v.* LAUTOUR (1828), 7 L. J. O. S. K. B. 33.

**525.** —— ——.]—BRYANT *v.* CLUTTON (1836), 1 M. & W. 408; 2 Gale, 50; Tyr. & Gr. 843; 5 L. J. Ex. 182; 150 E. R. 493.

—— —— *See* EXECUTION, Vol. XXI., pp. 420, 421, Nos. 26–35.

**526. Wrongful arrest due to misrepresentation of attorneys—Action by sheriff against attorneys.**]—COLLINS *v.* EVANS (1844), 5 Q. B. 820; Dav. & Mer. 669; 13 L. J. Q. B. 180; 2 L. T. O. S. 425; 8 Jur. 345; 114 E. R. 1459, Ex. Ch.; *revsg.* S. C. *sub nom.* EVANS *v.* COLLINS (1843), 5 Q. B. 804.

*Annotations :*—**Distd.** Childers *v.* Wooler (1859), 2 E. & E. 287. **Refd.** Sheffield Corpn. *v.* Barclay, [1905] A. C. 392. **Mentd.** Barley *v.* Walford (1846), 9 Q. B. 197; Freeman *v.* Cooke (1848), 18 L. J. Ex. 114; Evans *v.* Edmonds (1853), 1 C. L. R. 653; Thom *v.* Bigland (1853), 8 Exch. 725; Collen *v.* Wright (1858), 4 Jur. N. S. 357; Leather *v.* Simpson (1871), 40 L. J. Ch. 177; Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34; Derry *v.* Peek (1889), 14 App. Cas. 337; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94.

**527. Wrongful arrest due to misrepresentation of party arrested—Subsequent notice to sheriff of misrepresentation.**] — DUNSTON *v.* PATERSON (1857), 2 C. B. N. S. 495; 26 L. J. C. P. 267; 29

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**PART V. SECT. 6, SUB-SECT. 7.—L.**

q. *Liability of sheriff to action—Whether proof of damage necessary.*]—A sheriff is not liable to an action for neglecting to arrest a party on mesne process, unless pltf. has sustained some damage by his neglect. If the debt for which the process issued is barred by Stat. Limitations, the sheriff is not liable for neglecting to execute.—CURRAN *v.* BECKWITH (1856), 8 N. B. R. (3 All.) 365.—**CAN.**

r. —— *Defence — Order by execution creditor not to arrest.*]—BURNS *v.* DONELLY & KAY (1837), 5 O. S. 495.—**CAN.**

t. —— —— *Absconding debtor — Notice of return not shown.*]—Where the sheriff goes to the known residence of a debtor & *bonâ fide* searches for him to make an arrest, without success, because the debtor has absconded, he had done all that is required, & he is not liable for not arresting after the debtor's return unless it be shown that he had notice of such return.—RIGNEY *v.* RUTTAN (1838), 5 O. S. 707.—**CAN.**

a. —— —— *Debtor not to be found.*]—NELSON *v.* BABY (1856), 14 U. C. R. 235.—**CAN.**

b. —— —— ——.]—THORPE *v.* MCLEAN (1876), 11 N. S. R. (2 R. & G.) 200.—**CAN.**

c. —— —— *Defendant conforming with order for which warrant issued.*]—BURNHAM *v.* HALL (1879), 44 U. C. R. 297.—**CAN.**

d. *Attachment for contempt.*]—WARD *v.* SKINNER (1834), 3 O. S. 235.—**CAN.**

**PART V. SECT. 6, SUB-SECT. 7.—M. (a).**

e. *Arrest on defective warrant.*] — An informality in the warrant of the bailiff is not ground to set the arrest under it aside, especially where the writ itself is not produced.—HUSSEY *v.* LINK (1839), 1 Ont. Dig. 210.—**CAN.**

L. T. O. S. 199; 22 J. P. 23; 3 Jur. N. S. 982; 140 E. R. 509.

*(c) Justification.*

*See, generally,* TRESPASS.

**528. What amounts to — Warrant.**] — BATEMAN *v.* WOODCOCK (1615), 1 Roll. Rep. 221; Cro. Jac. 372; 81 E. R. 446.

**529.** ——— ———.] — GROENVELT *v.* BURWELL (1699), 1 Ld. Raym. 454; 3 Salk. 354; 12 Mod. Rep. 386; 91 E. R. 1202.

*Annotations:*—**Consd.** Lucas *v.* Nockells (1833), 10 Bing. 157. **Refd.** Crowther *v.* Ramsbottom (1798), 7 Term Rep. 654; Garnett *v.* Ferrand (1827), 6 B. & C. 611; Ridgway *v.* Hungerford Market Co. (1835), 4 Nev. & M. K. B. 797; R. *v.* Thomas (1838), 8 Ad. & El. 183; Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Phillips *v.* Whitsed (1860), 2 E. & E. 804; Ebon *v.* Neville (1861), 10 W. R. 6; Kemp *v.* Neville (1861), 10 C. B. N. S. 523; R. *v.* Saddler's Co. (1863), 10 H. L. Cas. 404; Wildes *v.* Russell (1866), L. R. 1 C. P. 722; Grimwood *v.* Moss (1872), L. R. 7 C. P. 360; Serjeant *v.* Nash (1903), 89 L. T. 112. **Mentd.** R. *v.* Despard (1798), 7 Term Rep. 736; Bristol Grdns. *v.* Wait (1834), 1 Ad. & El. 264; Baillie *v.* Kell (1838), 4 Bing. N. C. 638; Lindsay *v.* Leigh (1848), 12 Jur. 286; R. *v.* Hallett (1851), 5 Cox, C. C. 238.

**530.** ——— ———.]—DAVIES *v.* FLETCHER (1853), 2 E. & B. 271; Saund. & M. 137; 1 C. L. R. 1025; 22 L. J. Q. B. 429; 21 L. T. O. S. 127; 17 J. P. 679; 17 Jur. 894; 1 W. R. 367; 118 E. R. 769.

*Annotations:*—**Refd.** Kimpton *v.* L. & N. W. Ry., *Ex p.* Kimpton (1854), 18 J. P. 617; *Re* Swann *v.* Dakins, *Ex p.* Dakins (1855), 24 L. J. C. P. 131.

**531.** ——— ——— **Previously issued to another sheriff's officer—Procured after arrest.**]—COLLINS *v.* YEWENS, No. 326, *ante.*

**532.** ——— ——— **Court not properly described.**]—CARRATT *v.* MORLEY (1841), 1 Q. B. 18; 1 Gal. & Dav. 275; 10 L. J. Q. B. 259; 6 Jur. 259; 113 E. R. 1036.

*Annotations:*—**Distd.** Coomer *v.* Latham (1847), 16 M. & W. 713. **Refd.** Green *v.* Elgie (1843), 5 Q. B. 99; Dews *v.* Riley (1851), 11 C. B. 434; R. *v.* Davies (1861), 8 Cox, C. C. 486; Pease *v.* Chaytor (1863), 3 B. & S. 620; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; Aspey *v.* Jones (1884), 48 J. P. 613; Saunders *v.* Swansea Finance Co. & Horne (1905), 21 T. L. R. 317.

**533.** ——— **Process—Although issue irregular.**]—PRINSOR'S CASE (1641), Cro. Car. 602; 79 E. R. 1118.

**534.** ——— ——— ———.]—OSBORNE *v.* BROOKHOUSE (1692), 3 Lev. 93; 83 E. R. 594.

**535.** ——— ——— ———.]—KING *v.* HARRISON (1812), 15 East, 612; 104 E. R. 974.

**536.** ——— **Attachment.**] — SMITH *v.* EGGINTON (1837), 7 Ad & El. 167; 6 Dowl. 38; 2 Nev. & P K. B. 143; Will. Woll. & Dav. 532; 6 L. J. K. B. 206; 1 Jur. 607; 112 E. R. 434.

*Annotations:*—**Distd.** Watson *v.* Bodell (1845), 14 M. & W. 57; Moone *v.* Rose (1869), L. R. 4 Q. B. 486. **Refd.** Ames *v.* Waterlow (1869), L. R. 5 C. P. 53.

**537.** ——— **Committal order.**] — DAVIES *v.* FLETCHER, No. 530, *ante.*

**538.** ——— ———.]—BROWN *v.* WATSON (1871), 23 L. T. 745.

**539.** ——— ———.]—TURLEY *v.* DAW (1906), 94 L. T. 216; 22 T. L. R. 231.

*Annotation:*—**Consd.** Freeborn *v.* Leeming, [1926] 1 K. B. 160.

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SUB-SECT. 8.—PRIVILEGE FROM ARREST.

*A. In General.*

**540. Where question of privilege doubtful—What remedy available for party arrested.**] — LUNTLEY *v.* BATTINE (1818), 2 B. & Ald. 234; 106 E. R. 353.

*Annotations:*—**Consd.** Tapley *v.* Battine (1822), 1 Dow. & Ry. K. B. 79. **Apld.** Leslie *v.* Disney (1834), 1 Cr. M. & R. 578. **Distd.** Byrn *v.* Dibdin (1835), 5 Tyr. 357. **Refd.** Geath *v.* Atkinson (1838), 7 L. J. Ex. 314; Magnay *v.* Burt (1843), 5 Q. B. 381.

**541. Discharge on ground of privilege—Re-arrest on expiration of privilege.**] — TOWERS *v.* NEWTON (1841), 1 Q. B. 319; 4 Per. & Dav. 625; Woll. 149; 10 L. J. Q. B. 106; 5 Jur. 1035; 113 E. R. 1153.

*Annotation:*—**Distd.** Greenshields *v.* Harris (1842), 9 M. & W. 774.

**542.** ——— ———.] — REYNOLDS *v.* NEWTON (1841), 1 Gal. & Dav. 153.

**543. Payment by privileged defendant of amount indorsed on writ to obtain discharge—Writ remaining unexecuted in sheriff's hands—Return of writ.**] —WILLAMS *v.* WEBB (1843), 2 Dowl. N. S. 904; 12 L. J. C. P. 137; 7 Jur. 155.

*Annotation:*—**Refd.** Richardson *v.* Trundle (1860), 8 C. B. N. S. 474.

**544. Costs of privileged defendant.**]—DODD *v.* HOLBROOK, *Re* PITTMAN (1865), 35 L. J. Ch. 175; 13 L. T. 426; 11 Jur. N. S. 969; 14 W. R. 125.

*Annotation:*—**Refd.** *Re* Freston (1883), 52 L. J. Q. B. 545.

*B. Persons Privileged from Arrest.*

*(a) Members of Royal Household.*

*See* CONSTITUTIONAL LAW, Vol. XI., pp. 520, 521, Nos. 254–271.

*(b) Ambassadorial and Consular Persons.*

*See* CONSTITUTIONAL LAW, Vol. XI., pp. 536 *et seq.*

*(c) Peers.*

*See* PEERAGES, Vol. XXXVII., pp. 36–38, Nos. 76–101.

*(d) Members of Parliament.*

*See* PARLIAMENT, Vol. XXXVI., pp. 291 *et seq.*

**Duration of privilege.**]—*See* PARLIAMENT, Vol. XXXVI., pp. 289, 290, Nos. 386, 394.

*(e) Lunatics.*

**545. Insane when arrested.**]—KERNOT *v.* NORMAN (1788), 2 Term Rep. 390; 100 E. R. 210.

**546.** ———.] — NUTT *v.* VERNEY (1790), 4 Term Rep. 121; 100 E. R. 928.

**547.** ———.] — STEEL *v.* ALAN (1801), 2 Bos. & P. 362; 126 E. R. 1328.

**548. Lunacy supervening after arrest—Whether lunatic discharged.**] — KERNOT *v.* NORMAN, No. 545, *ante.*

**549.** ——— ———.]—IBBOTSON *v.* GALWAY (LORD) (1795), 6 Term Rep. 133; 101 E. R. 474.

*(f) Persons Attending Judicial Proceedings.*

i. *In General.*

**550. General rule—Privileged.**]—R. *v.* FEILDING 1685), Comb. 29; 90 E. R. 323.

**551.** ——— ———.]—PULTON *v.* FARRAR (1729), 1 Barn. K. B. 251; 94 E. R. 172.

**552.** ——— ———.]—RICKETTS *v.* GURNEY (1819), 1 Chit. 682; 7 Price, 699; 146 E. R. 1106.

*Annotations:*—**Consd.** Selby *v.* Hills (1832), 1 Moo. & S. 253. **Refd.** Spencer *v.* Newton (1837), 1 Nev. & P. K. B. 818.

**553. Application to Bankruptcy Court.**] — WILLINGHAM *v.* MATTHEWS (1815), 6 Taunt. 356; 2 Marsh. 57; 128 E. R. 1072.

*Annotations:*—**Apld.** Selby *v.* Hills (1832), 8 Bing. 166. **Refd.** Newton *v.* Constable (1841), 2 Q. B. 157.

———.]—*See, also,* Nos. 615–620, *post.*

**554. Application to police court.**]—MOUNTAGUE *v.* HARRISON (1857), 3 C. B. N. S. 292; 27 L. J. C. P. 24; 6 W. R. 43; 140 E. R. 753; *sub nom.* MONTAGUE *v.* HARRISON, 4 Jur. N. S. 29; 30 L. T. O. S. 135; 22 J. P. 86.

*Annotations:*—**Apld.** Gilpin *v.* Cohen (1869), L. R. 4 Exch. 131. **Refd.** McGeath *v.* Geraghty (1866), 15 W. R. 127.

**Application to arbitration proceedings.**] — *See* Nos. 608–614, *post.*

*Sect. 6.—Execution of process: Sub-sect. 8, B. (f) ii., iii., iv., v. & vi.]*

ii. *Barristers.*

**555. General rule — Privileged.**] — LUNTLY *v.* —— (1833), 1 Cr. & M. 579 ; 2 L. J. Ex. 185 ; 149 E. R. 530 ; *sub nom.* LUNTLY *v.* NATHANIEL, 2 Dowl. 51.

*Annotations :*—**Expld.** Newton *v.* Constable (1841), 2 Q. B. 157. **Refd.** Strong *v.* Dickenson (1836), 1 M. & W. 488.

**556.** —— ——.] — NEWTON *v.* CONSTABLE (1841), 2 Q. B. 157 ; 9 Dowl. 933 ; 1 Gal. & Dav. 408 ; 10 L. J. Q. B. 349 ; 6 Jur. 317 ; 114 E. R. 62.

*Annotations :*—**Refd.** Aga Kurboolie Mahomed *v.* R. (1843), 4 Moo. P. C. C. 239 ; Burt *v.* Magnay (1843), 12 L. J. Q. B. 225.

**557. Condition precedent to application of privilege—Proof that person has business at court.**] —STILES *v.* MEAD (1727), 2 Stra. 738 ; 93 E. R. 818.

*Annotation :*—**Refd.** Davidson *v.* Chilman (1834), 1 Bing. N. C. 297.

**558. Barrister attending circuit—Not briefed at towns attended.**] — OXFORDSHIRE SHERIFF CASE (1816), 2 Car. & Kir. 200

*Annotation :*—**Refd.** *Re* Kent Sheriff (1846), 2 Car. & Kir. 197.

**559. Going to & from court—Deviation—Going into shop—Reasonable time.**] — LUNTLY *v.* ——, No. 555, *ante*.

**560.** ——.] — NEWTON *v.* HARLAND (1839), 8 Scott, 70 ; 3 Jur. 679.

*Annotation :*—**Mentd.** Walker *v.* Lumb (1840), 4 Jur. 1014.

**561. Attending cause as party interested.**] — ANON. (1835), 1 Y. & C. Ex. 331 ; 4 L. J. Ex. Eq. 46 ; 160 E. R. 134.

**562. —— In expectation of pronouncement of judgment.**]—ANON. (1839), 9 L. J. C. P. 176.

**563. Necessity for retainer before attendance—Barrister attending petty sessions.**]—NEWTON *v.* CONSTABLE, No. 556, *ante*.

iii. *Parties.*

**564. General rule — Privileged.**] — LEA'S CASE (1586), Gouldsb. 33 ; 75 E. R. 976.

**565.** —— ——.] — MEYNEL & STERLING *v.* COOPER (1661), 1 Rep. Ch. 217 ; 21 E. R. 554.

*Annotation :*—**Refd.** *Re* Newton (1837), Donnelly, 178.

**566.** —— ——.]—WALKER *v.* WEBB, No. 302, *ante*.

**567.** —— ——.]—A.-G. *v.* SKINNERS' CO., *Ex p.* WATKINS (1837), 8 Sim. 377 ; Coop. Pr. Cas. 1 ; 6 L. J. Ch. 225 ; 1 Jur. 236 ; 59 E. R. 150.

**568.** —— —— **Barrister personally concerned.**] —NEWTON *v.* HARLAND, No. 560, *ante*.

**569. Whether privileged on way to or from court.**]—LEA'S CASE, No. 564, *ante*.

**570.** ——.]—ALISBURY *v.* TROUGHTON (1635), 1 Rep. Ch. 92 ; 21 E. R. 517.

*Annotation :*—**Refd.** *Re* Newton (1837), Donnelly, 178.

**571.** ——.] — SOLOMON *v.* UNDERHILL, No. 303, *ante*.

**572.** ——.] — NEWTON *v.* HARLAND, No. 560, *ante*.

**573.** —— **Leaving court after lodging complaint—Vexatious complaint.**]—ANON. (1706), 11 Mod. Rep. 79 ; 88 E. R. 906.

*Annotations :*—**Refd.** Cameron *v.* Lightfoot (1777), 2 Wm. Bl. 1190 ; Magnay *v.* Burt (1843), 5 Q. B. 381 ; Mountague *v.* Harrison (1857), 6 W. R. 43.

**574. Deviation.**]—LIGHTFOOT *v.* CAMERON (1776), 2 Wm. Bl. 1113 ; 96 E. R. 658 ; *subsequent proceedings, sub nom.* CAMERON *v.* LIGHTFOOT (1778), 2 Wm. Bl. 1190.

*Annotations :*—**Expld.** Strong *v.* Dickenson (1836), 1 M. & W. 488. **Refd.** Selby *v.* Hills (1832), 8 Bing. 166 ; Pitt *v.* Coombes (1834), 5 B. & Ad. 1078 ; Williams *v.* Webb (1842), 5 Scott, N. R. 898 ; Andrews *v.* Martin (1862), 12 C. B. N. S. 371.

**575.** —— ——.] — PITT *v.* COOMES (1834), 5 B. & Ad. 1078 ; 110 E. R. 1091 ; *sub nom.* PITT *v.* COOMBS, *Re* PITT, 3 Nev. & M. K. B. 212 ; *subsequent proceedings* (1835), 2 Ad. & El. 459.

*Annotations :*—**Expld.** Strong *v.* Dickenson (1836), 1 M. & W. 488. **Apld.** Williams *v.* Webb (1842), 5 Scott, N. R. 898.

**576.** —— **Leaving master's office.**] — FRANKLYN *v.* COLQUHOUN (1816), 1 Madd. 580 ; 56 E. R. 213.

*Annotation :*—**Refd.** *Re* Newton (1837), Donnelly, 178.

**577.** —— **Leaving registrar's office.**] — *Ex p.* BURT (1842), 2 Mont. D. & De G. 666, Ct. of R.

**578. Party preparing for commission to examine witnesses.**]—SMITH *v.* HOLMAN (1668), 2 Rep. Ch. 22 ; 21 E. R. 605.

**579. Party waiting in vicinity of court in expectation of hearing.**]—CHILDERSTON *v.* BARRETT (1809), 11 East, 439 ; 103 E. R. 1073.

*Annotations :*—**Distd.** Spencer *v.* Newton, Lane *v.* Newton (1837), 6 Ad. & El. 623. **Apld.** Anon. (1839), 9 L. J. C. P. 176. **Refd.** *Re* Newton (1837), Donnelly, 178 ; Walker *v.* Lumb (1840), 4 Jur. 1014.

**580. Husband or wife of party.**]—*Re* BRITTEN, *Ex p.* BRITTEN (1840), 1 Mont. D. & De G. 278 ; 9 L. J. Bcy. 38 ; 4 Jur. 943, Ct. of R.

**581. Party attending registrar's office to hear decree.**]—NEWTON *v.* ASKEW (1848), 6 Hare, 319 ; 18 L. J. Ch. 42 ; 13 Jur. 186 ; 67 E. R. 1188 ; *sub nom.* NEWTON *v.* ASKEW, *Re* NEWTON, 11 L. T. O. S. 326.

**582. Party coming to London for hearing — Long before hearing—Privileged only from time of appearance of cause in paper.**]—PERSSE *v.* PERSSE (1856), 5 H. L. Cas. 671 ; 27 L. T. O. S. 224 ; 10 E. R. 1064, H. L.

**Barrister attending court as party interested.**] — *See* Nos. 561, 562, *ante*.

**Persons accused in criminal cases.**]—*See* Nos. 598-603, *post*.

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**PART V. SECT. 6, SUB-SECT. 8.—B. (f) iii.**

**574 i.** *Whether privileged on way to or from court—Deviation.*]—A gentleman residing in Dublin will only be protected while going to or returning from ct. ; but a gentleman residing at a distance, & only temporarily in town, will be protected when going to or returning from ct., & also in his lodgings ; but he is not to be rambling about the city. —*Re* HUNT (1850), 15 L. T. O. S. 526. —**IR.**

**f.** —— *Leaving court after assisting solicitor.*]—A party in a suit who was arrested under an execution while returning home from ct. where he had been assisting his solr. in the discharge of duties, which were the proper business of his solr. is not privileged from arrest.—FLATTERY *v.* ANDERSON (1844), 6 I. Eq. R. 518.—**IR.**

**g.** *Party temporarily in town—To file bill of review.*]—Suitor's privilege does not extend to the case of coming to town to file a bill of review or put in an answer ; but suitor or guardian of minor coming to pass an account in the master's office, as it might require his personal attendance will be discharged from arrest. — *Re* ODELL'S (MINORS), CRONE *v.* ODELL, ODELL *v.* ODELL (1819), 2 Mol. 525.—**IR.**

**h.** —— *For hearing of cause—Arrest on way to solicitor's office.*]—A principal deft. having come to town for the hearing of a cause, & having been on his way from his hotel to his solr.'s office arrested under a *capias ad respondendum* :—*Held :* he was privileged & should be discharged, although he had deviated & remained a little for his amusement.—MAHON *v.* MAHON (1840), 2 I. Eq. R. 440.—**IR.**

**k.** —— *To attend master's office.*]—A respondent in a matter who came from the country to attend in the master's office to the letting of lands in his own occupation :—*Held :* privileged from arrest during his stay in town.—LAWLOR *v.* SCOLLARD (1852), 2 I. Ch. R. 146.—**IR.**

**l.** *Right to writ of protection.*]—A writ of protection will not be given to a suitor or a witness, to protect him from arrest in any case, when if arrested he would not be entitled to his discharge without it.—BRIEN *v.* BRIEN (1818), 1 Hog. 34.—**IR.**

iv. *Solicitors.*

**583. Attendance to justify bail.**]—GARDEN *v.* SHEERS (1730), Cooke, Pr. Cas. 60; 125 E. R. 957.

**584. Attending execution of writ of inquiry.**]—PIGOT *v.* CHARLEWOOD (1734), Barnes, 200; Cooke, Pr. Cas. 102; 94 E. R. 875.

**585. Attending taxing master's office.**] — *Re* HOPE (1845), 5 L. T. O. S. 178; 9 Jur. 856.

*Annotation :*—**Distd.** Jones *v.* Marshall (1857), 2 C. B. N. S. 615.

**586. Attendance at county court — Necessity for proof of signature of county court roll.**]—CLUTTERBUCK *v.* HULLS (1846), 4 Dow. & L. 80; 1 Saund. & C. 165; 15 L. J. Q. B. 310; 10 Jur. 1082.

**587. Attendance as professional adviser of bail —Not engaged for either party in cause.**]—JONES *v.* MARSHALL (1857), 2 C. B. N. S. 615; 26 L. J. C. P. 229; 29 L. T. O. S. 161; 3 Jur. N. S. 916; 5 W. R. 623; 140 E. R. 558.

**588. Attending police court — Proceedings consisting of preliminary inquiry.**] — *Re* FRESTON (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804, C. A.

*Annotations :*—**Folld.** *Re* Dudley (1883), 12 Q. B. D. 44. **Apld.** Harvey *v.* Harvey (1884), 26 Ch. D. 644; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190. **Consd.** *Re* Grey, [1892] 2 Q. B. 440; Seldon *v.* Wilde, [1911] 1 K. B. 701. **Refd.** *Re* Wickham, Marony *v.* Taylor (1887), 35 Ch. D. 272; *Re* Wray (1887), 36 Ch. D. 138; *Re* Evans, Evans *v.* Norton, [1893] 1 Ch. 252; Seaward *v.* Paterson (1897), 66 L. J. Ch. 267; Haydon *v.* Haydon (1911), 104 L. T. 477; Scott *v.* Scott, [1913] A. C. 417.

**Attending arbitration proceedings.**]—*See* No. 611, *post.*

**589. Going to & from court—Taxing master's office.**]—*Re* HOPE, No. 585, *ante.*

**590. —— Bankruptcy Court.**] — EYRE *v.* BARROW (1858), 27 L. J. Ch. 784; *sub nom.* EYRE *v.* BARROW, *Re* BARROW, 31 L. T. O. S. 281; 4 Jur. N. S. 652; 6 W. R. 767.

*Annotation :*—**Distd.** *Re* Freston (1883), 11 Q. B. D. 545.

**591. —— Judge's chambers.**] — *Re* JEWITT (1864), 33 Beav. 559; 4 New Rep. 315; 33 L. J. Ch. 730; 10 L. T. 556; 28 J. P. 628; 10 Jur. N. S. 814; 12 W. R. 945; 55 E. R. 486.

*Annotation :*—**Expld.** *Re* Freston (1883), 11 Q. B. D. 545.

**592. —— Deviation—To attend to professional business.**]—STRONG *v.* DICKENSON (1836), 1 M. & W. 488; 2 Gale, 83; Tyr. & Gr. 683; 5 L. J. Ex. 231; 150 E. R. 527.

**593. —— —— Must be substantial.**] — WILLIAMS *v.* WEBB (1842), 2 Dowl. N. S. 660; 5 Scott, N. R. 898; 12 L. J. C. P. 89.

**594. —— —— Proof of deviation.**]—A.-G. *v.* LEATHER SELLERS' CO. (1844), 7 Beav. 157; 2 L. T. O. S. 306; 49 E. R. 1023.

*Annotation :*—**Distd.** *Re* Freston (1883), 11 Q. B. D. 545.

**595. —— —— Slight deviation—For necessary purposes.**]—JONES *v.* ROSE (1847), 9 L. T. O. S. 330; *sub nom. Re* N., JONES *v.* ROSE, 11 Jur. 379.

**596. —— —— For purposes of refreshment—Purpose to deviate formed before arrest.**]—JONES *v.* ROSE, No. 595, *ante.*

**597. —— —— Necessity for proof of good cause for deviation.**]—JONES *v.* ROSE, No. 595, *ante.*

**Solicitors apart from attendance at court.**]—*See* Nos. 632–637, *post.*

**Privilege of solicitor's clerk.**]—*See* No. 638, *post*

v. *Witnesses.*

*See* EVIDENCE, Vol. XXII., pp. 442 *et seq.*

**Witnesses at arbitration proceedings.**] — *See* ARBITRATION, Vol. II., p. 433, Nos. 832–834.

**Witnesses at bankruptcy proceedings.**] — *See* BANKRUPTCY, Vol. IV., p. 244, No. 2312; Vol. V., pp. 610, 620, Nos. 5478–5483, 5578, 5579.

vi. *Persons Accused of Criminal Offences.*

**598. Discharged from legal custody—Returning home.**]—ANON. (1832), 1 Dowl. 157.

*Annotations :*—**Folld.** Goodwin *v.* Lordon (1834), 1 Ad. & El. 378; Hare *v.* Hyde (1851), 15 Jur. 315. **Refd.** Mountague *v.* Harrison (1857), 3 C. B. N. S. 292.

**599. —— ——.**]—GOODWIN *v.* LORDON (1834), 1 Ad. & El. 378; 3 Nev. & M. K. B. 879; 110 E. R. 1251.

*Annotations :*—**Refd.** Mountague *v.* Harrison (1857), 3 C. B. N. S. 292; Gilpin *v.* Cohen (1869), L. R. 4 Exch. 131.

**600. —— ——.**]—JACOBS *v.* JACOBS (1835), 3 Dowl. 675.

*Annotations :*—**Consd.** *Re* Douglas (1842), 3 Q. B. 825. **Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Mountague *v.* Harrison (1857), 3 C. B. N. S. 292.

**601. —— ——.**] —HARE *v.* HYDE (1851), 16 Q. B. 394; 20 L. J. Q. B. 185; 16 L. T. O. S. 462; 15 J. P. 580; 15 Jur. 315; 117 E. R. 930.

*Annotations :*—**Consd.** Mountague *v.* Harrison (1857), 3 C. B. N. S. 292. **Distd.** Gilpin *v.* Cohen (1869), L. R. 4 Exch. 131.

**602. Proceeding to court to move for new trial.**] —SHAPLAND *v.* HUNTER (1838), 7 L. J. C. P. 224.

**603. Remanded on bail — Returning home.**] — GILPIN *v.* COHEN & BENJAMIN (1869), L. R. 4 Exch. 131; 38 L. J. Ex. 50; 19 L. T. 830; 17 W. R. 885.

**Privilege from arrest of person illegally in custody.**]—*See* No. 622, *post.*

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**PART V. SECT. 6, SUB-SECT. 8.—B. (f) iv.**

m. *General rule.*]—If a solr. be *bonâ fide* attending a motion or other proceeding in ct. for his client, he is privileged from arrest.—*Re* FITTON, LONGFIELD *v.* CARPENTER (1839), 1 I. Eq. R. 349.—**IR.**

**592** i. *Going to & from court—Deviation—To attend professional business.*]—O, a party & solr. in the cause, having been in attendance in the master's office upon a summons in the cause, left the office & was arrested on a *ca. sa.* near C., which was out of the direction of & beyond his residence :—*Held :* the deviation was such as to deprive him of his privilege from arrest. The question in such cases always is whether the person arrested was at the time of his arrest *bonâ fide* engaged in the business he was called on to execute.—*Re* OWEN, HERON *v.* STOKES (1844), 6 I. Eq. R. 125.—**IR.**

n. —— ——.] — A solr. was arrested on the direct way from the Taxing Master's office, but it appeared that before his arrest he had deviated considerably from the direct way :—*Held :* he was not entitled to be discharged.—WALSH *v.* WILSON (1851), 1 I. Ch. R. 610.—**IR.**

o. —— *Country solicitor temporarily in town—Arrest at lodgings after leaving master's office.*]—Solr.'s privilege from arrest not extended to a case where it took place at the town lodgings of a country solr., on his return from the master's office & while preparing certain documents by him directed in the cause; although the cause of his coming to & remaining in town, was his necessary attendance at his client's business in ct.—FOOTE'S CASE (1824), 2 Mol. 530.—**IR.**

p. ——.] — A solr. is privileged from arrest, going to, tarrying at, & returning from ct. whilst he is in attendance on a motion or cause.—*Re* O'NEILL (1837), Sau. & Sc. 78.—**IR.**

q. *Where personal attendance not essential.*]—There is no distinction in respect to privilege whether the business of his client in which he was engaged was such as required the personal attendance of the solr. or might be equally answered by his clerk.—FITZMAURICE'S CASE (1828), 1 Mol. 512.—**IR.**

r. ——.]—The privilege of a solr. from arrest is not confined to those cases only in which his personal presence is indispensable.—*Re* KEANE (1837), Sau. & Sc. 81.—**IR.**

t. ——.]—SALMON *v.* KIERNAN (1837), Sau. & Sc. 83, n.—**IR.**

a. ——.] — A solr. is not bound to keep a clerk, & if in the *bonâ fide* discharge of duties, which might have been transacted by a clerk, he is arrested, he will be, nevertheless, entitled to his privilege.—*Re* AHEARNE (1842), 2 Dr. & War. 141.—**IR.**

b. *Jurisdiction of court to grant writ of protection.*]—The ct. has power to grant a writ of protection from arrest to a solr.—ANON. (1828), 1 Mol. 76.—**IR.**

*Sect. 6.—Execution of process: Sub-sect. 8, B. (f) vii., (g), (h) & (j), & C.; sub-sects. 9 & 10, A.]*

vii. *Other Persons.*

**604. Bail—Attending to justify.**]—RIMMER *v.* GREEN (1813), 1 M. & S. 638; 105 E. R. 238.

**605. Parliamentary agent — Attending appeal.**]—A.-G. *v.* SKINNERS' CO, *Ex p.* WATKINS, No. 567, *ante.*

**606. Person attending before justices to obtain summons.**]—*Ex p.* COBBETT (1857), 7 E. & B. 955; 26 L. J. Q. B. 293; 29 L. T. O. S. 210; 3 Jur. N. S. 665; 5 W. R. 708; 21 J. P. Jo. 436; 119 E. R. 1502.

*Annotation:*—**Distd.** Mountague *v.* Harrison (1857), 3 C. B. N. S. 292.

**607. Deputy coroner — Preparing to hold inquest.**]—*Ex p.* MIDDLESEX DEPUTY CORONER (1861), 6 H. & N. 501; 30 L. J. Ex. 77; 3 L. T. 754; 7 Jur. N. S. 103; 9 W. R. 281.

(*g*) *Persons Attending Arbitrations.*

**608. General rule—Privileged.**]—HETLEY'S CASE (1788), 7 Com. Dig., 112.

*Annotation:*—**Refd.** Arding *v.* Flower (1800), 8 Term Rep. 534.

**609.** —— ——.]—MOORE *v.* BOOTH (1797), 3 Ves. 350; 30 E. R. 1047, L. C.

*Annotation:*—**Apld.** *Re* Jewitt (1864), 33 Beav. 559.

**610.** —— ——.]—SPENCE *v.* STUART (1802), 3 East, 89; 102 E. R. 530.

*Annotations:*—**Distd.** Barclay *v.* Faber (1819), 2 B. & Ald. 743. **Expld.** Bateman *v.* Freston (1861), 3 E. & E. 578. **Refd.** Barrack *v.* Newton, Bicknall *v.* Newton, Williams *v.* Newton (1841), 10 L. J. Q. B. 182; *Re* Freston (1883), 11 Q. B. D. 545.

**611.** —— ——.]—WEBB *v.* TAYLOR (1843), 1 Dow. & L. 676; 13 L. J. Q. B. 24; 2 L. T. O. S. 106; 8 Jur. 39.

**612. Person going to & from arbitration.**] — SPENCE *v.* STUART, No. 610, *ante.*

**613.** —— **Deviation — For purpose connected with action — Reasonable time.**] — RANDALL *v.* GURNEY (1819), 3 B. & Ald. 252; 1 Chit. 679; 106 E. R. 656.

*Annotations:*—**Distd.** Selby *v.* Hills (1832), 1 Moo. & S. 253. **Refd.** Ricketts *v.* Gurney (1819), 7 Price, 699; Webb *v.* Taylor (1843), 13 L. J. Q. B. 24.

**614. Party coming to London to attend—Failing to return home within reasonable time—Through lack of means.**]—SPENCER *v.* NEWTON, LANE *v.* SAME (1837), 6 Ad. & El. 623; 1 Nev. & P. K. B. 818; Will. Woll. & Dav. 122; 6 L. J. K. B. 119; 112 E. R. 239.

(*h*) *Persons Attending Bankruptcy Proceedings.*

**615. Bankrupt.**] — *Ex p.* KING (1802), 7 Ves. 312; 32 E. R. 127.

*Annotations:*—**Apld.** *Re* Britten, *Ex p.* Britten (1840), 9 L. J. Bcy. 38. **Refd.** *Ex p.* Donlevy (1802), 7 Ves. 317; *Re* Biddulph, *Ex p.* Eyre (1841), 6 Jur. 41; *Ex p.* Cobbett (1857), 5 W. R. 708; Mountague *v.* Harrison (1857), 3 C. B. N. S. 292; Ockford *v.* Freston, Chapman *v.* Freston (1861), 6 H. & N. 466; McGeath *v.* Geraghty (1866), 15 W. R. 127.

**616.** —— **Going to & from court—Deviation—Calling on solicitor in reference to proceedings.**]—*Ex p.* JACKSON (1808), 15 Ves. 116; 33 E. R. 699.

**617.** —— ——.] — CHAUVIN *v.* ALEXANDER (1862), 2 B. & S. 47; 31 L. J. Q. B. 79; 5 L. T. 673; 8 Jur. N. S. 262; 121 E. R. 991.

——.]—*See, also,* BANKRUPTCY, Vol. V., p. 610, Nos. 5478–5483.

**618. Person attending on summons.**] — *Ex p.* KING, No. 615, *ante.*

**619. Creditor attending to prove debts.**]—LIST'S CASE, No. 304, *ante.*

**620.** —— **Deviation—Onus of proof.**]—SELBY *v.* HILLS (1832), 8 Bing. 166; 1 Dowl. 257; 1 Moo. & S. 253; 1 L. J. C. P. 55; 131 E. R. 364.

(*j*) *Other Persons.*

**Persons under naval & military discipline.**]—*See* Army Act 188, c. 58, s. 144; ROYAL FORCES, Vol. XXXIX., p. 339, No. 253.

**621.** —— **Chelsea College out-pensioners.**]—BOWLER *v.* OWEN (1732), Barnes, 432; Cooke, Pr. Cas. 77; 94 E. R. 990.

**622. Defendant illegally in custody—Whether privileged from arrest at suit of another plaintiff.**]—HOWSON *v.* WALKER, CROWDEN *v.* WALKER (1772), 2 Wm. Bl. 823; 96 E. R. 485.

*Annotations:*—**Distd.** Barratt *v.* Price (1833), 9 Bing. 566. **Expld.** Collins *v.* Yewens (1839), 10 Ad. & El. 570. **Consd** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Pearson *v.* Yewens (1839), 5 Bing. N. C. 489; Robinson *v.* Yewens (1839), 5 M. & W. 149.

**623.** —— ——.]—BARCLAY *v.* FABER (1819), 2 B. & Ald. 743; 106 E. R. 536.

*Annotations:*—**Distd.** Barratt *v.* Price (1833), 9 Bing. 566. **Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Bateman *v.* Freston (1861), 3 E. & E. 578.

**624.** —— ——.] — BARRATT *v.* PRICE (1833), 9 Bing. 566; 1 Dowl. 725; 2 Moo. & S. 634; 2 L. J. C. P. 56; 131 E. R. 726.

*Annotations:*—**Distd.** Fownes *v.* Stokes (1835), 2 Scott, 205. **Consd.** Jacobs *v.* Jacobs (1835), 3 Dowl. 675. **Apld.** *Ex p.* Cogg (1838), 6 Dowl. 461; Shapland *v.* Hunter (1838), 7 L. J. C. P. 224; Pearson *v.* Yewens (1839), 5 Bing. N. C. 489. **Consd.** Collins *v.* Yewens (1839), 10 Ad. & El. 570. **Distd.** Robinson *v.* Yewens (1839), 5 M. & W. 149; *Re* Eggington (1853), 2 E. & B. 717. **Apld.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Consd.** Bateman *v.* Freston (1861), 3 E. & E. 578. **Distd.** *Ex p.* Freston (1861), 3 De G. F. & J. 612. **Refd.** Price *v.* Peek (1834), 1 Bing. N. C. 380; Humphery *v.* Mitchell (1836), 2 Bing. N. C. 619; Aldridge *v.* Stanford (1841), 3 Man. & G. 409; Barrack *v.* Newton (1841), 1 Q. B. 525; Reynolds *v.* Newton (1841), 1 Gal. & Dav. 153; *Re* Stanford (1841), 4 Scott, N. R. 24; Gregory *v.* Cotterell (1855), 5 E. & B. 571; Ockford *v.* Freston, Chafman *v.* Same (1861), 6 H. & N. 466.

**625.** —— ——.]—*Ex p.* COGG (1838), 6 Dowl. 461; 5 Scott, 715.

*Annotations:*—**Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Bateman *v.* Freston (1861), 3 E. & E. 578.

**626.** ——.]—SHAPLAND *v.* HUNTER (1838), 7 L. J. C. P. 224.

**627.** —— ——.]—*Re* EGGINGTON (1853), 2 E. & B. 717; 22 L. T. O. S. 77, 118; 118 E. R. 936; *sub nom. Ex p.* EGGINGTON, 2 C. L. R. 385; 23 L. J. M. C. 41; 18 J. P. 165; 18 Jur. 224; *sub nom.* R. *v.* EGGINTON, 2 W. R. 10, 76; *subsequent proceedings, sub nom.* EGGINGTON *v.* LICHFIELD CORPN. (1855), 5 E. & B. 100.

*Annotations:*—**Consd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; *Ex p.* Freston (1861), 3 De G. F. & J. 612. **Refd.** Swan *v.* Dakins, *Ex p.* Dakins (1855), 16 C. B. 77; Bateman *v.* Freston (1861), 3 E. & E. 578; R. *v.* Whitecross Street Prison, R. *v.* Newgate Gaol (1865), 6 B. & S. 371; Bancroft *v.* Mitchell (1867), 8 B. & S. 558. **Mentd.** Jones *v.* Howell (1859), 29 L. J. Ex. 19.

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**PART V. SECT. 6, SUB-SECT. 8.—B. (f) vii.**

*c. Sheriff.*] — Sheriffs being required by rule of ct. to attend ct. every term, are privileged from arrest when they come to Fredericton during term, & the particular cause of their so coming will not be inquired into.—SCOTT *v.* CLARK (1825–1897), N. B. Dig. 59.—**CAN.**

*d. Coroner.*] — A coroner when engaged in the discharge of his official duty is privileged from arrest.—CALLAGHAN *v.* TWISS (1846), 9 I. L. R. 422.—**IR.**

*e. Magistrate—Attending petty sessions.*]—A magistrate attending petty sessions in the discharge of his duty is privileged from arrest.—CLENDENNING'S ASSIGNEES *v.* BROWN (1854), 3 I. C. L. R. 115.—**IR.**

*f.* —— *Police magistrate.*]—A divisional police magistrate, going to the police office to discharge his duty, by direct route is exempt from arrest.—DUBOIS *v.* WYSE (1855), 5 I. C. L. R. 300.—**IR.**

**PART V. SECT. 6, SUB-SECT. 8.—B. (h).**

*g. Bankrupt — Pending examination.*]—A bankrupt pending his examination, is protected from an arrest made by virtue of an attachment issued for a contempt in not lodging money in ct., pursuant to a decree.—*Re* MCWILLIAMS (1803), 1 Sch. & Lef. 169.—**IR.**

**628.** —— ——.]—HOOPER *v.* LANE, No. 86, *ante.*

**629.** —— ——.]—BATEMAN *v.* FRESTON (1861), 3 E. & E. 578; 30 L. J. Q. B. 133; 3 L. T. 806; 7 Jur. N. S. 391; 9 W. R. 311; 121 E. R. 559; *subsequent proceedings, sub nom. Ex p.* FRESTON, 3 De G. F. & J. 612, L. C. & L. JJ.

**630. Member of corporation summoned to election meeting.**]—NIXON *v.* BURT, REED *v.* BURT (1817), 7 Taunt. 682; 1 Moore, C. P. 413; 129 E. R. 271.

*Annotation:*—**Apld.** Blanc *v.* Geraghty (1866), 15 W. R. 133.

**631. Clergyman.**]—GODDARD *v.* HARRIS (1831), 7 Bing. 320; 5 Moo. & P. 122; 9 L. J. O. S. C. P. 109; 131 E. R. 124.

**632. Solicitor—Practising solicitor—Evidence of practice.**]—ANON. (1830), 1 Dowl. 208.

**633.** —— ——.]—WHALLEY *v.* PEPPER & HARDING (1836), 7 C. & P. 506, N. P.

*Annotation:*—**Refd.** The Walter D. Wallet, [1893] P. 20.

**634.** —— ——.]—LEFEVRE *v.* WRIGHT (1837), Will. Woll. & Dav. 603; 1 Jur. 985.

*Annotation:*—**Refd.** Kinder *v.* Dunford (1841), 5 Jur. 409.

**635.** —— **About to leave England.**]—THOMPSON *v.* MOORE (1841), 1 Dowl. N. S. 283; 5 Jur. 1009.

*Annotation:*—**Apld.** Flight *v.* Cooke (1843), 2 L. T. O. S. 173

**636.** —— ——.]—FLIGHT *v.* COOK (1843), 1 Dow. & L. 714; 13 L. J. Q. B. 78; 2 L. T. O. S. 173; 8 Jur. 125.

**637.** —— **Noncompliance with order of court.**]—*Re* DUDLEY (1883), 12 Q. B. D. 44; 49 L. T. 737; *sub nom. Re* DUDLEY, *Ex p.* MONET, 53 L. J. Q. B. 16; 32 W. R. 264, C. A.

*Annotations:*—**Apld.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190. **Refd.** *Re* Strong (1886), 32 Ch. D. 342; *Re* Wray (1887), 36 Ch. D. 138; *Re* Grey, [1892] 2 Q. B. 440; Seldon *v.* Wilde, [1911] 1 K. B. 701. **Mentd.** Godfrey *v.* G. (1895), 73 L. T. 599.

**638. Solicitor's clerk.**]—PHILLIPS *v.* POUND (1852), 7 Exch. 881; 21 L. J. Ex. 277; 19 L. T. O. S. 205; 16 J. P. 442; 16 Jur. 645; 155 E. R. 1207.

*C. Liability for Arrest of Privileged Person.*

**639. Whether sheriff liable—To action for false imprisonment.**]—TARLTON *v.* FISHER (1781), 2 Doug. K. B. 671; 99 E. R. 426.

*Annotations:*—**Consd.** Aga Kurboolie Mahomed *v.* R. (1843), 3 Moo. Ind. App. 164. **Apld.** Magnay *v.* Burt (1843), 5 Q. B. 381. **Consd.** Ewart *v.* Jones (1845), 14 M. & W. 774; Ames *v.* Waterlow (1869), L. R. 5 C. P. 53. **Refd.** Stokes *v.* White (1834), 4 Tyr. 786; Noel *v.* Isaac (1835), 4 L. J. Ex. 56; Whitworth *v.* Clifton (1836), 1 Mood. & R. 531; Watson *v.* Carroll (1839), 8 L. J. Ex. 97; Newton *v.* Constable (1841), 10 L. J. Q. B. 349; Yearsley *v.* Heane (1845), 14 M. & W. 322.

**640.** —— ——.]—LLOYD *v.* WOOD (1836), 5 Ad. & El. 228; 2 Har. & W. 158; 6 Nev. & M. K. B. 822; 5 L. J. K. B. 200; 111 E. R. 1152.

*Annotations:*—**Refd.** Birt *v.* Magnay (1843), 7 Jur. 127; Yearsley *v.* Heane (1845), 14 M. & W. 322.

**641.** —— **To action for malicious arrest—Arrest after notice of privilege.**]—MAGNAY *v.* BURT (1843), 5 Q. B. 381; Dav. & Mer. 652; 2 L. T. O. S. 172; 7 Jur. 1116; 114 E. R. 1293, Ex. Ch.; *revsg.* S. C. *sub nom.* BURT *v.* MAGNAY, 12 L. J. Q. B. 225.

*Annotation:*—**Consd.** Ames *v.* Waterlow (1869), L. R. 5 C. P. 53.

**642. Necessity to plead privilege precisely.**]—LLOYD *v.* WOOD, No. 640, *ante.*

SUB-SECT. 9.—MONEY DUE TO CROWN.

**643. Distress for duty to Crown—No right to replevy.**]—If a distress be for any duty to the Crown, the party distrained cannot replevy.—R. *v.* OLIVER (1717), Bunb. 14; 145 E. R. 578.

*Annotation:*—**Refd.** Cawthorne *v.* Campbell & Lowndes (1790), 1 Anst. 205.

**644. Authority by writ to collect debt due to Crown debtors.**]—READING CASE (undated), cited in 5 Price, at p. 464; 146 E. R. 665.

*Annotation:*—**Refd.** R. *v.* Ramsbottom (1818), 5 Price, 447.

**645. Extent—Return that money in hands of Accountant-General in bankruptcy.**]—The sheriff having returned to an extent that he had seized money into the hands of the Queen, & it appearing that the money was in the hands of the Accountant-General in bkpcy., the ct. made an order absolute for the sheriff to pay over the money, but refused to make the Accountant-General in bkpcy. a party to the order. The sheriff having applied to the Ct. of Review for an order for the Accountant-General in bkpcy. to pay over the money to him, the order was refused, on the ground that the sheriff had no *locus standi* in that ct. This ct. afterwards discharged the common order on the sheriff.—R. *v.* AUSTIN (1842), 10 M. & W. 691; 12 L. J. Ex. 85; 6 Jur. 222.

——.]—*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 221–232.

—— **Priority as between distress & extent.**]—*See* DISTRESS, Vol. XVIII., p. 343, No. 787–790.

**Estreat of recognisances.**]—*See* MAGISTRATES, Vol. XXXIII., p. 368, Nos. 770–776.

**Levy of fines.**]—*See* CRIMINAL LAW, Vol. XIV., p. 480, No. 5237.

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SUB-SECT. 10.—LIABILITY OF SHERIFFS AND OFFICERS.

*A. In General.*

**646. Ending liability—By the court.**]—Mode of putting an end to sheriff's liability before return of attachment where he has taken parties for contempt in non-payment of money and let them go at large on bail.—A.-G. *v.* MILLS (1838), Coop. Pr. Cas. 261; 47 E. R. 497.

**647. Liability in respect of money received.**]—ANON. (1577), 1 Leon. 264; 74 E. R. 240.

*See, generally,* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 66–71, Nos. 413–477.

—— **Proceeds of execution.**]—*See* EXECUTION, Vol. XXI., pp. 539–542, Nos. 1141–1167.

**648. Setting up own irregularity—As defence.**]—A sheriff shall not take advantage of his own irregularity to excuse himself in an action.—HALE *v.* OWEN (1703), 1 Com. 132; 2 Ld. Raym. 904; 92 E. R. 999.

**649. Whether manadamus lies to compel execution—County Court judgment.**]—Where a sheriff has set aside a judgment in the county ct.:—*Held:* whether he could do so or not, a *mandamus* could not be granted to compel him to issue execution on the judgment.—ELDRIDGE *v.* FLETCHER (1835), 1 Har. & W. 199.

**650. Liability for loss of warrant—Sent by post to sheriff's officer.**]—A writ of distringas was received by the sheriff, who sent a warrant to his officer by post. The warrant was lost, & pltf. delayed:—*Held:* it was the duty of the sheriff to send the warrant, &, it being lost, he ought to

*Sect.* 6.—*Execution of process: Sub-sect.* 10, *A. & B.* (*a*).]

pay the expenses incurred by pltf.—DALLOWAY *v.* TAYLOR (1853), 20 L. T. O. S. 238.

**Liability for payment of rents, rates & taxes.**]—*See* Sub-sect. 10, E., *post.*

**Liability for wrongful or irregular execution.**]—*See* Sub-sect. 10, C., *post.*

**Liability for failure to arrest.**]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 67, 68, No. 439.

**Liability for failure to make return to writ.**]—*See* Sub-sect. 6, B. (*b*), *ante.*

**Liability for insufficient return to writ.**]—*See* Sub-sect. 6, C. (*b*), *ante.*

**Liability for false return to writ.**]—*See* Sub-sect. 6, D., *ante.*

**Liability for false imprisonment.**]—*See* Sub-sect. 7, M. (*a*); Sub-sect. 8, C., *ante*; TRESPASS.

**Liability for extortion.**]—*See* Part VI., Sect. 4, sub-sect. 2, *post.*

**Penalties for misconduct.**]—*See* Sect. 8, *post.*

**Application of Public Authorities Protection Act, 1893 (c. 61).**]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 101–136.

*B. Sheriff's Liability for Acts of Officers.*

*(a) In General.*

**651. Criminal liability.**] — LAICOCK'S CASE (1627), Lat. 187; 82 E. R. 338.

*Annotations:*—**Consd.** Sturmy *v.* Smith (1809), 11 East, 25. **Refd.** Woodgate *v.* Knatchbull (1787), 2 Term Rep. 148.

**Liability for contempt of court.**]—*See* Nos. 793, 794, *post.*

**652. Civil liability—General rule.**]—LAICOCK'S CASE (1627), Lat. 187; 82 E. R. 338.

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**653.** —— ——.]—The sheriff is answerable for the misconduct of his under-officer.—ANON. (1705), 11 Mod. Rep. 49; 88 E. R. 877.

**654.** —— ——.]—All actions for breach of duty of the office of sheriff, must be brought against the high sheriff, though by default of the under-sheriff or bailiff.—CAMERON *v.* REYNOLDS (1776), 1 Cowp. 403; 98 E. R. 1154.

*Annotation:*—**Mentd.** Yorke *v.* Chapman (1839), 10 Ad. & El. 207.

**655.** —— ——.]—CROWDER *v.* LONG, No. 699, *post.*

**656.** —— —— **Officer disobeying instructions.**]—The officer represented the sheriff for all purposes relative to the execution of the writ, & the sheriff was responsible for him, whether he disobeyed his instructions or not (PARKE, B.).—SCARFE *v.* HALLIFAX (1840), 7 M. & W. 288; 10 L. J. Ex. 332; 151 E. R. 775.

**657.** —— **Judgment recovered against both sheriff & officer.**]—The sheriff & the bailiff are not both answerable in an action for a penalty under Debtor's Imprisonment Act, 1759 (c. 28), for the same act. Actions having been brought against both, & a verdict obtained in each, the ct. stayed the proceedings on payment of one penalty & the costs in one action.—PESHALL *v.* LAYTON, SAME *v.* MARTIN (1788), 2 Term Rep. 712; 100 E. R. 383.

*Annotations:*—**Distd.** Bagge *v.* Whitehead (1891), 7 T. L. R. 697. **Refd.** Dewhirst *v.* Pearson (1833), 1 Cr. & M. 365. **Mentd.** Newton *v.* Blunt (1846), 3 C. B. 675.

**658.** —— **Duration of liability—Act of servant of predecessor.**]—BESSEY *v.* OLLIOT & LAMBERT (1682), T. Raym. 467; 83 E. R. 244; *sub nom.* OLLIET *v.* BESSEY, T. Jo. 214; *sub nom.* ELLIOT *v.* BESEY, Skin. 49; *sub nom.* LAMBERT & OLLIOT *v.* BESSEY, T. Raym. 421.

*Annotations:*—**Consd.** Gwinne *v.* Poole (1692), 2 Lut. App. 1560; Henderson *v.* Preston (1888), 21 Q. B. D. 362. **Refd.** Parsons *v.* Lloyd (1772), 2 Wm. Bl. 845; Badkin *v.* Powell (1776), 2 Cowp. 476. **Mentd.** Goodwin *v.* Gibbons (1767), 4 Burr. 2107; Barker *v.* Braham & Norwood (1773), 2 Wm. Bl. 866; Scott *v.* Shepherd (1773), 2 Wm. Bl. 892; Smith *v.* Kenrick (1849), 7 C. B. 515; Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Demer *v.* Cook (1903), 88 L. T. 629; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671.

**659.** —— —— ——.] — *Qu.:* whether the present sheriff is liable, in trespass, for acts done by his officer in executing an old writ, the warrant for which was issued by his predecessor in office.—ANON. (1846), 8 L. T. O. S. 321; *subsequent proceedings, sub nom.* BIGGS *v.* LAURIE (1847), 8 L. T. O. S. 347.

**660.** —— —— **Expiry of year of office before return of writ.**]—FONSEC *v.* MAGNAY, No. 695, *post.*

**661.** —— **Acts outside scope of authority.**]—(1) An agent of the under sheriff, as clerk, cannot bind the sheriff or under sheriff to matters not properly within his business. (2) When a person becomes surety for a year, with others, he cannot discharge the indemnity given to the sheriff without the consent of the sheriff, & of the other sureties (LORD MANSFIELD).—MARTIN *v.* WENHAM (1773), Lofft, 225; 98 E. R. 622

**662.** —— ——.]—It is no part of the duty of the sheriff, in executing a writ of *ca. sa.* to receive the amount of the debt & costs, in order to pay them over to execution pltf. Therefore, where debtor makes a voluntary payment to the bailiff of the debt & costs to be paid over to execution pltf., & the bailiff fails to do so, &, in consequence thereof, debtor is a second time arrested under a fresh writ issued upon the same judgment, the sheriff is not liable as for a breach of duty in not paying over the money to execution pltf.—WOODS *v.* FINNIS (1852), 7 Exch. 363; 21 L. J. Ex. 138; 18 L. T. O. S. 331; 16 Jur. 936; 155 E. R. 988.

*Annotations:*—**Refd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443; Hemming *v.* Hale (1859), 7 C. B. N. S. 487.

**663.** —— —— **Subsequently assented to or adopted.**]—The sheriff is responsible for the acts of his officer, though not within the strict line of his duty, provided such acts be afterwards assented to or adopted by the sheriff.

Pltf.'s goods, farming stock, etc., having been seized under an execution at the suit of one P., the parties, with the assent of the officer, agreed that the latter should remain in possession for a

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**PART V. SECT. 6, SUB-SECT. 10.—B. (a).**

**652 i.** *Civil liability—General rule.*]—A collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, & an action will lie against them jointly.—CORBETT *v.* JOHNSTON (1851), 11 C. P. 317.—**CAN.**

**652 ii.** —— ——.]—A sheriff is identified in interest with his bailiff & liable for whatever the latter does under colour of the writ.—GORDON *v.* RUMBLE (1898), 19 A. R. 440.—**CAN.**

**652 iii.** —— ——.]—A sheriff in Alberta is not personally responsible for the neglect of duty or misconduct of one of his bailiffs.—GREAT NORTHERN INSURANCE CO. *v.* YOUNG (Alta.), [1917] 1 W. W. R. 886.—**CAN.**

**652 iv.** —— ——.]—R. *v.* STEPHEN (Sask.), [1924] 1 D. L. R. 565.—**CAN.**

**652 v.** —— ——.]—A sheriff is responsible for all moneys realised by a bailiff in executing a *fi. fa.* where the bailiff was appointed by & paid by the sheriff.—ROSS *v.* FISET, [1926] 3 D. L. R. 289; [1926] 2 W. W. R. 422; 20 Sask. L. R. 553.—**CAN.**

**652 vi.** —— ——.]—Where owing to the negligence of the deputy sheriff & his messenger goods were not attached under pltf.'s writ, which were available in satisfaction thereof, judgment was given against the sheriff for the amount which he had failed to recover through such negligence.—HEUGH & FLEMING *v.* HIGH SHERIFF (1856), 2 S. 280.—**S. AF.**

l. —— *Negligence of sheriff's clerk in signing certificate no executions.*]—COLONIAL SECURITIES CO., LTD. *v.* TAYLOR (1869), 29 U. C. R. 376.—**CAN.**

m. —— *Money paid to sheriff by*

ertain period, & that the farm should in the meanime be managed by pltf. The sheriff in his return ook credit for the money laid out upon the farm; ; an action was brought in his name by the underheriff, wherein a sum of money was recovered pon a contract entered into by the officer with an ncoming tenant, for the sale of hay, etc., the eceipt of which sum was admitted in a letter ritten by the under-sheriff to pltf.'s attorney:— *Held:* this was sufficient evidence of an assenting y the sheriff to the acts of his officer; & consequently that he was liable to pltf. for the surplus roceeds of the goods after satisfying the levy & xpenses.—UNDERHILL *v.* WILSON (1830), 6 Bing. 97; 4 Moo. & P. 568; 8 L. J. O. S. C. P. 290; 30 E. R. 1449.

**664. —— —— Receiving writ from party.**]—RIMINGER *v.* KEENE, [1882] W. N. 106, C. A.

**665. —— Whether summary remedy available s against officer of court.**]—In an action against sheriff for extortion by his officer, the latter, in onsideration of a stay of proceedings, undertook y a written memorandum to pay a sum of money o pltf. in seven days with costs, & on default f such payment, to withdraw his plea & suffer ltf. to have judgment. On motion to the ct. o compel the officer to perform his undertaking. hey refused to do so in that summary way, saying e was not an officer of the ct.—BROWN *v.* GERARD 1834), 1 Cr. M. & R. 595; 3 Dowl. 217; 5 Tyr. 220; 149 E. R. 1218.

**666. Refusal of bailiff to accept bail bond—Sureties sufficient.**]—If deft. in custody upon nesne process tender a bail-bond, with sufficient sureties, to the bailiff, & he refuses it, an action on the case will lie against the sheriff; but trespass for the false imprisonment will not lie against the officer.—SMITH *v.* HALL (1675), 2 Mod. Rep. 31; 36 E. R. 924.

**667. Refusal to deliver up bail bond—On payment of debts & costs.**]—LEWIS *v.* BLESSLEY, No. 794, *post.*

**668. Extortion by officer—Exaction of excessive fees—Liability for treble damages.**]—If it appear by the sheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by 29 Eliz. c. 4, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved.—WOODGATE *v.* KNATCHBULL (1787), 2 Term Rep. 148; 100 E. R. 80.

*Annotations:*—**Consd.** Sturmy *v.* Smith (1809), 11 East, 25. **Apld.** Thomas *v.* Pearse (1818), 5 Price, 578; Dew *v.* Parsons (1819), 1 Chit. 295. **Folld.** Buckle *v.* Bewes (1825), 4 B. & C. 154. **Consd.** Shoppee *v.* Nathan, [1892] 1 Q. B. 245. **Refd.** The Rendsberg (1805), 6 Ch. Rob. 142; R. *v.* Jones (1830), 1 Cr. & J. 140; Grainger *v.* Hill (1838), 7 L. J. C. P. 85; Berton *v.* Lawrence (1850), 5 Exch. 816; Lee *v.* Dangar, Grant, [1892] 1 Q. B. 231; Woolford's Estate Trustee *v.* Levy, [1892] 1 Q. B. 772. **Mentd.** Hardcastle *v.* Bielby, [1892] 1 Q. B. 709.

**669. —— Exaction of poundage where no levy.**]—BRUN *v.* HUTCHINSON, No. 830, *post.*

**670. Wrongful arrest.**]—An action for false imprisonment lies against the sheriff for an arrest made by the bailiff after the return day of the writ.—PARROT *v.* MUMFORD (1797), 2 Esp. 585; 170 E. R. 463, N. P.

*Annotations:*—**Consd.** Woods *v.* Finnis (1852), 7 Exch. 363. **Apld.** Gregory *v.* Cotterell (1855), 5 E. & B. 571. **Refd.** Price *v.* Peck (1834), 1 Bing. N. C. 380; Smith *v.* Pritchard (1849), 8 C. B. 565.

**671. Escape.**] — Action lies upon 44 Geo. 3, c. 13, s. 4, by a common informer, suing for himself & the King, to recover a penalty against the sheriff for the misconduct of his bailiff, in wilfully suffering a seaman to go at large who had been taken out of the King's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer; the statute which speaks of sheriffs, gaolers, or other officers arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, & who are made liable for their escape, meaning by "other officers" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; & not the inferior officers of the sheriff. The sheriff may be charged in such action for wrongfully & wilfully permitting the escape.—STURMY *v.* SMITH (1809), 11 East, 25; 103 E. R. 912.

*Annotations:*—**Distd.** Bagge *v.* Whitehead (1892), 66 L. T. 815. **Refd.** Dewhirst *v.* Pearson (1833), 1 Cr. & M. 365. **Mentd.** Terry *v.* Hutchinson (1868), 18 L. T. 521.

**672. ——.**]—BRYANT *v.* CARROLL, No. 93, *ante.*

**673. Contract with judgment creditor—By deputy sheriff.**]—(1) If a deputy sheriff, being in possession of goods seized under an immediate extent, & having received a subsequent *fi. fa.*, at the suit of a subject, contract with judgment creditor to deliver him, in satisfaction of his execution a certain quantity of the goods seized, on his paying into the sheriff's hands the debt due to the Crown, which is accordingly paid to him: & if afterwards, whilst his officer is in the act of delivering & measuring the quantity specified to pltf.'s agent, to whom he had given up the key, the goods are rescued—the sheriff is liable to judgment creditor, who may maintain a special *assumpsit* on the contract, whether the sheriff be authorised so to contract or not, or on a common count for goods sold & delivered, or for money had & received.

(2) In the case of an under-sheriff in the county employing an acknowledged town agent, such an engagement made by the latter is legal, & binding on the sheriff, who must seek his remedy over.—THOMAS *v.* PEARSE (1818), 5 Price, 578; 146 E. R. 699.

**674. —— By town agent.**]—THOMAS *v.* PEARSE, No. 673, *ante.*

**675. False return—Made by sheriff's direction.**]—A sheriff is not rendered responsible for a false return of the bailiff on the execution of a writ of *fi. fa.* on a judgment in the county ct., by an allegation, that the return was made by his direction & privity.—PITCHER *v.* KING (1838), 9 Ad. & El. 288; 1 Per. & Dav. 297; 1 Will. Woll. & H. 691; 8 L. J. Q. B. 15; 2 Jur. 1014; 112 E. R. 1221; *subsequent proceedings* (1844), 5 Q. B. 758.

**676. Neglect of duty of bailiff—No loss to execution creditor.**]—CARDEN *v.* SPARKES (1851), 18 L. T. O. S. 79.

**677. —— Payment of money to bailiff's assistant.**]—(1) The bailiff, to whom the sheriff had

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*deputy sheriff.*]—No action lies against the deputy sheriff for money received by him & paid over to the sheriff; the action must be brought against the sheriff himself.—BIRD *v.* HOPKINS (1841), 3 Ont. Dig. 6389.—**CAN.**

n. —— *Validity of return signed by deputy sheriff before appointment.*]—The sheriff is bound by the return to a *fi. fa.* made by a person who, though deputy sheriff when he signed the sheriff's name to the return, was not deputy until after the writ was returnable.—BABY *v.* FOOTT (SHERIFF) (1848), 4 U. C. R. 349.—**CAN.**

o. —— *For bailiff appointed under County Court Acts,* 1873 & 1874.]—LARKIN *v.* MCNUTT (1880), 2 P. E. I. 300.—**CAN.**

p. —— *For bailiff's negligence during lawful absence of sheriff.*]—A sheriff who was overseas & not even acting sheriff at the time was held not liable for the negligence of a bailiff in his office.—DE ZOUCHE *v.* COOKE, [1920] 2 W. W. R. 268; 12 Sask. L. R. 227.—**CAN.**

671 i. *Escape.*]—COMMERCIAL BANK *v.* JARVIS (1841), 3 Ont. Dig. 6378.—**CAN.**

q. *Variance between warrants produced—Whether variance fatal.*]—BOYLE *v.* GARNER (1840), 2 Ont. Dig. 2674.—**CAN.**

*Sect.* 6.—*Execution of process: Sub-sect.* 10, *A. & B.* (*a*).]

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**652 ii.** —— ——.]—A sheriff is identified in interest with his bailiff & liable for whatever the latter does under colour of the writ.—GORDON *v.* RUMBLE (1892), 19 A. R. 440.—**CAN.**

**652 iii.** —— ——.]—A sheriff in Alberta is not personally responsible for the neglect of duty or misconduct of one of his bailiffs.—GREAT NORTHERN INSURANCE CO. *v.* YOUNG (Alta.), [1917] 1 W. W. R. 886.—**CAN.**

**652 iv.** —— ——.]—R. *v.* STEPHEN (Sask.), [1924] 1 D. L. R. 565.—**CAN.**

**652 v.** —— ——.]—A sheriff is responsible for all moneys realised by a bailiff in executing a *fi. fa.* where the bailiff was appointed by & paid by the sheriff.—ROSS *v.* FISET, [1926] 3 D. L. R. 289; [1926] 2 W. W. R. 422; 20 Sask. L. R. 553.—**CAN.**

**652 vi.** —— ——.]—Where owing to the negligence of the deputy sheriff & his messenger goods were not attached under pltf.'s writ, which were available in satisfaction thereof, judgment was given against the sheriff for the amount which he had failed to recover through such negligence.—HEUGH & FLEMING *v.* HIGH SHERIFF (1856), 2 S. 280.—**S. AF.**

l. —— *Negligence of sheriff's clerk in signing certificate no executions.*]—COLONIAL SECURITIES CO., LTD. *v.* TAYLOR (1869), 29 U. C. R. 376.—**CAN.**

m. —— *Money paid to sheriff by*

certain period, & that the farm should in the meantime be managed by pltf. The sheriff in his return took credit for the money laid out upon the farm; & an action was brought in his name by the under-sheriff, wherein a sum of money was recovered upon a contract entered into by the officer with an incoming tenant, for the sale of hay, etc., the receipt of which sum was admitted in a letter written by the under-sheriff to pltf.'s attorney:—*Held:* this was sufficient evidence of an assenting by the sheriff to the acts of his officer; & consequently that he was liable to pltf. for the surplus proceeds of the goods after satisfying the levy & expenses.—UNDERHILL *v.* WILSON (1830), 6 Bing. 697; 4 Moo. & P. 568; 8 L. J. O. S. C. P. 290; 130 E. R. 1449.

**664. —— —— Receiving writ from party.**]—TRIMINGER *v.* KEENE, [1882] W. N. 106, C. A.

**665. —— Whether summary remedy available as against officer of court.**]—In an action against a sheriff for extortion by his officer, the latter, in consideration of a stay of proceedings, undertook by a written memorandum to pay a sum of money to pltf. in seven days with costs, & on default of such payment, to withdraw his plea & suffer pltf. to have judgment. On motion to the ct. to compel the officer to perform his undertaking, they refused to do so in that summary way, saying he was not an officer of the ct.—BROWN *v.* GERARD (1834), 1 Cr. M. & R. 595; 3 Dowl. 217; 5 Tyr. 220; 149 E. R. 1218.

**666. Refusal of bailiff to accept bail bond—Sureties sufficient.**]—If deft. in custody upon mesne process tender a bail-bond, with sufficient sureties, to the bailiff, & he refuses it, an action on the case will lie against the sheriff; but trespass for the false imprisonment will not lie against the officer.—SMITH *v.* HALL (1675), 2 Mod. Rep. 31; 86 E. R. 924.

**667. Refusal to deliver up bail bond—On payment of debts & costs.**]—LEWIS *v.* BLESSLEY, No. 794, *post.*

**668. Extortion by officer—Exaction of excessive fees—Liability for treble damages.**]—If it appear by the sheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by 29 Eliz. c. 4, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved.—WOODGATE *v.* KNATCHBULL (1787), 2 Term Rep. 148; 100 E. R. 80.

*Annotations:*—**Consd.** Sturmy *v.* Smith (1809), 11 East, 25. **Apld.** Thomas *v.* Pearse (1818), 5 Price, 578; Dew *v.* Parsons (1819), 1 Chit. 295. **Folld.** Buckle *v.* Bewes (1825), 4 B. & C. 154. **Consd.** Shoppee *v.* Nathan, [1892] 1 Q. B. 245. **Refd.** The Rendsberg (1805), 6 Ch. Rob. 142; R. *v.* Jones (1830), 1 Cr. & J. 140; Grainger *v.* Hill (1838), 7 L. J. C. P. 85; Berton *v.* Lawrence (1850), 5 Exch. 816; Lee *v.* Dangar, Grant, [1892] 1 Q. B. 231; Woolford's Estate Trustee *v.* Levy, [1892] 1 Q. B. 772. **Mentd.** Hardcastle *v.* Bielby, [1892] 1 Q. B. 709.

**669. —— Exaction of poundage where no levy.**]—BRUN *v.* HUTCHINSON, No. 830, *post.*

**670. Wrongful arrest.**]—An action for false imprisonment lies against the sheriff for an arrest made by the bailiff after the return day of the writ.—PARROT *v.* MUMFORD (1797), 2 Esp. 585; 170 E. R. 463, N. P.

*Annotations:*—**Consd.** Woods *v.* Finnis (1852), 7 Exch. 363. **Apld.** Gregory *v.* Cotterell (1855), 5 E. & B. 571. **Refd.** Price *v.* Peek (1834), 1 Bing. N. C. 380; Smith *v.* Pritchard (1849), 8 C. B. 565.

**671. Escape.**] — Action lies upon 44 Geo. 3, c. 13, s. 4, by a common informer, suing for himself & the King, to recover a penalty against the sheriff for the misconduct of his bailiff, in wilfully suffering a seaman to go at large who had been taken out of the King's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer; the statute which speaks of sheriffs, gaolers, or other officers arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, & who are made liable for their escape, meaning by "other officers" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; & not the inferior officers of the sheriff. The sheriff may be charged in such action for wrongfully & wilfully permitting the escape.—STURMY *v.* SMITH (1809), 11 East, 25; 103 E. R. 912.

*Annotations:*—**Distd.** Bagge *v.* Whitehead (1892), 66 L. T. 815. **Refd.** Dewhirst *v.* Pearson (1833), 1 Cr. & M. 365. **Mentd.** Terry *v.* Hutchinson (1868), 18 L. T. 521.

**672. ——.**]—BRYANT *v.* CARROLL, No. 93, *ante.*

**673. Contract with judgment creditor—By deputy sheriff.**]—(1) If a deputy sheriff, being in possession of goods seized under an immediate extent, & having received a subsequent *fi. fa.*, at the suit of a subject, contract with judgment creditor to deliver him, in satisfaction of his execution a certain quantity of the goods seized, on his paying into the sheriff's hands the debt due to the Crown, which is accordingly paid to him: & if afterwards, whilst his officer is in the act of delivering & measuring the quantity specified to pltf.'s agent, to whom he had given up the key, the goods are rescued—the sheriff is liable to judgment creditor, who may maintain a special *assumpsit* on the contract, whether the sheriff be authorised so to contract or not, or on a common count for goods sold & delivered, or for money had & received.

(2) In the case of an under-sheriff in the county employing an acknowledged town agent, such an engagement made by the latter is legal, & binding on the sheriff, who must seek his remedy over.—THOMAS *v.* PEARSE (1818), 5 Price, 578; 146 E. R. 699.

**674. —— By town agent.**]—THOMAS *v.* PEARSE, No. 673, *ante.*

**675. False return—Made by sheriff's direction.**]—A sheriff is not rendered responsible for a false return of the bailiff on the execution of a writ of *fi. fa.* on a judgment in the county ct., by an allegation, that the return was made by his direction & privity.—PITCHER *v.* KING (1838), 9 Ad. & El. 288; 1 Per. & Dav. 297; 1 Will. Woll. & H. 691; 8 L. J. Q. B. 15; 2 Jur. 1014; 112 E. R. 1221; *subsequent proceedings* (1844), 5 Q. B. 758.

**676. Neglect of duty of bailiff—No loss to execution creditor.**]—CARDEN *v.* SPARKES (1851), 18 L. T. O. S. 79.

**677. —— Payment of money to bailiff's assistant.**]—(1) The bailiff, to whom the sheriff had

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*deputy sheriff.*]—No action lies against the deputy sheriff for money received by him & paid over to the sheriff; the action must be brought against the sheriff himself.—BIRD *v.* HOPKINS (1841), 3 Ont. Dig. 6389.—**CAN.**

n. —— *Validity of return signed by deputy sheriff before appointment.*]—The sheriff is bound by the return to a *fi. fa.* made by a person who, though deputy sheriff when he signed the sheriff's name to the return, was not deputy until after the writ was returnable.—BABY *v.* FOOTT (SHERIFF) (1848), 4 U. C. R. 349.—**CAN.**

o. —— *For bailiff appointed under County Court Acts,* 1873 & 1874.]—LARKIN *v.* MCNUTT (1880), 2 P. E. I. 300.—**CAN.**

p. —— *For bailiff's negligence during lawful absence of sheriff.*]—A sheriff who was overseas & not even acting sheriff at the time was held not liable for the negligence of a bailiff in his office.—DE ZOUCHE *v.* COOKE, [1920] 2 W. W. R. 268; 12 Sask. L. R. 227.—**CAN.**

671 i. *Escape.*]—COMMERCIAL BANK *v.* JARVIS (1841), 3 Ont. Dig. 6378.—**CAN.**

q. *Variance between warrants produced—Whether variance fatal.*]—BOYLE *v.* GARNER (1840), 2 Ont. Dig. 2674.—**CAN.**

*Sect.* 6.—*Execution of process: Sub-sect.* 10, *B.* (*a*) & (*b*).]

given his warrant to execute a *fi. fa.*, sent a bailiff's assistant to execute it in the bailiff's absence, which was done:—*Held:* a ruling of the judge at the trial that the sheriff was answerable for this act, as being done by colour of the warrant, was correct.

(2) Judgment debtor paid the amount at the office of the bailiff, who held the warrant, in the absence of the bailiff, to an assistant of the bailiff, authorised by the bailiff to receive the money. This assistant did not pay it over to the bailiff; & the sheriff never in fact received the money:—*Held:* a ruling of the judge at the trial that a payment under such circumstances was good as against the sheriff, & satisfied the writ, was correct.—GREGORY *v.* COTTERELL (1855), 5 E. & B. 571; 25 L. J. Q. B. 33; 26 L. T. O. S. 125; 2 Jur. N. S. 16; 4 W. R. 48; 119 E. R. 593, Ex. Ch.

*Annotations:—As to* (1) **Refd.** Boulton *v.* Reynolds (1859), 29 L. J. Q. B. 11; Toms *v.* Wilson (1862), 4 B. & S. 442; Burton *v.* Le Gros (1864), 34 L. J. Q. B. 91; Bagge *v.* Whitehead (1892), 66 L. T. 815; Baker *v.* Wicks (1904), 73 L. J. K. B. 410.

**678. Fraud of bailiff.**]—To an action by a sheriff against an execution creditor, on a bond of indemnity for seizing goods under a *fi. fa.* deft. pleaded that the bond was obtained from deft., by pltf. & others in collusion with him, by fraud & misrepresentation:—*Held:* deft. supported this plea by proof that the sheriff's officer, who executed the process, obtained the bond by fraud & misrepresentation, though pltf. did not appear to have been personally cognisant of any part of the transaction.—RAPHAEL *v.* GOODMAN (1838), 8 Ad. & El. 565; 3 Nev. & P. K. B. 547; 1 Will. Woll. & H. 363; 7 L. J. Q. B. 220; 112 E. R. 952.

*Annotations:*—**Refd.** Merry *v.* Chapman (1839), 3 Per. & Dav. 25; Barwick *v.* English Joint Stock Bank (1867), L. R. 2 Exch. 259. **Mentd.** Masters *v.* Ibberson (1849), 8 C. B. 100.

**679. Making copy of writ for execution creditor.**]—COPLEY *v.* MEDEIROS (1844), 7 Man. & G. 426; 8 Scott, N. R. 172; 13 L. J. C. P. 148; 3 L. T. O. S. 126; 135 E. R. 178.

**Acts under writs of fieri facias.**]—*See* EXECUTION, Vol. XXI., pp. 542, 545, 546, Nos. 1177, 1205–1218.

**Trespass—Taking goods of third party.**]—*See* BANKRUPTCY, Vol. V., p. 825, No. 7009; EXECUTION, Vol. XXI., p. 544, No. 1192.

**Disregard of injunction.**]—*See* INJUNCTION, Vol. XXVIII., p. 529, No. 1368.

*(b) Evidence to Connect Sheriff with Officer.*

**680. Indorsement of name of officer on writ.**]—HILL *v.* LEIGH, No. 691, *post.*

**681. —— Course of sheriff's office.**]—In an action against the sheriff, in order to connect him with the act of his bailiff, it is sufficient to produce the writ, with the name of the bailiff indorsed upon it, in the sheriff's office, it being the course in the sheriff's office to indorse upon the writ, the name of the bailiff by whom it is to be executed.—TEALBY *v.* GASCOIGNE (1817), 2 Stark. 202; 171 E. R. 620, N. P.

**682.** —— ——.]—In an action against the sheriff for the extortion of his officer, pltf. proved an examined copy of the writ on which the officer's name was indorsed, & that a person of that name actually executed the writ, & that the course of the sheriff's office was, that the name of the officer to whom the warrant was granted was usually indorsed on the writ:—*Held:* sufficient *primâ facie* evidence to connect the sheriff with the acts of the officer.—SCOTT *v.* MARSHALL (1832), 2 Cr. & J. 238; 2 Tyr. 257; 1 L. J. Ex. 97; 149 E. R. 103.

*Annotation:*—**Refd.** Summers *v.* Moseley (1834), 2 Cr. & M. 477.

**683.** ——.]—Where, in an action for an escape against the sheriff, the writ in the former action was produced, to connect him with his officer, on which was indorsed "Warrant to B.," who, on being called, stated, that he had delivered the warrant to another, who did not produce it:—*Held:* it should have been left to the jury to say, whether B. acted under the authority of the sheriff, the indorsement being *primâ facie* evidence that he did so act.—FERMOR *v.* PHILIPS (1817), 3 Brod. & Bing. 27, n.; 5 Moore, C. P. 184, n.; 129 E. R. 1192.

*Annotations:*—**Folld.** Bowden *v.* Waithman (1821), 5 Moore, C. P. 183. **Refd.** Francis *v.* Neave (1821), 3 Brod. & Bing. 26; Scott *v.* Marshall (1832), 2 Cr. & J. 238.

**684.** —— **Further evidence of direction to officer.**]—(1) In an action against the sheriff for a false return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to show that this officer's name is written in the margin of the examined copy of the writ & return.

(2) Without producing the warrant it was held to be enough to give in evidence a paper issued by the sheriff's office & directed to this officer, requiring him to give instructions for making a return to the writ.—JONES *v.* WOOD (1812), 3 Camp. 228; 170 E. R. 1364.

*Annotations:—As to* (1) **Apld.** Morgan *v.* Brydges (1818), 2 Stark. 314. *Generally,* **Refd.** Francis *v.* Neave (1821), 6 Moore, C. P. 120.

**685.** ——.]—Proof of a copy of a bailable writ with the name of a sheriff's officer indorsed upon it, is not evidence, that the sheriff appointed that officer to execute the writ.—MORGAN *v.* BRYDGES (1818), 2 Stark. 314; 171 E. R. 657, N. P.; *subsequent proceedings*, 1 B. & Ald. 647.

*Annotations:*—**Refd.** Reeves *v.* Slater (1827), 1 Man. & Ry. K. B. 265; Summers *v.* Moseley (1834), 4 Tyr. 158.

**686.** ——.]—In an action of debt against a sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail:—*Held:* the indorsement of the name of the officer on the writ was sufficient to connect him with the sheriff without showing that such indorsement was made with his authority.—BOWDEN *v.* WAITHMAN (1821), 4 Moore, C. P. 183.

*Annotations:*—**Folld.** Francis *v.* Neave (1821), 6 Moore, C. P. 120. **Refd.** Scott *v.* Marshall (1832), 2 Cr. & J. 238.

**687.** ——.]—In an action for an escape, the sheriff's authority for appointing a bailiff, was proved by a person belonging to the sheriff's office, who had indorsed the bailiff's name on the writ produced: A verdict having been found for pltf., the ct. refused to set it aside, holding that this proof was sufficient.—FRANCIS *v.* NEAVE (1821), 3 Brod. & Bing. 26; 6 Moore, C. P. 120; 129 E. R. 1192.

*Annotation:*—**Refd.** Scott *v.* Marshall (1832), 2 Cr. & J. 238.

**688.** ——.]—DIGBY *v.* CURE (1831), 2 Tyr. 264, n.

*Annotations:*—**Refd.** Scott *v.* Marshall (1832), 2 Tyr. 257; Snowball *v.* Goodriche (1833), 2 L. J. K. B. 53.

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**PART V. SECT. 6, SUB-SECT. 10.—B. (b).**

*r. Proof of seizure colore officii.*]—In an action against a sheriff for seizing & taking goods, it is sufficient to prove that the deputy sheriff seized them *colore officii*, without proving the writ of execution, or giving other evidence of his being deputy sheriff than that of general reputation.—HOLT *v.* JARVIS (SHERIFF) (1830), Dra. 200.—**CAN.**

*t. No proof of sheriff or bailiff's interference—New trial granted.*]—TILT *v.* JARVIS (1856), 5 C. P. 486.—**CAN.**

*u. Failure to show seizure by deputy made under process.*]—In replevin

**689. Proof of issue of warrant to officer.**]—In an action of trespass against the sheriff for the wrongful act of a bailiff, it is not enough, in order to affect the sheriff, to prove him a general bailiff, & that he had given a bond of indemnity to the sheriff as such together with proving the copy of the warrant under which he entered & seized pltf.'s goods; but the privity between such bailiff & the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff; or at least by proving such notice to produce it as will, in case of non-production, let in the secondary evidence of its contents.

The admission of the under-sheriff may affect the high sheriff, because he is the general officer of the sheriff: but I do not think that the bailiff is his general officer. The bailiff gives a bond to execute such warrants as shall be directed to him; when a warrant is granted to him, he becomes the special officer of the sheriff; & I have always understood it to be necessary to produce the warrant to show that relation between them (LAWRENCE, J.).—DRAKE *v.* SIKES (1797), 7 Term Rep. 113; 101 E. R. 883.

*Annotation:*—**Refd.** Snowball *v.* Goodricke (1833), 4 B. & Ad. 541.

**690.** ——.]—In an action of trespass against the sheriff for seizing pltf.'s goods to connect deft. with the trespass, it is sufficient to prove the warrant under which the goods were seized by the bailiff.—GREY *v.* SMITH (1808), 1 Camp. 387; 170 E. R. 994.

*Annotation:*—**Mentd.** Millen *v.* Dent (1847), 10 Q. B. 846.

**691.** ——.]—In an action against the sheriff for an escape, the regular way of connecting him with his officer, so as to make him responsible for his act, is by the production of the warrant. But any recognition by the sheriff, that the officer acted under his authority, will dispense with the necessity of producing it. An indorsement upon the writ, returned & filed by the sheriff, of the name of the officer, is not sufficient to make the sheriff responsible, without proving that his name was written upon it by the authority, or with the privity of the sheriff. The writ, with the sheriff's return upon it, is only evidence against him, to the extent of his duty under it, & it is no part of his duty to annex the officer's name to the return.—HILL *v.* LEIGH (1816), Holt, N. P. 217; 171 E. R. 219, N. P.; *subsequent proceedings, sub nom.* HILL *v.* MIDDLESEX (SHERIFF), 7 Taunt. 8.

*Annotation:*—**Refd.** Scott *v.* Marshall (1832), 2 Cr. & J. 238.

**692.** —— **Issue by under-sheriff under sheriff's seal.**]—In an action of trover against the sheriff for goods taken in execution, it is sufficient for pltf. to give in evidence the warrant issued by the under-sheriff, under the sheriff's seal of office, & he is not bound to prove the writ.—GIBBINS *v.* PHILLIPPS (1828), 7 B. & C. 535, n; 2 Man. & Ry. K. B. 238; 6 L. J. O. S. K. B. 209; 108 E. R. 822.

*Annotation:*—**Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), De G. 9.

**693.** —— **Issue by London agents of sheriff.**]—In an action against a sheriff for taking pltf.'s goods, to connect the sheriff with the affair, it was proved by the officer that he took the goods under a warrant, which he produced, & which he stated that he received from A. & Co., the London agents of the sheriff. It was also proved by the under-sheriff that A. & Co. were the London agents of the sheriff:—*Held:* sufficient.—SHEPHERD *v.* WHEBLE (1838), 8 C. & P. 534.

*Annotations:*—**Refd.** Brown *v.* Copley (1844), 7 Man. & G. 558. **Mentd.** Taylor *v.* Steele (1847), 16 M. & W. 665.

**694.** —— **Default by other officer.**]—Where more than the sum allowed by statute has been taken for a bail bond, by an officer of the sheriff who keeps a lock-up house, but who was not the officer to whom the warrant was directed, but to whose house deft. was brought after being arrested, no action will lie against the sheriff.—GEORGE *v.* PERRING (1801), 4 Esp. 63; 170 E. R. 642, N. P.

*Annotation:*—**Refd.** Barsham *v.* Bullock (1839), 10 Ad. & El. 23.

**695.** —— **Delivery to officer necessary.**]—The sheriffs of the late & present year signed in Nov. the return of *non est inventus* on a writ of Trinity term. In an action against the late sheriff for not arresting:—*Held:* his return related to the day of his quitting office, & to make him liable for the default of the officer employed, it was not enough to show that a warrant was made to the officer, but it must be shown that the warrant was delivered to the officer, & neglect committed while deft. was in office.—FONSEC *v.* MAGNAY (1815), 6 Taunt. 231; 1 Marsh. 554; 128 E. R. 1023.

*Annotation:*—**Consd.** Scott *v.* Marshall (1832), 2 Cr. & J. 238.

**696.** —— **Issue of second process.**]—Declarations made by an officer whilst in possession of goods under a *fi. fa.*, after the return of the *fi. fa.*, are evidence against the sheriff, & no new warrant is necessary after a writ of *venditioni exponas*, to connect the officer with the sheriff.—JACOBS *v.* HUMPHREY (1834), 2 Cr. & M. 413; 4 Tyr. 272; 3 L. J. Ex. 82.

*Annotation:*—**Refd.** Brown *v.* Jarvis (1836), Tyr. & Gr. 1033.

—— **Secondary evidence.**]—*See* EVIDENCE, Vol. XXII., pp. 209, 256, 257, Nos. 1824, 2411.

**697. Officer acting under direction of execution creditor.**]—BOWSHER *v.* CALLEY (1808), 1 Camp. 391, n.; 170 E. R. 996, N. P.

**698.**] ——.—R. *v.* LONDON (LATE SHERIFF), RUSTIN *v.* HATFIELD (1819), 1 Chit. 613.

*Annotation:*—**Distd.** Botten *v.* Tomlinson (1847), 16 L. J. C. P. 138.

**699.** ——.]—A bailiff having seized goods under a *fi. fa* against B., is authorised by A., the creditor, to quit possession, B. consenting that he may return & sell. The bailiff quits possession, & afterwards returns & sells, & the sheriff pays the proceeds to A. Before the sale C. issues a *fi. fa* against B, to which the sheriff returns *nulla bona*. C. recovers the value of the goods from the sheriff in an action for a false return. A. is liable to the sheriff for the damages & costs recovered by C., unless he can show that the sheriff was conusant of the misconduct, or that the action is brought for the benefit of the bailiff.

The general rule undoubtedly is, that the act of the officer is, in point of law, the act of the sheriff, but I think the present case forms an exception to that rule. Where the misconduct of the officer is produced by the act of the execution creditor, it is not competent for the latter to say that the act of the officer, committed in violation of his duty to the sheriff, & induced by the execution creditor, is the act of the sheriff (BAYLEY, J.).—CROWDER *v.* LONG (1828), 8 B. & C. 598; 3 Man. & Ry. K. B. 17; 7 L. J. O. S. K. B. 86; 108 E. R. 1164.

*Annotations:*—**Refd.** Raphael *v.* Goodman (1838), 8 Ad. & El. 565; Brown *v.* Copley (1844), 7 Man. & G. 558.

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against the sheriff for a seizure under execution made by his deputy:—*Held:* as pltf. was obliged to show that the seizure was made under process in order to connect deft. with the act, it was not necessary to plead specially, but that under *non cepit* deft. might avail himself of 18 Vict. c. 118, which enacts that replevin shall not lie in such circumstances.—CLARK *v.* RUTTAN (1856), 6 C. P. 97.—**CAN.**

*Sect.* 6.—*Execution of process: Sub-sect.* 10, *B.* (*b*) *&* (*c*).]

**700. Officer acting under direction of assignees in bankruptcy.**]—Where a sheriff's officer had seized under a *fi. fa.* goods of a trader, more than sufficient to satisfy the levy, & the trader having become bkpt., & assignees chosen before the goods were sold, the assignees authorised the officer to deliver the whole of the goods to A. & to receive from him a certain sum as the full value of the goods, which he did accordingly, & out of that money satisfied the execution creditor, but never paid over the residue to the assignees:—*Held:* they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from pltfs., the assignees.—COOK *v.* PALMER (1827), 6 B. & C. 739; 9 Dow. & Ry. K. B. 723; 5 L. J. O. S. K. B. 234; 108 E. R. 623.

**701. Admission.**]—Confession of an escape by the under-sheriff is evidence against the sheriff.—YABSLEY *v.* DOBLE (1697), 1 Ld. Raym. 190; 91 E. R. 1023.

*Annotations:*—**Distd.** Drake *v.* Sykes (1797), 7 Term Rep. 113. **Refd.** Snowball *v.* Goodricke (1833), 4 B. & Ad. 541.

**702. —— In pleading.**]—BARSHAM *v.* BULLOCK, No. 298, *ante*.

**703. —— ——.**]—Case against a sheriff. The first count was framed upon 8 Ann. c. 14, s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, & of which arrear deft. had notice, & stated that deft. took the goods of T., the tenant of pltf., under a *fi. fa.* issued against T. at the suit of B. This was not traversed by the pleas, & no other execution appeared:—*Held:* the connection of the party, who was shown to have seized the goods, with deft., sufficiently appeared without producing any warrant of deft. to that party.—REED *v.* THOYTS (1840), 6 M. & W. 410; 9 L. J. Ex. 316; 151 E. R. 472; *sub nom.* READ *v.* THOYTS, 9 C. & P. 515.

**704. —— Of under-sheriff—Not accompanying act in official capacity.**]—Admissions by the under-sheriff not accompanying an act done in his official character:—*Held:* not receivable in evidence to charge the sheriff.—SNOWBALL *v.* GOODRICKE (1833), 4 B. & Ad. 541; 1 Nev. & M. K. B. 234; 2 L. J. K. B. 53; 110 E. R. 559.

**705. Admissible evidence — Conversation of officer.**]—BOWSHER *v.* CALLEY (1808), 1 Camp. 391, n.; 170 E. R. 996, N. P.

**706. —— Declarations of officer.**] — JACOBS *v.* HUMPHREY, No. 696, *ante*.

**707. —— Documents written in course of duty.**]—Where a paper written by the under-sheriff, in the course of his office, is given in evidence to charge the sheriff. *Semble:* the statement therein made as to the authority under which the sheriff acted is to be taken as well founded; so as to render it unnecessary for the sheriff to give his authority in evidence.—HAYNES *v.* HAYTON (1828), 6 L. J. O. S. K. B. 231.

*Annotations:*—**Consd.** White *v.* Morris (1852), 11 C. B. 1015. **Refd.** Bessey *v.* Windham (1844), 6 Q. B. 166.

**708. —— Affidavit by officer in interpleader proceedings.**]—In an action of trover, against the sheriff for taking the goods of pltf., an affidavit made by the officer under Interpleader Act, 1831 (c. 58) respecting the goods, is admissible in evidence to prove that the officer who seized the goods is the servant of the sheriff.—BRICKELL *v.* HULSE (1837), 7 Ad. & El. 454; 2 Nev. & P. K. B. 426; Will. Woll. & Dav. 610; 7 L. J. Q. B. 18; 2 Jur. 10; 112 E. R. 541.

*Annotations:*—**Consd.** Bolleau *v.* Rutlin (1848), 2 Exch. 665; Richards *v.* Morgan (1863), 4 B. & S. 641. **Mentd.** Gardner *v.* Moult (1839), 10 Ad. & El. 464; Cole *v.* Hadley (1840), 11 Ad. & El. 807; Campbell *v.* Rothwell (1877), 47 L. J. Q. B. 144; British Thomson-Houston Co. *v.* British Insulated & Helsby Cables, [1924] 2 Ch. 160.

**—— Secondary evidence.**]—*See* EVIDENCE, Vol. XXII., p. 228, 235, 239, 244, Nos. 2027, 2107, 2152, 2217.

**709. Presumption of authority — To execute assignments.**]—Where a bill of sale of goods taken under a *fi. fa.* is made by an officer of the sheriff, the ct. will presume that he was fully authorised to make it.

We think the under-sheriff has authority to empower his officers to put the seal to an instrument of this sort (ERLE, C.J.).—ROBINSON *v.* COLLINGWOOD (1864), 17 C. B. N. S. 777; 144 E. R. 311.

*Annotation:*—**Mentd.** *Re* Lees, *Ex p.* Collins (1874), 10 Ch. App. 369, n.

**710. Officer of sheriff acting for coroner.**] — A sheriff obtained judgment on a bail bond, & issued a *fi. fa.* directed to the coroner, on which pltf.'s attorney indorsed the name of a sheriff's officer as the person pointed out to the coroner to execute the writ. That officer took goods in execution & sold them, & received the purchase-money, but did not pay it over to pltf. The goods being afterwards taken from the purchaser by persons claiming a prior right, he sued the sheriff for the purchase-money, as for money had & received to his use on failure of consideration:—*Held:* he could not recover in that action, for the act of the officer was done by him as officer to the coroner, & the sheriff was not connected with it so as to make him liable.—SARJEANT *v.* COWAN (1833), 1 Cr. & M. 491; 2 L. J. Ex. 235; 149 E. R. 493; *sub nom.* SARGENT *v.* COWAN, 3 Tyr. 538.

### (*c*) *Special Bailiffs.*

**711. What constitutes a special bailiff—Request to direct warrant to particular officer.**]—The mere fact of pltf. requesting the sheriff to direct his warrant to a particular officer does not constitute the latter a special bailiff, so as to render him pltf.'s agent.—BALSON *v.* MEGGAT (1836), 4 Dowl. 557; 1 Har. & W. 659.

*Annotations:*—**Distd.** Ford *v.* Leche (1837), 6 Ad. & El. 699. **Folld.** Corbet *v.* Brown (1838), 6 Dowl. 794. **Refd.** Alderson *v.* Davenport (1844), 1 New Pract. Cas. 46.

**712. —— —— Or any officer thought proper.**]—A request by pltf. to a sheriff to direct his warrant to a particular officer if he is at home, & if not, to any officer he thought proper, does not make him a special bailiff so as to take away the responsibility from the sheriff.—CORBET *v.* BROWN (1838), 6 Dowl. 794; 1 Will. Woll. & H. 300; 2 Jur. 568.

**713. —— —— Who has received plaintiff's instructions.**]—A letter from pltf.'s attorney to an under-sheriff, inclosing writs of *ca. sa.* & requesting him to employ a particular officer who has received instructions for the execution, is not an appointment of a special bailiff, & does not release the sheriff from responsibility for neglect of the officer.—ALDERSON *v.* DAVENPORT, PERRIN *v.* DAVENPORT (1844), 1 Dow. & L. 966; 13 M. & W. 42; 1 New Pract. Cas. 45; 13 L. J. Ex. 352; 3 L. T. O. S. 182; 8 Jur. 650; 153 E. R. 17.

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**PART V. SECT. 6, SUB-SECT. 10.—B. (c).**

**b.** *Effect of appointment — On liability of sheriff—General rule.*]—The appointment of a special deputy or bailiff by a party to a suit discharges the sheriff from all responsibility.—COCHRAN *v.* BELL (1874), 9 N. S. R. (3 G. & O.) 488.—**CAN.**

**c.** —— ——.]—BOWRING *v.* DICKS, *Ex p.* DICKS' TRUSTEE (1891), 7 Nfld. L. R. 552.—**NFLD.**

**d.** —— ——.] — When a sheriff

**714. —— Writ indorsed with name of particular officer.**]—I do not see how the mere fact of pltf.'s name being placed on the back of the writs, in deft.'s handwriting, could be an appointment by the latter of the former as special bailiff (COLERIDGE, J.).—SEAL *v.* HUDSON (1847), 4 Dow. & L. 760; 2 Saund. & C. 55; 11 Jur. 610.

*Annotations:*—**Consd.** Maillé *v.* Main (1848), 6 Dow. & L. 42. **Refd.** Royle *v.* Busby (1880), 6 Q. B. D. 171.

**715. —— Warrant delivered by plaintiff to particular officer—Encouragement in making illegal arrest.**]—Pltf.'s attorney being about to issue a *ca. sa.* against H. at the suit of pltf., requested of the sheriff a particular sheriffs' officer; delivered the warrant to that officer; took him in his carriage to the scene of action, & then encouraged an illegal arrest, from which H. afterwards escaped:—*Held:* pltf. could not sue the sheriff for such escape, & the officer must be taken to be her special bailiff.—DOE *v.* TRYE (1839), 5 Bing. N. C. 573; 7 Dowl. 636; 7 Scott, 704; 8 L. J. C. P. 346; 3 Jur. 954; 132 E. R. 1220.

*Annotation:*—**Refd.** Sandon *v.* Jervis (1859), 5 Jur. N. S. 860.

**716. —— Interference with officer after appointment.**]—On Jan. 26, 1846, the sheriff, under a *fi. fa.* sued out by pltf., seized deft.'s goods. At pltf.'s request the sale was deferred. On May 9, pltf. paid all expenses up to that date, & then wrote to the officer in possession. "Provided deft. satisfies all future claims the sale may be postponed." The officer remained in possession till Sept., &, after a peremptory order from pltf., sold the goods on Sept. 20. On being ruled, the sheriff returned, on Oct. 24, that after deducting various sums for expenses (among which was an item of £20 possession money), he had £34 ready to pay to pltf. Pltf. applied to the ct. to order the sheriff to pay him the sum of £20 possession money, as well as the sum of £34:—*Held:* pltf. by his communications with, & directions to the officer, did not thereby discharge the sheriff, & the proper course to enforce the sheriff's liability was by summary application, & not by an action for money had & received.—BOTTEN *v.* TOMLINSON (1847), 16 L. J. C. P. 138.

**717. —— ——.**]—Debtor whose goods had been seized under a writ of *fi. fa.* persuaded the officer executing the writ not to advertise the sale, & himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour, & on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him, & under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods, & they consequently sold at an undervalue:—*Held:* the above facts did not constitute the officer the agent of execution debtor, so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale.—WRIGHT *v.* CHILD (1866), L. R. 1 Exch. 358; 4 H. & C. 529; 35 L. J. Ex. 209; 15 L. T. 141; 30 J. P. 646.

**718. Effect of appointment—On liability of sheriff—General rule.**]—The sheriff is discharged by pltf.'s appointing a special bailiff & agent to manage the sale, though the sheriff returned that he had sold, & that he had paid the sum illegally deducted for the auction, etc.—PALLISTER *v.* PALLISTER (1816), 1 Chit. 614, n.

*Annotations:*—**Refd.** Higgins *v.* M'Adam (1829), 3 Y. & J. 1; Harding *v.* Holden (1841), 2 Man. & G. 914.

**719. —— —— ——.**]—Where pltf. appoints his own bailiff to execute a writ, the sheriff is relieved from all responsibility until the party is arrested & delivered into the actual custody of the sheriff.

The sheriff received a *capias ad respondendum* against D., at the suit of R. Two days afterwards he received from F. an *alias capias* also against D., at the suit of F. F. wrote the following letter to the under-sheriff: "Myself *v.* D. I inclose you a writ herein, & shall feel obliged by your granting a warrant hereon, directed to M. & B. I shall write to B. in a day or two." The sheriff issued a warrant to M., on the writ at the suit of R., who arrested D., on that warrant, took a bail bond from him & then allowed him to go at large:—*Held:* the letter was an appointment by F. of M. & B. to be his special bailiffs; the sheriff was not therefore liable to an action for an escape; & although the actual arrest in the one action was a constructive arrest in the other, yet the sheriff was not liable, as the agency of B. & M. to pltf. did not cease when the arrest was made.—FORD *v.* LECHE (1837), 6 Ad. & El. 699; 1 Nev. & P. K. B. 737; Will. Woll. & Dav. 258; 6 L. J. K. B. 150; 1 Jur. 334; 112 E. R. 269.

*Annotations:*—**Refd.** Corbet *v.* Brown (1838), 6 Dowl. 794; Doe *v.* Trye (1839), 5 Bing. N. C. 573; Alderson *v.* Davenport (1844), 1 Dow. & L. 966.

**720. —— —— Return of writ.**]—If the sheriff appoint a special bailiff at pltf.'s request, the latter cannot rule the sheriff to return the writ.—DE MORANDA *v.* DUNKIN (1790), 4 Term Rep. 119; 100 E. R. 927.

*Annotations:*—**Distd.** Beckford *v.* Welby (1797), 2 Esp. 591; Taylor *v.* Richardson (1800), 8 Term Rep. 505. **Refd.** Higgings *v.* M'Adam (1829), 3 Y. & J. 1; Ford *v.* Leche (1837), 6 Ad. & El. 699; Harding *v.* Holden (1841), 10 L. J. C. P. 229; Alderson *v.* Davenport, Perrin *v.* Davenport (1844), 3 L. T. O. S. 182; Angell *v.* Baddeley (1877), 47 L. J. Q. B. 86.

**721. —— —— ——.**]—When a party appoints his own bailiff, the sheriff cannot be called upon for a return of the writ; but if he does return it, he subjects himself to an action if the writ has not been properly executed.—BECKFORD *v.* WELBY (1797), 2 Esp. 591; 170 E. R. 465.

*Annotation:*—**Refd.** Higgins *v.* M'Adam (1829), 3 Y. & J. 1.

**722. —— —— ——.**]—Where a special bailiff had been appointed by pltf. to execute a *fi. fa.* & the writ had been afterwards withdrawn preparatory to issuing a *ca. sa.*:—*Held:* the sheriff ought not to be ruled to return the writ until an application for that purpose had been first made to him.—HARDING *v.* HOLDEN (1841), 2 Man. & G. 914; 9 Dowl. 659; 3 Scott, N. R. 293; Woll. 207; 10 L. J. C. P. 229; 133 E. R. 1014.

**723. —— —— Action for false return.**]—PORTER *v.* VINER (1815), 1 Chit. 613, n.

*Annotations:*—**Consd.** Higgins *v.* M'Adam (1829), 3 Y. & J. 1. **Refd.** Ford *v.* Leche (1837), 6 Ad. & El. 699.

**724. —— —— Detainer of surplus proceeds.**]—COOK *v.* PALMER, No. 700, *ante.*

—— —— ——.]—*See, also,* BANKRUPTCY, Vol. V., p. 809, No. 6903.

**725. —— —— After arrest made.**]—Though the sheriff appoint special bailiffs to arrest deft. at pltf.'s request, the sheriff is responsible for deft. after the arrest made.—TAYLOR *v.* RICHARDSON (1800), 8 Term Rep. 505; 101 E. R. 1514.

*Annotation:*—**Refd.** Higgins *v.* M'Adam (1829), 3 Y. & J. 1.

—— ——.]—*See, also,* EXECUTION, Vol. XXI., p. 529, Nos. 1029–1032.

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has appointed a special bailiff to execute a writ of *fi. fa.* at the request & peril of pltf. he should move to set aside any rule subsequently obtained by pltf. upon him to return the writ. If instead of doing so, he returns that he appointed a special bailiff, to whom he refers to as to the execution of the writ, the return may be set aside, even on motion by pltf.—TAIT & Co. *v.* MITCHELL (1888), 22 L. R. Ir. 327.—IR.

horse was sold by the sheriff, & the money paid over to the officer. B. brought an action against the officer for money had & received to recover the amount. It appeared that the horse had belonged to her husband, but that after his death she had provided for its keep. No letters of administration were produced:—*Held:* this was sufficient evidence against a wrongdoer, to entitle her to recover in an action for money had & received.—OUGHTON *v.* SEPPINGS (1830), 1 B. & Ad. 241; 8 L. J. O. S. K. B. 394; 109 E. R. 776.

*Annotation:*—**Reld.** White *v.* Mullett (1851), 6 Exch. 713.

**742. Trover—Sale of more goods than legally seizable.**]—If a sheriff legally take goods in execution, the proprietor whereof afterwards becomes bkpt., & the sheriff sells at one time, after the bkpcy., enough to satisfy both that execution & also another execution, which being delivered to him after the bkpcy., is void, bkpt.'s assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution.—STEAD *v.* GASCOIGNE (1818), 8 Taunt. 527; 129 E. R. 488.

*Annotations:*—**Apld.** Batchelor *v.* Vyse (1834), 4 Moo. & S. 552. **Reld.** Giles *v.* Grover (1832), 9 Bing. 128; Aldred *v.* Constable (1844), 6 Q. B. 370.

**743. —— Goods wrongfully seized restored to owner—Damage to goods.**]—If the sheriff take the goods of one man under an execution against the goods of another person, & restore them before a suit commence, yet an action of trover can be maintained against him. If any of the goods are damaged by the omission of some act which the owner would have done if the sheriff had not seized the goods, the sheriff is liable to answer in damages for that injury.—ROBINSON *v.* WALKER (1824), 2 L. J. O. S. K. B. 144.

**744. —— Change of sheriffs.**]—In trover by the assignees of bkpt., for goods taken by the sheriff under an execution, it appeared that the goods were taken at about the time of year at which the sheriffs are changed; & it was proved, that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by defts. as sheriff:—*Held:* to be sufficient evidence that he was the sheriff who executed the writ; & if the writ, when produced at the trial, has his name erased, & the name of the previous sheriff substituted, it will be question for the jury, whether that substitution was made to correct a mistake, or to defeat pltf.—WHITEHOUSE *v.* ATKINSON (1828), 3 C. & P. 344; 172 E. R. 449, N. P.

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Where pltf. (deft. in a *capias*) sues the sheriff & pltf. in the writ for his arrest, as joint trespassers, he must take care that his record of the pleadings does not show him to be proceeding against the sheriff for one act of trespass & against pltf. in the writ for another act of trespass. Where the record showed this, the ct. set aside a verdict obtained by pltf. against both defts. on the issues raised.—ECCLES *v.* MOODIE (1848), 4 U. C. R. 250.—**CAN.**

l. —— *Necessity for proof of judgment & fieri facias.*]—CULBERT *v.* CONGER (SHERIFF) (1850), 7 U. C. R. 395.—**CAN.**

m. —— *Justification under warrant of county court judge.*]—MILLER *v.* GZOWSKI, LAWSON & DAVIDSON (1856), 6 C. P. 71.—**CAN.**

n. —— *Staying action.*]—WASHINGTON *v.* WEBB (1858), 16 U. C. R. 232.—**CAN.**

o. ——.]—A seizure of goods under a division ct. execution being entitled, under C. S. U. C. c. 22, s. 266, to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter for the seizure made by him, the goods being, under the division ct. writ, already in the custody of the law.—KING *v.* MACDONALD (1865), 15 C. P. 397.—**CAN.**

p. ——.]—GREAT WESTERN RY. CO. *v.* MCEWAN (1870), 30 U. C. R. 350.—**CAN.**

q. —— *Plea of leave & license.*]—SCOTT *v.* PALMER (1881), 21 N. B. R. (5 P. & B.) 304.—**CAN.**

r. ——.]—WALLBRIDGE *v.* HALL, WALLBRIDGE *v.* YEOMANS (1887), 4 Man. L. R. 341.—**CAN.**

t. —— *Right of sheriff to justify—Without showing judgment.*]—CROWE *v.* ADAMS (1892), 21 S. C. R. 342.—**CAN.**

s. *No notice of sale given by sheriff—Whether action lies.*]—MALCOLM *v.* RAPELJE (1826), Tay. 361.—**CAN.**

b. *Consolidation of actions against sheriff.*]—Several actions having been brought on a bond to a sheriff for the gaol limits, the ct. granted a rule to consolidate them.—LEONARD (SHERIFF) *v.* MERRITT (1830), Dra. 190.—**CAN.**

c. *Plea of tender—Validity of.*]—A sheriff sent his clerk to pltf.'s attorney before action brought, saying that certain moneys collected on an execution in favour of pltf. were ready to be paid; the clerk had not the money with him, nor did he offer to go for it; but the attorney said he would not receive it unless the costs of a rule on the sheriff to return the writ were also paid. In an action for the sum so levied:—*Held:* these facts would not sustain a plea of tender.—THOMSON *v.* HAMILTON (SHERIFF) (1836), 5 O. S. 111.—**CAN.**

d. *False swearing.*]—CLINE *v.* MCDONALD (1838), 1 Ont. Dig. 409.—**CAN.**

e. *Misconduct in execution of writ.*]—In an action by deft. in an execution against the sureties of a sheriff on their covenant under the statute, for misconduct of the sheriff in execution of the writ, the declaration need not set forth the judgment in the suit against himself.—SANDERSON *v.* HAMILTON (1840), 1 U. C. R. 460.—**CAN.**

f. *Sale of goods at undervalue.*]—In case against a sheriff, for selling goods upon pltf.'s *fi. fa.* under their value, the judgment in the original action must be set out.—BILLINGS *v.* HAMILTON (1840), 6 O. S. 113.—**CAN.**

g. ——.]—Where, in an action against a sheriff for not selling lands in execution for the best price that he could get for the same, but wrongfully & injuriously much below their real value, deft. pleaded that he sold the lands for the best price that he could get for them:—*Held:* plea good.—WATSON *v.* MCDONELL (1843), 6 O. S. 450.—**CAN.**

h. *Action against sheriff's sureties.*]—Where in an action against a sheriff's sureties for money received by the sheriff on an execution at the suit of pltf., it appeared that the amount had been credited to pltf.'s attorney in an award between him & the sheriff, & that the attorney had accepted the award:—*Held:* a verdict for defts. was right.—HALL *v.* HAMILTON (1840), 3 Ont. Dig. 6402.—**CAN.**

k. —— *Staying proceedings.*]—The ct. will not stay proceedings against a sheriff's surety, who has suffered judgment by default, on the ground that he has already paid the full amount of his liability, unless such payment were after plea pleaded; & the costs of actions brought against the sureties cannot be included in making up the amount for which he is liable under his covenant.—HIXON *v.* HAMILTON (1841), 6 O. S. 155.—**CAN.**

aa. *Trover—Goods illegally seized.*]—A joint action of trover is maintainable against the purchaser of goods at sheriff's sale, & the attorney for pltf., who indemnifies the sheriff for the sale, by a person whose goods have been illegally taken as the goods of the execution debtor.—KIRBY *v.* CAHILL & WALKER (1842), 6 O. S. 510.—**CAN.**

bb. —— *Who may obtain action—Whether tenant in common.*]—A tenant in common of goods, which have been sold under an execution against his co-tenant, cannot maintain trover against the sheriff to recover the value of his share.—ECCLESTONE *v.* JARVIS (1845), 1 U. C. R. 370.—**CAN.**

cc. ——.]—STOESER *v.* SPRINGER (1882), 7 A. R. 497.—**CAN.**

dd. ——.]—BEEMER *v.* INKSTER (1886), 3 Man. L. R. 534.—**CAN.**

ee. ——.]—THOMPSON & ABBOTT *v.* NUGENT (1860), 4 Nfld. L. R. 506.—**NFLD.**

ff. *Bankruptcy before seizure—Return of nulla bona.*]—Where before any actual seizure by the sheriff under the *fi. fa.*, & before the return day, the goods of the debtor are seized under a commission of bkpcy., & *nulla bona* returned to the writ, the sheriff is liable on such return to an action by the execution creditor.—DECATUR *v.* JARVIS (1845), 3 U. C. R. 133.—**CAN.**

gg. *Non-payment of money—Sufficiency of allegation of breach.*]—It is a sufficient breach of the covenant that the sheriff would pay over moneys received by him, "that he had by virtue of his office received certain moneys which pltfs. are entitled to, according to the true intent & meaning of the covenant, to wit, £50, within the four years mentioned thereby, but that he neglected & refused to pay them to pltfs., although often requested so to do."—SMUTER *v.* GRAHAM (1846), 2 U. C. R. 164.—**CAN.**

hh. —— *Rule against sheriff—Entry on motion paper.*]—A rule for a sheriff to pay over money in his hands cannot be entered on the motion paper & moved on fourteen days' notice.—*Ex p.* GRAHAM (1864), 11 N. B. R. (6 All.) 209.—**CAN.**

kk. *Reversionary interest—Whether*

**745. —— Seizure of goods of partner of debtor.**]—One partner cannot maintain trover against the sheriff for a mere sale of his share of the partnership property under a *fi. fa.* issued against the other partner for a separate debt. The sheriff in such case is in the same position, so far as regards his liability in trover, as if the sale had been by the execution partner; & upon a plea of not guilty the partnership is good evidence.—MAYHEW *v.* HERRICK (1849), 7 C. B. 229; 18 L. J. C. P. 179; 13 Jur. 1078; 137 E. R. 92.

*Annotations:*—**Expld.** Fraser *v.* Kershaw (1856), 2 K. & J. 496. **Reld.** Tancred *v.* Allgood (1859), 28 L. J. Ex. 362. **Mentd.** Jacob *v.* Seward (1872), L. R. 5 H. L. 464.

——.]—*See, also*, BANKRUPTCY, Vol. V., pp. 824, 825, Nos. 6996–7008; EXECUTION, Vol. XXI., pp. 513, 514, Nos. 897–899.

**746. Trespass—Seizure of goods of stranger.**]—By indenture between A. & B., reciting, that B. having become surety on behalf of A. for the payment of £600 due from A. to C., in consideration of C.'s forbearing proceedings against A., A., for the purpose of securing to B. the payment of the £600, in case he should be required, as such surety, to pay the same to C., had executed a bond to B., conditioned for the payment to B., his exors., etc., of £600, on a certain day; & that, for the better securing to B. the payment of the £600, in case he should be required, as such security, to pay the same to C., A. had agreed to grant, etc., his household goods & effects, etc., to B. A., in consideration of B. having become such surety, granted unto B. his said goods & effects, etc., unto, & to the proper use & behoof of, B., his exors., etc., for ever. The indenture contained a proviso to be void on payment to C. of £600, with interest, on a given day,—a covenant by A. with B. to pay the £600 & interest to C., & to indemnify B., his exors., etc., from the payment thereof,—a covenant by A. for quiet enjoyment by B. in case of default,—a covenant to insure,—& a power of sale for payment to C. of the £600 & interest:—*Held:* B. might maintain trespass against the sheriff for seizing these goods under a *fi. fa.* against A., notwithstanding that up to the time of the seizure they remained in A.'s possession.—WATSON *v.* MACQUIRE (1848), 5 C. B. 836; 136 E. R. 1108.

*Annotation:*—**Mentd.** Canning *v.* Raper (1852), 1 E. & B. 164.

**747. —— —— Payment into court against seizure—Damage to goods.**]—In trespass against the sheriff for seizing pltf.'s goods under an execution against another person, & for injuring them, defts. paid money into ct.:—*Held:* if pltf. proceeded for damages ultra, he must prove that the goods were in deft.'s possession when damaged,

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*action on case may be maintained against sheriff.*]—Pltf. loased cattle to T. for ten years, at the end of which time T. was to give up the cattle, or others in their stead, in as good condition as at the date of the lease:—*Held:* pltf. had no absolute reversionary interest in the cattle, & could not maintain an action on the case against the sheriff for selling them under an execution against T. during the term.—GOOD *v.* WINSLOW (1859), 9 N. B. R. (4 All.) 241.—**CAN.**

b. *Indemnity bond—When sheriff may take.*]—A sheriff, whenever there is an adverse claim to goods as between the execution debtor & a third party, may take an indemnity bond from either one or the other, or both the parties.—THOMAS (SHERIFF) *v.* JOHNSTON (1847), 4 U. C. R. 110.—**CAN.**

c. —— *What costs may be recovered from obligors.*]—In an action by the sheriff on an indemnity bond, the sheriff is entitled to recover from the obligors in the indemnity bond the costs for putting off the trial of the cause against himself, on account of the absence of a material witness.—CORBETT *v.* WILSON (1851), 8 U. C. R. 22.—**CAN.**

d. *Action for surplus money—After satisfying writ of fieri facias—Necessity for demand.*]—In an action against the sheriff by an execution debtor for the surplus of money in his hands after satisfying a *fi. fa.*, no demand before action is necessary.—AINSLIE *v.* RAPELJE (1847), 3 U. C. R. 275.—**CAN.**

e. *Conflicting claims to funds—Whether court will grant rule nisi—To compel sheriff to pay over money.*]—The ct. will not grant a rule *nisi* to compel a sheriff to pay over moneys collected under execution where there are conflicting claims to the funds, but will leave the parties to their remedy by action.—SCOTT *v.* ANGUS (1854), 2 N. S. R. (James) 183.—**CAN.**

f. *Seizure of attached goods under execution—Whether action on case lies against sheriff.*]—FRANCIS *v.* BROWN (1854), 11 U. C. R. 558.—**CAN.**

g. *Neglect to levy—Goods held under bill of sale.*]—DARLING *v.* CORBETT (SHERIFF) (1851), 8 U. C. R. 72.—**CAN.**

h. —— *Procedure.*]—If a sheriff has improperly omitted to levy the remedy is by action against him, & not by rule to amend his return.—CREIGHTON *v.* DANIELS (1854), 2 N. S. R. (James) 304.—**CAN.**

k. —— *Debtor having sufficiency of goods.*]—HOBBS *v.* HALL (1864), 14 C. P. 479.—**CAN.**

l. ——.]—CLARK *v.* CORBETT (1868), 27 U. C. R. 161.—**CAN.**

m. ——.]—DAVY *v.* JOHNSON (1871), 31 U. C. R. 153.—**CAN.**

n. *Replevin against sheriff—To whom writ directed—Coroners.*]—Where the sheriff is deft., a writ of replevin, under 14 & 15 Vict. c. 64, may be directed to the coroners, though the statute does not provide for such a case.—GILCHRIST *v.* CONGER (1854), 11 U. C. R. 197.—**CAN.**

o. *Venue—Laid by mistake in wrong county.*]—In an action against a bailiff of a division ct., the venue being local was by mistake laid in the wrong county, & pltf. discovering the mistake did not go to trial in pursuance of his notice. Cross-rules having been obtained, pltf. was allowed to amend by changing the venue, & deft.'s rule for judgment as in case of nonsuit was discharged on the peremptory undertaking, & on payment of costs.—WARD *v.* SEXSMITH (1855), 1 P. R. 382.—**CAN.**

p. —— *Right of opposite party—To have action tried in adjoining county.*]—In an action wherein a sheriff is pltf. or deft., the opposite party, if he so desire, may have the action tried in the county adjoining that in which the sheriff resides.—BRANNEN *v.* JARVIS (1880), 8 P. R. 322.—**CAN.**

q. *Sheriff given authority to bid to certain amount—Bid made for full amount authorised—Whether plaintiff has ground of action.*]—Pltf. before the sale gave the sheriff a memorandum authorising him to bid on his account to the amount of the debt & costs in the suit. Under this the sheriff, instead of bidding gradually, bid at once the full amount, & bought in the land:—*Held:* pltf. had clearly no ground of action against him for so doing.—MARKLE *v.* THOMAS (SHERIFF) (1856), 13 U. C. R. 321.—**CAN.**

r. *Procedure necessary requiring sheriff to return papers.*]—In moving for an order upon a sheriff to return papers sent to him for service, the proper mode is to give notice of motion.—PORTER *v.* GARDNER (1857), 1 Ch. Ch. 15.—**CAN.**

t. *Action for goods sold & delivered—Jury having found twice in plaintiff's favour.*]—In an action against the sheriff for goods seized & sold, the jury having twice found in pltf.'s favour:—*Held:* although it seemed clear on the evidence that pltf. had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as B. & Co., the execution pltfs. & the real defts. in this action, had concurred in holding him out in false character, the ct. should not interfere.—CINQ-MARS *v.* MOODIE (1858), 15 U. C. R. 601.—**CAN.**

aa. *Improper sale of equity of redemption in vessel.*]—BETHUNE *v.* CORBETT (1859), 18 U. C. R. 498.—**CAN.**

bb. *Taking out money paid into court—Waiver of action against sheriff.*]—Where pltf. obtained an order to take out of ct. money paid in by the sheriff, on condition that he should pay the master's charges, & was given to understand that he might either take it on these terms or sue the sheriff for it:—*Held:* having availed himself of this order, he could not afterwards recover from the sheriff the fees paid to the master on the ground that the money had been improperly paid into ct.—CROMBIE *v.* DAVIDSON (SHERIFF) (1860), 19 U. C. R. 369.—**CAN.**

cc. *Action against person who indemnified sheriff—Claim against sheriff unsatisfied.*]—LAWTON *v.* ADAMS (1861), 10 N. B. R. (5 All.) 274.—**CAN.**

dd. *Statutory protection of bailiff.*]—MCCANCE *v.* BATEMAN (1862), 12 C. P. 469.—**CAN.**

ee. ——.]—KERO *v.* POWELL (1875), 25 C. P. 448.—**CAN.**

ff. ——.]—RIORDAN *v.* IRVINE, [1908] 2 I. R. 138; 41 I. L. T. 187.—**IR.**

gg. *Conditional order for committal—Plea of justification.*]—The deputy sheriff joined with the attorney for deft. in a plea justifying under a conditional order for committal made upon the examination of a judgment debtor:—*Held:* the plea, being bad as to the attorney, was bad as to both.—CHICHESTER *v.* GORDON (1866), 25 U. C. R. 527.—**CAN.**

hh. *Action by sheriff against partner of absconding debtor.*]—TAYLOR (SHERIFF) *v.* BROWN (1867), 17 C. P. 387.—**CAN.**

*Sect.* 6.—*Execution of process: Sub-sect.* 10, *H. & J.; sub-sect.* 11.]

for that this was not admitted by the payment into ct.—SCHREGER *v.* CARDEN (1852), 18 L. T. O. S. 186; *subsequent proceedings*, 11 C. B. 851.

**748. —— Proof—Sale reciting execution by sheriff.**]—In an action of trespass against the sheriff, it is sufficient evidence to show a bill of sale executed by him of the property in question, which recites the writ, the taking, & the sale of the property by him under it.—WOODWARD *v.* LARKING (1801), 3 Esp. 286; 170 E. R. 618, N. P.

——.]—*See, also*, BANKRUPTCY, Vol. V., p. 825, Nos. 7009, 7010; EXECUTION, Vol. XXI., p. 513, No. 896.

**749. Replevin.**] — (1) The action of replevin lies in all cases where the goods of a party have been wrongfully taken, & he is desirous of getting them back again; & consequently, it may be brought to recover goods seized in execution, or under a distress warrant issued by a justice of the peace in a case where he has no jurisdiction.

(2) A sheriff who replevies goods seized under a writ of execution from a superior ct. will be punished by attachment, *aliter* in the case of an inferior tribunal.—GEORGE *v.* CHAMBERS (1843), 2 Dowl. N. S. 783; 11 M. & W. 149; 12 L. J. M. C. 94; 7 J. P. 79; 7 Jur. 836; 152 E. R. 752.

*Annotations:—As to* (1) **Refd.** Jones *v.* Johnson (1850), 5 Exch. 862; Mellor *v.* Leather (1853), 1 E. & B. 619; Pease *v.* Chaytor (1863), 3 B. & S. 620; Rhymney Ry. *v.* Price (1867), 16 L. T. 394. *Generally*, **Mentd.** Allen *v.* Sharp (1848), 2 Exch. 352; R. *v.* St. Albans JJ. (1853), 22 L. J. M. C. 142; R. *v.* Trafford, etc. Lancashire JJ. (1856), 2 Jur. N. S. 399.

**750. Proof—Whether writ must be produced.**]—GLAVE *v.* WENTWORTH (1842), 6 Q. B. 173, n.; 115 E. R. 67.

*Annotations:*—**Consd.** White *v.* Morris (1852), 11 C. B. 1015 **Mentd.** M'Mahon *v.* Lennard (1858), 6 H. L. Cas. 970.

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**k.** *Conversion.*]—MCLEAN *v.* BRADLEY (1878), 2 S. C. R. 535.—**CAN.**

**l.** ——.] — HANNON *v.* MCLEAN (1878), 12 N. S. R. (3 R. & C.) 101.—**CAN.**

**m.** *Void writ of attachment—Whether sufficient justification to sheriff.*]—Writ of attachment, if good on its face, is a sufficient justification to sheriff, although actually void.—BURKE *v.* CLARKE (1879), 18 N. B. R. (2 P. & B.) 662.—**CAN.**

**n.** *Negligence in execution of writ.*]—BANK OF BRITISH NORTH AMERICA *v.* BELL (1883), 16 N. S. R. (4 R. & G.) 121.—**CAN.**

**o.** *Replevin—Sheriff's duty to take bond with two good sureties.*]—It is the sheriff's duty in replevin to take a bond with two sureties, & to use due care & to exercise a reasonable discretion in inquiring into the sufficiency of the sureties.—NORMAN *v.* HOPE (1886), 13 O. R. 556; *affd.* (1887), 14 O. R. 287.—**CAN.**

**p.** —— *When action lies.*]—Replevin will lie against a sheriff for goods seized by him under an execution by any claimant of the goods other than the execution debtor.—FLANAGAN *v.* WHETEN (1891), 31 N. B. R. 295.—**CAN.**

**q.** *Failure of sheriff to prove himself representative of execution creditor—Effect of.*]—JOHNSON *v.* ARCHIBALD (1888), 20 N. S. R. (8 R. & G.) 321; 9 C. L. T. 56.—**CAN.**

**r.** *Necessity for judgment debtor's assignee—To deny receipt of notice of execution.*]—Where an execution has been placed in the hands of the sheriff, & the judgment debtor before levy makes an assignment of his goods, the assignee in an action against the sheriff for recovery of the goods must rebut knowledge both on his own part & that of the judgment debtor.—ROSS *v.* CREIGHTON (1890), 40 N. S. R. 131.—**CAN.**

**t.** *Errors in registration—Liability of sheriff.*]—A sheriff discharges his duty under Execution Act, *s.* 37, if he publishes a correct copy of the information as furnished him by the land registry office, & is not responsible for loss arising out of errors committed therein.—BRYNES *v.* MCMILLAN (1892), 2 B. C. R. 163.—**CAN.**

**s.** *Action for money had & received.*]—COBURN *v.* MCROBBIE (1893), 9 Man. L. R. 375.—**CAN.**

**b.** ——.]—Under a writ of *fieri facias*, the sheriff, without any actual or formal seizure of the execution-debtor's lands or crops, advertised them for sale, & conveyed them to the plaintiff by a deed reciting that the sheriff had caused the interest in the lands & crops to be seized; it turned out that the execution-debtor's interest in the lands was a freehold, so that the purchaser could not get possession: —*Held:* the purchaser was not entitled to recover the purchase-money from the sheriff in an action for money had & received, as for a consideration that had wholly failed.—MURPHY *v.* SANDES (1876), I. R. 10 C. L. 309.—**IR.**

**c.** *Whether sheriff proper party—To injunction.*]—WILKIE *v.* JELLETT (1895), 2 Terr. L. R. 133; 15 C. L. T. 315; *affd.* (1896), 26 S. C. R. 282; 16 C. L. T. 260.—**CAN.**

**d.** *Applicability of defence of Statute of Frauds—In action against sheriff to recover goods.*]—In an action against the sheriff to recover goods taken out of the possession of pltf. under an attachment against J., an absent or absconding debtor, deft. relied upon Stat. Frauds:—*Held:* the defence of Stat. Frauds was not applicable, the articles sued for having been purchased on two different occasions & the amount of the purchase in neither case exceeding $40. — JOHNSON *v.* BUCHANAN (1896), 29 N. S. R. (17 R. & G.) 27.—**CAN.**

**e.** *Duty of sheriff — To bring prisoner before county judge.*]—R. *v.* BALLARD (1897), 28 O. R. 489.—**CAN.**

**f.** *Right to security for costs.*]—CREIGHTON *v.* SWEETLAND (1898), 18 P. R. 180.—**CAN.**

**g.** *Duty of sheriff to interplead.*]—In a suit against the sheriff & an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead, but may be joined properly in a defence with the execution creditor. —TAYLOR *v.* ROBERTSON (1901), 31 S. C. R. 615.—**CAN.**

**h.** *Collection Act, R. S.* 1900 (*c.* 182), *s.* 28—*Rights of assignee—As against sheriff levying under execution.*]—FARLINGER *v.* INGRAHAM (1905), 38 N. S. R. 467.—**CAN.**

**aa.** *Liability of sheriff selling land free from incumbrances—Seed grain lien on land.*]—MORITZ *v.* CHRISTOPHERSON (1911), 18 W. L. R. 63; 4 Sask. L. R. 147.—**CAN.**

**bb.** *Action by assignee against sheriff—Whether execution creditor proper party.*]—BAKER *v.* RICHARDS (B. C.), [1918] 2 W. W. R. 902; 40 D. L. R. 351.—**CAN.**

**cc.** *Where wrong goods are seized—Party directing officer seizing goods is liable as principal.*] — GRAVES *v.* SPRAGUE (N. B.) (1920), 53 D. L. R. 337.—**CAN.**

**dd.** *Whether writ may be set aside—By party not party to action—Necessity for sheriff to be before court.*]—COUPAL *v.* BUIE, [1926] 2 D. L. R. 918; [1926] 2 W. W. R. 242; 20 Sask. L. R. 523.—**CAN.**

**ee.** *Sheriff of Bombay—Whether corporation sole.*]—The sheriff of Bombay is not a corpn. sole within the ordinary meaning of that expression, & cannot be sued as such.—BOMBAY (SHERIFF) *v.* HAKMAJI MOTAJI & Co. (1926), I. L. R. 51 Bom. 749.—**IND.**

**ff.** *Liability of sub-sheriff—To action for penalties.*]—BARRETT *v.* JOHNSON (1833), 1 Ir. L. Rec. N. S. 17.—**IR.**

**gg.** *Delay in execution of attachment—What order court will make against sheriff.*]—This ct. will on motion order a sheriff to pay in such a sum of money as it appears has been lost, in consequence of his refusing or neglecting to execute with due diligence an attachment issued out of this ct. directed to him.—*Re* COMYNS (1838), 1 I. Eq. R. 72.—**IR.**

**hh.** *Refusal by purchaser of term of years to pay purchase-money—Action by sheriff.*]—TENNENT *v.* ROBINSON (1851), 2 I. C. L. R. 142; 4 Ir. Jur. 147.—**IR.**

**kk.** *Reasonable diligence exercised in execution of writ.*]—A sheriff who has exercised reasonable diligence in the execution of a writ is not liable to an action because he did not use extraordinary exertion or provide against an unexpected unforeseen contingency. —HODGSON *v.* LYNCH (1871), I. R. 5 C. L. 353.—**IR.**

**ll.** *Liability for non-execution of civil bill decree.*] — SIMMONDS *v.* HENCHY (1886), 16 L. R. Ir. 467.—**IR.**

**mm.** *What action will be heard by Superior Court—Action against sheriff.*]—An action brought against an officer of the law, such as a sheriff, in which the legality of the performance by him of his duty is put in issue will be regarded by the ct. not as a sham action but as an action fit to be tried by the Superior Ct., irrespective of the amount of possible damages. — RICHARDSON *v.* BUNBURY (1909), 43 I. L. T. 138. —**IR.**

**nn.** *Damage to property attached by sheriff & whilst in his custody—Whether sheriff liable.*]—In respect to property in the custody of the sheriff, he is only liable when the injury complained of to the goods attached arises from his culpable neglect or fraud either by himself or his officers. He is not responsible for the destruction of property by rats if he has used ordinary precaution to guard against the damage.—MCDONALD *v.* NUGENT (1859), 4 Nfld. L. R. 376.—**NFLD.**

**oo.** *Costs against sheriff—When allowed.*]—In actions against a sheriff the ct. refused to allow costs where one action was taken prematurely & a second action taken after a stay of execution in the first.—GOODFELLOW *v.* TALBOT (1879), 6 Nfld. L. R. 198.—**NFLD.**

**pp.** *Excessive levy.*]—An action is not maintainable for an excessive levy.—

**751. Liability of executors of sheriff.**]—PARKINSON *v.* COLLIFORD (1639), March, 13, pl. 33 ; 82 E. R. 389.

**Indemnity of sheriff.**]—*See* GUARANTEE, Vol. XXVI., pp. 226, 227, 230, Nos. 1173–1775, 1793–1795.

*J. Notice to Sheriff or Officer.*

**752. Notice to sheriff—Notice to under-sheriff's agent.**]—In an action against the sheriff for not arresting a person on meine process, notice of this person being within deft.'s bailiwick, given to the under-sheriff's agent in town, is no evidence of such notice to deft.—GIBBON *v.* COGGON (1809), 2 Camp. 188 ; 170 E. R. 1124, N. P.

**753. Notice to officer—Notice to sheriff.**]—A sheriff executing a *fi. fa.* after notice of the allowance of a writ of error, is liable in trespass though there has been no further *supersedeas* of the execution. Notice to the sheriff of such allowance is notice to his officers & renders them liable in trespass for proceeding with the execution.—BELSHAW *v.* MARSHALL (1832), 4 B. & Ad. 336 ; 1 Nev. & M. K. B. 689 ; 110 E. R. 482.

**754.** ——— ———.]—A letter was addressed to deft., who held a warrant to arrest pltf., by the attorneys who had issued the writ, informing him that the action was arranged, & that notice had been given to pltf.'s attorney of the withdrawal of the writ :—*Held :* this was, under the circumstances, a sufficient notice to the bailiff not to execute the writ of *ca. sa.*, &, in this particular case, it was not necessary to show that the notice had actually reached the sheriff, it being deft.'s duty, as his agent, to communicate it to him.—FUTCHER *v.* HINDER (1858), 3 H. & N. 757 ; 28 L. J. Ex. 28 ; 32 L. T. O. S. 132 ; 7 W. R. 57 ; 157 E. R. 673.

SUB-SECT. 11.—REMEDY OF SHERIFFS AND OFFICERS AGAINST EXECUTION CREDITORS.

**755. Levy money paid in ignorance of act of bankruptcy.**]—A levy is made on the goods of a trader after he has committed an act of bkpcy. & the money levied is paid over to the party ; an action of trover is afterwards brought by the assignees against him, the sheriff, & the bailiff, in which damages are recovered ; & these, together with the costs, are paid by the bailiff :—*Held :* there is no implied promise on the part of pltf. in the original suit to indemnify the bailiff or to contribute to the damages & costs in the action of trover ; but the bailiff might maintain money had & received to recover back the levy money paid over.—WILSON *v.* MILNER (1810), 2 Camp. 452 ; 170 E. R. 1215, N. P.

*Annotations :*—**Consd.** Garland *v.* Carlisle (1837), 11 Bli. 421. **Reid.** Standish *v.* Ross (1849), 3 Exch. 527. **Mentd.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57.

**756. Payment of debt by officer—On attachment of sheriff.**]—Where a bailiff pays money in consequence of an attachment against the sheriff. *Qu. :* whether he can maintain an action against deft., whom he had liberated on the attorney's undertaking. But in such an action, the actual issuing of the attachment against the sheriff must be proved.—GRIFFIN *v.* ROBERTS (1795), 1 Esp. 383 ; 170 E. R. 392, N. P.

**757.** ——— ——— **Promise to indemnify.**]—An action for money paid to the use of deft. may be maintained by a sheriff's officer who has paid the debt & costs on an attachment against the sheriff, bail above not having been put in through the misconduct of deft. in imposing insufficient bail on the sheriff, & deft. having promised to indemnify the officer both before & after the payment : but the officer cannot recover beyond the debt.—WHITE *v.* LEROUX (1829), Mood. & M. 347, N. P.

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CORNISH *v.* BANK OF NEW SOUTH WALES (1865), Mac. 181.—**N.Z.**

f. *Malicious seizure of debtor's property—After tender of payment by him.*]—LAUBSCHER *v.* VIGORS & FRYER (1873), 3 Buch. 20.—**S. AF.**

g. *Liability of sheriff or messenger—For illegal attachment.*]—Apart from proceedings in execution under the direct instruction of the party who takes out the writ, the sheriff or messenger is personally liable for an illegal attachment.—KALLI *v.* NARASIMALOO (1905), 26 N. L. R. 184.—**S. AF.**

**PART V. SECT. 6, SUB-SECT. 10.—J.**

**753** i. *Notice to officer—Notice to sheriff.*]—HUTCHINGS *v.* RUTTAN (1857), 6 C. P. 452.—**CAN.**

h. *Notice of action.*]—A bailiff of a cty. ct. is entitled to notice of action for any misfeasance by him in the execution of his office as such bailiff.—SOLOMONS *v.* MULCAHY (1879), 5 V. L. R. (L.) 64.—**AUS.**

k. ———.]—Want of notice to a bailiff of a division ct., acting under 4 & 5 Vict. c. 3, must be pleaded specially. But while a bailiff, seizing goods under an execution, is entitled to notice, pltf. in the execution is not, as he is not a "person acting in the execution of the act."—FOWKE *v.* ROBERTSON (1842), 6 O. S. 572.—**CAN.**

l. ———.]—Want of notice to a bailiff of a division ct., acting under 4 & 5 Vict. c. 3, must be pleaded specially. But while a bailiff, seizing goods under an execution, is entitled to notice, the pltf. in the execution is not, as he is not a "person acting in the execution of the act."—TIMON *v.* STUBBS & BALFOUR (1845), 1 U. C. R. 347.—**CAN.**

m. ———.]—A sheriff is not entitled to notice of an action against him arising out of his execution of a *fi. fa.* in a private suit.—MCWHIRTER *v.* CORBETT (SHERIFF) & LOW (1854), 4 C. P. 203.—**CAN.**

n. ———.]—The bailiff of a division ct., acting in the discharge of his duty as such, is entitled to notice ; & that objection is open to him under the plea of not guilty by statute.—DALE *v.* COOL (1855), 4 C. P. 460.—**CAN.**

o. ———.]—Bailiffs of a division ct. are entitled to notice of action for seizing goods, although acting under a warrant without seal.—ANDERSON *v.* GRACE (1859), 17 U. C. R. 96.—**CAN.**

p. ———.]—C. S. U. C. c. 126, s. 10, requiring notice of action, does not apply to the case of a division ct. bailiff acting under an execution which is specially provided for by c. 19, sect. 193 ; & a notice thereof to such bailiff not having indorsed upon it the place of abode of pltf., as required by the former, but not by the latter Act, was held sufficient.—STEPHENS *v.* STAPLETON (1877), 40 U. C. R. 353.—**CAN.**

q. ———.]—PARDEE *v.* GLASS (1886), 11 O. R. 275.—**CAN.**

r. ———.]—YOURRELL *v.* PROBY (1868), I. R. 2 C. L. 460.—**IR.**

**PART V. SECT. 6, SUB-SECT. 11.**

t. *Creditor directing sheriff not to sell—Whether execution creditor liable on indemnity bond—Subsequent sale by sheriff.*]—Where an indemnity bond was given to the sheriff by an execution creditor for the sale of the debtor's goods, & the creditor afterwards directed the sheriff not to sell, but, notwithstanding, he went on & sold, in an action by the sheriff on the bond for damages recovered against him in consequence of the sale :—*Held :* deft. was entitled to a verdict on an issue that the sheriff was damnified of his own wrong ; & the jury having found for the sheriff, the ct. granted a new trial.—MCMAHON *v.* INGERSOLL (1841), 3 Ont. Dig. 6425.—**CAN.**

a. *Liability of attorneys on undertaking to indemnify.*]—CORBETT (SHERIFF) *v.* SMITH & HENDERSON (1850), 7 U. C. R. 13.—**CAN.**

b. ——— *Whether attorney's client liable.*]—A promise by the attorney of a judgment creditor to indemnify a sheriff for seizing goods under an execution issued on the judgment is binding upon his client where the attorney has the management of the business, & the subsequent acts of the client show that he had adopted the proceedings which his attorney had taken in reference to the execution.—SHIRREFF *v.* MUIRHEAD (1886), 25 N. B. R. 196.—**CAN.**

c. ———.]—Where a sheriff had been mulcted in the costs of an action brought against him for wrongfully charging certain lands with an execution :—*Held :* he was entitled to recover in an action brought by him against the solr. who gave him directions to charge the lands, for indemnity against such costs, although in giving such directions the solr. acted merely as agent for his client.—ROBERTSON *v.* TAYLOR (1898), 21 C. L. T. 270.—**CAN.**

d. *Indemnity agreement not under seal—Sufficiency of consideration.*]—Pltf. declared on a special agreement, not under seal, that in consideration that pltf., then a bailiff of a division ct., would do his duty as the law directed in seizing & selling crops on the farm of K., on account of a certain judgment obtained by deft. against

*Sect. 6.—Execution of process: Sub-sects. 11 & 12.]*

**758. Misrepresentation of execution creditor—Wrongful arrest—Compensation paid by officer.**]—A declaration in case stated, that defts., as attorneys for P. issued a *testatum ca. sa.* against W., at the suit of P., & delivered it to pltfs., sheriff of Middlesex, to be executed; that after the delivery of that writ, the sheriff lawfully had, & detained in their custody, one J. W., not being the same person against whom the *testatum ca. sa.* had issued, who subsequently became entitled to his discharge, & the sheriff would have discharged him, yet defts., so being attornies, etc., well knowing the premises, after the delivery of the *ca. sa.* at the suit of P. & after J. W. had become entitled to be discharged, for the purpose of preventing pltfs. from discharging him, falsely represented to pltfs. that J. W. was the same person as W. against whom the *ca. sa.* at the suit of P. had issued, whereas he was not the same person, etc., & pltfs. thereupon detained him for two days, until they discovered that the representation was false, when they discharged him, & had afterwards to pay £10 to J. W., as compensation for the illegal detainer, etc.

The sum paid as compensation to J. W., was paid by the sheriff's officer, & with his own money: —*Held:* notwithstanding, the action was maintainable by the sheriffs, as they were primarily liable for the unlawful arrest, & competent to sue for the officer's benefit.—EVANS *v.* COLLINS (1843), 5 Q. B. 804; 12 L. J. Q. B. 339; 1 L. T. O. S. 255, 336; 7 Jur. 743; 114 E. R. 1453; *revsd.* on other grounds, *sub nom.* COLLINS *v.* EVANS (1844), 5 Q. B. 820, Ex. Ch.

*Annotations:*—**Distd.** Childers *v.* Wooler (1859), 2 E. & E. 287. **Reld.** Childers *v.* Wooler (1860), 6 Jur. N. S. 444. **Mentd.** Barley *v.* Walford (1846), 9 Q. B. 197; Freeman *v.* Cooke (1848), 18 L. J. Ex. 114; Evans *v.* Edmonds (1853), 1 C. L. R. 653; Thom *v.* Bigland (1853), 8 Exch. 725; Collen *v.* Wright (1858), 4 Jur. N. S. 357; Leather *v.* Simpson (1871), 40 L. J. Ch. 177; Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34; Derry *v.* Peek (1889), 14 App. Cas. 337; Sheffield Corpn. *v.* Barclay, [1905] A. C. 392; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94.

**Arising on execution of fieri facias.**] — *See* EXECUTION, Vol. XXI., pp. 547–550, Nos. 1226–1248.

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SUB-SECT. 12.—PROPERTY IN GOODS AFTER SEIZURE.

*See* EXECUTION, Vol. XXI., pp. 507, 508, Nos. 817–831.

**759. General rule—Property remains in execution debtor.**]—If the property were not in debtor after seizure, I would ask, where the property would be till sale? Judgment creditor could not bring trespass or trover, most certainly: the sheriff alone can do this; & in case of a felony, the sheriff only can state that the property is in him, which shows, that the general property is not altered by the seizure of the sheriff. Debtor may, after seizure, pay the debt in satisfaction of the execution, & thereby bar the sale; & where he pays the debt in that stage of the proceeding, he requires no bill of sale from the sheriff to retransfer the property, which can only be attributable to this reason, that, in fact, the property never had been completely taken out of him (GRAHAM, B.).—R. *v.* GILES (1820), 8 Price, 293; 146 E. R. 1208; *on appeal, sub nom.* GILES *v.* R. (1823), 11 Price, 594, Ex. Ch.

*Annotations:*—**Reld.** Giles *v.* Grover (1832), 9 Bing. 128; Edwards *v.* R. (1854), 9 Exch. 628. **Mentd.** King *v.* Simmonds (1848), 1 H. L. Cas. 754.

**760.** —— ——.]—R. *v.* EASTALL (1822), 2 Russell on Crimes & Misdemeanors, 8th ed. 1228.

*Annotation:*—**Reld.** R. *v.* Moody (1850), 14 J. P. 578.

**761.** —— ——.]—Judgment was entered upon a warrant of attorney given by two joint traders, & a *fi. fa.* issued, returnable on May 2. On May 1, the sheriff's officer received from defts. the money directed to be levied. On May 2, one of them committed an act of bkpcy., & the other on May 5. On May 11, a commission of bkpt. issued, & on May 19, the sheriff paid over the money to execution creditor. In an action by the assignees: —*Held:* he was entitled to retain it, not being creditor having a security at the time of the bkpcy.

After seizure, & before sale, the sheriff has a special property in the goods, but debtor has the general property; up to that time, therefore, the debt is not extinguished, & judgment creditor has a security for his debt. But after sale, or payment of the money, the sheriff becomes debtor, & the original debt is extinguished (BAYLEY, J.).—MORLAND *v.* PELLATT (1828), 8 B. & C. 722; 3 Man. & Ry. K. B. 411; 7 L. J. O. S. K. B. 54; 108 E. R. 1211.

*Annotations:*—**Consd.** Giles *v.* Grover (1832), 9 Bing. 128. **Reld.** Cumming *v.* Welsford, Cumming *v.* Harris (1830), 8 L. J. O. S. C. P. 168; Bower *v.* Hett (1895), 14 R. 710; *Re* Greer, Napper *v.* Fanshawe, [1895] 2 Ch. 217.

**762.** —— ——.]—(1) That the general property in goods, even after seizure, remains in debtor, is clear from this, that debtor may, after seizure, by payment suspend the sale & stay the execution.

(2) It is undoubtedly true, that the sheriff does, by the seizure, acquire a special property in the goods. He may maintain trespass or trover for them (PATTESON, J.).—GILES *v.* GROVER (1832),

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M., he, deft., then promised pltf. to indemnify him against all risk that might arise in relation to his doing his said duty:—*Held:* sufficient consideration appeared for the promise. —ROBERTSON *v.* BROADFOOT (1853), 11 U. C. R. 407.—**CAN.**

*e. Proof of damage necessary—Before recovery on bond.*]—A sheriff, before he can recover upon a bond indemnifying him against all actions, suits, judgments, etc., must show a judgment entered in proper form against him.—RUTTAN *v.* CONGER (1859), 9 C. P. 16.—**CAN.**

*f.* —— ——.]—MOODIE (SHERIFF) *v.* DOUGALL (1862), 12 C. P. 555.—**CAN.**

*g. Revocation of covenant to indemnify—Effect of where sheriff assents to revocation.*]—A sheriff, having two executions against the same person, accepted a covenant from the execution creditors on one of the writs, indemnifying him against any seizure & sale by him. Before anything was done on either writ, defts. countermanded & revoked their covenant, with the assent of the sheriff, who afterwards, however, went on, sold, & was damnified:—*Held:* these facts formed a good equitable defence to an action on the covenant, for the agreement to indemnify merely created a conditional liability, from which defts. were at liberty to withdraw before any act done or damage sustained, especially where the withdrawal was with the sheriff's assent. —GRANGE *v.* MILLS (1869), 19 C. P. 398.—**CAN.**

*h. Direction to jury—On action by sheriff against execution creditor for costs.*]—A sheriff, sued for a wrongful arrest, defended the action without communicating with the execution creditor, who was liable to indemnify him. In a subsequent action by the sheriff against the execution creditor: —*Held:* to entitle the sheriff to recover the costs of defending the former action, it should be submitted to the jury to say whether the course pursued in defending the former action was reasonable, in all the circumstances of the case.—CALDBECK *v.* BOON (1872), I. R. 7 C. L. 32.—**IR.**

**PART V. SECT. 6, SUB-SECT. 12.**

**759** *1. General rule—Property remains in execution debtor.*]—The property of a judgment debtor in goods is not divested by a sale by the sheriff, unless there has been some overt act of seizure by him, such as marking or taking possession of them or separating them from others.—REYNOLDS *v.* AYRES (1862), 10 N. B. R. (5 All.) 333.—**CAN.**

9 Bing. 128; 6 Bli. N. S. 277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 131 E. R. 563, H. L.

*Annotations:*—*As to* (1) **Consd.** Godson *v.* Sanctuary (1832), 4 B. & Ad. 255; Grove *v.* Aldridge (1832), 9 Bing. 428. **Refd.** Balme *v.* Hutton (1833), 9 Bing. 471; Woodland *v.* Fuller (1840), 11 Ad. & El. 859; Doe d. Hughes *v.* Jones (1842), 9 M. & W. 372; Playfair *v.* Musgrove (1845), 14 M. & W. 239; *Re* Clarke, [1898] 1 Ch. 336 *As to* (2) **Consd.** *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. *Generally*, **Refd.** R. *v.* Maberley (1834), 4 Tyr. 345; Garland *v.* Carlisle (1837), 11 Bli. 421; Grainger *v.* Hill (1838), 5 Scott, 561; Whitworth *v.* Gaugain (1846), 1 Ph. 728; Bothamley *v.* Heyward (1862), 8 Jur. N. S. 1156. **Mentd.** R. *v.* Archdall (1838), 2 J. P. 486.

**763.** —— —— **Right of debtor to sell.**]—Deft. having obtained a judgment against T. lodged a *fi. fa.* with the deputy, under C. L. P. Act, 1833 (c. 42), s. 20, of the sheriff, & the deputy immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made, under Judgments Act, 1838 (c. 110), s. 37, by the Insolvent Debtors' Ct. transferring the estate of T. The assignee under this order took possession of T.'s property; & afterwards the sheriff's officer seized it:—*Held:* the seizure was proper.

The seizure confers only a right to sell, not a property; for deft. may sell, subject to the right of execution creditor; &, where the goods are worth more than the sum for which execution issues, such sale passes the right to the residue (LITTLEDALE, J.).—WOODLAND *v.* FULLER (1840), 11 Ad. & El. 859; 3 Per. & Dav. 570; 9 L. J. Q. B. 181; 4 Jur. 743; 113 E. R. 641.

*Annotations:*—**Expld.** Holmes *v.* Tutton (1855), 5 E. & B. 65. **Refd.** Bridge *v.* Tattersall (1857), 29 L. T. O. S. 76; Bothamley *v.* Heyward (1862), 8 Jur. N. S. 1156; Johnson *v.* Pickering, [1908] 1 K. B. 1.

**764.** —— —— ——.]—The owner of goods which are in the custody of the sheriff under a *fi. fa.* may make a valid sale & delivery of possession of them to a purchaser.

It is, I think, a fallacy to say that goods are in the possession of the sheriff. They are in the custody of the law, & of the sheriff's officer as representing the law. That is possession undoubtedly as against a wrongdoer who might seek to divest the sheriff's officer of any portion of the goods seized; but I think it is custody only so far as the real owner of the goods is concerned. Until the goods are sold under the authority of the law they are in the possession virtually of the owner, at all events as respects every one except the execution creditor or the officer of the law who holds the goods under the *fi. fa.* (COCKBURN, C.J.).—UNION BANK OF LONDON *v.* LENANTON (1878), 3 C. P. D. 243; 47 L. J. Q. B. 409; 38 L. T. 698; 3 Asp. M. L. C. 600, C. A.

*Annotations:*—**Refd.** The James W. Elwell, [1921] P. 351. **Mentd.** Gapp *v.* Bond (1887), 19 Q. B. D. 200.

**765.** —— —— ——.]—Seizure by the sheriff deprives the debtor of the power of selling his goods. The moment the sheriff takes possession the debt is *pro tanto* absolutely discharged, not indeed finally, but so long as that state of things continues (VAUGHAN WILLIAMS, L.J.).—*Re* A DEBTOR, *Ex p.* SMITH, as reported in, [1902] 2 K. B. 260.

**766. Special property of sheriff—Right to bring action for trespass.**]—A sheriff may bring trespass for goods in his possession under a *fi. fa.* taken by deft. before sale.—TYRREL *v.* BASH (1598), Cro. Eliz. 639; 78 E. R. 878.

*Annotations:*—**Apld.** Clerk *v.* Withers (1704), 11 Mod. Rep. 34. **Refd.** Bealy *v.* Sampson (1689), 2 Vent. 93; Giles *v.* Grover (1832), 9 Bing. 128.

**767.** —— ——.]—A sheriff may maintain an action of trespass or trover against any person who takes away goods which he has seized in execution.—WILBRAHAM *v.* SNOW (1670), 2 Keb. 588; 1 Lev. 282; 1 Mod. Rep. 30; 1 Sid. 438; 2 Wms. Saund. 47; 84 E. R. 370.

*Annotations:*—**Consd.** Jeanes *v.* Wilkins (1749), 1 Ves. Sen. 195. **Expld.** R. *v.* Giles (1820), 8 Price, 293. **Consd.** Giles *v.* Grover (1832), 9 Bing. 128. **Refd.** Mildmay *v.* Smith (1671), 2 Wms. Saund. 343; Bealy *v.* Sampson (1688), 2 Vent. 93; Clerk *v.* Withers (1704), 2 Ld. Raym. 1072; Wharam *v.* Broughton (1748), 1 Ves. Sen. 180; R. *v.* Cotton (1751), Park. 112; Slater *v.* Pinder (1871), L. R. 6 Exch. 228; *Re* Davies, *Ex p.* Williams (1872), 7 Ch. App. 314. **Mentd.** Collins *v.* Evans (1844), 5 Q. B. 820; Ford *v.* Beech (1848), 17 L. J. Q. B. 114; Wiltshire *v.* Cotterel (1853), 20 L. T. O. S. 259; Crouch *v.* G. N. Ry. (1856), 11 Exch. 742; Jeffries *v.* G. W. Ry. (1856), 5 E. & B. 802; Lee *v.* Bayes & Robinson (1856), 20 J. P. 694; Levy *v.* Hale (1859), 29 L. J. C. P. 127; Burroughs *v.* Bayne (1860), 5 H. & N. 296; Richardson *v.* Trundle (1860), 8 C. B. N. S. 474; Harper *v.* Godsell (1870), L. R. 5 Q. B. 422; Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584; England *v.* Cowley (1873), L. R. 8 Exch. 126; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757; R. *v.* Wynn (1887), 56 L. T. 749; Cochrane *v.* Moore (1890), 59 L. J. Q. B. 377; The Winkfield, [1902] P. 42; Wallis *v.* G. N. Ry. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Clayton *v.* Le Roy, [1911] 2 K. B. 1031.

**768.** —— ——.]—If a sheriff levy goods under a *fi. fa.*, & before sale his office expires, yet deft. cannot reclaim the goods, although pltf. died before the return of the writ, for deft. is completely divested of them by the levy, & the sheriff, though out of office, may sell them without a *venditioni exponas*, or, if he will not, he may be compelled by a distringas directed to the new sheriff.

It is plain, the sheriff may sell the goods, though he be out of his office, as in the case of *Ayre* v. *Aden* (1606), Cro. Jac. 73; & *Cleve* v. *Vere* (1636), Cro. Car. 450; for so soon as the sheriff has seized, he has such a property, as that he may maintain trespass or trover against the owner himself, as in the case of *Tyrrel* v. *Bash*, No. 766, *ante* (GOULD, J.).—CLERK *v.* WITHERS (1704), 11 Mod. Rep. 34; 6 Mod. Rep. 290; Holt, K. B. 303, 646; 2 Ld. Raym. 1072; 1 Salk. 322; 88 E. R. 866.

*Annotations:*—**Consd.** Doe d. Stevens *v.* Donston (1818), 1 B. & Ald. 230; R. *v.* Giles (1820), 8 Price, 293; Giles *v.* Grover (1832), 9 Bing. 128. **Distd.** Stimson *v.* Farnham (1871), L. R. 7 Q. B. 175. **Refd.** Wilcox & Litchey *v.* Pokinhorn (1728), 1 Barn. K. B. 81; Meriton *v.* Stevens (1741), Willes, 271; Wharam *v.* Broughton (1748), 1 Ves. Sen. 180; White *v.* Hayward (1752), Dick. 174; Cooper *v.* Chitty & Blackiston (1756), 1 Burr. 20; Clutterbuck *v.* Jones (1812), 15 East, 78; Morland *v.* Pellatt (1828), 8 B. & C. 722; Drewe *v.* Lainson (1840), 11 Ad. & El. 529; Holmes *v.* Newlands (1843), 5 Q. B. 367; Levy *v.* Hale (1859), 29 L. J. C. P. 127; *Re* Davies, *Ex p.* Williams (1872), 7 Ch. App. 314.

**769.** —— ——.]—R. *v.* GILES, No. 759, *ante*.

**770.** —— ——.]—GILES *v.* GROVER, No. 762, *ante*.

**771.** ——.]—Sheriff under *fi. fa.* has a special property, & the goods bound from delivery of the writ, in the case of a common person.—JEANES *v.* WILKINS (1749), 1 Ves. Sen. 195; 27 E. R. 978, L. C.

*Annotations:*—**Mentd.** Scott *v.* Scholey (1807), 8 East, 467; Gore *v.* Bowser (1855), 3 Sm. & G. 1.

**772.** ——.]—MORLAND *v.* PELLATT, No. 761, *ante*.

**773.** ——.]—UNION BANK OF LONDON *v.* LENANTON, No. 764, *ante*.

**774. Where false return of nulla bona.**]—Where upon a *fi. fa.* the sheriff returns *nulla bona* & an action is brought against him for a false return & a recovery is had against him, the property of the goods is not vested in him but they are liable to any other execution.—UNDERWOOD *v.* MORDANT (1691), Nels. 181; 2 Vern. 238; 21 E. R. 820.

**775. Where debtor allowed to remain ostensible owner.**]—An action will not lie at the suit of the

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**775 1.** ***Where debtor allowed to remain ostensible owner.***]—Where judgment has been recovered & execution levied by the sheriff upon goods of deft., the sheriff is not bound to leave an officer continuously in possession, & the absence of such officer, if satisfactorily explained, does not amount to such an abandonment of possession as will

*Sect.* 6.—*Execution of process: Sub-sect.* 12. *Sects.* 7 & 8: *Sub-sect.* 1, *A. & B.*]

sheriff, against overseers of a parish for taking goods under a warrant of distress for poor rates, where he has allowed deft., notwithstanding the execution, to continue to be the ostensible owner of the property.—SPICER *v.* TIDY (1822), 1 L. J. O. S. K. B. 10.

**776. Seizure not satisfaction of debt.**]—MORLAND *v.* PELLATT, No. 761, *ante.*

**777.** ——.]—LEE *v.* DANGAR, GRANT & CO., No. 856, *post.*

**778. Dispute as to property—Whether goods stayed in hands of sheriff.**]—The ct. will not stay goods taken by *fi. fa.* in the hands of the sheriff, till a dispute concerning the property of them is decided, unless for the protection & at the request of the sheriff.—SHAW *v.* TUNBRIDGE (1776), 2 Wm. Bl. 1064; 96 E. R. 626.

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## SECT. 7.—EXECUTION OF SENTENCE OF DEATH.

*See* Sheriffs Act, 1887 (c. 55), s. 13 (1) (2); Central Criminal Court (Prisons) Act, 1881 (c. 64); Capital Punishment Amendment Act, 1868 (c. 24).

**779. By whom execution carried out.**]—GUNPOWDER PLOT CONSPIRATORS TRIAL, GUY FAWKES CASE (1606), 2 State Tr. 159.

*Annotation:*—**Mentd.** R. *v.* Garbett (1847), 2 Car. & Kir. 474.

**780.** ——.]—Where a convict is sentenced to death, the proper officer, in default of express order, to do execution, is the officer who has the legal custody of such convict. Supposing that the ct. may authorise another officer to execute, such authority must be given by express order, directing the second officer to execute, & sufficiently explicit for the first officer to be bound by it to surrender the custody to the second. It is not equivalent to such an order, if the clerk of assize, by direction of the judge who has tried & sentenced the convict, shows to the sheriff of the county in which the offence was committed, not having the custody, a calendar signed by the judge, with a minute of the sentence in the margin, at the same time delivering him a copy. Although the sheriff acknowledge the receipt of the calendar, & at the same time refuse to execute. Especially where the officer having the legal custody has previously received an order of the judge, directing that a third officer shall do execution.—R. *v.* ANTROBUS (1835), 2 Ad. & El. 788; 6 C. & P. 784; 1 Har. & W. 96; 4 Nev. & M. K. B. 565; 4 L. J. K. B. 91; 111 E. R. 304.

*Annotations:*—**Mentd.** Pritchard *v.* Powell (1845), 15 L. J. Q. B. 166; R. *v.* Bourdon (1847), 2 Car. & Kir. 366; R. *v.* Bedfordshire (1855), 4 E. & B. 535.

**781. By whom ordered.**]—The Ct. of K. B. has authority to order the sheriff of any county, or the marshal of the ct., to carry into execution a sentence of death, pronounced by a judge under a commission of oyer & terminer & general gaol delivery.—R. *v.* GARSIDE & MOSLEY (1834), 2 Ad. & El. 266; 4 Nev. & M. K. B. 33; 4 L. J. M. C. 3; 111 E. R. 103.

*Annotation:*—**Refd.** R. *v.* Rushworth (1844), 1 New Sess. Cas. 415.

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## SECT. 8.—PUNISHMENT FOR MISCONDUCT.

### SUB-SECT. 1.—ATTACHMENT.

*A. When Issued.*

*See, generally,* CONTEMPT OF COURT, Vol. XVI., pp. 46–88, Nos. 487–1098; Sheriffs Act, 1887 (c. 55), s. 29.

**782. Contempt of court—Replevy of goods seized under warrant of justice.**]—R. *v.* LEICESTERSHIRE (SHERIFF) (1728), 1 Barn. K. B. 110; 94 E. R. 77.

**783.** —— **Replevy of goods under execution from superior court.**]—GEORGE *v.* CHAMBERS, No. 749, *ante.*

**784.** —— **Failure to compel local officer to perform his duty.**]—ANON. (1823), No. 144, *ante.*

**785.** —— **Failure to pay proceeds of execution.**]—DUCHASTAL *v.* FIESTAL (1846), 8 L. T. O. S. 124.

**786.** —— ——.]—LARDSHIP *v.* WIGGINGTON (1850), 16 L. T. O. S. 195.

**787.** —— —— **Landlord's claim for rent—Claim not proved.**]—Where the sheriff has realised the amount of an execution on a *fi. fa.* he cannot justify the retention of the money on the ground that the landlord had made a claim to the whole of it for rent, which claim he has not yet been enabled to prove the truth of; & upon a return to the writ setting forth such facts an attachment will issue.—HALL *v.* BADDEN (1863), 7 L. T. 721.

**788.** —— **Seizure of partnership property—After nomination of receiver.**]—After the institution of a suit seeking dissolution of a partnership & appointment of a receiver, an action was brought against the partnership firm & a judgment recovered. Before the receiver was actually appointed, but after he had been nominated, a writ of *fi. fa.* was issued upon the judgment, under which the sheriff took possession of certain partnership property, & refused to give up possession thereof after the appointment of the receiver. Upon motion to commit the sheriff for contempt of ct.:—*Held:* there was no contempt.—DEFRIES *v.* CREED (1865), 6 New Rep. 17; 34 L. J. Ch. 607; 12 L. T. 262; 11 Jur. N. S. 360; 13 W. R. 632.

*Annotation:*—**Apld.** Edwards *v.* Edwards (1875), 45 L. J. Ch. 391.

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entitle other persons claiming the goods to take possession of them.—*Re* MURPHY (1927), 27 S. R. N. S. W. 503; 44 N. S. W. W. N. 189.—**AUS.**

**k.** *Grantees of bill of sale.*]—TEMPLE *v.* NICHOLSON, Cass. Dig. 2nd ed. 114.—**CAN.**

**l.** *Special property of sheriff.*]—Where goods levied on under execution are replevied by the grantee of the judgment debtor under a bill of sale, the sheriff may put in a claim of special property.—LYMAN *v.* SHIRREFF (1887), 26 N. B. R. 617.—**CAN.**

**m.** ——.]—DOULL *v.* KEEFE (1901), 34 N. S. R. 15.—**CAN.**

**PART V. SECT. 8, SUB-SECT. 1.—A.**

**n.** *Attachment of sheriff—Non-payment of costs.*]—A sheriff cannot be attached for non-payment of the costs of a rule to return under 3 Will. IV., c. 9, unless there has been a rule specially calling on him so to do.—MARCEY *v.* BUTLER, DOE d. MCGREGOR *v.* GRANT (1839), 3 Ont. Dig. 6428.—**CAN.**

**o.** —— *Who may grant—Judge in Chambers.*]—An attachment against a sheriff for not obeying the rule to bring in the body cannot be granted by a Judge in Chambers.—R. *v.* NIAGARA (SHERIFF) (1831), Dra. 343.—**CAN.**

**p.** —— *Refusal of second attachment—Until costs of first paid.*]—A second attachment against a sheriff for not bringing in the body after a rule on a return of *cepi corpus*, was refused, until the costs of setting aside a former one for irregularity were paid.—R. *v.* RUTTAN (SHERIFF) (1836), 5 O. S. 154.—**CAN.**

**q.** —— *Sheriff Member of Parliament.*]—An attachment was granted against a sheriff who was a Member of Parliament, for not returning a writ pursuant to a rule of ct.—BELL *v.* BUCHANAN (1837), 3 Ont. Dig. 6429.—**CAN.**

**r.** —— *Non-return of writ after settlement of plaintiff's claim.*]—An attachment obtained for not returning a writ after a settlement of pltf.'s claim before the rule was issued, was set aside, but without costs, as the sheriff should have come in & applied to set aside the rule.—PELTON *v.* WELLS (1839), 5 O. S. 485.—**CAN.**

**t.** —— *Insufficient return.*]—An attachment will be granted against a sheriff for an insufficient return.—SMITH *v.* BELLOWS (1840), 2 P. R. 133.—**CAN.**

**s.** —— *Sufficiency of answer to*

**789. —— Death of defendant before attachment issued.**]—Where a sheriff has been guilty of a contempt in the course of a civil suit, & then deft. dies, an attachment may issue against the sheriff afterwards for the prior contempt.—R. *v.* MIDDLESEX (SHERIFF) (1789), 3 Term Rep. 133 ; 100 E. R. 494.

**—— Disobedience to order of court in interpleader proceedings.**]—*See* INTERPLEADER, Vol. XXIX., p. 486, Nos. 364–367.

**790. —— Failure to return writ.**] — Attachment against a high sheriff on affidavit of service of rule on him.—FRANKLIN *v.* NASH (1733), Cooke, Pr. Cas. 87 ; 125 E. R. 974.

**—— —— On expiry of office.**]—*See* EXECUTION, Vol. XXI., p. 455, Nos. 377–383.

**791. Relinquishing custody of sick defendant.**]—Where the return to a writ of *latitat* stated that deft., upon being arrested in his own house, was confined to his bed by illness, & could not be removed without danger to his life, & so continued ill at & after the return of the writ, & for such cause the custody of deft. was relinquished ; the ct. refused to grant an attachment against the sheriff, & allowed him to amend his return upon payment of costs.—BAKER *v.* DAVENPORT (1826), 8 Dow. & Ry. K. B. 606.

**792. Refusing to break open outer doors.**] — The ct. refused to attach a sub-sheriff for declining to break open outer doors, when called on to do so, for the purpose of arresting certain tenants against whom attachments had issued for non-payment of their rents to the receiver, in defiance of the order of the ct. *Qu. :* would the sheriff have been justified in breaking open outer doors in such a case ?—REYNOLDS *v.* REYNOLDS (1847), 9 L. T. O. S. 513.

**793. Sheriff liable for act of officer—Escape.**]—Where deft. was in custody under an extent, & a *capias* was issued against him at the suit of pltf., & delivered to the sheriff, who returned, that "he had taken deft., whose body remained in prison under his custody" : the ct. refused to allow the return to be amended by striking it out & making another according to the fact ; & on deft.'s being afterwards brought up before a judge under a *habeas corpus*, he was discharged from the extent, & the officer allowed him to go at large ; & an attachment was afterwards issued against the sheriff for not bringing in the body ; the ct. refused to set it aside ; as it was the duty of the sheriff to have detained deft. in custody at pltf.'s suit, & as he was liable for the negligence of the officer who suffered him to escape.—IBBOTSON *v.* TYNDAL (1823), 1 Bing. 156 ; 130 E. R. 63 ; *sub nom.* R. *v.* WORCESTERSHIRE (SHERIFF), IBBOTSON *v.* TYNDALL, 7 Moore C. P. 552 ; 1 L. J. O. S. C. P. 31.

**794. —— Failure to deliver up bail-bond.**] — LEWIS *v.* BLESSLEY (1837), 1 Jur. 358.

*B. Practice and Procedure.*

**795. Service of writ.**] — ANON. (1773), Lofft, 301 ; 98 E. R. 662.

**796. Motion for attachment — Notice to under sheriff.**]—Attachment against the sheriff, on a rule served upon affidavit of notice on one who was not under sheriff, but acted as such.—ARNE *v.* NEELER (1735), Cooke, Pr. Cas. 123 ; Barnes, 30 ; 125 E. R. 998.

**797. —— What must be alleged.**]—On motion for an attachment against the sheriff, pltf. must allege a search, etc.—ANON. (1759), 2 Keny. 467 ; 96 E. R. 1246.

**798. —— Rule nisi only in first instance.**] — A rule for an attachment for non-payment into ct. of the proceeds of a sale, pursuant to a rule, without stating the amount, must be a rule *nisi*.—HATFIELD *v.* HAVERFIELD (1843), 6 Man. & G. 724 ; 7 Scott, N. R. 430 ; 134 E. R. 1084 ; *previous proceedings, sub nom.* HATFIELD *v.* HATHERFIELD, 1 L. T. O. S. 315.

**799. Form of affidavit.**]—The affidavit for an attachment against the sheriff, should be entitled, *The King* v. *The Sheriff of* —— in the cause of ——. *v.* ——, with the Christian names of the parties.—R. *v.* MIDDLESEX (SHERIFF) (1823), 2 L. J. O. S. K. B. 38.

**800.** ——.]—An attachment may be said to be granted when the rule for the attachment is obtained, & after that the proceedings are on the Crown side of the ct., & affidavits in the matter are properly entitled *Rex* v. *The Sheriff* of ——.—R. *v.* MIDDLESEX (SHERIFF) (1836), 2 M. & W. 107 ; 2 Gale, 221 ; 6 L. J. Ex. 9 ; 150 E. R. 689.

**801. —— Annexing return.**] — Where a party applies to the ct. for an attachment against the sheriff, for the insufficiency of a return, he must bring the return before the ct. upon affidavit, with an office copy of the return annexed. The ct. will not take cognisance of the return, as being

*rule for attachment.*]—Where a sheriff returns *cepi corpus* to a writ of *ca. sa.*, & pltf. rules the sheriff to bring in the body, & the sheriff not complying with the terms of the rule, pltf. then obtains a rule for an attachment against the sheriff for not bringing in the body of deft. at the return of the rule to that effect :—*Held :* it is a good answer to such rule for an attachment, to show by affidavit that deft. was arrested under a *ca. sa.* & placed in close custody, & was afterwards discharged from close custody & admitted to the limits by virtue of a certificate from the clerk of the Crown & pleas annexed to the affidavit, & he had not since been committed to close custody by any process whatever.—WHITE *v.* PETCH & MANNING (1850), 7 U. C. R. 1.—CAN.

b. —— *Deputy-sheriff.*]—*Re* MAITLAND, GUNTHER *v.* COOKE (1882), 9 P. R. 400.—CAN.

c. —— *Striking tipstaff.*] — The sheriff was attached for striking an officer of the ct., the tipstaff.—MAUNCIL *v.* MALONY (1799), Rowe, 670.—IR.

d. —— *Misconduct in replevin proceedings.*] — FULTON *v.* HALL & FELTON (1804), Rowe, 360.—IR.

e. —— *On refusal to execute an attachment.*]—If a sheriff refuse to try to execute an attachment which has issued to compel an appearance in an equity suit, he will be attached.—MORGAN *v.* COPELAND (1836), 1 Jo. Ex. Ir. 248, n.—IR.

f. —— *Necessity for personal service—Of order served on sheriff.*]—The ct. will not grant an attachment against the sheriff for non-compliance with an order which has not been personally served upon him ; service upon the returning officer is not sufficient.—WILSON *v.* FAIR (1847), 10 I. L. R. 227.—IR.

g. —— *Inability to make return to writ of elegit.*]—An attachment not granted against a sheriff for not making a return to a writ of *elegit*, the sheriff being ignorant where the lands were, & pltf. refusing to point them out.—COLLINS *v.* WATTERS (1847), 1 Bl. D. & Osb. 178.—IR.

h. —— *Non-compliance with order of court.*]—An attachment for non-compliance with an order of the ct. to bring into ct. moneys levied under a *fi. fa.*, will be issued against the sheriff, & not against the sub-sheriff, the ct. taking no notice of the latter officer.—BURKE *v.* D'ARCY (1846), 9 I. L. R. 287.—IR.

k. —— *Neglect to take replevin bond.*]—An attachment does not lie against a sheriff for not taking a replevin bond.—DONNELAN *v.* BLOSSE (1850), 2 Ir. Jur. 304.—IR.

l. —— *Irregularity in bailable process.*] —An irregularity in a bailable process, such as the omission to endorse the amount of bail, or to state by whom it was directed, or the not giving the residence of deft., will not justify a sheriff in not executing it, & is no cause against an attachment issuing against him.—O'ROURKE & PURCELL *v.* KINSELLA (1851), 1 I. C. L. R. 496 ; 3 Ir. Jur. 310.—IR.

**PART V. SECT. 3, SUB-SECT. 1.—B.**

**795** i. *Service of writ.*]—HILTON *v.* MACDONELL (1847), 1 C. L. Ch. 207.—CAN.

m. *Allegation of sheriff's collusion —Whether amendment of return proper procedure.*]—If a sheriff is charged with being in collusion with a party against whom an attachment has issued, the practice is to apply that the sheriff should amend his return, & not for an

*Sect.* 8.—*Punishment for misconduct: Sub-sect.* 1, *B.; sub-sect.* 2. *Part VI. Sect.* 1.]

upon the files of the ct.—WILTON *v.* CHAMBERS (1835), 5 Nev. & M. K. B. 431; 5 L. J. K. B. 72.

**802. Motion to set aside attachment — Form of affidavit.**]—On an application to set aside an attachment against the sheriff, the affidavit must specifically state that the application is made on behalf of the sheriff, & at his expense.—R. *v.* SURREY (SHERIFF) (1834), 1 Cr. M. & R. 581; 3 Dowl. 174; 5 Tyr. 184; 4 L. J. Ex. 15.

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SUB-SECT. 2.—OTHER CASES.

*See* Sheriffs Act, 1887 (c. 55), s. 29.

**803. Fine — Arrest without writ or warrant.**] — THURLAND'S CASE, No. 321, *ante*.

**804. Forfeiture of office—Permitting escape of felon.**]—SAVAGE'S CASE (1516), 2 Dyer, 151 b; Keil. 192; 73 E. R. 329.

*Annotations:*—**Refd.** Shrewsbury's Case (1610), 9 Co. Rep. 46 b; Reynel's Case (1612), 9 Co. Rep. 95 a. **Mentd.** Young *v.* Fowler (1639), March, 38; R. *v.* Worcester (Bp.), Jervason & Hinkley (1670), 1 Mod. Rep. 276; St. David's (Bp.) *v.* Lucy (1698), 1 Ld. Raym. 447.

**805. Committal — Discharging prisoner in contempt—Before contempt purged.**] — KENDAL *v.* BARON (1743), 1 Dick. 89; 21 E. R. 210, L. C.

*Annotation:*—**Refd.** Russell *v.* East Anglian Ry. (1850), 3 Mac. & G. 104.

**806. —— Failure to execute writ of attachment.**]—WYATT *v.* AUSTIN (1825), cited in 13 L. J. Ch. at p. 12.

*Annotation:*—**Folld.** Evans *v.* Davies, Evans *v.* Evans (1843), 13 L. J. Ch. 11.

**807. —— Failure to return writ.**] — A sheriff having neglected to make a return to a writ of *fi. fa.*, issued out of this ct., directing him to make a levy of a sum of money, an order was made by the ct. directing him to return the writ forthwith. The sheriff being in contempt for not returning the writ, the ct. ordered that he should within six days after notice of the order of the ct., return the writ, or that he stand committed to the Queen's Prison, & that he should pay the costs of the former order & of the present application. *Qu.:* as to the application of Civil Procedure Act, 1833 (c. 42), s. 20, to cts. of equity.—EVANS *v.* DAVIES (1843), 7 Beav. 81; 49 E. R. 993; *sub nom.* EVANS *v.* DAVIES, EVANS *v.* EVANS, 13 L. J. Ch. 11.

*Annotation:*—**Refd.** *Re* Heiron's Estate, Hall *v.* Ley (1879), 12 Ch. D. 795.

—— **Irregular seizure—Partnership assets in possession of receiver.**]—*See* PARTNERSHIP, Vol. XXXVI., p. 489, No. 1546.

—— —— **After notice restraining further proceedings.**]—*See* CONTEMPT OF COURT, Vol. XVI., p. 53, No. 586.

—— **Non-return of writ.**] — *See* R. S. C., Ord. 52, r. 11.

**808. Penalty — Sheriff & bailiff not jointly liable.**]—PESHALL *v.* LAYTON, PESHALL *v.* MARTIN, No. 657, *ante*.

**809. —— Liability of sheriff for act of officer.**]—In executing a writ of *fi. fa.* the sheriff's officer wrongfully failed to except from execution the debtor's wearing apparel & bedding to the value of £5, as required by Small Debts Act, 1845 (c. 127), s. 8. In an action by debtor against the sheriff to recover a penalty of £200 under Sheriffs Act, 1887 (c. 55), s. 29, for this wrongful act of his officer:—*Held:* under sect. 29 (2) no person mentioned therein is liable for the acts of another, but for his own acts only.—BAGGE *v.* WHITEHEAD, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778; 66 L. T. 815; 56 J. P. 548; 40 W. R. 472; 8 T. L. R. 503; 36 Sol. Jo. 425, C. A.

*Annotations:*—**Refd.** Lee *v.* Dangar, Grant, [1892] 2 Q. B. 337; Moore *v.* Brompton County Court (1893), 69 L. T. 140.

—— **Inducing recall of writ—Collusion.**]—*See* CONTEMPT OF COURT, Vol. XVI., p. 36, No. 379.

**Misconduct of county court bailiff.**] — *See* COUNTY COURTS, Vol. XIII., pp. 451–454, Nos. 27-54.

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# Part VI.—Fees, Poundage, and Other Charges.

SECT. 1.—**FEES.**

*See* Sheriffs Act, 1887 (c. 55), s. 20; R. S. C., Ord. 42, r. 15; Order as to Sheriff's Fees (1920).

**810. No right to detain for fees.**] — Officer cannot detain for fees.—MASON *v.* CUTTERSON (1694), 1 Ld. Raym. 4; 91 E. R. 900.

**811.** ——.] — SUTTON *v.* MCGUIRE (1846), 8 L. T. O. S. 155.

**812. No right to recover more than statutory fees—Special contract.**]—A sheriff's officer cannot, since the passing of 7 Will. 4 & 1 Vict. c. 55, recover, even on a special contract, any higher fees than those allowed by the schedule, framed in pursuance of that Act.—JOYNSON *v.* OLDFIELD (1847), 8 L. T. O. S. 468.

**Distress fees.**]—*See* DISTRESS, Vol. XVIII., pp. 356, 357, Nos. 935, 939, 940.

**Execution fees.**]—*See* EXECUTION, Vol. XXI., pp. 612, 613, Nos. 2006–2016.

**813. Fees for arrest.**] — SHERLEY *v.* PACKER (1616), 1 Roll. Rep. 313; 81 E. R. 509.

*Annotation.*—**Mentd.** Stackpole *v.* Earle (1761), 2 Wils. 133.

——.]—*See, now,* Sheriffs Act, 1887 (c. 55), s. 29 (2).

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attachment against him.—M'CULLOGH *v.* LEGG (1853), 5 Ir. Jur. 23.—**IR.**

**PART V. SECT. 8, SUB-SECT. 2.**

n. *Sufficiency of good cause.*] — It is a good cause to show to an attachment against a sheriff for not paying over money, that the money has been attached in the hands of the party not paying over, under Absconding Debtors Act.—POWERS *v.* SCOTT (1839), 3 Ont. Dig. 6402.—**CAN.**

o. *Liability of sheriff's sureties.*]—Where pltf. declared, that on a *fi. fa.* against his goods a sheriff levied & made the debt, but falsely returned *nulla bona;* by reason of which a *ca. sa.* was issued & he was arrested & again compelled to pay the money:—*Held:* a sufficient damage was shown to make the sheriff's sureties liable as for the wilful misconduct of the sheriff.—HEXON *v.* HAMILTON (1840), 6 O. S. 115.—**CAN.**

p. ——.] — The sureties of a sheriff are not liable under their covenant, given in accordance with 3 Will. IV. c. 8, as for wilful misconduct by the sheriff, where it consists in a mere error in judgment in deciding *bonâ fide* upon the priority of executions in his hands.—BRADBURY *v.* ADAMS & GRAHAM (1845), 1 U. C. R. 538.—**CAN.**

**PART VI. SECT. 1.**

q. *Audit & payment of sheriff's fees in different districts.*]—The fees of the sheriffs of the different districts payable by the districts for services rendered in the administration of justice, are to be audited & paid by the order of the justices of the several districts in sessions, & not under the direction of the district councils.—*Re* HAMILTON & LONDON DISTRICT JJ. (1842), 3 Ont. Dig. 6415.—**CAN.**

r. *Deduction of fees by sheriff.*]—Where the sheriff receives a writ indorsed to levy a named sum as that recovered, & interest from the time of

**814. Mileage allowance—Execution of warrant of commitment.**]—Under Table C of the Scale of Fees & Percentages under Bankruptcy Acts, which prescibes *5d.* per mile for the high bailiff's man travelling "to execute a warrant of or order of commitment," he is entitled to mileage for the whole journey up to delivery of debtor to prison.—*Re* CROPLEY, [1911] 2 K. B. 309; 80 L. J. K. B. 822; 27 T. L. R. 391; 18 Mans. 119; *sub nom. Re* CROPLEY, *Ex p.* FOX, 104 L. T. 720.

**815. Fees allowed by order of court—Additional to poundage.**]—29 Eliz. c. 4, against extortion by sheriffs, etc., is not repealed by 7 Will. 4 & 1 Vict. c. 55; but the only effect of the latter statute is to exempt from the penalties of 29 Eliz. c. 4, the cases in which the sheriff shall take no larger fees than shall be allowed by order of the judges. Therefore, in a declaration on the case for extortion, on 29 Eliz. c. 4, it is not necessary to negative deft.'s having had authority under 7 Will. 4 & 1 Vict. c. 55, to take the fees complained of; but that is matter of defence, which should come by way of plea.

The ct. would not take judicial notice that an order of the judges, allowing a scale of fees under 7 Will. 4 & 1 Vict. c. 55, was made before the time of the alleged extortion stated in the declaration.—PILKINGTON *v.* COOKE (1847), 16 M. & W. 615; 4 Dow. & L. 347; 17 L. J. Ex. 141; 8 L. T. O. S. 516; 153 E. R. 1336.

*Annotation:*—**Folld.** Wrightup *v.* Greenacre (1847) 10 Q. B. 1.

**816.** —— ——.]—29 Eliz. c. 4, s. 1, giving treble damages against sheriffs, etc., taking more than the poundage there allowed, is not repealed by 7 Will. 4 & 1 Vict. c. 55, ss. 2, 3, which permits sheriffs, etc., to take certain additional fees, if previously sanctioned by the judges, & makes the officer exacting more than the charges so sanctioned punishable as for a contempt. Therefore, a count in debt, claiming treble damages against a sheriff's officer for exacting, in addition to certain fees sanctioned by the judges, a sum exceeding the poundage allowed by 29 Eliz. c. 4, was held good on demurrer.—WRIGHTUP *v.* GREENACRE (1847), 10 Q. B. 1; 2 New Pract. Cas. 87; 16 L. J. Q. B. 246; 9 L. T. O. S. 36; 11 J. P. 822; 11 Jur. 408; 116 E. R. 1.

**817. Fees for summoning special jurors.**]—The sheriff will not be allowed extra expenses of summoning special jurors on account of their residing at a distance from each other; & the ct. will make a rule absolute for the sheriff to refund money received on this account, although he has actually expended all the money.—LANE *v.* SEWELL (1819), 1 Chit. 175.

**818.** ——.]—The sheriff is not entitled to fees from the party giving notice under C. L. P. Act, 1852 (c. 76), s. 112, that a cause is to be tried by special jury; although the alteration of the system as to special juries has deprived the sheriff of the fees by which he formerly was remunerated by the party for summoning the special jurors.—BENNETT *v.* THOMPSON (1856), 6 E. & B. 683; 27 L. T. O. S. 202; 2 Jur. N. S. 613; 4 W. R. 614; 119 E. R. 1018.

*Annotation:*—**Mentd.** Knapman *v.* Pryer (1857), 26 L. J. Ex. 143.

**819. Possession fees—Right of bailiff of county court—Where sheriff in possession under earlier process.**]—On May 15, 1924, the high bailiff of a county ct. under a warrant of execution purported to levy upon the goods of the judgment debtors at their premises, & put a man in possession. The sheriff was then in possession of the goods under process of an earlier date, but not to the knowledge of the high bailiff, as the county ct. judge found. The high bailiff on taking possession received from the judgment debtors a document which stated that in consideration of his withdrawing from possession they authorised him at any time to re-enter & undertook not to remove any of the goods. On June 12, 1924, the high bailiff on the instructions of the judgment creditors

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entering the judgment, he must make the money generally, & pay over what he makes, fees, & expenses deducted.—CUMMINGS *v.* USHER (1850), 1 P. R. 15.—**CAN.**

t. *On completion of limit bond.*]—Payment of sheriff's fee is necessary to the completion of limit bond, & the sheriff is not bound to discharge deft. from gaol & give him the benefit of the limits without such fee being paid.—CALDWELL *v.* WINSLOW (1851), 7 N. B. R. (2 All.) 203.—**CAN.**

a. *Deputy sheriff's fees.*]—Upon the agreement in this case, pltf., the deputy sheriff, was entitled only to his share of the fees actually received by the sheriff, or in his office, except with regard to such fees as might not have been collected owing to some act or omission of the sheriff.—FRASER *v.* FRASER (1853), 11 U. C. R. 109.—**CAN.**

b. ——.]—FALLS *v.* POWELL (1873), 20 Gr. 454.—**CAN.**

c. ——.]—The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation, or removal of the sheriff, of right belong to the deputy himself, & neither the representatives of the late nor the newly appointed sheriff have any right or claim thereto.—MCKELLAR *v.* HENDERSON (1879), 27 Gr. 181.—**CAN.**

d. *Taxation of costs — Conclusiveness of fees indorsement on writ.*]—*Qu.*: whether the indorsement on a writ by the sheriff of his fees for the service of it, is not conclusive of the amount in the taxation of costs.—ATKINSON *v.* MCAULEY (1859), 9 N. B. R. (4 All.) 265.—**CAN.**

e. —— *On execution of writ of replevin.*]—Sheriff's fees, on executing a writ of replevin, being part of the general costs of the cause, are not taxable in the costs of opposing a rule to set aside the writ, as having been improperly issued.—MCGOWAN *v.* BETTS (1871), N. B. Dig. 202.—**CAN.**

f. —— *Sheriff's costs not authorised by law disallowed.*]—STEVENS *v.* RYAN (1878), 17 N. B. R. (1 P. & B.) 547.—**CAN.**

g. —— *Possession money.*]—It appeared that the deputy sheriff kept the keys of the store in Belleville, & went himself twice a day to see that the goods were safe:—*Held*: that the payment to him of $2 per day as possession money should have been allowed only if the master were satisfied that it was necessarily & actually paid, & the item was referred back for reconsideration, it being alleged that the only possession was locking up the store & keeping the key.—GRANT *v.* GRANT (1883), 10 P. R. 40.—**CAN.**

h. —— *Costs of serving interpleader summons disallowed.*]—COMMERCIAL BANK *v.* FEHRENBACH & BOAKE (1900), 7 Terr. L. R. 8.—**CAN.**

k. —— *Certificate of satisfaction of writ of fieri facias.*]—*Re* BROWN (1904), 7 Terr. L. R. 67.—**CAN.**

l. —— *Allowed to sheriff on process—Whether court will order officer to review.*]—POWER *v.* GREAT SOUTHERN & WESTERN RY. CO. (1847), Bl. D. & Osb. 236; 12 I. L. R. 59.—**IR.**

m. *Mileage, seizure or service.*]—A sheriff is entitled to mileage only on going to make a levy, not on going to sell also.—BURWELL *v.* TOMLINSON (1838), 3 Ont. Dig. 6423.—**CAN.**

n. ——.]—*Semble: subpœnas* being *mesne* process, under C. L. P. Act, s. 277, no fees can be allowed for mileage or service, if not made by the sheriff.—MCLEAN *v.* EVANS (1863), 3 P. R. 154.—**CAN.**

o. —— *Right to demand in advance.*]—PARSONS *v.* HUTCHINGS (1891), 1 Terr. L. R. 317.—**CAN.**

p. ——.]—CARSON *v.* CARSON (1903), 10 B. C. R. 83.—**CAN.**

q. ——.]—The sheriff is entitled to a fee of 10*s.* & mileage, as prescribed by 27 & 28 Vict. c. 99, Sched. B., Part 11, for executing a committal order of the county ct. judge, under Debtors Act, 1872, s. 6. Such fee & mileage are payable by pltf. to the sheriff, & cannot be recovered from deft.—KELLY *v.* MAGEE (1893), 27 I. L. T. 71.—**IR.**

r. *Payment — Whether mandamus proper remedy—Against treasurer for payment of fees.*]—*Re* DAVIDSON & MILLER (1864), 24 U. C. R. 66.—**CAN.**

aa. *Priority of payment.*]—DARLING *v.* SMITH (1884), 10 P. R. 360.—**CAN.**

bb. *Seizure made without instructions proving abortive—Whether sheriff entitled to costs of seizure.*]—ELLIOTT *v.* MCLEAN & MCLEAN (1901), 7 Terr. L. R. 413.—**CAN.**

cc. *Fees for appraisement — Excessive seizure.*]—DORNIAN *v.* CRAPPER (1914), 27 W. L. R. 599; 6 W. W. R. 551; 17 D. L. R. 121; 7 Sask. L. R. 229.—**CAN.**

dd. *Right to collection fee.*]—A bailiff who makes a seizure under a chattel mtge. is not entitled to a collection fee in addition to the fees provided by the Ordinance, in the absence

*Sect.* 1.—*Fees.* *Sect.* 2: *Sub-sects.* 1, 2 & 3.]

withdrew from possession. The execution was ineffective, except in so far as it brought the parties into negotiation with a view to a settlement. The high bailiff made an application to the county court judge under C. C. R., 1903–1923, Ord. 27, r. 1, for an order for payment by the judgment creditors of his fees for keeping possession from May 15 to June 12. The county ct. judge found that the high bailiff did not withdraw from possession, but was in actual possession & not in mere walking possession of the goods, & made an order for payment of the fees claimed. On appeal:—*Held:* (1) the possession of the sheriff did not in the circumstances prevent the high bailiff from taking & keeping such possession as would entitle him to claim fees; (2) there was evidence to support the finding of the county ct. judge that the high bailiff did not withdraw from possession, but kept actual as distinct from walking possession; & therefore the order of the county ct. judge was right.—A. W., LTD. *v.* COOPER & HALL, LTD., [1925] 2 K. B. 816; 94 L. J. K. B. 831; 133 L. T. 508, D. C.

**820. Erroneous writ delivered to sheriff—Sheriff entitled to fees.**]—If an erroneous writ be delivered to the sheriff, & he executes it, he shall have his fees, though the writ be erroneous.—EARLE *v.* PLUMMER (1697), 1 Salk. 332; 12 Mod. Rep. 124; 91 E. R. 292.

*Annotation:*—**Apld.** R. *v.* Fry (1793), 2 Anst. 358.

**Agreement to pay extra remuneration—Void.**]—*See* CONTRACT, Vol. XII., p. 291, No. 2398.

**821. Bond for fees—Right of sheriff to take.**]—PLACKET *v.* GRESHAM (1697), 3 Salk. 75; 91 E. R. 701.

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## SECT. 2.—POUNDAGE.

### SUB-SECT. 1.—IN GENERAL.

*See* Sheriffs Act, 1887 (c. 55), s. 20; R. S. C., Ord. 42, r. 15; Order as to Sheriff's Fees (1920).

**822. Right to poundage—Seizure must be lawful.**]—The claim of a sheriff to poundage depends on the legality of the seizure.—BARKER *v.* DYNES (1832), 1 Dowl. 169.

**823. —— Poundage prescribed by statute—No right to exceed.**]—The sheriff having taken goods in execution under a *fi. fa.*, the proceeds of which are not sufficient to satisfy pltf.'s claim, cannot against him retain anything beyond the poundage allowed by 29 Eliz. c. 4.—BUCKLE *v.* BEWES (1825), 3 B. & C. 688; 5 Dow. & Ry. K. B. 495; 3 L. J. O. S. K. B. 105; 107 E. R. 888; *subsequent proceedings*, 4 B. & C. 154.

**824. —— —— Though not indorsed on writ.**]—By 7 Will. 4 & 1 Vict. c. 55, a sheriff may, under a *fi. fa.*, levy the amount of his fees authorised by these statutes, though not indorsed on the writ, & he need not specify the amount of such fees in his return.—CURTIS *v.* MAYNE (1842), 2 Dowl. N. S. 37; 7 Jur. 154.

*Annotations:*—**Refd.** Withers *v.* Parker (1860), 6 Jur. N. S. 1033; Sneary *v.* Abdy (1876), 1 Ex. D. 299.

**825. —— Unaffected by regulations as to fees.**]—The sheriff's right to poundage is not affected by 7 Will. 4 & 1 Vict. c. 55, or the table of fees made under it.—DAVIES *v.* GRIFFITHS (1838), 4 M. & W. 377; 7 Dowl. 204; 1 Horn & H. 339; 8 L. J. Ex. 70; 3 J. P. 531; 2 Jur. 1045; 150 E. R. 1475.

*Annotations:*—**Refd.** Pilkington *v.* Cooke (1847), 16 M. & W. 615; Wrightup *v.* Greenacre (1847), 10 Q. B. 1.

**826. —— On money levied on attachment.**]—The ct. directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money; there being no practice to warrant it; & referred him to his action if he were supposed to have a right to it under 23 Hen. 6, c. 9.—R. *v.* PALMER (1802), 2 East, 411; 102 E. R. 426.

**827. —— ——.**]—The sheriff cannot be required to pay into ct. money levied under an attachment, but he is not entitled to his poundage on the sum levied.—R. *v.* DEVON (SHERIFF) (1834), 3 Dowl. 10;

**828. —— Execution of writ of capias ad satisfaciendum—Poundage received from defendant.**]—A sheriff has no right to take poundage from deft., on the execution of a writ of *ca. sa.*—HAYLEY *v.*

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of a special contract with the party employing him.—NORTHERN TRUSTS CO. *v.* BUIE (1916), 34 W. L. R. 285; 10 W. W. R. 524.—**CAN.**

d. *Legality of deed of deputation.*]—A deed of deputation by which high sheriffs appoint a sub-sheriff & which provides that the first £2,400 received by the sub-sheriff for fees in the office, are paid to the high sheriffs, then the surplus, if any, to the extent of £800, to the sub-sheriff as salary, & the further surplus, if any, to the high sheriffs, is not illegal, nor in violation of 12 Geo. 1, c. 4.—DRUMMOND *v.* PONDER (1839), 1 I. Eq. R. 223.—**IR.**

e. *Neglect to serve process—No fee paid.*]—GAMBLE *v.* BARR (1910), 44 I. L. T. 204.—**IR.**

f. *When sheriff's fees attach—Portion of duty done.*]—The sheriff's fees attach when a portion of the duty has been done, & he is in no default but stands ready to perform the remaining part when required without additional fee.—WALSH *v.* CORMACK (1850), 3 Nfld. L. R. 158.—**NFLD.**

g. —— ——.]—HARTERY *v.* WARREN & CO. (1850), 3 Nfld. L. R. 158.—**NFLD.**

h. *Right of judge to fix fees.*]—All that a judge can do by order under Sheriffs Act, 1883, s. 18, is to fix, in respect of any matter which has not been provided for under the scale of fees & poundage made under sect. 17 of the Act, the amount of any fees which may be taken & received by the sheriff, or his officer, bailiff, or other persons employed by him.—*Re* BEALE *v.* TIHEMA TE HAU, *Ex p.* AUCKLAND (SHERIFF) (1906), 26 N. Z. L. R. 184.—**N.Z.**

### PART VI. SECT. 2, SUB-SECT. 1.

k. *Right to poundage—Notice to withdraw given.*]—SICHEL *v.* WITTKOWSKI (1862), 1 W. & W. 394.—**AUS.**

l. —— *On compromise—After advertisement.*]—*Qu.:* if a sheriff is entitled to poundage on a compromise after advertisement, but before sale.—GATES *v.* CROOKS (1834), 3 O. S. 286.—**CAN.**

m. —— ——.]—Where an execution against lands was put into a sheriff's hands before the return day, but it was not shown that the sheriff did anything upon it & pltf. & deft. compromised:—*Held:* sheriff was not entitled to poundage on such execution although deft. had lands within this district which might have been taken upon such writ & sold.—LEEMING *v.* HAGERMAN (1836), 5 O. S. 38.—**CAN.**

n. —— *Levy on estreated recognisance.*]—Where on a levy on an estreated recognisance, the Crown discharges the estreat on payment of the sheriff's fees, the sheriff is entitled to poundage.—R. *v.* VINNING (1839), 3 Ont. Dig. 6066.—**CAN.**

o. —— *Coroner.*]—A coroner is not entitled to poundage on an attachment against a sheriff.—*Re* DUGGAN (1845), 2 U. C. R. 118.—**CAN.**

p. —— *Refusal of sheriff to take bail—Unless deft. secured sum for poundage.*]—Deft. being in gaol on a *ca. sa.* offered bail for the limits to the sheriff, who refused to take such bail unless deft. paid or secured, in addition to the usual gaol fees & charges for the limit bond, a certain sum for poundage, on the demand for which deft. was in custody, whereupon one of the bail gave his promissory note to the sheriff for his poundage:—*Held:* the sheriff had no right to exact such a note for poundage, or to claim any poundage on the execution in such circumstances.—ROBERTS *v.* WATSON (1847), 5 N. B. R. (3 Kerr) 414.—**CAN.**

q. —— *Sheriff must levy, sell, receive & pay over.*]—Under 16 Geo. 3, c. 1, P. E. Island, the sheriff is allowed poundage "for levying, paying & receiving" moneys under executions. Under this provision he must not only levy, but actually sell, receive, & pay over the purchase-money before he is entitled to poundage.—COX *v.* MURPHY, COX *v.* RICE (1872), 1 P. E. I. 412.—**CAN.**

r. —— *Apart from Judicature Ordinance, r.* 374.]—*Re* MURPHY (1902), 7 Terr. L. R. 271.—**CAN.**

t. —— *On void proceedings.*]—Under Dominion Winding-up Act, there is but one winding-up order, & one date for the commencement of the winding-up for the whole of Canada;

RACKET (1839), 5 M. & W. 620; 151 E. R. 262; *sub nom.* HELY *v.* RACKETT, 3 Jur. 1196.

**829. —— —— Writ returned non est inventus.**]—MAGNAY *v.* MONGER, No. 221, *ante*.

**830. —— Debt tendered before levy.**]—A. being informed that a writ of *fi. fa.* was in the sheriff's hands against him, sent a party to the house of the sheriff's officer to whom the warrant had been delivered with a bank post bill & some country notes to an amount sufficient as he thought to discharge the execution. On inquiry, however, the amount not being sufficient, the party returned to fetch the balance, leaving the bills & notes on the table, & in his absence the sheriff's officer levied on the money left in his hands & claimed poundage thereon, which was paid under protest: —*Held:* this was a colourable levy; the sheriff was not entitled to poundage & the ct. would order him to refund the sum he had so received.—BRUN *v.* HUTCHINSON (1844), 2 Dow. & L. 43; 13 L. J. Q. B. 244; *sub nom.* BENN *v.* HUTCHINSON, 3 L. T. O. S. 61, 108.

*Annotation:*—**Refd.** Mortimore *v.* Cragg (1878), 3 C. P. D. 216.

**831. —— Money paid into court by sheriff—Right of court officials.**]—The chief clerk is not entitled to poundage on money paid into ct. by the sheriff, under 43 Geo. 3, c. 46, s. 2.—STEWART *v.* BRACEBRIDGE (1819), 2 B. & Ald. 770; 106 E. R. 546.

*Annotation:*—**Foll.** Hunn *v.* Brine (1821), 6 Moore, C. P. 124.

**832. —— ——.**]—The clerk of the dockets is not entitled to poundage on money paid into ct. by the sheriff under 43 Geo. 3, c. 46, s. 2.—HUNN *v.* BRINE (1821), 6 Moore, C. P. 124.

**833. —— Where no writ venditioni exponas issued.**]—Upon a *capias utlagatum* on mesne process under which the sheriff has seized & taken an inquisition, but there has been no *venditioni exponas*, the sheriff is not entitled to poundage.—GRAHAM *v.* GRILL (1814), 2 M. & S. 294; 105 E. R. 391.

*Annotation:*—**Foll.** Colls *v.* Coates (1840), 11 Ad. & El. 826.

**834. —— Though creditor disentitled to costs of action.**]—Pltf. who recovers a debt not exceeding £20, although deprived of costs by force of County Court Acts, is nevertheless entitled to levy poundage fees & expenses of execution, in addition to the sum recovered, under C. L. P. Act, 1852 (c. 76), s. 112.—ARMITAGE *v.* JESSOP (1866), L. R. 2 C. P. 12; 36 L. J. C. P. 63; 15 L. T. 214; 12 Jur. N. S. 963; 15 W. R. 130.

——.]—*See, also,* EXECUTION, Vol. XXI., pp. 608–610, Nos. 1970–1987.

**Action to recover.**]—*See* Sect. 5, *post*.

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SUB-SECT. 2.—CROWN PROCESS.

**835. Poundage on debts collected.**]—Sheriffs are not entitled to poundage on money seized in the Crown debtor's possession under an extent against him. Nor on money paid by the sureties of the Crown debtor who has been arrested on the Crown process in order to obtain the release of his person. Sheriffs have no authority, under the extent, as sheriffs to collect debts due to the Crown debtor; & if they receive such debts, they cannot make it the ground of a charge for poundage on the amount.—R. *v.* VILLERS (1820), 8 Price, 587; 146 E. R. 1304.

——.]—*See, now,* Sheriffs Act, 1887 (c. 55), s. 20 (1).

**836. Poundage on execution for fine.**]—R. *v.* WADE (1681), T. Jo. 185; Skin. 12; 84 E. R. 1209; *sub nom.* R. *v.* WEBB, 2 Show. 166.

*Annotation:*—**Refd.** R. *v.* Woolf (1819), 2 B. & Ald. 609.

**Two seizures for same debt—Poundage apportioned.**]—*See* EXECUTION, Vol. XXI., p. 611, Nos. 1995–1999.

**837. Writ of extent—On contract debt—Poundage not leviable—Payable by the Crown.**]—If on an extent issuing against the acceptors of bills of exchange drawn in favour of officers of the Crown, for public money received by the drawers, & remitted by them to the acceptor, for the purpose of levying the Crown's debts, the drawers, after the execution of that process, take up & pay the bills, they are not liable to pay the sheriff's poundage on the levy. The sheriff, having retained, under an order of the ct., a sum for poundage in his hands, will be ordered to restore it to the assignees of bkpt. acceptor's estate:—*Semble:* whatever be due to the sheriff for poundage, in such a case, should be paid by the Crown.—R. *v.* FREME (1815), 2 Price, 58; 146 E. R. 21.

**838. —— ——.**]—A sheriff has no right to levy costs or poundage or any incidental expenses, under an extent, on a simple contract debt; neither has he, or the attorney for prosecutor of the extent, a right to receive any such costs, etc., under a compromise in consideration of staying proceedings, from deft., under duress of a seizure, if more than the precise debt be received by them under such circumstances they will be ordered to restore it, & to pay the costs of an application to the ct., for the purpose of obtaining the order.—R. *v.* TIDMARSH (1817), 5 Price, 189; 146 E. R. 578.

**839. —— Levy of costs.**]—The sheriff is entitled to levy costs under 43 Geo. 3, c. 99, on an extent against a collector of taxes; & the sheriff's poundage is included in the word charges, & may be levied; & it is payable where the money is paid in, before a *venditioni exponas* has issued, although that proceeding is obviated thereby. But if the agent in the country, of the solrs. for taxes, have received any money from deft. as costs under the levy, or the sheriff have taken anything for extra costs as bailiff's fees & keeping possession, the ct. will order them to refund.—R. *v.* COLLINGRIDGE (1816), 3 Price, 280; 146 E. R. 261.

**840. —— —— Compromise of proceedings.**]—R. *v.* TIDMARSH, No. 838, *ante*.

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SUB-SECT. 3.—RETAINER OF POUNDAGE.

**841. Right to retain poundage—Where restitution of proceeds of execution ordered.**]—R. *v.* BURRELL (1731), Bunb. 305; 145 E. R. 682.

*Annotations:*—**Refd.** R. *v.* Jetherell (1757), Park. 177 R. *v.* Fry (1793), 2 Anst. 358.

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& any execution or distress put in force after the date of the winding-up order is void, irrespective of notice of the winding-up order, in whatever province the winding-up order is made, & whether the execution or distress is put in force in that or any other province; & the sheriff can recover no fees or charges or poundage in respect of such a void proceeding.—*Re* PRODUCERS ROCK & GRAVEL CO. (1913), 25 W. L. R. 709; 14 D. L. R. 289; 18 B. C. R. 375.—CAN.

a. —— *Ambiguity of words in rule.*]—VINAYAK VASUDEV *v.* RITCHIE STEUART & CO. (1867), 4 Bom. O. C. 139.—IND.

b. ——.]—The sheriff is only entitled to poundage on sums levied; so where a seizure is wrongful & is withdrawn by direction of law, the sheriff receives no poundage.—BRIJRATAN *v.* JAYNARAIN (1910), I. L. R. 37 Calc. 649.—IND.

c. —— *Execution of writ of levari.*]—A sheriff is not entitled to his poundage under 12 Geo. 1, c. 4, for executing a writ of *levari* against a defaulting receiver & his sureties who have become bound by recognisance in the Ct. of Ch.—R. *v.* PHIBBS (1849) 15 L. T. O. S. 144.—IR.

*Sect.* 2.—*Poundage: Sub-sects.* 3 & 4. *Sects.* 3 & 4: *Sub-sects.* 1 & 2.]

**842. —— Proceeds of sale payable into court.**]—The sheriff selling under a *venditioni exponas* is not entitled to deduct anything, either for extra expenses or poundage, or to return such a deduction.

He must make a return of the whole sum produced by the sale, when the ct. order it to be paid over, deducting poundage; & he must move the ct. for any extra allowance to which he may be entitled.—R. *v.* JONES (1814), 1 Price, 205; 145 E. R. 1378.

**843. —— ——.**]—Where the amount of a Levy ordered to be brought into ct., sheriff no right to detain his poundage.—KING *v.* BIRCH (1843), 1 L. T. O. S. 291.

**844. —— Retention of surplus proceeds of execution—After Crown debt satisfied.**]—Where a sheriff had retained for several years a sum of money in his hands, the balahce of the produce of effects of a Crown debtor seized by him & sold under an extent after the Crown debt had been satisfied, claiming himself a lien thereon for poundage, etc., the ct. ordered that he should pay interest on the amount of such balance to the parties from whom he had withheld it, from the time when the ct. had determined, on a former occasion, that the claim of the sheriff was unfounded, notwithstanding which determination he had continued to keep the question before the ct.; & that although the sheriff shoul l not have made interest or any use or advantage of the money in the meantime, the ct. proceeding wholly on the ground of the injury done to the party entitled to it.—*Ex p.* VILLERS, R. *v.* VILLERS (1823), 11 Price, 575; 147 E. R. 569.

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SUB-SECT. 4.—AMOUNT OF POUNDAGE.

*See* Sheriffs Act, 1887 (c. 55), s. 20; Order as to Sheriff's Fees, (1920).

**845. Statutory specification of amount of poundage—Reasons for.**]—WALDEN *v.* VESEY (1625), Palm. 399; Noy, 75; 81 E. R. 1142; *sub nom.* WALDEN *v.* URSY, Lat. 51.

*Annotation:*—**Refd.** Hescott's Case (1693), 1 Salk. 330.

**Amount leviable in execution.**]—*See* EXECUTION, Vol. XXI., pp. 608, 610, 611, Nos. 1969, 1988–1999.

—— **In distress—Double charges.**]—*See* DISTRESS, Vol. XVIII., p. 356, Nos. 935.

SECT. 3.—**OTHER CHARGES.**

**846. Expenses of sale—Right of sheriff to retain—From money deposited by Crown.**]—A sheriff cannot retain against the Crown a sum of money deposited by an agent of the Crown, to cover the expenses of a sale by auction of property seised under an extent, & sold under a *venditioni exponas.*—R. *v.* JONES (1830), 1 Cr. & J. 140; 9 L. J. O. S. Ex. 2; 148 E. R. 1366.

—— **In bankruptcy.**]—*See* BANKRUPTCY, Vol. V., p. 822, Nos. 6981, 6982.

**847. Expenses of search.**]—(1) *Semble:* the proper title of affidavits in support of an attachment against a sheriff's officer for extortionate charges on a *fi. fa.* is in the cause.

(2) The officer is not entitled to charge as expenses, for search for detainers, or for discharge when on a *fi. fa.* the sum to be levied is paid at once.—MASTERS *v.* LOWTHER (1852), 11 C. B. 948; 21 L. J. C. P. 130; 18 L. T. O. S. 257; 16 Jur. 374; 138 E. R. 750.

*Annotations:*—*Generally*, **Refd.** *Re* Grubb, *Ex p.* Sims (1877), 4 Ch. D. 521; Roe *v.* Hammond (1877), 2 C. P. D. 300.

**848. Costs of taxation of charges.**]—BUTLER *v.* SMITH (1895), 39 Sol. Jo. 406.

**Costs of interpleader proceedings.**]—*See* INTERPLEADER, Vol. XXIX., pp. 479, 498–501, 505, 512, Nos. 296, 297, 501–531, 568, 569, 627, 628.

**Possession money.**]—*See* EXECUTION, Vol. XXI., pp. 611, 612, Nos. 2000–2005.

—— **In bankruptcy proceedings.**]—*See* BANKRUPTCY, Vol. V., pp. 822, 823, Nos. 6986–6993.

**Priority in Admiralty action—As against owner of ship.**]—*See* ADMIRALTY, Vol. I., p. 225, No. 1510.

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SECT. 4.—**EXTORTION.**

SUB-SECT. 1.—IN GENERAL.

*See* Sheriffs Act, 1887 (c. 55), s. 29 (2).

**849. What amounts to extortion—Remuneration for work beneficial to debtor—At debtor's request.**]—STEVENS *v.* ROTHWELL, No. 857, *post.*

**850. —— Remuneration for extra duties.**]—Pltf., a London attorney, sent a writ in a letter to a Dover attorney, who was also deputy constable or bodar of Dover Castle, in order to get it executed, & afterwards taxed the bill of the latter.

The master having allowed 4*s.* for the warrant, & 6*s.* 8*d.* for attending with it & instructing the officer to execute it, the ct. affirmed the taxation, though the fees were above those allowed by 23 Hen. 6, c. 9.

To bring the sheriff or his officer within the Act,

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**PART VI. SECT. 2, SUB-SECT. 4.**

*d. Fixed on amount of compromise.*]—WETMORE *v.* MCLEOD (1860), 10 N. B. R. (5 All.) 534.—**CAN.**

*e.* ——.]—Where property is attached by the sheriff after judgment, & the parties come to a compromise before the sheriff sells any of such property, the sheriff is only entitled to poundage on the amount received by the execution creditor in compromise of his claim.—*Re* BOMBAY JOINT STOCK CORPN., *Re* BOMBAY (SHERIFF) (1869), 6 Bom. O. C. 22.—**IND.**

*f. Payment of debt in full after attachment but before sale.*]—Certain immovable property of deft. was attached in execution of a decree which had been partly satisfied by the proceeds of a previous sale in execution. Before any proceedings for sale were taken under the attachment, deft. paid the balance & satisfied pltf.'s claim in full:—*Held:* the sheriff was entitled to poundage upon the amount so paid in satisfaction of the debt & satisfaction of the decree was ordered to be entered, & the attachment withdrawn, subject to the payment of such poundage.—ROYCHURN DUTT *v.* AMEENA BIBI (1876), I. L. R. 2 Calc. 385.—**IND.**

*g. Writ of extent—Sheriff entitled to poundage on actual amount received by Crown.*]—Upon an execution by extent, the sheriff is only entitled to poundage upon the sum which actually comes to the hands of the Crown, although the writ was marked for a greater sum, & goods exceeding in value the sum levied were seized.—R. *v.* AITKEN (1836), 2 Jo. Ex. Ir. 283.—**IR.**

*h. Amount fixed in order of arrest.*]—By Rules of 1875, r. 6, the sheriff is entitled to poundage on the amount for which an order to arrest has been made under Imprisonment for Debt Abolition Act, 1874, s. 15, if the arrest has been made, although the writ of arrest is afterwards set aside.—MOFFET *v.* SHEARS (1888), 6 N. Z. L. R. 317.—**N.Z.**

*k. Fixed by percentage on money received.*]—LA GRANGE *v.* MARAIS (1909), 3 Buch. A. C. 54.—**S. AF.**

**PART VI. SECT. 3.**

*l. Certificates of attendance.*]—Under C. S. U. C. c. 31, ss. 105, 161 (4), the sheriff is entitled to charge only for such certificates of attendance as are demanded by the jurors. He cannot prepare them beforehand & charge, whether they are asked for or not.—*Re* DAVIDSON (1863), 22 U. C. R. 405.—**CAN.**

*m. Commission.*]—On the sale of goods by the sheriff the ct. has authority to authorise the payment of a commission.—*Re* MCDONALD'S INSOLVENT ESTATE (1860), 4 Nfld. L. R. 526.—**NFLD.**

**PART VI. SECT. 4, SUB-SECT. 1.**

*n. Extortion lies against bailiff only.*]—A count charging the landlord with selling the goods for extortionate & illegal charges, cannot be sustained,

there must not be imposed on him any other duties beyond those to which he is liable in his official capacity (LORD LYNDHURST, C.B.).—PRIMROSE *v.* BRADLEY (1834), 2 Cr. & M. 687; 4 Tyr. 995; 3 L. J. Ex. 206; 149 E. R. 937.

**851. —— Payment under illegal execution.**]—Deft. who has paid money to the sheriff under pressure of an illegal execution has a right to say, that it is extorted & not paid in discharge of the debt.—BAYNTON *v.* SEAL (1844), as reported in 8 J. P. 571.

**852. —— Remuneration for ineffective execution.**]—HOLMES *v.* SPARKES, No. 861, *post*.

**853. —— Excessive possession money.**]—It is extortion for a bailiff on a *fi. fa.* to charge costs of a second man in possession & of a valuation of the goods.—HALLIWELL *v.* HEYWOOD (1862), 10 W. R. 780.

**854. —— Clerical error of clerk.**]—Sheriffs Act, 1887 (c. 55), s. 29, imposes a penalty on any sheriff's officer "who takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by the Act or any other Act."

Owing to a clerical error made by their clerk, a firm of sheriff's officers claimed & received from an execution debtor a sum for poundage which was £3 in excess of the amount due:—*Held:* the sheriff's officers were not liable in a penalty under Sheriff's Act, 1887 (c. 55), s. 29, in respect of such unintentional overcharge.—SHOPPEE *v.* NATHAN & Co., [1892] 1 Q. B. 245; 8 T. L. R. 209.

*Annotation:*—**Reld.** Lee *v.* Dangar, Grant, [1892] 2 Q. B. 337.

**855. —— Account greatly reduced on taxation.**]—Sheriffs Act, 1887 (c. 55), s. 29 (2) (*b*), imposes a penalty upon a sheriff, under-sheriff, bailiff, or officer of a sheriff, if he "takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act."

The sheriff's officer having sold the goods as above mentioned was requested to send in to the official receiver an account of the sale. He sent in an account, in which he claimed to deduct from the proceeds of the sale certain amounts in respect of his charges of the execution. The official receiver thereupon requested him to bring in his charges for taxation, & he accordingly took steps to obtain taxation of such charges, which, however, was resisted by the trustee in bkpcy., who had in the meantime brought an action for the penalty. Ultimately he obtained an order for taxation of his charges, & upon such taxation a large amount of the sum claimed in his account was taxed off as excessive:—*Held:* (1) under the circumstances of the case the claim made by the sheriff's officer in his account must be taken to have been made subject to & in contemplation of taxation, & did not amount to a taking or demand of money within the above-mentioned enactment, so as to render the sheriff's officer liable to a penalty.

(2) I am not prepared to say that the words of sect. 29 of the Act [Sheriffs Act, 1887 (c. 55)] are confined to demands made before the execution of the writ. I am disposed to think that there might be a wrongful demand within the sect. if a fraudulent or exorbitant demand was made after the execution of the writ (ESHER, M.R.).—WOOLFORD'S ESTATE TRUSTEE *v.* LEVY, [1892] 1 Q. B. 772; 61 L. J. Q. B. 546; 66 L. T. 812; 56 J. P. 694; 40 W. R. 483; 8 T. L. R. 492, C. A.; *affg.*, 7 T. L. R. 598.

*Annotations:*—*As to* (2) **Consd.** Lee *v.* Dangar, Grant, [1892] 2 Q. B. 337; Shoppee *v.* Nathan, [1892] 1 Q. B. 245. *Generally*, **Reld.** *Re* Thomas, *Ex p.* Middlesex, Sheriff, [1899] 1 Q. B. 460.

**856. —— Mistake of sheriff's officer.**]—Sheriffs Act, 1887 (c. 55), s. 29, imposes a penalty of £200 upon any sheriff's officer who (*inter alia*) "takes or demands any money or reward under any pretext whatever, other than the fees or sums allowed by or in pursuance of this or any other Act," or "is guilty of any offence against or breach of the provisions of this Act":—*Held:* the penalty is inflicted for the doing of an act in the nature of a criminal offence; to constitute such an offence there must be a *mens rea*; & a sheriff's officer is not liable to the penalty if he makes an overcharge by mistake.

It was argued that the seizure of the property of a debtor, without sale or valuation, is a satisfaction of the debt, to the extent of the amount which the property ultimately produces. It seems to me that that proposition is almost on the face of it untenable. How property can be a satisfaction of a debt at a time when the value of the property is not ascertained, but is to be ascertained at a subsequent time, is extremely difficult for me to understand. The proposition involves still greater difficulties, for it is obvious that, if the seizure of property is a satisfaction of the debt, the sheriff can go on further, & therefore he can never realise, he can never sell, & the satisfaction would be for an amount which could never be ascertained. The proposition is, therefore, absolutely absurd as a working proposition for the business of life (FRY, L.J.).—LEE *v.* DANGAR, GRANT & Co., [1892] 2 Q. B. 337; 61 L. J. Q. B. 780; 66 L. T. 548; 56 J. P. 678; 40 W. R. 469; 8 T. L. R. 494, C. A.

*Annotations:*—**Apld.** Moore *v.* Brompton County Court (1893), 62 L. J. Q. B. 498; Madeley *v.* Greenwood (1897), 42 Sol. Jo. 34. **Reld.** Bagge *v.* Whitehead, [1892] 2 Q. B. 355; Shoppee *v.* Nathan, [1892] 1 Q. B. 245; *Re* Thomas, *Ex p.* Middlesex, Sheriff, [1899] 1 Q. B. 460; *Re* A Debtor, *Ex p.* Smith, [1902] 2 K. B. 260.

**Extortion by violence.**]—*See* CRIMINAL LAW, Vol. XV., p. 942, No. 10400.

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SUB-SECT. 2.—REMEDIES.

*See* Sheriffs Act, 1887 (c. 55), s. 29 (2).

**857. Under Act authorising levy.**]—In an action by the assignees of bkpt., founded on the statute 29 Eliz. c. 4, against a sheriff for extortion, on executing a *levari facias* issued out of the Ct. of Exch. for a Crown debt:—*Held:* that statute applied only to cases between party & party, & pltf.'s remedy was under Estreats Act, 1717 (c. 15), which gives the sheriff poundage, in cases where the debt is due to the Crown, previously to which he was not entitled to such poundage, except under orders issued by that ct. It seems that the taking a remuneration by the sheriff for extra expenses incurred in dividing the property of bkpt. into lots, at his request in order that it might sell to greater advantage, does not amount to an extortion.—STEVENS *v.* ROTHWELL (1821), 3 Brod. & Bing. 143; 129 E. R. 1237; *sub nom.* STEPHENS *v.* ROTHWELL, 6 Moore, C. P. 338.

**858. Action for debt—Though no evidence that money received.**]—JONS *v.* PERCHARD, No. 51, *ante*.

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for the charge of extortion lies only against the bailiff who received the fee.—NICHOLS *v.* MOONEY (1843), 1 U. C. R. 199.—CAN.

o. *Court will order refund of money extorted under pressure of writ—With interest thereon.*]—Under pressure of a writ, a sheriff extorted moneys from the execution debtor. The ct. ordered him to refund the money, with interest at £6 per cent.—CREED *v.* CREED (1841), 4 I. Eq. R. 299; Fl. & K. 396.—IR.

*Sect. 2.—Duties and liabilities of old sheriff. Sect. 3.*]

**884.** ——.]—ANON. (1732), 2 Barn. K. B. 158; 94 E. R. 420.

—— **Liability for escape.**]—*See* Nos. 399–403, *ante.*

**885. Delivery of writ of supersedeas.**]—An action on the case for negligence lies against an ex-sheriff for omitting to deliver to the new sheriff a writ of *supersedeas*, by reason of which pltf. was taken in execution.—CALTHROP *v.* PHILLIPS (1677), 2 Mod. Rep. 217; 86 E. R. 1035.

**Return of the Writ—After expiration of term of office.**]—*See* EXECUTION, Vol. XXI., p. 455, Nos. 377–383.

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## SECT. 3.—RIGHTS AND LIABILITIES OF NEW SHERIFF.

**886. Title to fees—Extent made by old sheriff.**]—EMPSON *v.* BATHRUST (1622), Win. 21, 50; Hut. 52; 124 E. R. 43.

*Annotation:*—**Refd.** Giles *v.* Grover (1832), 9 Bing. 128.

**887. Right in respect of goods seized by old sheriff—Goods not sold.**]—Where a sheriff does not sell goods seized by him under a *testatum fi. fa.* before he leaves office, & the new sheriff distrains him that he sell the goods seized, on a motion afterwards to increase issues the ct. will allow him to be distrained for the amount of the debt directed to be levied, & a further sum to cover pltfs.' costs consequent on the delay, as well as those of the application. The rule for this purpose is absolute in the first instance.—NOWELL *v.* UNDERWOOD (1836), 5 Dowl. 229; 2 Har. & W. 300.

*Annotation:*—**Refd.** Monins *v.* Smith (1841), 5 Jur. 294.

**888. Liability—For tort of predecessor.**]—BESSEY *v.* OLLIOT & LAMBERT, No. 658, *ante.*

**889.** —— **For escape of prisoner—Prisoner permitted to go at large.**]—BRYANT *v.* CARROLL, No. 93, *ante.*

**890.** —— **Non return of writ—Proof of liability—Erasure of old sheriff's name & substitution of new.**]—WHITEHOUSE *v.* ATKINSON, No. 744, *ante.*

—— —— **Writ not transferred by predecessor.**]—*See* EXECUTION, Vol. XXI., p. 455, Nos. 382, 383.

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must be considered in office at the return of the writ, & liable upon the return made.—ROSS *v.* MCMARTIN (SHERIFF) (1850), 7 U. C. R. 179.—**CAN.**

o. *Sheriff leaving office before sale under writ of fieri facias—Liability on rule moved six months afterwards.*]—A *fi. fa.* was put into a sheriff's hands, under which he levied on real estate, which was sold in Apr. 1859. The sheriff went out of office a few days before the sale. A rule calling upon him to hand over the *fi. fa.* to the present sheriff, moved more than six months after his going out of office, was refused.—LEVY *v.* LAWSON (1860), 9 N. B. R. (4 All.) 501.—**CAN.**

PART VII. SECT. 3.

**887** i. *Right in respect of goods seized by old sheriff—Goods not sold.*]—RILEY *v.* NIAGARA DISTRICT BANK (1866), 26 U. C. R. 21.—**CAN.**

**889** i. *Liability—For escape of prisoner—Prisoner permitted to go at large.*—On the death of a sheriff, his deputy is charged with the execution of his office until a new sheriff is appointed, & he must assign over by indenture as well the debtors on the limits as those in custody; & a new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment, without such assignment. — MCPHERSON *v.* HAMILTON (1837), 5 O. S. 490.—**CAN.**

p. —— ——.]—If the prisoners be delivered by the old sheriff to the new within the gaol, with the writs under which they are detained, & the new sheriff does not require an indenture, he shall be chargeable in case of an escape after such delivery.—POWER *v.* JOHNSON (1842), 4 N. B. R. (2 Kerr) 43.—**CAN.**

q. *Deed by successor in office—Whether valid.*]—*Semble:* a deed by the successor of the sheriff who made the sale, is good under 27 & 28 Vict. c. 28, s. 43.—BELL *v.* MCLEAN (1868), 18 C. P. 416.—**CAN.**

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# SHIFTING USE.

*See* PERPETUITIES; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS; WILLS.

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# SHIP-BROKER.

*See* SHIPPING AND NAVIGATION.

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# SHIPPING AND NAVIGATION.

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# Part I.—In General.

NOTE.—*The following are the Merchant Shipping Acts, at present in force:—The Merchant Shipping Act*, 1894 (c. 60), *The Merchant Shipping Act*, 1897 (c. 59), *The Merchant Shipping (Liability of Shipowners) Act*, 1898 (c. 14), *The Merchant Shipping (Mercantile Marine Fund) Act*, 1898 (c. 44), *The Merchant Shipping (Liability of Shipowners & Others) Act*, 1900 (c. 32), *The Merchant Shipping Act*, 1906 (c. 48), *The Merchant Shipping Act*, 1907 (c. 52), *The Merchant Shipping (Seamen's Allotment) Act*, 1911 (c. 8), *The Merchant Shipping (Stevedores & Trimmers) Act*, 1911 (c. 41), *The Merchant Shipping Act*, 1911 (c. 42), *The Merchant Shipping (Certificates) Act*, 1914 (c. 42), *The Merchant Shipping (Convention) Act*, 1914 (c. 50), *The Merchant Shipping (Salvage) Act*, 1916 (c. 41), *The Merchant Shipping (Wireless Telegraphy) Act*, 1919 (c. 38), *The Merchant Shipping (Amendment) Act*, 1920 (c. 2), *The Merchant Shipping (Scottish Fishing Boats) Act*, 1920 (c. 39), *The Merchant Shipping Act*, 1921 (c. 28), *The Merchant Shipping (Amendment) Act*, 1923 (c. 40), *The Merchant Shipping (Equivalent Provisions) Act*, 1925 (c. 37), *The Merchant Shipping (International Labour Conventions) Act*, 1925 (c. 42). *They are referred to respectively throughout the Title as* 1894 *Act*, 1897 *Act*, 1898 *Act* (c. 14), 1898 *Act* (c. 44), 1900 *Act*, 1906 *Act*, 1907 *Act*, 1911 *Act* (c. 8), 1911 *Act* (c. 41), 1911 *Act* (c. 42), 1914 *Act* (c. 42), 1914 *Act* (c. 50), 1916 *Act*, 1919 *Act*, 1920 *Act* (c. 2), 1920 *Act* (c. 39), 1921 *Act*, 1923 *Act*, 1925 *Act* (c. 37), & 1925 *Act* (c. 42).

## SECT. 1.—THE MERCHANT SHIPPING ACTS.

### SUB-SECT. 1.—IN GENERAL.

**Use of illegal colours.**]—*See* ADMIRALTY, Vol. I., p. 156, Nos. 642–644.

**Concealment of British character.**] — *See* ADMIRALTY, Vol. I., p. 156, Nos. 646, 647.

### SUB-SECT. 2.—APPLICATION TO FOREIGNERS.

**1. Vessel within jurisdiction.**]—(1) A foreigner cannot set up against a British vessel with which she has been in collision the British vessel's violation of British statute law on the high seas, for the foreigner could not herself be bound by it, as it is beyond the power of the legislature to make rules applicable to foreign vessels beyond British waters. The rights & merits of a case may be governed by a different law from that applicable to the form of remedy & procedure.

The *Zollverein* was to blame for this collision in having continued to sail too close to the other light vessel, & so occasioned the light of the *Pet* to be obscured (DR. LUSHINGTON).

(2) The laws of Great Britain affect her own subjects everywhere—foreigners only when within her own jurisdiction (DR. LUSHINGTON).

(3) As between a British & foreign ship on the high seas, the general maritime law must be the rule of the ct. In such a case British ship not bound by her own municipal law.—THE ZOLLVEREIN (1856), Sw. 96; 27 L. T. O. S. 160; 4 W. R.

*Sect.* 1.—*The Merchant Shipping Acts: Sub-sect.* 2. *Sect.* 2.]

555; 166 E. R. 1038; *sub nom.* THE ZOLVEREIN, 2 Jur. N. S. 429.

*Annotations:*—*As to* (1) **Apld.** The Wild Ranger (1862), Lush. 553. **Refd.** Poll *v.* Dambe, [1901] 2 K. B. 579. *As to* (2) **Apld.** Cope *v.* Doherty (1858), 4 K. & J. 367. **Consd.** General Iron Screw Collier Co. *v.* Schurmanns (1860), 1 John. & H. 180; Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430; Davidsson *v.* Hill, [1901] 2 K. B. 606; The Wilhelmina, [1923] P. 112. **Refd.** The Johannes (1860), Lush. 182; The Amalia (1863), Brown. & Lush. 151; R. *v.* Keyn (1876), 2 Ex. D. 63. *As to* (3) **Apld.** The Leon (1881), 6 P. D. 148. **Refd.** The Halley (1867), L. R. 2 A. & E. 3.

**2. —— Lien of master—Application of lex fori.**]—(1) In a suit by a foreign master against the freight for his wages, the question whether the freight is liable is a question of remedy & not of contract, & is therefore to be determined by the *lex fori*.

(2) A statute general in terms & intended for the protection of navigation applies to foreign vessels within British waters.

Merchant Shipping Act, 1854 (c. 104), s. 191, notwithstanding s. 109, extends to the masters of foreign ships, & gives them a remedy against ships & freight for their wages.—THE MILFORD (1858), Sw. 362; 31 L. T. O. S. 42; 4 Jur. N. S. 417; 6 W. R. 554; 166 E. R. 1167.

*Annotations:*—*As to* (1) **Consd.** The Jonathan Goodhue (1859), Sw. 524. **Folld.** The Tagus, [1903] P. 44. **Consd.** The Colorado, [1923] P. 102. *As to* (2) **Dbtd. & Distd.** The Halley (1867), L. R. 2 A. & E. 3. (*See* L. R. 2 P. C. 193.) **Apld.** R. *v.* Stewart, [1899] 1 Q. B. 964. **Consd.** Davidsson *v.* Hill, [1901] 2 K. B. 606; Poll *v.* Dambe, [1901] 2 K. B. 579. **Refd.** The Nina (1867), 17 L. T. 391. *Generally*, **Mentd.** Salt Union *v.* Wood (1893), 41 W. R. 301.

**3. —— —— ——.**]—In proceedings *in rem* by the foreign master of an Argentine vessel in an English port, the claim of the master consisted of (*a*) wages as supercargo, & afterwards as master; (*b*) disbursements whilst acting as supercargo, & afterwards as master. On the question of priority as against a mtgee. intervening:—*Held:* though by the *lex loci* the master could only claim his wages & disbursements for the last voyage as a "privileged debt" in priority to the mtgee., the question was one of remedy, & therefore the *lex fori* applied, under which, by reason of the maritime lien conferred by 1894 Act, s. 167, he could claim, in priority, the whole of his wages & disbursements whilst master. He was also entitled to add thereto his wages as a seaman whilst acting as supercargo, & such disbursements as he had then made by way of advances to the crew on account of their wages.—THE TAGUS, [1903] P. 44; 72 L. J. P. 4; 87 L. T. 598; 19 T. L. R. 82; 9 Asp. M. L. C. 371.

*Annotations:*—**Consd.** The Petone, [1917] P. 198; The Colorado, [1923] P. 102.

**4. —— Statute for protection of navigation—General in terms.**]—THE MILFORD, No. 2, *ante*.

**5. —— Collision—Limited liability of owner.**]—THE ATLAS (1846), 2 Wm. Rob. 502; 5 Notes of Cases, 50; 7 L. T. 648; 166 E. R. 845.

*Annotation:*—**Refd.** The Velasquez (1867), L. R. 1 P. C. 491.

**6. —— —— ——.**]—Where a British ship damages a foreign ship by a collision within the distance of three miles from the shore of the United Kingdom, the provisions of Merchant Shipping Act, 1854 (c. 104), limiting the liability of the owner to the value of the ship, apply.—GENERAL IRON SCREW COLLIER CO. *v.* SCHURMANNS (1860), 1 John. & H. 180; 29 L. J. Ch. 877; 4 L. T. 138; 6 Jur. N. S. 883; 8 W. R. 732; 1 Mar. L. C. 60; 70 E. R. 712.

*Annotations:*—**Distd.** The Annapolis, The Johanna Stoll (1861), Lush. 295; The Saxonia, The Eclipse (1862), Lush. 410. **Consd.** Call *v.* Papayanni, The Amalia (1863), 1 Moo. P. C. C. N. S. 471; R. *v.* Keyn (1876), 2 Ex. D. 63. **Refd.** The Wild Ranger (1862), Lush. 553; The Northumbria (1869), L. R. 3 A. & E. 6.

**7. —— Pilotage.**]—The British Legislature has no authority over foreign vessels on the high seas out of British jurisdiction, but may impose any conditions on foreign vessels entering a British port, & consequently an obligation on foreign ships inward bound to take a pilot at a convenient station beyond three miles from the British shore.—THE ANNAPOLIS, THE JOHANNA STOLL (1861), Lush. 295; 30 L. J. P. M. & A. 201; 4 L. T. 417; 1 Mar. L. C. 69; 167 E. R. 128.

*Annotations:*—**Consd.** R. *v.* Keyn (1876), 2 Ex. D. 63. **Refd.** General Steam Navigation Co. *v.* British & Colonial Steam Navigation Co. (1869), L. R. 4 Exch. 238; The Lion (1869), L. R. 2 P. C. 525; The Woburn Abbey (1869), 38 L. J. Adm. 28; The Princeton (1878), 3 P. D. 90; The Servia, The Carinthia, [1898] P. 36.

**8. —— Application to vessels in Solent.**]—THE SAXONIA, THE ECLIPSE, No. 13, *post*.

**9. —— Unauthorised engagement of seamen.**]—The prohibition contained in 1894 Act, s. 111, against unauthorised persons engaging seamen to be entered on board any ship in the United Kingdom, applies where the ship for which the seamen are engaged is a foreign ship.

The fine imposed by sect. 111 of that Act for its contravention is a punishment for an offence, & is not recoverable as a civil debt.—R. *v.* STEWART, [1899] 1 Q. B. 964; 80 L. T. 660; 63 J. P. 547; 47 W. R. 445; 8 Asp. M. L. C. 534; *sub nom.* R. *v.* STEWART, *Ex p.* OLSEN, 68 L. J. Q. B. 582; 15 T. L. R. 308, D. C.

*Annotations:*—**Consd.** Poll *v.* Dambe, [1901] 2 K. B. 579; The Tagus, [1903] P. 44.

**10. —— Enticing seaman or apprentice to desert.**]—By 1894 Act, s. 236 (1) "If a person by means whatever persuades or attempts to persuade a seaman or apprentice . . . to desert from his ship" he shall be guilty of an offence:—*Held:* this sect. applies only to British ships, & does not make it an offence to persuade a seaman to desert from a foreign ship lying in a port in this country.—POLL *v.* DAMBE, [1901] 2 K. B. 579; 70 L. J. K. B. 721; 84 L. T. 870; 65 J. P. 774; 50 W. R. 28; 17 T. L. R. 590; 45 Sol. Jo. 618; 9 Asp. M. L. C. 220, D. C.

*Annotation:*—**Refd.** The Tagus, [1903] P. 44.

**11. —— "Crimping"—Foreign vessel arriving in this country.**]—Notwithstanding the difference in language, the provisions of 1894 Act, s. 219, are the same as those of Merchant Seamen (Payment of Wages & Rating) Act, 1880 (c. 16), s. 6, & therefore, where an Order in Council under Merchant Seamen (Payment of Wages & Rating) Act, 1880 (c. 16), declared that the provisions of Merchant Seamen (Payment of Wages & Rating) Act, 1880 (c. 16), s. 5, relating to "crimping" should apply to ships of a foreign country, those provisions have effect as if the ships of that country were British ships arriving, about to arrive, or which had arrived at the end of their voyage.—R. *v.* ABRAHAMS, [1904] 2 K. B. 859; 73 L. J. K. B. 972; 68 J. P. 546; *sub nom.* BOARD OF TRADE (SOLICITOR) *v.* ABRAHAMS, 91 L. T. 493; 20 T. L. R. 684; 10 Asp. M. L. C. 5; 20 Cox, C. C. 715, D. C.

**12. Vessel without jurisdiction—Application of general maritime law—As between British & foreign ships.**]—THE ZOLLVEREIN, No. 1, *ante*.

**13. —— —— ——.**]—(1) Merchant Shipping Act, 1854 (c. 104), has no local application to the Solent, & does not affect foreign vessels there.

(2) Where a British & a foreign ship meet in the high seas, Merchant Shipping Act, 1854 (104), does not apply, but only the rules of the sea.—THE SAXONIA, THE ECLIPSE (1862), Lush. 410;

31 L. J. P. M. & A. 201; 6 L. T. 6; 8 Jur. N. S. 315; 10 W. R. 431; 1 Mar. L. C. 192; 167 E. R. 179; *sub nom.* HAMBURGH AMERICAN STEAM NAVIGATION CO. *v.* NORTH OF SCOTLAND BANKING CO., THE ECLIPSE, THE SAXONIA, 15 Moo. P. C. C. 262, P. C.

*Annotations:*—*As to* (1) **Consd.** The Wild Ranger (1862), Lush. 553; The Amalia (1863), Brown. & Lush. 151; R. *v.* Keyn (1876), 2 Ex. D. 63. *As to* (2) **Refd.** The Industrie (1871), L. R. 3 A. & E. 303; The Fanny M. Carvill (1875), 13 App. Cas. 455, n.

**14.** —— **Collision.**]—THE ZOLLVEREIN, No. 1, *ante*.

**15.** —— ——.] — THE BLACKFRIAR *v.* THE RUMENA (1856), 5 L. T. 240.

**16.** —— —— **Limited liability of owner.**]—Merchant Shipping Act, 1854 (c. 104), ss. 504, 514, limiting the damages to be recovered in case of collision by reference to the value of the vessel doing the injury & her freight, do not apply to a collision on the high seas between foreign ships, of which the owners are foreigners.—COPE *v.* DOHERTY (1858), 2 De G. & J. 614; 27 L. J. Ch. 600; 31 L. T. O. S. 307; 4 Jur. N. S. 699; 6 W. R. 695; 44 E. R. 1127, L. JJ.

*Annotations:*—**Expld.** General Iron Screw Collier Co. *v.* Schurmanns (1860), 1 John. & H. 180. **Distd.** The Annapolis, The Johanna Stoll (1861), Lush. 295. **Apld.** The Wild Ranger (1862), Lush. 553. **Consd.** Call *v.* Papayanni, The Amalia (1863), 1 Moo. P. C. C. N. S. 471; R. *v.* Keyn (1876), 2 Ex. D. 63; Davidson *v.* Hill, [1901] 2 K. B. 606. **Refd.** Burns *v.* Chapman (1858), 5 C. B. N. S. 481; The Johannes (1860), Lush. 182; The Victor (1860), Lush. 72; Poll *v.* Dambe, [1901] 2 K. B. 579; The Wilhelmina, [1923] P. 112.

**17.** —— —— ——.]—The owners of a foreign ship found to blame for a collision on the high seas with a British ship are not entitled to limited liability under Merchant Shipping Act, 1854 (c. 104), s. 504.—THE WILD RANGER (1862), Lush. 553; 1 New Rep. 132; 32 L. J. P. M. & A. 49; 7 L. T. 725; 9 Jur. N. S. 134; 11 W. R. 255; 1 Mar. L. C. 275; 167 E. R. 249.

*Annotations:*—**Consd.** Call *v.* Papayanni, The Amalia (1863), 1 Moo. P. C. C. N. S. 471. **Apld.** The Leon (1881), 6 P. D. 148. **Refd.** The Nevada (1872), 27 L. T. 720; Davidsson *v.* Hill, [1901] 2 K. B. 606. **Mentd.** Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759.

**18.** —— —— ——.]—Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, provides, that the owners of any ship, whether British or foreign, shall not, in cases where all or any of the certain events specified in the sect. of the Act occur, be answerable in damages in respect to loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage, nor in respect of loss or damage to ship's goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 to each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, & in the case of steamships the gross tonnage, without deduction on account of the engine room:—*Held:* when a collision takes place on the high seas between a British & a foreign vessel, the enactment applies equally to British & foreign vessels.—CAIL *v.* PAPAYANNI, THE AMALIA (1863), 1 Moo. P. C. C. N. S. 471; Brown. & Lush. 151; 2 New Rep. 533; 32 L. J. P. M. & A. 191; 8 L. T. 805; 9 Jur. N. S. 1111; 12 W. R. 24; 1 Mar. L. C. 359; 15 E. R. 778, P. C.

*Annotations:*—**Apld.** The Albert (1863), 3 New Rep. 217. **Refd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; The Halley (1868), L. R. 2 P. C. 193; The Normandy (1870), L. R. 3 A. & E. 152; The Fanny M. Carvill (1875), 13 App. Cas. 455, n.; The Sisters (1875), 32 L. T. 837; The Karo (1887), 13 P. D. 24. **Mentd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; James *v.* L. & S. W. Ry. (1872), L. R. 7 Exch. 187.

**19.** —— —— ——.]—The owners of a foreign vessel, which is found to blame for a collision with an English vessel beyond British jurisdiction, are entitled to have their liability limited under Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 54.—THE ALBERT (1863), 3 New Rep. 217.

**20.** —— —— **Presumption of fault.**] — In a case of collision outside the territorial waters of the United Kingdom, a point, raised on behalf of defts., that the statutory presumption of fault created by 1894 Act, s. 419 (4), did not apply in the case of a foreign ship, & that such ship could not, therefore, be held to blame for a breach of art. 16, unless the ct. should be of opinion that the breach of the regulation in fact contributed to the collision, was not decided, deft.'s ship being found to blame upon the facts.—THE KONING WILLEM I, [1903] P. 114; 72 L. J. P. 28; 88 L. T. 807; 9 Asp. M. L. C. 425.

*See, now*, 1894 Act, sects. 419, 424; Sea Regulations, 1910, &, *generally*, Part XII., Sect. 3, *post*.

**21.** —— **Pilotage.**] — THE ANNAPOLIS, THE JOHANNA STOLL, No. 7, *ante*.

## SECT. 2.—DEFINITIONS.

*See* 1894 Act, s. 742.

**22. Ship — Within Merchant Shipping Acts — Vessel navigated exclusively on river—Propelled by sails & oars.**]—A Trinity House lighter, which is a vessel propelled by sails as well as oars, but is exclusively employed in the navigation of the river Thames & never goes to sea, is not a "ship" within Merchant Shipping Acts.—THE C. S. BUTLER (1874), L. R. 4 A. & E. 238; 31 L. T. 549; 23 W. R. 113; 2 Asp. M. L. C. 408.

**23.** —— —— —— **Not propelled by oars.**]—A vessel which is not propelled by oars is not the less a "ship" within Merchant Shipping Act, 1854 (c. 104), because she is navigated only on a tidal river.—CORBETT *v.* PEARCE, [1904] 2 K. B. 422; 73 L. J. K. B. 885; 90 L. T. 781; 68 J. P. 387; 20 T. L. R. 473, D. C.

*Annotation:*—**Refd.** Chislett *v.* Macbeth, [1909] 2 K. B. 811.

**24.** —— —— **Launch.**] — A vessel not registered under Merchant Shipping Act, 1854 (c. 104), s. 18, is a ship within that Act.

I am disposed to consider that a ship, in the imperfect state of a launch might be included under this provision (SIR ROBERT PHILLIMORE).—THE ANDALUSIAN (1878), 3 P. D. 182; 47 L. J. P. 65; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. L. C. 22.

**25.** —— —— **Dredging hopper — Moved by towing.**]—A hopper used for dredging purposes, not fitted with oars or other means of propulsion, & generally moved by towing, is a "ship" within Merchant Shipping Act, 1854 (c. 104).—THE MAC (1882), 7 P. D. 126; 51 L. J. P. 81; 46 L. T. 907; 4 Asp. M. L. C. 555, C. A.

*Annotations:*—**Consd.** The Gas Float Whitton (No. 2), [1896] P. 42. **Folld.** The Mudlark, [1911] P. 116. **Apld.** The Harlow, [1922] P. 175. **Refd.** The Fulham (1899), 81 L. T. 19; Poole Harbour Comrs. *v.* Pike (1901), 17 T. L. R. 251; Corbett *v.* Pearce, [1904] 2 K. B. 422; Merchants' Marine Insce. *v.* North of England Protecting & Indemnity Assocn. (1926), 42 T. L. R. 724.

**26.** —— —— —— ——.] — A hopper barge, with a rudder & other gear, used for dredging purposes, but with no means of propulsion, &

*Sect. 2.—Definitions. Part II. Sect. 1: Sub-sects. 1 & 2.]*

towed to sea & back by a tug, is a " ship " within 1894 Act, s. 742.—THE MUDLARK, [1911] P. 116; 80 L. J. P. 117; 27 T. L. R. 385.

*Annotation:*—**Refd.** Merchants' Marine Insce. *v.* North of England Protecting & Indemnity Assocn. (1926), 42 T. L. R. 724.

**27. —— —— Foreign ship.**]—Merchant Shipping Act, 1889 (c. 68), is retrospective, as it declares what the meaning of Merchant Shipping Act, 1854 (c. 104), always has been, & by it the word " ship " includes " foreign ship."—JONES *v.* BENNETT (1890), 63 L. T. 705; 6 Asp. M. L. C. 596, D. C.

—— —— **For purpose of limitation of liability.**]—*See* Part XVIII., Sect. 2, *post.*

—— —— **For purpose of transfer by bill of sale.**]—*See* Part II., Sect. 3, sub-sect. 2, A., *post.*

—— —— **For purpose of collisions.**]—*See* Part XII., Sect. 1, *post.*

**28. —— Whether cargo included.**]—A cargo cannot be considered as appurtenances of the ships. . . . Its connection with the ship is merely transitory, & it bears a distinct character of its own (LORD STOWELL).—THE DUNDEE (1823), 1 Hag. Adm. 109; 166 E. R. 39; *subsequent proceedings, sub nom.* GALE *v.* LAURIE (1826), 5 B. & C. 156.

*Annotations:*—**Refd.** The Girolamo (1834), 3 Hag. Adm. 169; The John Dunn (1840), 1 Wm. Rob. 159; Langton *v.* Horton (1842), 5 Beav. 9; Cope *v.* Doherty (1858), 31 L. T. O. S. 173; The Milan (1861), Lush. 388; The Wild Ranger (1862), Lush. 553; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795; *Re* Salmon & Woods, *Ex p.* Gould (1885), 2 Morr. 137; The Dictator, [1892] P. 304.

**29. —— ——.**]—The term " ship " in Merchant Shipping Act, 1854 (c. 104), & as recognised in the practice of the High Ct. of Admilty., does not include the cargo laden on board the ship.—THE MILAN (1861), 1 Lush. 388; 31 L. J. P. M. & A. 105; 5 L. T. 590; 1 Mar. L. C. 185; 167 E. R. 167.

*Annotations:*—**Refd.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157; The City of Manchester (1879), 5 P. D. 221; Chartered Mercantile Bank of India, London & China *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; The Vera Cruz (1884), 53 L. J. P. 33; The Karo (1887), 13 P. D. 24; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; The Englishman & The Australia, [1894] P. 239; The Frankland, [1901] P. 161; The Circe, [1906] P. 1; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634; The Seacombe, The Devonshire, [1912] P. 21; The Umona, [1914] P. 141.

—— **King's ships.**]—*See* ROYAL FORCES, Vol. XXXIX., pp. 316, 317, Nos. 1–12.

—— **Within jurisdiction of Admiralty Court.**]—*See* ADMIRALTY, Vol. I., p. 106, Nos. 85–90.

—— **For purpose of marine insurance.**]—*See* INSURANCE, Vol. XXIX., pp. 93, 94, Nos. 508–517, Supp. III., 505a.

**" Vessel "—Within County Courts Admiralty Jurisdiction Acts.**]—*See* ADMIRALTY, Vol. I., pp. 245, 246, Nos. 1722–1724, 1732.

—— **Exemption from harbour & dock tolls.**]—*See* Part XXI., Sect. 5, sub-sect. 2, C., *post.*

—— **Within Private Docks Act.**]—*See* No. 8618, *post.*

**30. " Dumb barge."**]—" Dumb barges " [are] barges which with the exception of two small cabins at the ends of the barge, one for stowing the tackle of the barge, & the other for the use of the bargemen, are altogether undecked & open for the reception of the cargo (LORD ESHER, M.R.).—AKT. HELIOS *v.* EKMAN & CO., [1897] 2 Q. B. 83; 66 L. J. Q. B. 538; 76 L. T. 537; 8 Asp. M. L. C. 244; 2 Com. Cas. 163, C. A.

*Annotations:*—**Refd.** Brenda S.S. Co. *v.* Green (1900), 82 L. T. 66; Glasgow Navigation Co. *v.* Howard (1910), 102 L. T. 172; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397; Rederi Akt. Aeolus *v.* Hillas (1925), 134 L. T. 184.

**" Passenger steamer."**]—*See* Part IX., Sect. 2, sub-sect. 1, *post.*

**" Seaman "—Within Employers' Liability Act, 1880 (c. 42).**]—*See* MASTER & SERVANT, Vol. XXXIV., p. 222, Nos. 1845, 1846.

—— **Within Conspiracy & Protection of Property Act, 1875 (c. 86).**]—*See* CRIMINAL LAW, Vol. XV., p. 769, No. 8238.

**" Freight."**]—*See* Part VIII., Sect. 1, *post.*

# Part II.—Ownership and Control of Ships.

## SECT. 1.—OWNERSHIP.

### SUB-SECT. 1.—HOW ACQUIRED.

**31. Long uninterrupted possession.**]—A title to a ship which may have been originally faulty becomes unimpeachable by great lapse of time, especially if it stands upon a sale to a neutral.—THE MOLLY (1814), 1 Dods. 394; 165 E. R. 1354.

**32. By delivery.**]—HOOPER *v.* GUMM, MCLELLAN *v.* GUMM, No. 350, *post.*

**By transfer.**]—*See* Sect. 3, *post.*

**By building.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 498–501.

**Seizure under writ of fieri facias.**]—*See* EXECUTION, Vol. XXI., pp. 489, 490, Nos. 675–683.

### SUB-SECT. 2.—PROOF OF OWNERSHIP.

*See* 1894 Act, ss. 64, 695; 1906 Act, s. 80.

**33. Custom house register.**]—A person who makes insurances as the owner of a ship must stand so registered at the custom house at the time & the production of the register from the custom house is conclusive evidence of ownership.—MARSH *v.* ROBINSON (1802), 4 Esp. 98; 170 E. R. 655, N. P.

**34. ——.**]—The entry in the custom house books of the transfer of a vessel to a particular person, is not even *primâ facie* evidence for a stranger, to charge that person as owner, unless the entry be shown to be made by the authority of the person named in it.—FRASER *v.* HOPKINS (1809), 2 Taunt. 5; 127 E. R. 975; *previous proceedings, sub nom.* FRAZER *v.* HOPKINS, 2 Camp. 170, N. P.

*Annotation:*—**Refd.** Frazer *v.* Marsh (1811), 13 East, 238.

**35. ——.**]—An entry in the register book at the custom house stating that a certificate of register was granted on an affidavit by A. that he was an owner:—*Held:* not admissible as secondary evidence of ownership against A. although all the

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HALL & MARSHALL *v.* YATES (1871), 1 P. E. I. 331.—CAN.

*d. Navigation company.*]—LAMBE *v.* DONALDSON S.S. LINE & REFORD ROBERT) CO. (1902), Q. R. 22 S. C. 510.—CAN.

*e. Foreign ship.*]—CULLEN *v.* TAIT (1906), 26 N. Z. L. R. 903.—N.Z.

**PART II. SECT. 1, SUB-SECT. 1.**

*f. Transfer by parol.*]—The property in an unregistered ship may be transferred by parol like any other personal chattel.—MCLEAN *v.* GRANT (1839), 3 N. B. R. (1 Kerr) 50.—CAN.

**PART II. SECT. 1, SUB-SECT. 2.**

*g. General rule.*]—To determine the question of true ownership, the ct. should not allow itself to be misled by documents, but will resort to all the evidence to extract the truth.—STONE *v.* THE ROCHEPOINT (1922), 68 D. L. R. 651; 21 Exch. C. R. 143; 30 B. C. R. 113.—CAN.

33 *h. Custom house register.*]—LYNCH *v.* SHAW, SINCLAIR, HINDS & PERRY (1859), 17 U. C. R. 241.—CAN.

affidavits on which registers had been granted were burnt at the custom house.—TEED *v.* MARTIN (1814), 4 Camp. 90; 171 E. R. 29, N. P.

**36. Ship's register.**]—The registry of a ship is conclusive evidence of the property upon the policy of Registry Acts; even against the claim of creditors, upon a joint purchase & various acts of apparent ownership, within 21 Jac. 1, c. 19, ss. 10, 11.—*Ex p.* YALLOP (1808), 15 Ves. 60; 33 E. R. 677, L. C.

*Annotations:*—**Consd.** Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127. **Refd.** Mestaer *v.* Atkins (1814), 1 Marsh. 76; Thompson *v.* Leake (1815), 1 Madd. 39; Thompson *v.* Smith (1815), 1 Madd. 395; McCalmont *v.* Rankin (1852), 2 De G. M. & G. 403; Liverpool Borough Bank *v.* Turner (1860), 1 John. & H. 159; De Wolf *v.* Pitcairn (1869), 17 W. R. 914. **Mentd.** Wedderburn *v.* Wedderburn (1838), 4 My. & Cr. 41; Barton *v.* Muir (1874), L. R. 6 P. C. 134.

**37.** ——.]—The registry of a ship is conclusive evidence of the property, even between creditors; excluding all trusts, created by acts of the parties; as, by payment of money on a purchase in the name of another.—*Ex p.* HOUGHTON, *Ex p.* GRIBBLE (1810), 17 Ves. 251; 34 E. R. 97, L. C.

*Annotations:*—**Distd.** The John (1830), 2 Hag. Adm. 305. **Refd.** De Wolf *v.* Pitcairn (1869), 17 W. R. 914. **Mentd.** Barton *v.* Muir (1874), L. R. 6 P. C. 134.

**38.** ——.]—TINKLER *v.* WALPOLE, No. 368, *post.*

**39.** ——.]—Property in a ship must be proved by evidence of possession in pltf., his vendors, or bailees, accompanied with a certificate of registry.—PIRIE *v.* ANDERSON (1812), 4 Taunt. 652; 128 E. R. 487.

**40.** ——.]—In an action for stores supplied to a ship if deft. pleads in abatement that he is only liable jointly with others it is not enough for him to produce the ship's register containing the names of himself & those others as owners of the ship.—FLOWER *v.* YOUNG (1812), 3 Camp. 240; 170 E. R. 1368, N. P.

**41.** ——.]—The certificate of a ship's registry is not evidence to charge as owners any of the persons therein named as such, other than those who have joined in the affidavit on which the registry is obtained.—COOPER *v.* SOUTH (1813), 4 Taunt. 802; 128 E. R. 547.

**42.** ——.]—In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of deft., & stating him to be sole owner, is no evidence of ownership.—SMITH *v.* FUGE (1813), 3 Camp. 456; 170 E. R. 1444, N. P.

**43.** ——.]—ROBINSON *v.* MACDONNELL (1816), 5 M. & S. 228; Holt, N. P. 612, n.; 105 E. R. 1034.

*Annotations:*—**Consd.** Kirkley *v.* Hodgson (1823), 1 B. & C. 588; Leslie *v.* Guthrie (1835), 1 Bing. N. C. 697. **Refd.** Curtis *v.* Auber (1820), 1 Jac. & W. 526; Monkhouse *v.* Hay (1820), 8 Price, 256. **Mentd.** Duck *v.* Braddyll (1824), M'Cle. 217; Doe d. Kettle *v.* Lewis (1830), 10 B. & C. 673; Metcalfe *v.* York (Archbp.) (1836), 1 My. & Cr. 547; Parry *v.* Deere (1836), 2 Har. & W. 395; Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191; Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352.

**44.** ——.]—DOWSON *v.* LEAKE & LONGSTER, No. 369, *post.*

**45.** ——.]—The vendee of a share in a ship shall be deemed complete part owner if an entry of the bill of sale to him, as the form 6 Geo. 4, c. 110, s. 37, requires, is made in the proper book of registry, though it does not express in terms that the bill of sale was produced, because it would be against the duty of the officer to make the entry except on such production. The giving a date, which has nothing to apply to but the production of the bill of sale, will imply it.

Two or more persons may hold shares of a ship jointly.

If the thing attempted would, if successful, have prejudiced any of the part owners, it shall be intended that such prejudice was meant.

The destruction of a vessel by a part owner shows an intent to prejudice the other part owners, though he has insured the whole ship, & promised that the other part owners shall have the benefit thereof.—PHILP'S CASE (1830), 1 Mood. C. C. 263; 168 E. R. 1265, C. C. R.

**46.** ——.]—Where the members of a trading partnership are interested in a ship, the names of all the partners should appear on the ship's register; & a ship belonging to a partnership having been registered as belonging to two partners carrying on trade under a particular firm:—*Held:* a third partner who formed one of the firm, but whose name was not on the register, had no interest in the ship.—SLATER *v.* WILLIS (1838), 1 Beav. 354; 48 E. R. 977.

**47.** ——.]—COOMBES *v.* MANSFIELD, No. 309, *post.*

**48.** —— **Primâ facie proof.**] — A ship's register containing a statement of British ownership, even if by Merchant Shipping Act, 1854 (c. 104), s. 107, made *primâ facie* proof of such ownership, may be outweighed by circumstantial evidence to the contrary:—*Semble:* the sect. does not make the register *primâ facie* proof of disputed British nationality.—THE PRINCESS CHARLOTTE (1863), Brown. & Lush. 75; 33 L. J. P. M. & A. 188; 167 E. R. 306.

**49.** —— ——.]—Under Merchant Shipping Act, 1854 (c. 104), s. 66, & Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 3, the ct. will look behind the register to the real character of a transaction between co-owners, & treat as mtge. that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties.

Under Merchant Shipping Act, 1854 (c. 104), s. 70, a mtgee. not in possession of the vessel cannot maintain an action of restraint. *Semble:* the ct. would in some cases recognise an agreement by which a person might be for some purposes an absolute owner, & for others a mtgee., if such an agreement were clearly proved & definite.—THE INNISFALLEN (1866), L. R. 1 A. & E. 72; 35 L. J. Adm. 110; 16 L. T. 71; 12 Jur. N. S. 653; 2 Mar. L. C. 470.

*Annotations:*—**Apld.** The Keroula (1886), 11 P. D. 92. **Refd.** The Fanchon (1880), 42 L. T. 483; The Benwell

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**36 i.** *Ship's register.*]—MAITLAND *v.* HARRIS (1856), 13 U. C. R. 118.—**CAN.**

**36 ii.** ——.]—CHABOT *v.* QUEBEC S.S. Co. (1894), Q. R. 6 S. C. 214.—**CAN.**

**36 iii.** ——.]—An extract from the register book kept & certified pursuant to M. S. Act, 1894, ss. 64 & 69 (Imp.), is proof of ownership in an action for damages for an accident causing the death of an employee under Evidence Act, C. S. 1903, c. 127, s. 39, & the certificate is admissible under M. S. Act, 1894, (Imp.) (c. 60), ss. 64 & 695.—BODDINGTON *v.* DONALDSON (1917), 44 N. B. R. 290.—**CAN.**

**36 iv.** ——.]—Under M. S. Act, 1854, the owners of a ship named in the register are to be the only owners recognised by law, & the representatives of deceased owners are not allowed to appear on such register or to join with the survivors in any bill of sale.—GOODFELLOW *v.* TALBOT (1873), 5 Nfld. L. R. 512.—**NFLD.**

**36 v.** ——.]—MORTON *v.* BLACK (1843), 5 Dunl. (Ct. of Sess.) 411.—**SCOT.**

**36 vi.** ——.]—Where certain shares of a ship were registered in the name of a party individually:—*Held:* incompetent to establish by proof that they were the property of a co. of which he was a partner.—ORD *v.* BARTON (1846), 8 Dunl. (Ct. of Sess.) 1011; 18 Sc. Jur. 505.—**SCOT.**

**48 i.** —— *Primâ facie proof.*]—Evidence may be admitted to contradict entry in the ship's register to show the true owner & home port of the vessel.—HALEY *v.* THE COMOX (B. C.), [1920] 3 W. W. R. 325; 20 Exch. C. R. 86.—**CAN.**

**48 ii.** —— ——.]—The certificate of registry is *primâ facie* evidence of ownership.—DUFFUS & LAWSON *v.* MACKAY (1857), 29 L. T. O. S. 67.—**SCOT.**

**h.** *Entry in register of shipping—Not conclusive.*]—Where a question of ownership is raised, the entry in the register of shipping is not conclusive, & the ct. may inquire into the validity of the bills of sale & into all other circumstances affecting the right of property in the ship.—ROBILLARD *v.* THE ST. ROCH & CHARLAND (1921),

*Sect.* 1.—*Ownership: Sub-sects.* 2, 3 & 4. *Sect.* 2: *Sub-sects.* 1 & 2.]

Tower (1895), 72 L. T. 664; Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359.

**50.** —— ——.]—Where an action has been brought in the Admlty. Ct. under Admiralty Court Act, 1860 (c. 10), s. 11, by the registered transferee of a mtge., & the ship arrested, the ct. will, in conformity with Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 3, enforce equities between the owner & the mtgee.; & will, in estimating the right of the mtgee., consider not only the registered documents, but all the transactions between the parties relative to the mtge. loan.—THE CATHCART (1867), L. R. 1 A. & E. 314; 16 L. T. 211; 2 Mar. L. C. 500.

*Annotation:*—**Refd.** The Benwell Tower (1895), 72 L. T. 664.

**51.** —— ——.] — BAUMWOLL MANUFACTUR VON CARL SCHEIBLER *v.* FURNESS, No. 383, *post.*

**52.** —— —— **Ownership of Crown.**]—Under a writ of *fi. fa.* taken out by pltfs., the sheriff of Lincoln seized two ships which pltfs. alleged were the property of their judgment debtors, a corpn. styled the Russian Volunteer Fleet. The solr. for the Board of Trade gave notice to the sheriff that the ships were the property of His Majesty & requested the sheriff to withdraw.

I can draw no certain inference from the register as to the Crown's ownership, whether legal or otherwise (HILL, J.).—THE MOGILEFF (No. 2), [1922] P. 122; 91 L. J. P. 72; 126 L. T. 548; 38 T. L. R. 279; 66 Sol. Jo. 250; 15 Asp. M. L. C. 476, C. A.

*Annotation:*—**Refd.** Pocahontas Fuel Co. *v.* Ambatielos (1922), 27 Com. Cas. 148.

**53. Registered transfer.**]—MOBISS *v.* OLIVER (1852), 19 L. T. O. S. 62.

**54. Facts evidencing ownership—Ordering & paying for stores.**]—To establish the fact of a person being the owner of a ship, evidence of his having ordered & paid for stores for her, is *primâ facie* sufficient.—THOMAS *v.* FOYLE (1803), 5 Esp. 88; 170 E. R. 747, N. P.

**55.** —— **Possession under unregistered transfer.**]—Possession of a ship under a transfer, void for non-compliance with the Register Acts, is a sufficient title in trover against a stranger for parts of the ship, being wrecked.—SUTTON *v.* BUCK (1810), 2 Taunt. 302; 127 E. R. 1094.

*Annotations:*—**Consd.** The Winkfield, [1902] P. 42. **Refd.** Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831; The Gas Float Whitton, No. 2 (1895), 65 L. J. P. 17. **Mentd.** Burton *v.* Hughes (1824), 2 Bing. 173; Daniel *v.* Rogers, [1918] 2 K. B. 228.

**56.** —— **Mortgagee taking possession.**] — Under 8 & 9 Vict. c. 89, s. 45, enacting that the mtgee. of a vessel is not to be deemed the owner, does not apply to the case of a mtgee. in possession; & where L., the owner in possession, mortgaged the ship to A., who afterwards took possession, & sold to W.:—*Held:* A., by taking possession became the legal owner of the ship.

Upon such sale W. took possession, & then mortgaged the ship to A. again; but A. did not appear to have taken possession under the mtge.:—*Held:* W. was the legal owner by virtue of 8 & 9 Vict. c. 89, s. 45.—WOODS *v.* READ (1850), 15 L. T. O. S. 90.

**57.** —— **Undertaking to appear & defend as owners.**]—In an action against the owners of a ship, it is sufficient *primâ facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them as owners; without further proof of agency. —MARSHALL *v.* CLIFF (1815), 4 Camp. 133; 171 E. R. 43, N. P.

*Annotation:*—**Mentd.** Wagstaff *v.* Wilson (1832), 4 B. & Ad. 339.

**58.** —— **Interference with repairs.**]—MILLER *v.* HOLLINGWORTH & WOODRUFFE (1849), 12 L. T. O. S. 428.

**59.** —— **Declaration of ownership.**]—A declaration of ownership in a ship:—*Held: primâ facie* proof of ownership without the registry.—TIBBALD *v.* WOOD (1858), 1 F. & F. 287, N. P.

**60.** —— **Disbursements on behalf of ship at foreign port.**]—The managing owner of a ship, who was the registered holder of certain shares therein, issued a circular inviting persons to purchase shares in the ship, the price to be paid by instalments. He afterwards executed a mtge. of all his shares to a banking co., by whom same was duly registered. Subsequently pltfs. on the authority of the managing owner as such, & as agent on behalf of the other persons interested in the ship, made disbursements at a foreign port in respect thereof. Pltfs. brought an action against defts. as the registered & true owners of one sixty-fourth share in the ship & as having given authority to the managing owner to navigate her on their behalf, to recover the amount of such disbursements. Pltfs. having obtained judgment, defts. claimed contribution from the persons who had entered into the contracts for the purchase of shares in the ship:—*Held:* there was a right of contribution against those persons. —VON FREEDEN *v.* HULL (1907), 76 L. J. K. B. 715; 96 L. T. 590; 23 T. L. R. 335; 10 Asp. M. L. C. 394, C. A.

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SUB-SECT. 3.—WHO MAY BE OWNERS.

*See* 1894 Act, s. 1; 1906 Act, s. 51.

**61. Corporation — Some members foreigners resident abroad.**]—Under 8 & 9 Vict. c. 89, a corpn. within the United Kingdom, some members of which are foreigners & persons residing abroad, may register ships which are the property of such corpn.—R. *v.* ARNAUD (1846), 9 Q. B. 806; 16 L. J. Q. B. 50; 8 L. T. O. S. 212; 10 J. P. 821; 11 Jur. 279; 115 E. R. 1485.

*Annotation:*—**Refd.** Continental Tyre & Rubber Co. (Great Britain) *v.* Daimler Co., Same *v.* Tilling, [1915] 1 K. B. 893.

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62 D. L. R. 145; 21 Exch. C. R. 132.—CAN.

k. *Facts evidencing ownership — Management & control of ship.*]—In an action for freight by a shipowner, proof that pltf. had for several years the management of the vessel & run her, taking charge of her when she arrived in port, & paying the captain & crew, is sufficient evidence for a jury of pltf.'s ownership.—FERGUSON *v.* DOMVILLE (1876), 16 N. B. R. (3 Pug.) 288.—CAN.

l. *Certificate of registry — Primâ facie proof.*]—Certificate of registry of British ship must be received as *primâ facie*, or, as our Statute expresses it, as presumptive proof of all the matters contained or cited in such registry.—SMITH *v.* FULTON (1877), 11 N. S. R. (2 R. & C.) 225.—CAN.

m. ——.] — The certificate of registration under 8 Vict. c. 5 is the legal evidence by which ownership can be proved.—BOCHUS *v.* SHAW (1859), 8 C. P. 391.—CAN.

n. *Oral evidence — Evidence of captain—Without production of share list.*]—In an action against defts. as owners of a steamer, for negligence in the carriage of goods, the captain of the vessel swore that they were shareholders, & that he sailed her for them, & on their account:—*Held:* sufficient proof of ownership, without producing the share list.—O'NEILL *v.* BAKER (1859), 18 U. C. R. 127.—CAN.

o. ——.]—In an action for services rendered to a vessel:—*Held:* oral evidence of ownership of a vessel was admissible. — LAKE SUPERIOR NAVIGATION CO. *v.* BEATTY (1873), 34 U. C. R. 201.—CAN.

**PART II. SECT. 1, SUB-SECT. 3.**

p. *Persons qualified by statute.*]—GRANT *v.* ROBERTSON (1871), 8 N. S. R. (2 G. & O.) 247.—CAN.

q. *Alien.*]—STRONG *v.* CANADIAN PACIFIC RY. CO. (1915), 32 W. L. R.

**62. —— British company—Principal place of business abroad.**]—THE POLZEATH, No. 543, *post.*

SUB-SECT. 4.—LEGAL AND EQUITABLE INTERESTS.

*See* 1894 Act, ss. 56, 57; Trustee Act, 1925 (c. 19), s. 51 (6).

**Possession—Jurisdiction of Admiralty Court.**]—*See* ADMIRALTY, Vol. I., pp. 112, 113, Nos. 162–194.

**63. Equitable interests — Whether recognised.**]—CHASTEAUNEUF *v.* CAPEYRON, No. 363, *post.*

**64. —— Lien—Deposit of documents relating to vessel.**]—The mere deposit of the documents relating to a vessel at sea in the hands of a *bonâ fide* creditor, will not confer even an equitable lien upon the creditor, against the assignees of the owner under a subsequent commission.—TAYLOR *v.* KINLOCH (1815), 1 Stark. 175; 171 E. R. 437, N. P.

*Annotations:*—**Mentd.** Smallcombe *v.* Bruges (1824), M'Cle. 45; Obbard *v.* Betham (1830), Mood. & M. 483; Wright *v.* Lainson (1837), 2 M. & W. 739; Anderson *v.* Weston (1840), 8 Scott, 583.

**65. —— —— —— Whether affected by Registration Acts.**]—The ship register Acts do not prevent a person having a lien on the papers deposited with him, of a ship which he is commissioned to sell.—MESTAER *v.* ATKINS (1814), 5 Taunt. 381; 1 Marsh. 76; 128 E. R. 737.

*Annotation:*—**Distd.** Wilson *v.* Heather (1814), 5 Taunt. 642.

**66. —— —— Given verbally.**]—The owner of a ship may verbally authorise a creditor to take possession of it as a lien, & the creditor so taking possession may enforce such lien without any alteration in the registry.—CAZENOVE *v.* CLAYTON (1844), 2 Mood. & R. 552, N. P.

**67. —— Application of Registration Acts—Registered owner holding proceeds of sale of ship as trustee.**]—The policy of the Ship Registry Act, in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship & to the produce of the freight.

Where a party who appears on the registry to be the absolute owner of a ship, enters into an agreement for valuable consideration, admitting he is a trustee, & engaging to sell the ship & hand over the produce to the true owner, the ct., notwithstanding the Ship Registry Act, will enforce the agreement.

Shares in a ship purchased with A.'s money were registered in B.'s name. After A.'s death, B. entered into an agreement with his representatives, admitting their right & for valuable consideration agreeing to sell the shares at the end of twelve months, & to account to the representatives for the proceeds. B. accordingly sold to C.:—*Held:* though the Ship Registry Act prevented the representatives enforcing any right against the ship itself, still they were entitled to recover the purchase-money in the hands of C.—ARMSTRONG *v.* ARMSTRONG (1855), 21 Beav. 78; 3 Eq. Rep. 973; 24 L. J. Ch. 659; 25 L. T. O. S. 251; 1 Jur. N. S. 859; 3 W. R. 563; 52 E. R. 788.

*Annotations:*—**Consd.** Coombes *v.* Mansfield (1855), 3 Drew. 193. **Refd.** Parr *v.* Applebee (1855), 7 De G. M. & G. 585.

*See, further,* ADMIRALTY, Vol. I., p. 113, Nos. 175, 176, 179, 180.

**Equitable mortgages.**]—*See* Sect. 3, sub-sect. 3, C., *post.*

SECT. 2.—**REGISTRATION.**

SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, Part I.

**68. Presumption of validity of registration.**]—COOMBES *v.* MANSFIELD, No. 309, *post.*

**69. ——.**]—Applt., a native of the Ionian Islands, purchased an American ship, &, upon a declaration that he was a British subject, obtained from the British consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized & condemned for a breach of Slave Trade Acts. Upon a preliminary objection taken on appeal to the jurisdiction of the ct. below, on the ground of the national character of the owner of the ship & cargo:—*Held:* the registry, flag, & pass of a ship carry with them the presumption that they are true & correct, & the owner was estopped from proving that he was not a British subject, & consequently that the registry of the ship was void.—DIONISSIS *v.* R., THE LAURA (1865), 3 Moo. P. C. C. N. S. 181; 12 L. T. 685; 2 Mar. L. C. 252; 16 E. R. 68; *sub nom.* R. *v.* THE LAURA, 13 W. R. 369, P. C.

*Annotation:*—**Refd.** Cassanova *v.* R., The Ricardo Schmidt (1866), L. R. 1 P. C. 115.

**The register as proof of ownership.**]—*See* Sect. 1, sub-sect. 2, *ante.*

SUB-SECT. 2.—OBLIGATION TO REGISTER.

*See* 1894 Act, ss. 2, 3, 23; 1906 Act, s. 80; 1921 Act, s. 1.

**70. Exemption from registry — Ship not exceeding fifteen tons burden—Gross or net tonnage.**]—By 1894 Act, s. 3 (1), ships not exceeding 15 "tons burden" employed solely in navigation on the rivers or coasts of the United Kingdom are exempted from registry. By 1894 Act, s. 503 (2) (*a*), the owners of a steamship shall not, where, without their actual fault or privity, any loss or

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849; 9 W. W. R. 451; 25 D. L. R. 51; 22 B. C. R. 224.—**CAN.**

r. —— *Sale of interest in ship to foreigner.*]—Although the policy of the law is that no foreign subject may own any share in a British ship, the only consequence of a purchase by a foreigner of an interest in a British ship is that the ship ceases to be British & may be forfeited in certain circumstances. The transaction of purchase is not void.—WALLIS *v.* HANSEN, [1921] 2 W. W. R. 250; 29 B. C. R. 552.—**CAN.**

**PART II. SECT. 1, SUB-SECT. 4.**

t. *Unregistered equitable interest—Postponement to purchasers from registered owner.*]—While under M. S. Act, 1894, (c. 60) (Imp.), s. 57, unregistered equitable interests can be enforced as between the parties immediately affected, the effect of sect. 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests even though he has notice of them.—LUFFMAN *v.* LUFFMAN (1898), 25 A. R. 48.—**CAN.**

a. *Right of equitable owner — To attach corpus of ship.*]—A party with an equitable interest in a ship cannot take the corpus of the ship by attachment out of the possession of the legal owner to satisfy the interest.—GOODFELLOW *v.* TALBOT (1873), 5 Nfld. L. R. 512.—**NFLD.**

**PART II. SECT. 2, SUB-SECT. 1.**

b. *Right to register — Foreign-built ships.*]—Under 12 & 13 Vict. c. 29, & previous statutes, foreign-built ships navigating our inland waters were entitled to be registered here.—SMITH *v.* BROWN & CHILDS (1856), 14 U. C. R. 9.—**CAN.**

c. —— ——.] — CRAWFORD *v.* SPOONER (1846), 4 Moo. Ind. App. 179. —**IND.**

d. *Registration of mortgagee — Whether sufficient to support title.*]—AUGER *v.* FORSYTH (1867), 17 L. C. R. 227.—**CAN.**

e. *False registration — Liability to forfeiture.*]—R. *v.* THE S. G. MARSHALL (1870), 1 P. E. I. 316.—**CAN.**

f. *Enforcing equities against unregistered owner of ship.*]—Equities may be enforced against unregistered owners of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.—FARQUARSON *v.* FARQUARSON (1913), 13 E. L. R. 66; 13 D. L. R. 534.—**CAN.**

g. *Registration in name of party furnishing materials—Custom of Newfoundland.*]—It is a custom in Newfoundland for two persons to agree that the one shall build a vessel & the other furnish the capital to enable him to do so, & that the vessel when built shall be registered in the name of the party who furnished the materials.—DELANEY *v.* NUTTALL, CAWLEY & Co. (1820), 1 Nfld. L. R. 215.—**NFLD.**

**PART II. SECT. 2, SUB-SECT. 2.**

h. *Necessity for registration.*] — SMITH *v.* JONES (1856), 5 C. P. 125.—**CAN.**

*Sect. 2.—Registration: Sub-sects. 2, 3, 4 & 5.]*

damage is caused to any other vessel, by reason of the improper navigation of their steamship, be liable to damages beyond £8 for each ton of the "gross tonnage" of the steamship:—*Held:* (1) under 1894 Act, s. 3, a small tug, solely employed in the manner mentioned in the sect., of the "gross tonnage," if measured in accordance with 1894 Act, of 35·99 tons, was exempted from registry as the words "tons burden" referred to the net tonnage, &, therefore, under the rules laid down in 1894 Act, involved the deduction from her "gross tonnage" of the allowances for engine-room & crew space, which reduced her tonnage to less than 15 "tons burden"; (2) as the vessel was properly exempted from registry, her owners were entitled, under 1894 Act, s. 503, to limit their liability to £8 for each ton of her gross tonnage ascertained by measuring her in accordance with 1894 Act.—THE BRUNEL, [1900] P. 24; 69 L. J. P. 8; 48 W. R. 243; 16 T. L. R. 35; *sub nom.* BRISTOL CORPN. *v.* GLANMIRE (OWNERS), THE BRUNEL, 81 L. T. 500; 9 Asp. M. L. C. 10, C. A.

**71. —— Temporary pass in lieu of registration.**]—By 1894 Act, s. 23, "Where it appears to the comrs. of customs . . . that by reason of special circumstances it would be desirable that permission should be granted to any British ship to pass, without being previously registered, from any port in Her Majesty's dominions to any other port within Her Majesty's dominions, the comrs. . . . may grant a pass accordingly, & that pass shall, for the time & within the limits therein mentioned have the same effect as a certificate of registry."

The comrs. purporting to act under this sect., granted a pass to pltfs.' vessel "to make one voyage as a British unregistered vessel from the Port of London to Immingham." While sailing under this pass, the vessel by her bad navigation caused three vessels, which belonged to some of defts., to come into collision whereby all three sustained damage. Pltfs. claimed to limit their liability in respect of this bad navigation of their vessel. Some of defts. alleged that the pass was invalid as no time was mentioned therein in accordance with the sect., so that the vessel could not be recognised as a British ship, & pltfs. could not limit their liability:—*Held:* the pass was valid, having been granted "for the time . . . therein mentioned" within the terms of the sect., namely, for the time of the voyage, & pltfs. were entitled to limit their liability.—THE WILLS No. 66 (1914), 83 L. J. P. 162; 30 T. L. R. 676.

**72. —— Government ships.**]—By 1906 Act, s. 80, His Majesty may by Order in Council make regulations with respect to the manner in which govt. ships may be registered as British ships for the purpose of Merchant Shipping Acts, & govt. ships are by 1906 Act, s. 80 (3), defined as "ships not forming part of His Majesty's Navy which belong to His Majesty, or are held by any person on behalf of or for the benefit of the Crown." Orders in Council of Mar. 22, 1911, Sept. 29, 1917, & June 4, 1918, promulgated under 1906 Act, s. 80, provided respectively that govt. ships in the service of the Admlty. should be included, & that govt. ships in the service of the Shipping Controller & the War Office should be excluded, from the category of "ships belonging to His Majesty" within the meaning of 1906 Act, s. 557:—*Held:* 1906 Act, s. 80, does not give any authority to the Crown by Order in Council to declare what class of ship is or is not within the category of the ships dealt with in 1906 Act, s. 557.—THE MATTI, [1918] P. 314; 87 L. J. P. 179; 34 T. L. R. 582; 62 Sol. Jo. 730.

**73. Vessel sailing without registration—Circumstances of necessity.**]—A British vessel sailing without a British register from circumstances of necessity was decreed not to be forfeited under navigation Acts.—THE BETTY CATHCART (1799), 1 Ch. Rob. 220.

*Annotation:*—**Apld.** Idle *v.* Royal Exchange Assce. (1819), 3 Moore, C. P. 115.

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SUB-SECT. 3.—PROCEDURE AND REQUIREMENTS ON REGISTRATION.

*See* 1894 Act, ss. 4–13, 59; 1906 Act, s. 75.

**74. Registration before completion of building—On builder's certificate.**]—A., a shipbuilder, contracted with B. to build a ship for him, & to complete her in Apr. 1819. The latter was to pay for her by four instalments: the first when the keel was laid, the second when at the light plank, & the third & fourth when the ship was launched. Before June 25, 1819, the ship was measured with the builder's privity, to the intent that B. might get her registered in his name. On June 25 the shipbuilder signed the usual certificate of her building; & on June 26 the ship was registered in B.'s name; & on the same day the third instalment was paid. On June 30 A. committed an act of bkpcy., upon which a commission afterwards issued. On July 2, the ship not being then completed, or launched, deft., & a crew hired by him, took possession of her, & a rudder & cordage, the former of which was made by the shipbuilder, & the latter bought by him, for the express purpose of completing the ship:—*Held:* the legal effect of the shipbuilder's having signed the certificate to enable B. to have the ship registered in his name, was to vest the general property in the ship in B. from the time the registry was completed.—WOODS *v.* RUSSELL (1822), 5 B. & Ald. 942; 1 Dow. & Ry. K. B. 587; 106 E. R. 1436.

*Annotations:*—**Consd.** Bishop *v.* Crawshay (1824), 3 B. & C. 415; Atkinson *v.* Bell (1828), 8 B. & C. 277; Clarke *v.* Spence (1836), 4 Ad. & El. 448; Laidler *v.* Burlinson (1837), 2 M. & W. 602. **Distd.** Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271. **Apprvd.** Seath *v.* Moore (1886), 11 App. Cas. 350. **Reld.** Wood *v.* Bell (1856), 6 E. & B. 355; Holderness *v.* Rankin (1860), 28 Beav. 180; *Re* Lindsay, *Ex p.* Lambton (1875), 10 Ch. App. 405; Clarke *v.* Millwall Dock Co. (1885), 53 L. T. 316; *Re* Blyth Shipbuilding & Dry Docks Co., Forster *v.* Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494. **Mentd.** Carruthers *v.* Payne (1828), 2 Moo. & P. 429; Beale *v.* Mouls (1847), 10 Q. B. 976; Acraman *v.* Morrice (1849), 14 L. T. O. S. 292; Turley *v.* Bates (1863), 2 H. & C. 200; Banbury & Cheltenham Direct Ry. *v.* Daniel (1884), 54 L. J. Ch. 265.

**75. —— ——.**]—It is no objection, under 3 & 4 Will. 4, c. 55, ss. 15, 25, to a contract for the sale of a ship in the course of building, that it contemplates the delivery by the builder to the purchaser of a certificate to enable the latter to procure a register as owner before the ship is completed.—GOSS *v.* QUINTON (1842), 3 Man. & G. 825; 4 Scott, N. R. 471; 12 L. J. C. P. 173; 7 Jur. 901; 133 E. R. 1372.

*Annotations:*—**Reld.** Wood *v.* Bell (1856), 6 E. & B. 355; *Re* Blyth Shipbuilding & Dry Docks Co., Forster *v.* Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494. **Mentd.**

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k. ——.]—A builder of a ship is not compelled to have her registered before he can make a valid sale.—CHISHOLM *v.* POTTER (1861), 11 C. P. 165.—CAN.

l. ——.]—CAHOON *v.* MORROW (1862), 5 N. S. R. (1 Old.) 148.—CAN.

m. ——.]—TREMBLAY *v.* LAMOTHE (1881), 7 Q. L. R. 294.—CAN.

n. ——.]—SAMSON *v.* ROSS (1890), 16 Q. L. R. 271.—CAN.

o. *Issue of certificate—In name of person trading in own name jointly with son.*]—R. *v.* HARIDAS LAKHMIDAS (1913), I. L. R. 38 Bom. 111.—IND.

Bessey *v.* Windham (1844), 6 Q. B. 166; White *v.* Morris (1852), 11 C. B. 1015.

**76. Registration of name of managing owner.**]—R. *v.* LINDSAY & BOARD OF CUSTOMS (1888), 4 T. L. R. 464.

SUB-SECT. 4.—MEASUREMENT OF SHIP AND TONNAGE.

*See* 1894 Act, ss. 77–87, sched. II.; 1906 Act, ss. 54, 55; 1907 Act, ss. 1–3; 1921 Act, s. 1 (3).

**77. Measurement of tonnage—Power of Board of Trade to modify rules—Not so as to affect deductions allowed.**]—Merchant Shipping Act, 1854 (c. 104), s. 29, which empowers the Comrs. of Customs, with the approval of the Board of Trade, to make "such modifications & alterations as from time to time become necessary in the tonnage rules thereby prescribed, in order to the more accurate & uniform application thereof, & the effectual carrying out of the principle of admeasurement therein adopted," does not authorise them to make rules for the measurement of the tonnage of steam vessels, which will have the effect of altering the allowance in respect of the space occupied by the propelling power, as provided by Merchant Shipping Act, 1854 (c. 104), s. 23.—CITY OF DUBLIN STEAM PACKET CO. *v.* THOMPSON (1866), L. R. 1 C. P. 355; Har. & Ruth. 369; 35 L. J. C. P. 198; 15 L. T. 112; 12 Jur. N. S. 726; 14 W. R. 376; 2 Mar. L. C. 412, Ex. Ch.

**78. —— Spar deck—Awning over main deck.**]—Where over the main deck of a ship there was a covering or awning open at the sides, & unfit for the carriage of cargo, passengers or crew:—*Held:* tonnage was not chargeable in respect of such covering or awning as if it were a third deck.

I am of opinion that the ship has not a third deck commonly called a spar deck (LORD CAIRNS, C.).—LORD ADVOCATE *v.* CLYDE STEAM NAVIGATION CO. (1875), L. R. 2 Sc. & Div. 409; 32 L. T. 287; 2 Asp. M. L. C. 502, H. L.

**79. —— Gross tonnage — Double bottom.**]—In ascertaining the gross tonnage, for the purpose of limitation of liability, of a steamship constructed with a double bottom for water ballast, the space between the inner & outer plating is not to be taken into account, but the measurements for depth are to be taken to the upper side of the inner plating only.—THE ZANZIBAR, [1892] P. 233; 61 L. J. P. 81; 68 L. T. 297; 40 W. R. 702; 7 Asp. M. L. C. 258.

*Annotation:*—**Folld.** The Cordilleras, [1904] P. 90.

**80. —— —— —— Foreign ship.**]—In an action of limitation of liability by the owners of a French steam vessel constructed with a double bottom for water ballast, a duly authenticated copy of the Order in Council of May 5, 1873, was produced showing that French vessels are to be deemed to be of the tonnage denoted in their certificates of registry, & the French certificate of registry was annexed to the usual affidavit verifying the statement of claim. This certificate gave the gross tonnage exclusive of the double bottom, & a certificate of a French surveyor stated that the space between the inner & outer plating of the double bottom was not available for the carriage of cargo, stores, or fuel:—*Held:* this was a sufficient compliance with the provisions of 1894 Act, ss. 81, 84, & 503, & enabled the gross tonnage of the vessel to be calculated upon which pltf.'s statutory liability in damages was based.—THE CORDILLERAS, [1904] P. 90; 73 L. J. P. 13; 89 L. T. 673; 9 Asp. M. L. C. 506.

**81. —— Error in register — Admissibility of evidence to correct.**]—In an action of limitation of liability defts. by their defence denied that the registered tonnage of pltfs.' ship was the correct tonnage, & at the hearing tendered evidence in support of their defence:—*Held:* the evidence was admissible.—THE RECEPTA (1889), 14 P. D. 131; 58 L. J. P. 70; 61 L. T. 698; 6 Asp. M. L. C. 433.

*Annotation:*—**Mentd.** Brierley *v.* Brierley & Williams (1918), 34 T. L. R. 458.

**For purpose of limitation of liability.**]—*See* Part XVII., *post.*

SUB-SECT. 5.—CERTIFICATE OF REGISTRY.

*See* 1894 Act, ss. 14–23, 49–53.

**82. Delivery up of certificate—Jurisdiction of court to order.**]—GIBSON *v.* INGO, No. 90, *post.*

**83. —— When ordered — Title of registered owner in dispute.**]—The ct. will not interfere to give possession of a ship's register to a person whose title to be considered as registered owner is subject to doubt.—THE FRANCES (1820), 2 Dods. 420; 165 E. R. 1533.

*Annotation:*—**Apld.** The Valiant (1839), 1 Wm. Rob. 64.

**84. —— —— Sale by order of court.**]—The owner of a ship consigned her to persons abroad who hypothecated her, & directed the captain to sign a bottomry bond. On her arrival in London, he, by their direction, delivered the register to deft., the agent of the consignees, who gave it to their solr., to institute proceedings in the Ct. of Admlty., on the bottomry bond. The ship was sold, by order of that Ct., & the register decreed to be given up to the purchaser. The owner became bkpt., & his assignees brought an action of trover for the register:—*Held:* they could not recover, as they might have appeared in the Admlty. Ct., & prevented the sale of the vessel, & as the delivery of the register to the purchaser, under the decree of that Ct., was not a conversion—HOSSACK *v.* MASSON (1820), 4 Moore, C. P. 361.

**85. —— —— On transfer by bill of sale.**]—READE *v.* ROWETT, No. 141, *post.*

**86. —— —— Dismissal of master.**]—(1) The Admlty. Div. has power upon application of the owners of a ship to order a master who has been dismissed from their employment to deliver up the certificate of registry & other papers & property belonging to the ship when he refused to surrender them.

(2) *Semble:* a master whether co-owner or not can have no lien upon a certificate of registry or ship's papers in case of wrongful dismissal by the managing owners.—THE ST. OLAF (1876), 35 L. T. 428; 3 Asp. M. L. C. 268; *subsequent proceedings* (1877), 2 P. D. 113.

**87. —— Refusal to deliver up—Penalty.**]—34 Geo. 3, c. 68, s. 18, giving a summary conviction against any master of a vessel, who, having received the certificate of its registry, shall wilfully detain & refuse to deliver up the same to the proper officers empowered to make registry, etc., on the requisition of the owner or major

**PART II. SECT. 2, SUB-SECT. 4.**

p. *Measurement of tonnage—Effect of temporary addition to open vessels.*]—R. *v.* JAMUDIN (1889), I. L. R. 14 Bom. 170.—**IND.**

q. *—— Closed-in space on upper deck—Available for cargo, stores etc.*]—LEITH, HULL & HANBURG PACKET CO. *v.* LORD ADVOCATE (1873), 11 Macph. (Ct. of Sess.) 597.—**SCOT.**

r. *Alteration of tonnage — Port of alteration port of measurement.*]—R. *v.* GARDNER (1864), 16 I. C. L. R. 349.—**IR.**

**PART II. SECT. 2, SUB-SECT. 5.**

t. *Delivery up of certificate—Refusal to deliver up—To purchaser at sheriff's sale.*]—A person who had been part owner of a ship, & as such had possession of the certificate of registry, & who refuses to deliver it up to a purchaser of the ship at sheriff's sale, is not liable to the penalty imposed by M. S. Act, 1854, s. 50, such certificate not being required by the purchaser for "the lawful navigation" of the ship.

*Sect.* 2 —*Registration: Sub-sects.* 5 & 6. *Sect.* 3: *Sub-sect.* 1, *A.*]

part of the owners, will not authorise a conviction of a master who did not comply with the requisition of the owner, though the sole owner, to deliver up such certificate to him, though expressed to be for the purpose of his providing the necessary indorsement to be made on it at the custom house upon the transfer of the ship to him.—R. *v.* PIXLEY (1810), 13 East, 91; 104 E. R. 301.

**88.** —— —— ——.] — A conviction under 3 & 4 Will. 4, c. 55, s. 27, stated that deft. refused to deliver up a certificate of registry to His Majesty's officers of customs:—*Held:* this was bad as not bringing the offence within the words of the sect. "shall refuse to deliver up to the proper officers of His Majesty's Customs."—R. *v.* WALSH (1834), 1 Ad. & El. 481; 3 Nev. & M. K. B. 632; 2 Nev. & M. M. C. 353; 3 L. J. M. C. 100; 110 E. R. 1291.

**89.** —— —— ——.]—H., the owner of the majority of the shares of a ship, being also ship's husband, & having, with the knowledge & consent of A., the master, who was also a part owner & who acted under his orders, the management of the ship, required the master to deliver up the certificate of registry of the ship, which was then lying in her port of discharge, but had not discharged. H. intended to dismiss A. & appoint another master; but he had not communicated this intention to A., nor assigned any other reason for requiring the certificate. A. refused to deliver it up:—*Held:* A. was not liable to a penalty under Merchant Shipping Act, 1854 (c. 104), s. 50, as having refused to deliver up the certificate to the person entitled to the custody thereof for the purposes of navigation, without a reasonable ground of refusal.—ARKLE *v.* HENZELL (1858), 8 E. & B. 828; 27 L. J. M. C. 110; 22 J. P. 593; 4 Jur. N. S. 306; 120 E. R. 309.

**89a. Indorsement of certificate—On sale of ship—Necessity for.**]—(1) A sale of a ship, which was afterwards lost at sea, made by deft., who claimed under a defective conveyance from a trader before his bkpcy., is a sufficient conversion to enable the assignees of the bkpt. to maintain trover, without showing a demand & refusal.

(2) Under the ship register Acts, in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, & a copy of such indorsement be delivered by the vendee to the persons authorised to make registry, which officers are directed to make an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, & to make a memorandum in the book of registers, & to give notice thereof to the comrs. of the customs; & it is not sufficient for the vendee to register such ship *de novo* in another port where he resided, though he removed the ship thither, & she never returned to her original port after the sale.—BLOXAM *v.* HUBBARD (1804), 5 East, 407; 1 Smith, K. B. 487; 102 E. R. 1126.

*Annotations:—As to* (2) **Reld.** Hayton *v.* Jackson (1807), 8 East, 511. *Generally*, **Mentd.** Aldritt *v.* Kittridge (1822), 6 Moore, C. P. 569; Abercrombie *v.* Hickman (1838), 8 Ad. & El. 683; Jones *v.* Smith (1848), 1 Exch. 831.

**89b.** —— —— **Delivery of copy of indorsement.**]—BLOXAM *v.* HUBBARD, No. 89a, *ante*.

**90. Detention of certificate—Lien claimed by master—For wages.**]—(1) There is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of the ct. to decree its delivery as against a party unlawfully detaining it.

(2) The master of a ship has no lien on the certificate of registry, either for his wages or for moneys disbursed by him for the use of the ship; nor have the shipbrokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship.—GIBSON *v.* INGO (1847), 6 Hare, 112; 67 E. R. 1103.

*Annotations:—As to* (1) **Apld.** The Celtic King, [1894] P. 175. *Generally*, **Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421.

**91.** —— —— **For moneys disbursed for use of ship.**]—GIBSON *v.* INGO, No. 90, *ante*.

**92.** —— **Lien claimed by shipbrokers — For moneys advanced to owner for use of ship.**]—GIBSON *v.* INGO, No. 90, *ante*.

**93.** —— **By pledgee.**]—(1) Where the certificate of a ship's register has been deposited as a security for advances for the use of the ship:—*Held:* this gives the holder a lien sufficient to defeat an action of trover for the certificate.

(2) *Qu.:* whether a person holding the certificate under such circumstances, & refusing to give it up when demanded, is guilty of a wilful detention within the meaning of 4 Geo. 4, c. 41, s. 25.

(3) *Qu.:* as to the power of one part owner of a ship to appoint a master, & to displace a master appointed by another part owner.—BOWEN *v.* FOX (1829), 10 B. & C. 41; 5 Man. & Ry. K. B. 4; L. & Welsb. 50; 8 L. J. O. S. M. C. 68; 109 E. R. 366.

*Annotations:—As to* (1) **Apld.** Clarke *v.* Batters (1855), 1 K. & J. 242. **Consd.** Wiley *v.* Crawford (1861), 1 B. & S. 265.

**94.** —— ——.] — Ship Registry Act, 1845 (c. 89), does not prevent a lien being created on certificate of original registry, deposited by unregistered owner to secure advances for the use of the ship.

Upon motion by pltf. claiming such a lien, a party who, without a lawful title, had procured himself to be registered as owner of a ship, was restrained by injunction from prosecuting a complaint made under sect. 30 against pltf., for wilfully detaining & refusing to deliver up the certificate of the ship's registry, & from instituting any other proceeding against pltf. to compel him to deliver up the certificate.—CLARKE *v.* BATTERS (1855), 1 K. & J. 242; 69 E. R. 447.

*Annotation:*—**Reld.** Wiley *v.* Crawford (1861), 1 B. & S. 265.

**95.** ——.]—If a person sole owner & captain of a ship pledges the certificate of registry of the ship for good consideration he may nevertheless re-demand the document for the purposes of navigation, & if it is not delivered to him on request, he may maintain an action against the pledgee; for the detention is made unlawful by Merchant Shipping Act, 1854 (c. 104), s. 50.—WILEY *v.* CRAWFORD (1861), 1 B. & S. 265; 30 L. J. Q. B. 319; 4 L. T. 653; 25 J. P. 516; 7 Jur. N. S. 943; 9 W. R. 741; 1 Mar. L. C. 101; 121 E. R. 713, Ex. Ch.

**96.** —— **By second mortgagee — From first mortgagee.**]—A shipowner, whilst a steamer was being built for him, entered into an agreement with defts. by which he undertook to fit her for a particular trade & run her for five years as one of defts.' line. After the completion & registration of the vessel her owner mortgaged her. Subsequently pltf. became second mtgee., &, after the

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but to enable him to perfect his title, by having the change of ownership indorsed upon it, or by delivering it up, & obtaining a new certificate in lieu of it.—*Re* MCCARTHY, R. *v.* MCAVITY (1872), 14 N. B. R. (1 Pug.) 193.—**CAN.**

a. *Validity — Addresses of owners omitted.*]—A certificate of ownership under 8 Vict. c. 5, s. 2, is not invalid because the addresses of the owners are omitted, the Statute on that point being directory only.—GILDERSLEEVE *v.* CORBY (1857), 15 U. C. R. 150.—**CAN.**

vessel had been running upwards of two years in defts.' line & was temporarily laid up, her owner died, having made default in payment of instalments under the first mtge. The first mtgees., who were without notice of the agreement with defts., thereupon took possession of the vessel & sold her to pltf., who, at the date of his second mtge. had notice of the existence of the agreement, &, at the date of his purchase, notice of the contents. Pltf. having entered into a contract for the sale of the ship to third parties, claimed for purposes of navigation under Merchant Shipping Act, 1854 (c. 104), s. 50, the delivery up of the certificate of registry which was in the hands of defts. Defts. denied pltf.'s right to the certificate except on condition that pltf. should be restrained from dealing with the ship in derogation of the agreement:—*Held:* pltf. was entitled to an order for the delivery up of the certificate, & he was not bound by the agreement between the late owner & defts., for otherwise the power of sale of the first mtgees. as vendors would be restricted.—THE CELTIC KING, [1894] P. 175; 63 L. J. P. 37; 70 L. T. 562; 7 Asp. M. L. C. 440; *sub nom.* ROSS *v.* TYSER LINE, THE CELTIC KING, 10 T. L. R. 222; 6 R. 754.

*Annotations:*—**Apld.** The Heather Bell, [1901] P. 143. **Refd.** Law Guarantee & Trust Soc. *v.* Russian Bank for Foreign Trade, [1905] 1 K. B. 815; The Lord Strathcona, [1925] P. 143.

**97. Certificate as evidence—Of nationality.**]—Upon the trial of a foreigner for a homicide committed on board a foreign built ship on the high seas, it was proved that the ship was manned by foreigners, but had been registered as a British ship under Merchant Shipping Act, 1854 (c. 104), &, at the time the offence was committed, was sailing under the British flag, & that the owner resided in London; but it was admitted that he was not a natural born British subject. Under Merchant Shipping Act, 1854 (c. 104), a ship can only be registered as a British ship upon the production of a declaration that the owner is a natural born British subject or that he has received letters of denisation or been naturalised; & the making a false declaration is a misdemeanour:—*Held:* (1) the register of the ship, coupled with the facts that she was sailing under the British flag & that the owner was resident in England, amounted to *primâ facie* evidence that the ship was British; but (2) such evidence was rebutted by the admission that the owner was not a natural born British subject; & (3) the Crown could not presume, from the fact of the vessel having been registered, that the owner had been naturalised, or had received letters of denisation.—R. *v.* BJORNSEN (1865), Le. & Ca. 545; 6 New Rep. 179; 34 L. J. M. C. 180; 12 L. T. 473; 29 J. P. 373; 11 Jur. N. S. 589; 13 W. R. 664; 10 Cox, C. C. 74; 2 Mar. L. C. 210, C. C. R.

——.]—*See* EVIDENCE, Vol. XXII., p. 344, Nos. 3474–3476.

—— **Of ownership.**]—*See* Sect. 1, sub-sect. 2, *ante*.

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SUB-SECT. 6.—RECTIFICATION AND CLOSE OF REGISTER.

*See* 1894 Act, s. 21; 1926 Act, s. 52.

**98. Rectification—Jurisdiction of court.**]—Where a transfer of an interest in a ship, void by reason of fraud or for any other cause, has been registered, the ct. has power, by virtue of its inherent jurisdiction, to rectify the register by ordering the entry of the void transfer to be expunged.—BROND *v.* BROOMHALL, [1906] 1 K. B. 571; 75 L. J. K. B. 548.

**99. —— —— Person having no title to ship—Order for retransfer & account.**]—Where a person, having no title to a ship, procures it to be registered in his name, this ct. will compel him to retransfer it to the rightful owner & account for the earnings, even though there has been no fraud, & notwithstanding Merchant Shipping Act (Amendment) Act, 1855 (c. 91).—HOLDERNESS *v.* LAMPORT (1861), 29 Beav. 129; 30 L. J. Ch. 489; 7 Jur. N. S. 564; 9 W. R. 327; 54 E. R. 576.

**100. Closing the register—"Constructive total loss."**]—By 1894 Act, s. 21, as amended by 1906 Act, s. 52, in the event of a registered ship being either "actually or constructively lost" the owner shall immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar, who shall make an entry thereof in the register book, & the registry of the ship in that book shall be considered as closed. The expression "constructively lost" has no meaning as applied to a ship, except in connection with marine insurance, & a vessel which is a constructive total loss within the meaning of the term in marine insurance is "constructively lost" within 1894 Act, s. 21.

On Mar. 22, 1913, a ship of 350 tons gross measurement was sunk in the fairway of the Manchester Ship Canal & abandoned by the owners to the underwriters, who paid as on a total loss. The canal co., acting under 1894 Act, s. 530, raised the vessel at a cost of £3,600 & removed her to a pontoon at Manchester where on May 1, 1913, they sold her by auction to deft. for £1,675. The contract of sale described the vessel as a "registered ship" of a certain tonnage, & provided that on completion the seller would deliver to the purchaser a delivery order for the vessel. On May 8, the day fixed for completion, deft. required the canal co. to transfer the ship by bill of sale on the ground that she was still a registered ship. On May 22 the canal co. offered to execute a bill of sale *quantam valeat*, but the registry having in the meantime been closed, deft. declined to complete the purchase. In an action for specific performance of the contract:—*Held:* the ship was "constructively lost" within 1894 Act, s. 21, & by the operation of that sect. as amended by 1906 Act, the ship having ceased to be a registered ship, no bill of sale was necessary to transfer her to deft. The canal co. had a statutory right to sell the ship whether the registry was closed or not, &, as, before action brought they had offered to execute a bill of sale for what it was worth, deft. was bound to complete his contract.—MANCHESTER SHIP CANAL CO. *v.* HORLOCK, [1914] 2 Ch. 199; 83 L. J. Ch. 637; 111 L. T. 260; 30 T. L. R. 500; 58 Sol. Jo. 533; 12 Asp. M. L. C. 516, C. A.

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SECT. 3.—TRANSFER AND TRANSMISSION OF PROPERTY IN SHIPS.

SUB-SECT. 1.—SALE.

*A. In General.*

*See* 1894 Act, ss. 24–30, &, *generally*, SALE OF GOODS, Vol. XXXIX., pp. 358 *et seq.*

**101. Application of Sale of Goods Act, 1893 (c. 7).**]—(1) A ship comes within the definition of "goods" in above Act, s. 62, & therefore a contract for the sale of a ship must, in order to be valid, comply with the requirements of above Act, s. 4.



98 l. *Rectification—Jurisdiction of court.*]—THE W. E. WIER (1873), Y. A. D. 145.—CAN.

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 1, A.*]

(2) Under above Act, s. 52, the ct. may, if it thinks fit, order specific performance of a contract for the sale of a ship.—BEHNKE *v.* BEDE SHIPPING Co., [1927] 1 K. B. 649; 96 L. J. K. B. 325; 136 L. T. 667; 43 T. L. R. 170; 71 Sol. Jo. 105; 17 Asp. M. L. C. 222; 32 Com. Cas. 134.

**102. Sale of ship with furniture — Whether ballast included.**]—KYNTERS CASE (1586), 1 Leon. 46; 74 E. R. 43.

*Annotation:*—**Refd.** Camplin *v.* Bullman (1761), Park. 198.

**102a. Sale by purchaser from bankrupt—Right of assignee in bankruptcy.**]—BLOXAM *v.* HUBBARD, No. 89a, *ante*.

**103. Sale "with all faults" — Liability for defects—Necessity for fraud.**]—If a ship is sold with all faults, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser.—BAGLEHOLE *v.* WALTERS (1811), 3 Camp. 154; 170 E. R. 1338, N. P.

*Annotations:*—**Apld.** Bywater *v.* Richardson (1834), 1 Ad. & El. 508. **Consd.** Ward *v.* Hobbs (1878), 4 App. Cas. 13. **Refd.** Pickering *v.* Dowson (1813), 4 Taunt. 779; Gorton *v.* Macintosh (1882), 31 W. R. 232.

**104. —— Misrepresentation as to age.**] — The vendor of a ship represents her to have been built in 1816, although in fact she had been launched a year earlier; the vendee is entitled to recover damages for the deceit, although the ship was to be taken with all faults.—FLETCHER *v.* BOWSHER (1819), 2 Stark. 561; 171 E. R. 736, N. P.

**105. —— Liability for breach of warranty.**] — Where an advertisement for the sale of a ship described her as "a copper fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, & it appeared that she was only partially copper fastened:—*Held:* notwithstanding the words, "with all faults, etc." the vendor was liable for the breach of the warranty.—SHEPHERD *v.* KAIN (1821), 5 B. & Ald. 240; 106 E. R. 1180.

*Annotations:*—**Distd.** Freeman *v.* Baker (1833), 5 B. & Ad. 797. **Consd.** Barr *v.* Gibson (1837), 3 M. & W. 390. **Distd.** Taylor *v.* Bullen (1850), 5 Exch. 779. **Apld.** Cowdy *v.* Thomas (1876), 36 L. T. 22. **Refd.** Budd *v.* Fairmaner (1831), 5 C. & P. 78. **Mentd.** Hart *v.* Windsor (1844), 13 L. J. Ex. 129.

**106. —— —— What amounts to warranty.**]—Deft., being the owner of a ship, advertised its sale, describing it as "The fine teak built barque *Intrepid*, A.1, & well adapted for a passenger ship." Pltf. having read the advertisement negotiated for its purchase, & a contract was signed by pltf. & deft., whereby the former agreed to buy & the latter to sell "the barque *Intrepid* as she now lies in the St. Katherine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement: under that was the word "Inventory," which was followed by a list of the ship's stores & tackle: & in the margin, opposite to this list, deft. signed his name. The document concluded thus: "The vessel & her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." The vessel proved not to be teak built, nor of class A1, nor adapted for a passenger ship:—*Held:* (1) the whole of the above document was incorporated with the contract of sale, & not merely the list of stores headed "Inventory"; (2) there was no warranty of the vessel.—TAYLOR *v.* BULLEN (1850), 5 Exch. 779; 20 L. J. Ex. 21; 16 L. T. O. S. 154; 155 E. R. 341.

*Annotation:*—**Refd.** Harrison *v.* Knowles & Foster, [1917] 2 K. B. 606.

——.]—*See, generally*, SALE OF GOODS, Vol. XXXIX., pp. 435, 436.

**107. Power to sell—Alleged breach of covenant that vendor had power.**]—By deed poll, dated Oct. 21, 1836, deft. sold & assigned, etc., to pltf. "all that ship or vessel called, etc., with her masts, tackle, & appurtenances," & covenanted that he had then good right, full power, & lawful authority, to sell & assign the said premises to pltf. To a declaration on this covenant, assigning as breaches, that at the time of making the deed poll, the ship was wholly lost & destroyed, & was incapable of being assigned, etc.; that deft. had not at that time good right, etc., to assign her; deft. pleaded, that the ship was not, at the time of making the deed poll, wholly lost & destroyed, etc.; & that deft. had good right to assign her. It appeared in evidence, that at the time of the sale the ship was on a foreign voyage, that, on Oct. 13, she went aground in a storm on the coast of the Prince of Wales's Island, & was left by the crew, who, however, had access to her afterwards; that she lay aground five feet above water on one side, & with her masts standing, till Oct. 24, when the captain called a survey, &, by the surveyor's advice, sold her; that her bulk-ends were strained, but that if there had been facilities at hand, & it had been a different season of the year, she might have been got off & repaired; & that she had sustained no more damage on Oct. 21 than when she first took the ground:—*Held:* the covenant of deft., that he had power to transfer her as a ship, was not broken.—BARR *v.* GIBSON (1838), 3 M. & W. 390; 1 Horn & H. 70; 7 L. J. Ex. 124; 150 E. R. 1196.

*Annotations:*—**Refd.** Hunter *v.* Parker (1840), 7 M. & W. 322; Hastie *v.* Couturier (1853), 9 Exch. 102; Harrison *v.* Knowles & Foster, [1917] 2 K. B. 606. **Mentd.** Strickland *v.* Turner (1852), 7 Exch. 208; Jones *v.* Just (1868), L. R. 3 Q. B. 197.

**108. Conditional sale — Subject to approval.**]—The purchaser held entitled to reject the ship after inspection & to recover the deposit paid on the signing of the agreement.—REPETTO *v.* FRIARY S.S. Co., LTD. (1901), 17 T. L. R. 265.

*Annotation:*—**Refd.** Diggle *v.* Ogston Motor Co. (1915), 84 L. J. K. B. 2165.

**109. —— ——.**]—An agreement for the sale of a steamer provided that the price should be "paid as follows: 10 per cent. on approval of the steamer so far as can be seen without opening up . . ." & on the purchaser so approving & paying deposit "the vendors agree to open up engines, boilers, water-ballast tanks for purchaser's inspection & approval. . . . If steamer not approved of, deposit to be returned immediately." On approval of engines, boilers, etc., the vendors are to dry dock the vessel for inspection of ship's bottom, etc. Purchaser's inspectors inspected the portion of the vessel which did not require opening up, paid the deposit, & subsequently inspected the opened up portions & disapproved of her:—*Held:* a *bonâ fide* exercise of judgment on inspection entitled purchaser to disapprove, & the deposit was recoverable back by him, whether the disapproval of his inspection was based upon reasonable grounds or not.—HAEGERSTRAND *v.* ANNE THOMAS S.S. Co. (1905), 10 Com. Cas. 67, C. A.

**109a. Authorisation by warrant of attorney—Revocation by death of owner.**]—(1) A power of attorney authorising the sale of a vessel is revoked by the death of the owner.

(2) Pltf. may recover for a fractional part of a ship, in an action of trover.—WATSON *v.* KING (1815), 1 Stark. 121; 4 Camp. 272; 171 E. R. 420, N. P.

*Annotations:*—*Generally*, **Refd.** Rundle *v.* Beaumont (1828), 1 Moo. & P. 396. **Mentd.** Gaussen *v.* Morton (1830), 5 Man. & Ry. K. B. 613; Doe d. Knight *v.* Nepean (1833), 5 B. & Ad. 86; Gillett *v.* Abbott (1838), 7 Ad. & El. 783; Smart *v.* Sandars (1848), 5 C. B. 895; Carter *v.* White (1882), 20 Ch. D. 225.

**110. Executory contract — When action for breach lies.**]—An action will not lie for the breach of an executory contract for the sale or transfer of a ship, unless the contract contains a recital of the certificate of registry, pursuant to Ship Registry Act, 1845 (c. 89), s. 34.—DUNCAN *v.* TINDALL (1853), 13 C. B. 258; 22 L. J. C. P. 137; 17 Jur. 347; 138 E. R. 1197.

*Annotation :*—**Refd.** Myers *v.* Willis (1855), 17 C. B. 77.

**111. Sale by instalments — Injunction to restrain dealing with ship.**]—B. contracted to purchase a barge of H., the purchase-money to be paid by instalments. Part of the money so to be paid was paid, and H. gave notice to B. that he had sold the barge to another person, & he must give it up, & gave a formal notice to that effect. On petition under Merchant Shipping Act, 1854 (c. 104), s. 65, to restrain the dealing with the barge until a day specified. Order made on the terms of bringing the arrears of instalments into ct., & giving security for the completion of the contract.—*Re* THE ISIS, *Ex p.* BAKER (1868), 18 L. T. 313; 3 Mar. L. C. 52.

**112. What amounts to delivery.**]—Deft. in London buys of pltf. a ship, which pltf. builds beyond seas. Deft. writes to pltf., ordering him to provide a captain & crew, to load the vessel, & to insure her. Pltf. carries out the order, & the captain & crew sail in the vessel, which is lost on the voyage. Pltf. may recover the price of the vessel under a count for goods sold & delivered.—HAZARD *v.* HODGES (1859), 32 L. T. O. S. 257; 7 W. R. 204.

**113. Refusal to deliver foreign ship—Injunction to restrain removal from jurisdiction.**] — A shipowner of Hamburg made at Hamburg an agreement with a domiciled Englishman for the sale to the Englishman of a Hamburg ship whenever she might return from the voyage on which she then was. The ship returned & was by the owner ordered to proceed to Sunderland. The master of the ship, who was authorised by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner & the master for specific performance. He obtained leave to substitute service on the master for the owner, & moved for an injunction to restrain defts. from removing the ship out of the jurisdiction :—*Held :* the ct. had jurisdiction to restrain defts. from removing the ship, & injunction granted.

The right of pltf. here was to have the ship delivered to him in exchange for the purchase-money (JAMES, L.J.).—HART *v.* HERWIG (1873), 8 Ch. App. 860; 42 L. J. Ch. 457; 29 L. T. 47; 21 W. R. 663; 2 Asp. M. L. C. 63, L. JJ.

*Annotations :*—**Consd.** Behnke *v.* Bede Shipping Co., [1927] 1 K. B. 649. **Refd.** Burn *v.* Herlofson & Siemensen, The Faust (1887), 56 L. T. 722.

**114. Accident before delivery — Damages for depreciation.**]—SAVARY, YOUNG & CO. *v.* PRIESTMAN & CO. (1886), 2 T. L. R. 467, C. A.

**115. Right of inspection.**] — An agreement for the sale of a ship contained a provision that the purchaser should have permission to remove the ship to a suitable gridiron to scrape & otherwise examine the vessel's bottom. The person mutually agreed upon to make the inspection went on board the ship for the purpose, it being in the middle of Milford Haven, when the vendors refused to allow him to inspect the bottom of the ship from the inside, & upon this point the sale went off :—*Held :* the purchaser was not entitled to maintain an action for breach of contract, as the only inspection permitted was of the ship on the gridiron, & defts. had a right to refuse an inspection when the ship was in the middle of Milford Haven.—DE MATTOS & CO. *v.* GREAT EASTERN S.S. CO. (1887), 3 T. L. R. 639, H. L.

**115a. Specific performance.**]—LYNN *v.* CHATERS (1837), 2 Keen, 521; 9 L. T. 53; 48 E. R. 728.

**115b.** ——.]—HART *v.* HERWIG, No. 113, *ante*.

**115c.** ——.]—BEHNKE *v.* BEDE SHIPPING CO., No. 101, *ante*.

**116. —— Ship unregistered.**]—A contract for the sale of a ship, or a portion of a ship, cannot be recognised in a ct. of equity unless it has been registered, in conformity with the provisions of 8 & 9 Vict. c. 89.—HUGHES *v.* MORRIS (1852), 2 De G. M. & G. 349; 21 L. J. Ch. 761; 19 L. T. O. S. 210; 16 Jur. 603; 42 E. R. 907, L. JJ.

*Annotations :*—**Consd.** M'Calmont *v.* Rankin (1852), 2 De G. M. & G. 403. **Apld.** Duncan *v.* Tindall (1853), 13 C. B. 258. **Consd.** Liverpool Borough Bank *v.* Turner (1860), 1 John. & H. 159. **Refd.** Parr *v.* Applebee (1855), 24 L. J. Ch. 767; Stapleton *v.* Haymen (1864), 9 L. T. 655. **Mentd.** Maddison *v.* Alderson (1883), 8 App. Cas. 467.

**117. Measure of damages — Wrongful sale — Interest.**] — Interest allowed for ship wrongfully taken by deft.—EKINS *v.* EAST INDIA CO. (1717), 1 P. Wms. 394; 2 Eq. Cas. Abr. 533, pl. 1; 24 E. R. 441, L. C.; *affd. sub nom.* EAST INDIA CO. *v.* EKINES (1718), 2 Bro. Parl. Cas. 382, H. L.

*Annotation :*—**Refd.** Law *v.* East India Co. (1799), 4 Ves. 824.

**118. —— Breach of contract.**] — In case of breach of contract for the sale of a ship the loss directly arising thereby is the fair amount of damages.—SIMONS *v.* PATCHETT (1857), 7 E. & B.

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**PART II. SECT. 3, SUB-SECT. 1.—A.**

**118 i.** *Measure of damages—Breach of contract.*]—S.S. BOVERIE CO. *v.* HOWARD SMITH & SONS PROPRIETARY, LTD. (1902), 28 V. L. R. 29.—**AUS.**

**118 ii.** —— ——.] — MCGOWAN *v.* MOCKLER (1879), Cass. Dig. 2nd ed. 421.—**CAN.**

**b.** *Sale of ship—"With all belonging to her on board & on shore."*]—ARMSTRONG & CO. *v.* M'GREGOR & CO. (1875), 2 R. (Ct. of Sess.) 339; 12 Sc. L. R. 243.—**SCOT.**

**c.** —— *Coals on board not covered by words "tackle," appurtenances, etc.*]—On the sale of a ship, lying in port, coals in her at the time are not a part of the ship, nor are they covered by the words "tackle," "appurtenances," etc., & do not pass to a purchaser of the ship unless expressly mentioned.—S.S. HOPE & PANTHER CO. *v.* BAINE, JOHNSTON & CO. (TRUSTEES) (1896), 7 Nfld. L. R. 881.—**NFLD.**

**d.** *Specific performance — Of purchase of shares—Steamer not yet built.*]—CAMERON *v.* THORNHILL (1843), 1 U. C. R. 132.—**CAN.**

**e.** *Validity of transfer — Necessity for registration.*]—ORSER *v.* MOUNTENY (1852), 9 U. C. R. 382.—**CAN.**

**f.** *Conditional sale — Intention of parties.*]—SEETON *v.* KING (1890), 18 S. C. R. 712.—**CAN.**

**g.** *Right of vendor to retake possession — Before property passes.*]—BROWN *v.* NICKERSON (1841), 3 N. B. R. (1 Kerr) 467.—**CAN.**

**h.** *Bond for transfer—Not intended to operate as assignment.*]—CORBY *v.* COTTON (1858), 7 C. P. 209; 3 C. L. J. O. S. 50.—**CAN.**

**k.** *Necessity for writing—Sale of unregistered boat.*]—OLYMPIC STONE CONSTRUCTION CO. *v.* MOMSEN & ROWE (1915), 30 W. L. R. 711; 8 W. W. R. 79; 21 D. L. R. 271.—**CAN.**

**l.** —— *Sale of share in ship.*]—Writing is not essential to a contract for the sale of shares in a ship.—MCCONNACHIE *v.* GEDDES, [1918] S. C. 391; [1918] 1 S. L. T. 346.—**SCOT.**

**m.** —— ——.] — An oral agreement for the sale of shares in a registered vessel cannot, although completely executed, form the basis of an action to recover unpaid purchase-money.—WRIGHT *v.* CURLE (1862), Mac. 45.—**N.Z.**

**n.** *Right of purchaser to repudiate —Delay in tender of bill of sale.*]—FORBES *v.* CAMPBELL (1885), 12 R. (Ct. of Sess.) 1065; 22 Sc. L. R. 699.—**SCOT.**

**o.** *Sale to alien—Whether enforceable.*]—CUTTEN *v.* MCFARLANE (1869), 7 N. S. R. (1 G. & O.) 468.—**CAN.**

**p.** *When sale complete — Payment of price & delivery of bill of sale.*]—GRANFELT *v.* LORD ADVOCATE (1874), 1 R. (Ct. of Sess.) 782; 11 Sc. L. R. 337.—**SCOT.**

**q.** *Form of transfer.*]—The transfer of a ship should be in the form, or as near the form as may be, laid down by the M. S. Act.—THE SHAH CALLANDER (1866), 1 Ind. Jur. N. S. 263.—**IND.**

**r.** ——.]—RAMANADAN CHETTI *v.* NAGOODA MARACAYAR (1897), I. L. R. 21 Mad. 395.—**IND.**

**t.** *Right to recover insurance premium.*]—MASON *v.* BRUNSKILL (1857), 15 U. C. R. 300.—**CAN.**

**a.** *Unpaid purchase-money — Purchaser restrained from removing*

*Sect.* 3.—*Transfer and transmission of property in ships: Sub-sect.* 1, *A. & B.*]

568; 26 L. J. Q. B. 195; 29 L. T. O. S. 88; 3 Jur. N. S. 742; 5 W. R. 500; 119 E. R. 1357.
*Annotations*:—**Consd.** Spedding *v.* Nevell (1869), L. R. 4 C. P. 212; *Re* National Coffee Palace Co., *Ex p.* Panmure (1883), 24 Ch. D. 367. **Refd.** Meek *v.* Wendt (1888), 21 Q. B. D. 126.

**119. Agreement for mutual indemnity by several owners—Sale of ship by one owner—Whether others liable to purchaser.**]—Several owners of different ships having entered into a bond to a trustee, binding themselves & their assigns to indemnify each other to a certain amount if any of their ships should be lost, & one of them having sold his ship & she being afterwards lost, the others are not liable under the bond, unless the vendor has sold, together with the ship, his interest in the agreement of indemnity.—AYRES *v.* WILSON (1780), 1 Doug. K. B. 385; 99 E. R. 248.

**Sale through agent—Right to commission.**]—*See* AGENCY, Vol. I., pp. 493, 495, 500, Nos. 1693, 1701, 1711.

—— **Purchase & resale by agent—Liability to account.**]—*See* AGENCY, Vol. I., p. 473, No. 1561.

**Sale of vessel under construction.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 498–501.

**Stamp duty on agreement for sale.**]—*See* REVENUE, Vol. XXXIX., p. 258, No. 429.

*B. Misrepresentation.*

*See* 1894 Act, ss. 24–30, &, *generally*, SALE OF GOODS, Vol. XXXIX., pp. 685, 686; MISREPRESENTATION, Vol. XXXV., pp. 6 *et seq.*

**120. Belief in truth of representation.**]—SWIFT *v.* SPOOLEY (1854), 23 L. T. O. S. 300, N. P.

**121.** ——.]—Upon a negotiation for the sale of a ship B., the seller represented to A. the buyer that she was, so far as he knew, as sound as a ship of her age usually was. Upon the faith of this representation A. agreed to purchase the ship & proceeded to make alterations in her to fit her for a voyage to Australia for which A., at the time of the contract knew she was intended. The register proving defective A. afterwards repudiated the bargain & upon a suggestion that the representation of B., as to the ship's soundness was false, brought an action against him, charging him with a false & fraudulent representation with a view to induce A., & whereby A. was induced to expend moneys on the ship, which but for such false & fraudulent representation he would not have done. At the trial, the judge told the jury that to sustain the action, pltf. must prove that deft. made the representation alleged; that it was false; that deft. knew it to be false; & that damage had resulted to pltf. The jury returned the following verdict—"We find for plaintiff but acquit deft. of any fraudulent intention":—*Held:* upon this finding the verdict was properly entered for pltf.—MILNE *v.* MARWOOD (1855), 15 C. B. 778; 3 C. L. R. 228; 24 L. J. C. P. 36; 139 E. R. 632.

**122. Whether representation amounting to warranty—Representation in advertisement but not in inventory.**]—The owners of a ship circulated advertisements of sale, beginning with a description of the ship, which stated her to be copper fastened; after which was a notice, that the hull, masts, yards, & rigging, were to be taken with all faults. Under this was printed the word "inventory," which was followed by a list of the ship's stores & tackle; & there was then a further announcement, that the vessel & her stores were to be taken with all faults, & without allowance for weight, length, quality, quantity, or any defect whatever. The owners, afterwards executed a written contract of sale, not stating the vessel to be copper fastened, but containing this clause, "On payment of the purchase-money, the said brig, with what belongs to her, shall be delivered according to the inventory which hath been exhibited; but the said inventory shall be made good as to quantity only; & the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever":—*Held:* assuming that the advertisement could, by words of reference, be incorporated with the contract of sale, the word "inventory" in the contract, referred only to the list of stores, etc., & not to the prior part of the advertisement; &, therefore, on the two documents taken together, no warranty appeared that the ship was copper fastened.—FREEMAN *v.* BAKER (1833), 5 B. & Ad. 797; 2 Nev. & M. K. B. 446; 3 L. J. K. B. 17; 110 E. R. 985; *previous proceedings*, 5 C. & P. 475, N. P.
*Annotations*:—**Refd.** Taylor *v.* Bullen (1850), 5 Exch. 779. **Mentd.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542.

**123.** ——.] — Where it is sought to import a warranty into a contract of sale contained in letters which are ambiguous in their terms, it is competent to the party sought to be charged to give evidence of all the surrounding facts & circumstances, for the purpose of showing that a warranty was not contemplated by the parties.

In an action for the breach of warranty of a yacht sold by deft. to pltf., the case for pltf. consisted of proof that his agent having gone to examine the vessel with a view to buying her, & being unable to ascertain the state of soundness of the masts, where they passed through the decks, told the captain, who was deft.'s agent in the sale, to have them examined by a shipwright & report the result. The captain subsequently wrote, "I have had a good overhaul at the masts, & find they are all as sound as ever." An offer of £3,000 was then made by letter by pltf.'s agent, who said pltf. would have to lay out £500 in repairs. Deft. replied by letter declining to take less than £3,500, & saying, "You must, I think, be under some very great error in thinking £500 would be required to be spent. Beyond the usual painting, etc., & perhaps a little repair to the copper, I don't really think there are any necessary repairs. . . . Personally I know her sea-going qualitites, & how thoroughly sound she is & tight in every part." In a subsequent letter deft. further said, "her masts have been examined & found as sound as when put in." After some further correspondence, pltf. purchased the vessel for £3,375, & a transfer or bill of sale was made in accordance with Merchant Shipping Act, 1854 (c. 104):—*Held:* assuming the assertions in the letters amounted to a warranty of the soundness of the masts, it was competent to deft. to prove all the surrounding circumstances & statements of the parties, as well after as before the letters, to show that a warranty was not contemplated.

*Semble:* the letters did not amount to a warranty.—STUCLEY *v.* BAILY (1862), 1 H. & C. 405; 31 L. J. Ex. 483; 10 W. R. 720; 158 E. R. 943.

**124.** —— **Statement in particulars.**] — Defts. being desirous of selling two steamships to pltfs.

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*machinery from vessel.*]—LAUGHTON *v.* THOMPSON (1858), 7 Gr. 30.—CAN.

*b. Duty of vendor to disclose material defects.*]—The seller of a ship at sea, or in any other situation where the purchaser cannot examine & judge for himself, is bound to communicate any material defects with which he may be acquainted.—DUTHIE *v.* CARNEGIE (1815), 18 Fac. Coll. 162.—SCOT.

PART II. SECT. 3, SUB-SECT. 1.—B.

*c. Whether representation amounting to warranty—Admissibility of parol evidence.*]—HENDERSON *v.* COTTER (1858), 15 U. C. R. 345.—CAN.

gave to pltfs. particulars in writing of the ships which stated (*inter alia*) that the dead weight capacity of each ship was 460 tons. The particulars also contained the words "not accountable for errors in description." Pltfs. relying upon the particulars agreed to buy the ships, & a memorandum of the contract, which did not in terms refer to the particulars, was signed by the parties on Dec. 9, 1915. The ships were delivered to, & accepted by pltfs. & it was subsequently discovered that the dead weight capacity of each ship was only 360 tons. In an action by pltfs. to recover damages for a breach of a condition of the contract, & alternatively for breach of warranty :—*Held:* on the evidence the statement in the particulars of the ships as to the dead weight capacity which was made *bonâ fide* was not part of the contract, & defts. were not liable.—HARRISON *v.* KNOWLES & FOSTER, [1918] 1 K. B. 608 ; 87 L. J. K. B. 680 ; 118 L. T. 566 ; 34 T. L. R. 235 ; 14 Asp. M. L. C. 249 ; 23 Com. Cas. 282, C. A.

**125. As to ownership — Fraud.**] — R. N. sole owner & at first master of the *Empress*, after some intermediate appointments, made his son R. N. master ; who, in Australia, without authority, sold the vessel, asserting himself to be the sole owner & master, the certificate of registry & indorsement bearing out, on the face of it, such assertion. R. N., the son, received the purchase-money, but never transmitted it to the father :—*Held:* the sale was effected by the fraud & forgery of the son ; the misleading description of him on the certificate of registry, which enabled him to practice such deceit, was not proved to arise from any culpable neglect in the instructions given by the father to the custom house & the sale was null & void.—THE EMPRESS (1856), Sw. 160 ; 28 L. T. O. S. 204 ; 3 Jur. N. S. 119 ; 5 W. R. 165 ; 166 E. R. 1073.

**126. As to classification at Lloyds.**] — Claim for damages on account of failure of guarantee that a new ship built at Quebec & sold to pltf. by defts., should class seven years A1 in Lloyd's Register.—THE SALDANHA, BAINES *v.* GIBBS (1856), 4 L. T. 742 ; 9 L. T. 87.

**127.** ——.]—In cross actions between vendor & vendee of a ship, the question in both being fraud, in the obtaining a classification as A1, which had been obtained by trickery on the part of an agent of the vendor :—*Held:* the jury must, to find against the vendor, believe him to have been a party to this fraud.—TINDALL *v.* BASKETT, BASKETT *v.* TINDALL (1861), 2 F. & F. 644.

**128. —— Admissibility of Lloyd's Register.**]—A party bought a ship under a representation that she was copper fastened. He ascertained, in the course of a few days, that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage & returned :—*Held:* "Lloyd's Register of Shipping" was not admissible in evidence to show that the vessel was considered as copper-fastened. —FREEMAN *v.* BAKER (1833), 5 C. & P. 475 ; 172 E. R. 1060, N. P. ; *subsequent proceedings*, 5 B. & Ad. 797.

**129. —— —— No privity of contract—Necessity for fraud.**]—Defts., the trustees of Lloyd's Register of Shipping, had, on the request of the owner of the barque *Midas*, to have the vessel surveyed & reclassed, caused a survey of the vessel to be made by one of their surveyors and after such survey the society issued a certificate in the usual form, in which they stated that the vessel was in a good & efficient state, & that she had been classed & entered in the register with the character A1 for seven years. The fees for this classification were paid by the owner. After the date of this classification & certificate pltf. bought the *Midas* from the owner, & he did so in reliance upon the statement in the certificate as to the condition of the vessel. Defects were soon afterwards discovered in the condition of the vessel, by reason whereof pltf. suffered damage. It was admitted, for the purpose of the case, that the survey was negligently made, & that but for such negligence the defects in such vessel would have been discovered, & pltf. saved from the loss which he sustained. In action by pltf. against the trustees of the society to recover damages from the loss so sustained :—*Held:* even assuming the negligence of the classification, & the false character given to the vessel thereby, pltf. was not entitled to recover against defts. as his action could not be based upon contract, there being no privity of contract between pltf. & defts., & it could not be based upon misrepresentation, as there was no misrepresentation of a fraudulent character.—BRAGINTON *v.* CHAPMAN, THE MIDAS (1878), 60 L. J. Q. B. 528, n. ; 65 L. T. 344, n.

*Annotations :*—**Folld.** Thiodon *v.* Tindall (1891), 60 L. J. Q. B. 526. **Refd.** Australian Steam Shipping Co. *v.* Devitt (1917), 33 T. L. R. 178.

**130.** —— —— ——.]—Lloyd's Committee had furnished the owner of a sailing yacht with a certificate which classed the yacht as A1 for eleven years. After the owner had sold the yacht to pltf., it was discovered that she was not entitled to this classification. Pltf. brought an action for damages against the committee upon the ground that owing to the representation in the certificate he had given more for the yacht than she was worth :—*Held:* pltf. had no cause of action.—THIODON *v.* TINDALL (1891), 60 L. J. Q. B. 526 ; 65 L. T. 343 ; 7 T. L. R. 581 ; 7 Asp. M. L. C. 76 ; *sub nom.* THISDON *v.* TINDALL, 40 W. R. 141, D. C.

*Annotation :*—**Refd.** Australian Steam Shipping Co. *v.* Devitt (1917), 33 T. L. R. 178.

**131. Purchaser to take risk of requisition — Ship already under requisition.**]—Pltfs. bought a steamer from first defts. through second defts., who were brokers, there being a term in the contract that pltfs. were to take the risk of the ships being requisitioned. The steamer was at the time under requisition by the Admlty., but had been temporarily released for one voyage only. In an action for damages against first defts. for breach of a contract to sell a free ship or for breach of a collateral written promise by the brokers that the ship was free, & against the brokers for breach of warranty of authority or for breach of duty in not giving pltfs. all material information : —*Held:* (1) the above-mentioned term of the contract did not imply that the ship was a free ship ; (2) the brokers gave pltfs. the information required ; (3) there was no collateral written promise, & therefore the action failed against both defts.—BRYS & GYLSON, LTD. *v.* IMPERIAL S.S. CO., LTD. & CROSBY, KER & CO. (1918), 34 T. L. R. 536, C. A.

**132. Sub-sale by purchaser — Liability for misrepresentation—No action over against original vendor—Where no recital of registry in original sale.**]—D. agreed to sell to K. a ship, & signed & delivered to him an instrument describing her as copper bolted, & containing an inventory of her stores, under which he wrote "Sold, the within-mentioned ship to K."—"A. D." : but it did not recite the registry of the ship, or mention the price to be paid. D. afterwards executed

126 l. *As to classification at Lloyds.*]—GOURLAY *v.* WATT & MACMILLAN (1870), 9 Macph. (Ct. of Sess.) 107 ; 43 Sc. Jur. 59.—SCOT.

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 1, B.; sub-sect. 2, A.*]

the usual bill of sale, which did not state that the ship was copper bolted. K. sold her with a warranty that she was copper bolt; but in fact she was not; & the vendee obtained a verdict against him for large damages:—*Held:* K. could not maintain an action against the exors. of D., for a breach of warranty, because the first instrument was void under Merchant Shipping Act, 1794 (c. 68), s. 14, because it did not contain a recital of the certificate of the registry.—KAIN *v.* OLD (1824), 2 B. & C. 627; 4 Dow. & Ry. K. B. 52; 2 L. J. O. S. K. B. 102; 107 E. R. 517.

*Annotations:*—**Apld.** Lloyd, Edward *v.* Sturgeon Falls Pulp Co. (1901), 85 L. T. 162. **Refd.** Jones *v.* Bright (1829), 5 Bing. 533; Freeman *v.* Baker (1833), 5 B. & Ad. 797. **Mentd.** Dobell *v.* Stevens (1825), 5 Dow. & Ry. K. B. 489.

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SUB-SECT. 2.—BILL OF SALE.

*A. In General.*

*See* 1894 Act, ss. 24–30, 71; 1906 Act, s. 52.

**133. General rule—Conveys property in ship.**]—Bill of sale of a ship assigns the property.—WALKER *v.* PRESWICK (1755), 2 Ves. Sen. 622; 28 E. R. 396, L. C.

*Annotation:*—**Refd.** Mackreth *v.* Symmons (1808), 15 Ves. 329.

**134.** —— ——.]—A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself.—ATKINSON *v.* MALING (1788), 2 Term Rep. 462; 100 E. R. 249.

*Annotations:*—**Refd.** Robinson *v.* Macdonnell (1816), 5 M. & S. 228. **Mentd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228.

**135.** —— ——.]—THE SISTERS, No. 159, *post.*

**136.** —— ——.]—An action of co-ownership was instituted on behalf of G. against a British vessel & against H. deft. intervening. The statement of claim alleged (*inter alia*), that by bill of sale duly registered in 1867, deft. as sole owner of the vessel transferred for valuable consideration a moiety of the same to one T. & that T., by a subsequent bill of sale duly registered in 1876, transferred the said moiety of the vessel to pltf. for value. Deft. in his statement for defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to T. & alleged, (*inter alia*), that if any such bill of sale had been registered, the same was made & registered fraudulently. At the hearing of the action the registration & execution of the bills of sale were proved. The ct. thereupon directed that the question whether the fraud alleged could affect the rights of pltf. should be raised on demurrer. Pltf. thereupon demurred to so much of the statement of defence as alleged fraud:—*Held:* the demurrer must be sustained on the ground that the legal ownership in the moiety of the vessel having passed to pltf. for valuable consideration by the execution & registration of a bill of sale without notice of fraud, pltf. had thereby acquired a title to the same as against deft.—THE HORLOCK (1877), 2 P. D. 243; 47 L. J. P. 5; 36 L. T. 622; 3 Asp. M. L. C. 421.

**137.** —— —— **Subject to divestment for non-registration.**]—The bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry not being made within ten days after the return of the ship to port.—DIXON *v.* EWART (1817), 3 Mer. 322; Buck. 94; 36 E. R. 123, L. C.

*Annotations:*—**Distd.** The John (1830), 2 Hag. Adm. 305. **Consd.** Boyson *v.* Gibson (1847), 4 C. B. 121. **Refd.** The Margaret Mitchell (1858), Sw. 382; De Wolf *v.* Pitcairn (1869), 17 W. R. 914.

**138. Agreement with covenant to give bill—Postponed to subsequent bill given with possession.**]—Equitable agreement by articles for security upon a share of a ship, then building; with a covenant for a future bill of sale, & if the ship should be sold in the interval, for payment out of the purchase-money, postponed to a subsequent bill of sale, with possession taken, as far as it could be, subject to the builder's possession & lien.—DANIEL *v.* RUSSELL (1807), 14 Ves. 393; 33 E. R. 572.

*Annotation:*—**Mentd.** *Re* Middleton, *Ex p.* Allen, *Ex p.* Page (1870), L. R. 11 Eq. 209.

**139. Validity of bill—Consideration not set out—Want of stamp.**]—ROBINSON *v.* MACDONNELL, No. 149, *post.*

**140. Failure of consideration—Whether relief given.**]—When the vendor of a share in a ship has executed the bill of sale, & a receipt for the purchase-money, without its being in fact paid, a ct. of equity will give relief as well as discovery.—RYLE *v.* HAGGIE (1820), 1 Jac. & W. 234; 37 E. R. 364

*Annotations:*—**Refd.** Pearce *v.* Creswick (1843), 2 Hare, 286; Shepard *v.* Brown (1862), 4 Giff. 208.

**141.** —— ——.]—Where a sale had taken place of part of a vessel, the vendor's signature to the bill of sale was considered as sufficient evidence of the transaction, &, therefore, notwithstanding his allegation that the purchase-money had not been paid, he was held bound to deliver up the certificate of registration.—READE *v.* ROWETT (1849), 13 L. T. O. S. 156.

**142. Time from which operative—Failure to register.**]—Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorised to make registry, etc., pursuant to Merchant Shipping Act, 1794 (c. 68), s. 15, yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, who for this purpose must be considered as a stranger to the legal owners, & consequently had no authority express or implied to bind them.—YOUNG *v.* BRANDER (1806), 8 East, 10; 103 E. R. 248.

*Annotations:*—**Consd.** M'Iver *v.* Humble (1812), 16 East, 169; Reeve *v.* Davis (1834), 1 Ad. & El. 312. **Distd.** Frost *v.* Oliver (1853), 2 E. & B. 301. **Refd.** Briggs *v.* Wilkinson (1827), 7 B. & C. 30; Curling *v.* Robertson (1844), 7 Man. & G. 336.

**143.** —— ——.]—The property of a ship vests in the purchaser instantly upon the execution of the bill of sale, not from the time of compliance with Register Acts, defeasible, nevertheless, upon

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**PART II. SECT. 3, SUB-SECT. 2.—A.**

**133 i.** *General rule—Conveys property in ship.*]—The delivery of the bill of sale & possession of a ship by the registered owner to a purchaser, vests in the latter, the ownership & the property passes to him.—SMALL *v.* CARTER (1878), 6 Nfld. L. R. 163.—**NFLD.**

**133 ii.** —— ——.]—A bill of sale, followed by possession, effectually vests in the purchaser of a vessel the right of property.—WATSON *v.* DUNCAN (1879), 6 R. (Ct. of Sess.) 1247; 16 Sc. L. R. 791.—**SCOT.**

**142 i.** *Time from which operative—Failure to register.*]—WILSON *v.* CAMERON (1872), 22 C. P. 198.—**CAN.**

**142 ii.** —— ——.]—THE ALERT, TERRINGTON *v.* SIMPSON (1841), Men. 110.—**S. AF.**

*d. Must be in statutory form.*]—THE JESSIE STEWART (1892), 3 Exch. C. R. 132.—**CAN.**

*e.* ——.]—Where the bill of sale of a ship had not been executed in accordance with Merchant Shipping Act, s. 24, it did not transfer the ownership therein.—ROBILLARD *v.* THE ST. ROCH & CHARLAND (1921), 62 D. L. R. 145; 21 Exch. C. R. 132.—**CAN.**

failure to comply with these Acts.—HUBBARD *v.* JOHNSTONE (1810), 3 Taunt. 177; 128 E. R. 71, Ex. Ch.

*Annotations:*—**Consd.** Palmer *v.* Moxon (1813), 2 M. & S. 43; Richardson *v.* Campbell (1821), 5 B. & Ald. 196. **Refd.** Ritchie *v.* St. Barbe (1813), 4 Taunt. 768.

**144.** —— ——.]—The property in a ship passes, as between the vendor & his assignees & the vendee, by a bill of sale, although the transfer be not registered pursuant to 17 & 18 Vict. c. 96.—STAPLETON *v.* HAYMEN (1864), 2 H. & C. 918; 3 New Rep. 481; 33 L. J. Ex. 170; 9 L. T. 655; 10 Jur. N. S. 497; 12 W. R. 317; 1 Mar. L. C. 416.

*Annotations:*—**Refd.** The Two Ellens (1871), L. R. 3 A. & E. 345; Keith *v.* Burrows (1876), 1 C. P. D. 722; Batthyany *v.* Bouch (1881), 50 L. J. Q. B. 421; Hughes *v.* Sutherland (1881), 7 Q. B. D. 160; Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359.

**145.** ——.]—Upon the sale of a ship the vendor covenanted "that the said hereby bargained premises, & every part thereof, are now & so from henceforth for ever shall remain free & discharged of or from all bargains, gifts, sales, incumbrances, & the like." At the time of the date of the deed the vessel was in B. docks. Vessels entering the B. docks were subject to a duty of 10*d.* on each ton of cargo, but the owners of the ship in question had compounded for a rate of 1½*d.* per ton, on an undertaking that on the vessel leaving the full duty should be paid. After the sale of the vessel the vendee took her to L., where she received her cargo, returning to the B. docks for her passengers, on leaving which the full duty of 10*d.* per ton was demanded & paid; but the deed was not delivered until the time when the vessel was at L.:—*Held:* the language of the deed spoke from the time of its delivery; at that time the ship being at L., it was in consequence of the voluntary act of the vendee that the duty attached, & there was, therefore, no breach of the covenant.—TAYLOR *v.* MCCALMONT (1855), 26 L. T. O. S. 93; 4 W. R. 59.

**146. Delivery of copies—Sale of ship at sea—To vendee resident in port where registered.**]—A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom house officers in that port, within a reasonable time after the sale.—RICHARDSON *v.* CAMPBELL (1821), 5 B. & Ald. 196; 106 E. R. 1164.

**147. What passes by—"With all furniture"—Goods ordered before sale—Delivered after.**]—TREWHELLA *v.* ROWE, No. 372, *post.*

**148. To what vessels applicable—Coaling hulk & workshop.**]—EUROPEAN & AUSTRALIAN ROYAL MAIL CO., LTD. *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., No. 162, *post.*

**149.** —— **Profits not in existence—At time of assignment.**]—(1) An assignment of the freight, earnings, & profits of a ship, does not extend to profits not in existence, actual or potential, at the time of the assignment; therefore, where C. assigned by deed to S. the freight, earnings, & profits of the ship *W.*, which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the said voyage:—*Held:* this oil did not pass to S. by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, & the voyage was not then contemplated.

(2) A bill of sale of a ship is not void, though it omit to set forth the true consideration, & is not stamped with an *ad volorem* stamp; but the parties thereto are liable to a penalty.—ROBINSON *v.* MACDONNELL (1816), 5 M. & S. 228; Holt, N. P. 612, n.; 105 E. R. 1034.

*Annotations:*—*As to* (1) **N.F.** *Re* Ship Warre, *Re* Robinson, Clarkson & Parker, *Re* Sharps (1817), 9 Price, 271, n. **Distd.** Leslie *v.* Guthrie (1835), 1 Bing. N. C. 697. **Refd.** Curtis *v.* Auber (1820), 1 Jac. & W. 526; Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191; Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352. *As to* (2) **Refd.** Duck *v.* Braddyll (1824), M'Cle. 217; Doe d. Kettle *v.* Lewis (1830), 10 B. & C. 673. *Generally*, **Mentd.** Monkhouse, Wright & Fairbairn *v.* Hay, etc. (1820), 8 Price, 256; Kirkley *v.* Hodgson (1823), 1 B. & C. 588; Metcalfe *v.* York (Archbp.) (1836), 1 My. & Cr. 547.

**150.** —— —— **Equitable right of assignee.**]—*Semble:* the future earnings of a ship may be assigned to secure money advanced, & to be advanced on the credit of such earnings, by the assignee, distinct from the ship itself; although it be the produce of an intended whaling voyage to be undertaken at some future indefinite time; & a ct. of equity will assist the assignee in establishing a right founded on such an assignment by which he acquires such an interest in the earnings of the vessel as is not within the purview of the registry Acts. *Semble:* also even where the vessel may not have been purchased at the time by the assignor.—*Re* THE WARRE, *Re* ROBINSON, CLARKSON & PARKER, *Re* SHARPS (1817), 8 Price, 269, n.; 146 E. R. 1200, L. C.

*Annotations:*—**Consd.** Leslie *v.* Guthrie (1835), 1 Bing. N. C. 697. **Apld.** Langton *v.* Horton (1842), 1 Hare, 549. **Refd.** Monkhouse *v.* Hay (1820), 8 Price, 256; Douglas *v.* Russell (1831), 4 Sim. 524; The Ariel (1857), 8 L. T. 92; Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191. **Mentd.** M'Calmont *v.* Rankin (1852), 2 De G. M. & G. 403.

**151.** —— **"With all appendages & appurtenances"—Sale while on voyage—Oil acquired during adventure.**]—(1) Bill of sale of a whaler, then absent on a fishing adventure, together with all masts, etc., boats, oars, & appurtenances:—*Held:* not to pass the cargo of oil, etc., acquired during the adventure.

(2) Bill of sale of a ship, though absolute in its terms, may, notwithstanding Registry Acts, be, in equity, held a mtge., if such appears to have been the real intention of the parties.

(3) A mtgee. out of possession of a whaler is not entitled, as against the mtgor. or his assignee of the cargo, to an allowance for the use of the ship.—LANGTON *v.* HORTON (1842), 5 Beav. 9; 11 L. J. Ch. 233; 6 Jur. 357, 594; 49 E. R. 479.

*Annotations:*—*As to* (1) **Consd.** Gardner *v.* Cazenove (1856), 1 H. & N. 423. *Generally*, **Mentd.** Strong *v.* Foster (1855), 17 C. B. 201.

**152.** —— —— **Provisions.**]—SMITH *v.* JOHNSON (1838), 7 L. T. 866.

**153.** —— **Earnings.**]—I do not doubt that the right to freight is incidental to the ownership of a ship, & that the owner of the ship is the person who has a right to the earnings made by it . . . I think it impossible to maintain, that a person who assigns a share in a vessel does not also assign at the same time the earnings attributable to that share (ROMILLY, M.R.).—LINDSAY *v.* GIBBS (1856), 22 Beav. 522; 28 L. T. O. S. 226; 2 Jur. N. S. 1039; 4 W. R. 788; 52 E. R. 1209; *on appeal* (1859), 3 De G. & J. 690, L.JJ.

*Annotations:*—**Consd.** Brown *v.* Tanner (1866), L. R. 2 Eq. 806. **Refd.** The Edmond (1860), Lush. 57; Wilson *v.* Wilson (1872), L. R. 14 Eq. 32; Keith *v.* Burrows (1876), 1 C. P. D. 722.

**154.** —— **Liabilities—Necessaries—Bill of Sale as collateral security.**]—MYERS *v.* WILLIS, No. 180, *post.*

**155.** —— —— **Seamen's wages.**]—The purchaser of a ship takes her with the liabilities attached by law—seamen's wages, bottomry bond, demand for salvage; & his remedy must be against the vendor.—THE NYMPH (1856), Sw. 86; 166 E. R. 1033.

**156.** —— —— ——.]—ROBINS *v.* POWER, No. 768, *post.*

**157.** —— —— **Claim for salvage.**]—THE NYMPH, No. 155, *ante.*

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 2, A., B. & C.; sub-sect. 3, A.*]

**158. Bankruptcy of assignor—Whether property passes to trustee in bankruptcy.**]—3 & 4 Will. 4, c. 55, s. 31, enacts that the sale of a registered ship shall be by an instrument in writing, containing a recital of the certificate of registry, " otherwise such transfer shall not be valid or effectual for any purpose whatsoever, either in law or equity." Sect. 34 provides that no instrument shall be valid to pass the property in a ship or for any other purpose, until such bill of sale shall have been registered by the proper officer & by sect. 35 it is enacted that, when & so soon as the instrument shall have been registered, it shall be valid & effectual to pass the property thereby intended to be transferred, as against all & every persons whatsoever, & to all intents & purposes, except as against such subsequent purchasers & mtgees. who shall first procure an indorsement on the certificate of registry, in the manner thereinafter mentioned.

A British ship registered under this Act was conveyed by A., the registered owner, to B., for a valuable consideration, by a bill of sale executed before, but not registered until after, the bkpcy. of A. :—*Held :* B. thereby acquired no property in the ship, but it passed to A.'s assignees, the effect of the statute being, that, until registration, every disposition by the act of the vendor, or of the law, is as effectual as if the unregistered deed had not existed, & is not defeated by subsequent registration, whether such intermediate disposition be one which requires registration, & is registered, or one which does not require registration.—BOYSON *v.* GIBSON (1847), 4 C. B. 121 ; 16 L. J. C. P. 147 ; 136 E. R. 449.

*Annotation :*—**Dbtd.** Stapleton *v.* Haymen (1864), 3 New Rep. 481.

*B. Necessity for.*

*See* 1894 Act, ss. 21 (1), 24 (1) ; 1906 Act, s. 52 (1).

**159. General rule.**]—A bill of sale is the proper title to which the maritime cts. of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries ; & in no degree a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects, what the Ct. of Admlty. would in its ordinary practice always require, & what the Legislature of this country has now made absolutely necessary, with regard to British subjects, by the regulations of the statute law (SIR WILLIAM SCOTT).—THE SISTERS (1804), 5 Ch. Rob. 155 ; 165 E. R. 731.

*Annotations :*—**Consd.** Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127. **Refd.** The Fruit Preserver (1828), 2 Hag. Adm. 181 ; The John (1830), 2 Hag. Adm. 305 ; The Valiant (1839), 1 Wm. Rob. 64.

**160.** ——.]—If on the sale of a ship there is no bill of sale, or indorsement of the certificate of registry, no relief can be given in equity on the ground of accident or fraud.—THOMPSON *v.* LEAKE (1815), 1 Madd. 39 ; 56 E. R. 16.

*Annotations :*—**Refd.** McCalmont *v.* Rankin (1852), 2 De G. M. & G. 403 ; Armstrong *v.* Armstrong (No. 2) (1855), 21 Beav. 78.

**161. When dispensed with — Ship unnecessarily registered—Under fifteen tons.**]—If a vessel under fifteen tons' burden, navigating on the coasts of the United Kingdom, be registered by her owner, a British subject, he may transfer it to another British subject without any instrument in writing, or fresh registry ; for 8 & 9 Vict. c. 89, s. 34, does not apply, inasmuch as, under 8 & 9 Vict. c. 88, ss. 13, 14, the original registration was unnecessary.—BENYON *v.* CRESSWELL (1848), 12 Q. B. 899 ; 18 L. J. Q. B. 1 ; 12 L. T. O. S. 172 ; 12 Jur. 1086 ; 116 E. R. 1107.

**162. —— Registered ship ceasing to be a "ship."**]—A ship registered under Merchant Shipping Act, 1854 (c. 104), may be so treated & dealt with as, at any rate between the parties to a transfer thereof, to no longer a ship for the purposes of Merchant Shipping Act, 1854 (c. 104), s. 53, & so to be transferable without a bill of sale like any other chattel, even, it would seem, although not becoming the subject of any of the contingencies specified in Merchant Shipping Act, 1854 (c. 104), s. 53.

A vessel which had been registered was by the owners used for the space of four years as a mere coaling hulk & workshop, moored at one of their coaling stations ; she was then transferred by them under an agreement in writing to a co. to which the owners transferred their business. She was described in the agreement, & also in an invoice delivered, as a coal hulk :—*Held :* as a matter of fact, under the circumstances of the case she was not a ship, at any rate as between the parties, so as to be by Merchant Shipping Act, 1854 (c. 104), s. 55, transferable only by bill of sale, & therefore the property in her passed to the co.—EUROPEAN & AUSTRALIAN ROYAL MAIL CO., LTD. *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1866), 14 L. T. 704 ; 12 Jur. N. S. 909 ; 14 W. R. 843 ; 2 Mar. L. C. 351.

*Annotation :*—**Refd.** The Gas Float Whitton No. 2 (1895), 65 L. J. P. 17.

**163. —— Unregistered ship—Not British ship.**]—A ship built for a foreign owner, & not intended to be registered as a British ship, was assigned by the builder to a creditor under an agreement, not in the form prescribed by Merchant Shipping Act, 1854 (c. 104). The assignment was not registered under that Act, nor under Bills of Sale Act, 1854 (c. 36), s. 7 :—*Held :* the vessel was not a British ship within Merchant Shipping Act, 1854 (c. 104), & therefore, the assignment was valid without registration under Merchant Shipping Act, 1854 (c. 104) ; & the assignment came within the exception in Bills of Sale Act, 1854 (c. 36), s. 7, by which transfers of ships are exempted from the provisions of Bills of Sale Act, 1854 (c. 36).—UNION BANK OF LONDON *v.* LENANTON (1878), 3 C. P. D. 243 ; 47 L. J. Q. B. 409 ; 38 L. T. 698 ; 3 Asp. M. L. C. 600, C. A.

*Annotations :*—**Apld.** Gapp *v.* Bond (1887), 19 Q. B. D. 200. **Refd.** The James W. Elwell, [1921] P. 351.

**164. —— Agreement for sale.**]—An agreement in writing to transfer a ship does not require to be registered under Merchant Shipping Act, 1854 (c. 104), s. 55, nor need the special description of the ship sold required by that sect. to be inserted

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**PART II. SECT. 3, SUB-SECT. 2.—B.**

**159 i.** *General rule.*]—The transfer of a ship or of a part interest in her, may be validly made without a registered bill of sale.—IVERSON *v.* ROWLANDS (1886), 12 V. L. R. 57.—**AUS.**

**159 ii.** ——.]—There is but one way by which a person qualified to be can become an owner of a British ship & that is by a transfer or bill of sale made & executed in the form prescribed.—GRANT *v.* ROBERTSON (1871), 8 N. S. R. (2 G. & O.) 247.—**CAN.**

**159 iii.** ——.]—ESAU AHMED *v.* JASSIM BINSAFF (1867), 2 Ind. Jur. N. S. 251.—**IND.**

**159 iv.** ——.]—HARLEY *v.* HARLEY (1860), 11 I. Ch. R. 451.—**IR.**

**159 v.** ——.] — LANGLEY'S TRUSTEES *v.* DARRELL & CAMPBELL'S TRUSTEES (1823), 1 Nfld. L. R. 334.—**NFLD.**

*f. When dispensed with—Sale to foreigners.*]—THE FRIENDS ADVENTURE (1810), Stewart, 200.—**CAN.**

*g.* —— *Shipwrecked vessel.*]—The title to a shipwrecked vessel can be transferred without bill of sale.—ORANGE *v.* MCKAY (1864), 5 N. S. R. (1 Old.) 444.—**CAN.**

*h.* —— *Transfer of equitable interest.*]—Merchant Shipping Act, 1894, s. 24, which makes a bill of sale

in a bill of sale transferring the ship be contained in such agreement. Pltf. agreed in writing with deft. to sell, & deft. agreed to purchase, a yacht belonging to pltf. for the sum of £2,600, whereof pltf. was the registered owner, on condition that deft. should be at liberty to rescind the said agreement should the yacht prove unsound. Deft. refused to carry out his part of the agreement, & pltf. brought an action against deft. for specific performance, or, in the alternative, £2,600, & for damages for breach of contract. Deft. pleaded that the agreement, if any was made, was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by Merchant Shipping Act, 1854 (c. 104). Pltf. demurred :—*Held :* Merchant Shipping Act, 1854 (c. 104), s. 55, applies to the actual instrument by which the ship is to be transferred & not to an agreement to transfer.—BATTHYANY *v.* BOUCH (1881), 50 L. J. Q. B. 421 ; 44 L. T. 177 ; 29 W. R. 665 ; 4 Asp. M. L. C. 380.

**165. —— Dumb barge.**]—A dumb barge propelled by oars, plying on the River Thames & carrying goods, wares & merchandise, without passengers, is a vessel within the exception of Bills of Sale Acts, 1878 (c. 31), & 1882 (c. 43), which excepts from registration as a bill of sale transfers or assignment of a ship or vessel or any share thereof.—GAPP *v.* BOND (1887), 19 Q. B. D. 200 ; 56 L. J. Q. B. 438 ; 57 L. T. 437 ; 35 W. R. 683 ; 3 T. L. R. 621, C. A.

*Annotations :*—**Refd.** The Harlow, [1922] P. 175 ; Merchants' Marine Insce. *v.* North of England Protecting & Indemnity Assocn. (1926), 42 T. L. R. 724. **Mentd.** *Re* Yarrow, Collins *v.* Weymouth (1889), 59 L. J. Q. B. 18 ; *Re* Watson, *Ex p.* Official Receiver in Bankruptcy (1890), 25 Q. B. D. 27 ; Beckett *v.* Tower Assets Co., [1891] 1 Q. B. 1.

**166. —— Ship "constructively lost."**]—MANCHESTER SHIP CANAL CO. *v.* HORLOCK, No. 100, *ante*.

*C. Registration.*

*See, now,* 1894 Act, s. 26.

**167. Effect of registration—Of invalid bill of sale.**]—ORR *v.* DICKINSON, No. 362, *post*.

**Effect of non-registration.**]—*See* Nos. 142–144, *ante*.

**168. Fees on registration—Transfer of shares by separate bills of sale.**]—Merchant Shipping (Mercantile Marine Fund) Act, 1898 (c. 44), s. 3, sched. I., gives a scale of the fees which are to be paid on the transfer of British ships "according to the gross tonnage represented by the ships or shares of ships transferred." Fifty-eight shares in a ship, each share being one-sixty-fourth, were transferred to a firm by twenty different bills of sale :—*Held :* the firm was liable to pay a separate fee, according to the scale, on the tonnage represented by the shares comprised in each bill of sale, & not merely to pay one fee upon the total of the tonnage represented by all the shares transferred.—HARROWING S.S. CO., LTD. *v.* TOOHEY, [1900] 2 Q. B. 28 ; 69 L. J. Q. B. 447 ; 82 L. T. 677 ; 16 T. L. R. 275 ; 9 Asp. M. L. C. 91.

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SUB-SECT. 3.—MORTGAGE.

*A. In General.*

*See* 1894 Act, ss. 31–38.

**169. Distinguished from lien.**]—The owner of a vessel, upon receiving a loan of £200, deposited her in the hands of a broker, & executed a bill of sale to him, whereon was an indorsement, that that assignment was made as a lien or security for the loan on the vessel, & that the broker should immediately sell, & execute a lawful bill of sale of her to the purchaser, & after retaining the loan, commission, & charges, pay the surplus to the owner : the requisites of Ship Register Acts were not pursued :—*Held :* this was no lien, but a mtge. ; but void under those Acts ; the broker, therefore, could not retain the vessel until payment of the loan.—WILSON *v.* HEATHER (1814), 5 Taunt. 642 ; 128 E. R. 842.

*Annotation :*—**Refd.** Thompson *v.* Smith (1815), 1 Madd. 395.

**170. Mortgage of ships at sea—Validity.**]—A mtge. of a ship at sea, the forms required by Registry Acts being observed, held to be valid ; & an injunction granted to prevent an improper indorsement on the certificate of the registry of the ship.—THOMPSON *v.* SMITH (1815), 1 Madd. 395 ; 56 E. R. 145.

*Annotation :*—**Refd.** Dixon *v.* Ewart (1817), 3 Mer. 322.

**171. Mortgagor remaining in possession—Validity of mortgage—Possession not contrary to deed.**]—A mtge. of barges, without delivery of possession, is valid, if the mtgor.'s continuing in possession is not contrary to the deed.—REED *v.* WILMOT (1831), as reported in 5 Moo. & P. 553 ; *sub nom.* READ *v.* WILMOTT, 9 L. J. O. S. C. P. 176.

*Annotation :*—**Mentd.** Doe d. Downe *v.* Govier (1845), 5 L. T. O. S. 37.

**172. —— —— Execution of purported bill of sale.**]—THE AURORA (1800), 3 Ch. Rob. 133 ; 165 E. R. 412.

*Annotation :*—**Refd.** The Fruit Preserver (1828), 2 Hag. Adm. 181.

**173. Mortgage to foreigner—Ship navigated & continued on register as British.**]—THE AURORA (1800), 3 Ch. Rob. 133 ; 165 E. R. 412.

*Annotation :*—**Refd.** The Fruit Preserver (1828), 2 Hag. Adm. 181.

**174. Mortgage by part owner—Of own & co-owner's share—Consent of co-owner.**]—THE ROYAL ARCH, No. 1230, *post*.

**175. Mortgage indorsed on certificate of registry—Presumption against satisfaction.**]—(1) In an action against ship & freight for master's wages, the mtgee. in possession is entitled to a release of the ship, upon giving bail in the action, notwithstanding the master has become liable in respect of bills of exchange drawn upon the charterers for the ship's use.

(2) A mtge. indorsed on the certificate of registry will be presumed to be unsatisfied.—THE RINGDOVE (1858), Sw. 310 ; 7 L. T. 340 ; 166 E. R. 1151.

**176. Infant shipowner—Power of guardian to mortgage.**]—MICHAEL *v.* FRIPP, No. 364, *post*.

**177. Mortgage of ship with insurance policies thereon—Policy a substantive & independent security—Right of mortgagee to insurance money.**]—The owner of a ship mortgaged her "together with the policies of insurance effected thereon" to secure advances. The ship, while insured, suffered a particular average loss within the policy, & the owner had her repaired. The owner being in default under the mtge., the

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compulsory, does not apply to transfers of equitable interests, which are governed by sect. 57 of the Act.—ALAGAPPA CHETTY *v.* CHIDAMBARAM CHETTY (1906), I. L. R. 29 Mad. 526.—IND.

PART II. SECT. 3, SUB-SECT. 2.—C.

**k.** *Delay in registration.*]—Registration of a bill of sale four years after its execution will not convert the party registering it into an owner, if he was not such before.—THE JANE (1870), 5 I. L. T. 188.—IR.

**l.** *Right to compel registration of substituted bills of sale—Where original bills invalid.*] — DUTHIE *v.* AIKEN (1893), 20 R. (Ct. of Sess.) 241 ; 30 Sc. L. R. 229.—SCOT.

PART II. SECT. 3, SUB-SECT. 3.—A.

**m.** *Mortgage to foreigner.*] — The mtgee. of a British ship is not an owner within 17 & 18 Vict. c. 104, & there is no provision in that statute to prevent

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 3, A., B. & C.*]

mtge. debt by the terms of the deed became immediately payable:—*Held:* the policy of insurance was to be treated as a substantive & independent security for the mtge. debt, & the mtgee. was entitled to recover from the underwriters for his own use the amount of the particular average loss without being under any obligation to apply the money in payment of the cost of the repairs.—SWAN & CLELAND'S GRAVING DOCK & SLIPWAY CO. *v.* MARITIME INSURANCE CO. & CROSHAW, [1907] 1 K. B. 116; 76 L. J. K. B. 160; 96 L. T. 839; 23 T. L. R. 101; 12 Com. Cas. 73; 10 Asp. M. L. C. 450.

*Annotation:*—**Mentd.** British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 476.

**178. Stamp duty—Stamp Act, 1891 (c. 39), Sched. I.—Debenture charging ship.**]—A co. issued a debenture bond for £1,000 & interest which was a marketable security within the meaning of above schedule. The debenture was one of a series protected by a trust deed. It purported to create a charge upon three ships belonging to the co. These ships had previously been mtged. by legal mtges. registered under the Merchant Shipping Acts to trustees for the debenture-holders. The trust deed contained covenants for payment of principal & interest & provisions for the maintenance & realisation of the security usual in trust deeds. The debenture provided that the holder should have the benefit *pari passu* with other debenture-holders of the mtge.:—*Held:* the debenture bond did not create any charge on the ships beyond that already in existence, & if it did create any charge its substantial object was to create not a charge but a marketable security, & it was therefore not an instrument for the disposition of a ship within clause 2 of the General Exemptions from all stamp duties contained in the above schedule, but was liable to stamp duty as a marketable security under the same schedule.—DEDDINGTON S.S. CO., LTD. *v.* INLAND REVENUE COMRS., [1911] 2 K. B. 1001; 81 L. J. K. B. 75; 105 L. T. 482; 18 Mans. 373, C. A.

**Partnership property.**]—*See* PARTNERSHIP, Vol. XXXVI., pp. 395–396, Nos. 666, 667, 673.

**For objects of partnership—Necessity for power of attorney from other partner.**]—*See* PARTNERSHIP, Vol. XXXVI., p. 396, No. 673.

**Whether within Bills of Sale Act.**]—*See* BILLS OF SALE, Vol. VII., p. 27, Nos. 131–134.

*B. Whether Transaction a Mortgage or Sale.*

**179. Intention of parties.**]—LANGTON *v.* HORTON, No. 151, *ante.*

**180.** ——.]—A. advanced money to the owner of a vessel at sea, receiving from him by way of security a bill of sale of the ship, accompanied by a letter as follows: "You have this day, Aug. 1, 1851, given me your acceptance for £1,000 against the inward freight of my bargue the *Celt*, which vessel I am expecting will load home from the Pacific; & it is understood she is to be consigned to you inwards on arrival, & you are to reimburse yourself from her inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered; &, on the return of the vessel to this country, & the due repayment to you of the above-mentioned sum of £1,000, the vessel is to be again returned to me." A. registered the bill of sale on Aug. 2, 1851:—*Held:* the register was *per se* no evidence of ownership, but the ct. might look at all the circumstances, to see whether it was the intention of the parties, at the time of giving the bill of sale, that A. should become the absolute owner of the ship, so as to be liable for contracts entered into by the captain for the benefit of the ship, or whether he was to take her merely as security for his advance.—MYERS *v.* WILLIS (1856), 18 C. B. 886; 25 L. J. C. P. 255; 27 L. T. O. S. 238; 2 Jur. N. S. 788; 4 W. R. 637; 139 E. R. 1621, Ex. Ch.; *affg.* (1855), 17 C. B. 77.

*Annotations:*—**Reid.** Brodie *v.* Howard (1855), 17 C. B. 109; Strong *v.* Foster (1855), 17 C. B. 201; Chapman *v.* Callis (1861), 9 C. B. N. S. 769; Pearson *v.* Nell (1865), 13 W. R. 967; Ward *v.* Beck (1866), 13 C. B. N. S. 668; The Harriet (1868), 18 L. T. 804.

**181.** —— ——.]—In July, 1853, pltf. being the owner of a ship, sold it to D., of the firm of D. Y. & co., for £4,725, & received in payment the draft of D. Y. & co. on B., at twelve months' date. In Sept. 1853, the ship sailed from London on a voyage to San Francisco & thence on a seeking voyage home. In June, 1854, the captain, who was sent out by D. to take charge of the vessel, chartered it to load a cargo of flour for Sydney. Some days before the bill of exchange became due. D. Y. & co. requested pltf. to renew it, & he consented to do so on having the vessel transferred to him as a security. The vessel was accordingly transferred to him by deed of assignment which was in the form of an absolute sale. In Oct. 1854, the captain, who had no knowledge of the assignment, received £1,000 on account of freight, & remitted it to D. Y. & co. by a bill of exchange. In Nov. 1854, D. Y. & co. who had acted as ship's husband, became bkpt.:—*Held:* (1) though the assignment was in form absolute, yet the ct. might look to the real nature of the transaction & see that it was by way of mtge. only; (2) pltf., being only a mtgee. & not having taken any step to obtain possession, was not entitled to the freight.—GARDNER *v.* CAZENOVE (1856), 1 H. & N. 423; 26 L. J. Ex. 17; 7 L. T. 339; 5 W. R. 195; 156 E. R. 1267.

*Annotations:*—*As to* (1) **Apld.** The Innisfallen (1866), L. R. 1 A. & E. 72. **Reid.** Willis *v.* Palmer (1859), 7 C. B. N. S. 340; Ward *v.* Beck (1863), 13 C. B. N. S. 668; Gumm *v.* Tyrie (1864), 4 B. & S. 680. *As to* (2) **Consd.** Rusden *v.* Pope (1868), L. R. 3 Exch. 269. **Reid.** Willis *v.* Palmer (1859), 7 C. B. N. S. 340.

**182.** ——.]—Merchant Shipping Act, 1854 (c. 104), s. 66, does not preclude the owner of a ship who has executed an absolute transfer of his interest therein, from showing that the real intention of it was to give the transferee only a security by way of mtge. for an advance of money.—WARD *v.* BECK (1863), 13 C. B. N. S. 668; 1 New Rep. 362; 32 L. J. C. P. 113; 9 Jur. N. S. 912; 143 E. R. 265.

*Annotation:*—**Apld.** The Innisfallen (1866), L. R. 1 A. & E. 72.

**183.** ——.]—THE INNISFALLEN, No. 49, *ante.*

**184. Promise by assignee to account to assignor.**]—Pltf. assigned his ship to deft. as a security for

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an alien being a mtgee.—COMSTOCK *v.* HARRIS (1887), 13 O. R. 407.—**CAN.**

n. *Recital of certificate of registry of ownership—Necessity for.*]—Under 8 Vict. c. 5, ss. 13, 23, 24, the certificate of registry of ownership must be recited in a transfer by way of mtge. or security, with power of sale in case of default, as well as upon an absolute or immediate sale; & if omitted the mtge. will be void.—WATKINS & MUCKLESTONE *v.* CORBETT (SHERIFF) (1849), 6 U. C. R. 587.—**CAN.**

o. *Mortgage of ship to secure current advances for shipping & trade—Construction.*]—CLEVELAND *v.* BOAK (1906), 39 N. S. R. 39; 1 E. L. R. 64.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 3.—B.**

p. *Admissibility of parol evidence.*]—Bills of sale of shares in a ship were executed by A. to B. & C., who were registered as owners of said shares. In an action against B. & C., for the repairs of said ship, as owners:—*Held:* parol evidence was admissible to show that the bills of sale were executed as mtges.—HARRIES *v.* HANDY (1854), 7 Ir. Jur. 290.—**IR.**

the repayment of money; but on the register it appeared to be an absolute assignment. Deft. sold the ship, & told pltf. that he had received the purchase-money, & would account with him for the balance of the proceeds of the sale. In an action upon the money counts:—*Held:* pltf. was entitled to recover this balance, the acknowledgment being sufficient to support the action.—PROUTING *v.* HAMMOND (1819), 8 Taunt. 688; Gow, 41; 129 E. R. 552.

*Annotations:*—**Consd.** Davenport *v.* Whitmore (1836), 2 My. & Cr. 177. **Apld.** Armstrong *v.* Armstrong (No. 2) (1855), 21 Beav. 78.

**185. Specific agreement for sale—On happening of particular event.**]—A. & B. being in partnership & joint owners of a ship, A. requests C. & D. to accept two bills, amounting together to £2,600 on the security of the ship, which they agree to do, & A. accordingly executes a bill of sale to them, & the ship is registered in their names, A. agreeing that they may sell the ship, & indemnify themselves out of the proceeds, if he neglects to provide for the bills when due. A. becomes bkpt., & the bills are paid by C. & D., who thereupon assume the ownership of the ship, writing specific directions to the captain in command of her at the Cape, as to procuring intermediate & homeward freight, & for his general government in the prosecution of a voyage to various parts of the Indian seas, & back to London; & these directions are from time to time renewed. The ship, on her arrival, becomes lessened in value, & C. & D. have been put to expense in her necessary disbursements:—*Held:* C. & D. were not to be considered as mtgees., but as absolute owners of the ship; the ship's expenses, after they assumed such ownership, must fall on them; & they could only prove for the balance of the £2,600 after deducting the value of the ship at the time they first took on themselves to act as owners.—*Ex p.* HOWDEN (1842), 2 Mont. D. & De G. 574; 11 L. J. Bcy. 19, Ct. of R.

**186. Memorandum indorsed on bill of sale—Bill to be void on repayment of sum lent & interest.**]—The owner of 8-64ths of a vessel, in consideration of £100, assigned them by bill of sale; contemporaneously with its execution, a memorandum was indorsed thereon, signed by an agent of the assignee, stipulating that, on the assignor repaying to the assignee the £100 & interest, the bill of sale should be void. Subsequently the assignee received interest, & gave a receipt for it, as for interest on £100 advanced on security of the bill of sale. The registry at the custom house was of an absolute sale. The assignee sold the 8-64ths, & the bill of sale to the purchaser was duly executed; but, before its registry, a bill to redeem by the original owner was filed, & the ct. restrained the registry of the bill of sale, & made a decree for redemption on payment of the £100 & interest, with costs so far as they were increased by the dispute of pltf.'s right to redemption.—WHITFIELD *v.* PARFITT (1851), 4 De G. & Sm. 240; 17 L. T. O. S. 161; 15 Jur. 852; 64 E. R. 814.

**187. Agreement constituting party, part absolute owner part mortgagee—Agreement clearly proved & definite.**]—THE INNISFALLEN, No. 49, *ante*.

### *C. Legal and Equitable Mortgages.*

*See* 1894 Act, ss. 21, 50, 57.

**188. Legal mortgage.**]—On a contract in writing by proposed borrower of money to execute a legal mtge. on a ship & pay commission to pltf. on procuring the loan:—*Held:* this *primâ facie* meant a first mtge.

A "legal mtge." means a "first mtge.," for a second mtge. is not, properly speaking, a "legal mtge.," as it conveys no legal interest (COCKBURN, C.J.).—THOMPSON *v.* CLARK (1862), 3 F. & F. 181; 1 New Rep. 19; 7 L. T. 269; 11 W. R. 23; 1 Mar. L. C. 256.

**189. Equitable mortgage—Power of court to entertain equitable claims.**]—EUROPEAN & AUSTRALIAN ROYAL MAIL CO. *v.* ROYAL MAIL STEAM PACKET CO., No. 276, *post*.

**190.** —— ——.]—Although Merchant Shipping Act, 1854 (c. 104), contains no provision negativing the validity of a mtge. made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, & an equitable mtge. is still invalid.—LIVERPOOL BOROUGH BANK *v.* TURNER (1860), 2 De G. F. & J. 502; 30 L. J. Ch. 379; 3 L. T. 494; 7 Jur. N. S. 150; 9 W. R. 292; 1 Mar. L. C. 21; 45 E. R. 715, L. C.

*Annotations:*—**Folld.** M'Larty *v.* Middleton (1861), 4 L. T. 852. **Consd.** Ward *v.* Beck (1863), 13 C. B. N. S. 668. **Distd.** Stapleton *v.* Haymen (1864), 2 H. & C. 918. **Consd.** Batthyany *v.* Bouch (1881), 50 L. J. Q. B. 421; Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127; Black *v.* Williams, [1895] 1 Ch. 408. **Refd.** Lacon *v.* Liffen (1862), 4 Giff. 75; Keith *v.* Burrows (1876), 1 C. P. D. 722; Hughes *v.* Sutherland (1881), 7 Q. B. D. 160; *Re* Great Eastern S.S. Co., Williams' Claim (1885), 53 L. T. 594. **Mentd.** *Re* General Provident Assce. (1869), 38 L. J. Ch. 320; *Re* Pearcey, *Ex p.* Sturt (1871), 41 L. J. Bcy. 12; Caldow *v.* Pixell (1877), 2 C. P. D. 562; Howard *v.* Bodington (1877), 2 P. D. 203.

**191.** —— ——.]—SAMUEL *v.* JONES, No. 298, *post*.

**192.** —— ——.]—RUSDEN *v.* POPE, No. 256, *post*.

*See, now,* 1894 Act, s. 57.

**193.** —— ——.]—BLACK *v.* WILLIAMS, No. 310, *post*.

**194.** —— **Deposit of builder's certificate—Unfinished ship.**]—The deposit of the builder's certificate created a good equitable mtge. of the unfinished ship, including the engines which were being built for her but subject as to the engines to any lien for unpaid purchase-money to which the engine builders might be entitled.—*Re* SOFTLEY, *Ex p.* HODGKIN (1875), L. R. 20 Eq. 746; *sub nom. Re* SOFTLEY, *Ex p.* WINTER, 44 L. J. Bcy. 107; 33 L. T. 62; 24 W. R. 68.

*Annotations:*—**Mentd.** *Re* Wincham Shipbuilding, Boiler & Salt Co., Poole, Jackson & Whyte's Case (1878), 26 W. R. 588; Bulteel & Colmore *v.* Parker & Bulteel (1916), 32 T. L. R. 661.

**195.** —— **Transfer by owners of shares to agent for sale—Agent made registered owner—Mortgage by member of agent's firm.**]—In furtherance of a project for the formation of a co. to purchase a ship, pltfs., who were owners of shares in the ship, executed transfers of their respective shares to H., the senior partner in a firm of H. & co., which managed the ship's business, as trustee for them, with power to sell the shares to the co. if formed; & H. was registered as owner of the shares in the register of shipping at the port to which the ship belonged. The project for formation of the co. proved abortive, but the above-mentioned shares were not reconveyed to pltfs. Subsequently a son of H., who acted as the manager of H. & co.'s financial business, obtained for the purposes of the firm from deft., through an agent for deft., without the knowledge or authority of pltfs., an advance of money, which was intended to be secured by a mtge. by H. of the above-mentioned shares. A document, which purported to be & was registered as such a mtge., turned out to be a nullity, never having been duly executed by H., the aforesaid manager having obtained H.'s signature to a printed form with blank spaces, which he subsequently handed to deft.'s agent for the purpose of

*Sect.* 3.—*Transfer and transmission of property in ships: Sub-sect.* 3, *C., D., E., F., G. & H.*]

his filling in the blank spaces with the material particulars of the proposed mtge. which he did. The money advanced by deft. was used for the purpose of the firm. Deft. had no notice of pltfs.' interest in the shares. In an action brought by pltfs., claiming that the mtge. deed should be declared void, & the entry of it expunged from the register:—*Held:* the fact that pltfs. had constituted H. the legal owner of the shares & allowed him to appear as such on the register, did not under the above-mentioned circumstances, give rise to an equity entitling deft. as against pltfs. to a charge upon the shares as security for the money advanced by him.—BURGIS *v.* CONSTANTINE, [1908] 2 K. B. 484; 77 L. J. K. B. 1045; 99 L. T. 490; 24 T. L. R. 682; 11 Asp. M. L. C. 130; 13 Com. Cas. 299, C. A.

*Compare* Sub-sect. 5, *post.*

*D. What Passes by Mortgage.*

**196. Cargo.**]—The mtge. of the ship does not vest any property in the cargo in the mtgee. (TINDAL, C.J.).—BRANCKER *v.* MOLYNEUX (1841), 3 Man. & G. 84; Drinkwater, 229; 3 Scott, N. R. 332; 10 L. J. C. P. 310; 5 Jur. 773; 133 E. R. 1067.

**197. —— To be acquired during adventure.**]—(1) A deed of assignment by way of mtge. of a ship, together with her tackle & appurtenances, & all oil, head matter & other cargo which might be caught or brought home in such ship, is, as against the assignor, a valid assignment in equity as well of the future cargo to be taken during the particular voyage, as of the cargo, if any, which existed at the time of the assignment.

(2) A chronometer on board of a ship engaged in the South Sea Fishery, passes under an assignment of "all the appendages & appurtenances" of the ship.—LANGTON *v.* HORTON (1842), 1 Hare, 549; 11 L. J. Ch. 299; 6 Jur. 910; 66 E. R. 1149.

*Annotations:*—*As to* (1) **Apld.** Gale *v.* Burnell (1845), 7 Q. B. 850. **Consd.** Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191. **Reld.** Sorensen *v.* R., The Ariel (1857), 11 Moo. P. C. C. 119; Acraman *v.* Bates (1860), 1 L. T. 322. *Generally*, **Mentd.** Whitworth *v.* Gaugain (1844), 3 Hare, 416; Watts *v.* Porter (1854), 3 E. & B. 743.

**198. —— —— Bill given for purchase of homeward cargo.**]—Under an assignment of a ship, & her present & future cargo, freight, & earnings, by the owner, for securing to the assignees all moneys which they had advanced, or might become liable to pay, on account of the vessel & her cargo, which they had furnished the means of purchasing; the assignees, who were also the ship's agents, held entitled to retain a bill which was given for the purchase of part of the homeward cargo, & was remitted, but not indorsed, to them by the owner; notwithstanding he denied that it was remitted in payment, & stated that they had not paid, & contrary to an express understanding, had left him personally liable to some of the debts incurred in fitting out the vessel, & an injunction which had been obtained by the assignees, restraining an action of trover for the bill, was continued until the hearing.—CURTIS *v.* AUBER, FLETCHER *v.* AUBER (1820), 1 Jac. & W. 526; 37 E. R. 468, L. C.

*Annotations:*—**Reld.** Langton *v.* Horton (1842), 1 Hare, 549. **Mentd.** Metcalfe *v.* York (Archbp.) (1836), 1 My. & Cr. 547.

**199. —— Existing at time of mortgage.**]—LANGTON *v.* HORTON, No. 197, *ante.*

**200. Engines—Ship unfinished—Lien of engine builders for purchase-money.**]—*Re* SOFTLEY, *Ex p.* HODGKIN, No. 194, *ante.*

**201. Passage money.**]—The owners of a ship gave a power of attorney authorising their agent to do many acts for them, &, among others, "to sign any bottomry bond or instrument of hypothecation on the vessel or her cargo, & to sell & dispose of, either absolutely or by way of mtge. or otherwise as he should think proper, the said vessel or any share thereof, & to execute all instruments, & to do all acts which would be requisite & necessary for completing such sales, transfers, mtges. or any of them, & generally to do all acts about the business & affairs aforesaid which the owner, if present could have done." Under this power, the agent, by deed, reciting a mtge. of the ship, & the necessity for further advance to enable the ship to set sail, & the advance of £4,000 for that purpose by pltfs., assigned all the freight, hire, & passage money, & earnings of the ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the £4,000 should be repaid. The ship sailed, & arrived at Liverpool; but the £4,000 was not paid. After the ship had sailed, the agent of the owners received the passage money of certain passenger by bills on England payable at sight, which bills were remitted to the owners in England, & the amounts received by them before the arrival of the ship:—*Held:* the power of attorney authorised the assignment of the passage money, & gave the mtgees. an immediate right to it before they took possession of the ship; & consequently they were entitled to recover back the amount so received.—WILLIS *v.* PALMER (1860), 7 C. B. N. S. 340; 29 L. J. C. P. 194; 2 L. T. 626; 6 Jur. N. S. 732; 8 W. R. 295; 141 E. R. 847.

*Annotation:*—**Reld.** Esparts *v.* Whinney (1903), 88 L. T. 191.

**202. Appurtenances — Ship's chronometer.**]—LANGTON *v.* HORTON, No. 197, *ante.*

**203. —— Must be specified — Mortgage of fishing boats—Nets & fishing gear claimed.**]—In a case where certain fishing boats had been mortgaged by bkpts., & the mtgees. laid claim to the nets & fishing gear which had been used on board the said vessels, but of which no particular nets were appropriated to or specially belonging to any particular vessel on the ground that such nets & fishing gear came within the word "ship" in Merchant Shipping Act, 1854 (c. 104), s. 72, & the word "appurtenances" in the form of mtge. of a ship now in use & substituted for Form I, given in Merchant Shipping Act, 1854 (c. 104):—*Held:* in order to make a thing an appurtenance it must be specified; in the present case there was no evidence to show that any specific nets were appropriated to any particular ship, but that they were used indiscriminately; & they could not in consequence be considered "appurtenances" within Merchant Shipping Act, 1854 (c. 104).—*Re* SALMON & WOODS, *Ex p.* GOULD (1885), 2 Morr. 137.

*Annotations:*—**Consd.** Coltman *v.* Chamberlain (1890), 25 Q. B. D. 328. **Mentd.** Bennett S.S. Co. *v.* Hull Mutual S.S. Protecting Soc. (1914), 111 L. T. 489.

**204. Articles necessary to navigation or adventure—On board at date of mortgage—Or replacing similar articles after mortgage.**]—A mtge.



q. *Appurtenances—Piano.*]—ST. JOHN *v.* BULLIVANT (1881), 45 U. C. R. 614.—CAN.

r. *Right to freight.*]—DOBBYN *v.* COMMERFORD (1860), 10 I. Ch. R. 327.—IR.

of a ship passes to the mtgee. under the word "ship" articles necessary to the navigation of the ship or to the prosecution of the adventure which were on board at the date of the mtge. & articles brought on board in substitution for them subsequently to the mtge.—COLTMAN *v.* CHAMBERLAIN (1890), 25 Q. B. D. 328; 59 L. J. Q. B. 563; 39 W. R. 12; 6 T. L. R. 359, D. C.

*E. Registration of Mortgage.*

*See* 1894 Act, ss. 31, 32.

**205. Non-compliance with registration regulations—Validity of mortgage.**]—An assignment of a ship by way of mtge., which is defective by not having complied with Registry Act, cannot be made good in equity.—*Ex p.* BULTEEL (1790), 2 Cox, Eq. Cas. 243; 30 E. R. 113, L. C.

**206. —— —— As between mortgagor & mortgagee.**]—A mtge. of a ship is good as between the mtgor. & mtgee., although the particulars of the mtge. are not indorsed on the certificate of registry, as required by 3 & 4 Will. 4, c. 55.—LISTER *v.* PAYN (1840), 11 Sim. 348; 59 E. R. 908.

**207.** —— ——.]—A mtge.:—*Held:* binding although particulars of it not indorsed on certificate of registry in terms of 3 & 4 Will. 4, c. 55.—SUTER *v.* PAYNE (1843), 7 L. T. 286.

**208. Registration without indorsement on certificate.**]—DICKINSON *v.* KITCHEN, No. 295, *post.*

**209. Registration in wrong name—Of ship.**]—A. being owner of a ship which was unfinished, on July 5 mortgaged it to B. A. on Aug. 5, registered the ship as owner pursuant to Merchant Shipping Act, 1854 (c. 104), s. 42. On the following day B. caused the mtge. to himself to be inserted on the register. A. having become bkpt.:—*Held:* A.'s assignees could not maintain trover against B. for the ship. If prior to registration the owner has executed an instrument, which, if executed after registration, would pass his interest, & that is registered, it is sufficient. As to the name, the registry is right, &, as the mtge. was made before registration, it matters not by what name the vessel is described in it (BRAMWELL, B.).—BELL *v.* BANK OF LONDON (1858), 3 H. & N. 730; 28 L. J. Ex. 116; 32 L. T. O. S. 96.

**210. Registration by mortgagor as owner—Subsequent to mortgage—Subsequent registration of mortgage by mortgagee.**]—BELL *v.* BANK OF LONDON, No. 209, *ante.*

**211. Trust deed to secure debentures—Provisions for mortgage of ships—Registration under Companies Acts.**]—Cos. Act, 1900 (c. 48), s. 14 (4), applies to an issue of debenture stock secured by a covering deed containing any charge to the benefit of which the stock-holders of that issue are entitled *pari passu.* If the covering deed contains specific equitable charges on specific ships, & the particulars required by sect. 14 (4) are registered, then for the purposes of sect. 14 that registration will not only cover subsequent statutory mtges. of those specific ships required to complete the security, but also statutory mtges. of any ships substituted therefor under the powers of the covering deed.—CUNARD S.S. CO., LTD. *v.* HOPWOOD, [1908] 2 Ch. 564; 77 L. J. Ch. 785; 99 L. T. 549; 24 T. L. R. 865; 11 Asp. M. L. C. 147; 15 Mans. 353.

*Annotation:*—**Reld.** National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K. B. 431.

**212. Fees on registration—Transfer of mortgage—1898 Act, s. 3.**]—A shipping co. had issued debenture stock & had registered in the names of trustees first mtges. over certain of its ships. One of the trustees died & a new trustee was appointed by deed, which deed contained a declaration of transmission or transfer of interest. The co. wished to have the new trustee registered as a transferee of the mtges. For that purpose they prepared an instrument of transfer of the mtges. with the name of the new trustee as transferee, & tendered same for registration under above Act, s. 37:—*Held:* by above Act, s. 3, read in connection with the First Schedule thereto, fees were payable on the transfer of a mtge. of a British ship, & they were properly demanded by the registrar in this case before registration.—*Re* NEW ZEALAND SHIPPING CO., LTD., [1918] 1 K. B. 346; 87 L. J. K. B. 413; 118 L. T. 538; 62 Sol. Jo. 249; 14 Asp. M. L. C. 250.

*See* Statutory Rules & Orders, 1924, No. 1056.

**213. Unregistered instrument—Foreign ship—Agreement to treat as if registered—While within jurisdiction of English courts.**] — A mtge. agreement between a British firm & the owner of a Greek steamship contained the following clause: "The owner agrees that the mtgees. as far as the law allows shall, in addition to the benefits conferred by the Greek mtge. & mtge. agreement, be entitled to enforce the Greek mtge. & mtge. agreement in the English cts. in a similar manner as in the Greek cts., & so long as the vessel is within the jurisdiction of the English cts. the security shall, so far as the mtgees. desire, be dealt with in precisely the same way as if the ship had been registered in England by a statutory mtge. with a collateral mtge. agreement containing the same terms & conditions as those contained in the mtge. & these presents." The ship not having been registered in Greece, the mtgees. were unable to register their mtge. On a motion by the mtgees. for judgment in an action *in rem*, the shipowner did not appear, but ship repairers, who had recovered judgment & an order for sale of the ship on their necessaries claim, intervened:—*Held:* being unregistered, the mtge. was invalid under Greek law, but by the mtge. agreement pltfs., as against the shipowner, were to be treated as having a registered mtge. enforceable by an action *in rem* whenever the ship was within the jurisdiction of the English cts.—THE BYZANTION (1922), 127 L. T. 756; 38 T. L. R. 744; 16 Asp. M. L. C. 19.

*F. Insurable Interest of Mortgagor and Mortgagee.*

*See* INSURANCE, Vol. XXIX., pp. 110–112, Nos. 656–667.

*G. Jurisdiction of Admiralty Courts.*

*See* ADMIRALTY, Vol. I., pp. 118–120, Nos. 243–266.

*H. Rights and Liabilities of Mortgagor.*

*See* 1894 Act, s. 34.

**214. Mortgagor as owner—How far ownership affected by mortgage.**]—COLLINS *v.* LAMPORT, No. 267, *post.*

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**PART II. SECT. 3, SUB-SECT. 3.—E.**

*t. Necessity for registration—Mortgage of registered vessel.*]—The mtge. of a registered vessel is exempt from registry under Chattel Mtge. Act.—PATTON *v.* FOY (1860), 9 C. P. 512.—CAN.

*a. —— Charge on ship not having British register.*]—A letter, purporting to create a charge on a ship, was not registered as a mtge. under Merchant Shipping Act. The ship not having a British register, it was held that the letter created a valid charge on the ship.—SHIB CHUNDER DOSS *v.* COCHRANE (1865), Bourke, 388.—IND.

**PART II. SECT. 3, SUB-SECT. 3.—H.**

*214 i. Mortgagor as owner—How far ownership affected by mortgage.*]—The mtgee. does not become, nor does the

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 3, H., I. & J. (a).*]

**215.** —— ——.]—Pltf. entered into an agreement with the owners of a steam vessel to run her on specified daily excursion trips for about six weeks, dividing the profits after deducting expenses, & advancing the money to liberate part of the machinery held as a lien for repairs. In respect of the advance for the liberation of the machinery, & other advances previously made, as well as in respect of any repairs executed, pltf. to have " a charge & lien on the boat ranking in the highest position the owners are able to fix having regard to the existing circumstances." A week after the trips commenced an instalment of the purchase-money owing to deft., the former owner of the vessel, fell due, &, on non-payment, deft., under a mtge. given by way of collateral security, seized her, alleging that the agreement between pltf. & the owners of the vessel was not binding upon him, as it postponed his rights as mtgee. & depreciated the saleable value of the vessel:—*Held:* the agreement was binding on the mtgee., for, though the powers of a mtgor., as owner, are, by 1894 Act, s. 34, limited by the proviso, " Except as far as may be necessary for making a mtged. ship available as a security for the mtge. debt." these powers had not been exceeded, the test to be applied being that laid down in *Collins* v. *Lamport*, No. 267, *post*, namely whether the mtgor.'s dealings with the vessel materially impair the security.—THE HEATHER BELL, [1901] P. 272; 70 L. J. P. 57; 84 L. T. 794; 49 W. R. 577; 17 T. L. R. 541; 9 Asp. M. L. C. 206, C. A.

*Annotations:*—**Refd.** Essarts v. Whinney (1903), 88 L. T. 191; Law Guarantee & Trust Soc. v. Russian Bank for Foreign Trade, [1905] 1 K. B. 815; The Manor, [1907] P. 339.

**216.** —— **Right to execute bottomry bond—Without consent of mortgagee—Notice by lender on bottomry to mortgagee.**]—THE ST. GEORGE, No. 1338, *post*.

*Compare* No. 56, *ante*; No. 265, *post*.

**217. Injunction restraining user—Undertaking for damages—Measure of damages.**]—(1) *Semble:* the mtgee. of a ship is entitled to take possession & sail her, & upon doing so becomes an owner within Merchant Shipping Act, 1854 (c. 104), & subject to all the liabilities consequent thereon.

(2) Where, on granting an injunction against the use of a ship by the owner, an undertaking for damages is given, the measure of damages would include the loss of profit by the detention of the ship. But where the injunction was against a mtgee. of a ship, which was an insufficient security, who had declared his intention to sell, & had not suggested the loss of possible profit as part of the damage anticipated:—*Held:* the loss of such profit was too speculative to be taken into account, & the measure of damage was the expense involved in the custody of the ship & the deterioration which she had suffered, together with interest in the meantime.—DE MATTOS v. GIBSON (1860), 1 John. & H. 79; 30 L. J. Ch. 145; 3 L. T. 121; 7 Jur. N. S. 282; 70 E. R. 669.

**218. Right against bailee of ship—After ship mortgaged—Demand for possession from bailee.**]—After bailment of a ship the bailor mortgages to a third person, who, having the right to do so, demands the ship from the bailee; he is entitled to refuse to restore it to the bailor, because he could not do so without exposing himself to an action; such case falling within the general principle, that when two parties contract, & one of them promises to perform something which the other subsequently puts it out of his power to perform, there is an answer to an action by the promisee.

If A. delivers a ship to B. under a contract, providing (*inter alia*) that B. during the contract, & while the ship remained in his possession & use, should pay certain expenses, wages of the crew, etc., &, upon the determination of a certain term, redeliver the ship, to A., & A. afterwards mortgaged the ship, & certain such expenses as above were incurred, & then the mtgee. demanded possession from B:—*Held:* though such mtge. & demand were an answer to A.'s claim for the redelivery of the ship to him, there was no answer to A.'s claim to have the above expenses paid by B. according to the contract.—EUROPEAN & AUSTRALIAN ROYAL MAIL CO., LTD. v. ROYAL MAIL STEAM PACKET CO. (1861), 30 L. J. C. P. 247; 8 Jur. N. S. 136.

**219. Right to redeem—Clog on equity—Commission in respect of advances.**]—THE BENWELL TOWER, No. 308, *post*.

**220.** —— —— **Option to mortgagee to become partner with mortgagor.**]—In Apr. 1896, resps. advanced £5,000 to applt., & he executed in their favour a legal mtge. of a ship as security for the advance. By the terms of the deed the money was not to be paid or called in for two years from July, 1896, & during that period resps. had the option of entering into partnership with applt., in which case they were to release the mtge. debt, & the mtged. property was to become partnership assets. In June, 1898, a deed was executed reciting that resps. had advanced to applt. £2,000, & conveying to them by way of mtge. certain wharves as security for the advance. In fact no further advance was made, but the £2,000 was part of the sum of £5,000 previously advanced. In July, 1898, the period of the loan was extended for five years with an option to resps. of entering into partnership with appt. during that period. In Feb. 1900, they elected to enter into partnership, but applt. refused to do so:—*Held:* there being nothing to show that the mtge. of June, 1898, & the agreement of July, 1898, were part of the same transaction, & the agreement being subsequent

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mtgor. cease to be, the owner of the vessel. A British ship forms the exception to the rule that the whole legal estate or interest in all property mtged. vests in the mtgee.—THOMPSON & ABBOTT v. NUGENT (1860), 4 Nfld. L. R. 506.—**NFLD.**

**214 ii.** —— ——.]—The owner of a ship, over which he has granted a mtge., is not entitled to deal with the ship as owner, in such way as may materially prejudice the mtgee.'s security.—LAMING & Co. v. SEATER (1889), 16 R. (Ct. of Sess.) 828; 26 Sc. L. R. 500.—**SCOT.**

**214 iii.** —— ——.]—A shipowner having mortgaged his ship has still an interest in her seizable in attachment under Civil Procedure Code.—AUHIN v. AHMED MAHOMED (1884), 1 Ind. Jur. N. S. 241.—**IND.**

b. *Right to redeem—Mortgage of shares by part owner—Mortgagee afterwards acquiring other shares.*]—CLARK v. SCHOFIELD (1889), 28 N. B. R. 231.—**CAN.**

c. *Where mortgagees in possession—Tortious possession by captain—Liability of mortgagor for necessaries.*]—Where a steamboat was mtged. & in possession of the mtgees., who navigated her for their own benefit to secure their advances, & she was tortiously taken possession of by the captain, who received the profits arising from her, for his own use:—*Held:* the mtgor. was not liable for goods furnished for the vessel while in the tortious possession of the captain.—FRASER v. FLINT (1835), 4 O. S. 12.—**CAN.**

d. —— *Liability of mortgagor for loss of goods shipped.*]—The owners of a vessel mtged., & in the possession of & navigated by the mtgee., are not liable for the loss of goods shipped on her.—WILKES v. FLINT, WOODRUFF & CLEMENT (1835), 4 O. S. 19.—**CAN.**

e. *Mortgagor disputing title of assignee of mortgagee—Estoppel.*]—Deft. owning a vessel mortgaged her to C., & C. assigned the mtge., with his other property, to pltf. in trust for creditors. Pltf. having brought replevin to

to the mtge., it was not a clog on the equity of redemption, & could be enforced by resps.—REEVE *v.* LISLE, [1902] A. C. 461; 71 L. J. Ch. 768; 87 L. T. 308; 51 W. R. 576; 18 T. L. R. 767, H. L.; *affg.* S. C. *sub nom.* LISLE *v.* REEVE, [1902] 1 Ch. 53, C. A.

*Annotation :*—**Consd.** Samuel *v.* Jarrah Timber & Wood Paving Corpn., [1904] A. C. 323.

*I. Bankruptcy of Mortgagor.*

*See* 1894 Act, s. 36.

**221. Whether mortgagee affected.**]—Mtge. of a ship at sea good in bkpcy., notwithstanding the statute of James I., if the party procures the bill of sale, etc. *Contra*, if he is incautious or negligent as by suffering the ship to come back & go on another voyage.—*Ex p.* MATTHEWS (1751), 2 Ves. Sen. 272; 28 E. R. 176, L. C.

*Annotation :*—**Refd.** Robinson *v.* Macdonnell (1816), 5 M. & S. 228.

**222.** ——.]—When A., the owner of a ship, duly assigned his interest in it to B., & B. became the registered owner but by his permission A. continued to have the same in his possession, order & disposition until he became bkpt. :—*Held :* the property in the ship passed to A.'s assignees under 21 Jac. 1, c. 19.—HAY *v.* FAIRBAIRN (1818), 2 B. & Ald. 193; 106 E. R. 337.

*Annotations :*—**Refd.** Monkhouse *v.* Hay (1820), 2 Brod. & Bing. 114; Kirkley *v.* Hodgson (1823), 1 B. & C. 588.

**223. Advance made on date of receiving order—Pre-existing agreement for advance.**]—A mtgor. who conveys all his property with the main object of securing further advances, does not thereby commit an act of bkpcy., even though the mtge. also secures a past debt due from the mtgor. to the mtgee. Where under a mtge. of a ship to secure further advances, an advance is made on the date of a receiving order against the mtgor., who is subsequently adjudicated bkpt. in respect of acts of bkpcy. committed prior to the execution of the mtge., the mtgee. is entitled, under Bankruptcy Act, 1883 (c. 52), s. 49, as against the trustee in bkpcy., to recover such advance, where before the date of the receiving order there was an existing contract between mtgor. & mtgee. to make future advances & a positive promise by the mtgee. to make this specific advance. A. mortgaged his shares in a ship to B., to secure further advances, & also a small part debt due from A. to B. Prior to the mtge., A. had committed acts of bkpcy. in respect of which he was subsequently to the date of the mtge. adjudicated bkpt. B. had no notice or knowledge of the acts of bkpcy., & made advances to enable A. to carry on his business. On the date of the receiving order, B. made A. an advance of £250, in consequence of a prior agreement between them to make future advances, & a positive promise to advance this specific sum. In an action by B. to establish the validity of his mtge. & recover against resp. the amount of his loans :—*Held :* the mtge. was valid, & B. was entitled, as against the trustee in bkpcy., to recover not only all advances prior to the date of the receiving order, but also the advance of £250 made on the date of the receiving order, as it was made in consequence of the contract & promise made before the date of the receiving order.—THE THAMES (1890), 63 L. T. 353; 6 Asp. M. L. C. 536.

**Property in reputed ownership of bankrupt.**]—*See* BANKRUPTCY, Vol. V., pp. 751, 753, 758, 763–764, 797, Nos. 6479, 6493, 6523, 6524, 6566–6575, 6809.

**Avoidance of preference.**]—*See* BANKRUPTCY, Vol. V., p. 858, No. 7190.

**Protection of bonâ fide transactions.**] — *See* BANKRUPTCY, Vol. V., p. 915, No. 7487.

**Trover by assignees of bankrupt against mortgagee.**]—*See* BANKRUPTCY, Vol. V., p. 983, No. 8043.

*J. Rights and Liabilities of Mortgagee.*

*(a) In General.*

*See* 1894 Act, s. 34.

**224. Liability in respect of previous contracts of owner.**]—BRIGHT *v.* FLEMING (1868), cited in L. R. 2 A. & E. at p. 72; 37 L. J. Adm. at p. 62.

*Annotation :*—**Refd.** The Feronia (1868), L. R. 2 A. & E. 65.

**225. Right to allowance—For use of ship—Mortgagee out of possession.**] — LANGTON *v.* HORTON, No. 151, *ante*.

**226. Arrest of ship—Enforcing bail for safe return.**]—A mtgee. is not entitled to arrest a vessel for the purpose of enforcing bail for her safe return to this country.—THE HIGHLANDER (1843), 2 Wm. Rob. 109; 2 Notes of Cases, 316; 166 E. R. 696.

*Annotation :*—**Refd.** The Innisfallen (1866), L. R. 1 A. & E. 72.

**227. —— Mortgagee not in possession.**]—THE INNISFALLEN, No. 49, *ante*.

**228. —— —— Security not in jeopardy—No default by mortgagor.**]—Where the registered mtgees. of a ship instituted an action *in rem* as mtgees. for possession, & the ship was arrested therein before the mtge. money became due, & without any default on the part of the mtgor., the ct., being of opinion upon the facts that the ship was not being dealt with so as to impair the mtgees.' security, ordered her release.—THE BLANCHE (1887), 58 L. T. 592; 6 Asp. M. L. C. 272.

**229. —— Bail given by mortgagee—Right to release of ships.**]—THE RINGDOVE, No. 175, *ante*.

**230. Master also joint mortgagee—Right to sue for wages.**]—The owners of a ship, in May, 1842, appointed T. M. master, who signed the ship's articles, etc. T. M. was a joint mtgee. of the ship. In June, 1842, after the sailing of the ship, the owners became bkpt. In Jan. 1845, the ship was, on her return, sold with the knowledge of T. M., who did not interfere in such sale, by the mtgee. in possession :—*Held :* (1) T. M. might sue the ship for his wages under 7 & 8 Vict. c. 112, s. 16; (2) the fact of T. M. being a joint mtgee. would not have the effect of barring the suit; (3) nor under the circumstances, his knowledge of, & non-interference in, the sale of the ship.—THE REPULSE (1845), 2 Wm. Rob. 398; 4 Notes of Cases, 166; 7 L. T. 225; 9 Jur. 738; 166 E. R. 805; *subsequent proceedings* (1847), 5 Notes of Cases, 348.

*Annotations :*—*As to* (1) **Refd.** The Repulse (1847), 5 Notes of Cases, 348; The Tecumseh (1850), 3 Wm. Rob. 144.

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obtain possession :—*Held :* deft. could not dispute pltf.'s title, or set up that he was trustee for a foreign corporation, who by law could not hold ships.—PATON *v.* BROWNE (1860), 19 U. C. R. 337.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 3.—J. (a).**

**224** i. *Liability in respect of previous contracts of owner.*]—FREER *v.* MAGUIRE (1866), 2 L. C. L. J. 104.—**CAN.**

*f. Whether owner of ship—Liability for wages of seamen.*]—In an action by a seaman for his wages against the mtgee. of his vessel, who was registered under the Act for the encouragement of shipbuilding :—*Held :* he was not an owner so as to be liable for the wages of the seamen engaged in navigating it, or of the mechanics employed in completing or repairing it.—DICKEY *v.* TERIAULT (1860), 11 L. C. R. 150.—**CAN.**

*g.* ——.]—ROBERT *v.* LAMARCHE (1900), Q. R. 18 S. C. 101.—**CAN.**

*h. Accounts—On taking possession.*]—*Semble :* a mtgee. of a vessel, until he takes possession or does something equivalent thereto, is not entitled

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 3, J. (a) & (b).*]

**231. Whether owner of ship—Mortgagee in possession.**]—WOODS *v.* READ, No. 56, *ante.*

**232. —— —— Subject to attendant liabilities.**]—DE MATTOS *v.* GIBSON, No. 217, *ante.*

**233. Right to interest.**]—The owner of a vessel mortgaged it as a security for a debt, with a proviso for redemption on payment of the principal moneys & interest at the rate of 10 per cent. in six months. The principal not having been paid at that time:—*Held:* interest continued payable at the rate of 10 per cent.—MORGAN *v.* JONES (1853), 8 Exch. 620; 22 L. J. Ex. 232; 155 E. R. 1500.

*Annotation:*—**Reld.** Gordillo *v.* Weguelin (1877), 5 Ch. D. 287.

**234. —— In lieu of notice—Realisation of security by mortgagee on other motion.**]—BANNER *v.* BERRIDGE, No. 292, *post.*

**235. Right to defend interest—In action against ship—Extent of right.**]—The mtgee. of a ship may come in & defend his interest in the ship sued, but can rely only on defences open to the owner of the ship.—THE CHIEFTAIN (1863), Brown. & Lush. 104; 2 New Rep. 528; 32 L. J. P. M. & A. 106; 8 L. T. 120; 9 Jur. N. S. 388; 11 W. R. 537; 1 Mar. L. C. 327; 167 E. R. 316.

*Annotations:*—**Reld.** The Edwin (1864), Brown. & Lush. 281; The Red Rose (1867), L. R. 2 A. & E. 80, n.; The Feronia (1868), L. R. 2 A. & E. 65; The Fairport (1882), 8 P. D. 48; The Orienta, [1894] P. 271; The Ruby (No. 2), [1898] P. 59.

**236. Dealing with ship to obtain benefit of fraudulent preference—Whether court will restrain.**]—The ct. will, under 17 & 18 Vict. c. 104, s. 65. restrain a mtgee. of a ship from dealing with the ship in such a manner as would enable him to obtain the benefit of a fraudulent preference, & will exercise such power of restraint for a definite period, without requiring the appct. to file a bill.—THE REGATTA (1865), 6 New Rep. 248.

**237. Discharge of maritime lien—Prior to obtaining possession—Right to indemnity—Against party working ship for mortgagor.**]—A. being the owner of a steamship mortgaged it to B., & subsequently, under circumstances held to show acquiescence by B., entered into an agreement, in contemplation of a partnership with C., by the terms of which C. was to work the ship for A. till further notice, paying all the expenses & receiving all the profits, A. agreeing to indemnify him against loss, if any, upon a periodical statement of accounts. Subsequently to this agreement B. gave notice to C. of the mtge., & required possession of the ship. The ship was being employed in voyages at a distance from England, between S. & T., & was at that time at S., under engagements which had been entered into by C. with third parties, with respect to its next voyage to T. The ship was given up to B.'s agent at T. at the termination of its next voyage thither. At the time of such delivery C. owed to the crew of the ship a large sum for wages, which entitled them to proceed against the ship in the Admlty. Ct.; & shortly after the delivery of the ship the crew took such proceedings, & the ship was seized by the officers of the ct. B., after suffering much delay & loss, paid the wages & obtained possession of the ship. In an action of trover for the ship. & for money paid, brought by B. against C.:—*Held:* (1) C. was entitled to retain possession of the ship till its arrival at T., in order to fulfil the engagements incurred before notice; (2) as there had been a delivery of the ship at T., notwithstanding it was subject to a maritime lien for wages, B. was not entitled to recover on the count for trover; (3) B. was entitled to recover the wages from C. under the count for money paid.—JOHNSON *v.* ROYAL MAIL STEAM PACKET CO. (1867), L. R. 3 C. P. 38; 37 L. J. C. P. 33; 17 L. T. 445; 3 Mar. L. C. 21.

*Annotations:*—*As to* (3) **Distd.** The Ripon City, [1898] P. 78. **Consd.** The Heather Bell, [1901] P. 143. *Generally,* **Reld.** Law Guarantee & Trust Soc. *v.* Russian Bank for Foreign Trade, [1905] 1 K. B. 815. **Mentd.** Edmunds *v.* Wallingford (1885), 14 Q. B. D. 811.

**238. —— —— —— Against mortgagors.**]—Pltfs. were mtgees. of forty-eight sixty-fourth shares in a vessel. The master having brought an action *in rem* against the vessel & arrested her, pltfs. paid the amount of his claim in order to obtain the release of the vessel from arrest & to enable them to take possession under their mtge. Pltfs. then sued defts., the owners of sixteen sixty-fourth shares, to recover the amount paid to the master:—*Held:* as the mtgor. & the other co-owners were severally liable for the disbursements paid by the master, & as pltfs. could not obtain possession of their shares as long as the vessel was under the arrest of the ct., they were entitled to recover from defts. the amount paid by them.—THE ORCHIS (1890), 15 P. D. 38; 59 L. J. P. 31; 62 L. T. 407; 38 W. R. 472; 6 T. L. R. 197; 6 Asp. M. L. C. 501, C. A.

*Annotations:*—**Distd.** The Ripon City, [1898] P. 78. **Reld.** The Heather Bell, [1901] P. 143.

**239. —— —— —— ——.**]—THE BLAZER (1911), cited in Halsbury's Laws of England, Vol. XXVI., at p. 26.

**240. —— —— —— Against co-owners with mortgagor.**]—THE ORCHIS, No. 238, *ante.*

**241. —— By vendors to mortgagor—Sale by vendors with consent of mortgagees—Deduction of sum paid in accounting to mortgagees.**]—THE RIPON CITY, No. 274, *post.*

**242. Accounts—Contraband carried by master—Ship exposed to risk of forfeiture.**]—DOVER *v.* OPEY (1733), 2 Eq. Cas. Abr. 7; 22 E. R. 6.

*Annotation:*—**Reld.** Ewing *v.* Osbaldestone (1837), Donnelly, 179.

**243. —— Just allowances—What included therein.**]—The mtgees. of a ship having seized it & advertised it for sale, the mtgors. brought an action against them for redemption & moved for an injunction to restrain the sale, when upon defts. undertaking not to proceed with the sale, a decree was taken by consent in the action directing an account of what was due on the mortgage for "principal & interest" & redemption on payment by the mtgors. of the amount certified:—*Held:* upon summons by defts. the mtgees., they were justified in seizing the ship & in taking the account directed they were entitled to be allowed expenses incurred by them in taking & holding possession of the ship advertising it for sale, & effecting insurances, under the head of "just allowances."—WILKES *v.* SAUNION (1877), 7 Ch. D. 188; 47 L. J. Ch. 150.

**244. —— Commission—Stipulated for by letter.**]—THE BENWELL TOWER, No. 308, *post.*

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to an account of the money earned by the vessel for freight.—MERCHANTS BANK *v.* GRAHAM (1880), 27 Gr. 524.—CAN.

k. *Duty to indorse mortgage on certificate of ownership.*]—The ct. cannot relieve against the omission of a mtgee. of a registered vessel, to have the proper indorsement of such mtge. made on the certificate of ownership.—COLEMAN *v.* SHERWOOD (1851), 2 Gr. 652.—CAN.

l. *Whether Registry Act, 1845, prevents mortgagees from asserting their rights under mortgage.*]—CAYLEY *v.* MCDONELL (1852), 8 U. C. R. 454.—CAN.

m. *Merger—Purchase by mortgagee at sale for wages.*]—PARKINSON *v.*

**245. —— Between mortgagor & deceased mortgagee — Evidence of account book.**] — In taking accounts between a mtgor. & a deceased mtgee. of a barge, an account book kept by the latter in his own handwriting containing entries of payments made to him by the mtgor. as well as disbursements made by him on account of the barge is admissible on behalf of the mtgee.'s exors. in evidence as containing entries against interest.—HUDSON & HUMPHREY *v.* SWIFTSURE (OWNERS), THE SWIFTSURE (1900), 82 L. T. 389; 16 T. L. R. 275; 9 Asp. M. L. C. 65.

**246. Costs of mortgage suit — Party & party — Decree for costs charges & expenses properly incurred.**]—Mtgees.' costs in a mtge. suit will be taxed as between party & party in accordance with the practice of the Ct. of Ch., & not as between solrs. & clients, where a decree has been made by consent that pltfs. are to receive their "costs, charges, & expenses properly incurred." On a motion made by pltfs., mtgees., to review the registrar's taxation, disallowing: (*a*) charges by pltfs.' solrs. for attending to take particulars of other suits against the vessel to which pltfs. were not parties; (*b*) costs of negotiations between rival incumbrancers which led to nothing, & to which the owners of the vessel were not parties; (*c*) costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held. The ct. affirmed the registrar's taxation, & refused the motion with costs.—THE KESTREL (1866), L. R. 1 A. & E. 78; 16 L. T. 72; 12 Jur. N. S. 713; 2 Mar. L. C. 472.

**247. —— What costs allowed — Charges of solicitors for attending to other suits against same vessel — Plaintiffs not parties.**] — THE KESTREL, No. 246, *ante*.

**248. —— —— Costs of abortive negotiations — Between other rival incumbrancers.**] — THE KESTREL, No. 246, *ante*.

**249. —— —— Costs of conference with counsel — Such conference not usual.**]—THE KESTREL, No. 246, *ante*.

**250. Dismissal of master — Liability of mortgagee for compensation — Misconduct of master.**]—A mtgee. took possession of a ship by putting a man on board & giving notice to the master. The latter, by order of the mtgor., took the vessel to sea with the man in possession on board. In an action by the master for wages, & for compensation for wrongful dismissal, the registrar awarded him a sum as compensation, being the amount of wages payable for two months after the mtgee. took possession:—*Held:* the master had been guilty of misconduct in taking the vessel to sea, & could not as against the mtgee. be properly awarded any sum as compensation for wrongful dismissal.—THE FAIRPORT (1884), 10 P. D. 13; 54 L. J. P. 3; 52 L. T. 62; 33 W. R. 448; 5 Asp. M. L. C. 348.

**251. Goods supplied to mortgagor on hire purchase — Rights against hirer.**]—An agreement by a hirer to pay a stated sum per month till the full price of the subject-matter be paid, when it was to become his own property, is, in the absence of a provision that he might terminate the hiring by delivering up to the owner, an agreement to buy within Factors Act, 1889 (c. 45), s. 9, notwithstanding provisions that the owner might put an end to the arrangement for sale on various contingencies. The addition by the owner of a mtged. ship of some equipment to the ship is a "transfer under a disposition" to the mtgee. within Factors Act, (c. 45), s. 9. There is also a like transfer within Factors Act, 1889 (c. 45), s. 9, where the mtgee. takes possession under the power in his mtge.—HULL ROPES CO., LTD. *v.* ADAMS (1895), 65 L. J. Q. B. 114; 73 L. T. 446; 44 W. R. 108; 40 Sol. Jo. 69, D. C.

*Annotations:*—**Refd.** Wylde *v.* Legge (1901), 84 L. T. 121; Belsize Motor Supply Co. *v.* Cox, [1914] 1 K. B. 244.

**252. Money paid under compulsion of law — To creditors of mortgagor — Right to recover.**]—Pltfs. were mtgees. in possession of a ship lying in a Chilian port. Defts., to whom the shipowners were indebted for considerable sums, obtained an order of the Chilian ct. which enabled them to arrest the ship. Defts. made an offer to pltfs. to release the ship on receiving an unconditional guarantee covering the amount of the debt due to them from the owners of the ship, plus interest & expenses, but pltfs. paid the amount in question under protest, purporting to reserve the right to open up the whole question in London, & the ship was thereupon released. In an action brought to recover the money so paid:—*Held:* pltfs. were not entitled to recover, on the ground that the money was paid under compulsion of law, & was therefore not recoverable even though the legal proceedings were instituted in a foreign ct.—CLYDESDALE BANK, LTD. *v.* SCHRÖDER & CO., [1913] 2 K. B. 1; 82 L. J. K. B. 750; 106 L. T. 955; 56 Sol. Jo. 519; 17 Com. Cas. 210.

**Proceedings by mortgagee in respect of ship — Withdrawal of action — Liability to damages & costs.**]—*See* ADMIRALTY, Vol. I., pp. 120, 165, Nos. 258, 752, 753.

(*b*) *Possession.*

**253. Necessity for actual possession.**]—BELCHIER *v.* PARSONS (1754), as reported in 1 Keny. 38; 96 E. R. 908, L. C.

**254. What amounts to possession.**]—BELCHIER *v.* PARSONS (1754), as reported in 1 Keny. 38; 96 E. R. 908, L. C.

**255. —— Assumption of control.**] — *Ex p.* HOWDEN, No. 185, *ante*.

**256. —— Act equivalent to possession — Notice to mortgagor & charterers.**]—(1) A mtge. of a vessel carries with it the freight, & the mtgee. intervening by taking possession, or by an act equivalent to taking possession, before the freight becomes payable, is entitled as against the mtgor. or his assignees in bkpcy. to receive it. The owners of a ship having mortgaged it to pltf., chartered it to S. & D., for a voyage to Brass River, two-thirds of the freight being payable five days after sailing from Liverpool, the remaining one-third on receipt of the captain's advice of delivery at Brass River. Pltf. demanded the two-thirds freight from the owners both before & after it was payable, but did not obtain it. After the complete discharge of the vessel at Brass River, but before receipt of the captain's advice of delivery, pltf. gave notice of his mtge. to the charterers, & on the return of the vessel to Liverpool took possession of her outside the port:—*Held:* although the mtgee. could not sue upon the

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HIGGINS (1876), 40 U. C. R. 274.—CAN.

n. *Registration of vessel in new name by mortgagor — After vessel substantially rebuilt — Whether rights of mortgagee affected.*]—GIBSON *v.* GILL (1880), 19 N. B. R. (3 P. & B.) 565.—CAN.



o. *What amounts to possession — Mortgage of shares.*]—A person does not become mtgee. in possession of shares in a vessel unless he actually takes possession of the shares with that intention. — THE LADY CLERMONT (1870), 23 L. T. 283.—IR.

p. —— *Letter intimating taking possession — Letter not acted on.*]—DUNCAN *v.* DON (1861), 33 Sc. Jur. 276.—SCOT.

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 3, J. (b), (c) & (d).]*

charterparty, yet he was by virtue of his mtge. entitled as against the owners to claim & to receive the freight; his right to receive the freight might be perfected by his taking possession, or doing an act equivalent to taking possession, at any time before the freight was payable, although after it has been actually earned; actual possession being impossible, notice to the mtgors. & to the charterers was an act equivalent to taking possession, & pltf. having done all that was possible to manifest his right, was entitled to be paid his freight.

(2) In an action for freight brought by the mtgee. of a ship against charterers under the mtgors. after the mtge. the charterers interpleaded & paid the freight into ct.; & an interpleader issue was directed between pltf. & the assignee in bkpcy. of the mtgors. On this issue a special case was stated, concluding with the question whether pltf. was entitled as against deft. to the sum in ct.:—*Held:* the ct. would in this special case consider the equitable rights of the parties; & as pltf. was equitably entitled to the freight as against the owners, & deft., as assignee in bkpcy. of the owners, could only take that to which the owners were equitably as well as legally entitled, pltf. was entitled to recover.—RUSDEN *v.* POPE (1868), L. R. 3 Exch. 269; 37 L. J. Ex. 137; 18 L. T. 651; 16 W. R. 1122; 3 Mar. L. C. 91.

*Annotations:—As to* (1) **Distd.** The Benwell Tower (1895), 72 L. T. 664. **Refd.** Anderson & Butler's Wharf Co. (1879), 48 L. J. Ch. 824. *As to* (2) **Consd.** Wilson *v.* Wilson (1872), L. R. 14 Eq. 32. **Refd.** Liverpool Marine Credit Co. *v.* Wilson (1872), 26 L. T. 717. *Generally,* **Mentd.** Duncan *v.* Cashin (1875), L. R. 10 C. P. 554; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645; Jennings *v.* Mather, [1901] 1 K. B. 108.

**257. Right to possession — Against party under agreement with mortgagor—Agreement in contemplation of partnership—Acquiescence of mortgagee.**]—JOHNSON *v.* ROYAL MAIL STEAM PACKET CO., No. 237, *ante.*

**258. —— Where security threatened—No actual default under mortgage.**]—If the dealings with a ship by the mtgor. are of such a character as to be inconsistent with the sufficiency of the security, the mtgee. may take possession, although there has not been any actual default on the part of the mtgor. under the mtge., & although the mtgee. has not commenced any formal proceedings.—THE MANOR, [1907] P. 339; 77 L. J. P. 10; 96 L. T. 871; 10 Asp. M. L. C. 446, C. A.

*Annotation:*—**Consd.** The St. George, [1926] P. 217.

*(c) Preservation of Security.*

**259. Repairs — Liability of mortgagee — Not in possession.**]—*Qu.:* whether a mtgee. of a ship, out of possession, be not liable for the repairs.—WESTERDELL *v.* DALE (1797), 7 Term Rep. 306; 101 E. R. 989.

*Annotations:*—**Consd.** Briggs *v.* Wilkinson (1827), 7 B. & C. 30. **Refd.** Young *v.* Brander (1806), 8 East, 10; Sutton *v.* Buck (1810), 2 Taunt. 302; Dowson *v.* Leake & Longster (1823), Dow. & Ry. N. P. 52; The Neptune (1833), 3 Hag. Adm. 129. **Mentd.** Copeland *v.* Stephens (1818), 1 B. & Ald. 593; Williams *v.* Bosanquet (1819), 1 Brod. & Bing. 238; Gale *v.* Burnell (1845), 7 Q. B. 850.

**260. —— —— ——.**]—Where A., the managing owner of a ship, mortgaged his share to B., who procured the transfer to be duly indorsed on the certificate of registry, but A. continued in the management as before, & B. did not take possession or interfere in the concerns of the ship:—*Held:* he was not liable for repairs & necessaries done & supplied in pursuance of A.'s orders.—BRIGGS *v.* WILKINSON (1827), 7 B. & C. 30; 9 Dow. & Ry. K. B. 871; 5 L. J. O. S. K. B. 349; 108 E. R. 036.

*Annotations:*—**Consd.** Curling *v.* Robertson (1844), 7 Man. & G. 336; Frost *v.* Oliver (1853), 2 E. & B. 301. **Refd.** Reeve *v.* Davis (1834), 1 Ad. & El. 312.

**261. —— —— Mortgagee also broker.**]—If a person, who is mtgee. as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel.—CASTLE *v.* DUKE (1832), 5 C. & P. 359; 172 E. R. 1010, N. P.

**262. —— —— Subsequent mortgagee—Repairs previously executed.**]—A subsequent mtgee. is liable for repairs previously done to the mtged. vessel.—THE SKIPWITH (1864), 10 L. T. 43; 10 Jur. N. S. 445; 2 Mar. L. C. 20.

*Annotations:*—**N.F.** The Pacific (1864), Brown. & Lush. 243. **Refd.** The Harriet (1868), 18 L. T. 804; The Two Ellens (1871), L. R. 3 A. & E. 345; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356.

**263. —— —— Sale by third party with concurrence of mortgagee—Deduction in accounting with mortgagee.**]—THE RIPON CITY, No. 274, *post.*

**264. —— Implied authority of mortgagor to create lien for repairs.**]—The mtgor. of a ship, who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs necessary to keep her seaworthy.—WILLIAMS *v.* ALLSUP (1861), 10 C. B. N. S. 417; 30 L. J. C. P. 353; 4 L. T. 550; 8 Jur. N. S. 57; 1 Mar. L. C. 87; 142 E. R. 514.

*Annotations:*—**Expld.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Apld.** Jowitt *v.* Union Cold Storage Co., [1913] 3 K. B. 1. **Consd.** Green *v.* All Motors, [1917] 1 K. B. 625. **Refd.** The Scio (1867), L. R. 1 A. & E. 353; The Harriet (1868), 18 L. T. 804; The Ripon City, [1897] P. 226.

**Dealings by mortgagor inconsistent with preservation of security.**]—*See* No. 258, *ante.*

**Ship under charterparty—Whether mortgagee bound—Security not in jeopardy.**]—*See* Nos. 267–272, *post.*

**Arrest of ship.**]—*See* Nos. 226–228, *ante.*

*(d) Where Ship Under Charterparty.*

**265. Whether mortgagee bound by charterparty—Mortgagee with notice.**]—A. took a mtge. of a ship, with a power of sale, with full notice that the ship was under contract by charterparty to carry a cargo for B. from N. to S.:—*Held:* B. was entitled to an injunction to restrain A. from doing anything to interfere with the voyage of the ship from N. to S.; B. undertaking to abide by any order the ct. might think proper to make as to damages.

Where a man had acquired property with a full knowledge of a previously existing contract, legally entered into, that that property should be used in a particular manner, the acquirer could not be allowed to apply or use the property otherwise than under the contract, or to the damage of the person with whom that earlier contract had been made (KNIGHT BRUCE, L.J.).—DE MATTOS *v.* GIBSON (1858), 4 De G. & J. 276; 28 L. J. Ch. 165; 32 L. T. O. S. 268; 5 Jur. N. S. 347; 7 W. R. 152; 45 E. R. 108, L. JJ.

*Annotations:*—**Apld.** Messageries Imperiales Co. *v.* Baines (1863), 7 L. T. 763; Adamson *v.* Gill (1868), 17 L. T. 464. **Distd.** Bucknall *v.* Tatem (1900), 83 L. T. 121. **Apprvd. & Apld.** Lord Strathcona S.S. Co. *v.* Dominion Coal Co., [1926] A. C. 108. **Refd.** Sevin *v.* Deslandes (1860), 30 L. J. Ch. 457; The Celtic King, [1894] P. 175; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683. **Mentd.** Peto *v.* Brighton, Uckfield & Tunbridge Wells Ry. (1863), 1 Hem. & M. 468; Catt *v.* Toule (1869), 4 Ch. App. 654; Greenhill *v.* Isle of Wight Newport Junction Ry. (1871), 23 L. T. 885; Montague *v.* Flockton (1873), L. R. 16 Eq. 189; Luker *v.* Dennis (1877), 7 Ch. D. 227; Piperno *v.* Harmston (1886), 3

T. L. R. 219; Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416; Davis *v.* Foreman, [1894] 3 Ch. 654; Formby *v.* Barker, [1903] 2 Ch. 539; Brigg *v.* Thornton, [1904] 1 Ch. 386; Wilkes *v.* Spooner, [1911] 2 K. B. 473; L. C. C. *v.* Allen, [1914] 3 K. B. 642; Barker *v.* Stickney, [1919] 1 K. B. 121; Macdonald *v.* Eyles, [1921] 1 Ch. 631.

**266.** —— ——.]—Pltfs. were the mtgees. of a vessel which had been chartered by her owners, the mtgors. for a succession of seasons on the St. Lawrence river with options for renewal which did not expire until 1932. Pltfs. brought an action *in rem* against the shipowners, who were in financial difficulties, claiming judgment for the validity of the mtges. & an order for the sale of the vessel by the marshal. No appearance was entered by defts. & judgment was given condemning the vessel & ordering her sale. Thereupon the charterers intervened & claimed (*a*) a declaration that the charterparty was binding on the mtgees. who had notice of its existence when the mtgees. were executed, & (*b*) an injunction to restrain pltfs. from exercising their right to an order for the sale of the vessel except subject to the terms of the charterparty. The interveners also alleged that the mtges. were invalid, whether or not the charterparty was binding on the mtgees., inasmuch as the shipowners, by reason of their financial position, were incapable of performing it, a sale at the instance of the mtgees. would not interfere with the performance of a contract which was already impossible of performance by the parties thereto; pltfs. were entitled to an order for the sale of the vessel by the marshal free from the obligations of the charterparty.—THE LORD STRATHCONA, [1925] P. 143; 95 L. J. P. 5; 133 L. T. 765; 41 T. L. R. 638; 69 Sol. Jo. 762; 16 Asp. M. L. C. 536; *subsequent proceedings*, [1926] P. 18.

**267.** —— **Mortgagor in possession—Security prejudiced by performance.**]—Under 17 & 18 Vict. c. 104, s. 70, a mtgor. of a ship, remaining in possession, retains all the rights & powers of ownership, & his contracts with regard to the ship will be valid & effectual, provided his dealings do not materially impair the security of the mtgee.; & a mtgee. will be restrained, by injunction, from interfering with the due execution of such contracts. A mtgor. in possession of a ship having entered into a beneficial charterparty, the mtgees. were restrained at the suit of the charterer from dealing with the ship in derogation of the charterparty.—COLLINS *v.* LAMPORT (1864), 4 De G. J. & Sm. 500; 5 New Rep. 177; 34 L. J. Ch. 196; 11 L. T. 497; 11 Jur. N. S. 1; 13 W. R. 283; 2 Mar. L. C. 153; 46 E. R. 1012, L. C.

*Annotations:*—**Consd.** The Innisfallen (1866), L. R. 1 A. & E. 72. **Apld.** The Fanchon (1880), 5 P. D. 173; The Heather Bell, [1901] P. 272. **Foll.** Law Guarantee & Trust Soc. *v.* Russian Bank for Foreign Trade, [1905] 1 K. B. 815. **Consd.** The Manor, [1907] P. 339; The St. George, [1926] P. 217. **Refd.** Brown *v.* Tanner (1868), 3 Ch. App. 597; The Celtic King, [1894] P. 175.

**268.** —— —— ——.]—Where shares in a ship are mortgaged, possession being retained by the mtgors., & the managing owner, duly appointed by all the co-owners, including the mtgors., charters the ship for a foreign voyage, & she loads & is about to proceed on the voyage, the mtgee., even though he takes possession of his shares before the sailing of the ship but after the making of the charterparty, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mtge. debt, provided the performance of the charterparty is not prejudicial to the security; & the ct. will, upon the application of the co-owners, release a ship so arrested, & will condemn the mtgee. arresting in costs.—THE MAXIMA (1878), 39 L. T. 112; 4 Asp. M. L. C. 21.

**269.** —— —— ——.]—THE HEATHER BELL, No. 215, *ante*.

**270.** —— —— —— **Removal of ship from jurisdiction of English courts.**]—Where a beneficial charterparty has been entered into by a mtgor. in possession of a ship the mtgee. cannot object to the charterparty being carried out simply upon the ground that the effect of carrying out the charterparty will be to remove the ship out of the jurisdiction of the ct., & to render it difficult for him to enforce his mtge. security.—THE FANCHON (1880), 5 P. D. 173; 50 L. J. P. 4; 42 L. T. 483; 29 W. R. 399; 4 Asp. M. L. C. 272.

**271.** —— —— —— **Difficulty in enforcing security.**]—THE FANCHON, No. 270, *ante*.

**272.** —— —— —— **Risk of capture by belligerent.**]—Where mtgors. in possession of a ship entered into a charterparty by which she was chartered for the carriage of contraband of war to a port of one or two belligerent states, which would involve great risk of her capture by the other belligerent, & the ship was not insured against such risks:—*Held:* the mtgees. were entitled to a declaration that the charterparty was not binding on them on the ground that it impaired the security, although the ship had sailed with her cargo on the voyage under the charterparty.—LAW GUARANTEE & TRUST SOCIETY *v.* RUSSIAN BANK FOR FOREIGN TRADE, [1905] 1 K. B. 815; 74 L. J. K. B. 577; 92 L. T. 435; 21 T. L. R. 383; 10 Asp. M. L. C. 41; 10 Com. Cas. 159, C. A.

*Annotations:*—**Refd.** The Manor, [1907] P. 339; The St. George, [1926] P. 217.

**273.** —— **Mortgagee in possession.**]—A mtgee. of a ship in possession cannot throw over a charterparty previously entered into by the mtgor.—CORY BROTHERS & CO. *v.* STEWART (1886), 2 T. L. R. 508, C. A.

*Annotations:*—**Refd.** The Heather Bell, [1901] P. 143; The Lord Strathcona, [1925] P. 143.

**274. Sum paid to cancel charter—By vendors of ship to mortgagor—Sale by vendors with consent of mortgagee—Deduction of sum paid in accounting to mortgagee.**]—The managing & majority owners of a vessel, as vendors, handed over the possession of her to a Scottish firm under a contract of sale by which the firm were to become owners of the shares in the vessel in proportion to the instalments of the purchase-money paid. The firm paid a sum on account of the purchase-money against which eight shares in the vessel were transferred to them. These shares the firm mortgaged. In working the vessel the firm incurred liabilities which, in an action *in rem* by the master, were held to have created maritime liens on her &, after entering into an onerous charter for the vessel, the firm became bkpt. The vendors resumed possession of the vessel, gave bail in the above-mentioned action, paid the amount subsequently adjudged to be due, paid a sum to cancel the charter, repaired the vessel, settled with the minority owners, &, with the acquiescence of the mtgees. of the eight shares, sold her to a foreign purchaser. In an action by the mtgees. against the vendors in respect of the distribution of the proceeds of the sale:—*Held:* as against the mtgees. the vendors could not, before dividing the purchase-money, deduct a proportion of (*a*) the sum paid to clear off the maritime liens, as there had been no request from the mtgees. & they were not at the time of the payment in possession; (*b*) the sum paid to cancel the charter, as the mtgees., not being in possession, were not liable for expenses connected with the working of the ship;

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(c) the cost of repairs, as it was not proved that they had been executed in pursuance of the agreement for the sale of the vessel to the foreign purchaser.—THE RIPON CITY, [1898] P. 78; 67 L. J. P. 30; 78 L. T. 290; 46 W. R. 586; 14 T. L. R. 219; 8 Asp. M. L. C. 391.

*Annotation:*—**Apld.** The Heather Bell, [1901] P. 143.

**275. Intervention by charterers after order for sale—Stay of sale—Security from charterers against possible loss & expenses.**]—In a mtge. action *in rem* pltfs., mtgees., in Jan. 1925, recovered judgment by default condemning the ship & ordering her sale by the marshal. Thereupon certain charterers, to whom the mtgors. had chartered the ship for a term of years, intervened, claiming (*inter alia*) a declaration that the charterparty was binding on the mtgees.; & by an order of Mar. 3, 1925, the sale of the ship stood over pending the trial of the issue, upon the interveners giving security in an amount satisfactory to the registrar for loss arising from delay & any loss on sale due to a fall in shipping values. The registrar ordered certain sums to be given, & on July 15, 1925, the judge gave judgment that pltfs. were not bound by the charterparty, that they were entitled to the judgment they had obtained, & that the costs of & occasioned by the intervention should be paid by the interveners. On Oct. 14 the ship was sold by the marshal, according to pltfs., for £20,000 less than she had been valued at nine months previously. Pltfs. accordingly took out a summons for further security:—*Held:* although judgment has been given against the interveners & they were not appealing against that decision, the matter was still at large, as they were contesting the pltfs.' claims before the registrar; accordingly the interveners could be ordered to give further security in respect of possible loss of capital & interest & for the marshal's expenses; & the case must be referred to the registrar to find what amount should be given & what was the amount of pltfs.' damages under each head.—THE LORD STRATHCONA (No. 2), [1926] P. 18; 95 L. J. P. 168; 134 L. T. 511; 17 Asp. M. L. C. 24; *previous proceedings*, [1925] P. 143.

(e) *Employment of Ship by Mortgagee.*

**276. Statutory power to use.**]—(1) *Semble:* a mtgee. of a ship has power, under 17 & 18 Vict. c. 104, s. 70, to use, as well as sell, the ship.

(2) Where a mtgee. claimed under a special contract, which did not contemplate a sale by him until two months had elapsed after a demand for payment:—*Held:* upon the construction of the agreement, & especially having regard to the circumstance that the ship would otherwise remain useless in that interval, he was at liberty to use the ship. In such a case, the circumstance of the mtgee. being registered as absolute owner is not conclusive as to the rights of the parties.—EUROPEAN & AUSTRALIAN ROYAL MAIL CO. *v.* ROYAL MAIL STEAM PACKET CO. (1858), 4 K. & J. 676; 5 Jur. N. S. 310; 70 E. R. 281.

*Annotations:*—*As to* (1) **Dbtd.** Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177. *Generally*, **Reld.** Collins *v.* Lamport (1864), 5 New Rep. 177.

**277. Where power of sale postponed.**] —EUROPEAN & AUSTRALIAN ROYAL MAIL CO. *v.* ROYAL MAIL STEAM PACKET CO., No. 276, *ante*.

**278. Must act with care & prudence.**] —The mtgees. of a ship took possession, & forthwith commenced employing her in a hazardous & speculative business. During the course of this employment, which was throughout a losing one, they put her up for sale under depreciating conditions, & no sale having been effected, continued to run her some weeks longer in a reckless manner till she was much depreciated in value, & then sold her for a small sum. The judge made a decree charging the mtgees. in account with the value of the ship & fittings at the time when they took possession of her, & placing matters on the same footing as if they had bought her at that time:—*Held:* this decree was correct.

It may be laid down . . . that if the mtgee. does take possession, he can only lawfully use the ship as a prudent man would use her, she being his own property (LORD WESTBURY, C.).—MARRIOTT *v.* ANCHOR REVERSIONARY CO. (1861), 3 De G. F. & J. 177; 30 L. J. Ch. 571; 4 L. T. 590; 7 Jur. N. S. 713; 9 W. R. 726; 1 Mar. L. C. 91; 45 E. R. 846, L. C. & L. JJ.

*Annotation:*—**Consd.** Wolff *v.* Vanderzee (1869), 17 W. R. 547.

**279. Value of ship impaired — Liability to account to mortgagor.**]—MARRIOTT *v.* ANCHOR REVERSIONARY CO., No. 278, *ante*.

**280. Right to sell in preference to employment.**] —SAMUEL *v.* JONES, No. 298, *post*.

(f) *Freight.*

*See* Part VIII., Sect. 2, sub-sect. 2, E., *post*.

(g) *Necessaries.*

**Supply of necessaries generally.**]—*See* Part IV., Sect. 2, *post*.

**281. Whether mortgagee liable — Not in possession.**]—A., the owner of a ship, executes an absolute bill of sale of it to B. & by another deed of the same date, assigns other property to B., which deed of assignment, reciting that the bill of sale was for the better securing a sum of money lent by B. to A. & also reciting a bond & warrant of attorney given by A. to B. to secure the said sum, declares that these "several deeds & instruments were made to enable B. by sale of all the things comprised in them, to raise the sum lent, without the concurrence of A., at any time before the money should be paid off"; but in the same deed there is a covenant, "That upon payment of the money, B. shall re-convey to A., but so as not to prevent B. from selling, etc., at any time before the full payment, etc." Under these conveyances, B. is not absolute owner of the ship, but only mtgee., & is not liable for necessaries provided for the ship, before he takes possession.—JACKSON *v.* VERNON (1789), 1 Hy. Bl. 114; 126 E. R. 69.

*Annotations:*—**Consd.** Briggs *v.* Wilkinson (1827), 7 B. & C. 30. **Reld.** Dowson *v.* Leake (1823), Dow. & Ry. N. P. 52; Willis *v.* Palmer (1859), 7 C. B. N. S. 340.

**282.** —— ——.]—A mere mtgee. of a ship who does not take possession is not liable for necessaries supplied for the use of the ship previous to a re-

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**PART II. SECT. 3, SUB-SECT. 3.—J. (e).**

q. *Ratification of charter of mortgagee by mortgagor.*]—APPLEBY *v.* BLACK (1885), 24 N. B. R. 598.—**CAN.**

r. *Liability for goods supplied & disbursements in foreign port.*]—Mtgees. in possession of a ship are liable to foreign merchants supplying goods & making disbursements for the ship in a foreign port, to the same extent & effect as the owners.—HAVILAND ROUTH & CO. *v.* THOMSON (1864), 3 Macph. (Ct. of Sess.) 313; 37 Sc. Jur. 147.—**SCOT.**

**PART II. SECT. 3, SUB-SECT. 3.—J. (g).**

281 l. *Whether mortgagee liable—Not in possession.*]—RUSSELL *v.* MARSHALL (1854), 2 N. S. R. (James) 330.—**CAN.**

t. —— *In possession.*]—A party made furnishings to a vessel in a home port, on the authority of the master as owner; he afterwards brought an action for the amount against the holder of a vendition in security over the vessel:—*Held:* in the circumstances, deft. had taken such possession of the vessel as to

transfer.—TWENTYMAN *v.* HART (1816), 1 Stark. 366; 171 E. R. 499.

**283.** —— ——.] — Where a tradesman gives credit for any of the requisites of the equipment of a vessel, such as stores, rigging, or repairs, the only question is, to whom the credit is given: & the mere fact of ownership, without a privity of contract, is not sufficient to render an owner liable for goods furnished on her account; nor does it attach any obligation on a mtgee., merely as such, as he derives no profit until the ship comes into his actual possession. Therefore, where the original owner had assigned all his interest in a vessel to defts. by bill of sale, & pltf. furnished sails & rigging by order of the former, to whom alone credit was given:—*Held:* pltf. could not maintain an action against defts. to recover the price of the goods.—BAKER *v.* BUCKLE (1822), 7 Moore, C. P. 349.

**284.** —— ——.]—BRIGGS *v.* WILKINSON, No. 260, *ante*.

**285.** —— **In possession — Supplied previous to mortgage.**]—BRIGHT *v.* FLEMING (1868), cited in L. R. 2 A. & E. at p. 72; 37 L. J. Adm. at p. 62.

*Annotation:*—**Refd.** The Feronia (1868), L. R. 2 A. & E. 65.

**286.** —— —— ——.] — Bunker coal was supplied in this country to a British ship on the personal credit of her owners, a limited co. registered & having its office in England. The vessel left in ballast for the river Plate, &, her owners having become involved in financial difficulties, mtgees. took constructive possession of her when about to return with a valuable cargo. During the homeward voyage a quantity of the coal was consumed, &, on the arrival of the vessel in this country, the freight was collected by a receiver appointed by the ct., the net proceeds, less necessary disbursements, being paid into ct. On the application of the mtgees. for payment out to them of the freight in ct., the vendor of the coal claimed a deduction in his favour on the ground that the coal had been used in earning the freight:—*Held:* the mtgees. in possession were entitled to an order for payment out to them of the balance of the freight in ct. without any deduction on account of the coal consumed, for, though the coal was used in earning the freight, it was coal which had been sold to & was the property of the mtgors., &, therefore, claimant, the unpaid vendor, had no interest in the coal or in the freight.—EL ARGENTINO, [1909] P. 236; 78 L. J. P. 102; 101 L. T. 80; 25 T. L. R. 518; 11 Asp. M. L. C. 280.

**287.** —— —— **Transferee of mortgagee.**] — In a cause of necessaries the transferee of a mtge., though in possession of a ship when the necessaries are supplied is not liable for them unless the master in ordering them was acting as his agent. Where in an article of the reply by pltfs. to deft.'s answer it was left open whether the person in possession of the ship when the necessaries were supplied was the original mtgee., or deft., the transferee of the mtge., the article was held bad on the ground of vagueness. An allegation that deft. was in possession at the date of the supply, & was responsible for the master's orders, & personally liable for the supplies, is not a good reply to deft.'s answer claiming to be a mtgee. prior to the date of supply.—THE TROUBADOUR (1866), L. R. 1 A. & E. 302; 16 L. T. 156; 2 Mar. L. C. 475.

*Annotations:*—**Consd.** Johnson *v.* Black, The Two Ellens (1872), L. R. 4 P. C. 161. **Refd.** The Heinrich Bjorn (1885), 10 P. D. 44.

(*h*) *Priorities.*

*See* Sub-sect. 3, K., *post*.

(*i*) *Sale.*

*See* 1894 Act, s. 35.

**288. Statutory power of sale.**] — EUROPEAN & AUSTRALIAN ROYAL MAIL CO. *v.* ROYAL MAIL STEAM PACKET CO., No. 276, *ante*.

**289. Limitation of power by mortgage deed — Public auction.**]—A vessel was mortgaged for a nominal sum to secure an unascertained balance due to the mtgee., with power to sell by public auction; & in case the vessel could not be sold, the mtgee. was to hold, enjoy & possess the free use, control, & possession thereof as sole owner, until the full amount of his claims should be satisfied. Default was made in payment of the sum named before the real balance was ascertained, & pending the investigation thereof before arbitrators, & the mtgee. caused the vessel to be sold by private contract:—*Held:* such sale was wrongful, & not warranted by the conditions of the mtge. deed, & an account of the value of the ship at the time of such sale ordered to be taken, & the amount thereof paid to the mtgee.—BROUARD *v.* DUMARESQUE (1841), 3 Moo. P. C. C. 457; 13 E. R. 186, P. C.

**290. Whether mortgagee allowed to bid.**] — Mtgee. of the vessel sold by decree of ct. allowed to bid as a purchaser when the ship was put up for sale.—THE WILSONS (1841), 1 Wm. Rob. 172; 7 L. T. 286; 166 E. R. 537.

*Annotation:*—**Refd.** The Iodine (1844), 3 Notes of Cases, 140.

**291. Surplus after sale — Duty to account to subsequent mortgagees.**]—A., the first mtgee. of a ship, with the sanction & authority of B., the second mtgee., sold it & received the proceeds, which exceeded the amount due to him:—*Held:* A. was accountable to B. in the character of trustee.—TANNER *v.* HEARD (1857), 23 Beav. 555; 29 L. T. O. S. 257; 3 Jur. N. S. 427; 5 W. R. 420; 53 E. R. 219.

*Annotations:*—**Distd.** Banner *v.* Berridge (1881), 18 Ch. D. 254. **Mentd.** Charles *v.* Jones (1887), 35 Ch. D. 544; Williams *v.* Jones (1911), 55 Sol. Jo. 500.

**292.** —— —— **Express or constructive trust — Statute of Limitations.**]—The second mtgee. of a ship claimed an account against the first mtgee., who had sold the vessel upon the mtgor. becoming bkpt. Deft. offered to pay a specific amount. The action having been commenced more than six years, after the sale, deft. pleaded above Act. Pltf. set up an express trust as a bar to above Act:—*Held:* there was no express trust; in case of an ascertained surplus the first mtgee. might be constructively a trustee of the surplus, but after

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render him liable for the amount.—RUSSELL *v.* WILLIAM BAIRD & CO. (1839), 1 Dunl. (Ct. of Sess.) 931.—**SCOT.**

a. —— *For goods supplied prior to mortgage.*]—NELSON *v.* WIGLE (1885), 8 O. R. 82.—**CAN.**

b. —— *For repairs.*]—The mtgees. of a ship are not, as owners, liable for her repairs.—HARRIES *v.* HANDY (1851), 3 Ir. Jur. 290.—**IR.**

c. —— *When registered as owner.*] —A party holding an *ex facie* absolute vendition to a vessel, & being the sole owner appearing on the register, but under a latent obligation to reconvey on receiving payment of a loan, is liable for furnishings made to the vessel.—M'LAREN *v.* BUIK (1829), 7 Sh. (Ct. of Sess.) 483; 4 Fac. Coll. 629.—**SCOT.**

**PART II. SECT. 3, SUB-SECT. 3.—J. (i).**

d. *Statutory power of sale—Whether barred by attachment on behalf of rights of mortgagor.*]—An attachment on behalf of the rights of the mtgor. of a ship will not debar the mtgee. from his power of sale under Merchant Shipping Act.—AHMED MAHOMED *v.* AUHIN (1884), 1 Ind. Jur. N. S. 95.—**IND.**

e. *Improper sale — Fictitious sale to clerk of mortgagee—Liability of mortgagee to account.*]—KENNEDY *v.* NEALIS (1897), 1 N. B. Eq. Rep. 455.—**CAN.**

f. *Purchase by trustee for mortgagee.*]—Pltfs., who were mtgees. of a vessel, in exercise of a power of sale

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six years evidence could not be adduced to prove a surplus; but although above Act was not avoided on the ground of express trust, it was in this case void by an acknowledgment within six years of an unsettled account pending, which by itself would have sufficed, & also by a promise to pay what should be found due. Pltf. was therefore entitled to an account.

Where the mtgee. of his own mere motion realised the mtged. property, he was held not to be entitled to interest in lieu of notice.—BANNER *v.* BERRIDGE (1881), 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. L. C. 420.

*Annotations:*—**Refd.** The Benwell Tower (1895), 72 L. T. 664. **Mentd.** Dooby *v.* Watson (1888), 39 Ch. D. 178; Firth *v.* Slingsby (1888), 58 L. T. 481; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Price *v.* Phillips (1894), 13 R. 191; Friend *v.* Young, [1897] 2 Ch. 421; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; Kessisoglu *v.* Balli (1903), 47 Sol. Jo. 738.

**293. Sale interfering with existing charterparty—Restraint by injunction.**]—DE MATTOS *v.* GIBSON, No. 265, *ante*.

**294.** ——.]—THE CELTIC KING, No. 96, *ante*.

——.]—*See, also*, No. 275, *ante*.

**295. Proviso postponing power of sale—Whether invalidating mortgage.**]—Claimant, upon an interpleader summons in the county ct. as to his alleged title to a ship seized in execution upon a judgment against the registered owner, proved a previous mtge. of the ship to him by such owner for a loan, with a proviso in the mtge. postponing until a date subsequent to the seizure of the ship the power of sale vested in the mtgee. by Merchant Shipping Act, 1854 (c. 104), s. 11, & that such mtge. was recorded in the register book of the port of the ship's registration in the form prescribed by sect. 66 of the same statute; but it also appeared that there was no indorsement made on the certificate of registry according to the requirements of 4 Geo. 4, c. 41, ss. 35, 43 & of 3 & 4 Will. 4, c. 55, ss. 34, 42:—*Held:* the mtge. was not invalid either as a fraud against creditors, or as not being according to 17 & 18 Vict. c. 104, on the ground of the postponement of the power of sale.—DICKINSON *v.* KITCHEN (1858), 8 E. & B. 789; 120 E. R. 293; *sub nom.* KITCHEN *v.* IRVINE, 28 L. J. Q. B. 46; 5 Jur. N. S. 118.

*Annotations:*—**Consd.** The James W. Elwell, [1921] P 351 **Refd.** The Feronia (1868), L. R. 2 A. & E. 65; Keith *v.* Burrows (1876), 1 C. P. D. 722.

**296. Injunction restraining sale—Undertaking for damages given—Measure of damages—What matters considered.**]—DE MATTOS *v.* GIBSON, No. 217, *ante*.

**297. Improper sale—No sum due to mortgagee—Liability to account.**]—A merchant of Gibraltar acted as agent for L., a merchant in Liverpool, & also for M., another merchant in the same place, L. & M. having also dealings together. The Gibraltar merchant was accustomed to send to L. monthly accounts of sales of coal which L. had sent to Gibraltar, giving him credit for the proceeds, & debiting him with commission & other expenses. In 1854 L. applied to M. to make him advances, which he agreed to do, provided L. would give orders to the Gibraltar merchant to remit him out of the proceeds of the sale of L.'s coals the sums he might advance. The Gibraltar merchant having a general account with M., instead of actually remitting these advances to him, entered to his credit the amount which he was instructed from time to time by L. to remit, & in the course of his business remitted bills to M. for collection, etc., including some drawn on L. In Mar. 1856, M. requiring further security for any future advances he might make, L. gave him a mtge. on a ship for them, he having previously given him security on the same ship for two sums, which had at different times been advanced to him. In Aug. 1856, L. assigned the equity of redemption in the ship to pltf., & on Sept. 2, following he became bkpt. On Sept. 4, pltf. sent to Gibraltar to take possession of the ship, tendering to M. £900, being the amount he thought due to him.

The ship, which had previously been advertised for sale, was sold to defts., who were registered as owners. Some of the bills drawn by the Gibraltar merchant on L. & remitted to M. were dishonoured, but the amounts credited to M. by the Gibraltar merchant remained undiminished & undisturbed. Upon pltf. filing his bill to have the sale of the ship set aside, & for an account:—*Held:* M. was not justified in selling the ship on Sept. 19, as nothing was due to him at that time beyond the £900; he was, therefore, liable to pay pltf. the then value of the ship beyond that sum.—M'LARTY *v.* MIDDLETON (1861), 4 L. T. 852; 9 W. R. 861; 1 Mar. L. C. 114; *affd. sub nom.* MCCLARTY *v.* MIDDLETON (1862), 10 W. R. 219, L. JJ.

**298. Sale in preference to employment of ship—Mortgagee's right to.**]—A. mtgee. of a ship had a power of sale by his security. The ship subsequently arrived at Glasgow, & the mtgee. advertised her for sale by public roup in Scotland. An interdict of the Scottish ct. was obtained to suspend the sale. In the meantime the parties claiming other interests in the ship, proposed to the mtgee. to enter into a charterparty for a voyage of the ship, pending the disputes which had arisen. The mtgee. refused to enter into such charterparty. The ship afterwards arrived, & was then, at Liverpool:—*Held:* (1) the mtgee. had a clear right to refuse, as being a speculation which could not be imposed upon him; (2) the interdict having thrown a cloud upon the mtgee.'s title, he was entitled to a decree for a sale, & an account as against all parties claiming interests in the ship.

(3) By Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 3, the ct. has jurisdiction over all equitable rights & claims of owners & mtgees. of ships.—SAMUEL *v.* JONES (1862), 7 L. T. 760; 1 Mar. L. C. 282.

**299. Sale by mortgagee of shares.**]—THE FAIRLIE (1868), 37 L. J. Adm. 66.

**300. Commission in sale—Whether allowed.**]—THE BENWELL TOWER, No. 308, *post*.

**301. Sale free from obligation of charter party—Charter party impossible of performance.**]—THE LORD STRATHCONA, No. 266, *ante*.

### *K. Priorities.*

#### *(a) As between Mortgagees.*

*See* 1894 Act, s. 33.

**302. First mortgagee a witness to second mortgage.**]—Where a first mtgee. is a witness to the second mtge., though no actual proof of his knowing the contents thereof, yet since the

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contained in their security on default of payment, sold the interest of their debtor by auction, when the same was bought by one who held it in trust for the mtgees.:—*Held:* the effect of such sale & purchase was, that pltfs. remained mtgees. only of the interest so sold.—MERCHANTS BANK *v.* GRAHAM (1880), 27 Gr. 524.—CAN.

*g. Duty of mortgagee to pay off prior claims before sale.*]—As possession ought to be given, pltfs. should, before the date of sale, pay all claims against deft. ship having priority over their claim.—IMPERIAL TRUSTS CO. *v.* THE LEQUESNOY & NOVA SCOTIA TRANSPORTATION CO., LTD. (1921), 20 Exch. C. R. 486.—CAN.

presumption is that he might have known the same, this shall postpone him.

Mtgee. of a ship, by deed intrusts the mtgor. with the original bill of sale, & the mtgor. indorses thereon subsequent mtges. or bills of sale of several parts of the ship, & mtgee. acquiesces; this is evidence of an assent in such mtgee., & shall therefore postpone him.—MOCATTA *v.* MURGATROYD (1717), 1 P. Wms. 393; 24 E. R. 440, L. C.

*Annotations:*—**Mentd.** Digby *v.* Craggs (1763), 2 Eden, 200; Beckett *v.* Cordley (1784), 1 Bro. C. C. 353; Plumb *v.* Fluitt (1791), 2 Anst. 432; Toulmin *v.* Steere (1817), 3 Mer. 210; Allen *v.* Wedgwood (1845), 4 L. T. O. S. 492; Watts *v.* Symes (1851), 1 De G. M. & G. 240; Stevens *v.* Mid-Hants Ry., London Financial Assocn. *v.* Stevens (1873), 8 Ch. App. 1064; Adams *v.* Angell (1877), 5 Ch. D. 634; Manks *v.* Whiteley, [1911] 2 Ch. 448.

**303. Mortgagee parting with title deeds — To mortgagor—Subsequent mortgages created—Knowledge of first mortgagee.**]—MOCATTA *v.* MURGATROYD, No. 302, *ante*.

**304. Mortgage by bonds — Not being maritime bottomry bonds.**]—MACKENZIE *v.* OGILVIE (1774), Burrell, 134.

**305. Mortgagee without notice of prior incumbrance—At time of advance—Subsequent notice by prior incumbrancer.**]—The owner of a vessel made a mtge. of it & of the cargo, in London, to A., whilst the vessel was on a whaling voyage to the South Seas, subject to two prior mtges. thereof, & the third mtgee. forthwith gave notice of his mtge. to the two prior incumbrancers. The master of the vessel afterwards, putting into Sidney, transhipped the oil taken in the voyage to another vessel, consigned to consignees in London, who honoured his bill of exchange on them upon having a lien on the consignment. The mtgor. induced B. to advance him £1,000 on a mtge. of the cargo so transhipped & consigned, without notice of any other charge thereon, except the lien of the consignee. B. gave notice of his mtge. to the consignee. A., as soon as he knew of the consignment, but subsequent to B.'s notice, gave notice to the consignee of the mtge. to him; & after such notice the consignee, after satisfying his own lien, paid over the balance of the proceeds of the oil to B.:—*Held:* A., having done all he could do towards possession, was entitled to priority over B.—FELTHAM *v.* CLARK (1847), 1 De G. & Sm. 307; 63 E. R. 1080.

**306. Registered mortgage—Unregistered further charge.**]—The owner of a ship mortgaged it with power of sale, to A. B., a partner of C. D. & co., for money due to the firm, & the same was duly registered under 3 & 4 Will. 4, c. 55. Afterwards he executed a further charge to A. B. for money owing from himself or from him & his partners, from time to time, to the firm of C. D. & co., however that firm should be constituted, but it was not registered. He then executed a further charge in favour of other persons, who registered their security:—*Held:* the unregistered further charge was inoperative.—PARR *v.* APPLEBEE (1855), 7 De G. M. & G. 585; 24 L. J. Ch. 767; 26 L. T. O. S. 45; 3 W. R. 645; 44 E. R. 228, L. JJ.

**307. —— Second mortgage — Further advance on freight by first mortgagee—No notice of second mortgage.**]—The first registered mtgee. of a ship made a further advance on the security of a mtge. comprising the ship & the freight thereof then earned or to be earned during the continuance of the security. Prior to the date of this further advance, the mtgor. had executed a second mtge. of the ship, & had given the second mtgee. a lien on the freight for a balance due to him. The first mtgee. had no notice of this second mtge., or of the lien on the freight, at the time of making the further advance. The second mtgee. completed his title by giving the charterers notice in writing of his lien on the freight. The first mtgee. subsequently took possession of the ship before she reached her port of discharge, & continued in possession till the ship was sold:—*Held:* the first mtgee. was entitled to priority over the charge of the second mtgee. of the freight, not only in respect of the amount due on his first mtge., but also in respect of the whole amount of his further advance, together with interest & costs.—LIVERPOOL MARINE CREDIT CO. *v.* WILSON (1872), 7 Ch. App. 507; 41 L. J. Ch. 798; 26 L. T. 717; 20 W. R. 665; 1 Asp. M. L. C. 323, L. JJ.

*Annotations:*—**Consd.** The Benwell Tower (1895), 72 L. T. 664. **Reid.** Keith *v.* Burrows (1876), 1 C. P. D. 722; Shillito *v.* Biggart, [1903] 1 K. B. 683. **Mentd.** Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824.

**308. —— —— —— With notice.**]—On Oct. 28, 1892, S. being the registered owner of the B., executed a mtge. to the M. co., which recited that they had accepted drafts of S.'s firm for £20,000, & might make further advances from time to time to S. or on account or to order of him or his firm, & in order to secure to the M. co. payment in cash upon demand of the advances, & any renewals of same, & any further or other payments or claims of any description which might be due or growing due, by S. or his firm to them on any account, S. covenanted to pay them the sums for the time being due on the mtge. whether by way of principal or interest; & for the purpose of better securing to them "the payment of such sums as last aforesaid," he mortgaged the ship B. This mtge. was registered as a mtge. to secure an account current on the day it was executed. On the same day S., by letter, requested the M. co. to make him advances by acceptances, &, as security for same & any other advances whatsoever present or future, said he had mortgaged or would mortgage the B. It was part of the arrangement that the amount covered by the bills should be reduced at the end of every six months. On Apr. 20, 1893, S. failed to make the due reduction. On May 15, he granted a second mtge. on the B. to T., which was registered on May 30. On Sept. 1, he, in consideration of a further advance, hypothecated to the M. co. an equal amount of the freight of the ship, which was then chartered to load a general cargo. He directed his agents at the port of discharge to pay that proportion of freight to the M. co., notice being given to T. He subsequently executed an assignment of the freight to the M. co. to secure advances for necessary disbursements. T. transferred their mtge. to pltf., on whose behalf an attachment was placed upon the freight. The ship was sold by the M. co., under their power of sale, & they paid themselves their advances under the first mtge. They further claimed out of the proceeds of the sale the subsequent advances by the assignment. Before making the further advances the M. co. had notice of the second mtge.:—*Held:* the last advances were covered by the first mtge., but the M. co. were not entitled to payment out of the proceeds of the ship in priority to the claim of pltf. as assignee of T.

The general principle that a first mtgee. whose mtge. is taken to cover future advances cannot claim in priority over a second mtgee. the benefit of advances made after he had notice of the second mtge., applies to the registered mtges. of ships, notwithstanding Merchant Shipping Act, 1854 (c. 104), s. 69. Where priorities depend, not upon the dates of the instruments, but upon a state of facts wholly independent of the dates of the instruments, that sect. does not apply.

The M. co., although they arrested the ship, did not take possession of her before the freight was paid:

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 3, K. (a) & (b) i., ii., iii. & iv.*]

—*Held:* they were not liable to account for the freight as mtgees. in possession. Having received it as assignees of freight they were entitled to it as against the second mtgees., although the assignment was made after notice of the second mtge.

Commission of 2½ per cent. charged by the mtgees. as part of the expense of the sale of the ship disallowed; it being an established principle that a mtgee. conducting a sale under his power of sale is so far in the position of a trustee that he can make no charge for his trouble in connection with the sale. No agreement between the parties can render such a charge valid.

Commission of 2 per cent. in respect of cash advances stipulated by letter allowed, on the ground that the letters created a valid collateral agreement, which was not void because not in the statutory form, or as clogging or otherwise affecting the redemption.—THE BENWELL TOWER (1895), 72 L. T. 664; 8 Asp. M. L. C. 13.

**309. —— Unregistered prior mortgage — Mortgagee with notice.**]—The registry is conclusive as to the ship being in a fit state to be registered under 8 & 9 Vict. c. 89, although there may be evidence to show that the ship was not completed at the time of the registry.

The registry is conclusive evidence of the title, & an indorsement on that registry good against a prior equitable mtgee., although the party subsequently obtaining registry of his incumbrance had full notice of the prior charge.—COOMBES *v.* MANSFIELD (1855), 3 Drew. 193; 3 Eq. Rep. 566; 24 L. J. Ch. 513; 25 L. T. O. S. 29; 1 Jur. N. S. 270; 3 W. R. 345; 61 E. R. 877.

**310. —— Prior equitable charge—Notice of charge.**]—Although equitable interests in ships are recognised, a legal mtge. of a ship, in statutory form & registered, has priority over an equitable charge previously given, even where the legal mtgee. takes with notice of the charge.—BLACK *v.* WILLIAMS, [1895] 1 Ch. 408; 64 L. J. Ch. 137; 43 W. R. 346; 11 T. L. R. 77; 2 Mans. 86; 13 R. 211.

*Annotations:*—**Reld.** The Benwell Tower (1895), 72 L. T. 664; Barclay *v.* Poole, [1907] 2 Ch. 284.

**311. Discharge of first mortgage — Purported revival by note on register—Priority as against second mortgagee.**]—A. mortgaged a ship for £1,200 to B., who transferred the mtge. to C. A. then executed a second mtge. for £400. B. afterwards paid off C. & C. signed a statutory receipt, instead of a re-transfer. This receipt was produced to the registrar, who made an entry in the register book, under Merchant Shipping Act, 1854 (c. 104), s. 68, to the effect that the mtge. had been discharged. C. afterwards executed a deed purporting to be a retransfer of the £1,200 mtge. to B., which was registered, & at the same time a note was made by the registrar against the entry of the receipt, stating that the receipt was signed in error, & the mtge. was afterwards again transferred to C., to secure a balance on account current, & this deed remained in C.'s hands, after satisfaction of all that was due on the account. B. then took a fresh mtge. from A. for £2,500, which included the £1,200 & £400 & had since been transferred to pltf. After the new mtge., B. agreed with C. that the mtge. for £1,200 should be a security for advances on an account current. The transfer of the mtge. to pltf. was not registered until after this agreement. Upon a question of priority between C. & pltf.:—*Held:* the receipt with the entry on the register operated as a discharge of the first mtge., & the same could not afterwards be revived by the note made by the registrar.—BELL *v.* BLYTH (1868), 4 Ch. App. 136; 38 L. J. Ch. 178; 19 L. T. 662; 17 W. R. 194; 3 Mar. L. C. 182, L. C. & L. J.

*Annotation:*—**Mentd.** Fourth City Mutual Benefit Bldg. Soc. *v.* Williams, Marson *v.* Cox (1879), 14 Ch. D. 140.

**312. Priorities dependent on state of facts—Not on date of instruments.**]—THE BENWELL TOWER, No. 308, *ante*.

*(b) As between Mortgagee and Third Parties.*

*i. In General.*

**313. Party paying ransom money — Capture during hostilities.**]—HOPE *v.* WINTER (1710), 2 Eq. Cas. Abr. 690; 22 E. R. 580.

**314. Claimant for wages.**] — A bottomry bond holder had advanced money *bonâ fide*, but with knowledge of a previous mtge. of the ship & of all the other circumstances; the bond was executed by the exor. of deceased sole owner, who had already made the necessary advances, & who had himself ample credit, & by the master who had been appointed by such exor.; the bond, opposed by mtgees., pronounced against, without costs.

It [the bond] can only be defeated by a claim for wages or by a bottomry bond executed by a master in case of absolute necessity—strict necessity arising on a voyage (SIR JOHN NICHOLL). —THE DUNVEGAN CASTLE (1836), 3 Hag. Adm. 331; 166 E. R. 428.

**315. ——.**]—THE PRINCE GEORGE, No. 807, *post*.

**316. Persons having liens—Subsequently accruing.**] — Assignees of a bkpt. shipowner have a *persona standi* to appear for the benefit of the general estate, & contest the appropriation of the proceeds, against the assignees of the freight, seeking to make the ship alone liable in the first instance. Parties taking an assignment of a ship or freight as security for a debt take such security liable to subsequently accruing liens, viz. bottomry bonds, salvage, wages, etc. Claim of a bondholder, for the payment of his bond, directed to be satisfied out of the proceeds of the ship & the freight *pro rata*. Same principle applied to claims under a judgment of the ct. for pilotage, towage, & mariners' wages.—THE DOWTHORPE (1843), 2 Wm. Rob. 73; 2 Notes of Cases, 264; 7 Jur. 609.

*Annotations:*—**Distd.** The Fortitude (1843), 2 Wm. Rob. 217. **Consd.** Place *v.* Potts (1853), 8 Exch. 705; The Priscilla (1859), Lush. 1; The Ambatielos, The Cephalonia, [1923] P. 68. **Reld.** The Mary Ann (1845), 9 Jur. 94; The Constancia (1846), 4 Notes of Cases, 512; The Harriet (1868), 18 L. T. 804; The Montrosa, [1917] P. 1.

**317. —— Legal liens.**] — THE ROYAL ARCH, No. 1230, *post*.

**318. Party attempting to obtain new register—With view to defeat mortgage.**]—LEE *v.* REID (1842), 7 L. T. 24.

**319. Salvage.**]—THE DOWTHORPE, No. 316, *ante*.

**320. Wages.**]—THE DOWTHORPE, No. 316, *ante*.

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**PART II. SECT. 3, SUB-SECT. 3.—K. (a).**

**309 i.** *Registered mortgage—Unregistered prior mortgage—Mortgagee with notice.*]—JARDINE *v.* HOYT (1871), 2 V. R. (Eq.) 152.—**AUS.**

**PART II. SECT. 3, SUB-SECT. 3.—K. (b) i.**

**h.** *Lien holder.*]—The mtgee. of a ship who takes possession under his mtge. before the institution of an action *in rem* for the recovery of a claim which constitutes a maritime lien, does not thereby become a subsequent purchaser, within Maritime Court Act, s. 14 (5), as against the lienholder although the lien may have arisen since the date of the mtge. In such an action the lien holder is

**321. Simple contract creditor.**]—A simple contract creditor not permitted to have his asserted debt paid out of the proceeds of a ship which had been found derelict, & had been sold under the decree of the ct., the application being resisted by the mtgees. of the vessel, who claimed the proceeds in question in satisfaction of their mtge. Proceeds directed to be paid out to the mtgees.—THE NEW EAGLE (1846), 2 Wm. Rob. 441; 4 Notes of Cases, 426; 10 Jur. 623.

*Annotation:*—**Consd.** The Petone, [1917] P. 198.

ii. *Assignee of Freight.*

*See* Part VIII., Sect. 3, sub-sect. 2, E. & G., *post.*

iii. *Bottomry Bond Holders.*

**322. Whether mortgagee entitled to priority.**]—A monition, to bring in freight, refused to a mtgee. of a ship, the ship having been sold to defray a bottomry bond secured upon ship & freight, & where a warrant of arrest had been served upon the freight at the suit of the bondholder, & there were owners before the ct.:—*Held:* the mtgee. could not bar payment of the bond out of the proceeds of the ship, until the freight was in the registry.—THE PERCY (1837), 3 Hag. Adm. 402; 3 L. T. 825.

*Annotations:*—**Expld.** The Dowthorpe (1843), 2 Wm. Rob. 73; The Fortitude (1843), 2 Wm. Rob. 217.

**323.** ——.]—THE ROYAL ARCH, No. 1230, *post.*

**324.** —— **Execution in case of absolute necessity.**]—THE DUNVEGAN CASTLE, No. 314, *ante.*

**325.** ——.]—THE DOWTHORPE, No. 316, *ante.*

**326.** —— **Right to impeach validity of bond.**]—THE LOCHIEL, No. 1229, *post.*

**327.** —— ——.]—THE MARY ANN, No. 1221, *post.*

**328.** —— ——.]—(1) Suit between mtgees. of the vessel & subsequent purchaser. Replication by the mtgees. that a bottomry bond had been fraudulently executed by the co-operation of the bondholder & the master, with a view to a sale of the vessel under the decree of a Vice-Admlty. Ct., & that these facts were fraudulently suppressed from the Ct. on the application for a decree of sale. *Semble:* such facts, if proved, would be sufficient to invalidate the sale.

(2) *Semble:* under such circumstances, a decree of sale fraudulently obtained in order to pay a valid bottomry bond would be invalid.—THE JUSTYN (1862), 6 L. T. 553; 1 Mar. L. C. 225.

iv. *Judgment Creditors.*

**329. Whether mortgagee has priority — Mortgage alleged a fraud against creditors—Irregularities in mortgage deed.**]—DICKINSON *v.* KITCHEN, No. 295, *ante.*

—— **Seizure under writ of fieri facias.**]—*See* EXECUTION, Vol. XXI., pp. 489–490, Nos. 677–680.

**330. Foreign creditors—Proceedings for sale in foreign court.**]—The owner of a ship mortgaged her, while on her outward voyage, to pltfs. He directed the consignees at New Orleans to advance what was necessary for her; & they having learned that he had become bkpt., & having previously made large advances for him, caused an attachment to be issued, & the ship was sold for one-fourth of her value in pursuance of an order made by the district ct. at Louisiana, although the judge of that ct. had previously ordered that six months' time should be allowed for the owner's counsel to communicate with him:—*Held:* the sale was fraudulent, & pltfs. as mtgees. were entitled to recover the ship in an action of trover on her arrival in this country.—BLAND *v.* LYNAM (1827), 5 L. J. O. S. C. P. 87.

**331.** —— ——.]—A. & B. were mtgees. of an English ship. The ship was attached in a foreign port by creditors of D., the registered owner, & proceedings were had in the ct. there for the sale of the ship. The agents of A. & B. intervened in these proceedings to protect the rights & assert the claims of A. & B. as mtgees. The ct. there refused to take notice of the claim as mtgees., as by the law of the state a mtge. of chattels was invalid. The ship was ordered to be sold. It finally arrived in a British port. Thereupon pltfs. as mtgees. filed their bill to confirm the mtge., & for the usual directions:—*Held:* the judgment of the foreign law ct. was not binding on the courts in England, the *lex loci contractus* being ignored by that ct.; pltfs. not having originated proceedings in the foreign law ct., but, on the contrary, their title being wholly denied by it, they were not estopped from proceeding here.—SIMPSON *v.* FOGO (1860), 1 John. & H. 18; 29 L. J. Ch. 657; 6 Jur. N. S. 949; 8 W. R. 407; 70 E. R. 644; *sub nom.* LIVERPOOL BANK *v.* FOGGO, 2 L. T. 594; *subsequent proceedings, sub nom.* SIMPSON *v.* FOGO (1863), 1 Hem. & M. 195.

*Annotations:*—**Consd.** Liverpool Marine Credit Co. *v.* Hunter (1868), 3 Ch. App. 479; Castrique *v.* Imrie (1870), L. R. 4 H. L. 414. **Refd.** London & Mediterranean Bank *v.* Strutton (1869), 21 L. T. 415; Schibsby *v.* Westenholz (1870), L. R. 6 Q. B. 155; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600. **Mentd.** Colliss *v.* Hector (1875), L. R. 19 Eq. 334; *Re* Kloebe, Kannreuther *v.* Geiselbrecht (1884), 54 L. J. Ch. 297.

**332.** —— ——.]—A ship, the property of British subjects, was duly mortgaged, in Great Britain, to other British subjects, & being in the mtgor.'s possession, proceeded to New Orleans. Whilst there it was attached by creditors of the mtgors., resident in New Orleans, &, after due intervention & hearing of the British mtgees., before & by the cts. of Louisiana, sold under process of the ct. to satisfy the attaching creditors, to a British subject, who had notice of the mtgees.' intervention. On a bill by the mtgees. against the purchaser:—*Held:* the sale was subject to the right of the mtgees.—SIMPSON *v.* FOGO (1863), 1 Hem. & M. 195; 1 New Rep. 422; 8 L. T. 61; 9 Jur. N. S. 403; 11 W. R. 418; 1 Mar. L. C. 312; 71 E. R. 85.

*Annotations:*—**Consd.** The Halley (1868), L. R. 2 P. C. 193; Liverpool Marine Credit Co. *v.* Hunter (1868), 3 Ch. App. 479; Castrique *v.* Imrie (1870), L. R. 4 H. L. 414; Aksionairnoye Obschestvo Luther *v.* Sagor, [1921] 3 K. B. 532. **Refd.** Schibsby *v.* Westenholz (1870), L. R. 6 Q. B. 155; Taylor *v.* Ford (1873), 22 W. R. 47; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600; *Re* Queensland Mercantile & Agency Co., *Ex p.* Australasian Investment Co., *Ex p.* Union Bank of Australia, [1892] 1 Ch. 219. **Mentd.** *Re* Kloebe, Kannreuther *v.* Geiselbrecht (1884), 54 L. J. Ch. 297; Voinet *v.* Barrett (1885), 54 L. J. Q. B. 521.

preferred to the mtgee.—SYLVESTER *v.* THE GORDON GAUTHIER (1895), 4 Exch. C. R. 354.—**CAN.**

k. *Last "fitter out."*]—GAGNON *v.* TREMBLAY (1899), Q. R. 15 S. C. 403.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 3.—K. (b) iv.**

l. *Right of registered mortgagee to oppose sale by creditor.*]—The sale of a merchant vessel by a creditor may be opposed by any previous registered mtgee., unless the leave of the court has been obtained.—ROSS *v.* SMITH & CANTIN (1879), 2 L. N. 362; 23 L. C. J. 309.—**CAN.**

m. *Priority of unregistered mortgage.*]—Ships being specially exempted from the operation of Bills of Sale Acts, & there being no provision in Merchant Shipping Act penalising neglect to register a mtge., on a ship, an execution creditor cannot seize & sell in priority to an unregistered mtge.—IMPERIAL TIMBER & TRADING CO., LTD. *v.* HENDERSON (1909), 14 B. C. R. 216; 10 W. L. R. 595.—**CAN.**

n. *Arresting creditor — Priority over*

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 3, K. (b) iv., v., vi. & vii.*]

**333. British creditors in foreign port—Mortgage of ships not recognised—Bond by mortgagee to protect ship from sale—Action to restrain creditors suing on bond.**]—A British ship, mortgaged in England by a British subject to British subjects, was arrested at New Orleans by creditors of the mtgor., also British subjects resident in England, & as the cts. of New Orleans do not recognise such mtges. of ships, the mtgees., in order to protect the ship from sale gave bonds for the amounts claimed by creditors. The mtgees. afterwards filed a bill to restrain creditors from suing on these bonds:—*Held:* though the decisions of the cts. of New Orleans might be open to the reproach of injustice, yet as creditors owed no duty to the mtgees., & had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained.—LIVERPOOL MARINE CREDIT CO. *v.* HUNTER (1868), 3 Ch. App. 479; 37 L. J. Ch. 386; 18 L. T. 749; 16 W. R. 1090; 3 Mar. L. C. 128, L. C.

*Annotations:*—**Apld.** *Re* Maudslay & Field, Maudslay *v.* Maudslay & Field, [1900] 1 Ch 602. **Consd.** Republica de Guatemala *v.* Nunez, [1927] 1 K. B. 669.

**334. —— Judgment by default in England rendered executory abroad—Intervention by mortgagees—Actions against creditor & mortgagor for declaration of right as to privilege.**]—Pltfs. mtgees. of a British ship, on default in payment of the mtge. money, took possession of the vessel & chartered her for a voyage to a French port. On arrival there the vessel & her freight were arrested by defts., British subjects, claiming as creditors of the mtgors. for necessaries supplied to the ship, & in respect of which they had rendered "executory" in France a judgment obtained by default in England. The mtgees. intervened in the proceedings in France, & for the purpose of assisting them in those proceedings they commenced separate actions against defts., the necessaries men, & defts., the mortgagors, asking, under R. S. C., 1883, Ord. XXV., r. 5, for declaratory judgments that they as mtgees. in possession were entitled to the ship & her freight in priority to the necessaries men & to the mtgors. Both defts. moved to stay the actions as vexatious:—*Held:* the action against defts., the necessaries men, would be allowed to proceed, for the opinions of foreign experts were conflicting as to the force to be attributed to an English judgment in a French ct., & no other sufficient evidence had been given to show that, in the proceedings in France, the declaratory judgment asked for would not be of use to pltfs. to protect their interests as mtgees. of the vessel & owners of the freight.—THE MANAR, [1903] P. 95; 72 L. J. P. 41; 89 L. T. 26; 51 W. R. 687; 19 T. L. R. 617; 9 Asp. M. L. C. 420.

*Annotation:*—**Refd.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536.

**335. Equitable mortgagee.**] — Creditor who obtains a judgment against any specific property of his debtor does not get the thing itself, but only the interest of judgment debtor in the thing. The above rule holds in the case where creditor obtains a judgment upon a ship belonging to his debtor which is subject to an equitable mtge.—DE WOLF *v.* PITCAIRN (1869), 17 W. R. 914.

*v. Master.*

**Whether mortgagee entitled to priority—Lien for wages & disbursements.**]—*See* Part XIX., Sect. 4, sub-sect. 5, *post.*

**336. —— Bond by master to cover damages—Negligent navigation.**]—The master of a vessel, which, by his default, had been in collision with another vessel in a foreign port, gave a bond for payment of the damages, & so released the vessel:—*Held:* as against the mtgees. of the vessel the amount of the penalty of the bond would not be retained in ct. to meet any claim which might be established against the master under his bond.—THE LIMERICK (1876), 1 P. D. 411; 34 L. T. 708; 3 Asp. M. L. C. 206, C. A.

*Annotations:*—**Consd.** The Beeswing (1885), 53 L. T. 554. **Refd.** The Sara (1887), 12 P. D. 158.

*vi. Material Men.*

**337. Whether mortgagee entitled to priority.**]—Material men have no lien for supplies furnished in England on the proceeds remaining in the registry of the Ct. of Admlty. of a ship sold under a decree of that ct. for the payment of seamen's wages. A mtgee. in possession of a ship so sold, is entitled to the remainder of such proceeds after payment of seamen's wages & costs.—HODGES *v.* SIMS, THE NEPTUNE (1835), 3 Knapp, 94; 12 E. R. 584, P. C.

*Annotations:*—**Consd.** The Wataga (1856), 28 L. T. O. S. 192; The Comtesse de Frègeville (1861), Lush. 329; The Pacific (1864), Brown. & Lush. 243; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356. **Refd.** The New Eagle (1846), 2 Wm. Rob. 441; Imrie *v.* Castrique (1860), 8 C. B. N. S. 405; The Dowse (1870), L. R. 3 A. & E. 135; James *v.* S. W. Ry. (1872), L. R. 7 Exch. 287; Johnson *v.* Black, The Two Ellens (1872), L. R. 4 P. C. 161; The Riga (1872), L. R. 3 A. & E. 516; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270; The Petone, [1917] P. 198; The Mogileff, [1921] P. 236.

**338. ——.**]—In Nov. 1861, A. supplied necessaries to a British ship. On Dec. 12, 1861, B. became a registered mtgee. of the ship, & A. subsequently instituted a cause of necessaries against the ship:—*Held:* the mtge. of B. had priority over the claim of A. for necessaries.

Under Admiralty Court Act, 1861 (c. 10), s. 5, the material man acquires no maritime lien, but only a right to sue the ship; his claim against the ship accrues only upon his institution of the suit, & is therefore subject to any registered mtge. at that time subsisting on the ship.—THE PACIFIC (1864), Brown. & Lush. 243; 3 New Rep. 709; 33 L. J. P. M. & A. 120; 10 L. T. 541; 10 Jur. N. S. 1110; 2 Mar. L. C. 21; 167 E. R. 356.

*Annotations:*—**Consd.** The Troubadour (1866), L. R. 1 A. & E. 302. **Folld.** The Harriet (1868), 18 L. T. 804. **Consd.** Johnson *v.* Black, The Two Ellens (1872), L. R. 4 P. C. 161; The Heinrich Björn (1885), 10 P. D. 44; Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209. **Refd.** The Mary Ann (1865), L. R. 1 A. & E. 8; The Scio (1867), L. R. 1 A. & E. 353; Simpson *v.* Blues (1872), L. R. 7 C. P. 290; Giovanni Dapueto *v.* Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; The Cella (1888), 36 W. R. 540; The Mecca, [1895] P. 95.

**339. ——.**]—A. was quarter owner of a ship; B. was owner of three-fourths. B. mortgaged his share. The mtgee. did not take possession, & the ship was by arrangement between A. & B. left under the control of A. A. ordered repairs to the vessel, which was afterwards sold by

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*mortgagee in possession.*]—*Held:* an arrestment of a ship, used on the dependence of a personal action against the owner by creditors of the owner, did not give the arresting creditors any preferential rights in the ship as against a mtgee. already in possession or prevent the latter from selling the ship under the powers conferred by Merchant Shipping Act, 1894, s. 35.—CLYDESDALE BANK, LTD. *v.* WALKER & BAIN, [1926] S. C. 72.—**SCOT.**

**PART II. SECT. 3, SUB-SECT. 3.—K. (b) v.**

*c. Whether mortgagee entitled to priority—Lien for wages & disbursements.*]—THE C. N. PRATT (1885), 5 C. L. T. 417.—**CAN.**

order of the ct. under Admiralty Court Act, 1861 (c. 10), s. 8:—*Held:* in the distribution of the proceeds of the sale the mtgee. of the three-fourths was entitled to his proportion of the proceeds, without contributing towards the payment of the material men.—THE HARRIET (1868), 18 L. T. 804; 3 Mar. L. C. 138.

**340. —— Material men not in possession—Claims arising after registration of mortgage.**]—Mtgees. of a ship are entitled to payment in priority to material men, who at the time of supplying the materials were not in such actual possession of the ship as to give them a possessory lien over her.—THE SCIO (1867), L. R. 1 A. & E. 353; 16 L. T. 642; 2 Mar. L. C. 527.

*Annotation:*—**Refd.** The Acacia (1879), 41 L. T. 564.

**341. —— Material men with common law possessory lien.**]—Where a mtgee. brings an action to realise his security, & material men with a common law possessory lien on the ship intervene, & the ship, by order of the ct., is sold, & the proceeds are only sufficient to satisfy the claim of the material men, the mtgee. is still entitled to be paid his taxed costs, up to the date of the sale, out of the proceeds of the sale of the ship in priority to the material men.—THE SHERBRO (1883), 52 L. J. P. 28; 48 L. T. 767; 5 Asp. M. L. C. 88.

vii. *Necessaries Men.*

**342. Whether mortgagee entitled to priority.**]—A British colonial vessel was mortgaged by her owners to B. The instrument of mtge. was duly registered. In Feb. 1868, in the port of London, pltfs., by the order of the master, did work & furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, B. executed an instrument for the transfer of the mtge. to deft. This transfer was without valuable consideration, & was made to enable deft. to take charge of the ship for B. In July, 1868, deft. took possession of the ship. Afterwards pltfs. instituted a suit against the ship to recover the amount due to them for the work & supplies. At the time of the institution of the suit the owners of the ship were domiciled in Nova Scotia. The proceeds of the ship were insufficient to satisfy the claim of pltfs. & the mtge. debt:—*Held:* pltfs. were not entitled to have the amount of their claim paid out of the proceeds until the mtge. debt had been satisfied.—THE TWO ELLENS (1871), L. R. 3 A. & E. 345; 40 L. J. Adm. 11; 24 L. T. 592; 19 W. R. 983; 1 Asp. M. L. C. 40; *affd. sub nom.* JOHNSON *v.* BLACK, THE TWO ELLENS (1872), L. R. 4 P. C. 161, P. C.

*Annotations:*—**Consd.** The Cella (1888), 13 P. D. 82. **Refd.** Giovanni Dapueto *v.* Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482; The Aneroid (1877), 2 P. D. 189; The Acacia (1879), 41 L. T. 564; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270; Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209; The Mecca, [1895] P. 95; The Veritas, [1901] P. 304; Von Freeden *v.* Hull & Turner (1906), 75 L. J. K. B. 359; The Colorado, [1923] P. 102.

**343. ——.**]—(1) An advance of freight to enable a master to pay his ship's disbursements before sailing does not give the charterer a claim against the ship, which will take precedence of the claim of a mtgee.; nor does an advance for a similar purpose made by an insurance co.

(2) Where it is necessary that a wooden ship bound upon a particular voyage should be coppered, the coppering is a "necessary for the voyage" which gives the material man doing the work to a foreign ship, upon the orders of the master, a maritime lien.—THE TURLIANI (1875), 32 L. T. 841; 2 Asp. M. L. C. 603.

**344. ——.**]—A claim by pltf. in an action for necessaries brought under Admiralty Court Act, 1861 (c. 10), s. 4, even though it includes wages paid to the ship's crew at the request of the owner, is not entitled to precedence of a mtgee.'s claim.—THE LYONS (1887), 57 L. T. 818; 6 Asp. M. L. C. 199.

*Annotation:*—**Consd.** The Petone, [1917] P. 198.

**345. ——.**]—THE MANAR, No. 334, *ante*.

**346. —— Bill of exchange for necessaries—Alleged fraud against mortgagee.**]—Declaration that C., a British subject, the owner of a ship, by bill of sale transferred it, by way of mtge., to H., who by bill of sale transferred his interest in the ship to E. who by bill of sale transferred to pltf. That while C. was owner, the master, during a voyage, drew a bill on C. for necessary disbursements in favour of L. That C. indorsed the bill to defts., British subjects residing in England, without value. That the bill was duly presented to C. for acceptance, & dishonoured. That defts., knowing that the ship was about to call at Havre, in France, & that a *bonâ fide* holder there of the bill could attach the ship, & procure the ship to be sold for the purpose of paying such bill, fraudulently conspired with T., a French subject residing in France, to indorse the bill to him without value, that T. might attach the ship at Havre, & obtain the sale thereof, & that T. should falsely represent that he was the *bonâ fide* owner of the bill for valuable consideration, & so obtain the attachment of the ship. That in pursuance of the conspiracy defts. indorsed the bill to T., who, upon the arrival of the ship at Havre, took proceedings to attach the ship, & fraudulently represented that he was the *bonâ fide* owner of the bill for valuable consideration, & thereby obtained an attachment of the ship, & thereby pltf. lost his property in the ship:—*Held:* the declaration was bad, as it was consistent with the averments that pltf. had notice of the proceedings at Havre, & purposely allowed judgment to go by default, or that he might have appeared in the French ct., & been heard on the question whether T. was holder for value; & while the foreign judgment remained unreversed the action was not maintainable.—CASTRIQUE *v.* BEHRENS (1861), 3 E. & E. 709; 30 L. J. Q. B. 163; 4 L. T. 52; 7 Jur. N. S. 1028; 1 Mar. L. C. 45; 121 E. R. 608.

*Annotations:*—**Mentd.** Basébé *v.* Matthews (1867), L. R. 2 C. P. 684; Bynoe *v.* Bank of England, [1902] 1 K. B. 467; Bater *v.* Bater, [1906] P. 209; Turley *v.* Daw (1906), 94 L. T. 216.

**347. —— French hypothèque.**]—According to French Law, the mtgee. of a ship under a French hypothèque, although he has not the same right of property as that given by Merchant Shipping Act in respect of an English mtge., has a right to arrest the ship in the hands of a subsequent owner. His claim, however, is postponed to that of a necessaries man. On a motion to determine priorities between English claimants, in respect of necessary repairs effected upon a French ship & claimants under a French hypotheque upon the ship:—*Held:* as the rights given under the hypothèque must be determined according to French law, which have greater rights than those given by English law to a necessaries man who had merely the right to sue *in rem*, the claim of the necessaries men, according to the *lex fori* by which the question of priorities must be determined, was postponed to the claim of the mtgees.—THE COLORADO, [1923] P. 102; 92 L. J. P. 100; 128 L. T. 759; 16 Asp. M. L. C. 145, C. A.

*Annotation:*—**Mentd.** Republica de Guatemala *v.* Nunez, [1927] 1 K. B. 669.

*Sect.* 3.—*Transfer and transmission of property in ships: Sub-sect.* 3, *K.* (*b*) *viii., L. & M.; sub-sects.* 4, 5 *&* 6.]

viii. *Purchasers.*

**348. Whether mortgagee entitled to priority.**]—Owner of eight-sixteenths of a ship, mtges. them. He afterwards sells the eight-sixteenths to different persons, one of whom, pltf., took possession of the ship, & got possession of the grand bill of sale upon which the names of all the purchasers were indorsed, but there was no date to it:—*Held:* the mtgee. should be preferred.—GILLESPY *v.* COUTTS (1767), Amb. 652; 27 E. R. 423, L. C.

*Annotations:*—**Refd.** Kirkley *v.* Hodgson (1823), 1 B. & C. 588. **Mentd.** *Ex p.* Staudgroom (1790), 2 Cox, Eq. Cas. 234.

**349.** ——.]—A ship belonged to A. & B. in different shares, & they were registered as the owners of it at the port of Liverpool. In Apr. 1849, the ship sailed from Liverpool for Sydney. In Oct. A. executed a power of attorney authorising B. to sell his shares. In Nov. A. mortgaged his shares in the ship & freight to C., & the deed of mtge. was registered at Liverpool. In Mar. 1850, being at Sydney, acting under the power of attorney as to A.'s shares sold the ship to D. On this occasion the old certificate of registry was given up, & the ship was registered *de novo* in D.'s name at Sydney. The ship, with a cargo, was put into the London Docks in Feb. 1851, & both C. & D. took possession of it, by each of them putting a man on board. Upon the question as to the right of C. & D. in the ship & freight:—*Held:* C. was entitled to A.'s shares in the ship & freight.—CATO *v.* IRVING (1852), 5 De G. & Sm. 210; 21 L. J. Ch. 675; 18 L. T. O. S. 345; 16 Jur. 161; 64 E. R. 1084.

*Annotations:*—**Consd.** Alexander *v.* Simms (1853), 18 Beav. 80; Brown *v.* Tanner (1868), 3 Ch. App. 597; Shillito *v.* Biggart, [1903] 1 K. B. 683. **Refd.** Japp *v.* Campbell (1887), 57 L. J. Q. B. 79.

**350. —— Purchaser without notice—Intentional concealment by mortgagee.**]—(1) A ship is not like an ordinary chattel, which passes by delivery, & there is no market overt for ships.

(2) The legal title of a mtgee. of a ship who, for the purpose of facilitating a sale by the mtgor., conceals his mtge., cannot prevail in equity against a purchaser for valuable consideration without notice.

The registered owner of an American ship, mortgaged her by a bill of sale duly recorded, as required by the American law, for making a valid mtge., but no notice of the mtge. was indorsed on the certificate of registry, such indorsement not being required by the American law, & in this case being purposely omitted in order to facilitate the sale of the ship. The ship was then, with the consent of the mtgee., sent to England, with a power of attorney authorising the captain to sell her. Afterwards the mtgor., without the knowledge of the mtgee., revoked the power of attorney authorising the captain to sell the ship, & executed a new power to another person under which the ship was sold. A bill filed by the mtgee. against the purchaser, to declare & enforce his legal rights as mtgee., was dismissed.—HOOPER *v.* GUMM, MCLELLAN *v.* GUMM (1867), 2 Ch. App. 282; 36 L. J. Ch. 605; 16 L. T. 107; 15 W. R. 464; 2 Mar. L. C. 481, L. C. & L. J.

*Annotations:*—*Generally.* **Mentd.** Alcock *v.* Smith, [1892] 1 Ch. 238; Republica de Guatemala *v.* Nunez, [1927] 1 K. B. 669.

**351. —— Unregistered mortgage.**]—The provisions of the Ship Registry Acts apply equally to contracts as to sales; & the whole frame of these Acts negatives any equity resulting out of the doctrine of notice. An unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person who has notice of the agreement, cannot be enforced either as against the ship or its proceeds.—MCCALMONT *v.* RANKIN (1852), 2 De G. M. & G. 403; 22 L. J. Ch. 554; 20 L. T. O. S. 1; 42 E. R. 928, L. C.

*Annotations:*—**Consd.** Armstrong *v.* Armstrong (No. 2) (1855), 21 Beav. 78. **Apld.** Coombes *v.* Mansfield (1855), 3 Drew. 193. **Refd.** Duncan *v.* Tindall (1853), 13 C. B. 258; Liverpool Borough Bank *v.* Turner (1860), 1 John. & H. 159.

**352. —— —— Notice after contract but before purchase price paid.**]—The managing owner of a ship contracted to sell shares of which he was registered owner to other part owners who were to apply the purchase money in discharging the vendor's debt to the ship & pay the balance to the vendor. The shares were forthwith transferred to the purchasers by registered bill of sale. After the contract & transfer, but before the purchase-money was paid or applied the purchasers received notice of an unregistered mtge. prior in date to the contract. In an action by the mtgees. to stop the entire purchase-money:—*Held:* as 1894 Act, s. 56, enabled the vendor as registered owner not only "absolutely to dispose" of the shares but also "to give effectual receipts" for the purchase-money, it enabled him to enter into a valid contract as to the application of the purchase money & therefore the purchaser's contractual right to apply part of the purchase money in discharge of the vendor's debt to the ship, a right in which as part owners they were pecuniarily interested took precedence over the prior unregistered mtge.—BARCLAY & CO., LTD. *v.* POOLE, [1907] 2 Ch. 284; 76 L. J. Ch. 488; 97 L. T. 632; 10 Asp. M. L. C. 574.

**353. —— Previous purchase without registered title.**]—Where a part owner of a ship institutes a suit against the ship claiming as against his co-owner an account & a sale of the ship, a mtgee. holding a mtge., which could not be satisfied, by a sale of the ship, is entitled, on intervening, in the suit, to a release of the ship & to his costs from the time of his claiming the release.

A shipowner sold certain shares in a ship & the purchaser having neglected to register the sale, subsequently mortgaged the whole ship to a third person, who had no knowledge of the previous sale, to secure a balance exceeding the value of the ship. The purchaser subsequently registered his shares, & then finding the mtge. registered, instituted a suit against the ship claiming as against his co-owner an account & the sale of the ship. The mtgee. intervened & claimed the release of the ship & damages & costs for its detention:—*Held:* the mtgee. was entitled

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**PART II. SECT. 3, SUB-SECT. 3.—K. (b) viii.**

**348 i.** *Whether mortgagee entitled to priority.*]—ELIAS *v.* BLACK (1856), 18 Dunl. (Ct. of Sess.) 1226; 28 Sc. Jur. 622.—**SCOT.**

**p.** —— *Purchaser without notice—Fraudulent filling in by mortgagee of mortgage in blank.*]—STEWART *v.* BOAK (1881), R. E. D. 467.—**CAN.**

**351 i.** —— *Unregistered mortgage.*]—The *bonâ fide* purchaser of a ship, with a legal title according to Merchant Shipping Act, 1854, is not bound by notice of a prior unregistered mtge.—DE WOLF *v.* CARVILL (1864), 10 N. B. R. (6 All.) 299.—**CAN.**

**q.** —— *Registered mortgage.*]—The purchaser of a merchant vessel at a judicial sale has no right of property as against a previous transferee, whose deed, by way of mtge., had been regularly registered at the custom house & endorsed on the back of the registrar's certificate.—HAMILTON *v.* KELLY (1872), 3 R. L. O. S. 564; 16 L. C. J. 320.—**CAN.**

**r.** —— ——.]—THE JEANNOTTE *v.* TREMBLAY (1889), 15 R. L. O. S. 115.—**CAN.**

to the release of the ship & to costs from the time pltf. became aware of the mtgee.'s claim.—THE EASTERN BELLE (1875), 33 L. T. 214; 3 App. M. L. C. 19.

*L. Dealings with Mortgagee's Interest.*

*See* 1894 Act, ss. 37, 38.

**354. Deposit of title deeds by mortgagee — Bankruptcy of mortgagees—Right of party holding deeds.**]—P. & P. the registered mtgees. of a ship, deposited the instruments of mtge. which were duly registered with L. to secure a debt, but no transfer was executed or registered:—*Held:* the indorsement being necessary to the statutory form of transfer, the deposit of the instruments took them out of the order, & disposition of bkpt., & L. was equitable mtgee. of the ships.—LACON *v.* LIFFEN (1862), 4 Giff. 75; 1 New Rep. 44; 32 L. J. Ch. 25; 7 L. T. 411; 9 Jur. N. S. 13; 11 W. R. 135; 1 Mar. L. C. 262; 66 E. R. 626; *on appeal* (1863), 32 L. J. Ch. 315, L. C.

*Annotations:*—**Mentd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623; Martin *v.* Willyams (1869), 20 L. T. 350.

**355. Sale by licitation.**] — CHASTEAUNEUF *v.* CAPEYRON, No. 363, *post.*

*M. Discharge of Mortgage.*

*See* 1894 Act, s. 32.

**356. Presumption against discharge.**] — THE RINGDOVE, No. 175, *ante.*

**357. Entry in register of mortgages — Erasure by registrar.**]—CHASTEAUNEUF *v.* CAPEYRON, No. 363, *post.*

**358. —— Improperly made—Power of court to expunge.**]—BROND *v.* BROOMHALL, No. 98, *ante.*

**359. Indorsement of discharge on mortgage deed—By mistake—Rectification.**]—A British ship was mortgaged by an instrument that was in the form prescribed by Merchant Shipping Act, 1854 (c. 104), & was duly registered. The mtgor. died intestate, & the mtgees. sold the ship under their power of sale, & executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mtge. money was indorsed on the mtge. & signed by the mtgee. & produced to the registrar of shipping who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mtgor. In order to complete the title of the purchaser a suit *in rem* was instituted on behalf of the mtgee. & purchaser, & in such suit the ct. held it had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship.—THE ROSE (1873), L. R. 4 A. & E. 6; 42 L. J. Adm. 11; 28 L. T. 291; 21 W. R. 511; 1 Asp. M. L. C. 567.

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SUB-SECT. 4.—PROHIBITION OF TRANSFER.

**360. Jurisdiction to prohibit—Probate Division.**]—The Ct. of Probate, as a division of the High Ct. of Justice, has vested in it the jurisdiction formerly exercised by the High Ct. of Ch., & therefore may, under Merchant Shipping Act, 1854 (c. 104), s. 65, direct an order to issue prohibiting the dealing in any share of a ship for a time & on conditions to be named therein, & the registrar of shipping, on being served with such order or an official copy thereof, must obey the same.—NICHOLAS *v.* DRACACHIS (1875), 1 P. D. 72; 45 L. J. P. 45; 24 W. R. 461.

**361. Restrain by injunction — Pending determination of rights at trial.**]—Between the date of a bill of sale of shares of a ship & the entry of the transfer on the register the purchaser had notice that the vendor, though the shares were registered in his name, was a trustee. The case presenting a *primâ facie* appearance of fraud, the ct. granted an injunction to restrain the purchaser from dealing with the shares or indorsing the transfer on the certificate of registry, so as to insure the effective determination of the questions at the hearing.—ARMSTRONG *v.* ARMSTRONG (1854), 21 Beav. 71; 2 W. R. 678; 52 E. R. 785; *subsequent proceedings* (1855), 21 Beav. 78.

*Annotation:*—**Consd.** Coombes *v.* Mansfield (1855), 3 Drew. 193.

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SUB-SECT. 5.—CERTIFICATES OF MORTGAGE AND SALE.

*See* 1894 Act, ss. 39–46.

**362. Certificate of sale—Exercise of power not in conformity with directions in certificate—Consideration less than minimum price.**]—Under Merchant Shipping Act, 1854 (c. 104), the registry of a bill of sale, which, though purporting to be valid, so that the registrar has no alternative but to register it, is in fact invalid, & gives no title, even at law, to the person thereby registered as sole owner of the ship.

Therefore, where a bill of sale, though executed by the person named for that purpose by pltf., the then owner of the ship, & purporting in all other respects to be made in conformity with the certificate of sale, was, in fact, made for less than the minimum price specified in the certificate, & the ship was registered in the name of the purchaser as sole owner:—*Held:* the registry was void, & the ship having been sold by arrangement pending the suit, pltf. was entitled to the net proceeds of the sale.—ORR *v.* DICKINSON (1859), John. 1; 28 L. J. Ch. 516; 34 L. T. O. S. 5; 5 Jur. N. S. 672; 70 E. R. 315.

*Annotation:*—**Reld.** Michael *v.* Fripp (1868), L. R. 7 Eq. 95.

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SUB-SECT. 6.—TRANSMISSION OF TITLE.

*See* 1894 Act, ss. 27, 28, 55.

**363. What amounts to transmission — Sale by licitation without conveyance by bill of sale.**]—The transfer of a British ship is governed by the express provisions of Merchant Shipping Acts, which make a clear distinction between the legal estate & mere beneficial interests therein:—*Held:* (1) a sale by licitation of a British ship, or of a share therein, without a conveyance by bill of sale did not create such an interest in the purchasers as rendered it compulsory on the Registrar, under Merchant Shipping Act, 1854 (c. 104), to register them as owners, & the registrar was right in refusing so to do, & to erase from his books the inscriptions contained in the register against the ship in the names of the mtgees.; (2) a purchaser under a judicial sale, of a beneficial interest in a British ship, is not entitled to be registered as owner of it. There is no provision in Merchant Shipping Acts which authorises the registrar to erase entries of mtges. In case of their having been duly discharged, an entry to that effect may be made under Merchant Shipping Act, 1854 (c. 104), s. 68.—CHASTEAUNEUF *v.* CAPEYRON



*t. Sufficiency of mortgage—Identity of vessel.*]—SHERWOOD & JONES *v.* COLEMAN (1850), 6 U. C. R. 614.—CAN.

*Sect. 3.—Transfer and transmission of property in ships: Sub-sect. 6. Sect. 4: Sub-sects. 1 & 2.]*

(1882), 7 App. Cas. 127; 51 L. J. P. C. 37; 46 L. T. 65; 4 Asp. M. L. C. 489, P. C.

**364. Transmission by incapacitated person—Infant—Power of guardian to sell.**]—The guardian of a registered infant owner of a ship has no power under Merchant Shipping Act, 1854 (c. 104), s. 99, to sell or mortgage the ship on behalf of the infant.—MICHAEL *v.* FRIPP (1868), L. R. 7 Eq. 95; 38 L. J. Ch. 29; 19 L. T. 257; 17 W. R. 23; 3 Mar. L. C. 162.

**365. —— Alien—Power of court to approve particular sale.**]—Under Merchant Shipping Act, 1854 (c. 104), ss. 62–64, the ct. will order a particular sale to be carried out, instead of making an order for sale generally, if that course is shown to be preferable.—THE SANTON (1878), 26 W. R. 810.

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## SECT. 4.—LIABILITY OF REGISTERED OWNER.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, ss. 58, 695.

**366. Liability confined to legal acts of agents.**]—MITCHELL *v.* GLENNIE, No. 374, *post.*

**367. For necessaries to ship—After disposal of interest.**]—YOUNG *v.* BRANDER, No. '42, *ante.*

**368. —— —— Stores.**]—Proof of the execution of a bill of sale of a ship, to deft. is not evidence to charge him as an owner with stores furnished to the ship, without showing his assent to such sale. Neither is the register of the ship, naming him as a part owner, made by & upon the oaths of others, *primâ facie* evidence to charge him as owner, without his assent or adoption.—TINKLER *v.* WALPOLE (1811), 14 East, 226; 104 E. R. 587.

*Annotation:*—**Refd.** Pirie *v.* Anderson (1812), 4 Taunt. 652.

**369. —— —— Repairs.**]—Where there were two joint owners of a ship, & one by private agreement parted with all his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register, by way of collateral security for the payment of the bills:—*Held:* he was liable for repairs done to the ship subsequent to such agreement, although he had never afterwards interfered in the concerns or management of the ship.

The register is legal evidence of ownership (ABBOTT, C.J.).—DOWSON *v.* LEAKE & LONGSTER (1822), Dow. & Ry. N. P. 52.

*Annotations:*—**Distd.** Jennings *v.* Griffiths (1824), Ry. & M. 42. **Consd.** Frost *v.* Oliver (1853), 2 E. & B. 301. **Refd.** Curling *v.* Robertson (1844), 7 Man. & G. 336.

**370. —— —— ——.**]—The registered owner of a ship is not liable for repairs, unless actually done upon his credit. Legal ownership is *primâ facie* evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, & of the legal owner's having ceased to interfere with the management of the ship.—JENNINGS *v.* GRIFFITHS (1824), Ry. & M. 42; 171 E. R. 937, N. P.

*Annotations:*—**Apld.** Cox *v.* Reid (1824), Ry. & M. 199; Curling *v.* Robertson (1844), 7 Man. & G. 336. **Distd.** Frost *v.* Oliver (1853), 2 E. & B. 301. **Consd.** Hibbs *v.* Ross (1866), L. R. 1 Q. B. 534.

**371. —— —— ——.**]—In order to charge a party by reason of his name appearing on a ship's register as a part owner, for repairs done to the ship, it must distinctly appear that they were done upon his credit, & that the order for them was given with his authority express or implied.

Deft., part owner of a ship, by an agreement made in June 1840, contracted for the sale of her interest therein to one V., & received the price by bill at six months, dated July 13, drawn by V. on one B., who was also a part owner, & who acted as ship's husband. By arrangement between V. & B. the bill of sale, which was dated Aug. 18, was made to B., by whom the acceptance was afterwards paid. The jury having found that the bill of sale was *bonâ fide* executed in pursuance of the prior contract:—*Held:* deft. was not responsible for repairs done to the ship upon the order of B. between June 11 & Aug. 5.—CURLING *v.* ROBERTSON (1844), 7 Man. & G. 336; 8 Scott, N. R. 12; 13 L. J. C. P. 137; 3 L. T. O. S. 56; 135 E. R. 141.

*Annotation:*—**Apld.** Brodie *v.* Howard (1855), 17 C. B. 109.

**372. —— —— Supply on personal credit of vendor.**]—The sole registered owner of a ship gave orders for materials to be furnished & work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered:—*Held:* (1) the vendee was not liable for any of the goods furnished before the legal title was conveyed to him & registered in the manner prescribed by Registry Acts; whatever equitable agreement might have existed before between him & the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen; (2) nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given; (3) the vendee was liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him.—TREWHELLA *v.* ROWE (1809), 11 East, 435; 103 E. R. 1072.

*Annotations:*—*Generally,* **Refd.** Harrington *v.* Fry (1824), 1 C. & P. 289; Frost *v.* Oliver (1853), 2 E. & B. 301. **Mentd.** Clarke *v.* Fell (1833), 4 B. & Ad. 404.

**373. —— —— ——.**]—BAKER *v.* BUCKLE, No. 283, *ante.*

**—— —— Supply on order of master.**]—*See* Part IV., Sect. 2, sub-sect. 2, B., *post.*

**374. —— Ordered by supercargo—Ship abandoned to underwriters.**]—(1) The owner of a ship is liable for stores & necessaries supplied by the order of the supercargo, after the detention & liberation of the vessel by a foreign power, although

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**PART II. SECT. 4, SUB-SECT. 1.**

u. *General rule.*]—The registered owner of a vessel is not liable for the negligence of the master, unless he has been appointed by such owner, or is acting for him as his servant or agent in the navigation of the vessel.—NEWBURY *v.* YOUNG (1872), 14 N. B. R. (1 Pug.) 148.—**CAN.**

**367 i.** *For necessaries to ship—After disposal of interest.*]—GAUDET *v.* FITZGERALD (P. E. I.), [1926] 1 D. L. R. 426.—**CAN.**

a. —— *Owner not interfering with management.*]—Where action was brought against defts., as registered owners of a vessel, for the value of wood supplied for the use of the vessel, & defts. pleaded that, though they were the registered owners, they had no interest, & had in no way contracted for the wood in question; that the vessel was being run by another for his own use & benefit, & that such party alone was liable:—*Held:* the registry of ownership did not determine the liability in such cases & the owner having sold to the party who was running the vessel, he was the person against whom action should have been brought.—MORGAN *v.* FORSYTH (1859), 3 L. C. J. 98; 9 L. C. R. 225.—**CAN.**

b. —— *Repair.*]—WILLIAMS *v.* WOOD & DIXON (1859), 9 N. B. R. (4 All.) 362.—**CAN.**

c. —— ——.]—The registered owner of a vessel is not liable for the expense of repairs put upon her, unless the work was done upon his credit, & by his authority express or implied.—THOMPSON *v.* HUGHES (1834), N. B. Dig. 717.—**CAN.**

d. —— ——.]—The legal, *i.e.*, the registered owner of a ship is not liable to pay for repairs made or stores

the supplies are afforded after an abandonment by the owner to the underwriters; & although the supplies are furnished for the purpose of enabling the vessel to prosecute a second voyage in the prosecution of which she is seized by British officers & confiscated, yet the institution of proceedings in the Admlty. Ct. by deft. to recover possession of the vessel, amounts to an adoption of the second voyage, & renders him liable for the amount.

(2) The authority delegated by the owners only extended to the doing of that which could legally be done, & they are not bound by the illegal acts of their agents (LORD ELLENBOROUGH).—MITCHELL *v.* GLENNIE (1816), 1 Stark. 230; 171 E. R. 456, N. P.

**375. —— Primâ facie liability—Rebuttal.**]—COX *v.* REID, No. 1115, *post.*

**376. —— Owner not interfering with management—Repair.**]—JENNINGS *v.* GRIFFITHS, No. 370, *ante.*

**377. —— —— ——.**]—FULLER *v.* GRAND (1865), 3 Mar. L. C. App. 69.

**378. —— Carried out under authority of stranger —Repair.**]—Pltf. supplied new running rigging to the ship P., then lying in dock, on the order of T., who was on board & acting as her master. This new running rigging was necessary for her outfit. Deft. was registered as owner of the ship; & T. was registered as master. Pltf., about the time he supplied the goods, inspected the register. Deft. afterwards sent the vessel on another voyage with a different captain aboard, & carrying with her all the rope which pltf. had sent for the running rigging, most of it worked up, but some not. Pltf. made out an invoice, debiting "Captain T. & the owners," & demanded payment from deft., who denied his liability. Deft. proved, on the trial, that he had made an agreement to sell the ship to G., to be employed as an emigrant ship, deft. to repair her, so as to be approved by the Emigration Comrs., & G. to pay the price out of the freight. T. was appointed master by G.; & deft. never saw him or desired him to order anything for the ship, but there was evidence that T. was put on the register with deft.'s concurrence, & that, whilst T. was acting as master, deft. kept concurrent possession of the vessel, & executed some other repairs, & also paid the dock dues; & that the new running rigging ought, under the agreement, to have been supplied by him, the Emigration Comrs. having condemned the old running rigging. Deft. not being satisfied as to payment by G., & the agreement not being binding under Registration Acts, as it did not recite the certificate of registration, took exclusive possession of the vessel. On these facts the case was left to the jury, who found for pltf.:—*Held:* there was evidence, under these circumstances, to go to the jury that pltf. supplied the new running rigging on the credit of deft., & that deft. had given T. authority to pledge deft.'s credit for the rigging so supplied.

The legal title to a ship will furnish *primâ facie* evidence that repairs are made under the authority & for the benefit of the legal owner; but, if it appear that they were made under the authority & for the benefit of another, the legal owner will not be answerable (WIGHTMAN, J.).—FROST *v.* OLIVER (1853), 2 E. &. B. 301; 1 C. L. R. 1003; 22 L. J. Q. B. 353; 21 L. T. O. S. 193; 18 Jur. 166; 118 E. R. 780.

*Annotations:*—**Distd.** Mackenzie *v.* Pooley (1856), 11 Exch. 638. **Apld.** The Great Eastern (1868), L. R. 2 A. & E. 88. **Refd.** Myers *v.* Willis (1856), 18 C. B. 886; Pearson *v.* Nell (1865), 6 New Rep. 304; Hibbs *v.* Ross (1866), L. R. 1 Q. B. 534; The Troubadour (1866), L. R. 1 A. & E. 302.

**379. —— Repair—Whether credit given question of fact.**]—In an action for repairs done to a ship, it is entirely a question for the jury whether those repairs were done on the credit of the registered owner, or of a person holding the ship at the time under a charterparty still running.—TEBBUTT *v.* STRAKER (1847), 10 L. T. O. S. 132.

**380. —— ——.**]—The mere fact of a man's being registered as a part owner of a ship, under an absolute bill of sale, which is shown *aliunde* to have been given only as a security for advances, does not give his co-owner, or the master, appointed by his co-owner, authority to pledge his credit for necessary repairs.—HACKWOOD *v.* LYALL (1855), 17 C. B. 124; 25 L. J. C. P. 44, n; 2 Jur. N. S. 44, n.; 139 E. R. 1015.

*Annotation:*—**Refd.** Hibbs *v.* Ross (1866), 35 L. J. Q. B. 193.

**381. For negligence of employee—Shipkeeper.**]—A ship was laid up in a public dock for the winter, under the care of a shipkeeper; pltf. being lawfully on board suffered injury from the negligence of the persons in charge of the ship, & brought an action against deft. At the trial there was no evidence by whom the shipkeeper was appointed, & the only evidence to fix deft. with liability was the ship's register, on which his name appeared as owner:—*Held:* the register was *primâ facie* evidence for the jury, from which they might draw the inference that the persons in charge of the ship were employed by deft.—HIBBS *v.* ROSS (1866), L. R. 1 Q. B. 534; 7 B. & S. 655; 35 L. J. Q. B. 193; 15 L. T. 67; 30 J. P. 613; 12 Jur. N. S. 812; 14 W. R. 914; 2 Mar. L. C. 397.

*Annotations:*—**Refd.** The Troubadour (1866), L. R. 1 A. & E. 302; Meiklereid *v.* West (1876), 34 L. T. 353; River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743.

—— **Master & crew.**]—*See* Part IV., Sect. 1, sub-sect. 3, *post.*

**For acts of managing owner or ship's husband.**]—*See* Sect. 6, sub-sect. 5, *post.*

**Liability of part owners.**]—*See* Sect. 5, sub-sect. 3, A., *post.*

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SUB-SECT. 2.—WHILE SHIP CHARTERED.

**382. Charter made by owner—Liability on contract made by master—Allotment note given to wife of seaman.**]—Merchant Shipping Act, 1854 (c. 104),

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furnished under the authority & for the benefit of another person.—LADY HAMILTON (OWNERS) *v.* POPE (1823), 1 Nfld. L. R. 325.—**NFLD.**

*e. For wages of seamen—Debt incurred before acquisition of interest.*]—Where action was brought against the registered owner of a vessel for the wages of a seaman, & deft. pleaded that though owner at the institution of the action he was not owner at the time the debt was incurred:—*Held:* there was no such distinction in the law, & he was nevertheless liable.—*Ex p.* WARNER (1860), 5 L. C. J. 120; 11 L. C. R. 115.—**CAN.**

*f. For goods supplied—Before acquisition of interest.*]—Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of defts., but on the order of one G., between whom & defts. no relation of agency was proved:—*Held:* pltf. could not recover.—NELSON *v.* WIGLE (1883), 8 O. R. 82.—**CAN.**

*g. For advances — Real owner liable.*]—The real owner, although not registered, of a vessel subject to registration, is alone liable for advances made to this vessel; & the outfitter has no recourse against the vendor, although this latter, by the Custom House registers, appears to be still the owner of the vessel.—HUDSON *v.* TREMBLAY (1887), 13 Q. L. R. 124.—**CAN.**

**PART II. SECT. 4, SUB-SECT. 2.**

*h. Liability for necessaries—Where express agreement.*]—The mere owner of a chartered boat is not liable for supplies furnished to the person chartering, or at the request of his agents, unless he is so liable by express agreement between himself & the

*Sect. 4.—Liability of registered owner: Sub-sect. 2. Sect. 5: Sub-sects. 1 & 2, A.*]

s. 169, enacts that the wife or father or any seaman in whose favour an allotment note of part of the wages of such seaman is made, may sue for & recover the sums allotted from the owner or any agent who has authorised the drawing of the note. M. was the registered owner of a ship which he demised by a time charterparty to H., who appointed the master & crew, paid their wages, & had the whole control of the ship. The master gave an allotment note in favour of W., wife of one of the seamen. Several instalments were paid by H. upon this note, but he afterwards got into difficulties. W. thereupon took proceedings against M. under the above sect. as being the owner:—*Held:* having parted with all control over the ship, & not having been any party to the making of the allotment note, he was not "owner" within the sect.—MEIKLEREID *v.* WEST (1876), 1 Q. B. D. 428; 45 L. J. M. C. 91; 34 L. T. 353; 40 J. P. 708; 24 W. R. 703; 3 Asp. M. L. C. 129.

*Annotations:*—**Consd.** Hughes *v.* Sutherland (1881), 7 Q. B. D. 160. **Reid.** Dittmar *v.* Ship V 593 (1908), 78 L. J. K. B. 523; Jackson *v.* S.S. Blanche, The Hopper No. 66, [1908] A. C. 126.

**383. —— —— Bill of lading.**]—(1) Where the owner of a ship, registered as managing owner under the 39 & 40 Vict. c. 80, s. 36, chartered her under a charterparty, according to which the charterers were to provide & pay for all provisions, the wages of the captain, officers, engineers, firemen, & crew, & to meet all other charges whatsoever, except the insurance of the vessel & the cost of maintaining her in an efficient condition, shippers under bills of lading which were signed by the captain or the agents of the charterers, & did not refer to the charterparty:—*Held:* to have no claim against the owner for loss of the cargo in consequence of the unseaworthiness of the ship, inasmuch as the owner had divested himself of all control over the ship during the currency of the charter, & neither the captain nor the charterer's agent had authority to bind him by signing the bills of lading.

(2) The register under 39 & 40 Vict. c. 80, is only *primâ facie* evidence of ownership, & its statutory effect may be displaced by proof of what the facts really are.—BAUMWOLL MANUFACTUR VON CARL SCHEIBLER *v.* FURNESS, [1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1; 9 T. L. R. 71; 7 Asp. M. L. C. 263; *sub nom.* SCHEIBLER *v.* FURNESS, 1 R. 59, H. L.

*Annotations:*—*As to* (1) **Consd.** Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1. **Reid.** Jackson *v.* S.S. Blanche, The Hopper No. 66, [1908] A. C. 126. *As to* (2) **Reid.** Barraclough *v.* Brown (1895), 65 L. J. Q. B. 333; Manchester Trust *v.* Furness, [1895] 2 Q. B. 539. *Generally*, **Reid.** Kish *v.* Taylor, [1912] A. C. 604. **Mentd.** Rowland & Marwood's S.S. Co. *v.* Nilson (1897), 13 T. L. R. 459.

**384. —— —— —— Effect of clause making master agent of charterers.**]—A charterparty contained a proviso that the captain & crew, although appointed & paid by the owners, should be the servants of the charterers, & that in signing bills of lading the captain should only do as the agent of the charterers, & that the charterers would indemnify the owners against all liabilities arising from the captain signing the bills of lading. The captain signed bills of lading in the ordinary form for goods to be delivered to the holders of the bills of lading, they paying freight & other conditions as per charterparty. The goods were misdelivered, & an action was brought by the holders of the bills of lading against the shipowners for the loss:—*Held:* (1) the special clause in the charterparty was binding only between the owners & the charterers, & did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the captain as the agent of the owners; (2) the reference to the charterparty in the bills of lading did not give the holders constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions.—MANCHESTER TRUST *v.* FURNESS, [1895] 2 Q. B. 539; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. L. C. 57; 1 Com. Cas. 39; 14 R. 739, C. A.; *sub nom.* MANCHESTER TRUST, LTD. *v.* TURNER, WITHY & CO., LTD., 64 L. J. Q. B. 766; 11 T. L. R. 530, C. A.

*Annotations:*—*As to* (2) **Apld.** The Draupner, [1909] P. 219; Greer *v.* Downs Supply Co., [1927] 2 K. B. 28. **Reid.** Molyneux *v.* Hawtrey, [1903] 2 K. B. 487; Lloyds Bank *v.* Swiss Bankverein, Union of London & Smith's Bank *v.* Swiss Bankverein (1913), 108 L. T. 143. *Generally*, **Reid.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; Howden *v.* Nutfield S.S. Co. (1898), 14 T. L. R. 172; East Yorkshire S.S. Co. *v.* Hancock (1900), 5 Com. Cas. 266; The Northumbria (1906), 95 L. T. 618; Roderiaktieselskabet Superior *v.* Dewar & Webb (1909), 101 L. T. 371; Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1; Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534.

**385. —— —— —— Effect of reference to charterparty in bill of lading.**] — MANCHESTER TRUST *v.* FURNESS, No. 384, *ante*.

**386. Charter made by master—Master employed on system of thirds—Liability for negligence of master.**]—A sloop was navigated under a verbal agreement between A, the "managing owner" registered according to 38 & 39 Vict. c. 88, & B. the captain by which, on condition that A. should have one-third of the net profits, accounts of which were to be rendered to him by B. from time to time. B. was at liberty to go to any port, & take or refuse any cargo he chose, & was also to hire & pay the crew & supply the stores, A. having no control over the vessel. While discharging cargo under a charter made by B. "for & on behalf of the owner," the vessel, through the negligence of B., broke loose from her moorings & damaged the wharf of pltf., who brought an action against A. & B.—*Held:* the agreement did not amount to a demise of the vessel, & whatever was the precise relationship thereby created between defts. *inter se* A. was responsible to the public for the negligence of B., & therefore both were liable in the action.—STEEL *v.* LESTER & LILEE (1877), 3 C. P. D. 121; 47 L. J. Q. B. 43; 37 L. T. 642; 26 W. R. 212; 3 Asp. M. L. C. 537.

*Annotations:*—**Apprvd.** Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1. **Reid.** Baumvoll Manufactur von Scheibler *v.* Gilchrest, [1892] 1 Q. B. 253; Boon *v.* Quance (1909), 102 L. T. 442.

**387. —— —— Liability for loss of cargo through unseaworthiness.**]—Pltfs. chartered a barge, the *Myrtle*, for the carriage of a cargo of cement, which was lost through the sinking of the barge consequent upon her unseaworthiness. The barge was being worked on the system of "thirds," under which the master, C., took two-

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charterer.—LYMAN *v.* BANK OF UPPER CANADA (1852), 8 U. C. R. 354.—**CAN.**

**k.** —— *Where owners parting with possession & control of ship.*]—THE SAM HING FIRM *v.* S.S. PAUL BEAU (1906), 1 Hong Kong L. R. 71.—**HONG KONG.**

**l.** *Charter made by transportation company—Liability of master & owners on contracts of affreightment.*]—The chartering of a ship with its co. for a particular voyage by a transportation co. does not relieve the owners & master from liability upon contracts of affreightment during such voyage, where the exclusive control & navigation of the ship are left with the master, mariners, & other servants of the owners, & the contract has been made with them only.—GLENGOIL S.S. Co. *v.* PILKINGTON, GLENGOIL S.S. Co. *v.* FERGUSON (1897), 28 S. C. R. 146.—**CAN.**

thirds of the gross freights, paying thereout the mate, crew, cost of provisions, & the expenses of the voyage, & handing over one-third of the gross freights, less harbour & towage dues & brokerage, to deft., the owner, who provided the barge & paid for her upkeep. Neither the charterparty nor the bill of lading contained any reference to the owner. C., described only as "of the good ship the *Myrtle*," signed the charterparty, but not as "master" or "for the owner," & in the bill of lading, which he signed as C., he was referred to as "the master of the ship." In an action by pltfs. against deft. to recover the amount of the lost cargo, deft. denied liability on the ground that the contract was with the master, & that there was nothing to show that he was agent of, or servant for, an undisclosed principal. It appeared from the evidence that C. usually arranged the chartering; that he was appointed by deft. to work & sail the ship; & that he was not dismissible during the continuance of the voyage except for grave misconduct:—*Held:* upon the true inference to be drawn from the facts as proved, there was no demise or bailment of the ship to the master; & he managed & sailed the ship for the joint benefit of himself & the owner whose servant or agent he was; & the owner was liable on the contract.—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LTD. *v.* ASHTON, [1915] 2 K. B. 1; 84 L. J. K. B. 519; 112 L. T. 486; 13 Asp. M. L. C. 40; 20 Com. Cas. 165, C. A.

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## SECT. 5.—CO-OWNERSHIP.

### SUB-SECT. 1.—IN GENERAL.

**388. What constitutes co-ownership—Necessity for registration as part owner.**]—In a ct. of the law of nations a person may be considered a part owner of a privateer, though his name has never been inserted in the bill of sale or ship's register; & the representative of a person so deemed a part owner is responsible for costs & damages decreed against the owners generally, though the party of whom he is the representative was not himself the wrongdoer.—THE NOSTRA SIGNORA DE LOS DOLORES (1813), 1 Dods. 290; 165 E. R. 1315.

*Annotations:*—**Refd.** The Girolamo (1834), 3 Hag. Adm. 169; The Zolverein (1856), 2 Jur. N. S. 429; R. *v.* Keyn (1876), 2 Ex. D. 63.

**389. —— Registration in different registers.**]—CAMPBELL *v.* STEIN, No. 502, *post.*

**390. —— Purchase by partner for himself—Out of partnership assets.**]—A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bkpt.:—*Held:* the firm had no interest in the ship, or any lien on it, for the amount of the purchase-money.—WALTON *v.* BUTLER (1861), 29 Beav. 428; 54 E. R. 693.

*Annotation:*—**Refd.** Hancock *v.* Heaton (1874), 30 L. T. 592.

**391. Right to hold shares jointly.**]—PHILP'S CASE, No. 45, *ante.*

**392. Criminal liability of part owner—Destruction of ship—Presumption of prejudice to co-owners.**]—PHILP'S CASE, No. 45, *ante.*

**392a. Trover for part share.**]—WATSON *v.* KING, No. 109a, *ante.*

**393. Right of part owner to mortgage shares.**]—THE ROYAL ARCH, No. 1230, *post.*

**Effect of bankruptcy of part owner.**] — *See* BANKRUPTCY, Vol. IV., pp. 429, 437, Nos. 3874–3876, 3952.

**Assessment for income tax.**]—*See* INCOME TAX, Vol. XXVIII., p. 39, Nos. 205, 206.

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### SUB-SECT. 2.—RELATION OF PART OWNERS INTER SE.

#### *A. In General.*

**394. Tenants in common.**]—Part owners of a ship are tenants in common, not joint tenants. No lien therefore on the share of one, a bkpt. having been also managing owner, for outfit, freight, etc., due to the others.—*Ex p.* YOUNG (1813), 2 Ves. & B. 242; 2 Rose, 78, n.; 35 E. R. 311, L. C.

*Annotations:*—**Apld.** Holderness *v.* Shackels (1828), Dan. & Ll. 203; *Re* Drury & Hudson, *Ex p.* Leslie (1833), 3 L. J. Bcy. 4. **Consd.** Green *v.* Briggs (1848), 6 Hare, 395. **Refd.** Richardson *v.* Bank of England (1838), 2 Jur. 911; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; The Vindobala (1887), 13 P. D. 42.

**395.** ——.]—The owners of a ship are not interested in it as joint tenants, but as tenants in common; upon a bkpcy., therefore, bkpt.'s share passes to creditors under bkpcy., without being liable specifically to the claims of the other part owners, in respect of their disbursements & liabilities for the ship.—*Re* NICHOLSON, *Ex p.* HARRISON (1814), 2 Rose, 76, L. C.

*Annotations:*—**Refd.** *Re* Drury & Hudson, *Ex p.* Leslie (1833), 3 L. J. Bcy. 4; Green *v.* Briggs (1848), 6 Hare, 395; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; The Vindobala (1887), 13 P. D. 42.

**396.** ——.]—An action is maintainable by a ship's husband, who is also part owner, against one of several other part owners, for his proportion of outfit, although there was no express promise; part owners of ships being tenants in common, & not joint tenants, & each separately liable for his proportion of outfit.

Where the dealings between the parties are on the footing of one part owner having a larger share of the ship than appears by the register, such part owner is liable to the ship's husband, in proportion of such larger share.

A part owner of a ship is not necessarily a partner.—HELME *v.* SMITH (1831), 7 Bing. 709; 5 Moo. & P. 744, 9 L. J. O. S. C. P. 206; 131 E. R. 274.

*Annotations:*—**Consd.** Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156. **Apld.** Green *v.* Briggs (1848), 6 Hare, 395. **Consd.** Brodie *v.* Howard (1855), 17 C. B. 109. **Refd.** Sadler *v.* Nixon (1834), 5 B. & Ad. 936; Bolter *v.* Peplow (1850), 14 L. T. O. S. 466, 550.

**397.** ——.]—*Re* DRURY & HUDSON, *Ex p.* LESLIE, No. 425, *post.*

**398.** ——.]—GREEN *v.* BRIGGS, No. 417, *post.*

**399.** ——.]—If part owners of a ship are connected together so as to be considered partners, a payment made by one will revive a joint debt as against the other, & will prevent the operation of Stat. Limitations, though the payment is made for the express purpose of so reviving the debt.

A ship's husband cannot, without express authority, render the owners liable for the premiums paid in insuring the ship; but slight evidence of recognition of the insurance by an owner will be sufficient to make him liable.

Generally, part owners of a ship are not partners, but tenants in common (COLERIDGE, J.).—GRIFFITHS *v.* HICKS (1850), 15 L. T. O. S. 349; *subsequent proceedings* (1851), 16 L. T. O. S. 341.

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**PART II. SECT. 5, SUB-SECT. 1.**

m. *What constitutes co-ownership—Subscription to intended company owning ship.*]—SYLVESTER *v.* MCCUAIG (1878), 28 C. P. 443.—**CAN.**

**PART II. SECT. 5, SUB-SECT. 2.—A.**

n. *Power to mortgage ship.*]—A part owner of a ship cannot hypothecate her beyond the extent of his own interest in her without an authority from the other part owner to do so.—BRISTOWE & BRISTOWE *v.* BUTLER & TODRIDGE'S ESTATE (TRUSTEES) (1817), 1 Nfld. L. R. 19.—**NFLD.**

*Sect. 5.—Co-ownership: Sub-sect. 2, A., B. & C.*]

**400. —— Necessity for joinder of executors of deceased part owner—Sale of ship.**]—The ct. refused a *mandamus* to the officers of the customs to register a ship transferred by the survivor of two part owners, merchants, on the ground that the exors. of deceased part owner ought to have joined in the transfer.—R. *v.* COLLECTOR OF CUSTOMS, LIVERPOOL (1813), 2 M. & S. 223; 105 E. R. 366.

*Annotation:*—**Refd.** Buckley *v.* Barber (1851), 6 Exch. 164.

**401. Whether partners.**] — DODDINGTON *v.* HALLET (1750), 1 Ves. Sen. 497; 27 E. R. 1165, L. C.

*Annotations:*—**Overd.** *Ex p.* Young (1813), 2 Ves. & B. 242. **Apld.** A.-G. *v.* Borrodaile (1814), 1 Price, 148. **N.F.** *Re* Drury, *Ex p.* Leslie (1833), 3 L. J. Bcy. 4; Green *v.* Briggs (1848), 6 Hare, 395. **Consd.** The Vindobala (1887), 13 P. D. 42. **Refd.** Sutherland *v.* I. R. Comrs. (1918), 12 Tax Cas. 63.

**402.** ——.]—*Ex p.* YOUNG, No. 394, *ante.*

**403.** ——.]—The ownership of trading vessels let to freight is a trade or concern in the nature of trade, within 46 Geo. 3, c. 65. The part owners of such ships are special partners. The ship's husband or managing part owner is bound to make a joint return of the aggregate profits of the concern to the property tax.—A.-G. *v.* BORRODAILE (1814), 1 Price, 148; 145 E. R. 1359.

*Annotation:*—**Apld.** Farrell *v.* Sunderland S.S. Co. (1903), 88 L. T. 741.

**404.** ——.]—If the names of two partners in trade appear, among others, on the certificate of registry, as owners of a ship, Registry Acts do not prevent the showing how & in what proportions the several owners are respectively entitled, & though the partners may derive title under different conveyances, yet if their shares were purchased with the partnership funds, & treated by them as partnership property, & the partners become bkpt., these shares will be considered as the joint property.—*Ex p.* JONES (1816), 4 M. & S. 450; 105 E. R. 900.

**405.** ——.]—HELME *v.* SMITH, No. 396, *ante.*

**406.** ——.]—GRIFFITHS *v.* HICKS, No. 399, *ante.*

**407.** ——.]—BRODIE *v.* HOWARD, No. 447, *post.*

**408.** ——.]—Part owners are not partners, & therefore, *semble*, the error or misconduct of one part owner would not forfeit the right of his co-owners to limited liability.—THE SPIRIT OF THE OCEAN (1865), as reported in 34 L. J. P. M. & A. 74; 12 L. T. 239; 2 Mar. L. C. 192.

*Annotations:*—**Refd.** The Northumbria (1869), L. R. 3 A. & E. 6; The Hopper No. 66, [1906] P. 34; Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359; The Yarmouth, [1909] P. 293; Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419.

——.] — *See, generally*, PARTNERSHIP, Vol. XXXVI., pp. 320 *et seq.*

### *B. Possession and Control of Ship.*

**409. Right of majority to control.**] — Part owners of a ship, the majority may send her out without consent of the rest.—KNIGHT *v.* PARRY (1688), 1 Show. 13; Comb. 109; 89 E. R. 418; *sub nom.* KNIGHT *v.* BERRY, Carth. 26; Holt, K. B. 647.

*Annotation:*—**Dbtd.** Dimmock *v.* Chandler (1731), 2 Stra. 890.

**410.** ——.]—In all sea adventures, the acts of a majority of the partners shall bind the whole.—FALKLAND (LADY) *v.* CHENEY (LORD) (1704), 5 Bro. Parl. Cas. 476; 2 E. R. 807, H. L.

**411.** ——.] — It is a condition of such co-partnership in ships therefore that the majority must prevail in deciding upon the course of employment of the vessel (SIR CHRISTOPHER ROBINSON).—THE MARGARET (1829), 2 Hag. Adm. 275; 166 E. R. 244.

*Annotations:*—**Mentd.** The Ganges (1869), L. R. 2 A. & E. 370; The Cawdor, [1900] P. 47.

**412. Right to possession—Removal of captain—Although part owner.**]—ADAMS *v.* CROUCH (1771), Burrell, 110; 167 E. R. 496.

——.]—*See* ADMIRALTY, Vol. I., pp. 112–115, Nos. 162–194.

**413. Part owner dissenting from voyage—Liability for loss of ship & cargo.**]—One part owner of a ship, freighted against the express dissent of the other. The ship & cargo are lost. The loss falls wholly on the partner who freighted.—HORN *v.* GILPIN (1755), Amb. 255; 27 E. R. 170.

*Annotation:*—**Refd.** Steers *v.* Rogers, [1893] A. C. 232.

**414. —— Right to restrain.**]—A prohibition was moved for to the Admlty. in a suit there brought by one part owner against the other who would go to sea with the ship, in order to oblige him to give security:—*Held:* if security was offered & refused they would grant a prohibition but not before.—DIMMOCK *v.* CHANDLER (1731), Fitz.-G. 197; 2 Stra. 890; 94 E. R. 717; *sub nom.* DYMOCK *v.* CHANDLER, 1 Barn. K. B. 415.

**415. —— —— Effect of delay—Injunction.**]—Injunction to restrain the sailing of a ship, upon the application of a part owner, refused; where the ship was intended to sail the next day, & it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for pltf.'s delay in applying.—CHRISTIE *v.* CRAIG (1817), 2 Mer. 137; 35 E. R. 892, L. C.

**416. —— —— Joint-stock company.**] — Certain persons entered into an agreement, in writing, for forming themselves into a joint-stock co., to be called the Medway Commercial Shipping co.; &, by one of their rules, the affairs & concerns of the co., were to be under the management of a committee; but no time was fixed for the duration of the co. Four of the members of the co. took upon themselves the exclusive management of a ship belonging to the co., &, being about to send her on a voyage which some of the members disapproved of, those members filed a bill, praying that the four might be restrained from interfering with the ship, or causing her to sail on the intended voyage, & from laying in or agreeing for any cargo or freight, otherwise than under the direction of the committee, & that they might deliver up, to the committee, all books, etc., in their possession, belonging to the ship or to the co. A demurrer for want of equity was allowed.—MILES *v.* THOMAS (1839), 9 Sim. 606; 59 E. R. 492.

*Annotation:*—**Mentd.** Fairthorne *v.* Weston (1844), 3 Hare, 387.

—— ——.]—*See, also*, ADMIRALTY, Vol. I., pp. 115–118, Nos. 195–242.

### *C. Division of Profits and Incidence of Losses.*

**417. Expenses deducted before division — General rule.**]—Part owners are tenants in common of a ship, but jointly interested in her use & employment; & the law as to the earnings of a

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**PART II. SECT. 5, SUB-SECT. 2.—B.**

*o. Part owner dissenting from voyage.*]—WELDON *v.* VAUGHAN (N. B.) (1880), 5 S. C. R. 35.—**CAN.**

*p. Right of part owner to detain ship.*]—A part owner of a ship having a right to detain a ship must do so before she commences her voyage if he is in a position to know that she is about to sail.—THE LADY CLERMONT (1870), 23 L. T. 283.—**IR.**

*q. Power to order extensive structural alterations in ship—When ship in home port.*]—When a vessel is in a home port, & the owners easily accessible, the managing part owner cannot, without specific authority, bind his co-owners for extensive structural alterations.—STEELE & Co. *v.* DIXON (1876), 3 R. (Ct. of Sess.) 1003; 13 Sc. L. R. 723.—**SCOT.**

ship, whether as freight, cargo or otherwise, follows the general law of partnership.

A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, notwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends.

The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, & without which that adventure could not have been undertaken; & it would seem that the circumstance that such repairs are not exhausted in the adventure does not create any exception to the rule.

The term "lien" does not properly describe the right of a part owner to be reimbursed, out of the gross freight, the amount of expenses incurred in the prior repair & outfit of the ship.

A partner who has not paid up his share of the capital, cannot entitle himself to a share of the profits, without giving credit for the share of capital which he ought to have supplied (WIGRAM, V.-C.).—GREEN *v.* BRIGGS (1848), 6 Hare, 395; 17 L. J. Ch. 323; 11 L. T. O. S. 412; 12 Jur. 326; 67 E. R. 1219; *subsequent proceedings* (1849), 6 Hare, 632.

*Annotations:*—**Apld.** Alexander *v.* Simms (1854), 5 De G. M. & G. 57. **Reid.** Lindsay *v.* Gibbs (1856), 22 Beav. 522; The Edmond (1860), 2 L. T. 192; Vanner *v.* Frost (1870), 39 L. J. Ch. 626; Japp *v.* Campbell (1881), 57 L. J. Q. B. 79.

**418. Right to share in profits—Part owner not joining in adventure.**]—ANON. (1680), 2 Cas. in Ch. 36; 22 E. R. 834.

**419. —— —— No express prohibition.**] —Four joint owners of a ship; three will navigate her, the fourth not; the course is to go to the Admlty. & there give security to answer for the ship if she be lost & then they shall be discharged against the other. If one dislike the voyage & doth not expressly prohibit navigating the ship & the ship go the voyage & is lost, in such case he shall not be answered his part; but if the ship return, he shall have an account for what is earned & it shall be intended a voyage with his consent without an express prohibition proved (LORD NORTH, KEEPER).—STRELLY *v.* WINSOR (1684), 1 Vern. 297; 23 E. R. 480; *sub nom.* ANON., Skin. 230.

*Annotations:*—**Consd.** Horn *v.* Gilpin (1755), Amb. 255. **Mentd.** Henderson *v.* Eason (1851), 17 Q. B. 701.

**420. —— —— ——.**]—(1) A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, & of the vessel's outfit for it, & is entitled to a share of the freight.

(2) Part owners who do not dissent from the employment of a ship, & are aware that other part owners have dissented, are liable to bear the expenses, & are entitled to receive the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part owners.—THE VINDOBALA (1888), 13 P. D. 42; 57 L. J. P. 37; 58 L. T. 353; 6 Asp. M. L. C. 250; *on appeal* (1889), 14 P. D. 50, C. A.

**421. —— Only part share of expenses paid—Right of assignees of bankrupt partner.**]—One of three partners in a ship & cargo, the cost & outfit of which was £4,568, pays only £410 in part of his third share, & gives his notes for the remainder; but, before they become due, is declared a bkpt. The other partners cannot, by voluntarily discharging the notes, stand in his place for any share of the profits. But the assignees are entitled to a full third both of the profits of the adventure, & of the value of the ship.—SMITH *v.* DE SILVA (1776), 2 Cowp. 469; 98 E. R. 1191.

*Annotation:*—**Consd.** Holderness *v.* Shackels (1828), 8 B. & C. 612.

**422. —— ——.**]—A part owner of a ship is not entitled to his share of the ship's earnings until he has paid his proportion of the outfit & expenditure for the voyage; & a part delivery of his share does not necessarily defeat the lien which the other part owners have upon the remainder.—HOLDERNESS *v.* SHACKELS (1828), 8 B. & C. 612; Dan. & Ll. 203; 3 Man. & Ry. K. B. 25; 7 L. J. O. S. K. B. 80; 108 E. R. 1170.

*Annotation:*—**Consd.** Green *v.* Briggs (1848), 6 Hare, 395.

**423. —— Part owner taking security—Liability for share of expenses.**]—A part owner of a ship, which had been let to the East India co. for a voyage to India, after the other part owner had expended a large sum in repairing it, & fitting it out for the voyage, arrested the ship by process out of the Admlty. Ct. & compelled the other part owner to give security for his share: the ship afterwards sailed to India, & returned home:—*Held:* the part owner who had taken the security was not entitled to any share of the profits of the voyage, but was bound to pay his proportion of the repairs & outfit.—DAVIS *v.* JOHNSTON (1831), 4 Sim. 539; 58 E. R. 202.

**424. —— Purchaser of share of ship whilst on voyage.**]—THE VINDOBALA, No. 420, *ante*.

**425. —— As against mortgagee of ship—Breach of agreement to make advances.**]—A mtgee. of a ship agreed with one of the part owners, that he would pay all disbursements of a voyage, & in consideration was to have the proceeds of the freight handed over to him in priority of all other charges. He failed to advance any money, & the part owner was obliged to do so instead. Both having become bkpt., & the ship, etc., having been sold:—*Held:* the assignees of the mtgee. were entitled to their full share of the proceeds, as, though he had not fulfilled his contract, yet the ownership of a vessel is in common, not joint: & this agreement & dealing had not made it joint; & the part owner had no claim on the share of the mtgee. for his advances.—*Re* DRURY & HUDSON, *Ex p.* LESLIE (1833), 3 L. J. Bcy. 4.

**426. —— Liability to deduct unpaid share of capital.**]—GREEN *v.* BRIGGS, No. 417, *ante*.

**427. —— Registration & voyage illegal.**] —A. & B., British subjects, purchased & repaired an American built ship, on a joint speculation, with a view to employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States in the name of C., a citizen of that country, upon a false declaration that she was *bonâ fide* the sole property of C. After the ship had made several voyages, B., who had had the

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**PART II. SECT. 5, SUB-SECT. 2.—C.**

**418** t. *Right to share in profits—Part owner not joining in adventure.*]—MERCHANTS BANK *v.* GRAHAM (1880), 27 Gr. 524.—**CAN.**

r. —— *Before payment for outfit—Construction of agreement.*]—BIGELOW *v.* RAND (1877), R. E. D. 495.—**CAN.**

t. *Part owners in earnings only.*]—Part owners of a ship are tenants in common of the ship, & partners in the earnings only.—BAKER *v.* CASEY (1872), 19 Gr. 537.—**CAN.**

a. *Liability to contribute to losses—Costs of action to which co-owner not a party.*]—BENNETT *v.* MACLELLAN (1891), 18 R. (Ct. of Sess.) 955; 28 Sc. L. R. 728.—**SCOT.**

*Sect. 5.—Co-ownership: Sub-sect. 2, C. & D.; sub-sect. 3, A.*]

management of her, attempted to exclude A. from his share in the speculation, &, in spite of the dissent of A., sent her on another voyage to America:—*Held:* even supposing the declaration above-mentioned & the registration thereby effected to have been a fraud upon the American law, & the subsequent employment of the ship so registered to have been a fraud upon the English navigation laws, such fraud would not prevent A. from maintaining a suit against B. for an account & payment of his share of the realised profits of the speculation.—SHARP *v.* TAYLOR (1849), 2 Ph. 801; 14 L. T. O. S. 1; 41 E. R. 1153, L. C.

*Annotations:*—**Consd.** Sykes *v.* Beadon (1879), 11 Ch. D. 170. **Reld.** Ralli *v.* University Marine Insce. (1861), 2 John. & H. 159. **Mentd.** Coyle *v.* Alleyne (1854), 2 W. R. 382; Williams *v.* Trye (1854), 2 Eq. Rep. 766; Sheppard *v.* Oxenford (1855), 1 K. & J. 491; Liverpool Corpn. *v.* Wright (1859), John. 359; Pare *v.* Clegg (1861), 4 L. T. 669; Sichel *v.* Raphael (1864), 3 New Rep. 662; Beeston *v.* Beeston (1875), 1 Ex. D. 13; *Re* South Wales Atlantic S.S. Co. (1876), 2 Ch. D. 763; Bridger *v.* Savage (1885), 15 Q. B. D. 363; Rawlings *v.* General Trading Co., [1921] 1 K. B. 635.

**428. Account settled by majority of part owners—Binding on remainder.**]—An account of the profits of a voyage settled by the major part of the part owners shall conclude the rest.—ROBINSON *v.* THOMPSON (1687), 1 Vern. 465; 1 Eq. Cas. Abr. 373, pl. 2; 23 E. R. 591, L. C.

**429. What expenses may be deducted—Insurance on cargo.**]—*Semble:* insurance on the cargo, & interest on advances to the mariners, may be deducted from the gross proceeds of the adventure.—M'AULIFFE *v.* BICKNELL (1835), 2 Cr. M. & R. 263; 1 Gale, 232; 5 Tyr. 1035; 4 L. J. Ex. 225; 150 E. R. 114.

**430. —— Interest on advances to seamen.**]—M'AULIFFE *v.* BICKNELL, No. 429, *ante*.

**431. Purchaser during voyage home under voyage charter—Not liable for losses on voyage out under time charter.**]—Where a ship, having been chartered out & home under a time charter, is being brought home under a voyage charter in consequence of the time charter having been broken, the purchaser of shares purchased during such homeward voyage is not liable for losses incidental to the voyage out under the time charter.

*Semble:* a managing owner may be entitled to some reasonable sum as a commission on profits, although he owns shares in the ship & no express agreement as to his remuneration has been entered into.—THE MEREDITH (1885), 10 P. D. 69; *sub nom.* WHITE *v.* DITCHFIELD, THE MEREDITH, 52 L. T. 520; 5 Asp. M. L. C. 400.

**432. Purchaser under uncompleted contract—Liability for share of expenses—Payment of share of profits—Seller unable to complete.**]—The managing owners of the steamship *Bonnie Kate* in 1882 agreed to sell deft. V. one sixty-fourth share in the *Bonnie Kate*, for which he gave them a bill of exchange for £156, & received from them a receipt for same as "being one sixty-fourth share in the *Bonnie Kate*." In 1883 the managing owners sent V. £8 in respect of profits on his share, & subsequently sent him a statement of accounts. No bill of sale of the share was ever executed by the managing owners, & it appeared that their shares in the *Bonnie Kate* were mortgaged at the time of the sale to V., & that subsequently they never were in a position to redeem them. Certain of the owners having paid losses incidental to the working of the ship, now sued V. as a co-owner for his proportion of the losses:—*Held:* notwithstanding the receipt by V. of the £8, he was not, either in law or equity, a co-owner, the managing owners had no authority to pledge his credit, & he was not liable.—THE BONNIE KATE (1887), 57 L. T. 203; 6 Asp. M. L. C. 149.

*Annotation:*—**Reld.** Von Freeden *v.* Hull (1907), 76 L. J. K. B. 715.

**433. Calculation of share—Where some part owners dissent from voyage.**]—THE VINDOBALA, No. 420, *ante*.

**434. Right to recover against ship—For necessaries—Part owner of foreign ship—Estopped by account rendered as agent.**]—Where the agents of a foreign ship furnished coals to the ship on several voyages, & the accounts for the several voyages were balanced & settled, they are estopped from appropriating the receipts to a previous agency account for the ship, & suing the ship for the coals as necessaries supplied & unpaid for.—THE WEST FRIESLAND (1860), Sw. 456; 166 E. R. 1214, P. C.; *sub nom.* VAN HASSELT *v.* SACK, THE TWENTJE, 13 Moo. P. C. C. 185; 2 L. T. 613; 8 W. R. 423, P. C.

*Annotations:*—**Distd.** The Underwriter (1868), 25 L. T. 279. **Consd.** The Mogileff, [1921] P. 236. **Reld.** The Riga (1872), L. R. 3 A. & E. 516; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; Northcote *v.* S.S. Henrich Björn, The Henrich Björn (1886), 11 App. Cas. 270; The El Salto (1908), 25 T. L. R. 99; Foong Tai *v.* Buchheister, [1908] A. C. 458; The Stream Fisher, [1927] P. 73.

**435. —— —— ——.**]—The agents of a foreign ship in a British port, who have paid for necessaries supplied to her, or who have rendered themselves liable to pay for such necessaries, may sue the ship for such advances as were made on the ship's account, but not for the balance of a general account against her owners.—THE UNDERWRITER (1868), 25 L. T. 279; 1 Asp. M. L. C. 127.

*Annotations:*—**Consd.** The Mogileff, [1921] P. 236. **Reld.** The Riga (1872), L. R. 3 A. & E. 516; André Théodore (1904), 93 L. T. 184; The El Salto (1908), 25 T. L. R. 99; Foong Tai *v.* Buchheister, [1908] A. C. 458.

**Liability of part owners to third parties.**]—*See* Sub-sect. 3, A., *post*.

*D. Actions between Part Owners.*

**436. Jurisdiction of Court of Chancery—Construction of agreement between part owners.**]—No question arises as to the jurisdiction of this ct. in enforcing the rights of some against the other part owners of a ship, with regard to the management of the ship & the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship.

The first clause of the agreement runs thus:—"It is agreed by the owners of the barque *Deborah*, that the ship shall be managed by Messrs. D. & S., who shall receive a commission of 2½ per cent. on all disbursements." I take the effect of this clause to be to place Messrs. D. & S. in the position of managing owners, or, in other words, of ship's husbands; & the powers & duties of ship's husbands are thus stated in *Abbott* on *Shipping*: "He is to see that the ship is properly repaired, equipped & manned; to procure freights or charterparties; to preserve the ship's papers; to make the necessary entries; adjust freight & averages; disburse & receive moneys; & keep & make up the accounts as between all parties interested. His acts for these purposes are to

—A vessel belonging to a number of part owners was forcibly taken by the minority out of the possession of the majority & sent by the former upon foreign voyages on one of which it was ultimately lost:—*Held:* trover could not be maintained.—KNIGHT *v.* COATES (1838), 1 I. L. R. 53.—IR.

be considered to be the acts of all the part owners, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship." Deft., therefore, must, I think, be considered to have given all these powers to D. & S. by the first clause of the agreement (TURNER, V.-C.).—DARBY *v.* BAINES (1851), 9 Hare, 369; 21 L. J. Ch. 801; 68 E. R. 550.

**437. Action for loss of ship—What amounts to destruction—Question for jury.**]—BARNARDISTON *v.* CHAPMAN & SMITH (1714), cited in 4 East, at p. 121; 102 E. R. 776.

*Annotations:*—**Refd.** Addison *v.* Overend (1796), 6 Term Rep. 766. **Mentd.** Fennings *v.* Grenville (1808), 1 Taunt. 241; Mayhew *v.* Herrick (1849), 7 C. B. 229.

**438. —— —— Sale of ship.**]—*Semble:* a sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the destruction of the subject-matter mediately or immediately, so as to enable his co-tenant to maintain trover against him for it.—HEATH *v.* HUBBARD (1803), 4 East, 110; 4 Esp. 205; 102 E. R. 771.

*Annotations:*—**Refd.** Mestaer *v.* Gillespie (1805), 11 Ves. 621. **Mentd.** Farrar *v.* Beswick (1836), Tyr. & Gr. 1053; Mayhew *v.* Herrick (1849), 18 L. J. C. P. 179.

**439. Action for share of ship's outfit—Co-owner acting as ship's husband.**]—HELME *v.* SMITH, No. 396, *ante*.

**440. Action on promise to pay debt.**]—Pltf. & deft. were joint owners of a ship. At the end of a voyage, an account was made out of the receipts & disbursements, & the balance ascertained & paid. One of the items for which credit was given to deft. in the account, consisted of a sum due from the partners to their broker, which sum deft. undertook to pay. Deft. neglecting to discharge this debt, pltf. was arrested & compelled to pay it:—*Held:* he might recover the amount from deft. as money paid to his use.—WILSON *v.* CUTTING (1834), 10 Bing. 436; 4 Moo. & S. 268; 3 L. J. C. P. 150; 131 E. R. 973.

**441. Action to restrain sale—Undertaking not to sell given—Whether cross undertaking in damages ordered.**]—THE LOUGHBOROUGH (1904), Shipping Gazette, Dec. 20th.

**442. Action for account—Period of accountability.**]—In an action brought by one co-owner of a ship against the other co-owners under the Admiralty Court Act, 1861 (c. 10), s. 8, for a settlement of accounts between the co-owners, pltf. is entitled to a settlement of such accounts only as are or ought to be rendered to the co-owners prior to the date of the writ in the action, & cannot recover any sum due upon accounts, which in the due course of the ship's business could not be rendered to the co-owners until after such date.

Where a ship's accounts are rendered half-yearly, a co-owner is not entitled to recover upon accounts rendered for & at the end of the half-year in which the writ is issued.

When a co-owner acts as ship's agent, not managing owner, for a coasting steamer at one of her ports of call, he cannot in a co-ownership action for the settlement of ship's accounts recover amounts due to him as agent.—THE EIDER (1879), 40 L. T. 462; 4 Asp. M. L. C. 104.

**443. —— Co-owner acting as ship's agent.**]—THE EIDER, No. 442, *ante*.

——.]—*See* ADMIRALTY, Vol. I., p. 117, Nos. 223–225.

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SUB-SECT. 3.—RELATIONS BETWEEN PART OWNERS AND THIRD PARTIES.

*A. Liability of Part Owners.*

**444. For repairs to ship.**]—No lien on a ship, or proceeds from sale of it, for repairs done, except in course of a voyage; liberty given to bring an action as to the personal liability of the part owners who received the benefit.—BUXTON *v.* SNEE (1748), 1 Ves. Sen. 154; 27 E. R. 952; *sub nom.* BUXTON *v.* SIDEBOTHAM, 2 Ves. 520, n., L. C.

*Annotations:*—**Consd.** The Neptune (1835), 3 Knapp, 94. **Refd.** The Gratitudine (1801), 3 Ch. Rob. 240; Green *v.* Briggs (1848), 17 L. J. Ch. 323; James *v.* S. W. Ry. (1872), L. R. 7 Exch. 287. **Mentd.** Stevens *v.* Praed (1795), 2 Ves. 519.

**445. —— Ordered by one part owner.**]—The principle which regulates the present application I find accurately laid down by *Abbott on Shipping*, p. 134. Where the repairs are executed in a port in this country, the vessel, till parted with, is specifically chargeable with their amount, but the lien is lost with the possession. Where the repairs are ordered by the master, he, in the first place, incurs a personal liability, & considering him in general as the servant or agent of the owners, in the employment & management of the ship, they also become responsible for his orders, unless they are expressly excluded by the terms of the contract. The same observation applies to the case where a part owner gives the order; the liability attaches against them all, unless it be expressly provided against (LORD ELDON, C.).—*Re* STRICKLAND, *Ex p.* BLAND (1814), 2 Rose, 91, L. C.

*Annotations:*—**Refd.** The Neptune (1833), 3 Hag. Adm. 129; Brodie *v.* Howard (1855), 25 L. J. C. P. 57.

**446. —— ——.]**—HACKWOOD *v.* LYALL, No. 380, *ante*.

**447. —— ——.]**—A part owner of a ship has no general authority to bind his co-owners for repairs. It is a question of fact whether a part owner has given another part owner authority, expressly or impliedly, to pledge his credit for repairs. A part owner does not require to give express notice that he will not be liable for repairs ordered by another part-owner, in order to exonerate from liability.

It is well established that a part owner of a ship is not in the position of a partner (WILLIAMS, J.).—BRODIE *v.* HOWARD (1855), 17 C. B. 109; 25 L. J. C. P. 57; 26 L. T. O. S. 91; 1 Jur. N. S. 1209; 4 W. R. 44; 139 E. R. 1010.

*Annotations:*—**Refd.** Whitwell *v.* Perrin (1858), 4 C. B. N. S. 412; Barker *v.* Highley (1863), 11 W. R. 968.

**448. —— Part owner dissenting.**]—A., B. & C. are part owners in a ship. A. directs B. & C. not to order any repairs in their joint names, &

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443 i. *Action for account—Co-owner acting as ship's agent.*]—ROBERTSON *v.* DENNISTOWN (1865), 3 Macph. (Ct. of Sess.) 829.—**SCOT.**

c. *Action of trover—Sale of vessel by one co-owner.*]—MCNAB *v.* HOWLAND (1862), 11 C. P. 434.—**CAN.**

**PART II. SECT. 5, SUB-SECT. 3.—A.**

445 i. *For repairs to ship—Ordered by one part owner.*]—Where pltf., at the request of A., the managing owner of a vessel, did certain repairs on the vessel, at the time not knowing that she was owned by A. jointly with others:—*Held:* all the owners were jointly liable to pltf.—HARRISON *v.* HARRIS (1851), 1 C. P. 235.—**CAN.**

d. *For goods supplied—Before purchase of interest.*]—ROY *v.* BLAGDON (1846), 2 R. de L. 73.—**CAN.**

e. —— *Without notice of sole liability of managing owner.*]—Pltfs. had, for some years, furnished outfits & supplies for a fishing vessel, of which defts. were part owners. In 1866 it was agreed among the owners that J., one of them, should manage the vessel on his own account, paying all expenses & that the others should receive certain proportions of the proceeds, but of this agreement pltf. had no notice:—*Held:* defts. were liable for goods supplied by pltfs. to J. in the usual way after the agreement.—RYERSON *v.* LYONS (1871), 8 N. S. R. (2 G. & O.) 458.—**CAN.**

f. ——.]—BLACK *v.* HALLIBURTON

*Sect. 5.—Co-ownership: Sub-sect. 3, A. & B. (a).*]

informs them that he will no longer consider them as managing owners. Repairs were done in their joint names, upon the direction of the captain employed by B. & C.:—*Held:* A. was jointly liable.—GLEADON *v.* TINKLER (1817), Holt, N. P. 586; 171 E. R. 348, N. P.

*Annotation:*—**Dbtd. & Distd.** Brodie *v.* Howard (1855), 17 C. B. 109.

**449. —— Bill given by part owner dishonoured.**]—The four defts. & B., were the owners, in certain shares between them, of a ship to which pltfs. by order of W., the ship's husband, & with the authority & consent of defts., did certain repairs, & upon pltfs.' account for such repairs being sent in to the owners, it was arranged between W. & pltfs., that it should be partly paid in cash, subject to discount & partly in good bills, & that the total amount of the contract should be apportioned between the said several owners according & in proportion to their interest & the number of their respective shares in the said ship. The necessary calculation having been made by W., the account was then paid to pltfs. through W., partly by a cheque of deft., A., payable to W.'s order, & indorsed by him for the amount of A.'s proportion, partly by cash payments from each of the other three defts. for the amount of their respective proportions, & partly by a bill at six months, drawn by W. on & accepted by B., for the amount of B.'s proportion of the said account. B.'s bill being dishonoured at maturity, pltfs. brought this action against defts. to recover from them, as joint owners of the ship, the amount of such dishonoured bill, in answer to which defts. contended that pltfs., by taking B.'s bill, & giving him time, had placed his co-debtors, defts., in a worse position, & necessarily postponed their remedy against B., & had consequently discharged defts.:—*Held:* giving judgment in favour of pltfs., & dismissing defts.' motion to enter a verdict or a nonsuit, deft. was bound by the mode of payment adopted, & that circumstance distinguished the case from that of principal & surety.—MOULD *v.* ANDREWS (1876), 35 L. T. 813; 3 Asp. M. L. C. 329.

**450. For goods supplied—Liability of grantee of bill of sale of ship.**]—TINKLER *v.* WALPOLE, No. 368, *ante*.

**451. For costs & damages decreed against owners generally—Liability of representative of part owner.**]—THE NOSTRA SIGNORA DE LOS DOLORES, No. 388, *ante*.

**452. For acts of joint agent—Liability in aggregate.**]—If persons separately interested in aliquot parts of a ship employ a joint agent, they are liable in the aggregate.—PASMORE *v.* BOUSFIELD (1816), 1 Stark. 296; 171 E. R. 478, N. P.

**453. For expenses of outfit.**]—HELME *v.* SMITH, No. 396, *ante*.

**454. For damage caused by negligence — Collision — Liability of part owner in command of ship.**]—A part owner who was on board, & in command of the damaging vessel at the time of the collision, held not responsible for the excess of damage beyond the proceeds of the ship.—THE VOLANT (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 6 Jur. 540; 166 E. R. 616.

*Annotations:*—**Consd.** The Mary Caroline (1848), 6 Notes of Cases, 536; Harmer *v.* Bell, The Bold Buccleugh (1851), 7 Moo. P. C. C. 267; The Temiscouata (1855), 2 Ecc. & Ad. 208; The Dictator, [1892] P. 304. **Reld.** The Mellona (1848), 6 Notes of Cases, 62; The Nostra Senora del Carmine (1854), 1 Ecc. & Ad. 303; The Milan (1861), 5 L. T. 590; The St. Olaf (1869), L. R. 2 A. & E. 360; The Freedom (1871), 25 L. T. 392; The Mullingar (1872), 26 L. T. 326; The Leon (1881), 6 P. D. 148; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; The Heinrich Bjorn (1885), 10 P. D. 44; The Cella (1888), 57 L. J. P. 55; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; The Africano, [1894] P. 141; Moran, Galloway *v.* Uzielli, [1905] 2 K. B. 555; The Joannis Vatis (No. 2), [1922] P. 213.

**455. —— Act of co-owner.**]—A. & S. were joint owners of a ship. A. worked the ship, defraying all the expenses & taking the entire management of her, & he took two-thirds of the gross earnings; S. did nothing, & took the remaining one-third of the gross earnings:—*Held:* the result of these facts was, that A. hired the share of S. in the ship, & he was not the partner or agent of S. so as to render S. liable in an action for damages caused by the negligence of A.—BURNARD *v.* AARON & SHARPLEY (1862), 31 L. J. C. P. 334; *sub nom.* BERNARD *v.* AARON & SHARPLEY, 9 Jur. N. S. 470.

*Annotation:*—**Expld.** Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1.

**456. Credit pledged by part owner—Must be for necessaries.**]—SNOWDON *v.* CHADWICK (1850), 15 L. T. O. S. 140.

**457. Claim for demurrage—Settlement by master part owner.**]—ALEXANDER *v.* DOWIE, No. 984, *post*.

**Insurance effected by part owner.**]—*See* INSURANCE, Vol. XXIX., pp. 77, 78, Nos. 368–373.

**Liability for acts of managing owner or ship's husband.**]—*See* Sect. 6, sub-sect. 5, *post*.

**Liability of registered owner.**]—*See* Sect. 4, *ante*.

**Liability of retired owner.**]—*See* PARTNERSHIP, Vol. XXXVI., p. 379, No. 564.

*B. Actions by and against Part Owners.*

*(a) Actions by Part Owners.*

**458. Right of part owner to sue alone — Surviving owner—Trover for ship.**]—One part owner of a ship may bring trover for the whole ship (HOLT, C.J.).—DOCKWRAY *v.* DICKENSON (1696), Comb. 366; Skin. 640; 90 E. R. 532.

*Annotations:*—**Mentd.** Omychand *v.* Barker (1745), 1 Atk. 21; Addison *v.* Overend (1796), 6 Term Rep. 766; Scott *v.* Godwin (1797), 1 Bos. & P. 67.

**459. —— —— For money deposited with banker by co-owner.**]—Where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, & was

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(1873), 9 N. S. R. (3 G. & O.) 207.—**CAN.**

**f.** ——.]—PERROTT *v.* WILLIS (1859), 9 I. C. L. R. 338.—**IR.**

**h.** *For necessaries—Unless exclusive credit given to part owner ordering goods.*]—Necessaries supplied to a vessel fitting for sea on the order of one of several part owners:—*Held:* the other owners are liable, unless they show that an exclusive credit was given to the part owner ordering the goods.—COBB *v.* TURNER (1854), 2 N. S. R. (James) 332.—**CAN.**

**k.** —— *Supplied before purchase of interest.*]—Where a party is in treaty for the purchase of a part in a ship, which ends in his becoming an apparent owner of a fourth in that ship, but never has any beneficial interest in it, such party will not be held liable for necessaries supplied to that ship before he became part owner.—*Re* AN ARRANGING TRADER (1867), 16 L. T. 466.—**IR.**

**l.** *For damages for non-delivery of goods—Unregistered sale of interest to co-owner.*]—Where a part owner of a vessel sold his share to the other part owner, but no bill of sale was executed, nor was an entry of the transfer made on the register:—*Held:* in an action brought against him for loss & non-delivery of iron shipped on board the vessel after such sale, that he was not liable.—FOWLER *v.* BORDEN (1859), 4 N. S. R. (Coch.) 79.—**CAN.**

**PART II. SECT. 5, SUB-SECT. 3.—B. (a).**

**m.** *Right of part owner to sue alone—Recovery of share of proceeds of sale of ship.*]—CAMPBELL *v.* JONES (1878), 17 N. B. R. (1 P. & B.) 656.—**CAN.**

**n.** —— *For damage to vessel.*]—All the proprietors of a registered vessel must join in an action for damages

received as such; &, therefore, where A. as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the East India co., to pay to the owners or bearer the sum of money therein mentioned, for freight; & A. deposited these warrants in the hands of his bankers, & they received the money due on them, & gave him credit for it in account; it was held, on *assumpsit* brought after A.'s death by the surviving part owners against the bankers, that on proof of the above facts, they could not recover the money, because it was not shown that the loan was upon their account; for the fact of the warrants being the property of all the part owners, when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan.—SIMS *v.* BOND (1833), 5 B. & Ad. 389; 2 Nev. & M. K. B. 608; 110 E. R. 834.

*Annotations:*—**Refd.** Humble *v.* Hunter (1848), 17 L. J. Q. B. 350; Walshe *v.* Provan (1853), 1 C. L. R. 823; Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649; Rederi Akt. Transatlantic *v.* Drughorn, [1918] 1 K. B. 394. **Mentd.** Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Cobb *v.* Becke (1845), 4 L. T. O. S. 394; Brunton *v.* Thompson (1846), 7 L. T. O. S. 430; Cooke *v.* Seeley (1848), 2 Exch. 746; New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474; Cooke *v.* Eshelby (1887), 12 App. Cas. 271; *Re* Derbyshire's Estate, Webb *v.* Derbyshire (1905), 94 L. T. 138; Soc. Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024.

**460. —— Detention of ship by proceedings against plaintiff alone.**]—In an action on the case for suing pltf. in the Admlty. for part of a ship belonging to pltf. & another; & where, in such action, the detention of the whole ship was deemed to be alleged in the declaration by way of consequential damage:—*Held:* deft. should not be at liberty, on account of a joint injury sustained by the detention, to plead the non-joinder of the other owner in abatement; for the suing pltf. personally in the Admlty was the gist of the action.—SMITH *v.* GIBSON (1736), Lee *temp.* Hard. 271; 2 Stra. 1045; 95 E. R. 174.

**461. —— On behalf of self & other part owners.**]—One part owner of a ship cannot bring a bill, on behalf of himself and the other part owners: but they must all be parties.—MOFFAT *v.* FARQUHARSON (1788), 2 Bro. C. C. 338; 29 E. R. 189.

**462. ——.**]—If one of several part owners of a chattel sue alone, deft. can only take advantage of the objection by a plea in abatement, even though the defect appear on the declaration.—ADDISON *v.* OVEREND (1796), 6 Term Rep. 766; 101 E. R. 816.

*Annotations:*—**Consd.** Sedgworth *v.* Overend (1797), 7 Term Rep. 279. **Refd.** Scott *v.* Godwin (1797), 1 Bos. & P. 67; Bloxam *v.* Hubbard (1804), 5 East, 407; Watson *v.* King (1815), 1 Stark. 121. **Mentd.** Stancliffe *v.* Hardwick (1835), 2 Cr. M. & R. 1; Jones *v.* Smith (1849), 18 L. J. Ex. 145.

**463. —— Recovery of insurance money.**]—RISING *v.* BURNETT (1798), Marshall on Marine Insurance, 4th ed. 570, N. P.

—— ——.]—*See* INSURANCE, Vol. XXIX., pp. 294, 295, Nos. 2402–2404.

**464. —— Action against master on several covenant.**]—Covenant by the master of a vessel with the several part owners & their several & respective exors., administrators, & assigns, to pay certain moneys to them, & to their & every of their several & respective exors., administrators, & assigns at a certain banker's, & in such parts & proportions as were set against their several & respective names:—*Held:* a several covenant, upon which each covenantee must sue severally in respect of his several interest, & they could not maintain a joint action.—SERVANTE *v.* JAMES (1829), 10 B. & C. 410; L. & Welsb. 54; 5 Man. & Ry. K. B. 299; 8 L. J. O. S. K. B. 64; 109 E. R. 502.

*Annotations:*—**Refd.** Lane *v.* Drinkwater (1834), 1 Cr. M. & R. 599. **Mentd.** Chanter *v.* Lease (1838), 1 Horn & H. 224.

**465. —— Recovery of share of proceeds of sale of ship—Against broker employed by co-owners.**]—One part owner of a ship cannot maintain a separate action of *assumpsit*, for his share of the proceeds of the sale of the ship, against a broker who has been employed to sell by the other part-owners, & has paid them their shares, but refuses to pay him his proportion without their concurrence.—HATSALL *v.* GRIFFITH (1834), 2 Cr. & M. 679; 4 Tyr. 487; 3 L. J. Ex. 191.

*Annotation:*—**Apld.** Brown *v.* Bradford (1842), 2 Mood. & R. 413.

**466. —— Action for freight.**]—A charterparty contained stipulations (*inter alia*) that the captain should attend daily at the broker's office to sign bills of lading; that the ship should take on board all such lawful goods as the charterers might require; & then proceeded—"In consideration whereof the charterers agree to pay freight for the use & hire of the said ship the sum of £1,400, with a gratuity of 25 guineas to the master, payable before leaving London." Then followed this clause—"The owner further agrees, that the ship shall be ready to sail, etc., at the expiration of the said laying days, or sooner if required by the charterers. If the ship be not ready, either on the owner's or charterers' part, at the above-named dates, then demurrage to be paid by the party in default at the rate of £7 *per diem.* The ship to be ready on or before Nov. 10, or the charterers to have the option of cancelling this agreement." The freight was stipulated to be paid, partly by bills of lading, at the port of destination, to the extent of £800, etc., & balance of £600, in cash, less seventy days' discount from the date of clearing from London:—*Held:* the captain, with whom the contract was made in his own name, though only partly interested in it as part owner of the ship, was a proper party to sue on it.—SEEGER *v.* DUTHIE (1860), as reported in 8 C. B. N. S. 45; 29 L. J. C. P. 253; 6 Jur. N. S. 1095; 141 E. R. 1081; *affd.*, 30 L. J. C. P. 65, Ex. Ch.

*Annotations:*—**Refd.** Behn *v.* Burness (1863), 2 New Rep. 184; MacAndrew *v.* Chapple (1866), L. R. 1 C. P. 643; Corkling *v.* Massey (1873), L. R. 8 C. P. 395.

**467. —— Damages for breach of terms of bill of lading—Part owner master of ship.**]—By the terms of a bill of lading, a ship was "to take her regular turn in unloading" at the port of discharge. On the arrival of the ship the consignee refused to accept & unload the cargo, in consequence of some dispute between himself & the consignor, & the ship was kept several days without being unloaded:—*Held:* the bill of lading was a contract between the master & the consignor, & A., who was master & part owner, was entitled to recover damages from the consignor for his breach of contract in not allowing the ship to unload in

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suffered by such vessel.—HUS *v.* MISSISSIPPI & DOMINION S.S. CO. (1886), 30 L. C. J. 126.—CAN.

o. —— *For share of earnings.*]—In an action by a part owner against the captain & ship's husband for a share of the earnings, deft. moved to dismiss the action because of the non-joinder of the other part owners:—*Held:* each part owner was entitled to sue separately for his share.—HARDIE *v.* BROWN (1845), Bluett, 298.—I. of M.

p. —— *Recovery from ship's husband of rebates from brokers.*]—MANNERS *v.* RAEBURN & VERREL (1884), 11 R. (Ct. of Sess.) 899; 21 Sc. L. R. 723.—SCOT.

*Sect. 5.—Co-ownership: Sub-sect. 3, B. (a) & (b); sub-sect. 4. Sect. 6: Sub-sects. 1, 2 & 3.]*

her regular turn, according to the terms of the bill of lading, & for this purpose it was not necessary that he should join his co-owner as a party to the action.—CAWTHORN *v.* TRICKETT (1864), 15 C. B. N. S. 754; 3 New Rep. 383; 33 L. J. C. P. 182; 9 L. T. 609; 12 W. R. 311; 1 Mar. L. C. 414; 143 E. R. 981.

**468. —— Action against charterers.]** — In an action by one of several joint owners of a steamship against the charterers, the latter applied to have all the joint owners joined as pltfs. The names of all the persons on whose behalf pltf. sued had been already disclosed. The application was refused as satisfactory reasons must be given & none had been given in the present case.

R. S. C., Ord. 16, r. 9, applies to an action brought by one of several joint owners of a ship against the charterers.—DE HART *v.* STEVENSON (1876), 1 Q. B. D. 313; 45 L. J. Q. B. 575; 24 W. R. 367; 2 Char. Pr. Cas. 281.

*Annotation:*—**Apld.** Janson *v.* Property Insce. (1913), 30 T. L. R. 49.

**469. Right of all co-owners to sue — On contract made by one—Sale of whale oil.]**—The joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part owners, & the purchaser did not know that other persons had any interest in the transaction.—SKINNER *v.* STOCKS (1821), 4 B. & Ald. 437; 106 E. R. 997.

*Annotations:*—**Distd.** Humble *v.* Hunter (1848), 3 New Pract. Cas. 175. **Refd.** Steel *v.* Western (1822), 7 Moore, C. P. 29.

**470. —— Action to impugn bottomry bond — Though bond given by one part owner.]**—(1) To justify the resort of a master of a ship to a bottomry bond, it is requisite by maritime law, that the advances should be merely to enable the ship to refit; or to pay for the repairs & despatch of the vessel for the completion of her voyage; & that the master should be unable to obtain such advances upon personal credit.

(2) The jurisdiction of the Ct. of Admlty., in cases of bottomry bond, is founded on the existence of necessity, arising from the want of personal credit.

(3) The sale of a bottomry bond, pursuant to public advertisement, by auction, to the lowest bidder, in a foreign port, by the master of a ship, is not sufficient to discharge a purchaser of the bottomry bond from making reasonable inquiries that the master is, under the circumstances, justified in granting the bond.

A bottomry bond on the ship, freight, & cargo, sold at public auction, in a foreign port, by the master & part owner of the ship, there being an agent of the charterer & sole owner of the cargo, willing to advance, on personal credit of the owner of the cargo, for the necessary repairs of the ship, under the circumstances, pronounced against.

(4) *Semble:* the master, though the original hypothecator of the ship, & a part owner, is not precluded, by the practice of the Ct. of Admlty., from joining his co-owners in impugning the bond.—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG (1839), 3 Moo. P. C. C. 1; 4 L. T. 28, 92; 13 E. R. 1, P. C.

*Annotation:*—*As to* (3) **Expld.** The Pontida (1884), 9 P. D. 177.

*(b) Actions against Part Owners.*

**471. Whether all need be joined — Action for negligence of master.]**—BOSON *v.* SANDFORD, No. 1006, *post.*

**472. —— ——.]** — To an action on the case against several partners for negligence in their servant, whereby pltf.'s goods were lost, it cannot be pleaded in abatement, that there are other partners not named.—MITCHELL *v.* TARBUTT (1794), 5 Term Rep. 649; 101 E. R. 362.

*Annotation:*—**Refd.** Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365.

**473. —— Action for price of necessaries supplied—Existence of other part owners not known.]**—DOE *v.* CHIPPENHAM (1790), Abbott's Merchant Shipping, *14th ed. 130, N. P.*

*Annotations:*—**Refd.** Baldney *v.* Ritchie (1816), 1 Stark. 338; De Mautort *v.* Saunders (1830), 1 B. & Ad. 398.

**474. —— Action for damage to goods.]** — To an action on the case in the form of tort against one of several joint owners of a ship for not safely conveying goods which had been delivered to him by pltf. for that purpose, deft. may plead in abatement that the goods were delivered to him & his partners jointly, & that his partners are not sued.—POWELL *v.* LAYTON (1806), 2 Bos. & P. N. R. 365; 127 E. R. 669.

*Annotations:*—**Folld.** Max *v.* Roberts (1807), 2 Bos. & P. N. R. 454. **Distd.** Ansell *v.* Waterhouse (1817), 6 M. & S. 385. **Consd.** Bretherton *v.* Wood (1821), 3 Brod. & Bing. 54. **Refd.** Lopes *v.* De Tastet (1820), 1 Brod. & Bing. 538; Leslie *v.* Wilson (1821), 3 Brod. & Bing. 171. **Mentd.** Green *v.* Greenbank (1816), 2 Marsh. 485; Cranch *v.* White (1835), 1 Bing. N. C. 414; Pozzi *v.* Shipton (1838), 8 Ad. & El. 963; Legge *v.* Tucker (1856), 26 L. J. Ex. 71; Alton *v.* Mid. Ry. (1865), 34 L. J. C. P. 292.

**475. Failure to prove all defendants part owners —Right as against those proved to be owners.]**—In an action on the case, upon the delivery of goods to several joint owners of a ship to be carried to A, for freight, alleging a deviation; if pltf. fail in proving all defts. to be owners he cannot recover even against those whom he proves to be owners.—MAX *v.* ROBERTS (1807), 2 Bos. & P. N. R. 454; 127 E. R. 706; *subsequent proceedings* (1810), 12 East, 89.

*Annotations:*—**Mentd.** Ansell *v.* Waterhouse (1817), 6 M. & S. 385; Bretherton *v.* Wood (1821), 9 Price, 408.

**Monition to proceed to adjudication of claim to prize.]**—*See* PRIZE LAW, Vol. XXXVII., p. 665, No. 1264.

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SUB-SECT. 4.—SALE OF SHIP BY ORDER OF COURT.

*See* ADMIRALTY, Vol. I., p. 118, Nos. 236–240.

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## SECT. 6.—MANAGING OWNERS AND SHIP'S HUSBANDS.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, s. 59.

**476. Managing owner — Commercial not legal expression.]**—W. was the registered owner of certain shares in a ship, & had been entered on the register as managing owner. Deft. subsequently became the registered owner of other shares in the ship. Deft. was not aware in fact that W. was so registered as managing owner. W. sent the ship on a voyage without deft.'s knowledge, & contrary to the terms of an agreement made between them. Deft. did not participate in the adventure, & had previously informed W. that he did not intend



q. *Managing owner—Agent of registered owners.]*—M'LAUCHLAN *v.* HOGARTH & SON, [1911] S. C. 522.—SCOT.

to navigate the ship or take any part in her management. Pltfs. supplied necessaries for the ship previous to such voyage, upon the order of W. without the knowledge or consent of deft. Pltfs. before supplying the goods consulted the register, & found deft.'s name entered therein as part owner of the ship :—*Held :* the fact that deft. had allowed the entry on the register describing W. as managing owner to remain unaltered did not *per se* amount to a holding out of W. as his agent, so as to render deft. liable for the necessaries supplied by pltfs., & inasmuch as W. had not in fact authority to bind deft., pltfs. could not recover against the deft. for such necessaries.

The term managing owner is not defined in the Act . . . it is a commercial & not a legal expression (BOWEN, J.).—FRAZER *v.* CUTHBERTSON (1880), 6 Q. B. D. 93 ; 50 L. J. Q. B. 277 ; 29 W. R. 396.

*Annotations :*—**Refd.** Baumvoll Manufactur von Scheibler *v.* Gilchrest, [1892] 1 Q. B. 253 ; Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359 ; Associated Portland Cement Manufacturers (1910) *v.* Ashton, [1915] 2 K. B. 1 ; Ellerman Lines *v.* Read (1927), 44 T. L. R. 7.

**477. —— Agent of each co-owner separately.**]—THE VINDOBALA, No. 515, *post.*

**478. Ship's husband—Servant of shipowner.**]—BENSON *v.* HEATHORN, No. 493, *post.*

**479. —— Position fiduciary—Director of company owning ships acting as ship's husband.**]—BENSON *v.* HEATHORN, No. 493, *post.*

**480. —— ——.**]—SMITH *v.* LAY, No. 496, *post.*

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SUB-SECT. 2.—APPOINTMENT.

*See* 1894 Act, s. 59.

**481. Validity of deed continuing appointment—Founded on contract for sale of shares.**]—A. & B., being owners of nine-sixteenth shares of a ship, & also husbands or managing owners, by deed, sold five-sixteenths to C. The deed contained a covenant that C. should be appointed to the command of the ship, & that A. & B. should continue to have the management, as husbands, & should elect the tradesmen & appoint all the officers ; & that if C. should relinquish the command, or die, A. & B. should appoint such fit person to succeed him as might be approved of by him or his exors., or that he or they might nominate a fit person to the command in his stead, & that A. & B. should be employed as the agent of C. in the concerns of the ship ; & if C. should be minded to sell all or any of his shares, he might do so, upon condition that the purchasers should abide by the stipulations in the deed, & not remove A. & B., or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part :—*Held :* although the covenant to continue A. & B. as C.'s agents in the concerns of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, & the continuance of the management, it was illegal & void.—CARD *v.* HOPE (1824), 2 B. & C. 661 ; 4 Dow. & Ry. K. B. 164 ; 2 L. J. O. S. K. B. 96 ; 107 E. R. 529.

*Annotations :*—**Expld.** Richardson *v.* Mellish (1824), 2 Bing. 229. **Refd.** Jones *v.* Waite (1839), 5 Bing. N. C. 341.

**482. Appointment by court.**]—A case in which the ct. on an interlocutory application appointed a ship's husband at the suit of some of the part owners of a ship as against the others, who were, under a contract, ship's husbands as well as part owners.—BRENAN *v.* PRESTON (1853), 10 Hare, 331 ; 1 W. R. 112 ; 68 E. R. 953 ; *on appeal*, 20 L. T. O. S. 241, L. C. & L. JJ. ; *previous proceedings* (1852), 2 De G. M. & G. 813, L. JJ.

*Annotation :*—**Mentd.** Lovett *v.* Lovett (1856), 2 Jur. N. S. 1130.

**483. Evidence of appointment—Acting as ship's husband.**]—Pltf., part owner of a ship, & who acted as ship's husband, being authorised by the other part owners, of whom deft. was one, to repair & lengthen the ship, gave verbal orders for the repairs, & entered into a written contract with a ship builder for lengthening the ship. Afterwards pltf. received a notice from deft. that he would not be answerable for any alterations in the ship. The work was completed & pltf. paid for it, & on telling deft. the amount, he said that "the ship had better have been sold." Pltf. having sued deft. for his proportion of the money paid :—*Held :* the fact of pltf. having acted as ship's husband was sufficient evidence of his appointment, without any formal proof.

An express authority is necessary from a part owner of a ship to the ship's husband to order works not necessary as repairs ; but such authority once given cannot be revoked after it has been acted upon, & it is for the part owner when sued for contribution to prove that it was revoked before the works were commenced or a contract for them entered into.—CHAPPELL *v.* BRAY (1860), 6 H. & N. 145 ; 30 L. J. Ex. 24 ; 3 L. T. 278 ; 9 W. R. 17 ; 158 E. R. 60.

*Annotation :*—**Refd.** Hill *v.* Nuttall (1864), 17 C. B. N. S. 262.

**484. —— Entry in register.**] — FRAZER *v.* CUTHBERTSON, No. 476, *ante.*

**485. Construction of contract.**] — DARBY *v.* BAINES, No. 436, *ante.*

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SUB-SECT. 3.—DUTIES.

*See* 1894 Act, s. 59.

**486. General duties.**]—DARBY *v.* BAINES, No. 436, *ante.*

**487. Duty to account—Within reasonable time—Liability for failure.**]—Part owners of a ship having agreed "each & every of them with the others & each & every of the others," that the ship should proceed on a certain voyage, under the exclusive management & control of one of them as ship's husband, & that after her return "a full account should be made of the said ship & her concerns," & the neat profits be divided in proportion, after deducting all charges ; the duty of making out such account is cast upon the ship's husband ; & for not doing so, & not dividing the neat profits after deducting all charges, within a reasonable time after the ship's return, an action lies against him upon the agreement by each of the part owners ; though it be not averred in terms that the charges were or could have been ascertained before the action brought ; for that is matter of defence.—OWSTON *v.* OGLE (1811), 13 East, 538 ; 104 E. R. 479.

*Annotations :*—**Apld.** Wilson *v.* Cutting (1834), 10 Bing. 436. **Refd.** Servante *v.* James (1829), 5 Man. & Ry. K. B. 299 ; Lyon *v.* Haynes (1843), 5 Man. & G. 504.

**488. —— —— Reasonable time question of fact.**]—It is the duty of a managing owner to account to his co-owners for the ship's earnings & disbursements within a reasonable time, but what

*Sect. 6.—Managing owners and ship's husbands: Sub-sects. 3, 4 & 5, A.]*

is a reasonable time must depend upon the circumstances of each case. There is no fixed rule that a ship's accounts are to be ready before she sails on her next voyage.—THE MOUNT VERNON (1891), 64 L. T. 148; 7 Asp. M. L. C. 32.

**489. —— Receipt of freight—After deduction of disbursements.**]—HARRIS *v.* REYNOLDS, No. 504, *post.*

**490. Duty to procure charters & freights.**]—DARBY *v.* BAINES, No. 436, *ante.*

**491. ——.**] —WILLIAMSON *v.* HINE, No. 497, *post.*

**Duty to insure.**]—*See* INSURANCE, Vol. XXIX., p. 79, No. 381.

**Duty to make return for purpose of income tax.**]—*See* INCOME TAX, Vol. XXVIII., p. 39, No. 205.

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SUB-SECT. 4.—REMUNERATION.

**492. Right to remuneration — No fixed rate applicable.**]—THE MEREDITH, No. 431, *ante.*

**493. Right to commission—Director of company acting as ship's husband.**]—H., being a director of a joint-stock co. established for the building, purchasing, hiring & employment of steam vessels, purchases a vessel for £1,340, & afterwards sells it to the co., as from a stranger, for £1,500, charging the co. with commission at 1 per cent. the broker's earnest money, & the expenses of the bill of sale to himself, there being but one bill of sale. Such a transaction cannot stand in a ct. of equity.

A ship's husband being the servant of the shipowners, holding an important office & open to the vigilant superintendence of his employers, it is *primâ facie* a breach of trust in any director of a co. established for the purpose of acquiring & working of vessels, especially where the directors have the exclusive management of the concern, to take upon himself the duties of ship's husband. Where, therefore, in a co. so constituted one of the directors with the consent of others forming with himself a board of directors, undertook the office of ship's husband, & in that character received out of the funds of the co. such sums for commission & brokerage as are usually allowed to the ship's husband:—*Held:* he must refund those moneys; & *semble*, the other members of the board of directors were similarly responsible in the event of any inability in the principal party implicated to refund.—BENSON *v.* HEATHORN (1842), 1 Y. & C. Ch. Cas. 326; 9 L. T. 118; 62 E. R. 909.

*Annotations:*—**Distd.** Smith *v.* Lay (1856), 3 K. & J. 105. **Consd.** *Re* Cape Breton Co. (1885), 29 Ch. D. 795. **Refd.** Imperial Mercantile Credit Assocn. *v.* Coleman (1871), 6 Ch. App. 558; Costa Rica Ry. *v.* Forwood, [1900] 1 Ch. 756; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669; Transvaal Lands Co. *v.* New Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488.

**494. —— Rate of commission.**] — DARBY *v.* BAINES, No. 436, *ante.*

**495. —— ——.**] — THE DELIA, SALTER *v.* ADEY (1855), 9 L. T. 119; *previous proceedings*, 24 L. T. O. S. 229.

**496. —— For services as ship-broker.**]—The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting & distributing the freight, there being no incompatibility between those services, as, *semble*, there would be between the services of ship's chandler or ship's carpenter, & his fiduciary character as managing owner.

But, before allowing him a commission in respect of the services in question, the ct. directed an inquiry whether, according to the custom of shipowners or otherwise, he, being managing owner, was entitled to any & what commission in respect of duties performed by him, & which duties are ordinarily performed by shipbrokers.—SMITH *v.* LAY (1856), 3 K. & J. 105; 69 E. R. 1041; *subsequent proceedings, sub nom.* THE TUDOR, SMITH *v.* LAY (1858), 9 L. T. 119.

**497. —— For procuring charters & freights.**]—The procuring of charters & freights is one of the ordinary duties incidental to the position of a managing owner of a ship; & in the absence of a special contract he is not entitled to retain, as against the ship, commissions on the charters or freights procured, whether he is acting as shipbroker himself or employing other brokers.—WILLIAMSON *v.* HINE, [1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 682; 39 W. R. 239; 7 T. L. R. 130; 6 Asp. M. L. C. 559.

**498. Right to receive profits.**]—Pltf. & deft. were partners, they were joint owners with B. of some ships, as to which B. acted as ship's husband, but the duties were principally performed for him by deft. There being no agreement on the subject between the parties:—*Held:* B. was entitled to the profits derived as ship's husband, & pltf. was not, as partner, entitled to participate in any share of them received by deft., by arrangement with B.—MILLER *v.* MACKAY (No. 2) (1865), 34 Beav. 295; 55 E. R. 649; *previous proceedings* (1862), 31 Beav. 77.

*Annotation:*—**Refd.** Hancock *v.* Heaton (1874), 30 L. T. 592.

**499. Effect of receipt of secret commission—Right of co-owners to terminate agreement.**]—A., B., & C. being joint owners in a vessel, it was agreed that A. should act as the ship's husband & broker, & be entitled to commission on "gross freight, & in case of gross negligence or fraud on the part of A. that B. & C. might put an end to the agreement by notice & purchase of A.'s shares. A. effected a charterparty of the vessel, the charterer paying all expenses, & £130 per week for the ship, & £4 a week to A., who in the accounts he rendered to B. & C. represented the amount paid as £130 a week only:—*Held:* the concealment of the receipt of the £4 a week was such a fraud on B. & C., that it entitled them to put an end to the agreement.—THE PHŒBE, BRENAN *v.* PRESTON (1853), 9 L. T. 119; 2 W. R. 138.

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SUB-SECT. 5.—AUTHORITY TO BIND OWNERS.

*A. In General.*

**500. General rule—Authority to do all necessary acts—To enable ship to prosecute voyage.**]—The ship's husband or managing owner has authority to do whatever is necessary to enable the ship to prosecute her voyage & earn freight.

Deft. was part owner, to the extent of 2-64ths in a ship which had been arrested in the Admlty. Ct. in a suit for collision. P., the other co-owner,

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**PART II. SECT. 6, SUB-SECT. 4.**

a. *Right to commission.*]—HALL *v.* DUNCAN (1863), 22 U. C. R. 602.—CAN.

**PART II. SECT. 6, SUB-SECT. 5.—A.**

b. *Delegation of powers.*]—FORBES *v.* MILNE & Co. (1822), 2 Sh. (Ct. of Sess.) 87.—SCOT.

who was also ship's husband or managing owner, in order to procure the release of the ship that she might be earning freight, induced pltf. to become bail for the ship in the Admlty. Ct., by which means the ship was released. The suit terminated in favour of the injured vessel. P. became bkpt., & the ship herself was lost. Pltf. having paid what was due from him under the bail bond, brought his action against deft. to recover back the money so paid:—*Held:* P., as managing owner, had, under these circumstances, authority to bind his co-owner, deft., & pltf. was therefore entitled to recover.—BARKER *v.* HIGHLEY (1863), 15 C. B. N. S. 27; 2 New Rep. 489; 32 L. J. C. P. 270; 9 L. T. 228; 10 Jur. N. S. 391; 11 W. R. 968; 1 Mar. L. C. 383; 143 E. R. 692.

*Annotations:*—**Consd.** Frazer *v.* Cuthbertson (1880), 6 Q. B. D. 93. **Reld.** Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649; Thomas *v.* Lewis (1878), 4 Ex. D. 18; Pringle *v.* Dixon (1896), 2 Com. Cas. 38; Doeg *v.* Trist (1897), 2 Com. Cas. 153.

**501. —— —— In management of ship.**]—A ship's husband is no doubt entitled to do all things usual in the management of the vessel, & to appoint an agent when in the ordinary sense the authority of an agent is required but not to appoint a ship's husband to act in his place (MATHEW, J.).—DOEG *v.* TRIST (1897), 13 T. L. R. 320; 2 Com. Cas. 153.

**502. Institution of legal proceedings—Liability of co-owner for costs.**]—Solr. in London brings his action against his debtor in Scotland for costs incurred in the conduct of an appeal *in dom proc.*

The action, in which the costs were incurred, was originally brought in the Admlty. Ct., to recover the amount insured upon salvage for a recapture made by the ship *Diana*, of which Y., O., & S., resp., were the owners; S. being however one of the registered owners only for security of a debt due to him from O. Pending the suit before the Judge Admiral the *Diana* was sold, & the debt paid to S. S.'s name was, however, continued in the subsequent proceedings in the Ct. of Session & House of Lords. Y., the ship's husband, by letter to the agent in Scotland, stated it to be S.'s request that a particular solr. named should be employed to conduct the appeal, & he was employed. To the action by the solr., S., who was the principal defender, the others being insolvent; pleaded the triennial prescription; & averred, & the averment not disproved, that Y. had no authority from him to write the letter to the agent in Scotland, that he never was consulted about the matter, & that the use of his name in the proceedings in Scotland & *in dom. proc.* had been entirely without his authority or knowledge. Answered that the law of Scotland & the triennial prescription did not apply, the debt having been contracted in England; & that, supposing that to be wrong, the prescription did not apply because the debt, was constituted by writ, Y., as ship's husband, having power to bind the other owners, & having bound them by his letter. Judgment below for the defender, the ct. being of opinion that it was itself the proper forum, & that a ship's husband could not bind the owners in this matter; & the grounds of judgment held *in dom. proc.* to be right. But the Lord Chancellor being of opinion that, by the policy of the Hawkesbury Acts, Y. might have bound S. as a co-owner, if their names appeared together as owners in the register, a copy of two registers, agreed by the parties to be a true copy produced, in one of which the name of S. appeared, in the other that of Y.; but not being together in the same register the Lord Chancellor conceived that it was too much to say that they were co-owners; & judgment affirmed.

I cannot conceive that a ship's husband has, as such, the power to pledge his owners to the expenses of a law suit (LORD ELDON, C.).—CAMPBELL *v.* STEIN (1818), 6 Dow, 116; 3 E. R. 1417, H. L.

*Annotation:*—**Mentd.** Don *v.* Lippmann (1837), 5 Cl. & Fin. 1.

**503. —— —— Effect of delay in application to court.**]—Where a shipowner applied to the ct. to set aside an order condemning him in the costs of unsuccessful legal proceedings taken in his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, & that the first intimation he had of the proceedings was a notice received by him about a month previous to the present application condemning him in the costs of such proceedings, the ct. refused to grant the application, as it did not appear that appct., though he had no knowledge of the institution of, was not aware of the pendency of the proceedings, & because he had not at once applied to the ct. on becoming aware of the proceedings, instead of delaying to take any steps for over a month.—THE BELLCAIRN (1886), 54 L. T. 544; 5 Asp. M. L. C. 582.

**504. Borrowing money on security of charterparty.**]—A ship's husband who had advanced for outfits & disbursements of the ship sums considerably exceeding the money received under the charterparty at the commencement of the voyage, had, before the freight was delivered, obtained a loan by deposit of the charterparty to relieve himself from his advances on account of the ship. Motion by one of the part owners to restrain the ship's husband from receiving or dealing with the freight, refused with costs, the ship's husband being entitled to receive the freight & deduct his disbursements, & his conduct not having been so improper as to justify the restraint of this right.—HARRIS *v.* REYNOLDS (1856), 9 L. T. 119; 4 W. R. 278.

**505. —— Loan necessary to enable ship to prosecute voyage.**]—A ship's husband & managing owner, as such, has no authority to borrow money on the credit of the co-owners of the ship.

*Semble:* a managing owner might have a right under exceptional circumstances to borrow money without express authority, if the loan were necessary to enable the ship to prosecute her voyage.—PRINGLE (ADAM) & CO. *v.* DIXON (1896), 2 Com. Cas. 38.

*Annotation:*—**Reld.** Doeg *v.* Trist (1897), 2 Com. Cas. 153.

**506. —— On assignment of freight.**]—S. & co. were owners of seven-eighths of an American vessel, & ship's husbands. T. was the owner of the remaining eighth, & was captain of the vessel, which was despatched on a voyage to Liverpool. Before the voyage, S. & co. spent a large sum in repairs, & for the purpose, as was alleged, of taking up bills which they had accepted on account of the repairs, they borrowed a sum of money from pltfs., & assigned the freight to them by way of security. On the arrival of the vessel in Liverpool, pltfs. obtained an injunction to prevent T. from receiving the freight:—*Held:* a part owner who is ship's husband has not the right as against other part owners of making an assignment of the whole freight to secure moneys advanced to him; the legal right to receive the freight was in the captain, & in the absence of any sufficient allegation & proof that he was about to misapply it, the injunction ought not to have been granted.—GUION *v.* TRASK (1860), 1 De G. F. & J. 373; 29 L. J. Ch. 337; 1 L. T. 469; 6 Jur. N. S. 185; 8 W. R. 266; 45 E. R. 403, L. JJ.

*Sect. 6.—Managing owners and ship's husbands: Sub-sect. 5, A., B. & C.; sub-sect. 6.]*

**507. Procuring bail bond—Liability of co-owner to bail.**]—BARKER *v.* HIGHLEY, No. 500, *ante.*

**508. Sale of ship—Subsequent ratification by co-owners.**]—D., the managing owner of a ship, through pltfs., his agents at Constantinople, sold her to the Turkish Govt., & received a bill upon the Oriental Bank in London for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from defts., who were the owners of 23-64ths of the ship, to sell her, but the latter knew that a sale was contemplated; &, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish Govt.; & had actually received the purchase-money, & empowering pltfs. to transfer their respective shares & to hand over the vessel to the purchasers. Defts. afterwards received from D., or settled in account with him, the value of their respective shares:—*Held:* the jury were warranted in finding that defts. had authorised the sale of the ship by D., or had by their subsequent ratification so adopted his act as to render them jointly liable to pltfs. for the commission due to the latter on the sale.—KEAY *v.* FENWICK (1876), 1 C. P. D. 745, C. A.

*Annotation:*—**Apld.** Mould *v.* Andrews (1876), 35 L. T. 813.

**509. —— Liability to co-owners for actual value.**]—Where a person deals as owner with the property of another, so as to found an action of conversion by the owner, there is an implied covenant on the part of such person to pay for the property as if there had been a sale to him by the owner. The managing owner of a ship sold her without the consent of the owner of 2-64th shares:—*Held:* there was an implied covenant on the part of the managing owner to pay to the owner of shares a price representing their actual value.—NICOL *v.* HENNESSEY (1896), 44 W. R. 584; 12 T. L. R. 485; 40 Sol. Jo. 601; 1 Com. Cas. 410.

**510. Charterparty cancelled—Liability of co-owners for compensation.**]—A ship's husband, who has the authority of the owners of the ship to enter into a charterparty, & has accordingly made a charterparty by which commission on the freight, primage, & demurrage is stipulated to be due to the charterers on the execution of the charterparty, has not, without the express sanction of the owners, power to bind them by an agreement to cancel the charterparty & pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners.—THOMAS *v.* LEWIS (1878), 4 Ex. D. 18; 48 L. J. Q. B. 7; 39 L. T. 669; 43 J. P. 56; 4 Asp. M. L. C. 51; *sub nom.* THOMAS *v.* OXLEY, 27 W. R. 111, D. C.

*Annotations:*—**Refd.** Pringle *v.* Dixon (1896), 2 Com. Cas. 38; Doeg *v.* Trist (1897), 2 Com. Cas. 153.

**511. Authority to act on shore.**] — The authority of the managing owner of a vessel extends to the conduct on shore of all that concerns the employment of the ship, so that co-owners in deputing to him the management of the vessel on their behalf thereby give him power to pledge their credit for what is necessary to repair her, so as to enable her to be employed in the ordinary course of trade suitable for the vessel, & it makes no difference in the liability of the co-owners that the managing owner has instructions to insure & has, in fact, collected the money from the underwriters to discharge a claim for heavy repairs consequent on damage sustained by the vessel.—THE HUNTSMAN, [1894] P. 214; 70 L. T. 386; 7 Asp. M. L. C. 431; 6 R. 698.

**512. Appointment of deputy.**] — DOEG *v.* TRIST, No. 501, *ante.*

**513. Appointment of agent.**]—DOEG *v.* TRIST, No. 501, *ante.*

**514. Whether authority revocable—Express authority.**]—CHAPPELL *v.* BRAY, No. 483, *ante.*

**515. —— By one co-owner alone.**] — The managing owner of a ship is the agent of each co-owner separately, & each co-owner may retract his authority to the managing owner without consulting the other co-owners.

The managing owner of the *Vindobala*, with the authority of his co-owners, entered into negotiations abroad with the view of chartering the ship. These negotiations were carried on by an agent abroad. On July 17, 1884, a form of charter, signed by the managing owner, was offered to the proposed charterers. They objected to certain provisions in it, to which objections the agent, with the managing owner's authority, assented. On July 19, the charterers signed the charter, having previously introduced into it certain further alterations which had never been suggested to the managing owner's agent. On the same day certain of the co-owners gave notice to the managing owner that they refused to be bound by any charter. The managing owner, considering himself bound to sign the charterparty, signed it on July 22. The execution of the charterparty was prevented by the arrest of the *Vindobala* by the dissentient owners, & damages resulted therefrom:—*Held:* in a co-ownership's action, there was no binding contract until the managing owner signed the charter on July 22, &, as the dissenting owners had revoked their authority on July 19, they were not bound by the charter.—THE VINDOBALA (1889), 14 P. D. 50; 58 L. J. P. 51; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. L. C. 376, C. A.

**Authority to insure.**] — *See* INSURANCE, Vol. XXIX., pp. 77, 78, 439, 440, Nos. 366–373, 3400–3403.

*B. Fitting out and Repairing Ship.*

**516. Liability of owners for expenses—Fitting out ship.**]—Part owners of a ship in the East India Co.'s service is liable to pay the bills of the tradesmen employed by the husband of the ship in fitting her out.—TOLSON *v.* HALLETT (1755), Amb. 269; 27 E. R. 180, L. C.

**517. —— ——.**]—HELME *v.* SMITH, No. 396, *ante.*

**518. —— —— Effect of insurance of ship.**]—THE HUNTSMAN, No. 511, *ante.*

**519. —— Work done to ship.**]—In an action against one of the owners, for work done to a vessel, by the order of the ship's husband, such owner will be liable, unless it be shown, that the dealing was that the person who directed the work to be done should be looked to exclusively.—THOMPSON *v.* FINDEN (1829), 4 C. & P. 158; 172 E. R. 652, N. P.

**520. —— —— Unnecessary works.**] — CHAPPELL *v.* BRAY, No. 483, *ante.*

**521. —— Repairs to ship—Effect of sale of share by part owner.**]—CURLING *v.* ROBERTSON, No. 371, *ante.*

**522. —— —— Managing owners also**

**PART II. SECT. 6, SUB-SECT. 5.—B.**

**516 1.** *Liability of owners for expenses—Fitting out ship.*]—E., the managing owner, obtained, on credit, metal sheathing & other goods from pltfs. which were used in sheathing & further outfitting the vessel, at the port where she had been built, & where the owners resided, before sending her out to sea:—*Held:* the managing owner had power to pledge the credit of the owners for such necessary purposes.—TROOP *v.* EVERETT (1894), Cout. 131.—CAN.

**charterers.**]—H. being the owner of a steam vessel sold 32-64th shares in her to M'C. & co., & agreed that they should have the full & exclusive direction, management & control of the vessel, to be dealt with & managed by them as managing owners & ship's husbands as they might think best without any let or hindrance of H., & as such managing owners & ship's husbands should have 5 per cent. on the gross earnings to be made or produced in any employment or service in which the vessel might be engaged by them & further that M'C. & co. should from henceforth be & become managing & exclusive owners for the purpose of employing the vessel in any service they might think fit. It being part of this agreement that M'C. & co. were to pay to H. £900 as a charter for his 32-64ths shares for the first six months, for which sum M'C. & co. were to have the entire use & control of the steamer & all her earnings for that period. Repairs having become necessary during the continuance of this charter:—*Held:* under the agreement M'C. & co. had power, as ship's husbands, to bind H. by contracts for such repairs, & such repairs having been done, H. was liable for the price to the persons employed by M'C. & co. as agents for the parties liable.—PRESTON *v.* TAMPLIN (1857), 2 H. & N. 684; 27 L. J. Ex. 192; 3 Jur. N. S. 1247; 157 E. R. 282; *sub nom.* HOLMES *v.* PRESTON, 30 L. T. O. S. 208; 6 W. R. 82, Ex. Ch.

*Annotation:*—**Refd.** Barker *v.* Highley (1863), 15 C. B. N. S. 27.

**523.** —— ——.]—HUNT *v.* WATERS (1858), 9 L. T. 238.

**524.** —— ——.]—TYNESIDE ENGINE WORKS CO. *v.* GOLDSMITH (1892), 8 T. L. R. 478.

**525.** —— ——.]—THE HUNTSMAN, No. 511, *ante*.

*C. Supplies for Ship.*

**526. Liability of owners.**]—HALL *v.* HOWARD (1853), 9 L. T. 302.

**527.** ——.]—HUNT *v.* WATERS (1858), 9 L. T. 238.

**528.** —— **Part payment by bills drawn on ship's brokers.**]—Necessaries were furnished to a ship on the order of the ship's husband, himself a part owner, by whom alone the ship was managed:—*Held:* the co-owners were liable, although part of the supplies had been paid for bills drawn by the ship's husband upon the brokers of the ship, &, on the bkpcy. of the latter, pltf. had proved against their estate for the balance.—WHITWELL *v.* PERRIN (1858), 4 C. B. N. S. 412; 31 L. T. O. S. 134; 140 E. R. 1144; *sub nom.* THE FELIZA, WHITWELL *v.* PERREN, 7 L. T. 509.

**529.** —— **Ship's husband only entitled to charge cost price—Ship's husband co-owner.**]—One of several co-owners of a ship, who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business.—RITCHIE *v.* COUPER (1860), 28 Beav. 344; 54 E. R. 398.

**530.** —— **Right of managing owner to sue for account.**]—Some of the joint owners of a ship, acting as managers on behalf of the owners generally, furnished supplies for the voyage:—*Held:* they were entitled to sue for an account of the transactions between themselves & the other owners.—VANNER *v.* FROST (1870), 39 L. J. Ch. 626.

**531.** —— **Payment by bill from ship's husband Ship's husband co-owner.**]—If a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband, a part owner, only, & settles with him alone, he discharges the other owners, particularly if the bill be renewed.—REED *v.* WHITE (1804), 5 Esp. 122; 170 E. R. 759, N. P.

*Annotations:*—**Refd.** Robinson *v.* Read (1829), 9 B. & C. 449; Thompson *v.* Percival (1834), 5 B. & Ad. 925. **Mentd.** Bedford *v.* Deakin (1818), 2 B. & Ald. 210; Mills *v.* Boyd (1842), 6 Jur. 943; Whitwell *v.* Perrin (1858), 31 L. T. O. S. 86.

**532. Holding out by co-owner—Entry in register not cancelled.**]—FRAZER *v.* CUTHBERTSON, No. 476, *ante*.

**533.** —— **Effect of delay.**]—In order to discharge a principal from his liability for a debt contracted by his agent the principal must show that the creditor has himself misled him into supposing that he has elected to give exclusive credit to the agent, & that the principal has been prejudiced by that supposition. Mere delay in enforcing payment from the agent will not be sufficient for the purpose. Pltf. sold stores for a ship to T., who was ship's husband & managing owner. Deft. was part owner of the ship, & was also interested jointly with T. in the adventure for which the ship was being fitted out. Pltf. applied to T. for payment, but did not obtain it. Three months after the goods were supplied & again two years after that, deft. settled accounts with T. & gave him credit for the price of the goods, supposing that they had been paid for. More than three years after the goods had been supplied, T. having become bkpt., pltf. for the first time applied for payment to deft. & brought his action for the debt:—*Held:* there had been no such conduct on the part of pltf. as would discharge deft. from his liability.—DAVISON *v.* DONALDSON (1882), 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. L. C. 601, C. A.

*Annotation:*—**Refd.** The Huntsman, [1894] P. 214.

**534. Liability of persons under contract to purchase shares—Disbursements at foreign port.**]—VON FREEDEN *v.* HULL, No. 60, *ante*.

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SUB-SECT. 6.—ACCOUNTS.

**535. Relation between co-owners & managing owner—Continuous partnership.**]—The relations between co-owners of a vessel engaged in foreign voyages & her managing owners are, in the absence of any evidence to show that each voyage is a separate trading transaction, to be treated, in relation to the profit & loss on her voyages, as a continuous partnership or agency, as the case may be.—THE PONGOLA (1895), 73 L. T. 512; 8 Asp. M. L. C. 89.

**536. Liability of co-owners to account—With agent employed by ship's husband.**]—A. & B., joint part owners of a ship, entrust the management to C., their co-part owner, as ship's husband. C. employs D. as his agent to raise & pay money in respect of the ship & also for his general affairs. The ship is chartered by the East India co., earning freight from them; which D. receives, upon giving receipts signed, as required by the rules of the co., by one other part owner in addition to C., the ship's husband. D., who knew that C. was only part owner, but was never controlled by them, places the amount of freights received to the account of C. as ship's owner, & keeps a distinct general account with him. C. dies insolvent:—*Held:* A. & B. cannot sue D. for the balance due

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**PART II. SECT. 6, SUB-SECT. 5.—C.**

**526 i.** *Liability of owners.*]—CLOY *v.* JACQUES (1867), 27 U. C. R. 88.—**CAN.**

**526 ii.** ——.]—Where the managing owner & the master of a ship order necessaries for the navigation of the ship on credit, the owners are liable.—SMITH *v.* FULTON (1877), 11 N. S. R. (2 R. & C.) 225.—**CAN.**

*Sect. 6.—Managing owners and ship's husbands: Sub-sect. 6. Sects. 7 & 8. Part III. Sects. 1 & 2: Sub-sect. 1, A.*]

from him on the ship's account, because there is no privity of contract between them; D.'s responsibility is to the exors. of C.—SIMS *v.* BRITTAIN (1832), 4 B. & Ad. 375; 1 Nev. & M. K. B. 594; 110 E. R. 496.

*Annotations:*—**Distd.** Walshe *v.* Provan (1853), 8 Exch. 843; Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649. **Refd.** Sims *v.* Bond (1833), 2 Nev. & M. K. B. 608; Ireland *v.* Thomson (1847), 4 C. B. 149. **Mentd.** Elston *v.* Braddick (1834), 2 Cr. & M. 435; Cooke *v.* Seeley (1848), 17 L. J. Ex. 286; Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903; *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198.

**537. Misapplication of moneys by managing owner—Freight money paid to bank—Right of co-owners against bank.**]—The managing owner of a ship chartered by the East India co. received the warrants for the freight, & paid them into a bank in his own name, drawing cheques from time to time for various sums out of the proceeds, part of which were applied for the use of the ship & part for other purposes:—*Held:* the other part owners had no lien on this fund in the hands of the bankers nor any claim against the bankers as their debtors.—*Re* BOND & PATESHALL, *Ex p.* GRIBBLE (1833), 3 Deac. & Ch. 339, Ct. of R.

*Annotation:*—**Mentd.** Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903.

**538. —— Liability of co-owners—Contribution paid by one co-owner.**]—Where a part owner of a ship pays to the managing owner his contribution due upon the ship's accounts as agreed between the co-owners, the managing owner receives such contribution as agent for all the owners, & in the event of the managing owner misapplying such payment to his own use & not paying the ship's accounts therewith, the contributing owner is entitled to be credited with the amount so paid but all the owners, including himself, must make good the defalcations in proportion to their shares.—THE IDA (1886), 55 L. T. 59; 6 Asp. M. L. C. 21.

**Operation of Statute of Limitations.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 371, 516, Nos. 550, 1745.

**Duty of managing owner to account.**]—*See* Sub-sect. 3, *ante*.

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## SECT. 7.—OFFENCES AND PENALTIES.

*See* 1894 Act, ss. 16, 28 (4), 67 (2), 69–71, 76; 1911 Act (c. 42), s. 1; Pacific Islanders Protection Act, 1872 (c. 19).

**539. Forfeiture of ship—Who is liable—Bonâ fide purchaser after offence.**]—A ship was arrested by the Crown in Tortola, on a charge of piracy. The affidavit which led to the warrant of arrest alleged, that the ship was bought at St. Marc, in Hayti, from a British subject by the revolutionary govt. of Hayti, & that the ship, having been equipped as a ship of war, was afterwards employed in acts of hostility. It appeared that the ship had been sold by public auction, six months before seizure, to a *bonâ fide* purchaser, a British subject. The Vice-Admlty. Ct. of Tortola sustained a protest to the jurisdiction of the ct. & decreed restitution of the ship, but without costs or damages:—*Held:* there was no authority to be derived from principle or precedent, for a ship sold by public auction to a *bonâ fide* innocent purchaser, before any proceedings have been taken on the part of the Crown against the ship, being afterwards arrested & condemned on account of having been engaged previously in piratical acts.—R. *v.* MCCLEVERTY, THE TELEGRAFO (OR THE RESTAURACION) (1871), L. R. 3 P. C. 673; 8 Moo. P. C. C. N. S. 43; 40 L. J. Adm. 18; 24 L. T. 748; 20 W. R. 242; 1 Asp. M. L. C. 63; 17 E. R. 229, P. C.

**540.** —— —— ——.]—A cause of forfeiture, under 17 & 18 Vict. c. 104, s. 103, was instituted on behalf of a British officer of customs against a vessel seized for an alleged infringement of the provisions of that sect. Pltf. in his statement of claim in effect alleged that on July 18, 1874, one of her owners, being a British subject, had falsely represented, contrary to the fact, & with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as deft., a statement of defence & counterclaim was delivered on his behalf, which in para. 7, thereof set up the defence, that on July 6, 1876, deft. became *bonâ fide* purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. Pltf. demurred to para. 7 of the statement of defence:—*Held:* the demurrer must be allowed; for the property in the vessel was divested out of its former owners, & vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the sect., the penalty of forfeiture was imposed.—THE ANNANDALE (1877), 2 P. D. 218; 47 L. J. P. 3; 37 L. T. 139; 26 W. R. 38; 3 Asp. M. L. C. 489, C. A.

*Annotation:*—**Refd.** The Polzeath, [1916] P. 241.

**541. —— On what grounds—Piracy.**]—R. *v.* MCCLEVERTY, THE TELEGRAFO (OR THE RESTAURACION), No. 539, *ante*.

**542. —— —— Share vesting in alien.**]—THE MILLICENT, [1891] W. N. 162.

**543. —— —— Owning company not having principal place of business within His Majesty's Dominions.**]—By 1894 Act, s. 1, "a ship shall not be deemed to be a British ship unless owned wholly by . . . bodies corporate established under & subject to the laws of some part of Her Majesty's Dominions, & having their principal place of business in those Dominions."

A ship registered as a British ship was owned by a co. registered as a British co. under the Cos. Acts. Doubts having arisen as to the title of the ship to be registered as a British ship, the Comrs. of Customs & Excise, pursuant to the provisions of 1906 Act, s. 51, directed pltf., the registrar of shipping at the ship's port of registry, to require evidence to be given to his satisfaction that the ship was entitled to be so registered. The evidence adduced established that the affairs of the co. from the time the ship was bought & put upon the register were directed from Hamburg by the chairman of the board of directors, a naturalised British subject of German origin, who held the majority of the shares & resided at Hamburg both before & after the outbreak of war between Great Britain & Germany. Accordingly, proceedings for forfeiture were instituted in accordance with the provisions of 1894 Act, s. 76:—*Held:* the principal place of business of the co. was not within His Majesty's Dominions, & the ship, therefore, was forfeit to the Crown.—THE POLZEATH, [1916]

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PART II. SECT. 7.

*e. Going to sea without statutory number of officers.*]—The duty of providing the officers specified in Shipping & Seamen Act, 1903, s. 21, is not imposed on the master of a ship; &, *semble*, even the owner is no longer liable to penal consequences if the ship goes to sea without such officers.—*Re* RITCHIE (1905), 25 N. Z. L. R. 905.—N.Z.

P. 241; 85 L. J. P. 241; 116 L. T. 370; 32 T. L. R. 647; 13 Asp. M. L. C. 595, C. A.
*Annotation :*—**Reid.** The St. Tudno, [1918] P. 174.

**544. —— Jurisdiction of court — Court not within British territory—Supreme Court of Shanghai.**]—The Supreme Ct. of China & Corea at Shanghai decreed the forfeiture for improperly carrying British colours of a ship owned by Russians which had been registered at Shanghai in the name of a British subject :—*Held :* as the Supreme Ct. of Shanghai was not within British territory it had no jurisdiction to make the decree. 1894 Act, s. 76, confers the jurisdiction exercised upon no ct. except within the dominions of the Crown, & there is no statutory authority extending the jurisdiction thereunder to the Shanghai Ct.—THE MAORI KING, [1909] A. C. 562; 78 L. J. P. C. 138; 100 L. T. 787; 25 T. L. R. 545; 53 Sol. Jo. 519; 11 Asp. M. L. C. 248, P. C.

**545. —— —— Admiralty Court—Where order for detention by Prize Court.**]—Where the Prize Ct. has made an order for the detention of a vessel so as to postpone the determination of the question whether the ship is entitled to the benefit of the Sixth Hague Convention, the Admlty. Ct. has no jurisdiction, so long as the ship is under the jurisdiction of the Prize Ct., to entertain a suit for a declaraton that the ship is forfeited to the Crown for want of satisfactory evidence of the title of the ship to be registered as a British ship.—THE ST. TUDNO, [1918] P. 174; 87 L. J. P. 105; 34 T. L. R. 357; 62 Sol. Jo. 521.

—— —— ——.]—*See* ADMIRALTY, Vol. I., p. 156, Nos. 642–648.

—— **Remedy for wrongful seizure.**] — *See* PUBLIC AUTHORITIES, Vol. XXXVIII., p. 65, No. 406.

**Piracy.**]—*See* CRIMINAL LAW, Vol. XV., pp. 724–726, Nos. 7838–7864.

**Slave trade—Kidnapping.**]—*See* CRIMINAL LAW, Vol. XV., pp. 726–728, NOS. 7865–7884.

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SECT. 8.—**REQUISITION AND CONTROL BY CROWN.**

*See* Part XXV., *post.*

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# Part III.—Master, Officers and Crew.

## SECT. 1.—QUALIFICATIONS OF MASTER, OFFICERS AND MEN.

*See* 1894 Act, ss. 12, 92, 93, 96–103, 126, 260–263, 266, 413; 1906 Act, ss. 58, 81, 458; 1914 Act (c. 42), s. 1.

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## SECT. 2.—CONTRACTS OF SERVICE.

### SUB-SECT. 1.—ENGAGEMENT OF MASTER.

#### *A. In General.*

*See* 1894 Act, s. 458 (1), (2).

**546. Nature of contract—Agreement for whole time employment.**]—If A., while employed as master of a ship, of which B. is the owner, gives part of his personal services to C. for a stipulated sum, & C. pays this into the hands of B., an action to recover it cannot be supported against B. at the suit of A.

Is it contended that a servant who has engaged to devote the whole of his time & attention to my concerns may hire out his services, or part of them, to another? It would have been a different thing if the owner had been suing for this money, but I am clearly of opinion, that at all events the present pltf. has no right to it (LORD ELLENBOROUGH, C.J.).—THOMPSON *v.* HAVELOCK (1808), 1 Camp. 527; 170 E. R. 1045, N. P.
*Annotations :*—**Reid.** Frazer *v.* Hatton (1857), 2 C. B. N. S. 512; Morison *v.* Thompson (1874), L. R. 9 Q. B. 480. **Mentd.** Shipway *v.* Broadwood, [1899] 1 Q. B. 369; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

**547. —— —— Alleged custom permitting private trading.**]—The master of a ship is bound to employ his whole time & attention in the service of his employer, & *semble*, a custom allowing such master to trade on his private account during the voyage, cannot be maintained.—GARDNER *v.* M'CUTCHEON (1842), 4 Beav. 534; 49 E. R. 446; *sub nom.* GARDNER *v.* M'LEITCH, 7 L. T. 258.
*Annotation :*—**Reid.** Dean *v.* Macdowell (1878), 8 Ch. D. 345.

**548. Construction of contract—Master to receive fixed sum "in lieu of privilege"—Right to freight on goods in master's cabin—Admissibility of parol evidence.**]—Where the master of a ship was hired for a voyage to the East Indies by a written agreement, which stipulated that he should receive £120 "in lieu of privilege"; & a question arose whether he was entitled to the freight of goods carried in the cabin, which depended chiefly upon the disputed meaning of the word "privilege" held, that what the parties said upon the subject before & at the time, when the agreement was entered into, was admissible in evidence, & that the owner then having told the master he should have the use of the cabin for his own benefit, the latter had a right to retain the cabin freight.—BIRCH *v.* DEPEYSTER (1816), 4 Camp. 385; 1 Stark. 210; 171 E. R. 122, N. P.
*Annotations :*—**Reid.** Luckie *v.* Bushby (1853), 13 C. B. 864. **Mentd.** Crampton *v.* Walker (1860), 3 E. & E. 321.

**549. What amounts to contract of service — Conditional engagement—On master purchasing shares.**]—*Semble :* an allegation of a general promise by J. to appoint pltf. to the command of a vessel, is not supported by evidence of a conditional promise, viz. to give pltf. the command on his becoming the purchaser of certain shares in the vessel.—M'NEILL *v.* REED (1832), 9 Bing. 68; 2 Moo. & S. 89; 1 L. J. C. P. 162; 131 E. R. 540.

**550. Enforcement of contract — With navigation company—Contract not under seal.**]—A co., incorporated for the purposes of trading as shipowners, were sued on a contract, not under seal,

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**PART III. SECT. 1.**

**d.** *Master of gas boat — Necessity for certificate.*]—Under Canada Shipping Act, 1906, s. 96, a gas boat is required to have a master who possesses a valid certificate, if the boat does not come within the exceptions mentioned in sect. 100, as amended by 1912 Act (c. 51), s. 1.—JANSEN *v.* THE TEX (B. C.), [1926] 4 D. L. R. 288; [1926] 3 W. W. R. 225.—**CAN.**

**PART III. SECT. 2, SUB-SECT. 1.—A.**

**e.** *Nature of contract — Master to receive monthly salary—No time specified for continuance of contract.*]—Deft. was employed as master of pltfs.' vessel under a contract made in Canada, by which wages were to be paid at the rate of $300 a month. No specified time was mentioned for the continuance of the contract.—*Held :* the hiring was a monthly hiring.—

*Sect.* 2.—*Contracts of service: Sub-sct.* 1, *A. & B.; sub-sects.* 2, 3 & 4, *A.* (*a*) & (*b*).]

made by the directors to pay remuneration in consideration of exertions to bring home a disabled vessel:—*Held:* the corpn. being a trading one, & incorporated for a special purpose, the co. was bound by the contract, as being made in furtherance of the purpose of their incorporation, though not under seal.—HENDERSON *v.* AUSTRALIAN ROYAL MAIL STEAM NAVIGATION CO. (1855), 5 E. & B. 409; 3 C. L. R. 1181; 24 L. J. Q. B. 322; 25 L. T. O. S. 234; 20 J. P. 132; 1 Jur. N. S. 830; 3 W. R. 571; 119 E. R. 533.

*Annotations:*—**Apld.** Reuter *v.* Electric Telegraph Co. (1856), 6 E. & B. 341; South of Ireland Colliery *v.* Waddle (1868), L. R. 3 C. P. 463. **Mentd.** Bateman *v.* Mid-Wales Ry. Co. (1866), L. R. 1 C. P. 499; Nicholson *v.* Bradfield Union Grdns. (1866), 7 B. & S. 774.

**551. Termination of contract—Right to reasonable notice.**]—Pltf., a master mariner, accepted the command of deft.'s ship under a written agreement as follows:

"I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at & after the rate of £180 sterling *per annum*." "Should owners require captain to leave the ship abroad his wages to cease on the day he is required to give up the command, & the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship":—*Held:* pltf. could not, except under unusual circumstances, be so dismissed without a reasonable notice.—CREEN *v.* WRIGHT (1876), 1 C. P. D. 591; 46 L. J. Q. B. 427; 35 L. T. 339; 3 Asp. M. L. C. 254, D. C.

—— **Removal.**]—*See* ADMIRALTY, Vol. I., pp. 114, 115, Nos. 189–192.

**552. Implied contract—Contract for one voyage—Succeeding voyage performed without agreement—Presumption of continuance on former terms.**]—The law will presume that the terms of a master's engagement for one voyage extend to a succeeding voyage performed without a new agreement, express or clearly implied. Deft. was sole owner of a ship which was equipped as a passenger ship, & chartered for Melbourne, Australia. Pltf., a master mariner, bought from him a small share of the ship, &, by a letter referring to the voyage then contemplated, became master, on the terms of receiving £15 a month, & half cabin passage money profits. The ship performed the voyage to Melbourne, carrying cargo only, & returned home. Deft., being managing owner, anticipating her arrival, had chartered the ship to carry goods & emigrants to New Zealand, the agreement being, that the charterers guaranteed the owners a lump sum; & if the freight & passage money, calculated as provided in the charter, should exceed that sum, the surplus should be equally divided between the charterers & the owners; & further appointing, amongst other things, that the master should keep account of the issue of all stores provided by the charterers, & account for all surplus stores, less ten per cent. This agreement was shown by deft. to pltf., who expressed his general satisfaction. No communication passed between them as to the terms on which pltf. should serve on the new voyage, except that pltf. would receive a gratuity from the charterers. Under this agreement the ship, under the command of pltf., took out to New Zealand a number of emigrants, including a number of cabin-passengers. Pltf. also received his gratuity from the charterers:—*Held:* the original agreement continued; & notwithstanding the altered circumstances, the master was entitled to a share of cabin passage money profits.—THE GANANOQUE (1862), 1 Lush. 448; 167 E. R. 199.

*Annotation:*—**Refd.** The Feronia (1868), L. R. 2 A. & E. 65.

**Compensation & damages for wrongful dismissal.**]—*See* Sect. 11, sub-sect. 2, *post.*

*B. Appointment.*

*See* 1894 Act, ss. 472, 483.

**553. Appointment in cases of necessity—Chief officer natural successor.**]—The mate is *hacres necessarius* to the employment of master in case of necessity (SIR WILLIAM SCOTT).—THE FAVOURITE (1799), 2 Ch. Rob. 232; 165 E. R. 299.

**554. —— By consignees—Appointment in substitution of former master.**]—THE ALEXANDER, No. 1174, *post.*

**555. —— By naval officer—In case of salvage—Shipmaster appointed.**]—THE SEGREDO (OR THE ELIZA CORNISH), No. 1557, *post.*

**556. —— By consul—Original master murdered in mutiny.**]—A British ship, whose master & officers had been murdered in a mutiny, came into a foreign port, where the British consul took possession of her, appointed a master, & gave a bottomry bond on the ship:—bond pronounced for.—THE CYNTHIA (1852), 3 L. T. 682; 6 L. T. 165; 20 L. T. O. S. 54; 16 Jur. 748.

*Annotation:*—**Refd.** Mackenzie *v.* Poolley (1856), 25 L. J. Ex. 124.

**557. Who may appoint—Part owner—Power to displace master appointed by other part owner.**]—BOWEN *v.* FOX, No. 93, *ante.*

——.]—*See, also,* Nos. 554–556, *ante.*

**Contract to procure appointment—Validity.**]—*See* CONTRACT, Vol. XII., p. 247, Nos. 2017–2020.

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SUB-SECT. 2.—ENGAGEMENT OF OFFICERS.

**558. Duty of shipowner to have sufficient number.**]—Duty of shipowners to have a sufficient number of competent officers, unless deficiency has been caused by accident or death.—THE FENIX *v.* THE MOBILE (1856), 7 L. T. 258.

**559. By whom appointed—Master.**]—ROSIERE *v.* SAWKINS, No. 564, *post.*

**560. Appointment as ship's surgeon Ship stated to belong to certain class—Appointment subject to approval.**]—In a correspondence in which it is proposed to deft. to go out as surgeon to pltf.'s emigrant ship, it is stated that the ship belongs to a certain class, & that the appointment must be subject to the approval of certain comrs. The proposal is accepted. Neither the quality of the ship nor the approval of the comrs. is a condition precedent to the obligation to go out as surgeon.—RICHARDS *v.* HAYWARD (1841), 2 Man. & G. 574; 2 Scott, N. R. 670; Drinkwater, 136; 10 L. J. C. P. 108; 10 L. T. 275; 133 E. R. 875.

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SUB-SECT. 3.—APPRENTICESHIP TO SEA SERVICE.

*See* 1894 Act, ss. 105–109, 168; 1906 Act, s. 49.

**561. Runaway apprentice — Work done on another ship where apprentice harboured—Right of**

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SCHOONER LAVONIA, LTD. *v.* LOWE (1921), 54 N. S. R. 159; 57 D. L. R. 727.—CAN.

**PART III. SECT. 2, SUB-SECT. 1.—B.**

*1. Who may appoint.*]—In a dispute between the owners of a vessel & the shipper of the cargo:—*Held:* the former had the right of appointing the master.—THE MARY & THE DOROTHY (1838), 1 S. V. A. R. 187.—CAN.

*2. Signing of ship's articles—No specified manner necessary.*]—Geo. 2, c. 36, does not require the master of a vessel to sign the ship's articles in any particular place or manner.—CARTER *v.* UPHAM (1821), 1 Nfld. L. R. 247.—NFLD.

**master to sue—Waiver of tort.**]—Where pltf.'s apprentice deserted from pltf.'s ship, & went on board deft.'s & secreted himself until deft.'s ship sailed, when he discovered himself to deft., who carried him to H. to which place he worked his passage receiving his food, & during their passage to H. pltf.'s & deft.'s ships were within hail, but deft. did not make known to pltf. that he had the apprentice on board, & on the arrival of deft.'s ship at H. the apprentice wished to leave her, but deft. persuaded him to remain, promising him either wages or clothes & pocket money, under which persuasion the apprentice sailed with him to E. & did duty as one of the crew, but received no wages, or clothes or pocket money:—*Held:* pltf. was entitled to waive the tort, & bring *assumpsit* against deft. for the work & labour of his apprentice, & to recover a reasonable compensation for the services of the apprentice from H. to E.—FOSTER *v.* STEWART (1814), 3 M. & S. 191; 105 E. R. 582.

*Annotations:*—**Apld.** Cornish *v.* Abington (1859), 7 W. R. 504. **Mentd.** Chamberlain *v.* Hazelwood (1839), 9 L. J. Ex. 87; Phillips *v.* Homfray (1883), 24 Ch. D. 439.

**562. Recovery of earnings of apprentice—By proxy.**]—(1) An apprentice is entitled to sue proceeds of the ship he has served in for wages due under a general apprenticeship to the owner, but not for the penalty contained in the indenture for breach of the agreement.

(2) A minor sues in the Admlty. Ct. by proxy.—THE ALBERT CROSBY (1860), 1 Lush. 44; 167 E. R. 23.

**563. Recovery of penalty under indenture.**]—THE ALBERT CROSBY, No. 562, *ante*.

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SUB-SECT. 4.—ENGAGEMENT OF SEAMEN.

*A. Agreement for Engagement.*

*(a) In General.*

**564. With whom agreement entered into—Master.**]—When a master is appointed to the command of a ship, he, & not the owners, has the right of appointing officers & sailors to the ship, unless it be otherwise specially agreed between them.—ROSIERE *v.* SAWKINS (1700), 12 Mod. Rep. 434; 88 E. R. 1432.

*Annotation:*—**Distd.** Card *v.* Hope (1824), 4 Dow. & Ry. K. B. 164.

**565. —— —— 1894 Act, s. 113.**]—THOMPSON *v.* NELSON (H. & W.), LTD., No. 582, *post*.

**566. Enforcement of agreement—Against whom enforceable—Owner becoming party by conduct.**]—Articles of agreement are executed between the crew of a vessel, of the one part, & the captain of the other part, containing a stipulation, that the seamen are not to have any demand against the owner of the ship; the owner subsequently acts under the agreement, &, in pursuance of it, makes payments to the seamen out of the proceeds of the cargo:—*Held:* the owner, by such conduct, becomes a party to the agreement, & a bill for the performance of the agreement may be maintained against him.—GOSTLING *v.* SMITH (1824), 3 L. J. O. S. Ch. 5.

**567. Effect of contract.**] — The mariner's contract or arts. confirms the time of shipping, the signing & the rate of wages. This contract is important, it binds both parties, the owner & the seaman (SIR JOHN NICHOLL).—THE TEST (No. 1) (1836), 3 Hag. Adm. 305; 166 E. R. 418.

*(b) Contents of Agreement.*

*See* 1894 Act, ss. 114 (2) (3), 140.

**568. What agreement must contain—Particulars of nature & duration of voyage.**]—THE GEORGE HOME (1825), 1 Hag. Adm. 370.

*Annotations:*—**Apld.** The Westmorland (1841), 1 Wm. Rob. 216; Caine *v.* Palace S.S. Co., [1907] 1 K. B. 670. **Reld.** The Cambridge (1829), 2 Hag. Adm. 243; The Scarsdale, [1906] P. 103.

**569. —— —— Giving seaman fair intimation of nature of service.**]—(1) In cases of alleged desertion the application of the ancient maritime law is not excluded by 5 & 6 Will. 4, c. 19.

This statute does not exclude the ancient maritime law. . . . To constitute desertion, in such a case, there must be a complete abandonment of duty without justification, & such abandonment must be by quitting the ship. At the time when the crew were informed of the intention to take the ship to Holland, it is alleged that they declined to perform their duty, in pumping & in other matters requiring their exertion as sailors. Assuming the fact to be so such conduct would be insubordination, but it could not be desertion. . . . This statute does not warrant an arbitrary & unnecessary extension of terms (DR. LUSHINGTON).

(2) The words "nature of the voyage" must

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**PART III. SECT. 2, SUB-SECT. 4.—A. (a).**

h. *With whom agreement entered into—Delegate appointed by master.*]—A master may delegate to a superintendent or foreman the duty of selecting fellow workmen or servants, & in such a case the master's obligation is limited to the exercise of reasonable care in selecting a competent person for such purpose.—WILSON *v.* HUME (1880), 30 C. P. 542.—**CAN.**

k. —— ——.]—Applt. was employed by the master of a ship to engage a seaman for the vessel, & engaged one accordingly. He was convicted of a breach of Shipping & Seamen's Act, 1903, s. 38, as not being one of the persons authorised under that sect. to engage seamen & apprentices. On appeal:—*Held:* applt. had been wrongly convicted, the master having power to employ any person for that purpose.—JOHNSON *v.* FLEMING (1907), 26 N. Z. L. R. 1272.—**N.Z.**

l. *Agreements made abroad—Applicability of statutes.*]—As the Canadian Seamen's Act, 1873, limits the effect intended to be given to its provisions to contracts made in the Dominion, it will not govern an agreement by the master of a Canadian registered vessel with a seaman entered into at Cardiff, in the United Kingdom, where such agreement was insufficient under the said Act, but sufficient under the Imperial Shipping Act.—THE WAVE QUEEN (1886), 12 Q. L. R. 218.—**CAN.**

m. —— ——.]—An agreement made with seamen out of Canada to serve on board a Canadian ship, is governed by the Imperial & not the Canadian Shipping Acts, & such engagement, instead of containing the nature or description of the voyage, may state its maximum period, as provided by 36 & 37 Vict. c. 85, s. 7 (Imp.).—THE COUNTY OF YARMOUTH (1886), 12 Q. L. R. 277.—**CAN.**

**PART III. SECT. 2, SUB-SECT. 4.—A. (b).**

**568 i.** *What agreement must contain—Particulars of nature & duration of voyage.*]—An agreement for service by a seaman was in the following words:—"From London to Plymouth & Sydney, & from thence wherever freight or employment offers, forwards & backwards, & backwards & forwards, in any rotation, & to her final port of discharge in the United Kingdom, calling at all necessary ports, the voyage not to exceed three years":—*Held:* the nature of the voyage (as distinguished from the course of the voyage, defined by its termini & intervening places of call), was sufficiently described, & the duration of the voyage was distinctly & unequivocally described.—*Re* MERCANTILE MARINE ACT, *Ex p.* SMITH (1852), 19 L. T. O. S. 339.—**AUS.**

**568 ii.** —— ——.]—THE BRITISH TAR (1858), 8 L. C. R. 272.—**CAN.**

**568 iii.** —— ——.]—A voyage was described as one to North & South America:—*Held:* such description was too indefinite to answer the leading purpose for which the words were framed under the heading "Nature of the Voyage" in Shipping Act, 1854.—THE MARATHON (1859), 10 L. C. R. 356; 2 S. V. A. R. 9.—**CAN.**

**568 iv.** —— ——.]—HANSOM *v.* BROWN (1886), 14 R. L. O. S. 488.—**CAN.**

**569 i.** —— —— *Giving seaman fair intimation of nature of service.*]—Suit by a seaman to test the validity of articles signed by him for a voyage from London to Quebec, & back to the port of London, the duration of the voyage not being stated. The promoter relied on Merchants' Shipping Act, 1854, s. 149 & the Act of 1873:—*Held:* as the intention of the Legislature evidently was to give the mariner

*Sect.* 2.—*Contracts of service: Sub-sect.* 4, *A.* (*b*), (*c*) & (*d*).]

have such a rational construction as to answer the leading purpose for which they were framed, viz. to give the mariner a fair intimation of the nature of the service in which he engages.

(3) The mere going on shore without leave to seek advice as to the effect of the articles, not a desertion under the general law.

(4) Imprisonment of the mariners for so going on shore an important ingredient in the case, as taking away all *locus penitentiæ* & all opportunity of returning to their duty on board the ship.—THE WESTMORLAND (1841), 1 Wm. Rob. 216; 1 Notes of Cases, 11.

*Annotations:—As to* (1) **Refd.** The Two Sisters (1843), 7 Jur. 861. *As to* (2) **Consd.** The Scarsdale, [1906] P. 103.

**570. —— Amount of wages—Including emoluments.**]—THOMPSON *v.* NELSON (H. & W.), LTD., No. 582, *post.*

**571. Provision for transfer of crew — To other vessel in same employ.**]—Pltf., a seaman in Mar. 1854, shipped on board a vessel of defts., called the *Custos*, to serve as steward, & signed arts., as required by 13 & 14 Vict. c. 93, which professed to be an agreement between the master & the several persons whose names were thereto subscribed, at £3 per month wages, for a voyage "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, & back to a final port of discharge in the United Kingdom, or for a term not to exceed three years.' The arts. contained amongst others, the following provision: "The crew, if required, to be transferred to any other ship in the same employ." After the *Custos* had remained some time on the African coast, pltf., at the request of the captain, was transferred to another & a larger vessel of defts. engaged in the same trade, called the *Dauntless*, entering into fresh arts. with the master, under which he was to receive wages at the rate of £4 per month. The *Dauntless* arrived in Liverpool on her return voyage in June, 1856, when pltf. claimed wages at £4 per month for the period during which he had served on board the *Dauntless*. Defts. refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship "in the same employ"; & pltf. declined to accept the sum mentioned in the original articles: —*Held:* (1) the arts. were not invalid for being in the alternative, "from Liverpool to the west coast of Africa & back, or for a term not to exceed three years"; (2) the provision for the transfer of the crew to another vessel in the same employ, was not in contravention of the statute; (3) the provision for transfer was not limited to a transfer of the whole crew collectively, but the arts. constituted an agreement between the owners & each of the crew for himself, & consequently pltf. was bound to serve under the original arts. & there was therefore no consideration for the master's promise to pay the increased wages; (4) there was no neglect or refusal by defts. without sufficient cause, to pay pltf. the wages really due, so as to render them liable to the penalty imposed by the statute; (5) the circumstance of the fresh arts. not having been executed in the presence of a consular agent, was not an objection to their validity, provided they could have been set up.—FRAZER *v.* HATTON (1857), 2 C. B. N. S. 512; 26 L. J. C. P. 226; 30 L. T. O. S. 165; 22 J. P. 114; 3 Jur. N. S. 694; 5 W. R. 632; 140 E. R. 516.

**572. Alternative stipulations — Validity.**] — FRAZER *v.* HATTON, No. 571, *ante.*

**573. Stipulations inconsistent with statute — Contrary to law—Deductions from wages.**] — Stipulations in an agreement between the master of a ship & the crew which are inconsistent with any of the provisions of 1894 Act, as for instance where the agreement provides that for absence by a seaman from his ship without leave deductions shall be made from his wages differing in amount, & recoverable in a different manner, from the deductions provided by the Act, are "contrary to law" within sect. 114 of that Act, & are therefore not permissible.—MERCANTILE S.S. Co. *v.* HALL, [1909] 2 K. B. 423; 78 L. J. K. B. 812; 100 L. T. 885; 25 T. L. R. 623; 53 Sol. Jo. 562; 11 Asp. M. L. C. 273; 14 Com. Cas. 208.

(*c*) *Construction of Agreement.*

**574. Meaning of words — "Or elsewhere."**] — On a voyage described in a mariners' contract to be "from London to New South Wales & India, or elsewhere, & to return to a port in Europe":— *Held:* (1) the words "or elsewhere" composed no part of the original agreement; (2) if they were not interpolated, they were words that must receive a limitation; (3) the contract being once defeated was not subsequently reinstated; (4) the conduct of the captain justified the men in their abandonment of the ship.

They [the words "or elsewhere] are not to be taken in that indefinite latitude in which they are express; they are no description of a voyage; they are an unlimited description of the navigable globe; & are not to be admitted as a universal alibi for the whole world, including the most remote, & even pestilential shores, indefinite otherwise both in space & time; they must receive a reasonable construction, a construction which, I readily admit, must be, to a certain extent, conformable to the necessities of commerce. . . . I am of opinion, in the third place, that the contract being thus defeated, was not reinstated by any succeeding act of either party. What was

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a fair intimation of the nature of the services & of their length, the description from London to Quebec & back to the port of London was sufficient.—THE RED JACKET (1882), 8 Q. L. R. 205.—CAN.

n. —— *Scale of provisions.*] — An agreement under which a seaman was engaged on a coasting-trade ship contained a form in which the scale of provisions was intended to be set out. This form was not filled in, & merely had the words "sufficient without waste" written across it:—*Held:* the scale prescribed in Merchant Shipping Act, 1906, s. 25 (1), must be regarded as incorporated in the agreement, & its omission could not invalidate the whole agreement.—BARTLETT *v.* GORDON, *Ex p.* GORDON, [1912] S. R. Q. 165.—AUS.

o. —— *Necessity for strict compliance with statute—Seamen engaged for fishing voyage.*]—R. *v.* WILNEFF (N. S.) (1906), 1 E. L. R. 267.—CAN.

573 i. *Stipulations inconsistent with statute—Contrary to law—Deductions from wages.*]—*Held:* Shipping & Seamen's Act, 1877, s. 39 (7), only authorised the adoption by the parties of provisions as to fines, etc., to be contained in general regulations to be made by the Minister & applicable generally to the class of vessels referred to in sect. 39 & it was not sufficient that a clause as to fines inserted in a form of agreement in use by a particular steamship co. should have been sanctioned & approved by the Minister.

The subsequent provision of sect. 39 that such an agreement "may contain any other stipulations not contrary to law" does not authorise a provision as to forfeiture of wages for misconduct which has not been sanctioned by the Minister by regulation.—UNION S.S. CO. OF NEW ZEALAND, LTD. *v.* SPENDIFF (1903), 23 N. Z. L. R. 239.—N.Z.

**PART III. SECT. 2, SUB-SECT. 4.—A. (c).**

*p. Construction of general terms following description of voyage.*]—The description of a voyage was to the United States:—*Held:* a good description, & more general terms following were to be construed as subordinate to the principal voyage, in the preceeding terms, & restricted to a reasonable distance from the United States, under the terms "Nature of the Voyage" in Merchant Shipping Act, 1856.—THE ELLERSLEY (1860),

done afterwards by the captain acting for the owners, was a mere continued violation of it, & the submission of the men to that violation could not divest them of that remedy which they had reserved to themselves—of a resort to the tribunals of their country for satisfaction. If even they had enjoyed the opportunity of a safe escape, it would not have recommended them to the ct. to have used it; for I will not venture to lay down so hazardous a proposition, as that sailors, when the articles are violated by their captain, are bound, at the peril of losing all their right to legal redress for such violation, to quit the ship instantly, thereby subjecting her to all the inconveniences & dangers consequent upon such a desertion, in a place where the deficiency of mariners could not be easily supplied. This ct. would not have attributed any such effect to their submission, even if it had not been compelled by necessity. They had a right to submit to the expired authority, reserving still to themselves the ultimate satisfaction which they looked to. I am of opinion, in the fourth place, that the mode of treatment, which they have received at Calcutta, justified their retiring from a service in which they had meritoriously hitherto submitted to what was, in its later stages, an usurped authority (LORD STOWELL). — THE MINERVA (1825), 1 Hag. Adm. 347; 166 E. R. 123.

*Annotations:—As to* (1) **Consd.** Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670. *As to* (4) **Refd.** The Cambridge (1829), 2 Hag. Adm. 243. *Generally*, **Refd.** The George Home (1825), 1 Hag. Adm. 370; The Prince Frederick (1832), 2 Hag. Adm. 394; Button *v.* Thompson (1869), L. R. 4 C. P. 330; The British Trade, [1924] P. 104. **Mentd.** The Don Francisco (1861), Lush. 468.

**575. —— Wages not payable "until arrival at port" — Meaning of "until."**]—The seaman entered into articles to serve on board the ship *Royalist* "bound from the port of London to the South Seas to procure a cargo of sperm oil; & to return therewith to the port of London, where the voyage was to end." Instead of wages he was to receive a certain share of the net proceeds of the cargo; & it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at London, & her cargo should be there sold & delivered & the money for the same actually received by the owner." A cargo was procured, the ship was afterwards condemned in a foreign port, & the mariner accompanied part of the cargo on its homeward voyage, it having been transhipped into another vessel, the *Alexander*, but died at sea:—*Held:* "until" in the above articles, is a word of limitation of the mariner's right to wages, & not of postponement of payment of them merely; & consequently, that as the ship did not return to London, the administrator of the mariner was not entitled to recover his ninety-fifth share of the net proceeds of the *Royalist's* cargo, but only to recover on a *quantum meruit* for his services on board the *Alexander*.—JESSE *v.* ROY (1834), 1 Cr. M. & R. 316; 4 Tyr. 626; 3 L. J. Ex. 268; 149 E. R. 1101.

*Annotations:*—**Consd.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Refd.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651.

**576. —— Dollar.**]—If there be a doubt as to the interpretation of a seamen's contract, the contract is to be interpretated favourably to the seaman.

A seaman signed articles at New York to serve on board a British ship on a voyage to terminate either in the United States or in the United Kingdom, "amount of wages per month" to be "50 dollars." At the time of making this contract there was an inconvertible paper dollar currency in the United States, & the actual exchange value of the paper dollar in England currency was then 2*s.* 8½*d.* It afterwards depreciated in value. The voyage terminated at Liverpool in the United Kingdom, & the seaman was there discharged. Upon evidence that for twenty-five years past seamen discharged from American ships in London or Liverpool received their wages at the rate of 4*s.* 2*d.* a dollar:—*Held:* the parties contracted subject to this usage, & that the seaman was entitled to have the dollar reckoned at the value of 4*s.* 2*d.*—THE NONPAREIL (1864), Brown. & Lush. 355; 33 L. J. P. M. & A. 201; 167 E. R. 399.

**577. Construction favourable to seamen.**]—THE NONPAREIL, No. 576, *ante*.

**578. Admissibility of evidence—Parol evidence.**]—A man being entered in the articles as second mate, but with no rate of wages affixed:—*Held:* (1) such omission let in parol evidence of an agreement; (2) the parol evidence establishing that the man was taken out of friendship to the father on a trial voyage, & with certain indulgences & advantages amounting to a valuable consideration in lieu of wages, a claim for wages was not sustainable, especially as the master had at all times denied that any wages were due.—THE HARVEY (1827), 2 Hag. Adm. 79; 166 E. R. 173.

*Annotations:—As to* (1) **Consd.** The Schwalbe (1859), Sw. 521. *Generally*, **Mentd.** Handley & Jones *v.* Edwards (1838), 1 Curt. 722.

**579. —— Custom.**]—THE NONPAREIL, No. 576, *ante*.

*(d) Execution of Agreement.*

*See* 1894 Act, s. 114 (1).

**580. Necessity for reading agreement to seaman.**]—THE GEORGE HOME (1825), 1 Hag. Adm. 370; 166 E. R. 132.

*Annotations:*—**Consd.** The Westmorland (1841), 1 Wm. Rob. 216. **Refd.** The Cambridge (1829), 2 Hag. Adm. 243; The Scarsdale, [1906] P. 103; Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670.

**581. Witnessing & signature.**]—THE GEORGE HOME (1825), 1 Hag. Adm. 370.

*Annotations:*—**Refd.** The Cambridge (1829), 2 Hag. Adm. 243; The Westmorland (1841), 1 Wm. Rob. 216; The Scarsdale, [1906] P. 103; Caine *v.* Palace S.S. Co., [1907] 1 K. B. 670.

**582. ——.**]—By 1894 Act, s. 113, the master of a ship shall enter into an agreement with every seaman whom he carries to sea as part of his crew; & by sect. 114 the agreement shall be signed by the master & seaman, & shall contain (*inter alia*) "the amount of wages which each seaman is to receive." By sect. 742, "seaman" includes every person, except masters, pilots, & apprentices, employed or engaged in any capacity on board any ship; & "wages" includes emoluments.

Pltf. entered the service of defts., who were the owners of a line of ocean steamers, as a steward

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10 L. C. R. 359; 2 S. V. A. R. 35.—CAN.

q. *Applicability of English decisions—Effect of differences in natural conditions.*]—In construing a seaman's articles, some of the reasons upon which English decisions are based which apply to an island with relatively only a small & all-enveloping accessible coastline need not necessarily be applied where the articles in question have reference to such a vast country as Canada fronting upon two oceans thousands of miles apart, the separated coasts of which are most accessible through a canal owned by another nation.—CROMBIE *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LTD., [1922] 1 W. W. R. 805; 68 D. L. R. 314; 21 Exch. C. R. 299; 30 B. C. R. 260.—CAN.

PART III. SECT. 2, SUB-SECT. 4.—A. (d).

r. *Signature of master.*]—Articles not signed by the master as required by 7 & 8 Vict. c. 112, s. 2, cannot be enforced.—THE LADY SEATON (1847), 1 S. V. A. R. 260.—CAN.

*Sect.* 2.—*Contracts of service: Sub-sect.* 4, *A.* (*d*) & (*e*) *i., ii. & iii.*]

on board one of their vessels, & he signed arts. of agreement with the master in which his wages were stated to be £10 a month. Part of his duties was to take charge of the bar, & he was paid, in addition to the £10 a month, a commission of 5 per cent. upon the profits thereof. Subsequently it was verbally agreed between pltf. & the superintendent steward that he should receive £5 a month instead of the 5 per cent. commission. Neither the commission of 5 per cent. nor the sum of £5 a month in lieu thereof was entered in the arts. In an action to recover £10 being two months' extra payment in lieu of the commission: —*Held:* as it was part of pltf.'s duties as steward to take charge of the bar, the extra sum of £5 a month was payable for the performance of his duties as steward, & was therefore part of his "wages" as a "seaman," & as it was not entered in the arts., it was not recoverable.—THOMPSON *v.* NELSON (H. & W.), LTD., [1913] 2 K. B. 523; 82 L. J. K. B. 657; 108 L. T. 847; 29 T. L. R. 422; 12 Asp. M. L. C. 351, D. C.

**583. —— Penalty for failure to sign.**] — THE PRINCE GEORGE, No. 807, *post.*

**584. —— Fresh agreement executed abroad— Whether presence of consul necessary.**]—FRAZER *v.* HATTON, No. 571, *ante.*

(*e*) *Duration of Agreement.*

i. *In General.*

*See* 1894 Act, s. 114 (2) (*a*).

**585. For voyage—Or prolonged period.**] — A seaman's contract is usually for a voyage, or, if not, then for some prolonged period of time, & it cannot be determined by notice. From the nature of the case, interruptions of the voyage &/or the services of the seaman are frequent, & the seaman has not the opportunity of putting an end to his engagement by notice. If he leaves the ship before the end of the voyage contracted for, he is liable to be prosecuted for desertion. It may well be that under these circumstances it is still the law that a seaman is not disentitled to his wages during the time when, through some external cause for which neither he nor the shipowner is responsible, the voyage is interrupted, if the interruption is only temporary & the voyage is resumed (GREER, J.).—BROWNING *v.* CRUMLIN VALLEY COLLIERIES, [1926] 1 K. B. 522; 95 L. J. K. B. 711; 134 L. T. 603; 90 J. P. 201; 42 T. L. R. 323; 24 L. G. R. 302.

**586. When seamen entitled to quit ship — Clause in articles—After three months if ship safely in port.**]—If there be a clause in ships' articles that the seamen may leave at the end of three months if the ship is in port or in perfect safety, of which the captain is to be the sole judge, & the ship be in port in safety after three months, the seamen may leave the ship, without the permission of the captain.—NEAVE *v.* PRATT (1807), 2 Bos. & P. N. R. 408; 127 E. R. 687.

**587. —— Whether after mooring of ship — Trade usage.**]—A seaman, who has engaged to serve on board a collier, "from Shields to London, & back," quits the vessel at the port of London:—*Held:* he had not incurred a forfeiture of his wages; the master failing to supply him with provisions.

Seamen must be found with provisions as long as they remain on board, & are willing to do their duty. . . . Where seamen engage on board a vessel in the coal trade for the run, or voyage, to London only, there is a custom as to the time of their staying on board after the mooring of the vessel, but the same does not in any manner extend to seamen entering into contracts for a voyage to London & back to the port from whence they sailed. Where there is a great distress for coals, ships are in the habit of waiting for an advanced price; a system which is much discountenanced in the London trade (LORD STOWELL).—THE CASTILIA (1822), 1 Hag. Adm. 59; 166 E. R. 22.

*Annotation:*—**Refd.** Edward *v.* Trevellick (1854), 2 C. L. R. 1605.

**588. —— After discharge of cargo — Where contract not superseded.**]—A vessel, whose voyage was described in the articles as to Madras & Calcutta & back to London, deviated, under a new charterparty, from Madras by Prince of Wales' Island to Calcutta. The deviation, though not notified, was known to the crew, who were dissatisfied, but did not remonstrate. The mariner, who after arriving at Calcutta, soon demanded his discharge, & refused to work, was put in irons till the unloading was completed, & then quitted the ship:—*Held:* (1) such proposed deviation entitled him to his discharge at Madras; (2) his remaining on board subsequently was not an implied consent, nor, as the vessel was not, under the new charterparty, to return direct from Calcutta to England, a virtual renewal of his engagement. The whole wages, to the time of his quitting the ship, & costs, pronounced for; though the ct. inclined that the mariner had acted illegally in refusing to discharge the cargo.

(3) A spontaneous deviation of importance entitles mariners to their discharge by the law of England; & where by some other codes an alteration is permitted, the mariners are to be compensated.

(4) The law of England, in ordinary cases, requires the mariner to stay by the ship till the discharge of the cargo; but this is only where the other party has done nothing to supersede the contract. Deviations, proceeding from accident or overruling authority, do not amount to a breach of the mariner's contract.

If contingencies are incident to such voyages, & can be foreseen, they should be provided for in the ship's articles. If they arise unexpectedly, power should be given to the master to make compensation for any deviation that may be legally considered to affect the original contract (SIR CHRISTOPHER ROBINSON).—THE CAMBRIDGE (1829), 2 Hag. Adm. 243; 166 E. R. 233.

**589. —— Termination of voyage — Circumstances showing termination.**]—A seaman signed articles "for a voyage not exceeding two years' duration . . . to end at such port in the United Kingdom or Continent of Europe, within home trade limits, as may be required by the master":—*Held:* although under such articles the voyage may come to an end without any express election by the master, & although, if the voyage has in fact so come to an end, the master cannot prolong its continuance by requiring the seaman to go on to a further port, the mere facts that the ship has discharged her cargo, that she has arrived in a

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**PART III. SECT. 2, SUB-SECT. 4.—A. (e) i.**

*t. Effect of transfer of ship.*]—When a British ship has changed owners, but the captain remains unchanged, the contract of service between the captain & the seamen under articles executed before the change of ownership continues in force.—*Exp.* WOODFORD (1865), 4 N. S. W. S. C. R. (L.) 265.—**AUS.**

*a.* ——.]—The contract of service between the master & seamen of a ship is not put an end to by a change in the ownership of the vessel, effected whilst the ship is within the British Dominions, & the seamen are bound to

home port, & that she has there taken on board bunker coal required for a future voyage do not conclusively show that the voyage has so terminated. —HAYLETT *v.* THOMPSON, [1911] 1 K. B. 311; 80 L. J. K. B. 267; 103 L. T. 509; 74 J. P. 480; 11 Asp. M. L. C. 512, D. C.

**590. —— —— No right to give notice.**]—BROWNING *v.* CRUMLIN VALLEY COLLIERIES, No. 585, *ante*.

ii. *Where Voyage extended.*

**591. Whether seaman entitled to quit ship.**]—On a contract "to V. D. Land & elsewhere, & back to London":—*Held:* a forfeiture of wages was not incurred by the refusal of a mariner to work during a voyage to Rotterdam.

What the seamen were not bound to accede to, cannot be considered as such a desertion of their duty as to amount to any forfeiture whatever. The owners had reserved in their own minds, the final termination of the voyage, but I must say that both parties have a right to know what is the precise voyage for which they undertake to contract. It may be said that the alteration is slight, that it is a very little prolongation of the voyage, but it is perfectly clear, that the seamen are not the less entitled to know that (LORD STOWELL).—THE COUNTESS OF HARCOURT (1824), 1 Hag. Adm. 248.

*Annotation:*—**Apld.** The Cambridge (1829), 2 Hag. Adm. 243.

**592. ——.**]—By arts. a seaman agreed to serve on board a certain ship on a voyage from the Tyne to Bombay, or any port within certain limits, for any period not exceeding twelve months, & back to a final port of discharge in the United Kingdom or on the Continent of Europe between the Elbe & Brest. At the expiration of the twelve months, the ship being at Aden, the master declared his intention of proceeding on a voyage to Batoum. The seaman applied for his discharge & was refused. Subsequently the ship took him on as a passenger to Port Said, where he was discharged, & paid his wages for the twelve months only:—*Held:* the seaman was entitled also to his passage home, his wages until arrival home, & board & lodging until he could get a passage home.—DONKIN *v.* HASTIE (1897), 61 J. P. 568, D. C.

**593. —— Inclusion of words "or elsewhere."**]—THE ELIZA (1823), 1 Hag. Adm. 182; 166 E. R. 65.

*Annotations:*—**Refd.** The Cambridge (1829), 2 Hag. Adm. 243; The British Trade, [1924] P. 104.

**594. —— ——.**]—THE MINERVA, No. 574, *ante*.

**595. —— Engagement until arrival at any port or ports in Europe—Arrival in England—Further journey to Holland contemplated.**]—THE GEORGE HOME (1825), 1 Hag. Adm. 370.

*Annotations:*—**Apld.** The Westmorland (1841), 1 Wm. Rob. 216. **Consd.** Caine *v.* Palace S.S. Co., [1907] 1 K. B. 670. **Refd.** The Cambridge (1829), 2 Hag. Adm. 243; The Scarsdale, [1906] P. 103.

**596. —— Deviation at first port of call—Implied consent to deviation.**]—THE CAMBRIDGE, No. 588, *ante*.

**597. —— Spontaneous deviation of importance.**]—THE CAMBRIDGE, No. 588, *ante*.

**598. —— Deviation from accident or overruling authority.**]—THE CAMBRIDGE, No. 588, *ante*.

**599. —— Arbitrary & unnecessary extension.**]—THE WESTMORLAND, No. 569, *ante*.

**600. —— Termination at such port in United Kingdom as required by master—What constitutes "end of voyage."**]—By an agreement a crew was engaged on a voyage within specified limits of time & space, which was to end "at such port in the United Kingdom or the Continent of Europe within home trading limits as may be required by the master." Within the prescribed limits the ship arrived at Southampton, where she discharged her cargo. The master required the crew to take her on to Cardiff in ballast. One of the seamen claimed his discharge & wages at Southampton, on the ground that the voyage had ended there:—*Held:* he was not entitled to his discharge at Southampton.—BOARD OF TRADE *v.* BAXTER, THE SCARSDALE, [1907] A. C. 373; 76 L. J. P. 147; 97 L. T. 526; 23 T. L. R. 729; 51 Sol. Jo. 70; 10 Asp. M. L. C. 525, H. L.

*Annotation:*—**Follid.** Haylett *v.* Thompson, [1911] 1 K. B. 311.

iii. *Where Character of Voyage changed.*

**601. Whether seamen entitled to quit ship—Increased risk—Carriage of contraband.**]—(1) Pltf. agreed with deft. to serve as one of the crew of a ship, whereof deft. was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, & back to a final port of discharge, & to obey during that period all deft.'s lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian Govt., & had on board a cargo of coal & ammunition. In the course of her voyage to Rio she joined co. with two Peruvian war steamers, to which from time to time she supplied coal & ammunition. At Rio it became known to pltf. & deft. that hostilities had commenced between Spain & Peru, two powers at peace with England. Deft., notwithstanding this circumstance, announced to pltf. that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. Pltf. objected to serve any further on the voyage on the ground that it had become illegal, & involved greater danger than he had anticipated when he entered into his agreement with deft. He accordingly left the ship. In an action for breach of contract brought by him against deft.:—*Held:* deft. must

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complete the voyage with respect to which they signed articles.—CASEY *v.* DEACON, THE DECCAN, [1906] S. A. L. R. 125.—**AUS.**

**PART III. SECT. 2, SUB-SECT. 4.—A. (e) ii.**

**591 i.** *Whether seaman entitled to quit ship.*]—Where a seaman shipped in Liverpool, & signed articles which thus described the voyage: "To come out to St. John in a ship called the *P.*; to be under the command of the master of the *P.* until her arrival in St. John, there to leave the *P.* & to go in a new ship commanded by the master, & to continue by her until her arrival at her port of discharge in the United Kingdom":—*Held:* an avowed intention to go to Savannah, in Georgia, previous to her return to Great Britain, was an intended departure sufficient to justify the seaman leaving the ship & suing for wages.—HAYWARD *v.* MAINE (1841), 3 N. B. R. (1 Kerr) 292.—**CAN.**

**591 ii.** ——.]—Where there was a deviation in the voyage from that stated in the shipping articles, occasioned by a return to the port of Quebec:—*Held:* the engagement of a seaman was terminated, as there was then no subsisting contract.—THE LATONA (1874), 18 L. C. J. 185.—**CAN.**

**591 iii.** ——.]—Where a change in destination of a ship is made, the crew can legally refuse on terms of existing contract. In such event, where the new terms asked are not accepted by the owner, members of the crew are entitled to legal notice before being discharged.—JACOBSON *v.* THE FORT MORGAN (1919), 19 Exch. C. R. 165; 49 D. L. R. 123.—**CAN.**

*b. Change in destination — Fresh terms not accepted by owner—Right to legal notice before discharge.*]—JACOBSON *v.* THE FORT MORGAN (1919), 19 Exch. C. R. 165; 49 D. L. R. 123.—**CAN.**

*Sect.* 2.—*Contracts of service: Sub-sect.* 4, *A.* (*e*) *iii.*, *& B. Sect.* 3.]

be taken to have engaged pltf. for an ordinary voyage, & pltf. was entitled to treat as a breach of contract deft.'s employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. (2) Pltf., after leaving deft.'s ship, was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment & the loss of clothes:—*Held:* these damages were too remote to be recoverable.—BURTON *v.* PINKERTON (1867), L. R. 2 Exch. 340; 36 L. J. Ex. 137; 16 L. T. 419; 17 L. T. 15; 31 J. P. 615; 15 W. R. 1139; 2 Mar. L. C. 494, 547.

*Annotations:*—*As to* (1) **Apld.** O'Neil *v.* Armstrong, Mitchell, [1895] 2 Q. B. 70; Lloyd *v.* Sheen (1905), 93 L. T. 174. **Consd.** Palace Shipping Co. *v.* Caine, [1907] A. C. 386. **Reld.** Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K. B. 315; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522. *As to* (2) **Reld.** Hobbs *v.* L. & S. W. Ry. (1875), L. R. 10 Q. B. 111.

**602.** —— —— ——.]—A seaman signed articles to serve on board a British ship for a voyage not exceeding two years to ports in the East, proceeding to Hong Kong & thereafter trading to ports in any rotation & ending at a port in the United Kingdom. War then existed between Russia & Japan, & coal had been declared contraband of war. The vessel left with a cargo of coal to Hong Kong or Shang hai as might be ordered at Singapore. On the voyage to Singapore the cargo was sold for Nagasaki in Japan, & on the arrival of the ship at Singapore the master received orders from the owner to go to Nagasaki instead of Hong Kong. At Singapore it first came to the knowledge of the crew that the ship was to go to Nagasaki instead of Hong Kong. They refused to proceed to Nagasaki on account of the increased risk & danger in going to a belligerent port with contraband of war. It was then arranged by the master that the crew should remain at Singapore & that he would call for them on his way back. He took another crew on board, went to Nagasaki, delivered the coal, & left that port, but on her way back the ship was driven ashore, was got off, & was taken to Hong Kong. It was not proved that she became a wreck. The seaman was sent home with the rest of the crew & arrived in London. He claimed his wages up to the date of his arrival in London, upon the ground that the agreement was broken by the owner when the ship was ordered to Nagasaki. When he made the agreement he had no knowledge that he would be required to sail with contraband of war to a belligerent port:—*Held:* there having been no wreck or loss of the ship which would terminate the service under 1894 Act, s. 158, & there having been no termination by the discharge of the seaman under the terms of the contract or under the provisions of the Act, either at home or abroad, the seaman was entitled to his wages up to the date of his arrival in London.—LLOYD *v.* SHEEN (1905), 93 L. T. 174; 10 Asp. M. L. C. 75, D. C.

*Annotations:*—**Distd.** Sivewright *v.* Allen (1906), 75 L. J. K. B. 476. **Reld.** Sibery *v.* Connelly (1905), 94 L. T. 198.

**603.** —— —— ——.]—PALACE SHIPPING CO., LTD. *v.* CAINE, No. 956, *post.*

**604.** —— —— ——.]—A seaman signed articles at Glasgow for a voyage on the British steamship G. of "not exceeding three years' duration to any ports or places within the limits of 75 degrees north & 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, via the Bristol Channel, thereafter trading to ports in any rotation, & to end at such port in the United Kingdom of continent of Europe, within home trade limits as may be required by the master." The vessel proceeded to Cardiff, where she was loaded with a cargo of coal. At the time the articles were signed a state of war existed between Russia & Japan, & both powers had declared coal to be contraband of war. The master knew at the time of the loading of the vessel at Cardiff that the cargo was destined for the Japanese port of Sasebo, but did not disclose this information to the crew. Sasebo was within the limits prescribed by the articles. Upon arrival at Hong Kong the seaman discovered the port of destination, & refused to proceed in the vessel. He remained at Hong Kong until she returned, when he rejoined her & returned to Cardiff:—*Held:* the seaman was entitled to wages & maintenance while he was waiting at Hong Kong.—SIBERY *v.* CONNELLY (1907), 96 L. T. 140; 23 T. L. R. 257; 10 Asp. M. L. C. 330, C. A.

*Annotations:*—**Consd.** Palace Shipping Co. *v.* Caine, [1907] A. C. 386. **Reld.** Hutton *v.* Ras Steam Shipping Co., [1907] 1 K. B. 834.

**605.** —— —— **Declaration of war.**]—The Japanese Govt. purchased in this country a warship, which was placed in charge of a master to navigate on their behalf from the Tyne to Yokohama. Pltf. contracted with the master to serve as one of the crew for the voyage for a fixed sum. The ship sailed from the Tyne, but before she arrived at her destination news reached her that war had been declared by Japan against China. Pltf. thereupon refused to continue to serve & left the ship. In an action brought by pltf. for his wages:—*Held:* the master was responsible to pltf. for the act of his principals in declaring war, &, as the consequence of such declaration of war would be to expose pltf., in the event of his continuing the voyage, to greater risks than those he had contracted to run, pltf. was justified in leaving the ship, & was entitled to recover the stipulated sum notwithstanding that the voyage was not completed.—O'NEIL *v.* ARMSTRONG, MITCHELL & Co., [1895] 2 Q. B. 418; 65 L. J. Q. B. 7; 73 L. T. 178; 11 T. L. R. 548; 8 Asp. M. L. C. 63; 14 R. 703, C. A.

*Annotations:*—**Apld.** Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K. B. 315; Palace Shipping Co. *v.* Caine, [1907] A. C. 386. **Reld.** Lloyd *v.* Shun (1905), 93 L. T. 174; St. Enoch Shipping Co. *v.* Phosphate Mining Co., [1916] 2 K. B. 624; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

**606.** —— —— ——.]—Pltfs. were engaged as seamen on a British ship on a commercial voyage from London to Port Arthur, Texas, & to a final port of destination in the United Kingdom. Upon arrival at Port Arthur she discharged her outward cargo & took on board a cargo of black oil. News having arrived that a state of war existed between Germany & England & that the *Karlsruhe*, a German cruiser, was in the vicinity of Port Arthur, pltfs. refused to proceed to sea & complete the voyage, on account of the extra risk due to the outbreak of war which they would incur, unless they received extra remuneration. The master being unable otherwise to obtain their services, signed an agreement to pay them an extra £12 each to take the ship home:—*Held:* the risks of war not being contemplated by the seaman when they made the bargain for the commercial voyage, & the risk of capture & of danger from mines on the voyage home being risks which might reasonably be taken into consideration, pltfs. were discharged from their obligation to proceed on the voyage, the master

was impliedly clothed with authority from the owners to make such reasonable contract with pltfs. as he could to obtain their services, & the contract was binding on the owners.—LISTON *v.* CARPATHIAN (OWNERS), [1915] 2 K. B. 42; 84 L. J. K. B. 1135; 112 L. T. 994; 31 T. L. R. 226; 13 Asp. M. L. C. 70; 20 Com. Cas. 224.
*Annotation :*—**Refd.** Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

*B. Licences to engage or supply Seamen.*

*See* 1894 Act, ss. 110–112.

**607. Necessity for licence—Engaging or supplying seamen—For British ship.**]—NELSON *v.* RICHARDSON (1884), 48 J. P. 457.

**608. —— —— For foreign ship in United Kingdom.**]—R. *v.* STEWART, No. 9, *ante*.

**609. —— Exemption—"Owner"—Unregistered but having control of ship.**]—By 17 & 18 Vict. c. 104, s. 147 (1), if any person not licenced by the Board of Trade other than "the owner or master or mate of a ship, or some person who is *bonâ fide* the servant & in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom," he incurs a penalty. Resp. having *bonâ fide* contracted to purchase one sixty-fourth share in a British ship from P., who, though not registered as the owner, had the full possession & control of the ship under a contract to purchase the sixty-four shares, supplied an apprentice to P., who engaged the apprentice for the ship: —*Held:* resp. was an "owner" within the meaning of the exemption, since though not a registered owner he had a contract enforceable in equity for the purchase of a share in the ship.—HUGHES *v.* SUTHERLAND (1881), 7 Q. B. 160; 50 L. J. Q. B. 567; 45 L. T. 287; 46 J. P. 6; 29 W. R. 867; 4 Asp. M. L. C. 459, D. C.
*Annotations :*—**Refd.** Von Freeden *v.* Hull & Turner (1906), 75 L. J. K. B. 359; The Hopper No. 66, [1907] P. 254.

**610. Proof of licence—Onus on defendant.**]—Deft. having been charged under 17 & 18 Vict. c. 104, s. 147, with supplying a seaman to a merchant ship in the United Kingdom he not being a person holding a licence from the Board of Trade for that purpose:—*Held:* proof having been given of the supply of the seaman by deft., the *onus* of proving that he held a licence from the Board of Trade rested with him.—R. *v.* JOHNSTON (1886), 55 L. T. 265; 6 Asp. M. L. C. 14; 16 Cox, C. C. 221; *sub nom.* TURNER *v.* JOHNSTON, 51 J. P. 22, D. C.

**611. Acting without licence—Nature of fine—Punishment for offence—Not civil debt.**]—R. *v.* STEWART, No. 9, *ante*.

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## SECT. 3.—CARE OF SEAMEN DURING CURRENCY OF AGREEMENT.

*See* 1894 Act, ss. 198–211; 1906 Act, ss. 25–27, 34, 35, 64; 1923 Act.

**612. Supply of provisions—Rights of seaman.**]—THE CASTILIA, No. 587, *ante*.

**613. —— Shortage due to prolongation of voyage—Right of seamen to compensation.**]—Owing to the unexpected length of a voyage the crew of a vessel had been put on short allowance, They were, on motion, allowed compensation under the provisions of Merchant Shipping Act, 1854 (c. 104).—THE JOSEPHINE (1856), Sw. 152; 28 L. T. O. S. 192; 2 Jur. N. S. 1148.

**614. —— Total ration issued unconsumed by seaman—Property in unconsumed rations.**]—1906 Act, s. 26, enacts that masters of ships shall furnish provisions to the members of the crew in accordance with the scale set out in Schedule I. to the Act. Where during a voyage a seaman saves up a portion of his rations supplied in accordance with that sect., & at the end of the voyage takes home the unconsumed rations, he cannot be convicted of larceny unless the prosecution prove that there was *mens rea* on his part. The fact that the shipowners, to the knowledge of the seaman, disapproved of the practice of taking away unconsumed rations at the end of the voyage, does not justify a finding of *mens rea* against the seaman. It must be proved that he knew that he was taking away the property of another.

The unconsumed rations remain the property of the shipping co.—MOGAN *v.* CALDWELL (1919), 88 L. J. K. B. 1141; 83 J. P. 213; 35 T. L. R. 381; 17 L. G. R. 330; *sub nom.* MORGAN *v.* CALDWELL, 121 L. T. 148; 26 Cox, C. C. 425; 14 Asp. M. L. C. 437, D. C.

**—— Board wages in default.**]—*See* No. 940, *post*.

**615. Provision of medicine & medical attendance—Failure to provide—Liability for manslaughter.**]—Persons on board a ship are necessarily subjected to something like a despotic government, & it is extremely important that the law should regulate the conduct of those who exercise dominion over them. Therefore, in a case of manslaughter against the captain & mate of a vessel by accelerating the death of a seaman, really in ill health, but who, they allege, they believe to be a skulker, the question will be, in determining whether it is a slight or an aggravated case, whether the phenomena of the disease were such as would excite the attention of reasonable & humane men; & in such a case, if deceased be taken on board after he was discharged from an hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman.—R. *v.* LEGGETT (1838), 8 C. & P. 191.

**616. —— —— Penalty.**]—An action will lie at the suit of a seaman, against his owners for injury arising to him from not providing a sufficient supply of medicines, pursuant to 7 & 8 Vict. c. 112, s. 18, notwithstanding the penalty imposed by the same sect. for non-compliance with it.—COUCH *v.* STEEL (1854), 3 E. & B. 402; 2 C. L. R. 940; 23 L. J. Q. B. 121; 22 L. T. O. S. 271; 18 Jur. 515; 2 W. R. 170; 118 E. R. 1193.
*Annotations :*—**Dbtd.** Atkinson *v.* Newcastle Waterworks Co. (1877), 2 Ex. D. 441. **Refd.** Gorris *v.* Scott (1874),

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**PART III. SECT. 3.**

c. *Provision of medicine & medical attendance—Right of master to withdraw authority before recovery of seaman.*]—A master of a ship who engages a medical practitioner to attend upon one of his seamen who has been injured, is at liberty to withdraw his authority before the seaman is out of danger.—BROWN *v.* FIGG (1879), 5 V. L. R. (L.) 136.—AUS.

d. ——.]—MORGAN *v.* BRITISH YUKON NAVIGATION CO., LTD. (1903), 10 B. C. R. 112.—CAN.

e. —— *Seaman absent on leave—No request from master.*]—The liability of a vessel & its owners to provide necessary medical attendance & care for members of the crew during the voyage will not enable a physician to recover against the vessel or owners for services rendered, in the absence of a request from the master, to a member of the crew who is permitted to absent himself from the vessel for a few days & while so absent becomes ill & dies. There is no contractual relation express or implied, in such case, between the attending physician & the owners, &, in the absence of a statute, he cannot recover.—MELANSON *v.* GORTON PEW FISHERIES CO. (1915), 48 N. S. R. 502.—CAN.

f. *Expenses of maintenance—Seaman receiving hurt or injury in service of ship—Detention in foreign*

*Sect.* 3.—*Care of seamen during currency of agreement. Sect.* 4: *Sub-sect.* 1.]

43 L. J. Ex. 92; Robertson *v.* Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598. **Mentd.** A.-G. *v.* Radloff (1854), 10 Exch. 84; Casswell *v.* Worth (1856), 25 L. J. Q. B. 121; Bartonshill Coal Co. *v.* Reid, Same *v.* M'Guire (1858), 22 J. P. 560; Brecon Corpn. *v.* Edwards (1862), 6 L. T. 293; Young *v.* Davis (1862), 7 H. & N. 760; Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326; Handley *v.* Moffat (1872), 21 W. R. 231; Jones *v.* Stanstead, Shefford & Chambly Railroad Co. (1872), 8 Moo. P. C. C. N. S. 312; Pickering *v.* James (1873), L. R. 8 C. P. 489; Thorley *v.* Glossop (1876), 34 L. T. 169; Melliss *v.* Shirley & Freemantle L. B. of Health (1885), 54 L. J. Q. B. 408; R. *v.* Hall, [1891] 1 Q. B. 747; Cowley *v.* Newmarket L. B., [1892] A. C. 345; Pictou Municipality *v.* Geldert, [1893] A. C. 524; Thompson *v.* Brighton Corpn., Oliver *v.* Horsham L. B., [1894] 1 Q. B. 332; Saunders *v.* Holborn District Board of Works, [1895] 1 Q. B. 64; Maguire *v.* Liverpool Corpn. (1905), 92 L. T. 374; Dawson *v.* Bingley U. C., [1911] 2 K. B. 149; Neville *v.* London Express Newspaper, [1919] A. C. 368; Hemmings *v.* Stoke Poges Golf Club, [1920] 1 K. B. 720; R. *v.* Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155; Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616.

**617. —— —— Seaman's right of action.**]—COUCH *v.* STEEL, No. 616, *ante*.

**618. —— Seaman receiving hurt or injury in service of ship—Illness brought on in discharge of duty—Hospital expenses.**]—Resp. was a seaman on board the British ship *Crown Prince*, & was shipped in London in 1875. In Nov. 1876, while the *Crown Prince* was at sea, resp. was taken ill, owing to the bad provisions which were supplied to the crew. The *Crown Prince* put into Port Stanley in Jan. 1877, & all the crew being sick were taken to the hospital there. Resp. remained there wholly incapacitated until Aug. 1877, when he was sent to England as a distressed seaman. Applt. declined to pay the expenses incurred by resp. at Port Stanley, & deducted them from a sum of £81 12*s.* 6*d.* due to resp. as wages. Upon a summons taken out by resp. to recover that amount, applt., as Secretary to the Board of Trade, was convicted & fined one penny, & ordered to pay forthwith to resp. the sum of £81 12*s.* 6*d.* Against this conviction the present appeal was brought:—*Held:* the conviction was good, as the words "hurt or injury in the service of the ship," in 17 & 18 Vict. c. 104, s. 228, were wide enough to apply not only to any hurt sustained by a casualty, but to any illness brought on a seaman while doing his duty in the service of the ship.—BOARD OF TRADE SECRETARY *v.* SUNDHOLM (1879), 41 L. T. 469; 4 Asp. M. L. C. 196.

**619. —— —— Seaman brought to home port—Medical expenses after return.**]—A shipowner is not liable under 1894 Act, s. 207 (1), for expenses of necessary surgical & medical attendance upon a seaman injured in the service of the ship incurred after the seaman has been brought back to a port of the United Kingdom.—ANDERSON *v.* RAYNER, [1903] 1 K. B. 589; 72 L. J. K. B. 292; 88 L. T. 313; 19 T. L. R. 297; 51 W. R. 369; 9 Asp. M. L. C. 385; *sub nom.* RAYNER *v.* ANDERSON (No. 1), 47 Sol. Jo. 353, C. A.

**620. Accommodation for seamen—1894 Act, sect. 210—Application to Lascars.**]—Above sect., which requires that a certain amount of space shall be provided for seamen on board any British ship, applies to Lascars serving on board such ships.—PENINSULAR & ORIENTAL STEAM NAVIGATION CO. *v.* R., [1901] 2 K. B. 686; 70 L. J. K. B. 845; 85 L. T. 71; 17 T. L. R. 610; 9 Asp. M. L. C. 228.

*See, now,* 1906 Act, s. 64.

**621. Expenses of maintenance—Seaman receiving hurt or injury in service of ship—Effect of desertion by seaman.**]—By 1906 Act, s. 34 (1), if a seaman receives any hurt or injury in the service of the ship, the expenses of his maintenance until he is cured, or dies, or is returned to a proper return port, & of his conveyance to the port, shall be defrayed by the owner of the ship.

Workmen's Compensation Act, 1906 (c. 58), s. 7 (1), applies the Act to seamen, subject to (*inter alia*) the following qualification: (*e*) "The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under 1894 Act, as amended by any subsequent enactment, . . . liable to defray the expenses of maintenance of the injured . . . seaman."

In June, 1920, a Mohammedan seaman, who was engaged for service throughout a round voyage from Bombay to the United Kingdom & back to Bombay within one year, sustained in the course of the voyage an injury arising out of his employment, whereby he was for a time totally incapacitated & remained partially incapacitated. He was treated in hospital at Marseilles & was ultimately taken to Glasgow, where he rejoined his ship. In Sept. 1920, while the shipowners were in process of returning the seaman to Bombay, he left the ship without leave & deserted his service:—*Held:* the liability of the owners in respect of the maintenance of the seaman under 1906 Act, ceased from the date of his desertion, & he was entitled to an immediate payment of compensation.—ANCHOR LINE (HENDERSON BROTHERS), LTD. *v.* MOHAD, [1922] 1 A. C. 146; 91 L. J. P. C. 65; 126 L. T. 420; 38 T. L. R. 199; 15 B. W. C. C. 1; 15 Asp. M. L. C. 434, H. L.

**622. Expenses of repatriation—After detention in foreign port.**]—BOARD OF TRADE *v.* ANGLO-AMERICAN OIL CO., LTD., No. 858, *post*.

**Right of seaman to compensation under Employers' Liability Act & Workmen's Compensation Act.**]—*See* Sect. 6, *post*.

**Destitute & dismissed seamen.**]—*See* Sect. 7, *post*.

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## SECT. 4.—WAGES.

### SUB-SECT. 1.—IN GENERAL.

**623. Assignability of wages.**]—A seaman assigns his wages, as a security for money, & dies indebted to other persons. This assignment specifically binds the wages, & the money secured thereby shall be paid preferable to all other debts.—CROUCH *v.* MARTIN (1707), 2 Vern. 595; 1 Eq. Cas. Abr. 45, pl. 7; 23 E. R. 987.

*Annotations:*—**Consd.** Stone *v.* Lidderdale (1795), 2 Anst. 533. **Apld.** Russell *v.* Fryers (1909), 25 T. L. R. 414. **Mentd.** Voyle *v.* Hughes (1854), 2 Sm. & G. 18.

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*port.*]—Deft.'s vessel left Liverpool, with a full crew, bound for Miramichi, N. B. S., a stowaway found on board, was permitted by the master to sign the ship's articles, at nominal wages, after which he performed the duties of a seaman until severely injured by a fall from a yard of the ship. In the course of her voyage the vessel put into Sydney Bar, & S., who was then suffering from disease resulting from his injuries & want of proper attendance was brought by the master to pltf., to whom the master represented that S. was a seaman who had been injured in the discharge of his duty, & pledged the credit of the owner for his support & maintenance:—*Held:* the contract made by the master with pltf. was within the scope of his authority as master of the vessel & was binding upon the owner.—WALSH *v.* MCDONALD (1867), 7 N. S. R. (1 G. & O.) 87.—**CAN.**

*g. Termination of navigation by ice—Right of seaman to sustenance or transportation to open seaport.*]—In cases arising out of the abrupt termination of the navigation of the St. Lawrence by ice or storms in the end of November, seamen shipped in England on a voyage to Quebec & back are entitled to have provision made for their sustenance during the winter, or their transportation to an open seaport on the Atlantic, with the payment of wages up to the arrival in such port.—THE JANE (1846), 1 S. V. A. R. 256.—**CAN.**

**624. Right to wages — Whether voyage must be completed—Contract for whole voyage.**]—CUTTER *v.* POWELL, No. 796, *post.*

**625.** —— —— —— **Quantum meruit.**] — HULLE *v.* HEIGHTMAN, No. 952, *post.*

**626.** —— —— —— ——.]—JESSE *v.* ROY, No. 575, *ante.*

**627.** —— —— —— ——.] — HILLYARD *v.* MOUNT, No. 631, *post.*

**628.** —— —— —— ——.]—Deft. having contracted with the Lords of the Admlty. to provide a steam vessel for exploring the river Niger, wrote to pltf. as follows:—"I am willing to give you the command of the steamer destined for an exploring & trading voyage up the river Niger & its tributaries. Your pay to be at the rate of £50 per month commencing from Dec. 1, 1853, & a commission of 20 per cent. on the net proceeds of the produce you may bring down." In reply, pltf. wrote to deft. as follows:—"In answer to your letter of yesterday offering me the command of the vessel to go out in a trading & exploring voyage to the river Niger & its tributaries at a fixed pay of £50 per month & 20 per cent. on the net proceeds of the goods obtained, I beg leave to say that I accept the service & the terms you mention." The vessel proceeded up the Niger under the command of pltf. as far as Dagbo when pltf. refused to proceed further & abandoned the command:—*Held:* this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, & which, when once vested, was not subject to be lost or divested by pltf.'s desertion or abandonment of the contract.—TAYLOR *v.* LAIRD (1856), 1 H. & N. 266; 25 L. J. Ex. 329; 27 L. T. O. S. 221; 156 E. R. 1203.

*Annotations:*—**Apld.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Mentd.** Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162.

**629.** —— —— —— **Unseaworthy ship forced back to port.**]—Though a ship, when she sails on a voyage, is not seaworthy, & after part of the voyage is performed she is forced into port, & compelled to abandon the voyage, that does not entitle the sailors to recover wages for any part of the voyage.—EAKEN *v.* THOM (1803), 5 Esp. 6; 170 E. R. 719, N. P.

**630.** —— —— —— **Seaman discharged by master.**]—By 39 Geo. 3, c. 80, s. 29, for the regulation of the African trade, mariners are not to be discharged abroad in that service. Wages given to the time of the ship's return to Liverpool.—THE BEAVER (1800), 3 Ch. Rob. 92; 165 E. R. 397.

*Annotation:*—**Refd.** The British Trade, [1924] P. 104.

**631.** —— —— —— **Seamen exchanged with consent of master.**]—By a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving twenty-seven months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship:—*Held:* if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work & labour.—HILLYARD *v.* MOUNT (1828), 3 C. & P. 93; 172 E. R. 338.

*Annotation:*—**Distd.** Robins *v.* Power (1858), 4 Jur. N. S. 810.

**632.** —— —— **Contract for succession of voyages—Seaman left behind through own negligence.**]—Pltf. shipped on board deft.'s vessel, as mate, at wages of £5 10*s.* per calendar month, under articles in the form sanctioned by the Board of Trade in pursuance of Merchant Shipping Act, 1854 (c. 104), for a voyage from Shields to Alexandria, &, if required, to any port or ports in the Mediterranean, Black Sea, Danube, etc., & home to the ship's final port of discharge in the United Kingdom or continent of Europe; the voyage not expected to exceed twelve months. During the voyage out there was evidence that pltf. had been guilty of drunkenness & violent & insubordinate conduct; &, being on shore at Sulina, a port in the Danube, he was left behind, & the vessel came home without him.—In an action for wages for the time pltf. actually served on board the jury found that he had been guilty of drunkenness & abusive language subversive of discipline, & that he was not left behind by the wilful misconduct or negligence of the captain, but through his own negligence & misconduct. They, however, negatived desertion:—*Held:* notwithstanding this finding of the jury, pltf. was entitled to recover wages up to the time of his being left behind at Sulina,—the contract being for a succession of voyages of indefinite duration, though "not expected to exceed twelve months," & the wages being vested & a debt at the end of each month of service, subject, it might be, to forfeiture in an event which had not happened, though perhaps not recoverable until the expiration of the period of service stipulated for.—BUTTON *v.* THOMPSON (1869), L. R. 4 C. P. 330; 38 L. J. C. P. 225; 20 L. T. 568; 17 W. R. 1067; 3 Mar. L. C. 231.

*Annotations:*—**Mentd.** Saunders *v.* Whittle (1876), 33 L. T. 816; Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162.

**633.** —— **Based on contract of service.**] — Where part of a vessel had been saved by the exertions of the mariners:—*Held:* they were entitled to the payment of their wages, as far as the fragments of the materials would form a fund, though there was no freight earned by the owners.

The natural & legal parents of wages are the

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**PART III. SECT. 4, SUB-SECT. 1.**

624 i. *Right to wages—Whether voyage must be completed—Contract for whole voyage.*]—When seamen execute articles for a period not exceeding two years, & back to a port of final discharge of cargo in the United Kingdom, they are not justified in leaving their vessel & demanding payment of their wages at a port of call for orders only, even although the period of two years has expired.—THE TRIUMPH (1859), 12 Ir. Jur. 381.—**IR.**

625 i. —— —— —— *Quantum meruit.*]—If there has been a deviation from the voyage agreed upon, or the ship is unseaworthy, a seaman has a right to determine the contract, & to recover wages to the time of leaving the ship.—R. *v.* WHETEN (1856), 8 N. B. R. (3 All.) 269.—**CAN.**

h. —— —— —— *Deviation.*]—THE PRINCE EDWARD (1858), 8 L. C. R. 293.—**CAN.**

k. —— —— —— *Seaman left behind on ground of unfitness.*]—CABLE *v.* THE SOCOTRA (1907), 11 Exch. C. R. 301; 7 W. L. R. 25; 13 B. C. R. 309.—**CAN.**

l. —— ——.]—Action was brought by a seaman for wages at Quebec, under articles of agreement that stipulated that "the several persons whose names are hereto subscribed hereby agree to serve on board the said ship in the several capacities expressed against their respective names on a voyage from the port of Liverpool to Constantinople, thence, if required, to any ports & places in the Mediterranean or Black Sea, or wheresoever freight may offer, with the liberty to call at a port for orders, & until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months":—*Held:* action for wages could be brought on such agreement at Quebec, & the seamen could not be compelled to return to a final port of discharge in the United Kingdom.—THE VARUNA (1855), 5 L. C. R. 312.—**CAN.**

m. —— *Supercargo — No specific agreement to pay wages—Quantum meruit.*]—A supercargo is entitled to a *quantum meruit*, if there is no specific agreement to pay him wages or to allow him a percentage on the value of the cargo exported & imported.—TUZO *v.* JONES (1846), 2 R. de L. 76.—**CAN.**

n. —— *Seaman leaving ship on ground of apprehension of danger to life—Alleged unseaworthiness of ship.*]—Under Merchant Shipping Act, 1854, a seaman who has contracted & signed

mariner's contract, & the performance of the service covenanted therein; they in fact generate the title to wages. What is the obligation which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favourable weather, but likewise in adverse weather inducing shipwreck, to exert himself . . . to save as much of the ship & cargo as he can. It is a part of his bounden duty in his character of a seaman of that ship. It is certainly a laborious & probably a dangerous portion of his service, but certainly not less a service, & a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, & pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages (LORD STOWELL).—THE NEPTUNE (1824), 1 Hag. Adm. 227; 166 E. R. 81.

*Annotations:*—**Distd.** The Riby Grove (1843), 2 Wm. Rob. 52. **Apld.** The Reliance (1843), 2 Wm. Rob. 119; The Portreath, [1923] P. 155. **Reld.** The Malta (1828), 2 Hag. Adm. 158; The Lady Durham (1835), 3 Hag. Adm. 196; The Florence (1852), 19 L. T. O. S. 304; The Warrior (1862), Lush. 476; The Le Jonet (1872), L. R. 3 A. & E. 556; The Schiller (Cargo Ex) (1877), 2 P. D. 145; The Solway Prince, [1896] P. 120; The Olympic, [1913] P. 92; The Leon Blum, [1915] P. 90. **Mentd.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225.

**634. —— Seaman wrongfully disrated.**]—FRANCIS *v.* HUTCHINSON (1841), 10 L. T. 913.

**635. —— Seaman prevented from doing duty.**]—FRANCIS *v.* HUTCHINSON (1841), 10 L. T. 913.

**636. —— Agreement to run blockade.**]—By principal authority, & usage, it is not a municipal offence, by the law of nations for a neutral to carry on trade with a blockaded port. In a suit for wages, upon an agreement entered into for the purpose of breaking the blockade of the Confederate States of America, an article in deft.'s answer alleging such agreement to be contrary to law ordered to be struck out.—THE HELEN (1865), L. R. 1 A. & E. 1; 35 L. J. Adm. 2; 13 L. T. 305; 11 Jur. N. S. 1025; 14 W. R. 136; 2 Mar. L. C. 293.

*Annotations:*—**Distd.** Geipel *v.* Smith (1872), L. R. 7 Q. B. 404. **Reld.** Caine *v.* Palace Shipping Co., [1907] 1 K. B. 670.

**637. —— Discharge wrongfully refused—Extension of voyage—Wages until arrival home.**]—DONKIN *v.* HASTIE, No. 592, *ante*.

**638. —— Seaman quitting ship by reason of increased risk—Carriage of contraband.**]—LLOYD *v.* SHEEN, No. 602, *ante*.

**639.** —— —— ——.]—PALACE SHIPPING CO., LTD. *v.* CAINE, No. 956, *post*.

**640.** —— —— ——.]—SIBERY *v.* CONNELLY, No. 604, *ante*.

**641. Agreement verbal or in writing.**]—THE PRINCE GEORGE, No. 807, *post*.

**642. Agreement to receive proportion of profits.**]—If a sailor engages on a whaling voyage, & is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the captain; & shall not be considered as a partner.—WILKINSON *v.* FRASIER (1802), 4 Esp. 182; 170 E. R. 684, N. P.

*Annotations:*—**Reld.** Whelan *v.* Great Northern Steam Fishing Co. (1909), 100 L. T. 913. **Mentd.** Stocker *v.* Brockelhurst (1851), 3 Mac. & G. 250.

**643.** ——.]—Where pltf. subscribed articles of agreement under seal, between the captain of a ship & the mariners, whereby, in consideration of their serving faithfully in a fishing voyage to the South Seas & back again, they were each to receive a certain share of the net proceeds of the cargo brought home, & deft., as owner of the ship, was appointed agent to dispose of the cargo for the benefit of all concerned:—*Held:* money had & received would not lie against deft. to recover pltf.'s share of the net proceeds, on proof that deft. had disposed of the cargo, & the price of it had come to his hands; without evidence of an acknowledgment that pltf. had done his duty during the voyage, & was entitled to his stipulated share of the proceeds.—EVANS *v.* BENNETT (1808), 1 Camp. 300; 170 E. R. 964, N. P.

**644.** ——.]—JESSE *v.* ROY, No. 575, *ante*.

**645.** ——.]—Articles of agreement provide, that a seaman shall receive for his wages a proportion of the net proceeds of the cargo, after the same are actually received by the owner, subject to certain stipulations as to the seaman's conduct. *Semble:* his share may be recovered in an action for money had & received: the owner having received the money, & the seaman having fulfilled the stipulations on his part.—HAYWARD *v.* KAIN (1829), Mood. & M. 311, N. P.

**646. —— Promise by master to procure cargo.**]—Pltf., as captain of a South Sea whaler, covenanted with defts., that he would proceed to the fishery & procure a cargo of sperm oil, etc., or as great a proportion as might be, under all circumstances, within his power to obtain; would return to London, & at his own cost deliver the cargo; would obey instructions; be frugal of provisions, & not dispose of any of them without accounting for the same; & would not smuggle or trade, or permit any on board to do so. Defts. covenanted, on the performance of the before-mentioned terms & conditions on the part of pltf., to pay him a certain proportion of the net proceeds of the cargo:—*Held:* pltf.'s covenants were independent, & the performance of them was not a condition precedent to an action on the

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articles for a voyage to British North America & back to a final port of discharge in the United Kingdom, is not entitled to recover wages here on the ground of apprehension of danger to life, in consequence of the alleged unseaworthiness of the vessel.—THE PILOT (1851), 8 L. C. R. 99.—**CAN.**

o. —— *Necessity for proof of contract of hiring.*]—*Held:* the claims of pltfs. for wages as seamen on a gasoline launch failed because they failed to establish a contract of hiring.—MCARTHUR *v.* THE JOHNSON (1913), 23 W. L. R. 619; 14 Exch. C. R. 321; 18 B. C. R. 94; 9 D. L. R. 568.—**CAN.**

p. —— *Sailors acting as salvors of ship driven on coast.*]—YOUNG *v.* THE MINNIE A. (P. E. I.) (1918), 40 D. L. R. 408.—**CAN.**

q. —— *Shareman at seal fishery.*]—In an action against the owner of a sealing ship, by a stowaway, who was adopted during the voyage as one of the crew by the acceptance of his work, for the value of his share of seals, it is no defence that the owner has only received the vessel's share of the seals, & that the crew's share has never come into his custody.—DUNN *v.* MCLOUGHLAN (1857), 4 Nfld. L. R. 177.—**NFLD.**

r. —— *During detention by embargo in foreign port.*]—Wages are due to a seaman during the period of the vessel's detention by an embargo in a foreign port.—THOMSON *v.* MILLIE (1806), 13 Fac. Coll. 560; 22 Mor. Dict. App. 10.—**SCOT.**

t. —— *Master's wages—Master owner of half vessel & cargo.*]—THE JOSEPH DEXTER (1869), 20 L. T. 820.—**IR.**

**642** i. *Agreement to receive proportion of profits.*]—Where a seaman holding a master's certificate agrees to accept a share of the season's profits earned by a ship in return for his services as master, he cannot, in the event of the venture not being successful, or before its conclusion, make a claim for payment of wages for navigating the ship.—QUINN *v.* THE VOLUNTEER (1920), 20 Exch. C. R. 324.—**CAN.**

**642** ii. ——.]—Where the master of a banking schooner was to receive one twenty-eighth part of the produce of a fishery banking voyage, after deducting the "necessary expenses" for securing & making the voyage, but the agreement was silent as to what the "necessary expenses" were, the ct. was of opinion that it included fish making & freight.—DENIEF *v.* JOB BROTHERS & CO. (1880), 6 Nfld. L. R. 201.—**NFLD.**

s. *Amount of wages—Conclusiveness of ship's articles.*]—In the case of an English vessel, the ship's articles are conclusive as to the amount of wages.—LOUPIDES *v.* THE CALIMERIS

defts.' covenant.—STAVERS *v.* CURLING (1836), 3 Bing. N. C. 355; 2 Hodg. 237; 3 Scott, 740; 6 L. J. C. P. 41; 132 E. R. 447.

*Annotations:*—**Apld.** Oliver *v.* Fielden (1849), 18 L. J. Ex. 353; Bradford *v.* Williams (1872), 41 L. J. Ex. 164. **Reid.** Seeger *v.* Duthie (1860), 8 C. B. N. S. 45; Richardson *v.* Stanton, Stanton *v.* Richardson (1872), 41 L. J. C. P. 190; Parkin *v.* South Hetton Coal Co. (1907), 97 L. T. 98; Kidner *v.* Stimpson (1918), 35 T. L. R. 63. **Mentd.** Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131; Sibthorp *v.* Brunel (1849), 3 Exch. 826; Grey *v.* Friar (1854), 4 H. L. Cas. 565; Newson *v.* Smythies (1858), 28 L. J. Ex. 97; Bastin *v.* Bidwell (1881), 18 Ch. D. 238.

**647. Employment of female cook & steward—Employment of wife of master.**]—THE JANE & MATILDA (1823), 1 Hag. Adm. 187; 166 E. R. 67.

*Annotations:*—**Reid.** R. *v.* City of London Court Judge & S.S. Michigan (1890), 25 Q. B. D. 339; *Ex p.* Guiness, *Ex p.* Murray (1926), 42 T. L. R. 766.

**648. Consideration in lieu of wages.**]—THE HARVEY, No. 578, *ante*.

**649. Board wages—Provisions exhausted—Seamen providing for themselves.**]—THE SAN JOSE PRIMEIRO, No. 940, *post*.

**650. Half wages—Provision in articles—Should ship winter abroad on account of ice.**]—The ship's articles contained a printed clause, usual in the Baltic trade to this effect: "& should the ship or vessel winter abroad on account of the ice, the officers & seamen agree to accept half of the wages agreed upon during the time of such detention." The ship went out "seeking"; the ice prevented her from getting a cargo, but not from sailing without one; she wintered abroad:—*Held:* the crew were only entitled to half wages during her detention.—THE HOGHTON (1833), 3 Hag. Adm. 100; 166 E. R. 343.

**651. Wages not insurable.**]—A seaman cannot insure his wages.—THE LADY DURHAM (1835), 3 Hag. Adm. 196; 166 E. R. 378.

*Annotation:*—**Consd.** The Riby Grove (1843), 2 Wm. Rob. 52.

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SUB-SECT. 2.—TIME AND MODE OF PAYMENT.

*See* 1894 Act, ss. 127, 131, 132, 134–137, 196, 197; 1906 Act, ss. 28, 37–39, 57, 60.

**652. Delay or refusal to pay—Right to double pay—Right of master.**]—A master is entitled, under 17 & 18 Vict. c. 104, ss. 187, 191, to double pay for the number of days, not exceeding ten, during which the payment of his wages is improperly withheld; but he is not so entitled, if he himself causes the delay, by improperly keeping back the accounts of the ship.

The owner of a ship refused to pay wages due to a master for a voyage, unless credited with certain salvage money received by the master under an award, & kept by him for his own share; the master refusing to account for a subsequent voyage, except on condition of a settlement for the former voyage, without reference to the salvage money:—*Held:* the payment of wages was improperly withheld, & the master was entitled, under 17 & 18 Vict. c. 104, to ten days' double pay.—THE PRINCESS HELENA (1861), Lush. 190; 30 L. J. P. M. & A. 137; 8 L. T. 335; 1 Mar. L. C. 108; 167 E. R. 91.

*Annotations:*—**Overd.** The Arina (1887), 12 P. D. 118. **Mentd.** Jones *v.* Jones (1895), 43 W. R. 656.

**653.** —— —— ——.]—(1) A master is not entitled under Merchant Shipping Act, 1854 (c. 104), ss. 187, 191, to the double pay for delay in the payment of wages recoverable by "seamen" under the former sect.

(2) A master is not entitled under 43 & 44 Vict. c. 16, s. 4, to wages up to the final settlement of his claim.—THE ARINA (1887), 12 P. D. 118; 56 L. J. P. 57; 57 L. T. 121; 35 W. R. 654; 6 Asp. M. L. C. 141.

*Annotation:*—*Generally*, **Mentd.** Jones *v.* Jones, [1895] P. 201.

**654.** —— —— **Refusal "without sufficient cause."**]—FRAZER *v.* HATTON, No. 571, *ante*.

**655.** —— —— ——.]—Under Merchant Shipping Act, 1854 (c. 104), s. 187, & 43 & 44 Vict. c. 16, s. 4, as to the nonpayment of wages the right to recover ten days' double pay & wages to the time of final settlement is not enforceable where there is a *bonâ fide* question as to liability.

I think in this case there was "sufficient cause," & "a reasonable dispute as to liability." It never could have been meant that, where there was a *bonâ fide* question as to liability, shipowners should be visited with the penalties prescribed by those statutes (BUTT, J.).—THE RAINBOW (1885), 53 L. T. 91; 5 Asp. M. L. C. 479.

**656.** —— —— ——.]—Where, in an action for master's wages, it appears that, at the institution of the suit, accounts are outstanding between the owners & pltf., & that the same have not been taken or settled, & that within two days of the institution of the suit the wages are paid, the owners have not refused to pay "without sufficient cause" within Merchant Shipping Act, 1854 (c. 104), s. 187, & therefore pltf. is not entitled to recover ten days' double pay.—THE TURGOT (1886), 11 P. D. 21; 54 L. T. 276; 34 W. R. 552; 5 Asp. M. L. C. 548.

*Annotations:*—**Reid.** Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; The Ripon City, [1897] P. 226.

**657.** —— **Right to wages until final settlement—"Reasonable dispute as to liability."**]—THE RAINBOW, No. 655, *ante*.

**658.** —— —— —— **Counterclaim in respect of separate cause of action.**]—A counterclaim in respect of a separate cause of action, is not "a reasonable dispute as to liability" within 43 & 44 Vict. c. 16, s. 4 (4).—DELAROQUE *v.* S.S. OXENHOLME CO., LTD. (1883), Cab. & El. 122.

**659.** —— —— **Right of master.**]—THE ARINA, No. 653, *ante*.

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(1922), 69 D. L. R. 138; 20 Exch. C. R. 331.—**CAN.**

b. *Priority.*]—Seamen's claims for wages have priority over master's wages & disbursements.—THE TYBURNIA (No. 1) (1887), 8 N. S. W. L. R. 1; 4 N. S. W. W. N. 1.—**AUS.**

c. ——.]—Seamen's wages are privileged, & are payable in preference to the mtges. due upon a steamboat navigating Canadian waters.—MITCHELL & COUSINEAU & DIVERS (1858), 7 L. C. J. 218.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 2.**

d. *Delay or refusal to pay—Right to wages until final settlement.*]—THE delay in paying the wages being due solely to the wrongful act or default of the master:—*Held:* the purser was entitled to wages at the stipulated rate down to "the time of final settlement," & "the time of final settlement" was the date of the interlocutor of the ct.—LANG *v.* ST. ENOCH SHIPPING CO., LTD., [1908] S. C. 103; 45 Sc. L. R. 59; 15 S. L. T. 454.—**SCOT.**

e. —— *Conviction — Jurisdiction.*]—M., the master of a British ship of Canadian register, was convicted before a stipendiary magistrate, for that he wrongfully & unlawfully refused to pay R., a seaman serving on board said ship, a sum of money claimed to be due him for wages, &., further, for refusing to discharge said R., he being then entitled to his discharge:—*Held:* quashing the conviction with costs, the refusal to pay R. his wages, or to give him his discharge, was not a criminal offence, & the proceedings taken were not warranted by Seamen's Act (D.), c. 74; the ship being, at the time the proceedings were instituted, within the jurisdiction of the Govt. of the British possession in which she was registered, the case was within the exception mentioned in sect. 26 (*d*) & Shipping Act (Imp.), Part 2, was not applicable. — R. *v.* MEIKLE, *Ex p.* RAMSEY (1903), 36 N. S. R. 297.—**CAN.**

f. *Seaman left behind—Duty of master to deliver account of seaman's effects & wages.*]—CABLE *v.* THE SOCOTRA (1907), 7 W. L. R. 25; 13 B. C. R. 309.—**CAN.**

g. ——.]—The wages to which a

*Sect. 4.—Wages: Sub-sects. 2 & 3, A.*]

**660. Wages payable in foreign currency — Specific condition in articles—Condition not enforced.**]—Where in a seaman's articles it is covenanted to pay wages in dollars, sterling & not currency value is to be assumed as intended, & the wages are to be paid at the rate of 4*s.* 2*d.* per dollar.

Where it was alleged that there was a specific covenant in seaman's articles, duly read over & explained to the crew, that the wages when due should be "payable in United States currency or its equivalent":—*Held:* the ct. could not enforce such a condition against the seamen, from the fact of its being contrary to equity & justice, & an imposition upon such a class of men as mariners.—THE ANNIE SHERWOOD (1865), 12 L. T. 582; 13 W. R. 641, 965; 2 Mar. L. C. 214.

**661. —— Sterling value presumed.**] — THE ANNIE SHERWOOD, No. 660, *ante*.

**662. —— American dollar.**]—THE NONPAREIL, No. 576, *ante*.

**663. Payment "through or in presence of superintendent"—Superintendent refusing to be present at payment—Deductions made on ground of forfeiture—Conviction for payment in absence of superintendent.**]—A seaman deserted from a ship at a foreign port, thereby committing an offence under 1894 Act, s. 221, which rendered him liable to forfeit his wages then due & subsequently earned, & to satisfy any excess of wages paid by the owners to a substitute at a higher rate. The seaman returned to the United Kingdom in another ship of which applt. was master. In order to escape a prosecution for desertion by the owners of the first ship, the seaman agreed to have deducted from the wages earned on the homeward voyage the extra expense which had been incurred by them in providing a substitute after his desertion. The superintendent of mercantile marine before whom the seaman was being discharged refused to be present at the payment of the wages on the ground that the deduction was illegally made. The balance due to the seaman after making the deduction was paid to him by applt. in the absence of the superintendent. Applt. was summoned under 1894 Act, s. 131, for having paid the wages otherwise than "through or in the presence of the superintendent," & was convicted; —*Held:* the conviction was right; there is no power to make a deduction from a seaman's wages on the ground of forfeiture after desertion, although with the consent of a seaman, except under an order of a ct. of competent jurisdiction.—KESLAKE *v.* BOARD OF TRADE, [1903] 2 K. B. 453; 72 L. J. K. B. 829; 89 L. T. 534; 67 J. P. 356; 52 W. R. 127; 19 T. L. R. 583; 47 Sol. Jo. 640; 9 Asp. M. L. C. 491, D. C.

**664. Seaman left behind — Duty of master to deliver account of seaman's wages—What deductions allowable—Deductions of bonus under forfeiture clause.**]—A seaman was engaged for a voyage on a British ship. The agreement provided for the payment of wages & a bonus of 15 per cent., but there was a stipulation that in the event of a seaman's desertion as being paid off abroad his bonus was to be forfeited. The seaman deserted abroad, & on the termination of the voyage the master tendered to the proper officer under 1906 Act, s. 28, the proper proportion of the seaman's wages, but no bonus:—*Held:* the stipulation for the forfeiture of the bonus was invalid, inasmuch as bonus was "wages" within 1894 Act, s. 742, & therefore the master had failed to comply with the requirements of 1906 Act, s. 28.—SHELFORD *v.* MOSEY, [1917] 1 K. B. 154; 86 L. J. K. B. 289; 115 L. T. 685; 80 J. P. 463; 13 Asp. M. L. C. 554, D. C.

**665. —— —— Meaning of left "behind"—Deserter.**]—1906 Act, s. 28 (1) provides that "if a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall . . . as soon as may be, enter in the official log book a statement of the effects left on board by the seaman & of the amount due to the seaman on account of wages at the time when he was left behind":—*Held:* the words "left behind" apply not only to the case of a seaman who has actually been left behind in the port when his ship sails therefrom, but also to the case of a seaman who has deserted from the ship & as to whom, when the ship sails from the port, the master has no information whether he is in fact left there or has already joined, & sailed from the port in, another ship.—COLBOURNE *v.* LAWRENCE, [1917] 2 K. B. 857; 87 L. J. K. B. 219; 117 L. T. 666; 82 J. P. 6; 26 Cox, C. C. 92; 14 Asp. M. L. C. 168, D. C.

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SUB-SECT. 3.—LOSS OF RIGHT TO WAGES.

*A. Loss or Wreck of Ship.*

*See. now*, 1894 Act, ss. 157, 158; 1925 Act (c. 42), s. 1.

**666. Whether right to wages lost.**] — ANON. (1664), 1 Sid. 179; 82 E. R. 1043.

*Annotation:*—**Consd.** The Neptune (1824), 1 Hag. Adm. 227.

**667.** ——.]—Sailors wages not recoverable if ship taken or lost before the end of the voyage.—HERNAMAN *v.* BAWDEN (1766), 3 Burr. 1844; 97 E. R. 1129.

**668.** ——.]—Monition to show cause, granted

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seaman is entitled, under Navigation Act, 1912–1920, s. 132 (1) (*b*), are wages for the period beginning on the date at which he was left on shore & ending either on his arrival at his home port or on the happening of one of the events mentioned in the proviso.—BRUHN *v.* AUSTRALIAN STEAMSHIPS PROPRIETARY, LTD. (1922), 31 C. L. R. 136; [1923] V. L. R. 375.—**AUS.**

h. *Payment of wages to disabled seaman.*]—Where the master of a disabled seaman obtains from the shipping master a discharge, he is bound to render to the shipping master the account of the wages due, but he must pay them to the seaman himself, though he is unable to attend before the shipping master.—PAIN *v.* KREEN (1878), 4 V. L. R. (L.) 73.—**AUS.**

k. *Seaman imprisoned by stranger for assault.*]—The imprisonment of a seaman by a stranger for assault does not entitle him to recover wages during the voyage & before its termination.—THE GENERAL HEWITT (1838), 1 S. V. A. R. 186.—**CAN.**

l. *Agreement by master to pay at port other than one originally agreed upon—Whether binding.*]—An agreement entered into by the master of a vessel & his crew, subsequently to the execution of the mariner's contract, to discharge & pay them their wages at a port other than the one agreed upon, & previous to the ship's arrival at the final port of destination, is not binding upon him.—*Re* WINSCALES (1858), 8 L. C. R. 350.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 3.—A.**

**636 i.** *Whether right to wages lost.*]—WOOD *v.* HIGGINBOTHAM (1846), 2 R. de L. 28.—**CAN.**

**636 ii.** ——.]—Three of the promoters shipped on a voyage from Millford to Quebec, & back to London; the eight remaining promoters shipped at Quebec on their return voyage, & all had signed articles accordingly. The ship came in ballast to Quebec, &, after taking in a cargo, sailed from Quebec on the return voyage, & was wrecked in the River St. Lawrence & abandoned by the master as a total loss:—*Held:* the seamen who shipped at Millford were entitled to wages for services on the outward voyage from Millford to Quebec, & for one half the period the vessel remained at Quebec, notwithstanding that the outward voyage was made in ballast, & the seamen who shipped at Quebec, having abandoned, were not entitled to claim wages.—THE ISABELLA (1850), 1 S. V. A. R. 281.—**CAN.**

**636 iii.** ——.]—THE LAUREL WHALEN, [1919] N. Z. L. R. 343.—**N.Z.**

against the owner of a ship totally lost, at the instance of a surviving seaman, whose wages were unpaid.—THE STEPHEN WRIGHT (1848), 12 Jur. 732.

**669. —— Necessity for proof of abandonment of ship.**]—On the wreck of a ship the seamen are bound by their contract to do their utmost to save ship & cargo; but the seamen's contract of service may be terminated either by final abandonment of the ship or by discharge given by the master. An abandonment of a ship, which is relied upon as operating a dissolution of the seamen's contract, must be clearly proved.—THE WARRIOR (1862), Lush. 476; 6 L. T. 133; 1 Mar. L. C. 204; 167 E. R. 214.

*Annotations:*—**Folld.** The Portreath, [1923] P. 155. **Reld.** The Le Jonet (1872), L. R. 3 A. & E. 556; The Olympic, [1913] P. 92.

**670. —— In whole or part.**]—If a ship be lost in her return, seamen shall have all outward wages, & but half while in harbour abroad.—ANON. (1700), 12 Mod. Rep. 408; 88 E. R. 1414.

**671. —— ——.**]—In a divided voyage, in which cargoes are successively taken in & delivered at different ports, & freight thereby earned for the owners, the mariners are by the general law entitled to their wages up to the time of arrival at each port of delivery; & an attempt to extinguish their right, in case of the loss of the ship on the last part of such divided voyage, by inserting a covenant in the ship's articles that they shall not be entitled to any part of their wages unless the ship returns to the last port of discharge, will not be upheld by the Ct. of Admlty.—THE JULIANA (1822), 2 Dods. 504; 165 E. R. 1560.

*Annotations:*—**Reld.** The Minerva (1825), 1 Hag. Adm. 347; The Hoghton (1833), 3 Hag. Adm. 100; Jesse *v.* Roy (1834), 1 Cr. M. & R. 316; The Lady Durham (1835), 3 Hag. Adm. 196; The Reliance (1843), 2 Notes of Cases, 347; The Don Francisco (1861), Lush. 468; Button *v.* Thompson (1869), L. R. 4 C. P. 330.

**672. —— ——.**]—A ship was hired by Govt. to take out convicts to Van Dieman's Land. From that place it sailed to Batavia, & on several other trading voyages. It sailed on the homeward voyage to England, & arrived safe at St. Helena, but was lost before arrival at the port of discharge, & all on board perished:—*Held:* proof of these facts, & of a seaman having gone on board the ship in England, & having been seen working on board at Van Dieman's Land, at Batavia, & afterwards at St. Helena, was sufficient to go to the jury, as evidence to entitle the seaman to wages *pro rata* for the voyage out.—HARRIS *v.* IVE (1835), 1 Har. & W. 238.

**673. —— ——.**]—Where any portions of a wrecked vessel have been recovered, the mariners are entitled to sue against the proceeds for their wages, although no freight has been earned; & their title is not divested by the circumstance that the portions of the ship have been preserved, were preserved not by the exertions of the crew, but by third parties. A summary petition in a suit for wages, admitted on behalf of the widow & administratrix of a deceased seaman, the whole of the crew, with the exception of one man, having been lost.—THE RELIANCE (1843), 2 Wm. Rob. 119; 2 Notes of Cases, 347; 7 Jur. 542; 166 E. R. 700; *sub nom.* THE ALLIANCE, 10 L. T. 913.

**674. —— —— Destruction of ship to escape enemy.**]—BENNET *v.* BUGGIN (1766), Burrell, 25; 167 E. R. 454.

**675. —— —— Wages until time of loss.**]—Where a ship was lost, the administratrix of the captain was entitled to maintain an action for wages for the period of his service before the loss.—HAWKINS *v.* TWIZELL (1856), 5 E. & B. 883; 25 L. J. Q. B. 160; 2 Jur. N. S. 302; 119 E. R. 709; *sub nom.* HAWKINS *v.* FURZILL, 26 L. T. O. S. 235; 4 W. R. 242.

**676. —— —— —— What constitutes "loss."**]—A British seaman on Mar. 10, 1905, signed articles for service on a British ship for a three years' voyage in certain specified latitudes including Japan, Manchuria, & Siberian ports. At that date a state of war existed between Russia & Japan. On May 18, 1905, the ship while proceeding through the China Sea & approaching the Straits of Formosa was captured by a Russian cruiser, & was on June 2, 1905, destroyed by the Russians. Her crew, who had been previously taken on board another Russian ship, were subsequently sent back to London. There was no evidence of what the cargo of the British ship consisted, nor that her capture by the Russians was justified:—*Held:* the capture of the ship, coupled with the fact of her subsequent destruction, constituted a "loss" of the ship within 1894 Act, s. 158, whereby the seaman's service was terminated on June 2, 1905.—SIVEWRIGHT *v.* ALLEN, [1906] 2 K. B. 81; 75 L. J. K. B. 476; 94 L. T. 778; 70 J. P. 290; 54 W. R. 604; 22 T. L. R. 482; 50 Sol. Jo. 440; 10 Asp. M. L. C. 251; 11 Com. Cas. 167, D. C.

*Annotation:*—**Reld.** Horlock *v.* Beal, [1916] 1 A. C. 486.

**677. —— —— Scuttling of ship.**]—THE WOODHORN (1891), 92 L. T. Jo. 113.

*Annotation:*—**Expld.** Sivewright *v.* Allen, [1906] 2 K. B. 81.

**678. —— —— Wages until "final settlement."**]—THE WOODHORN (1891), 92 L. J. Jo. 113.

*Annotation:*—**Expld.** Sivewright *v.* Allen, [1906] 2 K. B. 81.

**679. —— —— ——.**]—Pltfs. agreed to serve as seamen on board defts.' ship on a voyage from Cardiff to Kiau Chiu & any ports within certain limits & home again. At this time war had broken out between Russia & Japan. Pltfs. subsequently discovered that the ship was engaged in carrying contraband of war for Russia. When in the Far East on a voyage to Saigon, a port within the above limits, she was destroyed by an explosion. Pltfs. were rescued & were sent home to Cardiff as distressed seamen, & at Cardiff they signed a conditional release without prejudice to their claim for damages & wages. Pltfs. claimed wages down to the time of "final settlement" & damages for the loss of their kit & for the hardships suffered. Defts. contended that pltfs. were only entitled to wages down to the date of the destruction of the ship, & were not entitled to damages. The judge held that they were entitled to damages for the loss of their kit & for the hardship suffered. Upon appeal upon the question of wages:—*Held:* there had been a "loss" of the ship within the meaning of s. 158, when she was destroyed, & that the pltfs. were only entitled to wages down to that date.—COLLINS *v.* SIMPSON S.S. Co. (1907), 24 T. L. R. 178, C. A.

**680. —— —— Collision—Ship ceasing to be in seaworthy condition.**]—Pltfs., two members of the crew of a steamship, subscribed their names to articles of agreement by which they undertook to serve on board the ship, in the capacities & at

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675 l. —— *In whole or part—Wages until time of loss.*]—SIMPSON *v.* DEVEBER (1877), 17 N. B. R. (1 P. & B.) 316.—CAN.

678 l. —— —— *Wages until "final settlement."*]—M'LAGAN *v.* CLUNIE (1848), 10 Dunl. (Ct. of Sess.) 847; 20 Sc. Jur. 296.—SCOT.

m. —— —— *Destruction of ship by fire.*]—Where pltf. was engaged by defts. for "the season," *i.e.*, from May till Nov., as master to manage the steamer *W.* for $1,000, & he continued so employed until Sept., when the steamer was burnt:—*Held:* pltf. was not entitled to more than the proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, & performance was excused by its destruction without the default of

*Sect. 4.—Wages: Sub-sect. 3, A., B. & C.*]

the wages therein mentioned, on a voyage from Southampton to New York, &/or, if required, to any port within the North Atlantic & South Atlantic Oceans, trading as may be required, until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months, & should the vessel put back into port through accident, the crew to be transferred to any other vessel belonging to the same owners taking the place of the vessel named. On the same day that the vessel left Southampton for New York she came into collision with another vessel, & was so seriously damaged in the hull that she was obliged to come to anchor, & the next day to return, under her own steam, to Southampton, where the crew, including pltfs., were discharged with three days' pay, & her passenger & free board certificates having been, on demand, returned to the Board of Trade, the vessel was sufficiently patched up to enable her to proceed to Belfast, where she could be repaired, &, at the end of nine weeks, she received back the above-mentioned certificates enabling her to proceed to sea on the voyage from Southampton to New York. Pltfs. under 1894 Act, s. 162, claimed, in addition to the three days' wages earned by them, a further sum of one month's wages by way of compensation for the damage caused to them by being discharged otherwise than in accordance with the terms of the agreement, without fault on their part, & without their consent:—*Held:* in the circumstances, by reason of the injury sustained by the vessel in the collision, she had ceased to be in a seaworthy condition to continue the adventure, so that, in respect of the voyage agreed upon, the case fell within the words of the 1894 Act, s. 158, namely, that "by reason of the wreck . . . of the ship" the service of pltfs. had terminated before the date contemplated by the agreement, &, there pltfs. had been properly discharged with three days' pay.—THE OLYMPIC, [1913] P. 92; 82 L. J. P. 41; 108 L. T. 592; 29 T. L. R. 335; 12 Asp. M. L. C. 318; *sub nom.* FRASER & WELLER *v.* OCEANIC STEAM NAVIGATION CO. (No. 2), 57 Sol. Jo. 388, C. A.

*Annotations:*—**Consd.** Horlock *v.* Beal, [1916] 1 A. C. 486; The Countess (1922), 91 L. J. P. 161.

**681. What amounts to loss—Capture of ship carrying contraband.**]—AUSTIN FRIARS S.S. CO. *v.* STRACK, SAME *v.* STRACK, No. 693, *post.*

**682. —— Capture & subsequent destruction.**]—SIVEWRIGHT *v.* ALLEN, No. 676, *ante.*

**683. —— Destruction by explosion.**]—COLLINS *v.* SIMPSON S.S. CO., No. 679, *ante.*

**684. —— Unseaworthiness due to collision.**]—THE OLYMPIC, No. 680, *ante.*

**685. —— Detention of ship in enemy port.**]—A British ship during a voyage for which a British seaman had signed articles, being in a German port when war was declared between the United Kingdom & the German Empire, was immediately detained, & some months later the crew were imprisoned. The ship was still detained & the crew imprisoned when this action for an allotment of wages was commenced:—*Held:* (1) the detention of the ship did not constitute "the loss of the ship" within 1894 Act, s. 158; (2) the seaman ceased to be entitled to his wages as soon as the further performance of the contract became impossible; (3) (LORD ATKINSON, LORD SHAW OF DUMFERLINE, & LORD WRENBURY), the further performance of the contract had become impossible from the date of the detention of the ship; (4) LORD LOREBURN), from the date of the imprisonment of the crew.—HORLOCK *v.* BEAL, [1916] 1 A. C. 486; 85 L. J. K. B. 602; 114 L. T. 193; 32 T. L. R. 251; 60 Sol. Jo. 236; 13 Asp. M. L. C. 250; 21 Com. Cas. 201, H. L.; *revsg.* S. C. *sub nom.* BEAL *v.* HORLOCK, [1915] 3 K. B. 627, C. A.

*Annotations:*—*As to* (2) **Refd.** Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Scottish Navigation Co. *v.* Souter, Admiral Shipping Co. *v.* Weidner, Hopkins, [1917] 1 K. B. 222; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522. *As to* (3) **Refd.** Bank Line *v.* Capel, [1919] A. C. 435. *Generally,* **Refd.** Blackburn Bobbin Co. *v.* Allen, [1918] 2 K. B. 467; Ertel Bieber *v.* Rio Tinto Co., Dynamit Act. *v.* Same, Vereinigte Königs & Laurahütte Act. *v.* Same, [1918] A. C. 260; Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331; *Re* Comptoir Commerical Anversois & Power, [1920] 1 K. B. 868; Larrinaga *v.* Soc. Franco-Americaine Des Phosphates De Medulla (1922), 38 T. L. R. 739; Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497. **Mentd.** Daimler Co. *v.* Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; Metropolitan Water Board *v.* Dick, Kerr, [1918] A. C. 119; Fried Krupp Akt. *v.* Orconera Iron Ore Co. (1919), 88 L. J. Ch. 304; Schostall *v.* Johnson (1919), 36 T. L. R. 75.

*B. Capture.*

**686. Whether right to wages lost.**]—HERNAMAN *v.* BAWDEN, No. 667, *ante.*

**687. —— In whole or part.**]—If a ship is freighted out & home, & captured on her homeward bound voyage, the mariners shall be paid for the outward voyage, & for half the time they stayed at the port of delivery.—ANON. (1700), 1 Ld. Raym. 739; 91 E. R. 1394.

**688. —— ——.**]—CHANDLER *v.* MEADE (1705), cited in 2 Ld. Raym. at p. 1211; 92 E. R. 300, N. P.

*Annotation:*—**Consd.** Beale *v.* Thompson (1803), 3 Bos. & P. 405.

**689. —— —— Detention by foreign government.**]—PRATT *v.* CUFF (1798), cited in 4 East, at p. 43; 102 E. R. 746, N. P.

*Annotations:*—**Consd.** Beale *v.* Thompson (1804), 4 East, 546; Horlock *v.* Beal, [1916] 1 A. C. 486. **Mentd.** Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

**690. —— —— ——.**]—A seaman, detained in Russia under the late embargo, in 1800, who is permitted by the captain to return, & serve on board upon being taken off the embargo, is entitled to wages, during the time he was on shore & absent from the ship by force thereof his contract being for the voyage, & to do his best endeavour for the ship, & not to neglect or to refuse to do his duty by day or night, nor go out of the ship on board any other vessel, nor be on shore under any pretence without leave, under the penalties of 2 Geo. 2, c. 36, & 37 Geo. 3, c. 73; & twenty-four hours' absence, without leave, to be deemed a total desertion.

Capture, even hostile, does not defeat the right to wages, where the captors, instead of proceeding to condemnation, release the ship, & thereby pronounce that that act is not a valid seizure.—BEALE *v.* THOMPSON (1804), 4 East, 546; 1 Smith, K. B. 144; 102 E. R. 940; *affd. sub nom.* THOMSON *v.* BEALE (1813), 1 Dow. 299, H. L.

*Annotations:*—**Consd.** The Florence (1852), 19 L. T. O. S. 304. **Apld.** Melville *v.* De Wolf (1855), 4 E. & B. 844. **Consd.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Distd.** Horlock *v.* Beal, [1916] 1 A. C. 486. **Refd.** Dowthwaite *v.* Tibbut (1816), 5 M. & S. 75; Brown *v.* Milner

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defts.—ELLIS *v.* MIDLAND RY. CO. (1882), 7 A. R. 464.—CAN.

n. —— *Members of crew left on island for seal fishery purposes—Subsequent loss of ship—Stranded crew taken off by passing ship—Right to wages for whole period.*]—GUTHRIE *v.* MUNTINGH (1829), 1 Men. 398.—S. AF.

o. *What amounts to loss—Injury sustained sufficiently serious to necessitate substantial repairs.*]—THE LAUREL WHALEN, [1919] N. Z. L. R. 343.—N.Z.

(1817), 7 Taunt. 319; The Chieftain (1863), Brown. & Lush. 104; The Olympic, [1913] P. 92. **Mentd.** Cuckson v. Stones (1858), 1 E. & E. 248; Browning v. Crumlin Valley Collieries [1926] 1 K. B. 522.

**691.** —— —— ——.] — JOHNSON *v.* BRODERICK (1804), 4 East, 566; 1 Smith, K. B. 153; 102 E. R. 947.

**692.** —— —— ——.] — HORLOCK *v.* BEAL, No. 685, *ante*.

**693.** —— —— **Neutral ship carrying contraband.**]—A British seaman signed an agreement to serve on a British ship on an ordinary trading voyage to the East, & between ports in the East, to end at a final port of discharge in the United Kingdom. Whilst the ship was in the East war was declared between Russia & Japan, & the ship whilst carrying a cargo of contraband of war was captured by one of the belligerents & confiscated by a prize ct. The master knew, but the crew did not know, that the ship was carrying contraband. The crew were sent back to London, & suffered hardships on the journey:—*Held:* as the shipowners had broken the agreement by altering the character of the voyage, the service of the seamen was not terminated "by reason of the loss of the vessel" within 1894 Act, s. 158, when the ship was captured, & he was entitled to recover his wages up to the date of his arrival in London, & damages for breach of the agreement.—AUSTIN FRIARS S.S. Co. *v.* STRACK, SAME *v.* STRACK, [1905] 2 K. B. 315; 74 L. J. K. B. 683; 93 L. T. 169; 53 W. R. 661; 21 T. L. R. 556; 49 Sol. Jo. 537; 10 Asp. M. L. C. 70, D. C.; *on appeal*, [1906] 2 K. B. 499, C. A.

*Annotations:*—**Apld.** Lloyd *v.* Sheen (1905), 93 L. T. 174; Sibery *v.* Connelly (1905), 94 L. T. 198. **Consd.** Sivewright *v.* Allen, [1906] 2 K. B. 81. **Reld.** Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670; R. *v.* Westminstcr Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215. **Mentd.** Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

**694.** —— **Subsequent recapture.**] — (1) If a ship is captured in the course of her voyage, & is afterwards recaptured & arrives at her port of destination, the sailors are entitled to their wages.

(2) If a foreign seaman, captured on board an English ship, enters into the service of the enemy, though the ship is afterwards recaptured & completes her voyage, he shall not be entitled to wages.—BERGSTROM *v.* MILLS (1799), 3 Esp. 36; 170 E. R. 529, N. P.

*Annotation:*—*As to* (1) **Consd.** Beale *v.* Thompson (1804), 4 East, 546.

**695.** —— ——.]—THE FRIENDS (1801), 4 Ch. Rob. 143; 165 E. R. 565.

*Annotations:*—**Consd.** Horlock *v.* Beal, [1916] 1 A. C. 486. **Reld.** Beale *v.* Thompson (1804), 4 East, 546.

**696.** —— **Subsequent release by captors.**]—JOHNSON *v.* BRODERICK (1804), 4 East, 566; 1 Smith, K. B. 153; 102 E. R. 947.

**697.** —— ——.]—On a count for work & labour:—*Held:* a seaman might recover for wages during a hostile embargo in a foreign port, while he was imprisoned on shore, on proof that the crew were restored to the ship, & that she completed the voyage & earned freight, without producing the order by which the embargo was taken off.—DELAMAINER *v.* WINTERINGHAM (1815), 4 Camp. 186; 171 E. R. 60, N. P.

*Annotations:*—**Consd.** Horlock *v.* Beal, [1916] 1 A. C. 486. **Reld.** The Chieftain (1863), Brown. & Lush. 104. **Mentd.** Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

### *C. Desertion.*

*See* 1894 Act, ss. 221, 225, 376.

**What amounts to desertion.**]—*See* Sect. 10, subsect. 3, B. (*c*) i., *post*.

**698. Whether right to wages lost.**] — If a mariner or ship carpenter run away, he loses his wages due.—ANON. (1672), 1 Mod. Rep. 93; 1 Vent. 146; 86 E. R. 758.

**699.** —— **In whole or part.**] — ANON. (1701), 1 Ld. Raym. 639; 12 Mod. Rep. 442; 91 E. R. 1328.

*Annotations:*—**Consd.** Jesse *v.* Ray (1834), 1 Cr. M. & R. 316. **Reld.** The Juliana (1822), 2 Dods. 504.

**700.** —— —— **Seaman compelled to quit ship——Ill-treatment.**]—If a master of a ship by inhuman treatment compels a sailor to quit a ship, it is not such a desertion as shall amount to a forfeiture of his claim for his wages for the voyage performed.—LIMLAND *v.* STEPHENS (1801), 3 Esp. 269; 170 E. R. 611, N. P.

**701.** —— —— **Seaman quitting ship after reaching port—Before ship moored.**]—A seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of his whole wages under the 2 Geo. 2, c. 36, s. 3.—FRONTINE *v.* FROST (1802), 3 Bos. & P. 302; 127 E. R. 167.

*Annotation:*—**Consd.** The Baltic Merchant (1809), Edw. 86.

**702.** —— —— —— **Before arrival at particular dock.**]—Her port is not the Port of London, generally, but of that particular portion of it which is expressly & exclusively appropriated for the reception of West India ships. It is therefore a desertion during the voyage which . . . works a forfeiture of the whole wages (SIR WILLIAM SCOTT).—THE BALTIC MERCHANT (1809), Edw. 86; 165 E. R. 1041.

**703.** —— —— —— **Before cargo discharged.**]—THE TEST (No. 1) (1836), 3 Hag. Adm. 305; 166 E. R. 418.

**704.** —— —— —— ——.] — Desertion of a ship by a seaman, to work a total forfeiture of wages, under 5 & 6 Will. 4, c. 19, s. 9, must happen before the arrival of the ship in port. Quitting the ship after that time, & before the discharge of her cargo, is punished by a forfeiture of one month's pay only.—M'DONALD *v.* JOPLING (1838), 4 M. & W. 285; 1 Horn & H. 271; 7 L. J. Ex. 220; 6 L. T. 371; 2 Jur. 790; 150 E. R. 1437.

*Annotation:*—**Apld.** The Two Sisters (1843), 2 Wm. Rob. 125.

**705.** —— —— **Failure of master to supply provisions.**]—THE CASTILIA, No. 587, *ante*.

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**PART III. SECT. 4, SUB-SECT. 3.—C.**

**698 i.** *Whether right to wages lost.*]—Both under the general maritime law & under the Merchant Shipping Act desertion of a ship in the course of the voyage effects a forfeiture of wages.—THE WASHINGTON IRVING (1863), 13 L. C. R. 123; 2 S. V. A. R. 97.—**CAN.**

**698 ii.** ——.]—A seaman was employed for four months from July 4 at $150 a month. On Oct. 25, he left under circumstances held to be desertion:—*Held:* notwithstanding that he had nearly completed his contract, the ct. was bound to give effect to the law that his wages were forfeited from Oct. 4, the date of commencement of his last month's service.—OSTROM *v.* THE MIYAKO, [1924] 2 D. L. R. 200; [1924] Exch. C. R. 86; [1924] 1 W. W. R. 1098; 34 B. C. R. 4.—**CAN.**

**703 i.** —— *In whole or part—Seaman quitting ship after reaching port—Before cargo discharged.*]—The chief mate of a vessel, subsequently to her being moored in the port of discharge, but previously to the discharge of her cargo, quitted her without leave, & being afterwards told by the master to return & complete his duty, refused to do so:—*Held:* he had deserted the ship within Merchant Shipping Act, 1854, s. 243, & rendered himself liable to a forfeiture of the entire or part of his wages.—THE FORTUNA (1872), 6 I. L. T. 48.—**IR.**

p. —— —— *Seaman quitting ship contrary to master's orders — Substitute engaged for lower wages.*]—Pltf., cook & steward on deft. ship, left the ship contrary to the master's orders. Upon pltf. leaving, the master hired another cook for less money than was given pltf.:—*Held:* notwithstanding that pltf. was not justified in leaving the vessel by reason of the master's conduct, the owners having lost nothing by reason of his refusal to continue the voyage, but on the contrary having profited by his so doing, pltf. was

*Sect. 4.—Wages: Sub-sect. 3, C., D. & E.*]

**706. —— —— Seaman absent without leave—Waiver of forfeiture by master.**]—Where it is provided by a ship's articles, that any of the crew who shall absent themselves from the ship without leave shall forfeit their wages if, after one of the crew has so absented himself, the master receives him back again & allows him to work like the others, the forfeiture is waived, & the wages are recoverable.—MILLER *v.* BRANT (1811), 2 Camp. 590; 170 E. R. 1262, N. P.

**707. —— —— Seaman absent with leave—Neglect or refusal to return on expiry of leave.**]—Forfeiture of wages incurred by a mariner, who neglects or refuses to return to his ship, when demanded by the master, although previously absent with leave.—THE BULMER (1823), 1 Hag. Adm. 163; 166 E. R. 59.

**708. —— —— —— ——.**]—A sailor's wages & expenses pronounced for: as getting drunk on shore, at Dominica, & not returning on board immediately leave of absence expires, his clothes & other property being on board, is not an act of desertion working a forfeiture of wages; & is amply punished by seventy-five days' imprisonment in the island, when the man was willing to return to his ship.—THE EALING GROVE (1826), 2 Hag. Adm. 15; 166 E. R. 150.

**709. —— —— Seaman quitting ship in consequence of alteration of voyage—Insertion of words "or elsewhere."**]—THE ELIZA (1823), 1 Hag. Adm. 182; 166 E. R. 65.

*Annotations:*—**Consd.** The British Trade, [1924] P. 104. **Reld.** The Cambridge (1828), 2 Hag. Adm. 243.

**710. —— —— ——.**]—THE KING WILLIAM (1844), 2 Wm. Rob. 231; 2 L. T. O. S. 374; 8 Jur. 87; 166 E. R. 741.

**711. —— —— Seaman quitting ship by order of mate—Disobedience of master's order to return.**]—A mariner, having at Jamaica quitted the ship by order of the mate, applied to the master, who was on shore, for his discharge. The master refused, & ordered him to return to his duty. The mariner, however, engaged in another ship. Such conduct is desertion, working a forfeiture of wages.

It is manifestly of the greatest importance to the trade of this country that the duties for which mariners contract should be substantially performed, & not be rashly or wantonly abandoned; at the same time, it is the duty of the ct. to protect mariners from oppression or injustice, & even from the effect of error leading to acts that might not be strictly justifiable, if they should appear to have been occasioned by unjust provocation or violent conduct on the part of those in command (SIR CHRISTOPHER ROBINSON).—THE JUPITER (1829), 2 Hag. Adm. 221; 166 E. R. 225.

**712. —— —— Seaman quitting ship before reaching port.**]—M'DONALD *v.* JOPLING, No. 704, *ante*.

**713. —— —— —— Port too full to enter.**]—THE PEARL (1804), 5 Ch. Rob. 224; 165 E. R. 756.

**714. —— —— Seaman sent home as witness.**]—CROSS *v.* HYNE, No. 919, *post*.

—— —— ——.]—*Compare* No. 751, *post*.

**715. —— —— Stipulation for forfeiture invalid.**]—SHELFORD *v.* MOSEY, No. 664, *ante*.

**716. —— Entry into service of enemy after capture.**]—BERGSTROM *v.* MILLS, No. 694, *ante*.

**717. Evidence of desertion—Certificate of consul abroad.**]—A seaman having remained ashore all night at a foreign port, the master went to the consul without any notice to the seaman & obtained his certificate, with an indorsement thereon that the seaman had deserted. In a summary proceeding before justices in this country by the seaman to recover his wages, the consul's certificate was held not to be conclusive evidence of the fact of desertion.—LEWIS *v.* JEWHURST (1866), 15 L. T. 275; 31 J. P. 38; 2 Mar. L. C. 489.

**718. Wages forfeited for desertion—Payment into Exchequer—Deductions allowable—1894 Act, s. 232.**]—In taking the accounts in an action *in rem*, in a county ct., for wages & disbursements, the master was allowed to deduct, as against the Exchequer, from wages forfeited by desertion, the sum of £116 for clothing supplied to the seamen, prior to their desertion, out of the slop chest kept by the master with the knowledge of the owners. He was also allowed to retain a sum of £45, being the total of three gratuities paid by consignees of cargo to him, & not credited to the ship. On appeal by the owners:—*Held:* (1) the "wages forfeited for desertion," which are to be paid into the Exchequer under above sect., are the wages due after all proper deductions have been made, in which deductions may be included the price of stores supplied by the master to the seamen by way of advance of wages, with the knowledge of the owners; &, (2) the master was entitled to retain sums given to him by consignees by way of gratuity for the efficient manner in which he had superintended the discharge of cargoes.—THE PARKDALE, [1897] P. 53; 66 L. J. P. 10; 75 L. T. 597; 45 W. R. 368; 13 T. L. R. 82; 8 Asp. M. L. C. 211.

**719. Expenses caused by desertion—Right of master to reimbursement—Excess of wages paid to substitutes.**]—KESLAKE *v.* BOARD OF TRADE, No. 663, *ante*.

**720.** —— —— —— ——.]—On the arrival of a ship, in the course of a voyage, at San Francisco sixteen members of the crew deserted. The ship remained at that port for rather more than five months, being used there as a coal hulk. At the end of that period sixteen seamen were engaged as substitutes for the deserters at a higher rate of pay, & the ship sailed on her homeward voyage to the United Kingdom. The amount saved in the wages of the deserters during the period the ship was at San Francisco exceeded the amount of the excess of wages paid to the substitutes:—*Held:* (1) the amount so saved could not be set off against the excess of wages, & the master was entitled to be reimbursed out of the forfeited wages the excess of wages paid to the substitutes.

During the stay of a ship at Melbourne several members of her crew deserted on various dates. In consequence of the difficulty in obtaining substitutes for the deserters the ship was detained at the port one day longer than would otherwise have been the case. The master claimed to be

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entitled to recover his wages.—SHAW *v.* THE FIELDWOOD (1922), 68 D. L. R. 399; 21 Exch. C. R. 324.—**CAN.**

q. *Contract to serve for season as fisherman on shares—Quitting ship after one voyage—Right to share of proceeds of that voyage.*]—Pltf. shipped as a fisherman for the "present fishing season" upon a schooner of which deft. was master & part owner. The schooner left port & returned & landed her catch & then refitted for another trip. On the second trip pltf. left the vessel:—*Held:* the words "fishing season" & "voyage" were not to be taken in the same sense, but it was contemplated that there might be more than one fishing voyage in a season, & pltf., by leaving the vessel before the end of the season, did not forfeit his share of the proceeds of the voyage then terminated.—WENTZELL *v.* WINACHT (1907), 41 N. S. R. 406; 3 E. L. R. 94.—**CAN.**

r. *Contract for service on whaling voyage for certain sum per month "& lay"—Forfeiture of bonus on leaving ship before termination of season—Whether "lay" subject to forfeiture.*]—A sailor, who engages on a whaling voyage & is to receive a certain sum

reimbursed out of the wages of the deserters the sum of £16, representing one day's expenses for wages & keep of the crew & coal consumed on the ship:—*Held:* (2) this expenditure was not an expense caused by the desertions.—DEACON *v.* QUAYLE, NEATE *v.* WILSON, [1912] 1 K. B. 445; 81 L. J. K. B. 409; 106 L. T. 269; 76 J. P. 79; 12 Asp. M. L. C. 125, D. C.

*Annotation:*—**Refd.** Colbourne *v.* Lawrence, [1917] 2 K. B. 857.

**721. —— —— Fine on master through deserter being prohibited immigrant.**]—A ship in the course of a voyage arrived at Brisbane, at which port a Chinaman, who was a member of the crew, deserted. In respect of this desertion the master of the ship was fined £100 by a ct. of summary jurisdiction at Brisbane under an Act of the Commonwealth of Australia which imposed that penalty upon the master of any ship from which a prohibited immigrant, as the Chinaman was, entered the Commonwealth:—*Held:* the fine of £100 was not "an expense" caused to the master of the ship by the absence of the seaman due to desertion within 1906 Act, s. 28 (1) (*b*), & the master was, therefore, not entitled to be reimbursed out of the wages of the seaman.—HALLIDAY *v.* TAFFS, [1911] 1 K. B. 594; 80 L. J. K. B. 388; 104 L. T. 188; 75 J. P. 165; 27 T. L. R. 186; 11 Asp. M. L. C. 574, D. C.

*Annotation:*—**Refd.** Deacon *v.* Quayle, Neate *v.* Wilson, [1912] 1 K. B. 445.

**722. —— —— Expenses for detention of ship.**]—DEACON *v.* QUAYLE, NEATE *v.* WILSON, No. 720, *ante*.

**723. Liability to forfeiture criminal in nature—Not subject of compromise—Between masters, owners or crew.**]—KESLAKE *v.* BOARD OF TRADE, No. 663, *ante*.

*D. Insubordination.*

*See* 1894 Act, ss. 225, 376.

**724. Whether right to wages lost.**]—*Semble:* a regulation in the seamen's articles of a merchant ship, that "every seaman committed to custody for the preservation of good order, shall forfeit his wages, together with everything belonging to him on board the ship," is in point of law a good & proper regulation.—RICE *v.* HAYLETT (1828), 3 C. & P. 534; 172 E. R. 535, N. P.

**725. —— In whole or part—Wages subsequent to insubordinate act.**]—THE SUSAN (1829), 2 Hag. Adm. 229, n.; 166 E. R. 228.

**726. —— —— Single act of insubordination.**]—THE BLAKE (1839), 1 Wm. Rob. 73; 10 L. T. 913; 166 E. R. 500.

**727. —— —— Wages subsequent to dismissal.**]—THE MARINA, No. 898, *post*.

**728. —— Conduct tending to mutiny.**]—(1) Ill usage is an undefined term depending much upon the opinion of the person who uses it; & the provocation & relation of the parties. Holding of fists to strike a captain, is so near an act of mutiny, that the master may quell it by striking the first blow.

(2) *Semble:* a chief mate, who, unknown to the master, signs & is active in getting signed, a document tending to mutiny, incurs a forfeiture of wages.

The maintenance of order discipline, & the authority of the commanding officer on board, are essential to the safety of navigation, & the great commercial interests of the country (SIR JOHN NICHOLL).—THE LIMA (1837), 3 Hag. Adm. 346; 166 E. R. 434.

**729. —— Refusal to navigate ship—Character of voyage changed.**]—THE COUNTESS OF HARCOURT, No. 591, *ante*.

**730. —— —— Condonation.**]—THE TEST (No. 2) (1836), 3 Hag. Adm. 307; 166 E. R. 419.

**731. —— ——.**]—RENNO *v.* BENNETT, No. 884, *post*.

**Insubordination generally.**]—*See* Nos. 893-900, *post*.

*E. Drunkenness.*

**732. Whether incurring forfeiture—Occasional intemperance.**]—Forfeiture of wages is not incurred by occasional intemperance.—THE NEW PHŒNIX (1824), 1 Hag. Adm. 298; 166 E. R. 71.

**733. —— —— Circumstances of case considered.**]—Occasional acts of drunkenness, not more than usual with sailors, & latterly, when more frequent arising from the undue force given by bodily disease to the moderate use of strong liquors will not enure to the forfeiture of a steward's wages.—THE LADY CAMPBELL (1826), 2 Hag. Adm. 5; 166 E. R. 146.

*Annotation:*—**Refd.** The Macleod (1880), 5 P. D. 254.

**734. —— —— Causing loss of ship's property.**]—(1) The master of a ship does not forfeit his wages by occasional drunkenness; nor by mere errors of judgment in the performance of his duty.

(2) *Semble:* the loss of the ship's boat & other property ascribed to the master's drunkenness would work a forfeiture of his wages *pro tanto*.—THE ATLANTIC (1862), Lush. 566; 7 L. T. 647; 9 Jur. N. S. 183; 11 W. R. 188; 1 Mar. L. C. 274; 167 E. R. 257.

*Annotation:*—*As to* (1) **Refd.** The Roebuck (1874), 31 L. T. 274.

**735. —— —— Unaccompanied with neglect of duty.**]—(1) Occasional drunkenness in port on the part of the master of a vessel will not, if unaccompanied with neglect of duty, work a forfeiture of wages. *Semble:* constant drunkenness on the part of a master, whether there be proof of neglect of duty or not, will work a forfeiture of either the whole or part of his wages, according to circumstances.

(2) Where a master receives express orders from his owners as to the voyages which he is to make & the ports to which he is to take the ship, & those orders are given under & with a view to a state of circumstances out of which danger might arise to the ship, & which are known to & discussed by the master & owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages & to other ports; & if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyages are for the owners' benefit.

(3) A master's wages may be forfeited by desertion, but there can be no absolute desertion of his ship working a forfeiture of the whole of his wages if there be an *animus revertendi* upon the part of the master.

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per month, "& lay," may include the sum due him under "the lay" in an action for wages against the ship; the sum so due is not subject to forfeiture under a clause in the articles providing for the forfeiture of a "bonus" in case the seaman leaves his employment before the final termination of the whaling season.—FARRELL *v.* THE WHITE (1917), 20 B. C. R. 576.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 3.—D.**

**724 i.** *Whether right to wages lost.*]—When the master of a vessel by his wilful disobedience of the direct & positive orders of the owners causes the vessel to be driven ashore, he forfeits all right to wages.—THE HURON (1886), 6 C. L. T. 127.—**CAN.**

**724 ii.** ——.]—MCKELLAR *v.* MCKELLAR (1852), 1 W. R. 484.—**SCOT.**

*Sect. 4.—Wages: Sub-sect. 3, E. & F.; sub-sect. 4.*]

(4) Where a master quits his ship & remains away for such a time & under such circumstances as lead his owner reasonably to suppose that he has no intention of returning, the owners will be justified in removing the vessel from the place where it is left, & appointing another master; & the original master will not be entitled to recover his wages for any period after the time when he so quitted the ship.—THE ROEBUCK (1874), 31 L. T. 274; 2 Asp. M. L. C. 387.

*Annotation:—As to* (1) **Reld.** The Macleod (1880), 5 P. D. 254.

**736. —— Habitual intemperance.**]—(1) Though under the principle, that freight is the mother of wages, mariners lose their wages by an interruption of the voyage from accident, the condemnation of the vessel for illegal trading on the part of the master, to which the mariners are not parties, does not work a forfeiture of wages, nor even bar the mariners of their action against the owners; & charges of disobedience, neglect of duty, of intoxication & mutiny, not being established, wages pronounced for.

(2) In a suit for wages, a logbook, not pleaded but asserted to be in the mariner's hand-writing, allowed to be brought in by the owners.

(3) A single instance of intemperance does not work a forfeiture of wages; it must be a habit to produce that effect.—THE MALTA (1828), 2 Hag. Adm. 158; 166 E. R. 202.

*Annotation:—Generally,* **Reld.** The City of Manchester (1879), 5 P. D. 3.

**737. —— ——.**]—THE ATLANTIC, No. 734, *ante*.

**738. —— ——.**]—A shipmaster who has been habitually drunk during his employment cannot maintain an action for his wages.—THE MACLEOD (1880), 5 P. D. 254; 50 L. J. P. 6; 29 W. R. 340.

**739. —— —— Forfeiture of whole or part.**]—THE ROEBUCK, No. 735, *ante*.

**740. —— Single instance of intemperance.**]—THE MALTA, No. 736, *ante*.

*F. Other Cases.*

**741. Misconduct—Induced by treatment of master.**]—If a seaman's claim for wages is resisted, on the ground that he would not do his work, which, by the ship's articles, is to cause a forfeiture of wages; it is a good answer to this defence, to show that the refusal to work was caused by the misconduct of the captain, which went to induce the men to incur such forfeitures. If seamen have incurred a forfeiture of their wages, &, in a time of distress, when the ship is aground, the captain call on those seamen to assist in getting her off, this is no waiver of the forfeiture; but if the captain continues them in their work, after the peril is over, it is otherwise.

A master of a ship is not, by his own conduct, to induce a forfeiture of the men's wages (LORD TENTERDEN, C.J.).—TRAIN *v.* BENNETT (1827), 3 C. & P. 3; Mood. & M. 82; 172 E. R. 296, N. P.

**742. —— Of master.**]—Neither error of seamanship in a master, nor neglect to communicate to a Lloyd's agent stranding of the vessel, nor neglect to sign a bottomry bond, works a forfeiture of wages.

The alleged misconduct of the master does not work a forfeiture of wages at common law or in Admlty.—THE CAMILLA (1858), Sw. 312; 31 L. T. O. S. 282; 6 W. R. 840; 166 E. R. 1152.

*Annotations:*—**Consd.** The British Trade, [1924] P. 104. **Reld.** The Atlantic (1862), Lush. 566 The Joseph Dexter (1869), 20 L. T. 820.

**743. Condemnation of vessel—Illegal trading by master—Crew not party thereto.**]—THE MALTA, No. 736, *ante*.

**744. Clause providing for forfeiture & fine—If contraband carried—Necessity for proof of offence.**]—Ship's articles are only conclusive as to the amount of wages & the voyage; on collateral points the Ct. of Admlty. may consider how far they are reasonable & just; therefore a clause, providing that if contraband goods were found in the forecastle, the seamen living therein should forfeit their wages & £10, is not conclusive to work a forfeiture of wages against those not directly proved to be personally implicated in the offence. The penalty cannot be enforced in the Ct. of Admlty.—THE PRINCE FREDERICK (1832), 2 Hag. Adm. 394; 166 E. R. 287.

**745. Seaman left on shore by own fault—What amounts to "own fault."**]—A sailor serving under articles providing for a forfeiture of his wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it owing to his own fault in being absent, though he had no intention of deserting. He is left on shore by his own fault, if he is so in consequence of going away, after being forbidden by the captain, though he subsequently obtains the leave of an inferior officer.—SHERMAN *v.* BENNETT (1830), Mood. & M. 489, N. P.

**746. Trivial irregularity.**]—A trivial irregularity will not incur a forfeiture of wages.—THE GONDOLIER (1835), 3 Hag. Adm. 190; 166 E. R. 376.

**747. ——.**]—Payment of wages was refused on the ground that part of cargo embezzled through mariner's misconduct. A chief mate, though bound to exercise vigilance in preserving the cargo, not responsible for all embezzlements & robberies, & the wages were pronounced for, because the loss was not proved to have been owing to his neglect. Care of the cargo one of duties of chief mate. The mate is not responsible for all embezzlements; he is bound to exercise due care, vigilance, & caution; & if, notwithstanding, embezzlement or robbery is committed, without his knowledge, or participation, or reasonable means of preventing it, then he is not responsible for the consequences. Forfeiture of wages may be incurred by general or by particular neglect of duty. Mere neglect, in a particular instance, not followed by injury to owners, does not work a forfeiture.—THE DUCHESS OF KENT (1841), 1 Wm. Rob. 283; 1 Notes of Cases, 180; 5 Jur. 1042; 166 E. R. 578.

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**PART III. SECT. 4, SUB-SECT. 3.—E.**

**736 i.** *Whether incurring forfeiture—Habitual intemperance.*]—The master of a vessel, after having been dismissed by the owner for drunkenness, when in a foreign port, was reinstated in the command, & entrusted with the charge of the vessel on her homeward voyage, on the condition that no spirits were to be allowed on board: the master disobeyed the owner's orders by taking spirits on board, & was for a part of the voyage incapacitated through drunkenness from taking charge of the vessel:—*Held:* though the ship completed her voyage home in safety, the master had by this misconduct forfeited his claim to his wages.—M'KELLAR *v.* MACFARLANE (1852), 15 Dunl. (Ct. of Sess.) 246; 25 Sc. Jur. 156; 2 Stuart, 123.—**SCOT.**

**PART III. SECT. 4, SUB-SECT. 3.—F.**

**t.** *Neglect of duty—Work done by delegate.*]—*Held:* a party who was hired to take charge personally of a vessel, forfeited his wages by failure to do so, although he employed a delegate.—CAMPBELL *v.* PRICE (1831), 9 Sh. (Ct. of Sess.) 264.—**SCOT.**

**748. Incompetence—Reduction of wages.**]—THE RICHMOND (1839), 10 L. T. 913.

**749. Neglect of duty—Loss of cargo through embezzlement—Liability of chief mate.**]—THE DUCHESS OF KENT, No. 747, *ante*.

**750.** ——.]—THE CAMILLA, No. 742, *ante*.

**751. Seaman sent home as witness.**]—Action by a seaman for wages. Pleas: never indebted, & payment into ct. It appeared that pltf. had signed articles to serve at £7 a month, on a seeking voyage to the Pacific Ocean & back, till the ship's return to the United Kingdom or for a term of three years. The captain was sent home from Monte Video by a naval ct. constituted under 13 & 14 Vict. c. 93, to be tried for shooting one of the crew. Pltf. was sent home, by the ct., from the same place, as witness against him, & attended the trial in this country. When the trial was over, the ship was in the Pacific, & pltf. could not practically return. The payment into ct. covered the wages up to the time when pltf. left the ship in obedience to the order of the naval ct. Pltf. claimed further wages up to the time when the trial terminated:—*Held:* he was not entitled to any wages after he left the ship.—MELVILLE *v.* DE WOLF (1855), 4 E. & B. 844; 3 C. L. R. 960; 24 L. J. Q. B. 200; 25 L. T. O. S. 127; 19 J. P. 628; 1 Jur. N. S. 758; 3 W. R. 401; 119 E. R. 313.

*Annotations:*—**Consd.** Cross *v.* Hyne (1868), 18 L. T. 474. **Apld.** Horlock *v.* Beal, [1916] 1 A. C. 486. **Reld.** Millar *v.* Taylor, [1916] 1 K. B. 402.

——.]—*Compare* No. 919, *post*.

**752. Error of judgment by master.**]—Mere error of judgment on the part of the master in the management of the concerns of a vessel in a foreign port, unaccompanied by corrupt intention or wilful disobedience of orders, will not, *per se*, entail a forfeiture of his wages.—THE THOMAS WORTHINGTON (1848), 3 Wm. Rob. 128; 6 Notes of Cases, 570; 10 L. T. 913; 12 Jur. 1057; 166 E. R. 910.

*Annotations:*—**Consd.** The Roebuck (1874), 31 L. T. 274; The Dunmore (1875), 32 L. T. 340; The Macleod (1880), 5 P. D. 254. **Reld.** The Joseph Dexter (1869), 20 L. T. 820.

**753.** ——.]—THE CAMILLA, No. 742, *ante*.

**754.** ——.]—THE ATLANTIC, No. 734, *ante*.

**755.** ——.]—Where a master receives instructions to take the balance of freight due at the end of a voyage in cash, or by bank bill upon London, &, without sufficient inquiry, but without *malâ fides* & rather through error of judgment, he takes a bill which he believes to be, but which is not, a bank bill, & which is afterwards dishonoured, causing loss to his owners, this negligence of disobedience, not being wilful, does not work a forfeiture of his wages, nor can the owners claim to deduct the amount of their loss from his wages.—THE DUNMORE (1875), 32 L. T. 340; 2 Asp. M. L. C. 509.

**756. Temporary interruption of voyage.**]—BROWNING *v.* CRUMLIN VALLEY COLLIERIES, No. 585, *ante*.

SUB-SECT. 4.—DEDUCTIONS.

*See* 1894 Act, ss. 132, 133, 159–161; 1906 Act, s. 34 (3), (4).

**757. Insurance & interest on advances—Protest against deduction—Seaman estopped from subsequent claim.**]—(1) Where a seaman, about to proceed on a trading voyage, entered into & signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, & who alone was a party to the articles:—*Held:* he could not sue the other owners, although they sold & received the proceeds of the cargo, & one of them, the managing owner, adjusted the wages, & settled with the seamen.

(2) Pltf.'s wages were adjusted, & the balance struck, subject to certain deductions for insurance & interest on advances made to him before & during the voyage. It was proved that such charges were the usual ones in trading voyages, & that the accounts were always made out so. Pltf. remonstrated against those deductions, but ultimately accepted the balance, & gave a receipt for the whole wages:—*Held:* he could not recover the amount of such deductions.

(3) So also, where, in another voyage, he had stipulated for 90th share of the net proceeds of the cargo, on a whaling adventure in lieu of wages, & was charged with insurance on such share:—*Held:* such deductions need not, under the circumstances, be made the subject of a set-off.—M'AULIFFE *v.* BICKNELL (1835), 2 Cr. M. & R. 263; 1 Gale, 232; 5 Tyr. 1035; 4 L. J. Ex. 225; 150 E. R. 114.

**758. Illegal payments—Distribution of forfeited wages.**]—THE ARAMINTA, No. 775, *post*.

**759. Reduction consequent on disrating.**]—Pltf. signed articles to serve on board defts.' vessel as refrigerating engineer at £10 per month. He so served for two months, at the end of which time the master of the vessel, on account of alleged drunkenness & unfitness, disrated him, & placed him in the main engine room, at wages reduced to £7 per month, for the remaining period of one month & eighteen days during which the voyage lasted. In the account of wages on the Board of Trade form, the master filled in the date when the wages began, the date when they ceased, the total period of employment, & in the column headed "Earnings" entered "Wages at 10 & 7 per month —two months at £10–£20," & then filled in the final balance less cash advances. In an action for wages, brought by pltf. against defts. in the Liverpool Ct. of Passage, the defence raised of justification for the disrating on account of drunkenness & unfitness was not gone into, but judgment was entered for pltf. on the ground that the account delivered by defts. was insufficient as there was no entry in the column headed "deductions" of the amount of wages forfeited by reason of the reduction consequent on disrating:—*Held:* the case must be sent back to be retried, as the reduction in the amount of wages consequent on disrating was not a "deduction" requiring to be

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**756 i.** *Temporary interruption of voyage.*]—The detention of a sailing vessel during winter by stranding in the River St. Lawrence on her voyage to Quebec, where she arrived in the following spring, was held not to defeat the claim of the seamen to wages during the detention.—THE FACTOR (1838), 1 S. V. A. R. 183.—CAN.

**756 ii.** ——.]—THE FACTOR (1846), 1 R. de L. 358.—CAN.

a. *Voyage broken up by consent—Seaman continuing under new articles—Claim for wages under first articles.*]—Where a voyage was broken up by consent, & the seamen continued under new articles on another voyage:—*Held:* they could not claim wages under the first articles subsequently to the breaking up of the voyage.—THE SOPHIA (1839), 1 S. V. A. R. 219.—CAN.

PART III. SECT. 4, SUB-SECT. 4.

b. *Value of articles negligently lost.*]—The mate of a vessel is chargeable for articles lost through his inattention & carelessness, & the amount may be deducted from his wages.—THE PAPINEAU (1836), 1 S. V. A. R. 94.—CAN.

c. *Refusal to work on Sunday.*]—Action to recover $8 deducted from wages for refusal to work in port on Sunday in discharging & loading cargo:—*Held:* the command to "work cargo" on Sunday for the purpose of hastening the voyage, thereby making it more profitable to the contestants, was not such a command as the claimant was bound, under the terms of his articles, to obey: the evidence did not bring the work within the exception of "works of necessity & mercy" in Lord's Day Act, 1906, s. 2; if the refusal to "work cargo" on Sundays was an infraction

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entered under that column in the Board of Trade form.

*Semble:* the master has the power, & is the proper person, if circumstances require it, to disrate.—THE HIGHLAND CHIEF, [1892] P. 76; 61 L. J. P. 51; 66 L. T. 468; 40 W. R. 416; 7 Asp. M. L. C. 176, D. C.

**760. Necessity for inclusion of amount deducted —In account delivered to seaman—At end of voyage.**]—THE HIGHLAND CHIEF, No. 759, *ante*.

**761. Advance of wages to seaman — Right to deduct.**]—The master of a ship in a foreign port can make a valid contract with a seaman whom he engages abroad for the advance to him of a sum on account of his wages conditionally on his shipping, & there is no limit to the advance which may thus be made to the seaman, & if the master pays the advance to the seaman or to some one authorised by him to receive it he can afterwards deduct the whole sum so paid from the seaman's wages. Such advances are not prohibited by 1894 Act, s. 163, & advance notes signed by the master in the usual form are not assignments by the seaman of his wages within the meaning of that sect. The master of a ship engaged a seaman in a foreign port for the homeward voyage, & agreed to advance to him a sum equal to two months' wages. A note was drawn up acknowledging the receipt of the money in advance & this note was assigned by the seaman to a third party, who received payment of the same from the master:—*Held:* the master was entitled to deduct from the seaman's wages the whole of the money so advanced, & he was not limited to a deduction of one month's wages only.—ROWLANDS *v.* MILLER, [1899] 1 Q. B. 735; 68 L. J. Q. B. 338; 80 L. T. 290; 63 J. P. 407; 47 W. R. 687; 15 T. L. R. 216; 43 Sol. Jo. 398; 8 Asp. M. L. C. 508; 4 Com. Cas. 133, D. C.

**762. Deduction for forfeiture after desertion.**]—KESLAKE *v.* BOARD OF TRADE, No. 663, *ante*.

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SUB-SECT. 5.—WAGES DURING ILLNESS.

*See* 1894 Act, ss. 159, 160.

**763. Right of seaman to wages.**]—A seaman belonging to a merchant ship which is articled for a certain voyage, is prevented from performing the whole voyage by being disabled by an accident happening in the course of his duty: he is entitled to wages for the whole voyage.—CHANDLER *v.* GRIEVES (1792), 2 Hy. Bl. 606, n.; 126 E. R. 730.

*Annotations:*—**Consd.** Beale *v.* Thompson (1803), 3 Bos. & P. 405. **Refd.** Horlock *v.* Beal, [1916] 1 A. C. 486.

**764.** ——.]—THE CATHAYA, BARKER *v.* WINDER (1853), 11 L. T. 113.

**765.** ——.]—S. was a seaman hired & serving on board a British ship, & owing to the pork & provisions being bad, he & several others became so ill that he was obliged to be sent to an hospital, & several months elapsed before he recovered. He claimed his wages during that time under 17 & 18 Vict. c. 104, s. 228, as his illness arose from injury or hurt in the service of the ship:—*Held:* this illness came under the words "injury," & S. was entitled to his wages.—FARRER *v.* SANDHOLM (1879), 43 J. P. 735, D. C.

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SUB-SECT. 6.—EFFECT OF TRANSFER OF SHIP.

**766. Whether seaman entitled to wages — Hypothecation of ship.**]—The hypothecation of a ship cannot deprive the seaman of his right to wages.—THE SYDNEY COVE (1815), 2 Dods. 11; 165 E. R. 1399.

*Annotations:*—**Consd.** The Riby Grove (1843), 2 Wm. Rob. 52. **Refd.** The Mona (1840), 1 Wm. Rob. 137.

**767.** —— **Sale of ship abroad.**]—The owner of a British ship cannot, by the sale of his ship to a foreigner in a distant part of the world, divest the seaman of his wages earned under a contract entered into with himself in this country, & the Ct. of Admlty. will enforce the payment of wages so earned. *A fortiori*, if the transfer of the ship was merely colourable.—THE BATAVIA (1822), 2 Dods. 500; 165 E. R. 1559.

**768.** —— **Sale of ship in England—Ship abroad —Seaman continuing to serve at request of new owner.**]—Where a change of ownership in a British vessel takes place, by sale in this country, whilst she is in a foreign port, the contract under which the crew shipped is, *quoad* the new owner, at an end; but, if one of the crew continues to serve on board the vessel at the request of an agent of the new owner, without entering into any fresh articles, & afterwards, & before the termination of the contemplated voyage, quits with the consent of the captain appointed by the new owner, he

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of the claimant's articles, it was waived by the retention of the claimant in the contestants' service after the breach; & the deduction from the wages was improperly made.—GREEN *v.* CANADIAN PACIFIC RY. CO. (B. C.) (1911), 18 W. L. R. 608.—**CAN.**

**d.** ——.]—Action for $12.20, being the amount deducted from a seaman's wages by defts. to recompense themselves for amounts paid other workmen to do pltf.'s work on occasions when he refused to do the same. The occasions referred to were on one occasion after 6 p.m., & on two occasions the whole of Sunday. Pltf. had agreed, in his contract of service, to work after hours or on Sundays if needed, but claimed that to require him to work on Sundays was a breach of the Lord's Day Act:—*Held:* the term "emergency" in the Lord's Day Act must be liberally construed in the case of maritime labour, which is so dependent on wind, water or tide, & pltf., having expressly agreed to work on Sunday, had no status to complain.—MURRAY *v.* COAST S.S. CO. (B. C.) (1912), 22 W. L. R. 572; 3 W. W. R. 153 8 D. L. R. 378.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 5.**

**763 i.** *Right of seaman to wages.*]—Navigation, Act, 1912-1920, s. 92, applies to a claim for wages alleged to be due by virtue of sect. 132 (1) (*b*), & no appeal lies to the High Ct. from a judgment of a District Ct. upon a claim for such wages.—AUSTRALIAN STEAMSHIPS PROPRIETARY, LTD. *v.* ABBOTT (1927), 39 C. L. R. 148.—**AUS.**

**763 ii.** ——.]—A seaman going into the hospital for a small hurt, not received in the performance of his duty, is not entitled to wages after leaving the ship.—THE CAPTAIN ROSS (1838), 1 S. V. A. R. 216.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 6.**

**767 i.** *Whether seaman entitled to wages—Sale of ship abroad.*]—THE SCOTIA (1837), 1 S. V. A. R. 160.—**CAN.**

**e.** —— —— *Contract ended by mutual consent.*]—It was a term of the contract that in the event of the vessel being sold in a foreign port deft. was to receive his expenses back to H. & his wages up to the time of his return. The vessel was sold, but it appeared from the evidence that the contract was ended by mutual consent:—*Held:* deft. was not entitled to wages & expenses claimed.—SCHOONER LAVONIA, LTD. *v.* LOWE (1921), 54 N. S. R. 159; 57 D. L. R. 727.—**CAN.**

**f.** —— *Former owner limited company in liquidation.*]—Where the former owner of the ship is a limited co. which has gone into liquidation the crew are not entitled to immediate payment of their wages up to the date when the new owners took possession in the absence of proof that the liquidation was compulsory.—CASEY *v.* DEACON, THE DECCAN, [1906] S. A. L. R. 125.—**AUS.**

**g.** ——.]—A seaman agreed by articles to perform a voyage from Great Britain to America, & thence back again to the United Kingdom, & the contract was terminated by reason of a change of ownership having taken place:—*Held:* he was not in a position to sue in N. B. for wages due him up to the time of transfer under Merchant Shipping Act, s. 190, but should have proceeded to England &

may in an action against such new owner recover wages *pro rata*.—ROBINS *v.* POWER (1858), 4 C. B. N. S. 778 ; 27 L. J. C. P. 257 ; 31 L. T. O. S. 202 ; 4 Jur. N. S. 810 ; 140 E. R. 1297.

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SUB-SECT. 7.—EXTRA REMUNERATION.

*A. In General.*

**769. General rule—Conclusiveness of articles.**]—Declaration by a sailor for wages & the average price of a negro slave earned " during a certain voyage from the port of London to the coast of Africa, & from thence to the West Indies " : at the trial it appeared from the articles that the voyage was, " from the port of London, upon an intended voyage to the coast of Africa for slaves, from thence to the West Indies or America, & afterwards to London in Great Britain, or to her delivering port in Europe," & that no mention was made in the articles of the average price of a negro-slave :—*Held :* the contract for the average price of a negro slave in addition to the wages was void, not being included in the articles according to 2 Geo. 2, c. 36.—WHITE *v.* WILSON (1800), 2 Bos. & P. 110 ; 126 E. R. 1188.

**770.** —— ——.]—A mariner who has signed articles for a voyage at a certain pay per month, cannot claim any further wages or gratuity by usage or custom.—ELSWORTH *v.* WOOLMORE (1803), 5 Esp. 84 ; 170 E. R. 746, N. P.

*Annotation :*—**Distd.** Clutterbuck *v.* Coffin (1841), Car. & M. 273.

**771.** —— ——.]—If one execute a ship's articles to serve on board as an able seaman, at certain wages, & when on board act as a cuddy servant ; if there be no express agreement that he shall receive separate wages as a cuddy servant, he can maintain no action against the captain for wages in that capacity. *Qu. :* whether he could, if there were an express agreement.

If a man signs the ship's articles as a seaman, he can recover no more wages than are there agreed for however he may be employed on board the ship (ABBOTT, C.J.).—DAFTER *v.* CRESWELL (1826), 2 C. & P. 161 ; 172 E. R. 73, N. P. ; *subsequent proceedings*, 7 Dow. & Ry. K. B. 650.

*Annotation :*—**Consd.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47.

**772.** —— ——.]—A claim for increased wages on the part of seamen will be disallowed by this ct., & the contract or ship's articles which they signed when originally undertaking the voyage, must regulate the payments to be made to them on its termination.—THE PRINCE EDWARD (1860), 2 L. T. 139.

**773.** —— ——.]—TURNER *v.* OWEN, No. 788, *post*.

**774. Where duty of master to unload cargo—Unloading loose cargo in hold.**]—SWINNEY *v.* TINKER (1774), Burrell, 139 ; 167 E. R. 510.

**775. Wages forfeited by desertion—Division amongst remainder of crew—Legality.**]—Seamen's wages, forfeited by desertion, divided amongst that portion of the crew which did not desert :—*Held :* an illegal act, & not binding on the owner of the vessel.

A vessel sailed from this country to Australia ; there a part of her crew deserted, thereby forfeiting the wages due to them. The master, to encourage the remainder of the crew to adhere to the ship, & work her home, divided amongst them the wages so forfeited. The owners objected to such payment :—*Held :* since the payment of that portion of the wages was an illegal act, the owners were entitled to deduct such sum from the wages due to the crew for their homeward voyage.—THE ARAMINTA (1854), 1 Ecc. & Ad. 224 ; 24 L. T. O. S. 43 ; 18 Jur. 793 ; 164 E. R. 130.

*Annotations :*—**Expld.** The Don Francisco (1861), Lush. 468. **Reld.** Hartley *v.* Ponsonby (1857), 7 E. & B. 872.

**776. Right to retain gratuity.**]—THE BANKER'S DAUGHTER, KELLY *v.* COULBORN (1854), 6 L. T. 914.

*B. Agreement for Extra Remuneration.*

*(a) In General.*

**777. Necessity for consideration.**]—No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship.—HARRIS *v.* WATSON (1791), Peake, 102 ; 170 E. R. 94, N. P.

*Annotations :*—**Apld.** Stilk *v.* Myrick (1809), 2 Camp. 317. **Distd.** Clutterbuck *v.* Coffin (1842), 1 Dowl. N. S. 479. **Apld.** Harris *v.* Carter (1854), 3 E. & B. 559. **Reld.** Frazer *v.* Hatton (1857), 2 C. B. N. S. 512. **Mentd.** Wilkinson *v.* Byers (1834), 1 Ad. & El. 106.

**778.** ——.]—In the course of a voyage some of the seamen desert, & the captain not being able to find others to supply their place, promises to divide the wages which would have become due to them among the remainder of the crew. This promise is void for want of consideration.—STILK *v.* MYRICK (1809), 2 Camp. 317 ; 6 Esp. 129 ; 170 E. R. 1168, N. P.

*Annotations :*—**Distd.** Clutterbuck *v.* Coffin (1842), 1 Dowl. N. S. 479. **Consd.** The Araminta (1854), 1 Ecc. & Ad. 224 ; Harris *v.* Carter (1854), 3 E. & B. 559. **Reld.** Frazer *v.* Hatton (1857), 2 C. B. N. S. 512. **Mentd.** Shadwell *v.* Shadwell (1860), 7 Jur. N. S. 311.

**779.** ——.]—Pltf., a sailor, signed articles, for a voyage out to M. & home, at £3 per month. On the arrival of the ship at M. several of the crew

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sued.—R. *v.* PETERS (1874), 15 N. B. R. (2 Pug.) 352.—**CAN.**

h. ——.]—SIMPSON *v.* DEVEBER (1877), 17 N. B. R. (1 P. & B.) 316.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 7.—A.**

**769 i.** *General rule—Conclusiveness of articles.*]—Ship's articles prescribed the hours of work for navigating & engineer officers "in port when watches are suspended," & provided : —" Time worked outside these hours to be paid for at the rate of 2*s.* 6*d.* per hour, except in the following cases :—Officers in charge. No overtime payable where navigating or engineer officers are appointed as officers in charge for night duty & are given equivalent time off duty " :—*Held :* overtime was payable only for " time worked," & an officer in charge for night duty, who received no equivalent time off duty, was not entitled to overtime payment for the whole time during which he was the officer in charge, but only for time during which he was engaged in actual work.—VALENTINE *v.* GOW, HARRISON & Co., [1921] S. C. 435.—**SCOT.**

**769 ii.** —— ——.]—A claim for increased wages on the part of seamen will be disallowed by the ct., & the contract or ship's articles, which they signed when originally undertaking the voyage, must regulate the payments to be made to them on its termination.—THE PRINCE EDWARD (1859), 12 Ir. Jur. 110.—**IR.**

k. *Release a bar to claim for overtime.*]—A release signed & attested as required by Merchant Shipping Act, 1894, s. 136, operates to bar a claim by the seamen for payment for overtime unless under Merchant Shipping Act, 1906, s. 60, he excepts from the release such claim for overtime.—COLEMAN *v.* SMITH HOWARD CO., LTD. (1912), 12 S. R. N. S. W. 208 ; 29 N. S. W. W. N. 50.—**AUS.**

**PART III. SECT. 4, SUB-SECT. 7.—B. (a).**

**777 i.** *Necessity for consideration.*]—A promise made by the master of a vessel at an intermediate port on the voyage to give an additional sum over & above the stipulated wages in the articles of agreement is void for want of consideration.—*Re* LOCKWOODS (1837), 1 S. V. A. R. 123.—**CAN.**

l. *Legality.*] — HANSEN *v.* THE THOMAS F. BAYARD (B. C.) (1911), 16 W. L. R. 527.—**CAN.**

m. *Whether contrary to public policy.*]—Special agreements with the owners by the masters of a tug steamer as to a percentage on the earnings of the tug, & by seamen as to increased wages, for foregoing all claims for salvage, will not be upheld by the ct. of

*Sect. 4.—Wages: Sub-sect. 7, B. (a) & (b); sub-sects. 8 & 9.*]

deserted. The captain, to induce the rest to remain, signed fresh articles with pltf. & others at the rate of £6 per month for the home voyage. Pltf. continued in the vessel till her arrival home, & then sued the shipowner for work & labour. Deft. paid money into ct. at the rate of £3 per month. Pltf. claimed to be paid at the rate of £6 for the home voyage. On the trial, there was some evidence that at M. the captain had consented to the discharge of some of the crew. The judge asked the jury if pltf. himself had been discharged before entering into the fresh articles. On their answering that he had not, the judge directed a nonsuit. On a motion for a rule for a new trial:—*Held:* the nonsuit was right; for there was no evidence of any circumstances to free pltf. from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorise the captain to bind the owners by such a contract.—HARRIS *v.* CARTER (1854), 3 E. & B. 559; 2 C. L. R. 1582; 23 L. J. Q. B. 295; 23 L. T. O. S. 66; 18 Jur. 1014; 2 W. R. 409; 118 E. R. 1251.

*Annotations:*—**Apld.** Harrison *v.* Dodd (1914), 78 J. P. 206. **Refd.** Hartley *v.* Ponsonby (1857), 7 E. & B. 872.

**780.** ——.]—FRAZER *v.* HATTON, No. 571, *ante*.

**781.** —— **Extra risk.**]—In an action by seamen to enforce an agreement made by the master with them abroad, while under articles, to pay additional remuneration in consideration of their remaining on board & working the vessel home after an accident, which had, in fact, not rendered the vessel unseaworthy:—*Held:* in the absence of evidence that the risk of navigating the vessel in her then state was such as would have justified the crew breaking their articles abroad, the agreement was not one that could be enforced.—HOPKINS *v.* M'BRIDE (1901), 50 W. R. 255; 18 T. L. R. 53; 46 Sol. Jo. 52, D. C.

**782.** —— **Overtime.**]—When a seaman enters into articles with a shipowner for a voyage, the seaman is as a general rule bound to give his full services for the wages specified in the articles, & he is not entitled to any payment in respect of overtime merely because he is called upon to work for longer hours than was contemplated when the articles were entered into, even though an express promise was made to him by an officer of the ship to pay overtime.

A seaman signed articles as a fireman & trimmer on a steamship; he had four hour watches until the ship reached L., when one fireman was left behind having fallen ill. The remaining firemen were asked by the chief engineer to do six hour watches, which they did for about a week, the chief engineer promising to pay overtime & saying that if the shipowners did not pay it he would pay it himself. Upon a claim by a fireman against the shipowners in respect of such overtime:—*Held:* there was no consideration for the promise made by the chief engineer even if he had authority to make it, which he had not, & the seaman was not entitled to claim any overtime payment.—HARRISON *v.* DODD (1914), 111 L. T. 47; 78 J. P. 206; 30 T. L. R. 376; 12 Asp. M. L. C. 503, D. C.

**783. Necessity for express agreement.**]—DAFTER *v.* CRESWELL, No. 771, *ante*.

**784. Legality—Agreement to serve as cook — On board man of war.**]—Pltf., who was a cook on board a merchant ship, was engaged by deft. to serve in that capacity on board a man of war, of which deft. was captain, & extra wages, in addition to the ordinary pay, were promised him. Pltf. went on board deft.'s ship, & was rated in the usual way, & acted as cook, receiving pay as a seaman:—*Held:* there was a good consideration for the promise of deft. to pay the extra wages, & an action might be maintained by him, against deft., in respect of them.

*Semble:* such an agreement is not illegal.—CLUTTERBUCK *v.* COFFIN (1842), 3 Man. & G. 842; 1 Dowl. N. S. 479; Car. & M. 273; 4 Scott, N. R. 509; 11 L. J. C. P. 65; 6 Jur. 131; 133 E. R. 1379.

*Annotation:*—**Mentd.** Shadwell *v.* Shadwell (1860), 7 Jur. N. S. 311.

**785.** —— **Payment extorted mutinously — Ship in distress.**]—THE BANKER'S DAUGHTER, KELLY *v.* COULBORN (1854), 6 L. T. 914.

*(b) Validity of Consideration.*

**786. Agreement to serve as ship's cook — On board man of war.**]—CLUTTERBUCK *v.* COFFIN, No. 784, *ante*.

**787. Increased risk—Shortage of crew.**] — A vessel, in consequence of the desertion of some of the seamen, was left short of hands in harbour, before the voyage was completed. The master, to induce the remaining seamen to perform the rest of the voyage, promised to pay them a sum of money in addition to their wages. They accordingly performed the rest of the voyage with the diminished number of hands. On an action by one of the seamen against the master for the sum promised, the jury found that he made the agreement without coercion, for the best interests of the owners; that he could not have obtained additional hands at a reasonable price; & that it was unreasonable for so large a ship to proceed on the completion of the voyage with the diminished number of hands:—*Held:* on this finding, which the ct. understood to mean that it was unsafe so to proceed, pltf. was entitled to recover, as the seamen were not bound, by their original contract of service, to proceed with the diminished number of hands; & their undertaking to do so was therefore a good consideration for the master's promise.—HARTLEY *v.* PONSONBY (1857), 7 E. & B. 872; 26 L. J. Q. B. 322; 29 L. T. O. S. 195; 3 Jur. N. S. 746; 5 W. R. 659; 119 E. R. 1471.

*Annotations:*—**Consd.** Hopkins *v.* M'Bride (1901), 50 W. R. 255. **Refd.** The Mobile (1857), Sw. 256. **Mentd.** Shadwell *v.* Shadwell (1860), 9 C. B. N. S. 159.

**788.** —— **Vessel unseaworthy.**] — When a seaman signs articles at a foreign port, there is an

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Admlty., as being repugnant to general principle & prejudicial to the public interest, & as the effect of such agreements would be to take away from the actual salvors the motives to all enterprise & energy.—THE MARYANNE (1864), 11 L. T. 85.—IR.

n. *Agreement made by captain—Whether owners bound.*]—Where seamen sign ship's articles for a specified service, & before the voyage has concluded, the captain agrees to give one or more of them increased wages, the ct. will not bind the owners by such an agreement & will make its decree for the wages properly payable under the ship's articles.—THE PATRIOTTO (1864), 11 L. T. 149.—IR.

o. *Loss of extra remuneration—By desertion.*]—Pltf. signed articles for the fishing season. On her second trip the schooner was damaged & was put upon a marine slip for repairs. In order to get the men to stay by her, the managing owner entered into a special agreement to pay pltf. & other members of the crew $15 each provided they remained on board for the fishing season, "to be paid at the end of the voyage." The vessel returned to her home port for further repairs. Before these repairs were completed pltf. & other members of the crew left & the vessel was then sold by her owner:—*Held:* the owners having done nothing on their part, at the time the crew deserted, to constitute a breach of contract, pltf. could not recover upon the special agreement the whole or any part of the amount claimed, on the ground of *quantum meruit*.—SELIG *v.* ARENBURG (1917), 51 N. S. R. 198; 35 D. L. R. 608.—CAN.

implied warranty of seamanship, & if the ship is unseaworthy, there is consideration for a new contract for extra reward to induce him to sail in her.

When a seaman has signed articles, he cannot claim extra remuneration for the same services as are included in the articles. On the other hand, when he signs articles it is implied, on the part of the owner, that the ship shall be reasonably fit for navigation, *i.e.*, shall be seaworthy, & if, before the ship sets sail, the seaman discovers that she is one in which he cannot safely embark, he can refuse to do so, & enter into a new contract (COCKBURN, C.J.).—TURNER *v.* OWEN (1862), 3 F. & F. 176, N. P.

**789.** —— ——.]—HOPKINS *v.* M'BRIDE, No. 781, *ante*.

**790. Promotion during voyage.**]—MURDOCK *v.* WILKINSON (1843), 7 L. T. 258.

**791.** ——.] — The master of a ship carrying passengers may bind the owners by an agreement with an ordinary seamen, under articles, to serve for three years at £1 a month, to serve as steward, upon the death of the then steward, at £4 10*s.* a month.—HICKS *v.* WALKER (1856), 27 L. T. O. S. 83; 20 J. P. 517; 4 W. R. 511.

**792.** ——.]—A. engaged to serve on board a ship as an able seaman for a long voyage out & back. The captain having died shortly after the ship left port, the first mate assumed the command, & appointed A. to act as second mate, & agreed with him that he should receive the pay of a second mate. The ship subsequently touched at several ports & returned home, A. continuing to act throughout as second mate:—*Held:* the agreement made with A. was binding on the shipowner, & A. was entitled to wages as second mate.—HANSON *v.* ROYDEN (1867), L. R. 3 C. P. 47; 37 L. J. C. P. 66; 17 L. T. 214; 16 W. R. 205; 3 Mar. L. C. 8.

**793.** —— **Although no alteration in ship's articles.**]—Mariner's wages. Claim of a second mate, who succeeded to the office of chief, to the rate of wages given to chief officers upon similar voyages, established; an alteration in the ship's articles is not absolutely necessary to support his title.—THE PROVIDENCE (1825), 1 Hag. Adm. 391; 166 E. R. 139.

*Annotation:*—**Folld.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47.

**794.** —— **No specific rate in ship's articles.**]—Mariner's wages. Claim for a gradation of wages sustained upon the facts; there being no specific rate of hiring inserted in the articles. A tender of reward is an admission of services.—THE PORCUPINE (1825), 1 Hag. Adm. 378; 166 E. R. 135.

*Annotations:*—**Distd.** The Harvey (1827), 2 Hag. Adm. 79. **Consd.** The Prince George (1837), 3 Hag. Adm. 376. **Refd.** Hanson *v.* Royden (1867), 37 L. J. C. P. 66.

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SUB-SECT. 8.—PAYMENT ON DEATH.

*See, now*, 1894 Act, s. 169; 1906 Act, s. 29.

**795. Right to wages to time of death.**]—The rule that "freight is the mother of wages" does not apply to the case of the master of a ship; & therefore where a master, engaged for a voyage at £10 per month, continued to act as master from the time when the ship sailed until she was lost with all hands, his representatives were entitled to recover against the owners his wages up to the time of the loss.—HAWKINS *v.* TWIZELL (1856), 5 E. & B. 883; 25 L. J. Q. B. 160; 2 Jur. N. S. 302; 119 E. R. 709; *sub nom.* HAWKINS *v.* FURZILL, 26 L. T. O. S. 235; 4 W. R. 242.

**796.** —— **Agreement for whole voyage—Death before completion.**]—If a sailor hired for a voyage take a promissory note from his employer for a certain sum provided he proceed, continue, & do his duty on board for the voyage, & before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*.—CUTTER *v.* POWELL (1795), 6 Term Rep. 320; 101 E. R. 573.

*Annotations:*—**Consd.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651; Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Distd.** O'Neil *v.* Armstrong, Mitchell, [1895] 2 Q. B. 70. **Refd.** Thomas *v.* Williams (1834), 3 Nev. & M. K. B. 545; Baxter *v.* Nurse (1844), 8 Jur. 273; De Bernardy *v.* Harding & Pooley (1853), 1 C. L. R. 884; Harrison *v.* James (1862), 31 L. J. Ex. 248; Bartholomew *v.* Markwick (1864), 9 L. T. 651; Donkin *v.* Hastie (1897), 61 J. P. 568; Sumpter *v.* Hedges, [1898] 1 Q. B. 673; Parkin *v.* South Hetton Coal Co. (1907), 97 L. T. 98; George *v.* Davies, [1911] 2 K. B. 445; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171; Dakin *v.* Lee, [1916] 1 K. B. 566; Moriarty *v.* Regent's Garage Co., [1921] 1 K. B. 423. **Mentd.** Collins *v.* Price (1828), 5 Bing. 132; *Ex p.* Baker (1857), 3 Jur. N. S. 937; Savage *v.* Canning (1867), 16 W. R. 133.

**Judgment in favour of seaman—Renewal to administrator after death.**]—*See* No. 807, *post*.

**Summary proceedings to recover wages due.**]—*See* Nos. 843, 845, *post*.

**Property of deceased seamen.**]—*See* Sect. 9, *post*.

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SUB-SECT. 9.—ADVANCE AND ALLOTMENT.

*See* 1894 Act, ss. 140–144; 1906 Act, ss. 61, 62; 1911 Act (c. 8), s. 1.

**797. Advance note—Validity — Sum exceeding one month's wages—Engagement abroad.**]—A seaman was engaged at a foreign port, in which there was a British consul, & was paid a sum exceeding one month's wages, under an advance note, conditionally on his going to sea. In proceedings to recover wages the master claimed to deduct the whole amount paid under the advance note:—*Held:* 1894 Act, s. 124, does not extend sect. 140 to engagements of seamen abroad, & sect. 140 applies only to engagements to sail from the United Kingdom, & the master was entitled to deduct the whole amount.—RITCHIE *v.* LARSEN, [1899] 1 Q. B. 727; 68 L. J. Q. B. 335; 80 L. T. 259; 47 W. R. 413; 15 T. L. R. 167; 43 Sol. Jo. 224; 8 Asp. M. L. C. 501; 4 Com. Cas. 129, D. C.

*Annotation:*—**Consd.** Rowlands *v.* Miller, [1899] 1 Q. B. 735.

**798.** —— —— —— ——.] — ROWLANDS *v.* MILLER, No. 761, *ante*.

**799.** —— **Whether negotiable.**] — CARDIFF BOARDING MASTERS' ASSOCN. *v.* CORY & SONS (1893), 9 T. L. R. 388, D. C.

*Annotation:*—**Refd.** Rowlands *v.* Miller, [1899] 1 Q. B. 735.

**800.** —— —— **Necessity for fulfilment of conditions—Advance partly in cash & partly in goods.**] —The master of a vessel on the eve of sailing gave one of the seamen an advance note in the following form — "Ten days after the ship *Athlone* sails from the port of Liverpool, the undersigned does promise & agree to pay to any person who shall advance to H. on this agreement the sum of £6, provided H. shall sail in the ship from said port of Liverpool." Pltf., an outfitter, gave the seaman in exchange for the note £3 5*s.* in cash, & £2 15*s.*

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**PART III. SECT. 4, SUB-SECT. 9.**

*p. Agreement to pay wages in advance.*]—A promise to pay wages to a mariner in advance, on condition that he proceed to sea in the ship, is an agreement to pay so much absolutely upon the performance of the condition, whether the ship & cargo be afterwards lost on the voyage or not.—MULLEN *v.* LEFROY (1845), 1 R. de L. 362.—CAN.

*Sect. 4.—Wages: Sub-sects. 9, 10, 11 & 12, A.]*

worth of wearing apparel; but he stated, in answer to a question from the ct., that, if he had advanced the whole amount in cash, he would have charged a discount of 7½ per cent. The seaman having sailed with the vessel:—*Held:* the condition upon which the holder of the document was entitled to sue the maker was substantially fulfilled by giving the seaman the amount in money & money's worth.—M'KUNE *v.* JOYNSON (1858), 5 C. B. N. S. 218; 28 L. J. C. P. 133; 4 Jur. N. S. 760; 141 E. R. 87; *sub nom.* M'KANE *v.* JOYNSON, 31 L. T. O. S. 165; 6 W. R. 658.

*Annotations:*—**Refd.** Cardiff Boarding Masters' Assocn. *v.* Cory (1893), 9 T. L. R. 388; Rowlands *v.* Miller, [1899] 1 Q. B. 735.

**801. —— —— —— Payment conditional on continued employment of seaman.**]—An advance note was given to A., a seaman, for a half month's wages. The note was in this form: "Five days after the ship *W.* leaves P. pay to the order of A., provided he sails in the ship & is duly earning his wages, according to his agreement," etc. It was directed to B. & co., the shipowners' agents at P., & there was a note upon it that it should at once be presented to B. & co. for acceptance. A. transferred the note to C., who presented it to B. & co. by whom it was duly accepted. Four days after *W.* left P., A. was discharged. The master of the *W.* informed B. & co. that A. had been discharged within five days of sailing, & directed them not to pay the note. B. & co. paid the note. On action by B. & co. against the shipowners for the amount of the note:—*Held:* as A. was not earning his wages at the end of five days after the *W.* left P., the condition of the note was not fulfilled, & neither the shipowners nor B. & co. as acceptors were liable upon it.—BELLAMY & Co. *v.* LUNN & Co. (1897), 77 L. T. 396; 8 Asp. M. L. C. 348, D. C.

—— **Forgery of.**]—*See* CRIMINAL LAW, Vol. XV., pp. 1059, 1060, Nos. 11,973–11,976.

**802. Allotment note—Who may be liable—Registered owner demising ship by charterparty.**]—MEIKLEREID *v.* WEST, No. 382, *ante*.

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SUB-SECT. 10.—REMITTANCE.

*See* 1894 Act, ss. 145–154; 1906 Act, s. 63.

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SUB-SECT. 11.—COMPENSATION FOR PREMATURE DISCHARGE.

*See* Sect. 11, sub-sect. 2, A., *post*.

SUB-SECT. 12.—PROCEEDINGS FOR RECOVERY.

*A. In General.*

*See* 1894 Act. ss. 164–167.

**Jurisdiction — Admiralty Court.**]—*See* ADMIRALTY, Vol. I., pp. 131–139, Nos. 363–466.

—— —— **Colonial & Vice-Admiralty Courts.**]—*See* ADMIRALTY, Vol. I., pp. 251, 252, Nos. 1795, 1796.

—— **Summary proceedings.**]—*See* Sub-sect. 12, D., *post*.

**803. —— Foreign ship — Conflict of laws.**] — Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, & thereby agree amongst other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country & the adjudication of their own cts. Having made this agreement in their own country, they cannot maintain an action in England against the master for wages, though the ship & cargo be confiscated in an English port, & the voyage thereby ended.—GIENAR *v.* MEYER (1796), 2 Hy. Bl. 603; 126 E. R. 728.

**804.** —— —— ——.] — THE WILHELM FREDERICK (1823), 1 Hag. Adm. 138; 166 E. R. 50.

*Annotation:*—**Expld.** The Golubchick (1840), 1 Wm. Rob. 143.

**805.** —— —— ——.]—All questions of collision are questions *communis juris;* but in suits for wages, the claim of the mariner must be tried by the law of the country to which the ship belongs.—THE JOHANN FRIEDERICK (1839), 1 Wm. Rob. 35; 166 E. R. 487.

*Annotations:*—**Refd.** Harmer *v.* Bell, The Bold Buccleugh (1851), 7 Moo. P. C. C. 267; The Clara (1855), 2 Jur. N. S. 46; The Leon (1881), 6 P. D. 148; Chartered Mercantile Bank of India, London & China *v.* Netherlands Steam Navigation Co. (1883), 10 Q. B. D. 521; The Dictator, [1892] P. 304.

**806. Application for payment by bond holder—Out of proceeds of sale of ship.**]—Motion that a bond holder, in a suit in *pœnam* against a foreign ship, may pay wages of crew & deduct the same from proceeds of sale, rejected.—THE ADOLPH (1835), 3 Hag. Adm. 249.

*Annotation:*—**Expld.** The Golubchick (1840), 1 Wm. Rob. 143.

**807. Favourable attitude of court to seamen.**]—(1) An agreement for wages, as purser, having been entered into by a master & sole owner, the purser, prior to the ship's sailing, signed the usual articles, but in which there was no rate of wages specified for him. After the completion of the outward voyage, he ceased, by the master's orders, to do duty as purser, but was not regularly

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**ART III. SECT. 4, SUB-SECT. 12.—A.**

q. *Jurisdiction—Admiralty Court—Effect of special contract for wages.*]—THE ENTERPRISE (1861), 5 L. T. 29.—R.

r. —— *County court.*]—BROWN *v.* JAUGHAN (1882), 22 N. B. R. 258.—CAN.

t. —— —— *Effect of R. S. C. c. 74, s. 52.*]—The jurisdiction given by the County Ct. Act not taken away or the common law right impaired by R. S. C. c. 74, s. 52.—FISENHAUER *v.* ERNST (1903), 40 N. S. R. 420.—CAN.

a. —— ——.]—A county ct. judge has jurisdiction in an ordinary action for wages of a seaman to try a claim for more than $200 where pltf. has good demand at common law.—CAIRNS *v.* BRITISH COLUMBIA SALVAGE CO., LTD. (1907), 13 B. C. R. 83.—CAN.

b. —— *Supreme Court.*]—An action for seaman's wages, where the amount claimed is under £50, cannot be brought in a Supreme Ct. except where the owner or master, neither is, nor resides, within twenty miles of the place where the seaman is discharged or put on shore.—WATSON *v.* LEUKTEN (1903), 36 N. S. R. 412; 24 C. L. T. 25.—CAN.

c. —— *Facts & circumstances giving jurisdiction must be shown.*]—Under R. S. C. c. 74, s. 52, to enable a seaman to sue for & recover his wages, the complaint must show all the facts & circumstances which, under the statute, give the ct. jurisdiction.—*Ex p.* ANDREWS (1897), 34 N. B. R. 315.—CAN.

d. —— *Joinder of claims.*]—A number of seamen forming part of the crew of a ship, to whom separate & varying sums are alleged to be due for wages, may combine in one action to recover the same.—BEATON *v.* THE CHRISTINE (1907), 11 Exch. C. R. 167.—CAN.

e. —— ——.]—Although the claims of a number of seamen for wages do not amount to the sum of $200 individually, yet, where the aggregate of such claims exceeds that sum, the claims may be joined & sued for in the Exchequer Ct. on its Admiralty side.—BURKE *v.* THE VIPOND (1914), 14 D. L. R. 396; 14 Exch. C. R. 326.—CAN.

f. —— ——.]—COWAN *v.* THE ST. ALICE (B. C.) (1915), 32 W. L. R. 17.—CAN.

g. ——.]—The restriction on the jurisdiction of the Exchequer Ct. contained in Canada Shipping Act, s. 181, applies as well to the cases of a master as of a seaman.—BECK *v.* THE KOBE (1915), 32 W. L. R. 351; 9 W. W. R.

suspended for neglect of duty; the wages pronounced for, & a mtgee., who opposed them, condemned in costs.

*Qu.:* though the owner be bkpt., & the ship has been sold, & the proceeds are insufficient to pay mtgees., a principal mtge. has sufficient interest to oppose a mariner's claim for wages.

(2) *Semble:* a decree for wages, with costs, to a mariner, when deceased may be renewed to his administrator.

In suits for wages the ct. is anxious that seamen should not be harassed with litigation. . . . An agreement for wages may be made by word of mouth or in writing; the mariner incurs no forfeiture or penalty by not signing articles; it is only the master who does so. . . . The law favours a mariner suing for wages (SIR JOHN NICHOLL).—THE PRINCE GEORGE (1837), 3 Hag. Adm. 376; 166 E. R. 445.

**808. To what date wages recoverable.**]—A seaman who commences a suit *in rem* for the recovery of his wages cannot have a decree for wages or subsistence money after the date of the commencement of his suit, although he is retained in the service of the ship by the master; but he will be entitled to an allowance in the way of costs for detention & subsistence money from the date of the institution of the suit to the date of decree.—THE CAROLINA (1875), 34 L. T. 399; 3 Asp. M. L. C. 141.

**809.** ——.]—The time up to which a seaman is entitled in an action to recover his wages under this Act [Merchant Seamen (Payment of Wages & Rating Act, 1880 (c. 16))] is to date of certificate of chief clerk in Chancery or report of registrar in Admiralty.—*Re* GREAT EASTERN S.S. CO., WILLIAMS' CLAIM (1885), 53 L. T. 594; 5 Asp. M. L. C. 511.

*Annotations:*—**Consd.** Vickerson *v.* Crowe, [1914] 1 K. B. 462; The British Trade, [1924] P. 104. **Refd.** R. *v.* City of London Court Judge & S.S. Michigan (1890), 6 T. L. R. 364; Palace Shipping Co. *v.* Caine, [1907] A. C. 386; Haws *v.* Brown (1917), 81 J. P. 300.

**810. Question of ownership pending in Chancery Court—Effect of admission of ownership.**]—Mariner's wages. A protest, on the ground of non-liability pending a question in the Court of Ch. as to the ownership of the vessel under an assignment, the parties having, in their answer to a bill in that Ct., admitted that they were the owners, overruled.

The party suing here is not implicated in the proceeding there. . . . Here the party is a mariner suing for his wages, as mate of a vessel upon two foreign voyages, & though there may be some affinity between the questions, yet there may be enough to furnish grounds for a decree upon the confined interests of this man, without in the least interfering with that jurisdiction which embraces the whole merits of the case. . . . There never was a more absolute admission on the part of these gentlemen than what is contained in this answer; they say, they were the owners, not only affirmatively, but negatively, that no other person was the owner—the services were at least therefore accepted for them. . . . I am justified in taking these gentlemen at their word, that they are the owners & nobody else (LORD STOWELL).—THE ST. JOHAN (1825), 1 Hag. Adm. 334; 166 E. R. 119.

**811. Evidence—Log book.**]—THE MALTA, No. 736, *ante*.

**812.** —— **Power of attorney to owner's agent—Secondary evidence.**]—B. was engaged as master of a ship on a trading voyage out & back; but, after the voyage out was dismissed by C., his employer's agent. At the trial of an action by B. for full wages, C. said he acted under a power of attorney, which was lost, & gave secondary evidence of its contents:—*Held:* it was for the judge, & not the jury, to say whether this secondary evidence showed sufficient authority in C. to dismiss, & though the jury found otherwise, their finding was immaterial.—BERWICK *v.* HORSFALL (1858), 4 C. B. N. S. 450; 27 L. J. C. P. 193; 31 L. T. O. S. 117; 22 J. P. 659; 4 Jur. N. S. 615; 6 W. R. 471; 140 E. R. 1160.

—— **Ship's articles—Notice to produce.**]—*See* EVIDENCE, Vol. XXII., p. 248, No. 2283.

**813. Set-off or counterclaim—Engagement for whole voyage—Discharge at foreign port—Wages earned on return voyage in another ship.**]—(1) A refusal, on the part of the master, to certify for the wages of his crew upon their quitting the ship, especially when coupled with equivocal expressions as to leave, is no decisive proof of a desertion.

(2) Effect of wages earned on board another vessel not making the same homeward voyage as the one for which the engagement had been made.—THE FREDERICK (1823), 1 Hag. Adm. 211; 166 E. R. 76.

**814.** —— **Loss due to negligence of seaman.**]—Loss arising from the gross negligence of a mariner, may be set off against a claim for wages.—THE NEW PHŒNIX (1832), 2 Hag. Adm. 420; 166 E. R. 297.

**815.** —— **Insurance & interest—Agreement to share profits.**]—M'AULIFFE *v.* BICKNELL, No. 757, *ante*.

——.]—*See* ADMIRALTY, Vol. I., p. 184, Nos. 975–977.

**816. Costs—Disputed accounts—Costs of reference.**]—On a reference of the accounts in a master's suit for wages, more than one-half of the owner's

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89; 24 D. L. R. 573; 22 B. C. R. 169. —**CAN.**

h. —— *Foreign ship—Conflict of laws.*]—In an action by an American seaman for services alleged to have been rendered on board an American ship of which deft. was master, a plea to the jurisdiction was put in:—*Held:* the ct. would entertain such suits for wages by foreign seamen & would notice the *lex loci* to ascertain whether there was a legal & subsisting contract to prevent the mariner from enforcing payment of such services as had been rendered.—CARROLL *v.* BALLARD (1861), 12 L. C. R. 247.—**CAN.**

k. —— ——.]—BRUHN *v.* GRUNWALDT (1863), 2 Macph. (Ct. of Sess.) 335; 36 Sc. Jur. 223.—**SCOT.**

l. *Evidence — As to validity of articles & nature of law under which made.*]—In an action by certain sailors against the captain of their ship for wages the vessel being a Russian one:—*Held:* the evidence of the master as to the validity of the ship's articles, & the nature of the law under which they were made, would be admitted.—PATEZ *v.* KLIEN (1863), 13 L. C. R. 433. —**CAN.**

**814** i. *Set-off or counterclaim—Loss due to negligence of seaman.*]—SHARP *v.* RETTIE (1884), 11 R. (Ct. of Sess.) 745; 21 Sc. L. R. 507.—**SCOT.**

m. —— *Passenger fare & board of friend—Custom of port.*]—An item of set-off asserted by the owners against the master's claim for wages, consisting of an amount charged for the fare & board of a friend of the master who had been taken with him on one of his trips on the owner's tug boat, was not allowed, because it was a general practice in the port of Vancouver to allow the masters such a privilege.—ROBERTS *v.* THE TARTAR (1908), 11 Exch. C. R. 308; 13 B. C. R. 474.—**CAN.**

n. —— *Speculative & remote damages.*]—Deft.'s vessel sailed under charter with a cargo of lumber consigned to St. Vincent, Cape Verde Islands. On arrival deft.'s agent, the consignee, refused to accept more than a portion of the cargo & pltf. in the absence of instructions from deft., who had been notified, sailed for a port in Africa with the remainder of the cargo & disposed of it & secured another cargo & eventually returned home. Deft. counterclaimed damages:—*Held:* pltf. having acted in good faith & to the best of his judgment in the interest of his owner & in the absence of instruction, although he had asked for instructions before leaving, damages that would not have been incurred if he had acted otherwise were too speculative & remote to be claimed by deft. in his counterclaim.—POTHIER *v.* THERIAULT (1924), 57 N. S. R. 408.—**CAN.**

o. *Costs—Claim within jurisdiction*

*Sect. 4.—Wages: Sub-sect. 12, A., B., C. & D.*]

claim of set-off, & nearly two-thirds of the master's claim, were disallowed. Charges of immorality were made by the owners, but not sustained. The ct., considering that the master had at the utmost been guilty only of extravagance, allowed him his costs of the reference.—THE STRATHALLAN (1862), 6 L. T. 107 ; 1 Mar. L. C. 207.

—— **Expenses of witnesses.**]—*See* ADMIRALTY, Vol. I., p. 227, No. 1527.

**817. Judgment for wages—Renewal to administrator.**]—THE PRINCE GEORGE, No. 807, *ante*.

**818. —— Whether satisfied by payment before shipping master.**]—Payment to seamen by shipowners before a shipping master held to be no satisfaction of wages pronounced for in a suit in the Ct. of Admlty.—THE ARAMINTA (1856), Sw. 81 ; 26 L. T. O. S. 317 ; 2 Jur. N. S. 310 ; 4 W. R. 396 ; 166 E. R. 1030.

*Annotation :*—**Reld.** The Soblomsten (1866), L. R. 1 A. & E. 293.

**Who may sue—Alien enemy.**]—*See* ALIENS, Vol. II., p. 156, Nos. 264, 265.

**Limitation of action.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 377, No. 604.

**Loss of right to wages.**]—*See* Sub-sect. 3, *ante*.

**Lien for wages & disbursements.**]—*See* Part XVIII., *post*.

*B. Who may be Liable.*

**819. Master.**]—For the wages of mariners the master is liable, the ship is liable, & the owner is liable. The mariner is entitled to his option (SIR WILLIAM SCOTT).—THE JACK PARK (1802), 4 Ch. Rob. 308 ; 165 E. R. 622.

**820. ——.**]—WILKINSON *v.* FRASIER, No. 642, *ante*.

**821. —— Remedy over against owner.**]—The owners of a ship let it out to freight, & by the charterparty it was agreed, that no freight should be paid to the owners, until six days after the ship should be returned to the Port of London, & make a full delivery of her lading, but the master might detain the imprest money ; & if the ship should be lost in her voyage, the master & owners should not expect any other satisfaction than the imprest money, for the freight & demurrage of the ship. The ship was lost ; & upon a question, who was liable to pay the seaman's wages :—*Held :* the master was liable in the first instance, as having hired them, but he had his remedy against the owners.—BUCK *v.* RAWLINSON (1704), 1 Bro. Parl. Cas. 137 ; 1 E. R. 470, H. L.

*Annotations :*—**Consd.** The Juliana (1822), 2 Dods. 504. **Distd.** Jesse *v.* Roy (1834), 1 Cr. M. & R. 316.

**822. —— Necessity for previous demand from owner—Order on owners given to seaman by master.**]—During a voyage the ship is wrecked, & the captain gives the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging at the same time that he had hired them by the month :—*Held :* under these circumstances, no action for wages could be maintained by the mariners against the captain, at least without proving that they had first made a demand upon the owners.—FORSBOOM *v.* KRUGER (1812), 3 Camp. 197 ; 170 E. R. 1353, N. P.

**823. Owner.**]—THE JACK PARK, No. 819, *ante*.

**824. —— Reimbursement of master.**]—BUCK *v.* RAWLINSON, No. 821, *ante*.

**825. —— Unless agreement that master alone liable.**]—M'AULIFFE *v.* BICKNELL, No. 757, *ante*.

**826. Ship.**]—THE JACK PARK, No. 819, *ante*.

**827. Mortgagee—Mortgagor in possession.**]—Where a ship is mortgaged, but the mtgor. continues in possession, the master employed by him cannot maintain an action for wages & disbursements against the mtgee.—ANNETT *v.* CARSTAIRS (1813), 3 Camp. 354 ; 170 E. R. 1409, N. P.

**828. Purser—Action by purser's steward.**]—A purser's steward on board one of His Majesty's ships cannot recover wages from the purser, upon an implied contract, for his services as such on board the ship.—CARTER *v.* HALL (1818), 2 Stark. 36 ; 171 E. R. 673, N. P.

*Annotation :*—**Reld.** Clutterbuck *v.* Coffin (1842), 3 Man. & G. 842.

**829. Charterers.**]—(1) Where a ship is chartered under a charter providing that the master shall be appointed by the charterers, that the owners are to provide & pay for all provisions & wages of captain & crew, & for the necessary equipment & efficient working of the ship, that the captain is to be dismissed by the owners if he fails to give satisfaction, & that the charterers shall provide & pay for all coals, pilotages, port charges, etc., the master is the servant of the shipowners, & hence he has a right *in rem* for his wages & such disbursements as are necessary for the navigation of the ship, & which the charterers had not by the provisions of the charterparty undertaken to pay.

(2) *Semble*, if the charterers had refused to make these disbursements, & without them the ship

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*of inferior court—Pltf. deprived of costs.*]—Where pltfs., seamen, recovered for wages due them an amount in each case below $40 :—*Held :* as their claims might have been sued for before a stipendiary magistrate or two justices, they should not have their costs.—THE ANN (1871), Y. A. D. 104.—**CAN.**

p. ——.]—Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the ct., the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata*.—MUNSEN *v.* THE COMRADE, SAUNDERS *v.* THE COMRADE, DICKSON *v.* THE COMRADE (1902), 7 Exch. C. R. 330.—**CAN.**

q. —— *Error in computing wages necessitating bringing action.*]—In an action by a seaman for recovery of wages :—*Held :* as there had been an error, though unintentional, in computing his wages, thus necessitating pltf. bringing action therefor, he was entitled to his costs.—CABLE *v.* THE SOCOTRA (1907), 13 B. C. R. 309.—**CAN.**

r. *Action for wages until dismissal & further sum under special contract—Wages paid into court—Failure to prove special contract.*]—Pltf. claimed a sum for wages up to the term of his dismissal, & a further sum under a special contract, which he alleged had been made upon his entering into the service of deft., but of which he had failed to produce any evidence. Deft. paid the first sum into ct. having, first tendered it to pltf. :—*Held :* there should be judgment for deft., with costs.—THE PEERESS (1880), Y. A. D. 265.—**CAN.**

t. *Assignability of right of action.*]—The right of action *in rem* for wages cannot be assigned.—BIERRE *v.* THE J. L. CARD (1899), 6 Exch. C. R. 274.—**CAN.**

a. *Dispute as to amount of wages—No reason to discredit either party—Defendant's version to prevail.*]—In an action by pltf. for wages claimed to be due him as master of deft.'s schooner, pltf. claimed that the amount agreed upon was $175 per month, while deft. swore that the amount agreed upon was $170 per month :—*Held :* as there was no reason for discrediting either of the parties & the burden of proof was upon pltf., deft.'s version of the agreement must prevail.—POTHIER *v.* THERIAULT (1924), 57 N. S. R. 408.—**CAN.**

**PART III. SECT. 4, SUB-SECT. 12.—B.**

**819 1.** *Master.*]—A mariner has a three-fold remedy for his wages, (1) against the ship ; (2) against the master ; (3) against the owner of the ship.—MORRIER *v.* LALA RAGHUMULL (1922), I. L. R. 50 Calc. 29.—**IND.**

**823 1.** *Owner.*]—MORRIER *v.* LALA RAGHUMULL (1922), I. L. R. 50 Calc. 29.—**IND.**

**826 1.** *Ship.*]—MORRIER *v.* LALA RAGHUMULL (1922), I. L. R. 50 Calc. 29.—**IND.**

b. *Part owner.*]—A part owner of

could not be navigated, the master would be entitled to charge them against the shipowners.

(3) *Semble:* where a master is the servant of the charterers, & not of the shipowner, he has no right against the owners in respect of wages & disbursements.—THE BEESWING (1885), 53 L. T. 554; 5 Asp. M. L. C. 484, C. A.

*Annotation:—As to* (2) **Reld.** The Turgot (1886), 11 P. D. 21.

*C. Action.*

*See* 1894 Act, s. 165.

**830. Wages earned on enemy ship.**]—THE OSPRAY (1795), cited 5 Ch. Rob. at p. 8; 165 E. R. 678.

*Annotations:*—**Consd.** The Anglo Mexican (1917), 87 L. J. P. 33. **Reld.** The Vigilantia (1798), 1 Ch. Rob. 1.

**831.** ——.]—THE INDUSTRY (*circa* 1795), cited 5 Ch. Rob. at p. 8; 165 E. R. 678.

**832.** ——.]—THE FREDERICK (1803), 5 Ch. Rob. 9; 165 E. R. 678.

**833. Agreement not to demand wages until specified time from arrival—Action commenced within specified time—Right to recover sum admitted to be due.**]—A seaman is restricted by the ship's articles from demanding his wages until the expiration of twenty days after the ship's arrival at her destined port, & the delivery of her cargo:—*Held:* although the seaman had commenced his action before the expiration of the twenty days, he might still recover a sum which the captain had admitted to be due to him for wages, & which he had offered to pay him.—WHITE *v.* MATTISON (1818), 2 Stark. 325; 171 E. R. 661, N. P.

*Annotation:*—**Reld.** M'Auliffe *v.* Bicknell (1835), 1 Gale. 232.

**834. Owner insolvent—Right of master to sue.**]—(1) The balance of a running account between the owner & master of a vessel, by reason of expenses incurred on behalf of the vessel, was due to the master. The owner gave bills for it, including wages due to the master. The owner subsequently became bkpt., & the bills were unpaid:—*Held:* the master might, under 7 & 8 Vict. c. 112, s. 16, sue for his wages as an ordinary seaman. (2) *Semble:* where the majority of interests in a vessel becomes bkpt. or insolvent the master may proceed against the ship for the recovery of wages.—THE SIMLAH (1851), 18 L. T. O. S. 35; 15 Jur. 865.

*Annotation:*—*Generally*, **Reld.** The Albion (1872), 27 L. T. 723.

**835. Action in rem—Fraudulent application of master's money by managing owner.**]—A master on his appointment agreed with the managing owner that he, the master, should find the provisions for the officers & crew at a certain rate per day. The master subsequently agreed with the managing owner, who was also a ship's store dealer, that the managing owner should supply the provisions & should charge them against moneys of the master which he held in his hands. The managing owner, however, debited his co-owners with the costs of the provisions, & fraudulently applied the master's money to his own purposes:—*Held:* in an action *in rem* against the owners by the master to recover wages & disbursements, the master was entitled to credit for such an amount in the settlement of his accounts with the owners, the fraudulent application of his money by the managing owner being a wrong done to the co-owners for which he was not responsible.—THE DORA TULLY (1886), 54 L. T. 467; 5 Asp. M. L. C. 550.

**836. Time for commencement of action.**]—THE TEST (No. 2) (1836), 3 Hag. Adm. 307; 166 E. R. 419.

**837.** —— **Master leaving ship abroad on account of ill health.**]—A master, being compelled by pressing necessity of ill health to leave his ship abroad, is entitled to sue immediately for wages.—THE RAJAH OF COCHIN (1859), Sw. 473; 166 E. R. 1223.

*Annotation:*—**Reld.** The Yuri Maru, The Woron, [1927] A. C. 906.

**838. Statute of Limitations, 1623 (c. 16)—Whether applicable.**]—Above Act does not extend to suits in Admlty. for seamen's wages.—ANON. (1702), 11 Mod. Rep. 6; 88 E. R. 849.

**839.** —— ——.]—*Qu.:* if above Act extends to suits in the Admlty. Ct. for seamen's wages; if it does, a plea that it appears by the libel that the cause did not accrue within six years is bad. Deft. should state immediately that the cause in action did not accrue within six years.—EWER *v.* JONES (1703), 1 Com. 137; 2 Ld. Raym. 934; 6 Mod. Rep. 25; 3 Salk. 227; 92 E. R. 1001.

*Annotations:*—**Reld.** Lothian *v.* Henderson (1803), 3 Bos. & P. 499; Hopkins *v.* Swansea Corpn. (1839), 8 L. J. Ex. 121; The City of Mecca (1879), 5 P. D. 28. **Mentd.** Millar *v.* Taylor (1769), 4 Burr. 2303; Webb *v.* Jiggs (1815), 4 M. & S. 113; Braithwaite *v.* Skinner (1839), 5 M. & W. 313; Longbottom *v.* Longbottom (1852), 8 Exch. 203.

**840.** —— ——.]—*Qu.:* whether above Act extends to suits in Admlty. for mariner's wages. If it does a plea there that the contract was made ten years before the commencement of the suit is bad.—HYDE *v.* PARTRIDGE (1705), 2 Ld. Raym. 1204; 11 Mod. Rep. 43; 3 Salk. 227; 92 E. R. 295; *sub nom.* HIDE *v.* PARTRIDGE, 2 Salk. 424; Holt, K. B. 428.

*Annotation:*—**Mentd.** Watlington *v.* Wilkinson, Watlington *v.* Brand (1729), 1 Barn. K. B. 270.

**841.** —— ——.]—ELLIOTT *v.* LISTER, THE JOHN (1756), Burrell, 320; 167 E. R. 591.

**842. Limitation of jurisdiction—Distance of residence of owner from port of discharge—What amounts to residence—Action by master.**]—Merchant Shipping Act, 1854 (c. 104), s. 189, read with s. 191, extends to masters of ships.

A place of occasional business is not a residence within Merchant Shipping Act, 1854 (c. 104), s. 189.—THE BLAKENEY (1859), Sw. 428; 5 Jur. N. S. 418; 166 E. R. 1199.

*Annotation:*—**Reld.** The Ferret, Phillips *v.* Highland Ry. (1885), 48 L. T. 915.

**Right to sue in Admiralty.**]—*See* ADMIRALTY, Vol. I., pp. 131–139, Nos. 363–466.

**Action in Admiralty side of county court.**]—*See* ADMIRALTY, Vol. I., p. 247, Nos. 1749–1752.

*D. Summary Procedure.*

*See* 1894 Act, ss. 164, 165, 693, Criminal Justice Act, 1925 (c. 86), s. 29.

**843. Necessity for personal application—Application by administrator.**]—Under 7 & 8 Vict. c. 112, s. 15, a justice of the peace is not authorised to act upon the personal application of the administrator of a seaman, but only upon the application of the seaman himself.—HOLLINGWORTH *v.* PALMER (1849), 4 Exch. 267; 18 L. J. Ex. 409; 13 L. T. O. S. 363; 13 J. P. 553.

*Annotation:*—**Reld.** The Ferret, Phillips *v.* Highland Ry. (1883), 48 L. T. 915.

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a vessel is liable to be sued for seamen's wages under 6 Will. 4, c. 44.—*Ex p.* WOOD (1849), 6 N. B. R. (1 All.) 422.—CAN.

PART III. SECT. 4, SUB-SECT. 12.—C. c. *Action abroad.*]—THE HAIDEE (1860), 10 L. C. R. 101; 2 S. V. A. R. 25.—CAN.

PART III. SECT. 4, SUB-SECT. 12.—D. d. *Jurisdiction.*]—The jurisdiction of the stipendiary magistrate under 3 R. S. c. 75, is concurrent only with that

*Sect.* 4.—*Wages: Sub-sect.* 12, *D. Sect.* 5: *Sub-sects.* 1 & 2. *Sects.* 6 & 7.]

**844. To what claims applicable—Wages earned on foreign ship.**]—*Qu.:* whether 17 & 18 Vict. c. 104, s. 189, applies to a claim for services on board a foreign ship.—BURNS *v.* CHAPMAN (1858), 5 C. B. N. S. 481; 28 L. J. C. P. 6; 32 L. T. O. S. 128; 5 Jur. N. S. 19; 7 W. R. 89; 141 E. R. 195.

**845. —— Wages of deceased seaman.**]—A ship was lost at sea, & all hands perished. At the time the ship was lost, five months' wages were due to one of the seamen, but a certain sum had been paid to his wife under an allotment note. Information was laid by the shipping master at Sunderland against the shipowner, under Merchant Shipping Act, 1854 (c. 104), s. 196, to recover the whole wages & the penalty imposed by that sect., but the justices refused to make any order:—*Held:* the justices ought to have made an order for the sum due to the seaman at the time the vessel was lost, after deducting the sum which had been paid to his wife, but that no penalty ought to be imposed, there having been no wrongful refusal on the part of the shipowner.—LAMBTON *v.* SMURTHWAITE (1859), 8 W. R. 61.

**846. Objection to jurisdiction—Time for making—Before magistrates.**]—THE MINERVA (1822), 1 Hag. Adm. 54; 166 E. R. 20.

**847. Appeal—To Court of Appeal—From Divisional Court—R. S. C., Ord. 68, r. 15.**]—An order of a Div. Ct. affirming an orde of an alderman of the City of London made upon a summons for wages taken out by a seaman, under 1894 Act, s. 164, is a final order in a matter not being an action within the meaning of above rule, & no appeal can be brought to the Ct. of Appeal after the expiration of fourteen days from the decision of the Div. Ct.—AUSTIN FRIARS S.S. CO. *v.* STRACK, [1906] 2 K. B. 499; 75 L. J. K. B. 658; 94 L. T. 875; 70 J. P. 528; 22 T. L. R. 701, C. A.

*Annotations:*—**Reld.** R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215. **Mentd.** Lloyd *v.* Sheen (1905), 93 L. T. 174; Sibery *v.* Connelly (1905), 94 L. T. 198; Sivewright *v.* Allen, [1906] 2 K. B. 81; Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

**848. —— Not by special case.**]—By Summary Jurisdiction Act, 1879 (c. 49), s. 33 (1), any person aggrieved who desires to question an order or other proceeding of a ct. of summary jurisdiction, on the ground that it is erroneous in point of law, may apply to the ct. to state a special case setting forth the facts of the case & the grounds on which the proceeding is questioned.

By 1894 Act, s. 164, a seaman may, as soon as any wages due to him, not exceeding £50, become payable, sue for the same before a ct. of summary jurisdiction as therein described, & the order made by the ct. in the matter shall be final:—*Held:* notwithstanding the former enactment, no appeal by special case lies from an order made by a ct. of summary jurisdiction under the latter.—WILLS & SONS *v.* MCSHERRY, [1914] 1 K. B. 616; 83 L. J. K. B. 596; 110 L. T. 65; 78 J. P. 120; 12 Asp. M. L. C. 426, D. C.

*Annotations:*—**Mentd.** Higgs & Hill *v.* Stepney B. C. (1913), 78 J. P. 134; Godman *v.* Crofton, [1914] 3 K. B. 803.

## SECT. 5.—PROTECTION OF SEAMEN FROM IMPOSITION.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, ss. 156, 163, 212–219.

**849. Assignment of salvage & wages—What amounts to assignment—Indorsement of advance note—Advance note for more than one month's wages.**]—ROWLANDS *v.* MILLER, No. 761, *ante*.

**—— Agreements for apportionment of salvage.**]—*See* Part XIII., Sect. 5, sub-sect. 3, *post*.

**850. Stranger boarding ship without permission—Right to trial by jury.**]—A person charged with the offence of "crimping" under 1894 Act, s. 218, has a right to claim to be tried by a jury.—R. *v.* GOLDBERG, [1904] 2 K. B. 866; 73 L. J. K. B. 970; 91 L. T. 490; 68 J. P. 554; 20 T. L. R. 683; 20 Cox, C. C. 699, D. C.

**—— Soliciting seaman to become lodger.**]—*See* No. 11, *ante*; No. 852, *post*.

### SUB-SECT. 2.—LODGING-HOUSE KEEPERS.

*See* 1894 Act, ss. 214–219, &, *generally*, PUBLIC HEALTH, Vol. XXXVIII., pp. 209–211, Nos. 437–466.

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of two justices of the peace & not exclusive.—ANDERSON *v.* MASON (1867), 7 N. S. R. (1 G. & O.) 1.—**CAN.**

**845** i. *To what claims applicable—Wages of deceased seaman.*]—STEPHENS *v.* DUNCAN (1862), 1 Macph. (Ct. of Sess.) 146.—**SCOT.**

e. ——.]—The jurisdiction of justices under 7 & 8 Vict. c. 112, s. 15, extends to all cases where wages are due & payable, & not merely to the case specified in sect. 11. Any justice in the county where the voyage ends has jurisdiction. The order of the justice need not fix any time for the payment of the wages.—R. *v.* WHETEN (1856), 8 N. B. R. (3 All.) 269.—**CAN.**

f. ——.]—Where a vessel had been sold in execution of a judgment of a magistrate for the recovery of wages due to the men employed on her:—*Held:* as the vessel was not owned or registered in Quebec all the proceedings had concerning her were absolutely null & void.—KERR *v.* GILDERSLEEVE (1858), 3 L. C. J. 304; 8 L. C. R. 267.—**CAN.**

g. ——.]—7 & 8 Vict. c. 112, s. 15, is founded on 5 & 6 Will. 4, c. 19, s. 15, & was the model for 3rd R. S. N. S., c. 75, s. 24. It was the object of the Legislature in passing 5 & 6 Will. 4, c. 19, to assist mariners in a speedy recovery of their wages, & for that purpose to give to magistrates a summary jurisdiction when the question of wages was merely in dispute; but it was not intended to enable them to decide upon intricate questions for forfeiture, whether arising from imputed desertion, disobedience of orders, or from any other cause.—CRAWLEY *v.* ANDERSON (1868), 7 N. S. R. (1 G. & O.) 385.—**CAN.**

h. ——.]—Pltf. contracted with F., who professed to be the owner of a vessel, to sail her as master at a stipulated rate of wages. After six months F., who had up to that time been on board, left the ship, & pltf. discovered that he was not the owner, the possession of the ship having been demanded by deft., the real owner. Pltf. then sued deft. for wages as master before the stipendiary magistrate under C. S., 1873, c. 129, ss. 52, 59, which enable a master to sue for wages due, him, not exceeding $200:—*Held:* the stipendiary had no jurisdiction.—HAWES *v.* HART (1885), 18 N. S. R. (6 R. & G.) 42; 6 C. L. R. 140.—**CAN.**

k. ——.]—Under R. S. C. c. 74, a claim for less than $200 for wages earned on board a Canadian registered vessel must be enforced by summary proceedings under sects. 48–55 of the Act.—BEATTIE *v.* JOHANSEN (1887), 28 N. B. R. 26.—**CAN.**

l. ——.]—R. S. C. c. 74, s. 52, does not confer jurisdiction upon the stipendiary magistrate for the county of Halifax, in relation to a deft. residing & a voyage terminating in the city of Halifax, the stipendiary magistrate being permitted to hold his ct. in the city, but his jurisdiction being confined to the county.—GRANT *v.* WEBBER (1893), 25 N. S. R. (13 R. & G.) 193.—**CAN.**

m. ——.]—*Re* GAMBLE *v.* WARD, 20 C. L. T. 462.—**CAN.**

n. *Objection to jurisdiction—Inquiry into accounts exceeding £50 to ascertain balance.*]—Merchant Seaman Act gives two justices of the peace jurisdiction in actions for wages up to £50. Pltf. sued for a balance of £15 15*s*. To ascertain the balance really due the justices had to inquire into the amount of his wages during his whole services, which exceeded £70. An application was now made to set aside their judgment on the ground that they had exceeded their jurisdiction:—*Held:* the judgment below must be sustained.—BOUCHE *v.* AYLWARD (1869), 1 P. E. I. 295.—**CAN.**

o. *Ouster of jurisdiction.*]—The jurisdiction of a magistrate in an action by a seaman for wages is not ousted by the fact that the master had purported to forfeit the wages for misconduct.—UNION S.S. CO. OF NEW ZEALAND, LTD. *v.* SPENDIFF (1903), 23 N. Z. L. R. 239.—**N.Z.**

**851. Meaning of lodging-house—Sailor's home.**]—By Merchant Shipping Act, 1854 (c. 104), s. 238, it is enacted that if within twenty-four hours after the arrival of any ship at any port in the United Kingdom, any person then being on board such ship solicits any seaman to become a lodger at the house of any person letting lodgings for hire, or takes out of such ship any effects of any seaman, except under his personal direction & with the permission of the master, he shall for every such offence incur a penalty not exceeding £5 :—*Held :* upon an information charging A., the agent of a sailors' home at H., with infringing the above section, sailors' homes are not lodging-houses within the meaning of the statute.—RICHARDSON *v.* ARTHUR (1864), 28 J. P. 168.

**852. Boarding ship for purpose of soliciting seaman to become lodger—Meaning of "arrival."**]—Resp. was charged under Merchant Shipping Act, 1854 (c. 104), s. 237, with boarding without the permission of the master a ship "about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge." The ship, at the time resp. boarded her, had just entered the Cumberland Basin in the port of Bristol at 7 a.m. The basin is divided from the river Avon by dock gates, & is a complete dock, forming part of, but divided by other dock gates from, the rest of the docks. There are quays in the basin, but the ship was not intended to discharge in the basin; she remained in the basin all night, & the next morning she was moored further in the floating harbour, & discharged her cargo at the quay there. The justices dismissed the complaint :—*Held :* the ship had not arrived "at her place of destination" by merely arriving in the port of Bristol, & she had not "actually arrived at her place of discharge," which was the quay where she ultimately did discharge; but she had "actually arrived in dock" within Merchant Shipping Act, 1854 (c. 104), s. 237, although the dock was not the dock in which she ultimately discharged; & the justices' decision was therefore right.—ATTWOOD *v.* CASE (1875), 1 Q. B. D. 134; 45 L. J. M. C. 20; 40 J. P. 534; *sub nom.* ATWOOD *v.* CASE, 33 L. T. 507; 24 W. R. 94; 3 Asp. M. L. C. 84, D. C.

*See, now,* 1894 Act, s. 218.

**853. —— Foreign ship—Extension of Act by Order in Council.**]—R. *v.* ABRAHAMS, No. 11, *ante.*

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## SECT. 6.—ACCIDENTS TO SEAMEN IN COURSE OF EMPLOYMENT.

**Liability of owners under Employers' Liability Act.**]—*See* MASTER & SERVANT, Vol. XXXIV., p. 222, Nos. 1845, 1846.

**Liability of owners under Workmen's Compensation Acts.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 241–244, 254, 276, 293, 421, Nos. 2059–2078, 2176, 2339, 2445, 3417.

**Liability of owners under Merchant Shipping Acts.**]—*See* Sect. 3, *ante.*

## SECT. 7.—DESTITUTE AND DISTRESSED SEAMEN.

*See* 1894 Act, ss. 184, 185; 1906 Act, ss. 28–49; 1923 Act; Statutory Rules & Orders, 1914, No. 90; Statutory Rules & Orders, 1921, No. 642.

**854. Termination of service abroad—Meaning of "passage home"—Passage to port of shipment or other port in United Kingdom agreed to by seamen.**]—By 1894 Act, s. 186, where the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's dominions, the master shall, among other alternatives, either (*c*) provide him with a passage home, or (*d*) deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance & passage home.

Upon the discharge abroad of a British seaman, the consul, acting under clause (*d*), fixed a sum which he deemed sufficient to defray the expenses of the seaman's passage home, & the master deposited this sum with the consul, who provided the seaman with a voucher for a passage. The voucher for the passage did not include maintenance. In an action by the seaman against the shipowners to recover the expenses of his maintenance on the passage :—*Held :* the master, by depositing the sum fixed by the consul, had complied with the requirements of clause (*d*), & the shipowners were not liable.

*Semble :* a "passage home" in clause (*c*) means a passage to the port at which the seaman was shipped, or to some port in the United Kingdom agreed to by him.—EDWARDS *v.* STEEL, YOUNG & Co., [1897] 2 Q. B. 327; 66 L. J. Q. B. 690; 77 L. T. 297; 45 W. R. 689; 13 T. L. R. 528; 8 Asp. M. L. C. 323; 2 Com. Cas. 272, C. A.

*Annotation :*—**Followed.** Purves *v.* Straits of Dover S.S. Co., [1899] 2 Q. B. 217.

**855. —— —— ——.**]—When the service of a seaman belonging to a British ship terminates at a foreign port, & the master elects to "provide him with a passage home," under 1894 Act, s. 186 (2) (*c*), the master is bound to provide him with a passage to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by him.—PURVES *v.* STRAITS OF DOVER S.S. Co., [1899] 2 Q. B. 217; 68 L. J. Q. B. 925; 81 L. T. 35; 15 T. L. R. 450; 43 Sol. Jo. 620; 8 Asp. M. L. C. 566; 4 Com. Cas. 274, C. A.

**856. —— —— —— Agreement to return to nearest port served by steamers.**]—Seamen agreed to serve on a British ship on a voyage from Newport, Monmouth, to Malta, & the end at a final port of discharge in the United Kingdom or Continent of Europe between the Elbe & Brest, inclusive, & it was agreed that when the seamen were discharged on the continent as above the master should furnish the means of sending them back to the nearest port in the United Kingdom served by regular steamers, & the seamen agreed to such nearest port as the port United Kingdom

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**PART III. SECT. 7.**

p. "*Crimping.*"]—T. was convicted under Seaman's Laws Consolidation Act, 1864, s. 14, for supplying a seaman to be entered on board a ship. It was, however, not proved that T. took the seaman on board in any way against his will :—*Held :* T. was wrongly convicted inasmuch as the word "supply" in the sect. means that the person supplied has no volition or no power to prevent himself from being supplied, *e.g.* drink & drugs.—MCLEAN *v.* THOMSON (1893), 14 N. S. W. L. R. (Law) 114; 9 N. S. W. W. N. 147.—AUS.

q. *Construction of* 20 *Geo.* 2, *c.* 38.]—The object of the above Act was to provide a fund for the permanent relief of the persons named in the title; but it left the right of the sailor to support & medical aid abroad, while the voyage was not terminated, untouched. The sailor was bound to pay so much per month towards the fund contemplated by the Act, & in consideration of such payment he was entitled to certain advantages & relief under it, but there was no intention of enacting any matter interfering with the then existing rights between master & mariner.—RALSTON *v.* BARSS (1836), 1 N. S. R. (1 Thom.) 75.—CAN.

r. *Liability of owner—Under* 11 *Geo.* 4, *c.* 20.]—As 11 Geo. 4, c. 20, had failed to express the ultimate liability of the owner to discharge the duty of sending home distressed seamen, or to bear the burthen of it, it created none & recognised none. The statute not merely shows that there is no duty on the owner, but that it was not one thought proper to impose on him, but rather a public charge.—MELANCON *v.*

*Sect. 7.—Destitute and distressed seamen. Sects. 8, 9 & 10: Sub-sects. 1 & 2.]*

to which they might be so sent back. The voyage ended at Hamburg, where the crew were discharged. The master paid the expenses of sending the seamen to Hull, which was the nearest port served by regular steamers. The seamen claimed that they were entitled to the expense of conveyance to Newport, the port of shipment:—*Held:* the agreement that the seamen should be sent back from the port of discharge to the nearest port in the United Kingdom served by regular steamers was not inconsistent with the provisions of 1894 Act, s. 186, and that the seamen were not entitled to the expenses of conveyance to the port of shipment.—A.-G. *v.* FARGROVE STEAM NAVIGATION CO., LTD. (1908), 24 T. L. R. 430, C. A.

**857. —— Expenses of maintenance — Insufficient sum fixed by consul—Shipowner not liable for deficiency.**]—EDWARDS *v.* STEEL, YOUNG & CO., No. 854, *ante*.

**858. —— —— Right of Crown to recover from owner—Seaman suffering from venereal disease.**]—Under 1906 Act, ss. 41 & 42, the Board of Trade on behalf of the Crown is entitled to recover from the owner of a British ship the expenses incurred on behalf of the Crown of maintenance in the sense of board & lodging & conveyance home of a seaman left behind from the ship in a place out of the United Kingdom & in distress in that place, though suffering from venereal disease, but it cannot recover any medical or surgical expenses of the seaman.

I cannot conceive that Parliament used the word "maintenance" [in 1906 Act, s. 41] to cover, say, the fee of a surgeon for amputating a leg (SCRUTTON, J.).—BOARD OF TRADE *v.* ANGLO-AMERICAN OIL CO., LTD., [1911] 2 K. B. 225; 80 L. J. K. B. 835; 104 L. T. 497; 27 T. L. R. 344; 11 Asp. M. L. C. 599; 16 Com. Cas. 151.

**859. —— —— Medical or surgical expenses not included—Fee for operation.**]—BOARD OF TRADE *v.* ANGLO-AMERICAN OIL CO., LTD., No. 858, *ante*.

**860. Distressed seaman—Who is—Question of fact.**]—The question whether a seaman who has been shipwrecked abroad is a "distressed seaman" within 1894 Act, ss. 190, 191, 193, is a question of fact.

A "distressed seaman" does not of necessity cease to be a "distressed seaman" on his being paid the wages due to him, when such wages are enough to pay the expenses of his maintenance abroad & passage home.

*Qu.:* whether the "sufficient evidence" of expenses incurred for his benefit which is provided for by 1894 Act, s. 193 (3), means "conclusive evidence."

The mere fact that a seaman is shipwrecked abroad is not conclusive evidence of distress.—BOARD OF TRADE *v.* SAILING SHIP GLENPARK, [1904] 1 K. B. 682; 73 L. J. K. B. 315; 90 L. T. 360; 52 W. R. 646; 20 T. L. R. 321; 48 Sol. Jo. 310; 9 Asp. M. L. C. 550; 9 Com. Cas. 192, C. A.

**861. —— —— Effect of payment of wages.**]—BOARD OF TRADE *v.* SAILING SHIP GLENPARK, No. 860, *ante*.

**862. —— "Sufficient evidence" of expenses incurred by Crown—Whether equivalent to conclusive evidence.**]—BOARD OF TRADE *v.* SAILING SHIP GLENPARK, No. 860, *ante*.

**Care of seaman during currency of agreement.**]—*See* Sect. 3, *ante*.

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## SECT. 8.—RELIEF TO FAMILIES OF SEAMEN.

*See* 1894 Act, ss. 182, 183.

**Allotment notes.**]—*See* Sect. 4, sub-sect. 9, *ante*.

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## SECT. 9.—PROPERTY OF DECEASED SEAMEN.

*See* 1894 Act, ss. 169–181; 1906 Act, s. 29.

**863. Sale of seaman's property at the mast—Whether conclusive as to value.**]—*Qu.:* if the inventory & sale of a dead seaman's property at the mast is conclusive evidence of their value, or the practice of mast-selling legal.—BLAINFIELD *v.* MARCH (1703), 7 Mod. Rep. 141; 87 E. R. 1150.

**864. Will of seaman — Whether will must be made at sea — Wills Act, 1837 (c. 26), s. 11.**] — Deceased, who was master of a trading vessel, in the course of a voyage, arrived at Port Adelaide, from whence he wrote, & forwarded by post a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea:—*Held:* deceased was a mariner at sea, & such a letter, being in the handwriting of deceased, & testamentary, was entitled to probate.—*In the Goods of* PARKER (1859), 2 Sw. & Tr. 375; 28 L. J. P. & M. 91; 23 J. P. 360; 5 Jur. N. S. 553; 164 E. R. 1041.

——.]—*Compare* ROYAL FORCES, Vol. XXXIX., pp. 332, 333, Nos. 180–190.

**Payment of wages on death.**]—*See* Sect. 7, sub-sect. 8, *ante*.

**Presumption of death.**]—*See* EVIDENCE, Vol. XXII., p. 169, No. 1450.

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## SECT. 10.—DISCIPLINE.

### SUB-SECT. 1.—GENERAL DUTIES OF SEAMEN.

*See* 1894 Act, ss. 220–238, 376–384.

**865. General rule.**]—(1) Drunkenness, neglect of duty, & disobedience. These are certainly offences of a high nature, fully sufficient to justify the discharge, if proved. In respect to the negligence, it would not be necessary to prove, that it was wilful negligence; it would be sufficient if it appeared to amount to that habitual inattention to the ordinary duties of his station that might expose the ship to danger (SIR WILLIAM SCOTT).

(2) Upon the matter of drunkenness, the ct. will be no apologist for that; it is an offence peculiarly noxious on board a ship, where the sober & vigilant attention of every man, & particularly of officers, is required. At the same time the ct. cannot entirely forget, that in a mode of life peculiarly exposed to severe peril & exertion, & therefore admitting in seasons of repose something of indulgence & refreshment; that indulgence & refreshment is naturally enough sought by such persons in grosser pleasures of that kind; & therefore that the proof of a single act of intemperance, committed in port, is no conclusive

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COMEAU (1854), 2 N. S. R. (James) 378.—CAN.

t. —— "*Owner for the time being.*"]—M. S. Act, 1854, s. 213, makes the expenses of a seaman left in a foreign port & being relieved from distress under the Act a charge upon the ship, & empowers the Board of Trade, in Her Majesty's name, to sue for & recover the same from the master of the ship or "owner thereof for the time being":—*Held:* the latter words mean the owner at the time of action brought.—R. *v.* SAILING SHIP "TROOP" CO. (1899), 29 S. C. R. 662.—CAN.

proof of disability for general maritime employment. Another rule would, I fear, disable many very useful men for the maritime service of the country (SIR WILLIAM SCOTT).

(3) As to disobedience to lawful command, it is an offence of the grossest kind; the ct. would be particularly attentive to preserve that subordination & discipline on board of ship which is so indispensably necessary for the preservation of the whole service, & of every person concerned in it. It would not, therefore, be a peremptory or harsh one, or an overcharged manner in the exercise of authority, that will be ever held by this ct. to justify resistance. It will not be sufficient that there has been a want of that personal attention & civility which usually takes place on other occasions, & might be wished, generally, to attend the exercise of authority. The nature of the service requires, that those persons who engage in it should accommodate themselves to the circumstances attending it (SIR WILLIAM SCOTT).

(4) If a master chose to turn a mariner on shore, without cause, in a foreign country, the mere refusal to go would of itself justify an improper discharge (SIR WILLIAM SCOTT).—ROBINETT *v.* THE EXETER (1799), 2 Ch. Rob. 261; 165 E. R. 309.

*Annotations:*—*As to* (2) **Consd.** The Roebuck (1874), 31 L. T. 274; The Macleod (1880), 5 P. D. 254. *As to* (3) **Consd.** The Blake (1839), 1 Wm. Rob. 73. *Generally*, **Refd.** The British Trade, [1924] P. 104.

**866.** ——.]—(1) In an action against the captain of an E. I. C. ship for personal damage on the ground of excessive punishment:—*Held:* the justification was sufficiently established.

It does not appear to me that there is any doubtful question of law, arising upon the illegality of inflicting bodily correction upon offending mariners—such punishment being commensurate to the offence committed, being awarded by due authority, & being administered with due moderation (LORD STOWELL).

(2) In the punishment of a seaman for misconduct, previous acts *ejusdem generis* may be considered, & pleaded in justification.

(3) This ct will expect that seamen shall do their proper duty, & in a proper manner (LORD STOWELL).—THE LOWTHER CASTLE (1825), 1 Hag. Adm. 384; 166 E. R. 137.

*Annotations:*—*As to* (1) **Refd.** The Sylph (1867), L. R. 2 A. & E. 24; Mersey Docks & Harbour Board *v.* Turner, The Zeta (1893), 63 L. J. P. 17.

**867.** ——.]—THE JUPITER, No. 711, *ante*.

**868. To serve the ship—In river as well as at sea.**]—THE PEARL (1804), 5 Ch. Rob. 224; 165 E. R. 756.

**869. —— In favourable & adverse weather.**]—THE NEPTUNE, No. 633, *ante*.

**870. —— Threatened shipwreck.**]—THE NEPTUNE, No. 633, *ante*.

SUB-SECT. 2.—AUTHORITY OF MASTER.

*See* 1894 Act, ss. 220–238.

**871. General rule.**]—The master of a merchant ship has authority over the mariners to enforce obedience to his lawful commands, for the navigation of the vessel & preservation of good order; &, in case of disobedience or disorderly conduct, may inflict corporal punishment, moderate & proportionate to the offence.—LAMB *v.* BURNETT (1831), 1 Cr. & J. 291; 1 Tyr. 265; 9 L. J. O. S. Ex. 55; 148 E. R. 1430.

*Annotation:*—**Mentd.** Penn *v.* Ward (1835), 2 Cr. M. & R. 338.

**872. Basis of authority—Safety of navigation.**]—THE LIMA, No. 728, *ante*.

**873. Whether personal violence justified.**]—THE LIMA, No. 728, *ante*.

**874. Punishment—Corporal punishment—Extent of right to inflict.**]—In a case of gross misbehaviour, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner; that right must be supported by the law of England, which is the proper authority for fixing the limits within which one subject of this realm has a right to inflict corporal suffering upon another (LORD STOWELL).—THE AGINCOURT (1824), 1 Hag. Adm. 271; 166 E. R. 96.

*Annotations:*—**Apld.** The Lowther Castle (1825), 1 Hag. Adm. 384. **Refd.** The Sylph (1867), L. R. 2 A. & E. 24, R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; Mersey Docks & Harbour Board *v.* Turner, The Zeta (1893); 63 L. J. P. 17.

**875.** —— —— ——.]—THE LOWTHER CASTLE, No. 866, *ante*.

**876.** —— —— ——.]—LAMB *v.* BURNETT, No. 871, *ante*.

**877.** —— —— ——.]—FRANCIS *v.* HUTCHINSON (1841), 7 L. T. 224.

**878.** —— —— ——.]—CARNAGHAM *v.* DAVIDSON (1852), 7 L. T. 224.

**879. —— Evidence of previous acts ejusdem generis.**]—THE LOWTHER CASTLE, No. 866, *ante*.

**880. —— By local authority in foreign port—Offence committed on board—Master instigating action of local authority.**]—The commander of an English merchant ship lying in a port of a foreign state sent a seaman, who had committed mutiny on board the ship, ashore, in custody of the soldiers of the port, & procured him to be flogged & imprisoned by the local authorities:—*Held:* the captain was answerable in trespass for what was done on shore, he having taken an active part in instigating & promoting the proceedings.—AITKEN *v.* BEDWELL (1827), Mood. & M. 68, N. P.

**881. —— Previous institution of inquiry—Entry of inquiry in log.**]—It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry, with

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**PART III. SECT. 10, SUB-SECT. 2.**

**873 i.** *Whether personal violence justified.*]—Although the master of a ship may take all reasonable means to preserve discipline, where, to enforce an order given by him, he unnecessarily lays hands on a member of the crew (a woman) he is technically guilty of an assault on her.—LOUPIDES *v.* THE CALDERIS (1921), 20 Exch. C. R. 331.—CAN.

**873 ii.** ——.]—In an action by a seaman against the owners of a vessel on which he was employed for damages on account of an assault committed upon him by the master of the vessel, the pursuer averred that the master "acting in the course of his employment, & in defenders' interest," came into the forecastle, where the pursuer was lying ill, & in order to compel him to proceed with his work, pulled him from his berth & dragged him on deck, whereby his illness was aggravated:—*Held:* pursuer's averments disclosed that the master was acting in the course of his employment, & defenders were not responsible to the pursuer for an injury caused by the fault of his fellow-servant.—DOWNIE *v.* CONNELL BROTHERS, LTD., [1910] S. C. 781.—SCOT.

**874 i.** *Punishment — Corporal punishment—Extent of right to inflict.*]—Where a seaman having mutinied & incited the rest of the crew to mutiny, the captain ordered him to be placed in irons & afterwards to be flogged which was done, & the seaman, on arrival of the ship at Quebec brought action of damages against the captain:—*Held* the latter had the right of punishment so practised by him, & the action was dismissed.—THE COLDSTREAM (1832), S. R. C. 518.—CAN.

**874 ii.** —— —— ——.]—GORDON *v.* GORDON (1867), 7 N. S. R. (1 G. & O.) 80.—CAN.

**874 iii.** —— —— ——.]—The master of a ship is entitled to chastise an apprentice, & the ct. on a claim for damages being made on the apprentice's behalf, will not inquire whether the master was right or wrong, provided his act was truly an act of chastisement, & not an act of wanton cruelty.—WIGHTS *v.* BURNS (1883), 11 R. (Ct. of Sess.) 217; 21 Sc. L. R. 160.—SCOT.

**a.** *Right to reduce mate in rank.*]—

*Sect.* 10.—*Discipline: Sub-sects.* 2 *&* 3, *A. & B.* (*a*) *&* (*b*).]

the assistance of others, & to have the result entered in the log.—MURRAY *v.* MOUTRIE (1834), 6 C. & P. 471; 172 E. R. 1324, N. P.

**882. —— Controlled by exigencies of occasion.**]—The master has no authority to inflict punishment, except what the exigencies of any occasion demand.—SAVORY *v.* BURNETT (1854), 6 L. T. 557.

**883. To disrate seaman.**]—THE HIGHLAND CHIEF, No. 759, *ante*.

**884. Death of master — Chief mate succeeding —Crew bound to accept chief mate as master—Although foreigner.**]—In an action for wages by a seaman against the shipowner, plea, after setting out the ship's articles between H. the master & pltf. & others, that H. died, & S. the chief mate became & was master; & that, while S. was such master, pltf. was guilty of mutiny. Replication, admitting the ship's articles & the death of H., & that S. became & was master, concluded "*de injuria absque residuo causae*":—*Held:* under this replication, pltf. could not show that S. was a foreigner, & incompetent to be master of the ship under 3 & 4 Will. 4, c. 54, s. 12.

*Semble:* if the master of a ship dies on the voyage, & the chief mate succeeds him in the command, the crew are bound by the ship's articles, though such chief mate is a foreigner.—RENNO *v.* BENNETT (1842), 3 Q. B. 768; 3 Gal. & Dav. 54; 12 L. J. Q. B. 17; 6 Jur. 992; 114 E. R. 702.

——.]—*Compare* No. 792, *ante*.

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SUB-SECT. 3.—OFFENCES AGAINST DISCIPLINE.

*A. In General.*

*See* 1894 Act, ss. 220–238, 376–384.

**885. Application of statutory provisions as to discipline—Only to registered British ships.**]—The sects. coming under the head of "Discipline" in 17 & 18 Vict. c. 104, have reference to British ships alone. One of these, sect. 257, renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship":—*Held:* in order to convict an offender under this sect., it must be shown that the ship deserted from is a British ship; & that, inasmuch as by Merchant Shipping Act, 1854 (c. 104), s. 19, "every British ship must be registered," "& no ship" thereby "required to be registered shall, unless registered, be recognised as a British ship," proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by sect. 107.—LEARY *v.* LLOYD (1860), 3 E. & E. 178; 29 L. J. M. C. 194; 3 L. T. 210; 24 J. P. 662; 6 Jur. N. S. 1246; 121 E. R. 409.

*Annotations:*—**Consd.** Poll *v.* Dambe, [1901] 2 K. B. 579. **Reld.** The Tagus (1902), 87 L. T. 598.

**886. —— "Sea going ships" — Summary punishment for offences.**]—Resp. was engaged on a screw steamer, of about 142 tons gross tonnage, registered as a British ship at the port of Liverpool. She was exclusively used to carry salt upon the rivers Weaver & Mersey from Winsford to Liverpool where it was transferred to ocean going vessels. Her voyages, so far as they were upon the river Mersey, were in tidal waters, but did not extend in such tidal waters beyond the limits of the port of Liverpool:—*Held:* the ship was not a "sea going" ship within Merchant Shipping Act, 1854 (c. 104), s. 109, &, therefore, that proceedings could not properly be taken against resp. under 17 & 18 Vict. c. 104, s. 243.—SALT UNION *v.* WOOD, [1893] 1 Q. B. 370; 62 L. J. M. C. 75; 68 L. T. 92; 57 J. P. 201; 41 W. R. 301; 37 Sol. Jo. 195; 7 Asp. M. L. C. 281; 5 R. 176, D. C.

**887. Naval court constituted under 1894 Act—Extent of powers—Whether limited to powers of punishment—Discharge of seaman.**]—A naval ct. summoned under the provisions of 1894 Act in dealing with the offence of continued wilful disobedience by a seaman to lawful commands, may put in exercise all its statutory powers so far as they are applicable to the case, including the power to discharge the seaman from his ship, & is not limited to the powers of punishment conferred by the Act on a ct. of summary jurisdiction in respect of the same offence.

An order regularly made by a duly constituted naval ct. within the scope of its jurisdiction is conclusive in any subsequent legal proceedings of the rights of all the parties interested, whether they are parties to the proceedings before the naval ct. or not; consequently, where by such order a seaman is discharged from his ship, the order is a bar to a civil action by the seaman against the owner for wrongful dismissal, notwithstanding that the owner was not a party to the criminal proceedings.

Pltf., who was engaged on a ship for a term of three years, which covered the period of the Russo-Japanese war, on the arrival of the ship at Yokohama, refused to continue the voyage on the ground that the ship was carrying contraband of war. At the instance of the master a naval ct. was convened, which found pltf., with others of the crew, guilty of continued wilful disobedience to lawful commands & of insubordination prejudicial to the owners' interests, & rejected the men's plea with respect to the carriage of contraband; & the ct. discharged the men from the ship & forfeited their wages. In an action by pltf. against the owner for wrongful dismissal & for wages, it appeared that the ship was carrying contraband at the time of pltf.'s refusal to proceed:—*Held:* the order of the naval ct. was a bar to the action.—HUTTON *v.* RAS S.S. CO., LTD., [1907] 1 K. B. 834; 76 L. J. K. B. 562; 96 L. T. 515; 23 T. L. R.

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Where a second mate is raised to the rank of chief mate by the master during the voyage, he may be ordered to his own rank by the master for incompetency, & thereupon the original contract will revive.—THE LYDIA 1837), 1 S. V. A. R. 136.—**CAN.**

*b. Detention — Action for false imprisonment.*]—The master of a steamer lying in Halifax harbour having cause to suspect pltf. of stealing, & having procured warrants to be issued against him, confined pltf. while the search was being made, in order to prevent him from communicating with the rest of the crew. An action for false imprisonment was brought:—*Held:* the master had acted within the scope of his authority.—LEITH *v.* TROTT (1863), 16 N. S. R. (4 R. & G.) 120.—**CAN.**

**PART III. SECT. 10, SUB-SECT. 3.—A.**

*c. Application of statutory provisions.*]—On a petition for *habeas corpus* in a case of conviction under M. S. Act:—*Held:* 36 Vict. c. 129, s. 125, does not modify or limit sect. 124, so as to restrict the application of the Act in relation to ships in the merchant service of foreign countries to the offence of desertion only, but the whole provisions of such Act apply to such foreign vessel in so far as is consistent with existing treaties between Great Britain & foreign countries.—*Ex p.* JOHANSEN & NORDIN (1874), 18 L. C. J. 164.—**CAN.**

*d. —— British ship in Canadian waters.*]—The *Orion*, a British ship, being in Canadian waters, Imperial Shipping Act, 1894, Part 2 (ss. 220–238), relating to discipline, have no application.—R. *v.* OLSEN (B. C.) (1906), 4 W. L. R. 108.—**CAN.**

*e. —— Necessity for stating that act charged wilfully committed.*]—R. *v.* BRIDGES (1907), 13 B. C. R. 67.—**CAN.**

*f. —— To British India.*]—M. S. Act, 1854 (c. 104), s. 243 (b), has no application to British India. The Act applicable to cases of continued wilful disobedience of lawful commands by

295; 50 Sol. Jo. 95; 10 Asp. M. L. C. 386; 12 Com. Cas. 231, C. A.; *affg.* (1905), 94 L. T. 645.

*Annotations:*—**Refd.** Caine *v.* Palace Shipping Co. (1906), 22 T. L. R. 816. **Mentd.** Hill *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236.

**888. —— Order of court—Operation as estoppel—Subsequent action by discharged seamen for wages.**]—HUTTON *v.* RAS S.S. CO., LTD., No. 887, *ante*.

**Limits of criminal jurisdiction—Offences committed on seas & rivers.**]—*See* CRIMINAL LAW, Vol. XIV., pp. 137–141, NOS. 1090–1139.

*B. Nature of Offences.*

*(a) In General.*

*See* 1894 Act, ss. 220, 225, 237, 376; 1896 Act, s. 82 (1), Marine Insurance Act, 1906 (c. 41), Sched. I. (1).

**889. Wilful negligence.**]—ROBINETT *v.* THE EXETER, No. 865, *ante*.

**890. Misconduct endangering ship—Act tending to loss or destruction.**]—To sustain an indictment for a misdemeanour under Merchant Shipping Act, 1854 (c. 104), s. 239, it is not necessary that the act done or omitted should be followed by actual loss, destruction, or damage.

If the act tended to the loss, destruction or damage of the ship though neither result followed, it is a misdemeanour within this sect., as if a man should stick a lighted candle in an uncovered barrel of gunpowder, though he put it out immediately, I think that would be an act tending to the damage of the ship. . . . Two persons being together in the immediate neighbourhood of an explosive & unprotected material & one lighting a candle, & the other omitting to put it out, the first would be guilty under the former clause of the sect., & the second under the latter (BRAMWELL, B.).—R. *v.* GARDNER (1859), 1 F. & F. 669.

**891. —— Omission to do act for preserving ship—No look out kept.**]—Where a ship comes into collision with another vessel as the result either of the act of the master in placing the look-out man in such a position on deck that his view ahead is partially obstructed, or of the failure of the look-out man to keep a good look out, neither the act of the master nor the neglect of the look-out man is a neglect of duty of the kind contemplated by 1894 Act, s. 220.—DEACON *v.* EVANS, [1911] 1 K. B. 571; 80 L. J. K. B. 385; 104 L. T. 99; 75 J. P. 162; 11 Asp. M. L. C. 550, D. C.

**892. Refusal to serve—Agreement to serve—Articles not signed.**]—By Reg. 39A of the Defence of the Realm Regulations Consolidated, 1917, "If a person lawfully engaged to serve on board any ship or vessel belonging to or chartered, hired, or requisitioned by the Admlty. or Army Council . . . neglects or refuses without reasonable excuse to join his ship or vessel . . . he shall be guilty of an offence. . . ." Where a seaman has agreed to serve on a requisitioned ship & to proceed to a port to sign articles thereon & afterwards refuses to carry out the agreement:—*Held:* the fact that he has not signed articles does not prevent him from being "lawfully engaged" & from being liable to be convicted under above regulation for refusing to join his ship.—HAWS *v.* BROWN (1917), 87 L. J. K. B. 124; 117 L. T. 408; 81 J. P. 300; 14 Asp. M. L. C. 164; 26 Cox, C. C. 21, D. C.

**Offences on the high seas—Piracy & slave trade.**]—*See* CRIMINAL LAW, Vol. XV., pp. 724–728.

**Larceny from ships, docks, etc.**]—*See* CRIMINAL LAW, Vol. XV., pp. 899, 900, Nos. 9865–9869.

**Trade disputes—Proceedings under Conspiracy & Protection of Property Act, 1875 (c. 86).**]—*See* CRIMINAL LAW, Vol. XV., pp. 768, 769, Nos. 8237, 8238.

*(b) Drunkenness and Insubordination.*

*See* 1894 Act, ss. 220, 376.

**893. Drunkenness—Habitual drunkenness & single acts of intemperance distinguished.**]—ROBINETT *v.* THE EXETER, No. 865, *ante*.

**894. —— —— Master.**]—THE ROEBUCK, No. 735, *ante*.

**—— Forfeiture of wages.**]—*See* Sect. 4, subsect. 3, E., *ante*.

**895. Insubordination.**]—ROBINETT *v.* THE EXETER, No. 865, *ante*.

**896. —— Refusal to return to ships with captain—Forfeiture of offenders property on board.**]—Where the second mate of a vessel was ordered with three other seamen to take the ship's boat & convey the captain on board, who had gone on shore at the Mauritius, & on their getting on shore they refused to return with him, but remained there all night, & he was obliged to get back to his ship in another boat, & redeem his own on the following morning: when such mate was taken before a magistrate at the Mauritius, & committed to prison for a month:—*Held:* this was such an act of disobedience as to warrant the captain to detain his property on board the vessel by way of forfeiture, & consequently that trover could not be maintained against the captain for such detention.—WEATHERPEN *v.* LAIDLER (1823), 8 Moore, C. P. 37.

**897. —— Duty of captain immediately to discharge seaman—Where facility for replacement.**]—THE EALING GROVE, No. 708, *ante*.

**898. —— Officer directly or indirectly promoting—Right of owner to dismiss.**]—The owners of a vessel have a right to dismiss an officer who directly or indirectly promotes insubordination, & such officer has no right to wages otherwise due to him by agreement after such dismissal.—THE MARINA (1881), 50 L. J. P. 33; 29 W. R. 508.

**899. —— Wilful disobedience—Question of fact.**]—Applt. was the representative of the Neptune Navigation co., & resps. were seamen employed as firemen on the ss. *Pennine Range*, which belonged to that co. Resps. were summoned upon an information that on May 18, 1908, being seamen engaged on the *Pennine Range* when on the high seas, they had been guilty of wilful disobedience to a lawful command contrary to 1894 Act, s. 225. When the ss. *Pennine Range* was two days out from Las Palmas on a homeward voyage, resps. were ordered by the engineer to clean out the engine room. They refused to do so, saying that they were tired. The captain then sent for them, & explained the penalty that might be imposed upon them for refusing to obey a lawful command, & gave them twenty-four hours to consider the matter, but

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sailors is Act 1 of 1859, s. 83, cl. 5 (*c*).—*Re* REARDON (1875), 8 Mad. 85.—**IND.**

**g.** —— *To imposition of punishments.*]—Shipping & Seamen Act (Imperial), s. 771, did not authorise the imposition of punishments expressly prohibited by New Zealand Legislature, 1909 Act, s. 94.—*Re* MULVANEY, [1928] N. Z. L. R. 129.—**N.Z.**

**PART III. SECT. 10, SUB-SECT. 3.—B. (b).**

**h.** *Insubordination — Refusal to obey order on Sunday.*]—MARSHALL *v.* FOSTER (1898), 24 V. L. R. 155.—**AUS.**

**k.** —— *Continued refusal to obey commands—Unless proper rate of wages was paid.*]—BIDWELL *v.* ABBOTT, *Ex p.* ABBOTT, [1926] S. R. Q. 196.—**AUS.**

**l.** —— ——.]—R. *v.* GOODREW (1915), I. L. R. 39 Bom. 558.—**IND.**

**m.** —— —— *Justification of disobedience—Increased risk in war time.*]

*Sect.* 10.—*Discipline: Sub-sect.* 3, *B.* (*b*) & (*c*) *i. & ii.*]

they again said they were too tired, & did not do the work of cleaning. Evidence was given that other steamships of the same kind & about the same tonnage & horse power as the *Pennine Range* carried eight or more firemen, & that to command the six resps. to clean the engine room in the circumstances was unreasonable. The magistrate found as facts—(*a*) that cleaning the engine room at the time of the command to do so was necessary work & proper for firemen; (*b*) that resps. were then physically capable of performing the work; (*c*) that they were then tired by their ordinary work; (*d*) that by not cleaning the engine room when ordered to clean it they disobeyed a lawful command; but he doubted whether in the circumstances resps. had been guilty of "wilful disobedience" within 1894 Act, & he gave them the benefit of the doubt & dismissed the information:—*Held:* it was impossible to say as a matter of law that resps'. refusal was wilful, & the question being a question of fact for the magistrate this ct. would not interfere.—CAROE *v.* BAYLISS (1908), 72 J. P. 525; 25 T. L. R. 22, D. C.

**900. —— —— Where command disobeyed unreasonable.**]—Seamen signed articles as members of a crew of sixteen men. This number was subsequently reduced to fifteen. Some of the seamen thereupon refused to go to sea on the ground that fifteen men were insufficient to man the lifeboats or to keep an adequate look out. An information having been preferred against these men under 1894 Act, s. 225 (1) (*b*), for wilfully disobeying a lawful command, the magistrate found that the command ordering them to go to sea was unreasonable, inasmuch as the perils of the voyage had been increased by the reduction in the crew, & dismissed the information:—*Held:* since the magistrate had found that the command to go to sea was unreasonable for the reasons above stated, it was an unlawful command, & consequently resps. could not be guilty of "wilful disobedience to a lawful command" within 1894 Act, s. 225 (1) (*b*).—O'REILLY *v.* DRYMAN (1915), 85 L. J. K. B. 492; 114 L. T. 613; 80 J. P. 79; 13 Asp. M. L. C. 298; 25 Cox, C. C. 334, D. C.

**—— Forfeiture of wages.**]—*See* Sect. 4, sub-sect. 3, D., *ante.*

### (*c*) *Desertion or Absence Without Leave.*

#### i. *In General.*

*See* 1894 Act, ss. 221, 228, 376–384; 1906 Act, s. 65.

**901. What constitutes desertion—Quitting ship before end of run—Not necessarily desertion.**]—FELL *v.* THE DOROTHY (1766), Burrell, 9; 167 E. R. 447.

**902. —— Unjustifiable abandonment of duty—By leaving ship.**]—THE WESTMORLAND, No. 569, *ante.*

**903. —— —— No animus revertendi.**]—There can be no total desertion without an intention absolutely to quit, which is to be inferred from the circumstances. If there be absence from the ship with an *animus revertendi*, whatever may be the duration of this absence, that is provided for by 5 & 6 Will. 4, c. 19, s. 7, & it is not desertion forfeiting the whole of the wages (DR. LUSHINGTON).—THE TWO SISTERS (1843), 2 Wm. Rob. 125; 2 Notes of Cases, 420; 6 L. T. 371; 7 Jur. 861; 166 E. R. 702.

*Annotation:*—**Apld.** The Roebuck (1874), 31 L. T. 274.

**904. —— —— ——.**]—THE ROEBUCK, No. 735, *ante.*

**905. —— Remaining ashore after further leave refused—Subsequent offer to return to duty.**]—If seamen go on shore on the ship's duty, & when the boat is about to return request to be permitted to remain on shore to get some victuals, which is refused, & the boat goes without them; if they afterwards go & offer to return to their duty on board the ship, it is not a desertion.—SIGARD *v.* ROBERTS (1799), 3 Esp. 71; 170 E. R. 542, N. P.

**906. —— Leaving ship because of inhuman treatment.**]—LIMLAND *v.* STEPHENS, No. 700, *ante.*

**907. —— ——.**]—Where a seaman serving on board a British registered merchant ship was flogged & punished by the captain & officers with great & unreasonable cruelty & severity, & had just & reasonable cause to apprehend that the captain & officers would continue to flog & punish him with such great & unreasonable cruelty & severity:—*Held:* he was justified in leaving the ship, & he was not thereby guilty of desertion within 7 & 8 Vict. c. 112.—EDWARD *v.* TREVELLICK (1854), 4 E. & B. 59; 2 C. L. R. 1605; 24 L. J. Q. B. 9; 23 L. T. O. S. 208; 18 J. P. 680; 1 Jur. N. S. 110; 2 W. R. 586; 119 E. R. 23.

**908. —— Leaving ship because of shortage of provisions.**]—THE CASTILIA, No. 587, *ante.*

**909. —— Refusal to return when ordered.**]—THE BULMER, No. 707, *ante.*

**910. —— Request to accede to unauthorised demand.**]—THE COUNTESS OF HARCOURT, No. 591, *ante.*

**911. —— Failure to return owing to drunkenness.**]—THE EALING GROVE, No. 708, *ante.*

**912. —— ——.**]—BUTTON *v.* THOMPSON, No. 632, *ante.*

**913. —— Engaging on another ship.**]—THE JUPITER, No. 711, *ante.*

**914. —— —— In King's service.**]—THE AMPHITRITE, No. 965, *post.*

**915. —— Negative definition in articles—Absence for less than twenty-four hours.**]—THE AMPHITRITE, No. 965, *post.*

**916. —— Insubordinate acts—Refusal to perform work.**]—THE WESTMORLAND, No. 569, *ante.*

**917. —— Going on shore to obtain legal advice.**]—THE WESTMORLAND, No. 569, *ante.*

**918. —— Leaving ship because unseaworthy.**]—THE ELLERSLIE, DAVIDSON *v.* TODHUNTER (1855), 8 L. T. 803.

**919. —— Leaving ship to give evidence against captain—Under instruction of consul.**]—A. signed articles as chief mate of a ship for a foreign voyage, not to exceed twelve months, wages 5 guineas a month. When he had served six months, & was at sea, the steward charged the captain with having stabbed him, whereupon he (captain) was, with the assent of A. put in irons & taken to Lisbon. The consul there having investigated the matter, sent the captain, together with A. & three sailors as witnesses, from Lisbon to England;

—HARRIS *v.* BENCE, SULLIVAN *v.* MCFARLANE (1915), 34 N. Z. L. R. 628.—N.Z.

PART III. SECT. 10, SUB-SECT. 3.—B. (*c*) i.

**918** i. *What constitutes desertion—Leaving ship because unseaworthy.*]—THE BRENDA (1855), 8 L. T. 803.—SCOT.

n. —— *Quitting ship before end of run.*]—COX *v.* LO FOOK, LO LOCK & HO POO (1906), 2 Tas. L. R. 53.—AUS.

o. —— —— *Whether right to wages forfeited.*]—SEWARD *v.* RATTER (1884), 12 R. (Ct. of Sess.) 222; 22 Sc. L. R. 173.—SCOT.

p. —— —— *Agreement for twelve months certain.*]—R. *v.* THE QUEEN, [1921] 3 W. W. R. 123; 30 B. C. R. 256.—CAN.

q. —— *Absence on shore without*

but on the matter being brought before a metropolitan police magistrate, he, on hearing the evidence, discharged the captain. A. having under 17 & 18 Vict. c. 104, laid a complaint before the justices of Sunderland for wages due by the owner of the ship to A. up to the time of leaving it at Lisbon, the owner resisted on the ground, first, that he (A.) deserted the ship by leaving her at Lisbon, & secondly, of his misconduct in being a party to the putting the captain in irons on a groundless charge. The justices having overruled these objections, & made an order for payment of the wages :—*Held :* the order was good.—CROSS *v.* HYNE (1868), 18 L. T. 474 ; 16 W. R. 967 ; 3 Mar. L. C. 80 ; *sub nom.* HYNE *v.* CROSS, 32 J. P. 566.

**920. Evidence of desertion—Proof of agreement of service.**]—Resistance to a claim for seaman's wages on a plea of desertion, not sustained ; upon a failure of proof by the owners as to the time of service.—THE GEORGE (1823), 1 Hag. Adm. 168, n. ; 166 E. R. 60.

**921. —— Refusal of master to certify for wages of crew.**]—THE FREDERICK, No. 813, *ante.*

**922. —— Certificate of consul — Obtained by master without notice to seaman.**]—LEWIS *v.* JEWHURST, No. 717, *ante.*

**923. Summary proceedings—Exclusive of civil remedy for damage.**]—17 & 18 Vict. c. 104, s. 243, which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a ct. of summary jurisdiction with imprisonment & forfeiture of part of his wages, by implication takes away any other remedy against the seaman for the breach of contract, & the shipowner cannot, where the amount which he claims does not exceed £10, take proceedings for the recovery of damages under Employers & Workmen Act, 1875 (c. 90), s. 4.—GREAT NORTHERN FISHING CO. *v.* EDGEHILL (1883), 11 Q. B. D. 225, D. C.

*Annotation :*—**Reld.** Salt Union *v.* Wood (1893), 62 L. J. M. C. 75.

*See, now,* 1894 Act, ss. 226, 377.

**924. —— Conviction as for disobedience to lawful command—1894 Act, s. 376 (1), (a), (b), (d).**]—A seaman may be convicted of the offence of wilfully disobeying a lawful command of the master, under above Act, s. 376 (1) (*d*), although the act of disobedience amounts to the offence of desertion or absence without leave under above Act, s. 376 (1) (*a*) or (*b*).—EDGILL *v.* ALWARD (J. & G.), LTD., [1902] 2 K. B. 239 ; 71 L. J. K. B. 690 ; 87 L. T. 121 ; 66 J. P. 760 ; 9 Asp. M. L. C. 341 ; 20 Cox, C. C. 302, D. C.

**Forfeiture of wages for desertion.**]—*See* Sect. 4, sub-sect. 3, C., *ante.*

ii. *Enticing to Desert or Harbouring Deserters.*

*See* 1894 Act, s. 236.

**925. Offence must relate to British ships.**] — LEARY *v.* LLOYD, No. 885, *ante.*

**926.** ——.]—POLL *v.* DAMBE, No. 10, *ante.*

**927. Who is seaman—No written agreement for service.**]—A seaman engaged by the master of a vessel, & taken to sea without any such written agreement having been entered into between them as is rendered necessary by 7 & 8 Vict. c. 112, s. 2, is not a seaman or mariner within 11 & 12 Will. 3, c. 7, s. 9, & therefore is not liable under that sect. for making a revolt, by deserting his vessel in port, & inducing the rest of the crew to do the same.—R. *v.* SMITH (1848), 12 J. P. 762 ; 3 Cox, C. C. 443.

**928. Institution of proceedings — "Parties to proceedings" out of United Kingdom—Who are such parties.**]—17 & 18 Vict. c. 104, s. 287, makes it an offence to persuade or attempt to persuade any seaman to neglect or refuse to join or to desert from his ship ; by sect. 525 no conviction for any offence shall be made under this Act in any summary proceeding, unless such proceeding is commenced within six months after the commission of the offence ; or if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same :—*Held :* "parties to the proceeding" meant the seaman & the person persuading or attempting to persuade, & if either of them leaves the kingdom during the six months after the commission of the offence, an information may be laid within two months of his return ; the offence might be committed, although the formalities required by sect. 150 in the engagement of the seaman had not been complied with.—AUSTIN *v.* OLSEN (1868), L. R. 3 Q. B. 208 ; 9 B. & S. 46 ; 37 L. J. M. C. 34 ; 17 L. T. 537 ; 32 J. P. 183 ; 16 W. R. 426 ; 3 Mar. L. C. 52.

**929. —— Statutory formalities as to engagement of seaman not complied with.**]—AUSTIN *v.* OLSEN, No. 928, *ante.*

**930. —— Under Conspiracy & Protection of Property Act, 1875 (c. 86)—Offence against seamen.**]—Conspiracy & Protection of Property Act, 1875, c. 86, s. 16, means only that the punishments prescribed by the Act are not to fall on seamen. The case of an offence against a seaman by a person who is not a seaman is therefore not excluded from the Act by this sect.—KENNEDY *v.* COWIE, [1891] 1 Q. B. 771 ; 60 L. J. M. C. 170 ; 64 L. T. 598 ; 55 J. P. 680 ; 39 W. R. 686 ; 7 T. L. R. 474 ; 17 Cox, C. C. 320, D. C.

**931.** —— —— ——.]—A federation of shipowners which was not qualified under 1894 Act, s. 111, by licence or otherwise to engage or supply seamen to be entered on any ship in the United Kingdom, provided a depot ship for men intending to serve as seamen on ships in the United Kingdom belonging to members of the federation. Certain men were on board the depot ship, & had entered into engagements with the federation to remain on board until engaged to serve as seamen on such

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*eave.*]—THE VENOSTA *v.* COLLIERS, 1925] Exch. C. R. 212.—CAN.

r. *Justification for desertion—Agreement not containing statutory provisions.*]—If an agreement for service by a seaman does not contain the particulars required by the Mercantile Act, 1850, s. 46, a seaman's desertion is justifiable or, at any rate he is not liable to summary punishment, under sect. 70.—*Re* MERCANTILE MARINE ACT ; *Ex p.* SMITH (1852), 19 L. T. O. S. 39.—AUS.

t. —— *Suspicious conduct of owners as to wages agreement.*]—PORTEOUS *v.* THE LIGHTNING (Y. T.) (1905), 2 W. L. R. 199.—CAN.

a. *Who may institute proceedings—Captain.*]—M'NAUGHTON *v.* ALLHUSEN & Co. (1847), 10 Dunl. (Ct. of Sess.) 236 ; 20 Sc. Jur. 68.—SCOT.

PART III. SECT. 10, SUB-SECT. 3.—B. (c) ii.

927 i. *Who is seaman—No written agreement for service.*]—A., a storekeeper on a homeward bound vessel, was on her arrival formally discharged, but verbally re-engaged to act in that capacity for the vessel's next voyage, & also to remain by her & to attend to the stores while she lay in harbour. Before he had signed articles for the voyage, an attempt was made to induce him to leave the vessel by a delegate of a seamen's union. The delegate on being convicted of an offence under M. S. Act, 1854, s. 257, appealed to the High Ct. of Justiciary on the ground that A. was not a "seaman" within sect. 2 of the Act because he had not signed articles :—*Held :* A. was a seaman in the sense of the Act, & appeal dismissed.—THOMSON *v.* HART (1890), 18 R. (Ct. of Sess.) (J.) 3 ; 28 Sc. L. R. 28.—SCOT.

b. *When offence complete—Seaman not "lawfully engaged."*]—BELL *v.* MANSFIELD (1893), 19 V. L. R. 165.—AUS.

c. *Necessity to show on face of*

*Sect.* 10.—*Discipline: Sub-sect.* 3, *B.* (*c*) *ii.*, *C.* & *D. Sect.* 11: *Sub-sects.* 1 & 2, *A.*]

ships, receiving in the meantime certain daily wages & rations from the federation. Resps., with a view to compel these men to abstain from remaining on board the depot ship & fulfilling the engagements, wrongfully & without legal authority beset the deposit ship & the approach thereto. An information having been laid against resps. under Conspiracy & Protection of Property Act, 1875 (c. 86), s. 7 (4):—*Held:* they ought to be convicted inasmuch as, though fulfilling the engagements might not be an act which the men had a legal right to do within that sub-sect., remaining on board the depot ship & receiving the wages & rations were such acts; &, it was immaterial for the purposes of the sub-sect. that the relationship of master & servant did not exist between the federation & the men.—FARMER *v.* WILSON (1900), 69 L. J. Q. B. 496; 82 L. T. 566; 64 J. P. 486; 16 T. L. R. 309; 44 Sol. Jo. 363; 19 Cox, C. C. 502, D. C.

**932. —— —— Offence by seaman.**]—KENNEDY *v.* COWIE, No. 930, *ante.*

**933. —— —— —— Meaning of "seaman."**]—Persons who follow the sea as a calling are not "seamen" within the exception contained in sect. 16 of above Act, unless they are actually employed or engaged on board ship within the meaning of the definition of "seaman" contained in Merchant Shipping Act, 1854 (c. 104), s. 2, an indictment for intimidation under sect. 7 of above Act, will therefore lie against persons not so employed or engaged.—R. *v.* LYNCH & JONES, [1898] 1 Q. B. 61; 67 L. J. Q. B. 59; 77 L. T. 568; 46 W. R. 205; 14 T. L. R. 78; 42 Sol. Jo. 83; 8 Asp. M. L. C. 363; 18 Cox, C. C. 677, C. C. R.

**934. When offence complete—Seaman engaged but articles not signed.**]—By 1894 Act, s. 113, the master of every ship, except as therein mentioned, shall enter into an agreement with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom. By 1894 Act, s. 114, the agreement is to be in the form approved by the Board of Trade & is to be dated & signed as therein directed.

By 1894 Act, s. 236, if a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, he shall be liable to a penalty.

A seaman was engaged to serve as a seaman on a British ship. After he was so engaged, but before he had signed any agreement under 1894 Act, s. 113, a person attempted to persuade him to refuse to join the ship:—*Held:* the person could properly be convicted of attempting to persuade the seaman to refuse to join "his ship" although at the time of the attempt no agreement had been signed.—VICKERSON *v.* CROWE, [1914] 1 K. B. 462; 83 L. J. K. B. 469; 110 L. T. 425; 78 J. P. 88; 30 T. L. R. 111; 12 Asp. M. L. C. 446; 24 Cox, C. C. 122, D. C.

*Annotation:*—**Apld.** Haws *v.* Brown (1917), 81 J. P. 300.

### *C. Entry of Offences.*

*See* 1894 Act, ss. 228–231; 1906 Act, ss. 28, 36, 49.

**935. Entry in log—Seaman deserting in foreign port—1906 Act, s. 28.**]—COLBOURNE *v.* LAWRENCE, No. 665, *ante.*

### *D. Penalties.*

*See* 1894 Act, ss. 221, 225, 227, 232, 234–237, 376, 378.

**936. Agreement providing for penalties other than statutory—Ultra vires.**]—MERCANTILE S.S. Co. *v.* HALL, No. 573, *ante.*

**Loss of right to wages.**]—*See* Sect. 4, sub-sect. 3, *ante.*

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## SECT. 11.—DISCHARGE.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, ss. 127–130; 1906 Act, ss. 30–33, 36.

**937. Authority of master.**]—ROBINETT *v.* THE EXETER, No. 865, *ante.*

**938. ——.**]—THE PEARL (1804), 5 Ch. Rob. 224; 165 E. R. 756.

**939. Discharge abroad—Whether consent of seaman necessary.**]—By the general rule, a master is not at liberty to discharge his crew in a foreign port without their own consent, but circumstances may vest in him an authority to do so, upon proper conditions.—THE ELIZABETH (1819), 2 Dods. 403; 165 E. R. 1527.

*Annotations:*—**Consd.** The Olympic, [1913] P. 92; Horlock *v.* Beal, [1916] 1 A. C. 486; The British Trade, [1924] P. 104.

**—— Proceedings for penalty.**]—*See* CRIMINAL LAW, Vol. XV., p. 762, Nos. 8190, 8191.

**940. Discharge of foreign seaman in England—Right to return money.**]—(1) Foreign seamen engaged for a voyage out & home, are entitled, upon being discharged in this country against their own consent, to receive out of the proceeds of the ship passage money for their return home; not so seamen engaged during the course of the voyage.

(2) Seamen forced to provide themselves, the ship's provisions being exhausted, are entitled to board wages out of the proceeds of the ship.—THE SAN JOSE PRIMEIRO (1860), 3 L. T. 513; 1 Mar. L. C. 5.

**941. —— ——.**]—Foreign seamen discharged in Great Britain, & who recover wages in a suit against a foreign ship in which they served, are not entitled as of course to their passage money home, but will obtain it when their consul certifies they have gone or are about to go home. *Semble:* their shipping in another vessel as seamen, even for the voyage home, would disentitle them.—THE RAFFAELLUCCIA (1877), 37 L. T. 365; 3 Asp. M. L. C. 505.

*Annotation:*—**Reld.** The Tagus (1902), 19 T. L. R. 82.

**942. Sale of ship abroad—Right of seaman to complete voyage.**]—On a contract to employ pltf. on board a particular ship, on certain specified voyages:—*Held:* a breach, to sell the ship before those voyages are completed without procuring him similar employment on board that particular vessel.—DRISCOLL *v.* AUSTRALIAN ROYAL MAIL STEAM NAVIGATION CO. (1859), 1 F. & F. 458, N. P.

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*proceedings—Consent of both parties or foreign consul to prosecute.*]—*Re* FRASER, R. *v.* BLAIR & STAPLETON (1884), 24 N. B. R. 245.—CAN.

**PART III. SECT. 10, SUB-SECT. 3.—C.**

*d. Entry in log—"Wilfully & intentionally disobeying orders"—Whether action lies against master for bonâ fide entry.*]—HILL *v.* THOMSON (1892), 19 R. (Ct. of Sess.) 377; 29 Sc. L. R. 317.—SCOT.

**PART III. SECT. 11, SUB-SECT. 1.**

**937 i.** *Authority of master.*]—CHAN A. FOOK *v.* THE SEQUOIA (1921), 16 Hong Kong L. R. 7.—HONG KONG.

**937 ii. ——.**]—A master of a vessel is justified in dismissing a seaman for a single act of grave misconduct, such as attempting to kill or do grievous bodily harm to a petty officer.—MINISTER OF MARINE *v.* BRISCOE, MACNEIL & Co. (1899), 18 N. Z. L. R. 722.—N.Z.

**943. Certificate — As to discharge — Refusal to give—Whether action lies.**]—An action will not lie for the refusal to give to a seaman the certificate of discharge directed to be given by 17 & 18 Vict. c. 104, s. 172, the only remedy for such refusal being the penalty provided by that sect.—VALLANCE *v.* FALLE (1884), 13 Q. B. D. 109; 53 L. J. Q. B. 459; 51 L. T. 158; 48 J. P. 519; 32 W. R. 770; 5 Asp. M. L. C. 280, D. C.

*Annotation:*—**Mentd.** Groves *v.* Wimborne, [1898 2 Q. B. 402.

**944. —— —— —— Penalty for refusal.**]—VALLANCE *v.* FALLE, No. 943, *ante*.

—— **As to character—Forgery.**]—*See* CRIMINAL LAW, Vol. XV., p. 1065, No. 12,057.

**945. Disagreement as to interpretation of agreement—Vessel to be taken only to "places of safety"—Interpretation question for judge.**]—JOHNSON *v.* UNION LIGHTERAGE CO. (1924), 18 Lloyd, L. R. 418, D. C.

**Discharge of master.**]—*See* ADMIRALTY, Vol. I., pp. 114, 115, Nos. 189–192.

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SUB-SECT. 2.—WRONGFUL DISMISSAL.

*A. Claim for Compensation.*

*See* 1894 Act, s. 162.

**946. Right to compensation.**]—Compensation granted for improper dismissal of an engineer, £20.—CLEMENT *v.* AFRICAN S.S. CO. (1853), 6 L. T. 580.

**947. —— Method of assessment.**]—MITCHELL *v.* FOE (1866), cited in Maclachlan's Merchant Shipping, 5th ed. 239.

**948. —— In addition to damages.**]—THE JUSTITIA, No. 951, *post*.

**949. —— Condition precedent — Discharge before commencement of voyage—Or improper discharge before one month's wages earned.**]—Resp., a seaman, was engaged under an agreement in the prescribed form to serve on a ship on a voyage from Sunderland to Bilbao, & any other ports within certain degrees, & back to a port of discharge in the United Kingdom. The term of employment was not to exceed six months. The wages were stated to be at a monthly rate. The ship returned to Sunderland within twenty-three days, &, the voyage being thereupon terminated, resp. was duly discharged. Upon a summons issued by resp. against applt., the master, the justices held that he was entitled to compensation up to one month's wages for such discharge under Merchant Shipping Act, 1854 (c. 104), s. 167, & notwithstanding any agreement:—*Held:* being properly discharged under his agreement, resp. was not entitled to the benefit of Merchant Shipping Act, 1854 (c. 104), s. 167, since discharge before the commencement of the voyage, or an improper discharge before one month's wages have been

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**943 i.** *Certificate—As to discharge—Refusal to give—Whether action lies.*]—In an action by a seaman against the owners of a vessel on which he was employed for damages in respect of the failure of the master of the vessel to grant a certificate to pursuer on his discharge at Colombo:—*Held:* the duty imposed by M. S. Act, 1894, s. 128 (1) & M. S. Act, 1906, s. 31, of granting a certificate of discharge to a seaman discharged at any place either within or out of the United Kingdom, is a duty laid upon the master alone, & he alone is responsible for failure to perform it, & action dismissed. — DOWNIE *v.* CONNELL BROTHERS, LTD., [1910] S. C. 781.—**SCOT.**

**944 i.** —— —— —— *Penalty for refusal.*]—BÉLANGER *v.* GAGNON (1905), Q. R. 14 K. B. 340.—**CAN.**

**944 ii.** —— ——.]—SMITH *v.* SUTCLIFFE, SUTCLIFFE *v.* SMITH (1908), 28 N. Z. L. R. 207.—**N.Z.**

*e. Right to wages—During illness.*]—JOHANSEN *v.* HUDDART, PARKER, LTD., [1922] V. L. R. 750.—**AUS.**

*f.* ——.]—Where a vessel on her voyage from Quebec to England, in Dec., encountered so much ice in the Gulf of the St. Lawrence that she was obliged to be run ashore in order to avoid total shipwreck, & the master prevailed upon the crew by representations that the boat was condemned, to accept their wages up to that period in full discharge, which they did, & signed receipts therefor, but afterwards brought action, alleging that no provision had been made for their sustenance or for their reaching any other Atlantic port by which they could get to England, & praying for their wages & the value of their board & lodging up to the first of June following, their board & lodging was allowed & wages up to the opening of navigation.—THE JANE (1846), 1 R. de L. 355.—**CAN.**

*g. Refusal of marine superintendent to allow discharges—Repugnancy between Imperial Act and Federal Act.*]—UNION S.S. CO. OF NEW ZEALAND, LTD. *v.* THE COMMONWEALTH (1925), 36 C. L. R. 130; 31 Argus L. R. 269.—**AUS.**

*h. Grounds for discharge — Food insufficient & unwholesome.*]—Where seamen brought action to be discharged from their engagement on account of the insufficiency & unwholesomeness of the provisions supplied:—*Held:* unless the master was satisfied that he had the means of properly providing for the men, they should be discharged.—THE RECOVERY (1837), 1 S. V. A. R. 128.—**CAN.**

*k.* —— *Whether death of master & substitution of mate.*]—The death of the master & substitution of the mate in his place does not operate as a discharge of the seamen.—THE BRUNSWICK (1837), 1 S. V. A. R. 139.—**CAN.**

*l.* —— *Illness of seaman*]—When a seaman can safely proceed on his voyage he is not entitled to his discharge by reason of illness.—THE TWEED (1837), 1 S. V. A. R. 132.—**CAN.**

*m.* —— *Immorality or intemperance of master.*]—Immorality or intemperance of master is not alone a sufficient ground for dismissal.—THE BELLA MUDGE (1878), Y. A. D. 222.—**CAN.**

*n.* —— *Insolvency of owners of ship.*]—The insolvency of the owners does not *ipso facto* put an end to the functions of the master He must be dismissed by their assignee.—THE JEAN ANDERSON (1879), Y. A. D. 244.—**CAN.**

*o.* —— *Ill-usage.*]—A seaman is not entitled to his discharge & wages under Rev. Stat. Can. cap. 74, s. 58, where the ill-usage was a blow on the face with the fist, accompanied with very abusive language.—*Ex p.* LOWERY (1893), 32 N. B. R. 76.—**CAN.**

*p.* —— *Ship unseaworthy.*]—THE LAUREL WHALEN, [1919] N. Z. L. R. 343.—**N.Z.**

*q. Reasonableness of alleged custom at Vancouver.*]—There is no custom at the port of Vancouver that masters of tug-boats & small coasting vessels may on the one hand be discharged without notice, & on the other, leave their employer's service in the same manner, in either case receiving their wages to the date of termination of the service; & if there were such custom the ct. would refuse to enforce it on the ground of unreasonableness.—ROBERTS *v.* THE TARTAR (1908), 13 B. C. R. 474.—**CAN.**

*r. Whether shipping master has discretion — Captain consenting to discharge.*]—Where the captain of a ship consents to the discharge of a seaman, who also desires to be discharged, the shipping master has no discretion in the matter, but is bound to sanction the discharge of the seaman under M. S. Acts, 1854 & 1862, & the regulations of the Board of Trade.—R. *v.* CALCUTTA SHIPPING MASTER (1867), 2 Ind. Jur. N. S. 371.—**IND.**

*t.* —— *Articles of seaman unexpired.*]—The Shipping Master of Bombay has a discretion vested in him of refusing to sanction the discharge of a seaman shipped from a foreign port whose articles have not expired, though the seaman consents to such discharge.—*Re* LEWIS (1869), 6 Bom. O. C. 42.—**IND.**

**PART III. SECT. 11, SUB-SECT. 2.—A.**

**946 i.** *Right to compensation.*]—THE INVERNESSHIRE (NO. 2) (1915), 11 Tas. L. R. 123.—**AUS.**

**943 ii.** ——.]—J. was hired in New York as master of a Norwegian ship for a voyage to Halifax & thence to the West Indies. On arriving at Halifax he found that the ship was to go to Newfoundland & from there to Italy. He was offered $400 a month for the new voyage & agreed to go for $450 or, at all events, more than was paid to the chief engineer. Without further notice the owner engaged a new master & chief engineer, paying the latter $400 a month. J. left the ship &, the owner refusing to pay the account he rendered, brought an action claiming damages for wrongful dismissal:—*Held:* he was entitled to recover; & not having been hired for a definite term he was entitled to reasonable notice before being dismissed; & the assessment of his damages at three months' wages, the arrears due when he was suspended, & expenses of his trip to Norway after dismissal should not be disturbed.—THE FORT MORGAN *v.* JACOBSEN (1919), 59 S. C. R. 404; 51 D. L. R. 149.—**CAN.**

*a. Allowance for viaticum.*]—A seaman wrongfully discharged in the port of Melbourne is not entitled to receive as part of his compensation an

*Sect.* 11.—*Discharge: Sub-sect.* 2, *A. & B. Sects.* 12 & 13. *Part IV. Sect.* 1: *Sub-sect.* 1, *A.*]

earned, are the conditions precedent to the relief given by the Act.—TINDLE *v.* DAVISON (1892), 61 L. J. M. C. 107; 66 L. T. 372; 56 J. P. 390; 7 Asp. M. L. C. 169, D. C.

*Annotation*:—**Reld.** The Olympic, [1913] P. 92.

**Jurisdiction of Admiralty Court.**]—*See* ADMIRALTY, Vol. I., p. 134, No. 415.

*B. Action for Damages.*

**950. Right to damages.**]—DOWDELL *v.* AUSTRALIAN ROYAL MAIL STEAM NAVIGATION CO. (1853), 8 L. T. 30.

**951. —— In addition to compensation.**]—In an action by a seaman for breach of the stipulations in his agreement for service, the ct., in addition to the compensation provided by Merchant Shipping Act, 1854 (c. 104), can award general damages for breach of the agreement, & for hardships incurred by the seamen through the vessel being employed for purposes other than those contemplated by the agreement.—THE JUSTITIA (1887), 12 P. D. 145; 56 L. J. P. 111; 57 L. T. 816; 6 Asp. M. L. C. 198.

*Annotations*:—**Folld.** O'Neil *v.* Armstrong, Mitchell, [1895] 2 Q. B. 70; Austin Friars S.S. Co. *v.* Strack, The Same *v.* Strack, [1905] 2 K. B. 315. **Expld.** Caine *v.* Palace Shipping Co. (1906), 12 Com. Cas. 96. **Reld.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273.

**952. —— Contract for whole voyage.**]—A seaman having contracted to go a voyage from A. to B. & back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro ratâ* as far as B.; though he were there wrongfully dismissed by deft., the captain: but his remedy is either for the breach of the special contract, or for such tortious act of the captain's, whereby he was prevented from earning his wages.—HULLE *v.* HEIGHTMAN (1802), 2 East, 145; 102 E. R. 324.

*Annotations*:—**Consd.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Reld.** Thomas *v.* Williams (1834), 3 Nev. & M. K. B. 545. **Mentd.** Collins *v.* Price (1828), 2 Moo. & P. 233; Prickett *v.* Badger (1856), 1 C. B. N. S. 296.

**953. —— Master refusing to be on board.**]—THE SIR THOMAS GRESHAM, RIPPON *v.* LIDGETT (1858), 7 L. T. 196.

**954. —— Seaman left behind—Disability from accident.**]—ROBERTS *v.* MARTIN (1858), 31 L. T. O. S. 99; 22 J. P. 271.

**955. —— Termination of service by altered character of voyage—Carriage of contraband.**]—AUSTIN FRIARS S.S. CO. *v.* STRACK, SAME *v.* STRACK, No. 693, *ante*.

**956.** —— —— ——.]—British seamen signed an agreement for a voyage from Cardiff to any ports within certain limits, including Hong Kong, knowing that Russia & Japan were at war, that the ship was to carry coal to Hong Kong, & that coal was treated by both belligerents as contraband of war. At Hong Kong the master required the men to proceed with the coal to a naval base in Japan within the limits, & on their refusal illegally procured their imprisonment & left them at Hong Kong & proceeded to Japan without paying them their wages:—*Held*: (1) the agreement being for a peaceful commercial voyage, the men were justified in refusing to go to Japan at the risk of war capture & its consequences; (2) they were entitled to wages until the final settlement, & to the costs of maintenance for the same period under the head of damages for wrongful discharge.—PALACE SHIPPING CO., LTD. *v.* CAINE, [1907] A. C. 386; 76 L. J. K. B. 1079; 97 L. T. 587; 23 T. L. R. 731; 51 Sol. Jo. 716; 10 Asp. M. L. C. 529; 13 Com. Cas. 51, H. L.; *affg.* S. C. *sub nom.* CAINE *v.* PALACE S.S. CO., [1907] 1 K. B. 670, C. A.

*Annotations*:—*As to* (1) **Reld.** Hutton *v.* Ras S.S. Co., [1907] 1 K. B. 834. *As to* (2) **Expld.** Collins *v.* Simpson S.S. Co. (1907), 24 T. L. R. 176. **Folld.** Sibery *v.* Connelly (1907), 96 L. T. 140. *Generally*, **Reld.** Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

**957. —— Previous order of naval court—Finding seamen guilty of insubordination—Estoppel.**]—HUTTON *v.* RAS S.S. CO., LTD., No. 887, *ante*.

**958. In respect of what matters damages recoverable—Loss of kit.**]—BURTON *v.* PINKERTON, No. 601, *ante*.

**959.** —— ——.]—COLLINS *v.* SIMPSON S.S. CO., No. 679, *ante*.

**960. —— Imprisonment.**]—BURTON *v.* PINKERTON, No. 601, *ante*.

**961. —— Hardship.**]—THE JUSTITIA, No. 951, *ante*.

**962.** —— ——.]—COLLINS *v.* SIMPSON S.S. CO., No. 679, *ante*.

**963. Taxation of expenses—Loss of subsistence.**]—Pltf. obtained a verdict. Deft. obtained a rule *nisi* for a new trial, which was discharged. Pltf. was a witness in his own cause; & he remained in this country till after the rule *nisi* was discharged. On taxation the master allowed pltf. subsistence money from the time the rule was granted till it was discharged. On a rule to review the taxation:—*Held*: as the master must be taken to have found that pltf. was a necessary witness, that he could not have attended a second trial, if one were ordered, unless he remained, & his remaining incapacitated him from earning his subsistence, the detention might, under those special circumstances, be considered as part of the costs of the rule; & the allowance was right.

It is not a general rule that parties, if witnesses, are to have an allowance for their attendance.—DOWDELL *v.* AUSTRALIAN ROYAL MAIL STEAM NAVIGATION CO. (1854), 3 E. & B. 902; 2 C. L. R. 1656; 23 L. J. Q. B. 369; 23 L. T. O. S. 189; 18 Jur. 579; 2 W. R. 554; 118 E. R. 1379.

*Annotation*:—**Reld.** The Bahia (1865), L. R. 1 A. & E. 15.

**964.** —— ——.]—An action was brought by a seafaring man for unliquidated damages for a breach of an agreement, & upon the trial it was pressed upon the jury as a subject of damages, that pltf. had been detained in this country for thirty-two weeks, awaiting the trial, & the jury gave him £32 in respect of that claim. Upon the taxation

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allowance for *viaticum* to London, his port of engagement, if it be proved that he would have obtained employment on ships bound direct to London at higher wages than he was receiving when discharged.—THE FERRET (1881-2), 8 V. L. R. (Adm.) 1, P. C.—**AUS.**

*b. Right to compensation—Equal to loss of wages.*]—The action whereby a sailor, dismissed without reason, claims from his employers the amount equal to the loss of his wages during the balance of the season, is not a suit for wages, withdrawn from the jurisdiction of the Superior Ct. by M. S. Act.—SIMARD *v.* CANADA S.S. CO. (1916), Q. R. 50 S. C. 105.—**CAN.**

**PART III. SECT. 11, SUB-SECT. 2.—B.**

**950 i.** *Right to damages.*]—Damages for wrongful dismissal may be sued for & recovered as wages.—THE W. B. HALL, 8 C. L. T. Occ. N. 169.—**CAN.**

**950 ii.** ——.]—GUILDFORD *v.* ANGLO-FRENCH S.S. CO. (1883), 9 S. C. R. 303.—**CAN.**

*c.* —— *Justification by master of refusal to obey orders.*]—THE LADY EILEEN *v.* POULIOT (1907), 11 Exch. C. R. 87.—**CAN.**

*d. Whether maintenance costs allowed.*]—Maintenance costs are allowed when the action is not one of wrongful dismissal.—HARVEY *v.* EWAN (1881), 2 N. S. W. L. R. (Law) 267.—**AUS.**

*e. What amounts to wrongful discharge—Seamen abandoned disabled.*]—Abandoning seamen disabled in the service of the ship, without providing for their support & care, is equivalent to a wrongful discharge.—THE ATLANTIC (1837), 1 S. V. A. R. 125.—**CAN.**

of pltf.'s costs the master allowed him £20 for subsistence money pending the action:—*Held:* the jury, having included such subsistence money in their verdict, it ought not to have been allowed in the taxed costs.—BARKER *v.* CLOUGH (1861), 4 L. T. 306; 7 Jur. N. S. 545; 9 W. R. 618.

—— ——.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 440–442, Nos. 4585–4597.

**Jurisdiction of Admiralty Court.**] — *See* ADMIRALTY, Vol. I., pp. 134, 247, Nos. 414, 1750.

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SECT. 12.—**SEAMEN VOLUNTEERING FOR ROYAL NAVY.**

*See* 1894 Act, s. 195.

**965. Enlistment after desertion of ship—Consequent on insubordination.**] — (1) A mariner quitted a vessel in defiance of the master, with opprobrious language; &, without any declaration of such intention when he quitted the vessel, entered on board a king's ship within twenty-four hours, this is desertion, working a forfeiture of wages.

(2) A clause in the articles, to the effect that mere absence for less than twenty-four hours shall not be deemed a desertion, relates to occasional absences, & not to a wilful denial of authority.—THE AMPHITRITE (1832), 2 Hag. Adm. 403; 166 E. R. 291.

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SECT. 13.—**REGISTRATION AND RETURNS RESPECTING SEAMEN.**

*See* 1894 Act, ss. 195, 252–258.

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# Part IV.—Authority and Liability of Master as Custodian of Ship and Cargo.

SECT. 1.—**GENERAL AUTHORITY AND LIABILITY.**

SUB-SECT. 1.—AUTHORITY.

*A. In General.*

**966. Extent of authority—General rule.**]—The master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed.

The authority of the master of a ship is very large & extends to all acts that are usual & necessary for the use & enjoyment of the ship; but is subject to several well known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign ports, & under certain circumstances at home, for necessary disbursements, & for repairs, & bind the owners for repayment; but his authority is limited by the necessity of the case, & he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, & acknowledge the nature & condition of the goods (JERVIS, C.J.).—GRANT *v.* NORWAY (1851), 10 C. B. 665; 20 L. J. C. P. 93; 16 L. T. O. S. 504; 15 Jur. 296; 138 E. R. 263.

*Annotations:*—**Consd.** Coleman *v.* Riches (1855), 16 C. B. 104; Reynolds *v.* Jex (1865), 7 B. & S. 86; Gunn *v.* Roberts (1874), 43 L. J. C. P. 233. **Apld.** Cox *v.* Bruce (1886), 18 Q. B. D. 147; Thorman *v.* Burt, Boulton (1886), 54 L. T. 349. **Consd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117; Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237. **Refd.** Udell *v.* Atherton (1861), 7 H. & N. 172; Stagg *v.* Elliott (1862), 12 C. B. N. S. 373; British Columbia & Vancouver's Island Spar, Lumber & Saw Mills Co. *v.* Nettleship (1868), 16 W. R. 1046; Pyman *v.* Burt (1883), Cab. & El. 207; Parsons *v.* New Zeland Shipping Co., [1901] 1 K. B. 548; Hambro *v.* Burnand, [1903] 2 K. B. 399; Russo Chinese Bank *v.* Li Yau Sam, [1910] A. C. 174; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489; Jones *v.* Oceanic Steam Navigation Co., [1924] 2 K. B. 730.

**967. Right to maintain action for trespass—For wrongful seizure.**]—The master of a ship may, though he is not owner, maintain trespass against any one who seizes the ship or if he sustains any consequential damage thereby case.—PITTS *v.* GAINEE & FORESIGHT (1700), 1 Ld. Raym. 558; Holt, K. B. 12; 1 Salk. 10; 91 E. R. 1272.

*Annotations:*—**Apld.** Moore *v.* Robinson (1831), 1 L. J. K. B. 4. **Refd.** The Jupiter (No. 3), [1927] P. 122. **Mentd.** Hopper *v.* Reeve (1817), 1 Moore, C. P. 407 Newcastle *v.* Clark (1818), 2 Moore, C. P. 666; Branscomb *v.* Brydges (1823), 2 Dow. & Ry. K. B. 256; Parker *v.* Bailey (1824), 4 Dow. & Ry. K. B. 215; Moreton *v.* Hardern (1825), 4 B. & C. 223; Hansworth *v.* Fowkes (1833), 2 L. J. K. B. 72; Muskett *v.* Hill (1839), 5 Bing. N. S. 694; M'Mahon *v.* Lennard (1858), 6 H. L. Cas. 970.

**968. —— Injury to ship.**]—Where pltf. had the superintendence of a boat belonging to the proprietors of the Aire & Calder Canal, & hired the man who assisted him in the navigation of it:—*Held:* he might maintain trespass for any injury done to the boat.—MOORE *v.* ROBINSON (1831), 2 B. & Ad. 817; 1 L. J. K. B. 4; 109 E. R. 1646.

*Annotations:*—**Consd.** The Jupiter (No. 3), [1927] P. 122. **Mentd.** British Columbia Electric Ry. *v.* Stewart, [1913] A. C. 816.

**969. Authority as servant of owners.**]—SPEERMAN *v.* DEGRAVE, No. 1082, *post.*

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**PART IV. SECT. 1, SUB-SECT. 1.—A.**

**969 i.** *Authority as servant of owners.*] —THE ALEXANDER WILLIAMS (1878), Y. A. D. 217.—CAN.

**969 ii.** ——.]—Pltf. sued deft. for the price of a barrel of beef supplied by him to the master of deft.'s vessel. The beef was shown to be necessary for the vessel, but it appeared that deft. had an agent at the place where it was procured who might have been requested by the master to supply or procure the beef for him:—*Held:* in the absence of evidence to show that the master had made such a request to the agent, or that he had special authority to bind the owner, pltf. could not recover.—PETTIPAS *v.* CROSBY (1888), 20 N. S. R. (8 R. & G.) 446; 9 C. L. T. 197.—CAN.

**969 iii.** ——.]—The master of a ship sought to enforce a claim *in rem* for wages as well as for disbursements & liabilities assumed in respect of necessaries supplied the ship, for which he had made a joint note with the owner for $250 under an agreement that the note should be paid out of the earnings of the ship. This agreement was made without the consent or knowledge of the mtgee.:—*Held:* the master did not exceed his authority in borrowing money on the note for the purposes of the ship, it appearing that the sum so borrowed had been duly & properly expended for the ship.—REIDE & HAYES *v.* THE QUEEN OF THE ISLES (1892), 3 Exch. C. R. 258.—CAN.

**969 iv.** ——.]—LARSEN *v.* IRELAND & SON (1892), 20 R. (Ct. of Sess.) 228; 30 Sc. L. R. 228.—SCOT.

**969 v.** ——.]—A master of a vessel has sufficient authority to sue for damages for an injury to the ship occasioned by the wrongful act of a

*Sect.* 1.—*General authority and liability: Sub-sect.* 1, *A. & B.*]

**970.** ——.]—*Re* STRICKLAND, *Ex p.* BLAND, No. 445, *ante.*

**971. Payment of ransom money.**]—HELLY *v.* GRANT (1783), cited in 1 Term Rep. at p. 76; 99 E. R. 980.

*Annotation:*—**Consd.** Yates *v.* Hall (1785), 1 Term Rep. 73.

**972.** ——.]—Ransom of ships is a species of salvage, & the owners are bound by the contract of the master.—ANON. (1702), 11 Mod. Rep. 6; 88 E. R. 849.

**973. Payment to member of crew—As inducement to become hostage.**]—A promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners although they abandon the ship & cargo.—YATES *v.* HALL (1785), 1 Term Rep. 73; 99 E. R. 979.

*Annotations:*—**Refd.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47; Jackson *v.* Blanche (Owners), The Hopper No. 66, [1908] A. C. 126.

**974. Authority to contract.**]—The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship (LORD CHELMSFORD).—MCLEAN & HOPE *v.* FLEMING (1871), L. R. 2 Sc. & Div. 128; 25 L. T. 317; 1 Asp. M. L. C. 160, H. L.

*Annotations:*—**Consd.** Smith *v.* Bedouin Steam Navigation Co., [1896] A. C. 70; Whitechurch *v.* Cavanagh, [1902] A. C. 117. **Refd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522; Brown *v.* Powell Coal Co. (1875), L. R. 10 C. P. 562; Pyman *v.* Burt (1883), Cab. & El. 207; Red "R." S.S. Co. *v.* Allatini (1909), 100 L. T. 268; Kish *v.* Taylor, [1912] A. C. 604; New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664. **Mentd.** The Hollinside (1898), 3 Com. Cas. 100.

**975.** —— **Engagement of pilot.**]—On the part of the owner, it is certainly not a valid ground of defence that it was an agreement [for pilotage] made only by the master, because the master's agreement in the service of the vessel, not affected by collusion or fraud, would be as binding on the owner as if made in his own person (SIR WILLIAM SCOTT).—THE NELSON (1805), 6 Ch. Rob. 227; 165 E. R. 911.

*Annotation:*—**Mentd.** The Ambatielos, The Cephalonia, [1923] P. 68.

**976.** —— **To borrow money—At home or abroad.**]—GRANT *v.* NORWAY, No. 966, *ante.*

**977.** —— —— **Transaction to owner's benefit.**]—The master of a ship, who had expended all the money furnished to him by his employers, entered into a contract abroad for the purpose of obtaining funds to enable him to lay in the cargo which constituted the main object of his voyage:—*Held:* under the circumstances, & upon its appearing that the owners had derived benefit from the contract in question, that they had no right to repudiate the claim of the party by whom the advance was made, upon the ground that the master had exceeded his authority in the transaction; or that he had obtained the advance by means of representations to the lender the truth of which the latter was not in a position to prove.

*Qu.:* if the conduct of the master had been proved by the owners to be fraudulent, & his representations untrue, whether, in such a case, a person in the position of pltf. ought to bear the loss arising from the misconduct of the master, who was an agent of the owners.—ASHMALL *v.* WOOD (1857), 30 L. T. O. S. 20; 3 Jur. N. S. 232; 5 W. R. 397; *previous proceedings*, 28 L. T. O. S. 30.

**978.** —— **Hire of ship.**]—GRANT *v.* NORWAY, No. 966, *ante.*

**979.** —— **Hiring of servants.**]—A., the ostensible commander of a ship in the temporary possession of B. has an implied authority from B. in the absence of evidence to the contrary, to hire servants for the ship's purposes.—LUTTRELL *v.* CHINA NAVIGATION CO. (1863), 1 New Rep. 329.

**980.** —— **Appointment of agent.**]—The master has authority to appoint an agent, both for ship & cargo, when there is no representative of the owner of the cargo.—THE SOBLOMSTEN (1866), L. R. 1 A. & E. 293; 36 L. J. Adm. 5; 15 L. T. 393; 15 W. R. 591; 2 Mar. L. C. 436.

*Annotations:*—**Refd.** The Teutonia (1871), L. R. 3 A. & E. 394; Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613; The Mogileff, [1921] P. 236. **Mentd.** The Livietta (1883), 8 P. D. 209.

—— **Charterparties.**]—*See* Part VII., Sect. 2, sub-sect. 3, *post.*

—— **Signature to bills of lading.**]—*See* Part VII., Sect. 3, sub-sect. 4, B., *post.*

—— **Freight.**]—*See* Part VIII., Sect. 2, *post.*

**981. Right to promote seaman—To vacant post—With corresponding increase of wages.**]—HICKS *v.* WALKER, No. 791, *ante.*

**982.** —— —— ——.]—BATES *v.* FINLAY (1865), 30 J. P. 55.

*Annotation:*—**Distd.** Hanson *v.* Royden (1867), 37 L. J. C. P. 66.

**983. Right to increase wages—On appointment of new steward—Post vacant through death.**]—HICKS *v.* WALKER, No. 791, *ante.*

**984. Settlement of accounts—Freight & demurrage.**]—Pltf. the owner of a ship, entered into a charterparty with defts., containing stipulations as to demurrage. The ship was detained in South America beyond the time stipulated for. The captain was in possession of the ship, he was to be paid freight & demurrage by bill in South America. After the making of the charterparty, & before the settlement hereafter mentioned, the ship with the charter was sold to F. The captain became a part owner of the ship. The captain having settled the account for freight, demurrage, & delay with deft., by taking a bill in South America:—*Held:* F. & pltf., in whose name he was suing, were bound by such settlement.—ALEXANDER *v.* DOWIE (1856), 1 H. & N. 152; 25 L. J. Ex. 281; 27 L. T. O. S. 159; 156 E. R. 1156.

**985. Expenses in defence against false charge—Brought by crew—Forfeit of security to prosecute for perjury.**]—A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried & acquitted, & bound over in a sum of £10 to prosecute the men for perjury. He forfeited the £10 in order to return with the vessel to England:—*Held:* (1) the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men; (2) the ct. allowed the £10 forfeit, as it was for the interest of his owners that the master should not be delayed in returning with

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Board vested with control of a patent slip, or its servants.—GIFFORD *v.* TABLE BAY DOCK & BREAKWATER MANAGEMENT COMMISSION (1874), Buch. 96.—S. AF.

*f. Authority to contract—For discharge of vessel.*]—*Re* THE VOLAGE, MCKENZIE *v.* JOHNSON (1901), 18 S. C. 276; 11 C. T. R. 450.—S. AF.

*g. Acting master accepting service of writ.*]—Where deft. resided in Wales & the master of his ship had died at St. John's, Newfoundland, where she had put into for repairs:—*Held:* the acting master of the ship (the mate) was to be deemed the recognised agent of such owner for the purpose of compelling him to accept service of a writ on behalf of the owner.—DOOLY *v.* JONES (1867), 5 Nfld. L. R. 200.—NFLD.

the vessel.—THE JAMES SEDDON (1866), L. R. 1 A. & E. 62; 35 L. J. Adm. 117; 15 L. T. 636; 12 Jur. N. S. 609; 14 W. R. 973; 2 Mar. L. C. 443.

*Annotation:*—*As to* (1) & (2) **Consd.** *Re* Famatina Development Corpn., [1914] 2 Ch. 271.

**986. Salvage — Under & apart from express stipulation.**]—The steamer *T.*, while on a voyage from Marseilles to London, fell in with the steamer *S.*, which had been disabled by an accident to her machinery. The master of the *T.* agreed to tow the *S.* to port for a sum agreed on. In endeavouring to do so the *T.* negligently came into collision with the *S.* & sunk her. The policy of insurance upon the *T.* & her bills of lading provided that she might assist & tow vessels in all situations. The master of the *T.* had never received any instructions from the owners as to performing salvage services:—*Held:* the master of the *T.* was acting within the scope of his general authority as master in endeavouring to tow the *S.* to port, & the owners of the *T.* were consequently liable for the damage caused by his negligence in so doing.

*Semble:* even if there had been no clause in the policy of insurance or bills of lading as to salvage services, the master would nevertheless have been acting within his general authority as master in rendering salvage service to the *S.*—THE THETIS (1869), L. R. 2 A. & E. 365; 38 L. J. Adm. 42; 22 L. T. 276; 3 Mar. L. C. 357.

*Annotations:*—**Refd.** The C. S. Butler, The Baltic (1874), 30 L. T. 475. **Mentd.** Bayley *v.* M. S. & L. Ry. (1872), L. R. 7 C. P. 415; The Charkieh (1873), L. R. 4 A. & E. 59.

**987. Towage.**] — The steamship *W.*, having found the steamship *A.* on Feb. 12 off Cape Finisterre in a disabled condition, towed her in heavy weather until Feb. 14 when, in consequence of the condition of the *A.*, the master of the *W.* proposed to abandon her. However, at the desire of the master of the *A.* it was agreed in writing that the *W.* should "stand by the *A.* as long as possible, & that the *W.* & owners are to be paid for the time & towing already done & to be done from Feb. 12, 1883." The *W.* thereupon again took the *A.* in tow, but on Feb. 16, owing to stress of weather, it was found necessary to abandon her, after which she was totally lost. In an action for towage against the owners of the *A.*, the ct. held that the agreement entered into by the master of the *A.*, was a reasonable one, & one which, in his position of agent, *ex necessitate* for his owners, he had an authority to enter into, & awarded pltfs. the sum of £400, in respect of the services rendered prior to & after the agreement.—WELLFIELD (OWNERS) *v.* ADAMSON & SHORT, THE ALFRED (1884), 50 L. T. 511; 5 Asp. M. L. C. 214.

**988. Institution of proceedings — Action in rem in foreign port.**]—*Semble:* the master of a ship carrying cargo where his ship & cargo have been damaged by collision in or near a foreign port, has authority to institute an action *in rem* in the foreign port against the offending ship on behalf of both ship & cargo, & the owners of the cargo cannot, so long as that suit is pending in their names, be allowed to deny his authority.—THE REINBECK (1889), 60 L. T. 209; 6 Asp. M. L. C. 366.

*Annotation:*—**Mentd.** The Mannheim, [1897] P. 13.

—— **For freight.**]—*See* No. 4538, *post.*

**989. Costs of defending action on bill—Drawn by master on owners.**]—The costs incurred by a master in unsuccessfully defending an action on a dishonoured bill of exchange drawn by him on his owners for the price of coals supplied to the ship will not be deemed "liabilities properly incurred by him, as master, on account of the ship" within 1894 Act, s. 167, unless the defence was reasonably necessary in the interests of the ship.—THE ELMVILLE (No. 2), [1904] P. 422; 74 L. J. P. 69; 53 W. R. 287; 20 T. L. R. 783.

**990. Authority as agent to receive goods for carriage—Not to accept delivery.**]—The captain is an agent to receive the goods for the purpose of carriage, not to accept delivery of them.

The captain of the ship is merely an agent to receive the goods for the purpose of carriage; he knows nothing of the contract of purchase & is not an agent to accept delivery under it (BIGHAM, J.).—VIGERS BROTHERS *v.* SANDERSON BROTHERS, [1901] 1 K. B. 608; 70 L. J. K. B. 383; 84 L. T. 464; 49 W. R. 411; 17 T. L. R. 316; 45 Sol. Jo. 328; 6 Com. Cas. 99.

*Annotations:*—**Refd.** Aron *v.* Comptoir Wegimont, [1921] 3 K. B. 435. **Mentd.** *Re* Bourgeois & Wilson, Holgate (1920), 25 Com. Cas. 260; Szymonowski *v.* Beck, [1923] 1 K. B. 457.

**991. Control of ship — Where pilot on board — Unpaid pilot.**]—A pilot allowed to be in control of pltfs.' ship by her master for his own convenience negligently ran her ashore off Barry, in the Bristol Channel. The pilot was a volunteer in the sense that he was not to be paid for piloting the ship until she reached Flatholm, which is beyond Barry. In an action brought by the shipowners against the pilot:—*Held:* although the pilot was negligent, the master had no right to give up control of the vessel to an unpaid pilot, & was guilty of contributory negligence in so doing, & the owners therefore could not succeed in their action.—THE BONVILSTON (1914), 30 T. L. R. 311.

**992. Death of captain—Chief mate succeeding—Authority to promote seaman—With corresponding increase of wages.**]—HANSON *v.* ROYDEN, No. 792, *ante.*

**Preservation of cargo.**]—*See* Part VII., Sect. 6, sub-sect. 3, A., *post.*

**Authority to collect freight—Whether an assignment.**]—*See* No. 4700, *post.*

**Sale of ship.**]—*See* Part IV., Sect. 6, *post.*

**Sale of cargo.**]—*See* Part VII., Sect. 6, sub-sect. 6, *post.*

*B. Limitation of General Authority.*

**993. Acts contrary to law.**] — I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any; & where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage (LORD ELLENBOROUGH, C.J.). — EARLE *v.* ROWCROFT (1806), 8 East, 126; 103 E. R. 292.

*Annotations:*—**Apld.** Wilson *v.* Rankin (1865), 6 B. & S. 208. **Refd.** Grill *v.* General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600; Atkinson & Hewitt *v.* Great Western Insce., New York (1872), 27 L. T. 103; Australasian Insce. *v.* Jackson (1875), 33 L. T. 286; Cory *v.* Burr (1883), 8 App. Cas. 393; Westport Coal Co. *v.* McPhail, [1898] 2 Q. B. 130.

**994.** ——.] — A master of a vessel, though acting within the scope of his ordinary authority as master, who does an act in contravention of the laws of his country without the express authority, knowledge or sanction of his owner, whether with or without a view to the owner's advantage, is guilty of an implied breach of his orders.—WILSON *v.* RANKIN (1865), L. R. 1 Q. B. 162; 6 B. & S. 208; 35 L. J. Q. B. 87; 13 L. T. 564; 14 W. R. 198; 2 Mar. L. C. 287; 122 E. R. 1173, Ex. Ch.

*Annotation:*—**Refd.** Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. 581.

**995. Acts outside scope of authority.**] — LYALL *v.* HICKS, No. 1246, *post.*

*Sect.* 1.—*General authority and liability: Sub-sect.* 1, *B.: sub-sect.* 2.]

**996. Contractual authority—Pledging credit of owners.**]—The master of a vessel agreed with a tug for towage from Sea Reach in the Thames to a London wharf, & agreed to pay £6 & give an order upon the owner of the wharf for the amount usually allowed by him, under the name of towage, as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, & the master paid the £6, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf according to his practice was proved; & it was also proved that if an order, signed by the master of the vessel towed, was presented by the master of the tug, the money would be, as a matter of practice, paid to him:—*Held:* the master of the vessel had no authority to agree to transfer to the master of the tug an uncertan sum payable to the owners of the vessel; & the ct. had no authority to enforce such a contract or give damages for the breach of it.—THE MARTHA (1861), 1 Lush. 314; 167 E. R. 138.

—— —— **Necessaries.**]—*See* Sect. 2, *post.*

**997.** —— **Insurance of ship—Bottomry bond to pay for premiums.**]—(1) The master of a ship putting into a foreign port of distress has not authority to insure the ship or freight for performing the residue of the voyage, & has no authority, therefore, to grant a bottomry bond on the ship to pay for the premiums of such insurance.

(2) A bottomry bond, to cover payment of premiums of such insurance, stipulated that, in case of average or loss of the ship, the lender should obtain reimbursement from the underwriters, & should thence repay himself the premiums of insurance, with interest, commission & costs, holding the remainder at the disposal of the master or his principal. *Semble*, such a bond was also invalid, as not being conditioned to bear maritime risk.—THE SERAFINA (1864), Brown. & Lush. 277; 167 E. R. 362.

**998.** —— **Whether authority ousted—By presence of agents of owner.**]—THE EQUATOR (1921), 56 L. J. C. C. 76; 152 L. T. Jo. 259, D. C.

—— **Freight.**]—*See* Part VIII., Sect. 2.

**999. Alteration of voyage—Substitution of new for agreed voyage.**]—The captain of a ship has no authority as such to agree to the substitution of another voyage in the place of the one agreed upon between his owners & the freighters of the ship in England, & on which he has sailed to a foreign country.—BURGON *v.* SHARPE (1810), 2 Camp. 529; 170 E. R. 1241, N. P.

**1000.** —— **Apprehended danger.**]—THE ROEBUCK, No. 735, *ante.*

**1001.** —— **Deviation to save property only.**]—A deviation for the purposes of saving life is justifiable, but not a deviation for the mere purpose of saving property.

Defts.' ship was chartered by pltfs. to carry a cargo of wheat from C. to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted & went to the assistance of a vessel in distress, called the *Arion*, & the master, in consideration of £1,000 agreed to tow her into the T., which was out of his direct course. Whilst doing so defts.' vessel was stranded, & ultimately, with her cargo, was totally lost. The jury found that it was not reasonably necessary to take the *Arion* to the T. in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her & her cargo:—*Held:* the deviation was unjustifiable, & consequently pltfs. were entitled to recover the value of the cargo against defts. as owners of the ship.—SCARAMANGA *v.* STAMP (1880), 5 C. P. D. 295; 49 L. J. Q. B. 674; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. L. C. 295, C. A.

*Annotations:*—**Refd.** Kish *v.* Taylor (1910), 80 L. J. K. B. 601; A.-G. *v.* Smith (1918), 87 L. J. K. B. 1045. **Mentd.** Brandon *v.* Osborne, Garrett, [1924] 1 K. B. 548.

SUB-SECT. 2.—LIABILITY.

**1002. General rule—Duty to take care of ship & cargo.**]—When the ship is brought in, the master writes to Mr. F., his asserted owner's correspondent in London, informing him that the ship is taken, & she is immediately claimed. But no claim is given for the cargo till after a considerable time. It is said no mention was made of the cargo, as it is not usual to mention it, although it belongs to the owner of the ship. It may be so, but it seems to be the natural conduct on such an occasion & indeed the duty of the master when both are equally in danger, to take care of one as well as of the other (SIR WILLIAM SCOTT).—THE ARGO (1799), 1 Ch. Rob. 158; 165 E. R. 133.

**1003. Duty to inform owners—Of danger—Owners of ship & cargo.**]—THE ARGO, No. 1002, *ante.*

**1004.** —— **Of accidents—To ship.**]—THE CAMILLA, No. 742, *ante.*

**1005. Loss of cargo by theft.**]—An action in the case lies against the master of a ship to recover the value of goods which he has received upon freight, on their being stolen by open force & violence from on board ship while lying in the river Thames.—MORS *v.* SLUCE (1672), 1 Mod. Rep. 85; 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; T. Raym. 220; 1 Vent. 190; 86 E. R. 752.

*Annotations:*—**Apld.** Boson *v.* Sandford (1688), 3 Lev. 258. **Consd.** Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194. **Expld.** Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894. **Consd.** Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338; Nugent *v.* Smith (1876), 1 C. P. D. 423. **Refd.** Barton *v.* Wolliford (1686), Comb. 56; Coggs *v.* Bernard (1703), 2 Ld. Raym. 909; Drinkwater *v.* Quenell (1738), 7 Mod. Rep. 248; Mitchell *v.* Torup (1766), Park. 227; Gibbon *v.* Paynton (1769), 4 Burr. 2298; Bodenham *v.* Bennett (1817), 4 Price, 31; Crouch *v.* L. & N. W. Ry. (1854), 14 C. B. 255; Phillips *v.* Clark (1857), 2 C. B. N. S. 156; Redhead *v.* Mid. Ry. (1869), 9 B. & S. 519. **Mentd.** Lane *v.* Cotton (1701), 12 Mod. Rep. 472; Ashby *v.* White (1703), 2 Ld. Raym. 938; Austin *v.* M. S. & L. Ry. (1852), 10 C. B. 454; M'Manus *v.* L. & Y. Ry. (1859), 4 H. & N. 327; Peek *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Pandorf *v.* Hamilton (1886), 17 Q. B. D. 670; G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742.

**1006. Non-delivery of cargo.**]—(1) An action for the miscarriage of goods by water may be brought against the shipowners, or the master. It will lie *ex contractu* without alleging the custom of England.

(2) It must be brought against all the owners, & a non-joinder may be shown under the general issue.—BOSON *v.* SANDFORD (1690), Freem. K. B. 499; 3 Lev. 258; 2 Show. 478; Carth. 58; Comb. 116; 2 Salk. 440; 3 Mod. Rep. 321; 89 E. R. 374; *sub nom.* BOULSTON *v.* SANDIFORD, Skin. 278.

*Annotations:*—*As to* (1) **Consd.** Boucher *v.* Lawson (1735), Lee *temp.* Hard. 194. **Refd.** Laugher *v.* Pointer (1826), 5 B. & C. 547; Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894. *As to* (2) **Consd.** Abbot *v.* Smith (1774), 2 Wm. Bl.

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**PART IV. SECT. 1, SUB-SECT. 1.—B.**

**996 i.** *Contractual authority—Pledging credit of owners.*]—Master has no power to bind the credit of the shipowner, except where absolutely required & when he cannot communicate with his owner.—GIOVANNINI *v.* RORKE (1891), 7 Nfld. L. R. 578.—**NFLD.**

**996 ii.** —— ——.]—A ship's master at a foreign port cannot bind the owners by drawing a bill upon them.—DRAIN & CO. *v.* SCOTT (1864), 3 Macph. (Ct. of Sess), 114.—**SCOT.**

**h.** *Alter or vary contract.*]—The master of a ship has no express or implied authority to alter or vary a contract made directly with the owners of his vessel.—PERRY *v.* PRINCE EDWARD ISLAND STEAM NAVIGATION CO. (1874), 1 P. E. I. 476.—**CAN.**

947. **Distd.** Mitchell *v.* Tarbutt (1794), 5 Term Rep. 649. **Consd.** Govett *v.* Radnidge (1802), 3 East, 62. **Reld.** Kendall *v.* Hamilton (1879), 4 App. Cas. 504. *Generally*, **Consd.** Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365. **Reld.** Max *v.* Roberts (1807), 2 Bos. & P. N. R. 454. **Mentd.** Corbett *v.* Packington (1827), 6 B. & C. 268; Alton *v.* Midland Ry. (1865), 19 C. B. N. S. 213.

**1007.** ——.]—The owner is liable, as well as the master; in respect of such custom & of receiving freight; & the owner, as well as the master, may bring an action for the freight, & it is on that foundation that he is liable to the freighters (LEE, J.).—BOUCHER *v.* LAWSON (1736), Lee *temp.* Hard. 194; 95 E. R. 125.

*Annotations:*—**Consd.** Yates *v.* Hall (1785), 1 Term Rep. 73. **Reld.** Ashmall *v.* Wood (1857), 3 Jur. N. S. 232; Jackson *v.* S.S. Blanche, The Hopper No. 66, [1908] A. C. 126.

**Safe stowage of cargo.**]—*See* Part VII., Sect. 3, sub-sect. 5, *post*.

**1008. Misconduct—Own misconduct.**]—HUSSEY *v.* PENSEY (1666), 2 Keb. 88; 84 E. R. 55; *sub nom.* HUSSEY *v.* PUSY, 1 Sid. 298; *sub nom.* HUSSY *v.* PACY, 1 Lev. 188.

*Annotations:*—**Apld.** Mitchell *v.* Torup (1766), Park. 227. **Mentd.** Barker *v.* Braham & Norwood (1773), 2 Wm. Bl. 866; Swinfen *v.* Chelmsford (1860), 29 L. J. Ex. 382.

**1009.** —— ——.]—The master is answerable to the owners for the damage they suffer by his default, or by the unlawful act of the mariners because he employs them; & the mariners are answerable to the master for any damage he suffers by their doing an act prohibited by law, or that is a breach of trust in them; though it must be confessed that but little benefit can be expected from this remedy against the mariners (PARKER, C.B.).—MITCHELL *v.* TORUP (1766), Park. 227; 145 E. R. 764.

*Annotation:*—**Mentd.** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54.

**1010.** —— **Of crew.**]—MITCHELL *v.* TORUP, No. 1009, *ante*.

**1011.** —— ——.]—(1) If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time.

(2) The master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direction of a pilot, who, by the regulations of a statute, supersedes the master for the time in the government of his ship.—BOWCHER *v.* NOIDSTROM (1809), 1 Taunt. 568; 127 E. R. 954.

*Annotations:*—*As to* (1) **Consd.** The Druid (1842), 1 Wm. Rob. 391. *As to* (2) **Reld.** The Maria (1839), 1 Wm. Rob. 95. *Generally*, **Mentd.** Hall *v.* Smith (1824), 2 Bing. 156.

**1012.** —— ——.]—P. *v.* ACHESON (1841), cited 33 L. T. O. S. at p. 346.

*Annotation:*—**Reld.** Blakie *v.* Stembridge (1859), 33 L. T. O. S. 345.

**1013. Acts of crew done under direction of pilot.**]—BOWCHER *v.* NOIDSTROM, No. 1011, *ante*.

**1014. To account for profits.**]—If the master of a ship in a foreign port, from the state of the exchange receives a premium for a bill drawn upon England on account of the ship, this belongs to his owner, although there may have been a usage for masters of ships to appropriate such premiums to their own use.—DIPLOCK *v.* BLACKBURN (1811), 3 Camp. 43; 170 E. R. 1300.

*Annotation:*—**Reld.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

**1015.** ——.]—The master of a ship, who having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owners' account, & being unable to procure remunerative freight loads the ship with a cargo of his own:—*Held:* liable to account to the owners for all profits made by the sale of the cargo, & not merely for a proper freight.—SHALLCROSS *v.* OLDHAM (1862), 2 John & H. 609; 5 L. T. 824; 10 W. R. 291; 70 E. R. 1202.

**1016. Collision—In absence of master ashore.**]—THE FERONIA *v.* THE NORTHAMPTON (1853), 7 L. T. 258; *sub nom.* THE NORTHAMPTON, 1 Ecc. & Ad. 152.

*Annotation:*—**Reld.** The Woburn Abbey (1869), 38 L. J. Adm. 28.

**1017. Error in bill of lading.**]—The mere employment of ship's brokers at a foreign port to find a cargo for a ship & adjust the terms upon which it is carried does not give them implied power to relieve the master, when he signs bills of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bills. For breach of that duty the master is liable to his owners.—STUMORE, WESTON & Co. *v.* BREEN (1886), 12 App. Cas. 698; 56 L. J. Q. B. 401, H. L.

**1018. Expenses of deportation — Undesirable alien.**]—The master of a ship in which an undesirable alien has been brought into the United Kingdom is liable under Aliens Act, 1905 (c. 13), s. 4 (2) for the expenses of the deportation of such alien, following upon an expulsion order, although the alien, having been a stowaway, was brought into the United Kingdom involuntarily on the part of the master.—A.-G. *v.* SUTCLIFFE, [1907] 2 K. B. 997; 76 L. J. K. B. 991; 97 L. T. 373; 23 T. L. R. 711.

**1019. Liability on bill of exchange—Drawn for necessaries—Master's lien against ship.**] — A master drew bills on his owners in favour of coal merchants who had supplied coals to the ship he commanded. The bills were accepted, but were dishonoured on presentation, & the coal merchants then sued the master as the drawer of the bills. The coal merchants issued a writ *in personam* in the Admlty. Div. against the master, & on a summons for directions it was ordered that the cause should be set down for trial as a short cause, & that evidence might be given by affidavit:—*Held:* the master was liable, but he had a lien against his ship for his disbursements.—THE CAIRO, WATSON & PARKER *v.* GREGORY (1908), 99 L. T. 940; 11 Asp. M. L. C. 161.

**1020. Judgment against owners—In same cause of action—Bar to action against master.**]—PRIESTLY *v.* FERNIE, No. 1029, *post*.

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**PART IV. SECT. 1, SUB-SECT. 2.**

**1008 i.** *Misconduct—Own misconduct.*]—M., the husband of pltf., was employed by deft., master of a steamship, to assist in unmooring the steamship then lying at the wharf at Montreal, & about to put to sea. While M. was standing ready to cast off the stern hawser from the post to which it was fastened, the hawser snapped, & M. was fatally injured:—*Held:* the presumption was that the rope was insufficient for the purpose for which it was being used, & the ship was unskilfully handled, & in either case, the master of the ship was responsible.—CORNER *v.* BYRD (1886), M. L. R. (2) Q. B. 262.—**CAN.**

**1010 i.** —— *Of crew.*]—The master of a ship in harbour, is not liable for injuries occasioned by the negligence of the crew.—CLANCY *v.* HARRISON (1878), 4 V. L. R. (L.) 437.—**AUS.**

**1010 ii.** —— ——.]—At common law, captains & masters of vessels are not personally liable to the owners thereof for damage done to the cargoes through the fault or negligence of the mates.—PETRIE, ETC. (EXECUTORS) *v.* AITCHISON & Co. (1841), 37 Fac. Coll. 493.—**SCOT.**

**k.** *To be sued for breach of bill of lading.*]—By the maritime law the master is a party to the bill of lading, & may be sued for a breach of it without joining the ship owner.—MAXWELL *v.* LAWSON (1887), 3 Q. L. J. 58.—**AUS.**

**l.** *Under charterparty executed by owners only.*]—The master of a ship, although he is liable in respect of the obligations arising under the contracts made by him as master, is not liable under a charter party not executed by him, but by the owners themselves.—BURSTALL *v.* CAVE (1898), Q. R. 14 S. C. 110.—**CAN.**

**m.** *Liability to account for property entrusted to him.*]—In a small vessel, carrying only a master, mate, chief & assistant engineer, cook, & one seaman, besides fishermen, who were not shipped as seamen, the master

SUB-SECT. 3.—LIABILITY OF OWNERS FOR ACTS OF MASTER AND CREW.

**Liability of master for acts of servant generally.**]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 123–167.

**1021. General rule.**]—The act of the master of the vessel binds the owner in respect of the conduct of the ship, as much as if it were committed by the owner himself. There are powers with which the law invests him; & if he abuses his trust, it is a matter to be settled between him & the person who constituted him master; but his act of violation is, as to the penal consequences, to be considered as the act of the owners (SIR WILLIAM SCOTT).—THE VROUW JUDITH (1799), 1 Ch. Rob. 150; 1 Eng. Pr. Cas. 86; 165 E. R. 130.

*Annotations:*—**Refd.** Northcote *v.* Douglas, The Franciska (1855), 10 Moo. P. C. C. 37; Rodoconachi *v.* Elliott (1874), L. R. 9 C. P. 518; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781.

**1022. Deviation.**]—ANON. (1677), 2 Cas. in Ch. 238; 22 E. R. 925, L. C.

*Annotation:*—**Refd.** Yates *v.* Hall (1785), 1 Term Rep. 73.

**1023. Misconduct.**]—The owners of vessels on the navigation between A. & C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10 per cent. unless extra freight were paid, the master of one of the ships took on board pltf.'s goods, to be carried from A. to B., an intermediate place between A. & C., & delivered at B.; the vessel passed by B. without delivering pltf.'s goods there, & sunk before her arrival at C. without any want of care in the master:—*Held:* the owner of the vessel was responsible to pltf. for the whole loss in an action on the contract.

Though the loss happened in consequence of the misconduct of defts.' servant, defts. are answerable for it in this action (LORD KENYON, C.J.).—ELLIS *v.* TURNER (1800), 8 Term Rep. 531; 101 E. R. 1529.

*Annotations:*—**Mentd.** Bodenham *v.* Bennett (1817), 4 Price, 31; Batson *v.* Donovan (1820), 4 B. & Ald. 21; Garnett *v.* Willan (1821), 5 B. & Ald. 53; Owen *v.* Burnett (1834), 3 L. J. Ex. 76; Morritt *v.* N. E. Ry. (1876), 1 Q. B. D. 302.

**1024.** ——.]—If a ship be chartered to the Comrs. of the Navy, as an armed vessel, & an injury be done to another vessel by the misconduct of the persons on board the former, while a Commander of the Navy & a King's Pilot are on board, an action for the injury may be sustained against the owners of the chartered ship.

If an injury happens through the misconduct of the master & crew the owners should be liable, but if by the misconduct of the officer, that the officer should be liable (SIR J. MANSFIELD, C.J.).—FLETCHER *v.* BRADDICK (1806), 2 Bos. & P. N. R. 182; 127 E. R. 593.

*Annotations:*—**Distd.** Scott *v.* Scott (1818), 2 Stark. 438; The Tasmania (1888), 13 P. D. 110. **Refd.** Omoa Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464. **Mentd.** Laugher *v.* Pointer (1826), 5 B. & C. 547.

**1025. Breach of blockade.**] — THE ADONIS (1804), 5 Ch. Rob. 256; 165 E. R. 767; *affd.* (1807), 6 Ch. Rob. XI.

*Annotations:*—**Refd.** Baltazzi *v.* Ryder, The Panaghia Rhomba (1858), 12 Moo. P. C. C. 168; The Kim Björnstjerne, The Björnson, The Alfred Nobel, [1920] P. 319.

**1026. Failure to lower boats.**]—Where the master of an American vessel, held not to be in fault, did not, at the time of the collision, order out a boat & afford assistance to save the life of a seaman who had fallen overboard from the other vessel, & was drowned, the ct. in pronouncing in favour of the American owners, refused to decree their costs. The owners of a vessel are responsible, civilly speaking, for the whole conduct of the master, & for any deviation from that line of conduct which it behoves a master to perform, not simply in the navigation of the ship, but in offices of humanity.—THE ST. LAWRENCE (1850), 7 Notes of Cases, 556; 14 Jur. 534.

**1027. Failure to put pilot on shore.**]—THE RICHARD REYNOLDS, PLANT *v.* DOEG (1855), 7 L. T. 649.

**1028. Untrue or fraudulent representations.**]—ASHMALL *v.* WOOD, No. 977, *ante.*

**1028a. Negligence.**]—Pltfs., owners of oyster beds at the mouth of a navigable river, brought an action *in rem* against defts., as owners of a vessel, for so negligently navigating her as to ground on the property of pltfs., & thereby do damage to their oysters & oyster beds:—*Held:* as the damage was not done by grounding in the ordinary course of navigation, or without notice of the existence of the oyster beds, defts. were liable for the negligence of those in charge of their vessel.—THE SWIFT, [1901] P. 168; 70 L. J. P. 47; 85 L. T. 346; 17 T. L. R. 400; 9 Asp. M. L. C. 244.

*Annotation:*—**Refd.** The Carlgarth, The Otarama, [1927] P. 93.

**1029. Judgment against master—On same cause of action—Bar to action against owners.**]—A separate action cannot be maintained against the master & the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other.—PRIESTLY *v.* FERNIE (1865), 3 H. & C. 977; 34 L. J. Ex. 172; 13 L. T. 208; 11 Jur. N. S. 813; 13 W. R. 1089; 2 Mar. L. C. 281; 159 E. R. 820.

*Annotations:*—**Mentd** Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57; Kendall *v.* Hamilton (1879), 4 App. Cas. 504; Firm of R.M.K.R.M. *v.* Firm of M.R.M.V.L., [1926] A. C. 761.

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must personally account for the property of the owner entrusted to his charge, whatever may be his responsibility in a larger vessel where property may be in the custody of various officers.—BROWN *v.* THE ALIANCE (No. 2) (1914), 27 W. L. R. 704; 16 D. L. R. 413; 19 B. C. R. 529.—**CAN.**

n. ——.]—GILLIES *v.* SMITH (1832), 10 Sh. (Ct. of Sess.) 636.—**SCOT.**

**PART IV. SECT. 1, SUB-SECT. 3.**

o. *Detention of ship.*]—WILSON *v.* HOLMES (1870), 1 V. R. (Law) 53.—**AUS.**

p. *Goods supplied.*]—In an action against deft. for goods supplied by pltfs. to certain vessels at the request of the masters thereof, there was no evidence of deft. having employed the masters, &, though the vessels appeared to have been transferred to deft. before the goods were supplied, the transfers were not registered until after, nor was any express contract with deft. proved:—*Held:* deft. was not liable.—HAWN *v.* ROCHE (1876), 27 C. P. 142.—**CAN.**

q. *Repairs.*] — The authority of the captain of a ship to bind her owners for repairs, & anything incidental thereto, can only exist by reason of his being their special agent for the purpose, which he will be presumed to be only in particular cases of necessity.—BAYLEY *v.* TARUKNAUTH PORAMANIC (1865), Bourke, 263.—**IND.**

r. *Advances by charterers' agents.*]—BENN & CO. *v.* PORRET (1868), 6 Macph. (Ct. of Sess.) 577; 40 Sc. Jur. 278.—**SCOT.**

t. *Powers conferred by Merchant Shipping Act, 1854, s.* 246.]—The powers conferred by the above sect. upon masters, etc., were conferred upon them in their individual capacity, & not as acting for the owners, & consequently the owners were not responsible for any misuse of these powers.—O'NEIL *v.* RANKIN & SONS (1873), 11 Macph. (Ct. of Sess.) 538; 45 Sc. Jur. 346.—**SCOT.**

s. *Liability on bills of exchange.*]—MEIER & CO. *v.* KUCHENMEISTER (1881), 8 R. (Ct. of Sess.) 642; 18 Sc. L. R. 431.—**SCOT.**

## SECT. 2.—NECESSARIES.

### SUB-SECT. 1.—WHAT ARE NECESSARIES.

*A. In General.*

**1030. General rule—Things fit & proper for service of ship—Such as prudent owner would require.**]—A shipowner is liable for necessary repairs done to a ship by the master's order; & the word "necessary" means such as are fit & proper for the vessel upon her voyage, & such as a prudent owner himself, if present, would order. —WEBSTER *v.* SEEKAMP (1821), 4 B. & Ald. 352; 106 E. R. 966.

*Annotations:*—**Apld.** The Alexander (1842), 1 Wm. Rob. 346; The Riga (1872), L. R. 3 A. & E. 516; The André Théodore (1904), 93 L. T. 184. **Refd.** Gunn *v.* Roberts (1874), 43 L. J. C. P. 233; The Orienta, [1895] P. 49; Foong Tai *v.* Buchheister, [1908] A. C. 458; The Mogileff, [1921] P. 236.

**1031.** —— —— ——.]—(1) Suit by material man for necessaries supplied to a foreign ship under Admiralty Court Act, 1840 (c. 65).

Legal definition of the term necessaries, viz. whatever is fit & proper for the service in which a vessel is engaged, & what the owner of that vessel, as a prudent man, would have ordered if present.

(2) The burden lies on the person making advances to the master to prove that they were necessary for the use of the ship, & he must show that the money was applied to such necessary purpose.—THE ALEXANDER (1842), 1 Wm. Rob. 346; 1 Notes of Cases, 380; 7 L. T. 340; 6 Jur. 241; 166 E. R. 602.

*Annotations:*—*As to* (1) **Consd.** The Ella A. Clark (1863), Brown. & Lush. 32. **Refd.** The Sophie (1842), 1 Wm. Rob. 368; The Two Ellens (1871), L. R. 3 A. & E. 345; The Riga (1872), L. R. 3 A. & E. 516; Giovanni Dapueto *v.* Wyltie, The Pievo Superiore (1874), L. R. 5 P. C. 482; Gunn *v.* Roberts (1874), 22 W. R. 652; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; Northcote *v.* S.S. Henrich Bjorn, The Henrich Bjorn (1886), 11 App. Cas. 270; The Cella (1888), 36 W. R. 540; The Mogileff, [1921] P. 236.

**1032.** —— —— ——.]—(1) The term "necessaries," where used in the statutes giving the Admlty. Ct. jurisdiction over such claims, has the same meaning as is given to it by the common law cts., & signifies, whatever the owner of a vessel, as a prudent man, if present under circumstances in which his agent, in his absence, is called upon to act, would have ordered.

(2) Premiums paid by a shipbroker at the owner's request to procure insurance on freight are necessaries.

(3) Charges paid by a shipbroker at the owner's request for entering, reporting, & piloting a ship, & for tonnage & light dues, & for noting protest, are within the meaning of the term "necessaries."

(4) Advances at the owner's request for travelling expenses of the master & goods supplied for the ship's use are necessaries.

(5) Brokerage charges made by a ship's broker for acting as ship's agent, & for negotiating a charter-party, may be necessaries with the meaning of the statutes, but must be proved to come within the definition.

(6) Where a petition merely alleges that money was advanced for necessary expenses at the owner's request, without stating what those necessary expenses were, such a claim will be struck out on motion to reject or alter the petition.—THE RIGA (1872), L. R. 3 A. & E. 516; 41 L. J. Adm. 39; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. L. C. 246.

*Annotations:*—*As to* (1) **Refd.** The Tergeste (No. 2) (1902), 19 T. L. R. 91; Foong Tai *v.* Buchheister, [1908] A. C. 458; The Mogileff, [1921] P. 236; Pocahontas Fuel Co. *v.* Ambatielos (1922), 27 Com. Cas. 148. *As to* (2) **Distd.** The André Théodore (1904), 93 L. T. 184. *As to* (4) **Refd.** The Jenny Lind (1872), L. R. 3 A. & E. 529; The Marianne, [1891] P. 180.

**1033. For purpose of Admiralty Court Act, 1840 (c. 65).**]—(1) In order to establish that the necessaries supplied to a foreign ship or vessel are necessaries within above Act, the vessel must be in a state of exigency at the time; & the articles supplied must consist of articles needful for the relief of such exigency.

(2) Articles supplied for the equipment of a vessel building in a foreign dockyard not necessaries within the meaning of the statute.—THE OCEAN (1845), 2 Wm. Rob. 368; 4 Notes of Cases, 31; 7 L. T. 340; 9 Jur. 381; 166 E. R. 793.

*Annotations:*—*As to* (1) **Refd.** The Wataga (1856), 28 L. T. O. S. 192; The India (1863), 32 L. J. P. M. & A. 185. *As to* (2) **Refd.** The West Friesland (1859), Sw. 454; The Heinrich Bjorn (1885), 10 P. D. 44; The Mecca, [1895] P. 95. *Generally*, **Refd.** The Feronia (1868), L. R. 2 A. & E. 65.

**1034.** ——.]—The master of a Belgian steamer, plying constantly between Ghent & London, employed an engineer, in London . . . to do some repairs, & to supply him with a new screw propeller: *Held:* (1) the ct. had jurisdiction under the statute, as whatever was necessary to put the machinery of a passenger steamship in the best working order was a "necessary" within the meaning of the Act; (2) where no special contract was proved, the purchaser takes at his own risk.—THE FLECHA (1854), 1 Ecc. & Ad. 438; 3 L. T. 58; 164 E. R. 252.

*Annotations:*—*As to* (1) **Refd.** Northcote *v.* S.S. Henrich Bjorn, The Henrich Bjorn (1886), 11 App. Cas. 270; The Mecca, [1895] P. 95.

**1035.** ——.] — "Necessaries," in Admiralty Court Act, 1840 (c. 65), s. 6, means articles immediately necessary for the ship, as contra-distinguished from those merely necessary for the voyage.

The statute does not apply to ordinary mercantile accounts between ship-owner & agent.—THE COMTESSE DE FREGEVILLE (1861), 1 Lush. 329; 4 L. T. 713; 1 Mar. L. C. 106; 167 E. R. 146.

*Annotations:*—**Folld.** The Underwriter (1868), 25 L. T. 279. **Consd.** The Riga (1872), L. R. 3 A. & E. 516. **Folld.** The El Salto (1908), 25 T. L. R. 99. **Refd.** The Panthea (1871), 25 L. T. 389; The Mogileff, [1921] P. 236.

**1036.** —— **Liberal construction.**]—(1) A liberal meaning is to be attached to the term "necessaries," in above Act, s. 6. (2) Copper sheathing is a necessary.

(3) Where necessaries are supplied for the use & benefit of a foreign ship, the presumption is that the ship is liable.—THE PERLA (1858), Sw. 353; 7 L. T. 397; 4 Jur. N. S. 741; 166 E. R. 1164.

*Annotations:*—*As to* (1) **Refd.** The Heinrich Bjorn (1883), 8 P. D. 151. *As to* (3) **Refd.** Foong Tai *v.* Buchheister, [1908] A. C. 458; The Mogileff, [1921] P. 236.

**1037.** —— **Similar to common law necessaries.**] —THE RIGA, No. 1032, *ante.*

——.]—*See, also*, No. 1031, *ante;* Nos. 1047, 1049, 1057, 1061, 1063, 1071, 1073, *post.*

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**PART IV. SECT. 2, SUB-SECT. 1.—A.**

**1030 i.** *General rule—Things fit & proper for service of ship—Such as prudent owner would require.*]—In considering what goods or services supplied to a ship are "necessaries" so as to enable the person supplying them to maintain an action *in rem* in the Admiralty Ct., the term "necessaries" is not to be given a restricted meaning. It is not essential that such goods or services should have been supplied in some sudden emergency or to meet some urgent need. All the circumstances must be considered. The test is what a prudent owner would have considered reasonable in the circumstances.—CHRISTIE *v.* THE KARU (1927), 27 S. R. N. S. W. 443; 44 N. S. W. W. N. 11.—**AUS.**

*Sect. 2.—Necessaries: Sub-sect. 1, A., B. & C.*]

**1038. In relation of hypothecation—Usual legal meaning.**]—DROEGE *v.* SUART, THE KARNAK, No. 1509, *post.*

**1039. Repairs.**]—WEBSTER *v.* SEEKAMP, No. 1030, *ante.*

**1040.** ——.]—A claim for "repairs" to a ship held to be a claim for "necessaries" supplied to the ship.—THE TERGESTE (No. 2) (1902), 19 T. L. R. 91.

**1041. Anchor.**]—THE SOPHIE, No. 1071, *post.*

**1042. Cable.**]—THE SOPHIE, No. 1071, *post.*

**1043. Rigging.**]—THE SOPHIE, No. 1071, *post.*

**1044. Screw propeller.**]—THE FLECHA, No. 1034, *ante.*

**1045. Supplies to crew on shore—Medicine & food for injured seamen.**]—Several sailors on board a merchant vessel, having met with a serious accident in weighing the vessel's anchor, were taken on shore by the captain to pltf.'s, a public-house, the captain telling pltf. that the owner of the vessel would pay for what the sailors had. The captain immediately afterwards hired some fresh hands & proceeded on the voyage. At the time the sailors were entrusted to the care of pltf., there was no probability that they would be able to resume their duties for that voyage, & they remained at his house for several weeks.

In an action against the owner of the vessel for food & medicine supplied to the sailors:—*Held:* as the matters supplied were not necessary for the due prosecution of the voyage, the captain had no authority to pledge the owner's credit, & consequently the latter was not liable.—ORGAN *v.* BRODIE (1854), 10 Exch. 449; 3 C. L. R. 51; 24 L. J. Ex. 70; 24 L. T. O. S. 82; 3 W. R. 13; 156 E. R. 513.

**1046. —— Refreshments for crew working on ship in dock.**]—NIND *v.* HUTCHINSON (1855), 9 L. T. 237.

**1047. Provisions for crew on board—Butcher's meat.**]—Butcher's meat is a necessary within Admiralty Court Act, 1840 (c. 65), s. 6.—THE N. R. GOSFABRICK (1858), Sw. 344; 31 L. T. O. S. 345; 4 Jur. N. S. 742; 6 W. R. 871; 166 E. R. 1160.

*Annotations:*—**Consd.** The Riga (1872), L. R. 3 A. & E. 516. **Refd.** The Albert Crosby (1870), 18 W. R. 410; The Panthea (1871), 25 L. T. 389.

**1048. Fitting out ship for passengers.**]—THE MARY HOLLAND, MERINO *v.* WINCH (1855), 9 L. T. 237.

**1049. Stevedoring.**]—The expression "necessaries supplied" to a foreign ship in Admiralty Court Act, 1840 (c. 65), s. 6, includes necessary work & labour, such as that of a stevedore.—THE WABAN (1855), 6 L. T. 662.

**1050.** ——.]—THE LANCASTRIAN (1923), 155 L. T. Jo. 526.

**1051. Commissions for services.**]—THE RODERICK DHU, No. 1276, *post.*

**1052. Copper sheathing.**]—THE PERLA, No. 1036, *ante.*

**1053.** ——.]—THE TURLIANI, No. 343, *ante.*

**1054. Coals.**]—THE COMTESSE DE FREGEVILLE, No. 1035, *ante.*

**1055.** ——.]—Pltfs. supplied coals at Alexandria, Port Said & Algiers to a steamship belonging to Jeddah in Asiatic Turkey & also at Port Said advanced her canal dues. To recover payment, pltfs., on the arrival of the vessel in this country commenced an action *in rem* for necessaries & arrested her:—*Held:* Under Admiralty Court Act, 1861 (c. 10), s. 5, the ct. had jurisdiction. *Semble:* in respect of the necessaries supplied at Alexandria & Algiers the ct. also had jurisdiction under Admiralty Court Act, 1840 (c. 65), s. 6, those places being "upon the high seas" within the meaning of that sect.—THE MECCA, [1895] P. 95; 64 L. J. P. 40; 71 L. T. 711; 43 W. R. 209; 11 T. L. R. 139; 39 Sol. Jo. 132; 7 Asp. M. L. C. 529, C. A.

*Annotation:*—**Refd.** Pocahontas Fuel Co. *v.* Ambaticlos (1922), 27 Com. Cas. 148.

**1056. Items of general mercantile account.**]—THE COMTESSE DE FREGEVILLE, No. 1035, *ante.*

**1057.** ——.]—The ct. will not exercise the powers conferred upon it by the Admiralty Courts Acts, 1840 & 1861, to enforce the payment of a claim for necessaries where these are merely items forming part of a general mercantile account between a shipowner & agent.—EL SALTO (1908), 25 T. L. R. 99.

*Annotation:*—**Distd.** The Mogileff, [1921] P. 236.

**1058. Travelling expenses—Agent.**]—The expenses of an agent for coming from Newcastle to London to assist the master in the defence of a vessel prosecuted in a cause of collision, & for attending the trial:—*Held:* not to be necessaries.—THE BONNE AMELIE (1865), L. R. 1 A. & E. 19; 35 L. J. Adm. 115; 14 L. T. 191; 2 Mar. L. C. 321.

*Annotation:*—**Consd.** The Riga (1872), L. R. 3 A. & E. 516.

**1059. —— Master.**]—THE RIGA, No. 1032, *ante.*

**1060. Brokerage.**]—THE RIGA, No. 1032, *ante.*

**1061.** ——.]—There is no jurisdiction to entertain an action *in rem* against a foreign ship for brokerage on a charterparty, such a claim not falling within the word "necessaries" in Admiralty Court Act, 1840 (c. 65), s. 6.—THE MARIANNE, [1891] P. 180; 60 L. J. P. 39; 64 L. T. 539; 7 Asp. M. L. C. 34.

*Annotation:*—**Refd.** The Mogileff, [1921] P. 236.

**1062. Insurance premiums.**]—THE RIGA, No. 1032, *ante.*

**1063.** ——.]—Sums paid by a broker as insurance premiums for the purpose of effecting insurances on the hull & safe arrival of a vessel, or sums due to underwriters as premiums cannot be recovered by the broker or by the underwriters as necessaries within Admiralty Court Act, 1840 (c. 65), s. 6; &, as such sums are not necessaries, the broker & underwriters have no right to proceed against the ship *in rem*.—THE ANDRÉ THÉODORE (1904), 93 L. T. 184; 10 Asp.

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**1039 i.** *Repairs.*]—A claim for money advanced to a foreign ship to pay for repairs, equipment, & outfitting is a claim for necessaries.—WILLIAMS & LAKE ERIE & DETROIT RIVER RY. CO. *v.* THE FLORA & THE ROSE D. BROWN (1897), 6 Exch. C. R. 137.—**CAN.**

**1062 i.** *Insurance premiums.*]—The insurance of a ship is not a necessary within 26 Vict. c. 24, s. 10.—STOKES *v.* THE CONFERENCE (1887), 8 N. S. W. L. R. (Adm.) 10; 3 N. S. W. W. N. 130.—**AUS.**

**b.** *Fishing stores 'or fishing tackle.*]—Fishing-stores or fishing-tackle, such as hooks, gaffs, nippers, & knives, used in a fishing-boat, are "necessaries," for which the ship is liable.—PICHON *v.* THE ALLIANCE (No. 2) (1914), 20 B. C. R. 560; 28 W. L. R. 632; 20 D. L. R. 70.—**CAN.**

**c.** *Provisions.*]—CLOY *v.* JACQUES (1867), 27 U. C. R. 88.—**CAN.**

**d.** *Lining.*]—Action for necessaries brought by the promoter, a shipliner and carpenter of Montreal. The *Glendevon* came to Montreal with a cargo of coal; she was to take a cargo of wheat on her return voyage & the promoter was employed by the master to line her so as to undertake this voyage. He did the work & brought the action for the price of it, $666.15:—*Held:* such lining came under the terms "necessaries" in Imperial Act, 26 Vict. c. 24, s. 10 (10).—*Re* THE GLENDEVON (1884), 10 Q. L. R. 295.—**CAN.**

**e.** *Alterations in structure & equipment—To change style of fishing craft.*]—Alterations in the structure & equipment of a vessel in order to change her from one style of fishing craft into another are "necessaries" within Admiralty Courts Act, 1861, s. 5

M. L. C. 94; *sub nom.* THE ANDRÉ THÉODORE, ADAMS *v.* ANDRÉ THÉODORE (OWNERS), 21 T. L. R. 158.

*Annotations:*—**Apld.** Nolan, Galloway *v.* Uzielli (1905), 54 W. R. 250. **Refd.** The Mogileff, [1921] P. 236.

**1064. Charges connected with discharge of cargo—Quay rent for cargo.**]—The agents at New York of the steamer *A.*, made payments in connection with the discharge of her cargo at New York. In an action against the *A. in rem* to recover these disbursements as necessaries it was contended that they were made in respect of the cargo only, & were not necessaries to the ship:—*Held:* payments though made in respect of the cargo were necessaries to the ship if she could not go on her business without them. As the business of the *A.* consisted in entering the port of New York, discharging her cargo, & leaving the port, payment of charges which, being unpaid, would prevent her from doing any of these things was necessary to the *A.*, notwithstanding that the amount disbursed did not become due, nor was the disbursement made, until after the *A.* had left New York. Quay rent for cargo, & the cost of destroying putrid cargo, were necessaries to the *A.*, since by the law of New York she was liable for these charges, & could have been prevented from sailing had they not been paid.—THE ARZPEITIA (1921), 126 L. T. 29; 15 Asp. M. L. C. 426.

**1065. —— Cost of destroying putrid cargo.**]—THE ARZPEITIA, No. 1064, *ante.*

*B. Advances for Purpose of Necessaries.*

**1066. Whether regarded as "necessaries."**]—SCARREBORROW *v.* LYRIUS (1628), Noy, 95; 74 E. R. 1061.

**1067. ——.**]—The owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply be absolutely necessary for the use of the vessel.—ROCHER *v.* BUSHER (1815), 1 Stark. 27; 171 E. R. 391, N. P.

*Annotation:*—**Consd.** The Alexander (1842), 1 Wm. Rob. 346.

**1068. ——.**]—The owner, in England, is liable for money advanced to the master at his request for the necessary use of the ship, after her arrival in an English port; nor is the consent of the owner necessary to establish his responsibility.—ROBINSON *v.* LYALL (1819), 7 Price, 592; 146 E. R. 1071.

*Annotations:*—**Apld.** Arthur *v.* Barton (1840), 6 M. & W. 138. **Consd.** The Alexander (1842), 1 Wm. Rob. 346. **Dbtd.** Beldon *v.* Campbell (1851), 6 Exch. 886. **Refd.** Edwards *v.* Havill (1853), 14 C. B. 107; The Karnak (1868), L. R. 2 A. & E. 289.

**1069. —— Money must be advanced for that purpose.**]—The owner of a ship is not liable for money advanced to the master, & expended by him in the necessary use of the ship, unless the money is advanced expressly for that purpose.—THACKER *v.* MOATES (1831), 1 Mood. & R. 79, N. P.

**1070. —— Necessity question for jury.**]—ARTHUR *v.* BARTON, No. 1119, *post.*

**1071. —— Proof of necessity required.**]—It is absolutely necessary, when the owner is abroad, to prove not only that the articles supplied were necessaries, but that they were actually wanting for the service of the ship at the time when they were made. The technical meaning of the term necessaries I have already explained, as strictly applying to anchors, cables, rigging, & matters of that description; & at the same time, I consider myself at liberty to enlarge the term necessaries so as to include money expended upon necessaries; but in such cases, I must be satisfied that the necessaries were wanting, & that the money was *bonâ fide* advanced for the purpose of procuring them (*per* CUR.).—THE SOPHIE (1842), 1 Wm. Rob. 368; 1 Notes of Cases, 393; 3 L. T. 153; 166 E. R. 610.

*Annotations:*—**Distd.** The N. R. Gosfabrick (1858), Sw. 344. **Apld.** The Masonic (1861), 5 L. T. 460; The Albert Crosby (1870), 18 W. R. 410. **Consd.** The Riga (1872), L. R. 3 A. & E. 516.

**1072. —— Borrowing advantageous to owner.**]—EDWARDS *v.* HAVILL, No. 1123, *post.*

**1073. —— Advance to pay averages.**]—A claim for money advanced to a master to pay averages dismissed with costs, such advances not being "necessaries" within 3 & 4 Vict. c. 65, s. 6.—THE AALTJE WILLEMINA (1866), L. R. 1 A. & E. 107.

*Annotation:*—**Consd.** The Riga (1872), L. R. 3 A. & E. 516.

**1074. —— Advance to discharge shipwright's lien.**]—A., being master & sole owner of a vessel, put her into a shipwright's dock for repair. The shipwright repaired the vessel, & refused to allow her to leave his dock until his bill for the repairs was paid. A. having no funds, pltf. lent him money to pay the shipwright's bill, & A. paid the bill with the money lent:—*Held:* pltf. was entitled to recover the amount of the loan in a suit for necessaries.—THE ALBERT CROSBY (1870), L. R. 3 A. & E. 37; 18 W. R. 410.

*Annotation:*—**Apld.** The Tergeste (No. 2) (1902), 19 T. L. R. 91.

**1075. —— Advance to discharge dock dues.**]—A person who has advanced money for the purpose of discharging dock dues stands in the same position as the dock co., & his claim ranks with pilotage & towage claims, & has priority over the claim of a holder of a bottomry bond of a previous date.—THE ST. LAWRENCE (1880), 5 P. D. 250; 49 L. J. P. 82.

*Annotations:*—**Distd.** The Lyons (1887), 57 L. T. 818. **Consd.** Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241; The Petone, [1917] P. 198. **Refd.** Pocahontas Fuel Co. *v.* Ambatielos (1922), 27 Com. Cas. 148.

*See, also,* Sect. 2, sub-sect. 2, C., *post.*

*C. Onus of Proof.*

**1076. Plaintiff to prove necessity—& application of money borrowed.**]—In an action against the owner of a ship for money supplied to the captain at a foreign port, it is not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, & an application of part of that sum to such uses, & that the residue was placed to the private account of the captain. It is essential to prove the advance of a specific sum, that it was necessary for the use of the ship, & that it was so applied in fact.—PALMER *v.* GOOCH (1818), 2 Stark. 428; 171 E. R. 694, N. P.

*Annotation:*—**Consd.** The Alexander (1842), 1 Wm. Rob. 346.

**1077. —— ——.**]—To charge the owners of a ship with money advanced to the captain in a foreign country, pltf. must show that it was necessary to borrow the money, & must prove the actual application of it. Where the paper, in which a party charges himself with the receipt of

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(c. 10).—VICTORIA MACHINERY DEPOT CO., LTD. *v.* THE "CANADA & THE TRIUMPH" (1913), 15 Exch. C. R. 142; 17 D. L. R. 27.—CAN.

**1064 1.** *Charges connected with discharge of cargo—Quay rent for cargo.*]—On May 27, 1926, deft. ship, a foreign ship, discharged her cargo at the port of Hamilton & loaded another cargo. Pltf.'s dock & warehouse were used by deft. ship under the authority of the master thereof. Deft. was bound to incur the charges made for the use of this dock & warehouse before he could discharge his cargo & leave the port of Hamilton:—*Held:* such charges were to be considered as "necessaries" within Admiralty Act.—HAMILTON HARBOUR COMRS. *v.* THE WENCHITA, [1927] Exch. C. R. 176.—CAN.

*Sect. 2.—Necessaries: Sub-sect. 1, C.; sub-sect. 2, A.*]

money, likewise contains a discharge of it, it is not admissible in evidence.—BOGLE *v.* ATTY (1818), Gow, 50; 171 E. R. 835, N. P.

**1078.** —— ——.]—THE ALEXANDER, No. 1031, *ante*.

**1079.** —— ——.]—THE SOPHIE, No. 1071, *ante*.

**1080.** ——.]—In an action against a shipowner for goods supplied, & money lent to the master, at a foreign port, the *onus* is on pltf. to prove that the goods & money supplied were necessaries.—MACKINTOSH *v.* MITCHESON (1849), 4 Exch. 175; 18 L. J. Ex. 385; 13 L. T. O. S. 344; 154 E. R. 1171.

*Annotation:*—**Consd.** Ashmall *v.* Wood (1857), 30 L. T. O. S. 20.

**1081.** ——.]—THE RIGA, No. 1032, *ante*.

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SUB-SECT. 2.—LIABILITY OF OWNER.

*A. In General.*

**1082. General rule—Owner liable.**]—Master of a ship buys provisions for the ship, & has money from the owners to pay for the provisions, but fails without paying the money. The owners are liable to pay in proportion to their respective shares in the ship.

Master of a ship is but a servant to the owners.—SPEERMAN *v.* DEGRAVE (1709), 2 Vern. 643; 23 E. R. 1020.

*Annotation:*—**Reld.** Samsun *v.* Brag[g]lington (1750), 1 Ves. Sen. 443.

**1083.** —— ——.]—By the custom of merchants, if the master of a ship be supplied with necessaries for the ship, by the order or on the credit of any freighter, the owner of the ship is liable to pay such freighter; & on this ground it is customary for freighters to furnish the masters of the ships they take to freight, with letters of credit for whatever money they may happen to want, for the necessary service of the ship.—CARY *v.* WHITE (1710), 5 Bro. Parl. Cas. 325; 2 E. R. 708, H. L.

*Annotations:*—**Distd.** Webster *v.* Seekamp (1821), 4 B. & Ald. 352. **Reld.** Bogle *v.* Atty (1818), Gow, 50; Palmer *v.* Gooch (1818), 2 Stark. 428; The Alexander (1842), 1 Wm. Rob. 346.

**1084.** —— ——.]—GARNUM *v.* BENNET (1728), 1 Barn. K. B. 96; 2 Stra. 816; 94 E. R. 67.

**1085.** —— —— **Unless liability expressly excluded.**]—*Re* STRICKLAND, *Ex p.* BLAND, No. 445, *ante*.

**1086.** —— —— **Express or presumed authority of master — Rebuttal of presumption.**] — The relation between the owner & commander of a vessel, as to the ordering & payment of necessaries & repairs, is exactly the same as between a master & servant generally; & consequently, the presumption of an implied authority of the commander to order repairs to be done on the credit of the owner, may be repudiated by circumstances, as where the commander promises to pay ready cash, & no mention is made of the owner's responsibility.—GORDON *v.* HARE (1823), 1 L. J. O. S. K. B. 70.

**1087.** —— —— —— ——.]—Action for goods sold & delivered, work, labour & materials. Plea, never indebted. Pltf. proved that he supplied the goods & did the work to fit out the ship *P.* then in London in dock. That the orders were given by T., who appeared on the register as master, & that deft. appeared on the register as owner. Some evidence was given from which it might be inferred that T. was appointed by deft. Deft. proved that he had agreed to sell the *P.* to one G., that T. was appointed master by G., & gave the orders for G.; & that deft. afterwards resumed possession of the vessel. The judge directed the jury that, if T. acted as master with deft.'s privity & consent, & the goods were *bonâ fide* supplied on the credit of the owner, deft. was liable; & that, though deft.'s evidence was believed, he was not conclusively entitled to a verdict. On a bill of exceptions:—*Held:* deft. was not liable for the goods ordered by T. unless he had sanctioned T.'s appearing to be his captain acting for him, & the goods were supplied on the faith of T.'s being so; &, consequently, the direction was wrong. *Qu.:* whether the *primâ facie* authority of the captain of a ship in dock in London extends to order repairs, the owner being no farther distant than Liverpool?—MITCHESON *v.* OLIVER (1855), 5 E. & B. 419; 3 C. L. R. 1104; 25 L. J. Q. B. 39; 25 L. T. O. S. 258; 1 Jur. N. S. 900; 119 E. R. 537, Ex. Ch.

*Annotations:*—**Consd.** Pearson *v.* Neli (1865), 6 New Rep. 304; Hibbs *v.* Ross (1866), L. R. 1 Q. B. 534; The Great Eastern (1868), L. R. 2 A. & E. 88. **Reld.** Hackwood *v.* Lyall (1855), 17 C. B. 124; Mackenzie *v.* Pooley (1856), 11 Exch. 638; Myers *v.* Willis (1856), 18 C. B. 886; Whitwell *v.* Perrin (1858), 4 C. B. N. S. 412; The Troubadour (1866), L. R. 1 A. & E. 302; The Orienta, [1894] P. 271. **Mentd.** Currey *v.* Armitage (1858), 6 W. R. 516; Ley *v.* Peter (1858), 3 H. & N. 101; Flower *v.* Allan (1863), 2 H. & C. 688.

**1088.** —— —— ——.]—FROST *v.* OLIVER, No. 378, *ante*.

**1089.** —— —— ——.]—The liability of the owner of a vessel to pay for repairs & equipments ordered by the master, depends, not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the owner's agent for the purpose of ordering such necessaries. The master's contracts cannot bind the owner, unless authority to bind the owner has been actually given to him; or unless the owner has, by word or deed, held out the master as his master, & thereby induced the vendor to supply the necessaries upon the credit of the owner. The owners of a vessel entered into an agreement & charterparty, by which it was provided (*inter alia*) that the master, officers & crew should be appointed by the owners, be under their control, & be dismissed by them, but that their wages should be paid by the charterer, it was also provided that the master should act as supervisor of the repairs & fittings of the ship.

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**PART IV. SECT. 2, SUB-SECT. 1.—C.**

**1080 i.** *Plaintiff to prove necessity.*]—A ship's master incurred a debt in a foreign port. In an action against the owners for payment the latter were assoilzied, in respect the pursuers had not proved that the debt was for necessary & proper charges for the ship.—DRAIN & Co. *v.* SCOTT (1864), 3 Macph. (Ct. of Sess.) 114.—**SCOT.**

**PART IV. SECT. 2, SUB-SECT. 2.—A.**

**1082 i.** *General rule—Owner liable.*]—Where the managing owner & the master of a ship order necessaries for the ship on credit, the owners are liable.—SMITH *v.* FULTON (1877), 11 N. S. R. (2 R. & C.) 225.—**CAN.**

**1082 ii.** —— ——.]—The managing owner of a fishing vessel let to the captain & crew on the "quarter lay" is not liable for supplies furnished to the crew of the vessel unless he specially authorises the advances to be made on the credit of the vessel & owners.—CROWELL *v.* SMITH (1900), 32 N. S. R. 505.—**CAN.**

**1082 iii.** —— ——.]—STEWART *v.* HALL (1813), 2 Dow, 29.—**SCOT.**

**1082 iv.** —— ——.]—CARSWELL *v.* FINLAY (1887), 14 R. (Ct. of Sess.) 903; 24 Sc. L. R. 643.—**SCOT.**

*f. Master servant of charterers & not of owner—Owner not liable.*]—THE DAVID WALLACE *v.* BAIN (1903), 23 C. L. T. 103; 8 Exch. C. R. 205.—**CAN.**

*g. Claim by material men—Against surplus proceeds lying in court registry.*]—*Re* PROCEEDS OF THE ASIA, *Ex p.* HORMASJI & UKARJI (1868), 5 Bom. O. C. 64.—**IND.**

*h. Presumption that necessaries supplied on credit of ship—Whether rebuttable.*]—Necessaries supplied to a

An action having been brought for necessaries supplied to the ship while under this charter, by the master's order, who stated in his evidence that he considered himself as acting for & as the servant of both owners & charterer:—*Held:* the owners had held out the master as their master, & they were therefore liable for the debt.—THE GREAT EASTERN (1868), L. R. 2 A. & E. 88; 17 L. T. 667; 3 Mar. L. C. 58.

*Annotations:*—**Refd.** The Orienta, [1894] P. 271; The Wellgunde (1902), 18 T. L. R. 719.

**1090.** —— —— ——.]—THE WELLGUNDE (1902), 18 T. L. R. 719.

**1091.** —— —— ——.] — Pltfs. were an American co. carrying on business at Norfolk, Virginia, & deft. was a Greek shipowner. In Jan. 1921, a steamer belonging to deft. called at Norfolk for coal. Pltfs. supplied her with coal & made certain disbursements on her behalf whereby deft. became indebted to pltfs. in a sum $15,174. In payment the master gave to pltfs. a bill of exchange drawn on deft.'s agent in London & payable in sterling. The amount for which the bill was drawn was £4,262 11*s.* 0*d.* which represented the value in sterling of $15,174 at the rate of exchange then prevailing. At the date when the bill became payable the rate of exchange had moved in favour of England & £4,262 11*s.* 0*d.* had become worth $16,368. Deft. refused to pay the full sum of £4,262 11*s.* 0*d.* but tendered $15,174 which pltfs. accepted. Deft. contended that the sum was accepted in full satisfaction; pltfs. said that they had only accepted it on account & they now sued for a sum of £310 16*s.* 3*d.* representing the outstanding balance of $1,194. Deft. refused to pay on the ground that the master in giving the bill had exceeded his authority; pltfs. contended that the master had power to give the bill on these grounds, because he had such power by special contract between the parties, by the course of business between the parties, or by general implication of law:—*Held:* (1) on the facts the master had no power by special contract to give a bill binding on deft., but (2) he had such power in consequence of the course of dealing which had taken place between the parties; & judgment must therefore be entered for pltfs.; & (3) *obiter* whether in any case a master has power to draw a bill on the owner in payment for necessaries supplied to the ship must depend on the particular circumstances of the case.—POCAHONTAS FUEL CO. (INCORPORATED) *v.* AMBATIELOS (1922), 27 Com. Cas. 148.

**1092. Credit given personally to owners.**]—HOSKINS *v.* SLAYTON, No. 1127, *post.*

**1093.** ——.]—Where goods were ordered for a ship by the owner before the appointment of the captain, though some were not delivered till afterwards, yet as no personal credit was given to the captain, he is not answerable for any of them.—FARMER *v.* DAVIES (1786), 1 Term Rep. 108; 99 E. R. 1000.

*Annotation:*—**Refd.** The Neptune (1833), 3 Hag. Adm. 129.

**1094. Master lessee of ship.**] —Though the master of a vessel, be also lessee of it, by agreement with the owners, for a term of years, under covenants on their part, that he shall have the sole management of the ship, & employ her for his own sole benefit, etc., & on his part, that he shall repair her at his own sole cost & charge, etc., the owners are still liable for necessaries furnished for the ship by order of the master, though without their knowledge, or without their being known to the person who supplied them.—RICH *v.* COE (1777), 2 Cowp. 636; 98 E. R. 1281.

*Annotations:*—**Dbtd.** Westerdell *v.* Dale (1797), 7 Term Rep. 306; Priestly *v.* Fernie (1865), 3 H. & C. 977. **Refd.** Yates *v.* Hall (1785), 1 Term Rep. 73; Jackson *v.* Vernon (1789), 1 Hy. Bl. 114; The Neptune (1833) 3 Hag. Adm. 129.

**1095.** ——.]—The registered owner of a ship having chartered her to the then captain at a rent for a certain number of voyages is not liable for stores furnished to the ship by order of the charterer during the charter-party.—FRAZER *v.* MARSH (1811), 13 East, 238; 2 Camp. 517; 104 E. R. 362.

*Annotations:*—**Folld.** Reeve *v.* Davis (1834), 1 Ad. & El. 312. **Distd.** Frost *v.* Oliver (1853), 2 E. & B. 301; Steel *v.* Lester (1877), 3 C. P. D. 121. **Apld.** Baumwoll Manufactur Von Carl Scheibler *v.* Furness, [1893] A. C. 8. **Refd.** M'Iver *v.* Humble (1812), 16 East, 169; Hutton *v.* Bragg (1816), 7 Taunt. 14; Helme *v.* Smith (1831), 9 L. J. O. S. C. P. 206; Jackson *v.* S.S. Blanche, The Hopper No. 66, [1908] A. C. 126; Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1.

**1096. Order by agent of owner—Payment by owners to agent—Failure of agent to pay.**]—Repairs & furnishings done at Hull to a Greenock ship, by order of the agents of the owner, at the instance & under the direction of the master. Account made out to "Captain C., the master, & owners of ship *Jeanie*" attested by C., & addressed to the agents for payment, but payment not demanded for some months. In the meantime, the owner pays the agents for the repairs. The agents become embarrassed in their circumstances, upon which those who did the repairs apply for payment to the owner:—*Held:* the owner is still liable; for he can be discharged only by positive agreement, or by necessary inference that those who did the repairs have abandoned that security.—STEWART *v.* HALL (1813), 2 Dow, 29; 3 E. R. 777, H. L.

**1097. Authority to draw bills—On third party.**]—There is no implied undertaking on the part of the owner of a ship, that a bill of exchange drawn by the master on a third person for money advanced for the ship's use abroad, shall be duly honoured.—HARDER *v.* BROTHERSTONE (1815), 4 Camp. 254; 171 E. R. 81, N. P.

**1098.** —— **On Owner.**]—POCAHONTAS FUEL CO. (INCORPORATED) *v.* AMBATIELOS, No. 1091, *ante.*

**1099.** —— —— **Indemnification of master against loss or damage.**]—Where the owners of a ship instruct the captain to make purchases in a foreign country, & to draw bills upon them in payment, the promise implied by the law is not a promise to accept or pay the bills, but a promise to indemnify the captain against any loss, damage, etc., sustained by him from having drawn the bills. —HUNTLEY *v.* SANDERSON (1833), 1 Cr. & M. 467; 3 Tyr. 469; 2 L. J. Ex. 204; 149 E. R. 483.

**1100. Ownership without privity of contract.**]—BAKER *v.* BUCKLE, No. 283, *ante.*

**1101. Agreement for advance of money—Goods supplied & payments made—No actual advance.**]—Where A. the charterer of a vessel, by the charter-party agreed that on the arrival of the ship at the

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ship are *primâ facie* presumed to have been supplied on the credit of the ship, but that presumption can be rebutted by evidence of facts going to show that the person who supplied or paid for the necessaries, looked for payment to the person at whose instance he furnished the supplies or advanced the sums & not to the owner of the ship.—HEIWA MARU (OWNER) *v.* BIRD & CO. (1923), I. L. R. 1 Ran. 78.—**IND.**

k. *Action against agent not satisfied—Whether owners liable.*]—Although the owners of a ship are liable for furnishings made to her in a foreign port on the order of the ship's agent, yet if the furnisher selects the agent as his debtor, he cannot, especially after a lapse of time & the insolvency of the agent, recur to the owners, who have in the meantime paid for the furnishings to their agent.—SCOTTS & STEVENSON *v.* CARSEWELL (1839), 1 Dunl. (Ct. of Sess.) 1215; 35 Fac. Coll. 1214. —**SCOT.**

l. *Onus of proof.*] — A ship's master incurred a debt in a foreign port. In an action against the owners for

*Sect. 2.—Necessaries: Sub-sect. 2, A., B. & C.*]

outward port, he would, through his agent there, supply cash to the master for the disbursement of the vessel to be repaid by bills to be drawn by the master on the owner; &, on the arrival of the vessel there, the agent supplied goods for the use of the crew & paid certain money demands made on the master, but did not advance any actual cash :—*Held:* although it was not shown that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold & delivered & for money paid, the master having authority to obtain supplies of goods & money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty.—WESTON *v.* WRIGHT (1841), 7 M. & W. 396; 10 L. J. Ex. 329; 5 Jur. 197.

**1102. Whether agency of master established—Question for jury.**]—In an action against the owner of a ship, to recover money advanced to the captain for the use of the ship whilst in a home port :—*Held:* the only question for the jury was, whether, under the circumstances, the captain's position was such as to constitute him the authorised agent of the owner, in order to procure such advances, & the state of the accounts between the captain & the owner at the time had nothing to do with the case.—WILLIAMSON *v.* PAGE (1844), 1 Car. & Kir. 581.

*Annotation :*—**Reld.** Frost *v.* Oliver (1853), 2 E. & B. 301.

**1103. Money advanced to captain whilst in home port.**]—WILLIAMSON *v.* PAGE, No. 1102, *ante*.

**1104. Master working on "clear fifths" principle.**]—THE DEBORAH, JOHNSON *v.* WARD (1856), 9 L. T. 237.

**1105. Liability question of contract not ownership.**]—PEARSON *v.* NELL, No. 1133, *post*.

**1106.** ——.]—THE GREAT EASTERN, No. 1089, *ante*.

**1107. Authority limited—To knowledge of party supplying necessaries—Power of master to vary contract—Ratification by owner.**]—Where pltfs. contracted with the agent of an absent shipowner to effect certain specified repairs, all confined to damage by stranding, & instead of doing the work as stipulated alleged that they had on the agent's authority, done the equivalent thereto or better, & in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them :—*Held:* it appearing that the agent's authority to their knowledge was limited to the said specified repairs, they could not recover on the contract which was an entire one, & in its entirety had never been performed, the shipowner having taken the ship as repaired & sold it did not thereby ratify the contract.—FORMAN & CO. PROPRIETARY *v.* THE SHIP LIDDESDALE, [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331; 9 Asp. M. L. C. 45, P. C.

*Annotation :*—**Mentd.** Dakin *v.* Lee, [1916] 1 K. B. 566.

**1108. Effect of existence of time charter—Liability of charterer for necessaries.**]—Where pltfs. at the request of the master of a Norwegian vessel made necessary payments & disbursements for the vessel in a British port without knowing of the existence of the time charter :—*Held:* the fact that the ship was under a time charter, by the terms of which such payments & disbursements were mostly to be for charterer's account, did not affect the right of the master to pledge the credit of the shipowners, & such right would not have been affected by pltfs.' knowing of the existence of the time charter without being aware of its terms.—THE TOLLA, [1921] P. 22; 90 L. J. P. 103; 37 T. L. R. 73.

**1109.** ——.]—WEISE & CO. *v.* THE HETTIE (1920), 5 Lloyd, L. R. 440.

*B. On Sale of Ship.*

**1110. Whether vendor or purchaser liable—Failure to register sale.**]—YOUNG *v.* BRANDER, No. 142, *ante*.

**1111.** —— **After transfer of legal title.**]—TREWHELLA *v.* ROWE, No. 372, *ante*.

**1112.** —— **Imperfect sale afterwards rescinded.**]—FROST *v.* OLIVER, No. 378, *ante*.

**1113.** —— **Executory contract of sale.**]—Pltf. by a letter dated June 4, 1858, addressed to one T., agreed to take certain shares in a vessel called the *Conrad*, belonging to T., on account of a debt due to him from T., & also to take upon himself all liabilities after the vessel had discharged her cargo at S. Pltf., with several other creditors of T., afterwards signed the following latter, dated July 14, 1858, & addressed to T.: "Sir,—We, the undersigned, agree to purchase the ships in the annexed statement at the prices there put down, in the proportions set down opposite to our names, it being understood as part of this agreement that the debts owing by you to us annexed be taken to their full amount in payment or part payment of the said purchases." By the statement annexed to such letter pltf. was entered as a purchaser of the said shares of the *Conrad*. Pltf. sold these shares to deft., who signed a memorandum, dated Sept. 30, 1858, & addressed to pltf., in which he said, "I have this day bought from you sixteen sixty-fourth shares of the barque *Conrad*, 328, now registered in your name at the custom house, for the sum of £700, & all liabilities or profits on the said shares from the time of your purchase from T. for which you are liable as owner, in any way, or entitled to if there be any profits or balance in your favour." At the time deft. signed such memorandum he was aware of the letter of July 14 but not of the letter of June 4. T. did not execute a bill of sale of the shares to pltf. until Sept. 14, 1858. Pltf. having paid certain expenses incurred on account of the *Conrad* after the ship had discharged her cargo at S., & before the said bill of sale had been executed to him, sued deft. for the same upon the contract of Sept. 30, 1858 :—*Held:* pltf. could not recover such expenses, as the letter of July 14 was the only letter which could be connected with the contract, & there was therefore nothing to show any liability of pltf. before he had become legal owner of the shares in the ship which deft. had contracted to pay; *qu.:* whether the contract of Sept. 30, 1858, was altogether void by reason of 17 & 18 Vict. c. 104, s. 55.—CHAPMAN *v.* CALLIS (1861), 9 C. B. N. S. 769; 30 L. J. C. P. 241; 3 L. T. 890; 7 Jur. N. S. 995; 9 W. R. 375; 1 Mar. L. C. 37; 142 E. R. 303.

*Annotation :*—**Reld.** Stuckey *v.* Bailey (1862), 10 W. R. 720.

**1114.** —— **Whether registered title conclusive.**]—JENNINGS *v.* GRIFFITHS, No. 370, *ante*.

**1115.** —— ——.]—The registered owner of a ship is, *primâ facie*, liable for goods furnished for the use of that ship; but such liability may be rebutted by evidence of the credit having been given to others.

If there be a bill of sale of a ship, not containing

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payment, the latter were assoilzied in respect the pursuers had not proved that the debt was for necessary & proper charges for the ship.—DRAIN & CO. *v.* SCOTT (1864), 3 Macph. (Ct. of Sess.) 114; 37 Sc. Jur. 64.—**SCOT.**

m. *Whether shipowner liable to shipbroker employed by charterer.*]—BARNETSON *v.* PETERSEN BROTHERS (1902), 5 F. (Ct. of Sess.) 86; 40 Sc. L. R. 56; 10 S. L. T. 345.—**SCOT.**

any qualification, & such unqualified bill of sale be entered properly on the register, & there be also a deed of defeasance, making void such bill of sale on the payment of a sum of money, the deed of defeasance may be given in evidence on the part of deft., charged, in an action for goods, as the registered owner, in order to show the qualified nature of such deft.'s ownership.—COX *v.* REID (1824), 1 C. & P. 602; Ry. & M. 199; 171 E. R. 1334, N. P.

*Annotations:*—**Consd.** Frost *v.* Oliver (1853), 2 E. & B. 301. **Refd.** Hibbs *v.* Ross (1866), L. R. 1 Q. B. 534.

**1116.** —— —— **Proof of agency of master.**]—The fact of a person being the registered owner of a ship is not of itself evidence that the master has authority to bind him by contracts for necessaries supplied to the ship; but it must be shown that the master is his agent for that purpose.

Therefore, where a ship sailed for a foreign port, the master having a power of attorney from the owner, & whilst the ship was at the port deft. purchased it:—*Held:* he did not thereby become liable for necessaries supplied to the ship by order of the master.—MACKENZIE *v.* POOLEY (1856), 11 Exch. 638; 25 L. J. Ex. 124; 26 L. T. O. S. 223; 4 W. R. 262; 156 E. R. 986.

*Annotation:*—**Consd.** Myers *v.* Willis (1856), 18 C. B. 886.

*C. Facilities for Communication with Owner.*

**1117. General rule.**]—The master of a ship has, in the absence of the owner or means of communicating with him, authority to pledge his credit for all things necessary for the purpose of conducting the navigation to a favourable termination; & for that purpose he may borrow money for services which require prompt payment; but he has no authority to borrow money in order to pay for services already rendered.

Therefore, where the state of the weather rendered it necessary that a vessel should be towed into its port of destination, which was accordingly done, without any previous agreement as to payment:—*Held:* (1) the master had no authority to borrow money on the owner's credit for the purpose of paying the towage; (2) the ship, having arrived at its port of destination, [in England] & the owner residing at a distance where he might have been easily communicated with, the master had no authority to borrow money in order to enable a shipwright, who was engaged on the necessary repairs of the vessel, to pay his workmen on a Saturday.—BELDON *v.* CAMPBELL (1851), 6 Exch. 886; 20 L. J. Ex. 342; 17 L. T. O. S. 257; 155 E. R. 805.

*Annotations:*—*As to* (1) **Distd.** Edwards *v.* Havill (1853), 17 Jur. 1103. **Consd.** Frost *v.* Oliver (1853), 2 E. & B. 301. *As to* (2) **Consd.** The Karnak (1868), L. R. 2 A. & E. 289. **Refd.** Anderson *v.* Ocean Steam Co. (1884), 10 App. Cas. 107. *Generally*, **Mentd.** Brady *v.* Todd (1861), 4 L. T. 212.

**1118.** ——.]—The doctrine of authority by necessity in the case of the master of a ship only applies when he cannot communicate with the owner (LORD ESHER, M.R.).—GWILLIAM *v.* TWIST as reported in, [1895] 2 Q. B. 84, C. A.

*Annotations:*—**Mentd.** Beard *v.* London General Omnibus Co., [1900] 2 Q. B. 530; Harris *v.* Fiat Motors (1906), 22 T. L. R. 556; Ricketts *v.* Tilling, [1915] 1 K. B. 644; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566; Jebara *v.* Ottoman Bank, [1927] 2 K. B. 254.

**1119. Ship in English port—Owner without agent in port.**]—The master of a ship has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; & whether it was so or not is a question for the jury.—ARTHUR *v.* BARTON (1840), 6 M. & W. 138; 9 L. J. Ex. 187; 7 L. T. 224; 151 E. R. 355.

*Annotations:*—**Apld.** Johns *v.* Simons (1842), 2 Q. B. 425; Wallace *v.* Fielden, The Oriental (1851), 7 Moo. P. C. C. 398. **Consd.** Gunn *v.* Roberts (1874), L. R. 9 C. P. 331. **Refd.** Weston *v.* Wright (1841), 7 M. & W. 396; Duncan *v.* Benson (1847), 17 L. J. Ex. 238; Gibbs *v.* Gray, Gray *v.* Gibbs (1857), 26 L. J. Ex. 286.

**1120.** —— **Communication easily obtained.**]—In a home port, as well as a foreign one, the master of a ship has implied authority to borrow money on the owner's credit in case of necessity. But, it was held that the master had no implied authority to pledge the owner's credit in respect of necessary supplies & advances for the use of the vessel during several weeks while she lay at Newport, Monmouthshire, the owner, during all the time, having resided at Plymouth, & nothing appearing to have prevented a communication, if desired, between the master & owner.—STONEHOUSE *v.* GENT (1841), 2 Q. B. 431, n.; 114 E. R. 170, n.; *sub nom.* STONEHOUSE *v.* GRANT, 7 L. T. 224.

*Annotations:*—**Apld.** Johns *v.* Simons (1842), 2 Q. B. 424. **Distd.** Snowdon *v.* Chadwick (1850), 15 L. T. O. S. 140. **Apld.** Wallace *v.* Fielden, The Oriental (1851), 7 Moo. P. C. C. 398. **Refd.** Williamson *v.* Page (1845), 1 C. B. 464.

**1121.** —— ——.]—In a home port, as well as a foreign one, the master has implied authority to borrow money for the necessary use of the ship, if the owner is absent & no communication with him can be had without great prejudice & delay. But, where the ship was in the port of Swansea & the owner at Llanelly, only eleven miles distant, & the master, being in want of money to clear the vessel, & having been unable to raise it, as the owner had directed, by selling part of the cargo, sent three messages to the owner for money but received no money, whereupon he borrowed £10 of pltf., telling him of the applications made to the owner:—*Held:* the master was not authorised to borrow, & the lender could not recover the money from the owner. Though the jury found that the money was advanced for the necessary use of the ship, & on the credit of the owner, not the master.—JOHNS *v.* SIMONS (1842), 2 Q. B. 425; 7 L. T. 224; 114 E. R. 168.

*Annotations:*—**Distd.** Snowdon *v.* Chadwick (1850), 15 L. T. O. S. 92, 140. **Apld.** Wallace *v.* Fielden, The Oriental (1851), 7 Moo. P. C. C. 398. **Refd.** Williamson *v.* Page (1845), 1 C. B. 464; Gibbs *v.* Gray, Gray *v.* Gibbs (1857), 26 L. J. Ex. 286; Gunn *v.* Roberts (1874), 22 W. R. 652.

**1122.** —— ——.]—BELDON *v.* CAMPBELL, No. 1117, *ante*.

**1123.** —— ——.]—(1) A vessel having been a fortnight windbound at Newport, her owner residing at Exeter, one day's post from Newport, the master borrowed £5 from a broker, to enable him to purchase provisions necessary for the use of the ship:—*Held:* the jury were justified in inferring that there was such a reasonable necessity for borrowing the money, as to render the owner liable for it, though there was no proof that the goods might not have been obtained by the master on credit.

(2) It may be to the advantage of the owner to borrow a small sum for the purpose of buying provisions; they would necessarily be obtained upon better terms for ready money (MOULE, J.).—EDWARDS *v.* HAVILL (1853), 14 C. B. 107; 2 C. L. R. 1343; 23 L. J. C. P. 8; 22 L. T. O. S. 87; 17 Jur. 1103; 2 W. R. 12; 139 E. R. 45.

*Annotation:*—*As to* (1) **Refd.** Gunn *v.* Roberts (1874), L. R. 9 C. P. 331.

**1124.** —— ——.]—CURRAN *v.* WOOD, No. 1134, *post*.

**1125. Ship in foreign port—Resident agent.**]—GUNN *v.* ROBERTS, No. 1248, *post*.

*Sect.* 2.—*Necessaries: Sub-sect.* 2, *C.; sub-sects.* 3 & 4. *Sect.* 3: *Sub-sect.* 1.]

**1126. No time to communicate with owner.**]—THE WILLIAMS'S ADVENTURE, SCHENCK *v.* TOWNHEND (1854), 9 L. T. 119.

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SUB-SECT. 3.—LIABILITY OF MASTER.

**1127. General rule.**]—The owners or the master are in general liable for necessaries for the use of a ship, if the master order them; but if it appear that the credit had been given exclusively to the owners, & that the master in giving the orders acted merely as their servant, he will not be liable.—HOSKINS *v.* SLAYTON (1737), Lee *temp.* Hard. 376; 95 E. R. 244.

**1128. Credit given to master only.**]—GARNUM *v.* BENNET (1728), 1 Barn. K. B. 96; 2 Stra. 816; 94 E. R. 67.

**1129.** ——.]—GORDON *v.* HARE, No. 1086, *ante*.

**1130.** ——.]—The captain of a ship, who gives directions for repairs, is liable to the tradesman in the first instance, if it does not appear that any credit was given to the owners.—ESSERY *v.* COBB (1832), 5 C. & P. 358; 172 E. R. 1010, N. P.

**1131.** ——.]—THE PROGRESS, TILLY *v.* THOMPSON (1853), 7 L. T. 224.

**1132.** ——.]—THE FORERUNNER, ASHTON *v.* HUDSON (1858), 9 L. T. 87.

**1133.** ——.]—(1) In an action against an exor. for work done for deceased in repairing a vessel, it was proved by witnesses, called for pltf., that deceased was the registered owner, & that the repairs were done at the request of the captain of the vessel, but it also appeared that the captain, when he received the bill, said he was the biggest owner, & that deceased was part owner; that pltf. in his books gave credit to the captain only, & had originally applied to him for payment, drawing a bill upon him which he did not accept. No witnesses were called for deft., but it was objected on his behalf that there was no evidence to go to the jury. The case, however, went to the jury, who found their verdict for pltf.:—*Held:* there must be a new trial, as there was no evidence that deceased owner had authorised the captain to employ pltf., & the verdict was against the evidence, which showed that pltf. treated the captain as the person with whom he contracted.

(2) The liability of the owner is a question of contract, & not of ownership (CROMPTON, J.).—PEARSON *v.* NELL (1865), 6 New Rep. 304; 12 L. T. 607; 13 W. R. 967; 2 Mar. L. C. 213.

*Annotation:—As to* (1) **Refd.** Hibbs *v.* Ross (1866), 7 B. & S. 655.

**1134.** ——.]—Where clothes have been supplied to a ship's crew on the orders of the master of the ship, in a port within a day's post of the residence of the owners of the vessel, & an undertaking to pay given by the master, the value of the goods cannot be recovered from the owners of the ship.—CURRAN *v.* WOOD (1867), 15 L. T. 592; 2 Mar. L. C. 441.

**1135. Judgment against master—Bar to action against owners—Judgment unsatisfied.**]—PRIESTLY *v.* FERNIE, No. 1029, *ante*.

**1136. Liability expressly excluded—In bill drawn for payment of goods.**]—In pursuance of a contract for the supply of bunker coal, made between the owners of a steamship, as buyers, & the agent of the suppliers of the coal at Colombo, as sellers, deft., the master of the steamship, drew a bill of exchange on the owners of the vessel in favour of the suppliers, concluding with the words "value received on 300 tons coal & disbursements . . . supplied to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, & freight responsible." The bill was duly accepted in London, but on presentation for payment at maturity on a Saturday was dishonoured. Pltfs., holders of the bill, learnt through their bankers on the Monday that the bill was not paid, &, having communicated with the agents of the suppliers of the coal, ascertained that the vessel had arrived in the Tyne; but not knowing in what part, they made further inquiries without success, & on the following Thursday sent deft. notice of dishonour by registered letter addressing him as master of the vessel at Newcastle-upon-Tyne:—*Held:* deft. was liable as drawer for the wording of the bill did not by implication relieve him of that liability.—THE ELMVILLE, [1904] P. 319; 91 L. T. 151; 9 Asp. M. L. C. 606; *sub nom.* CEYLON COALING CO. *v.* GOODRICH, 73 L. J. P. 104.

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SUB-SECT. 4.—LIABILITY OF SHIP.

*See* Part XVIII., Sect. 1, sub-sect. 7, *post*.

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## SECT. 3.—AUTHORITY TO HYPOTHECATE SHIP AND FREIGHT.

SUB-SECT. 1.—IN GENERAL.

**1137. General rule—Master has authority.**]—If a ship be at sea & take leak, or otherwise want victual, or other necessaries, whereby either herself be in danger or the voyage defeated, in such case of necessity the master may impawn for money or other things to relieve such extremities, by employing the money so; for he is the person trusted with the ship & voyage, & therefore reasonably may be thought to have that power given to him implicitly, rather than to see the whole lost.—BRIDGEMAN'S CASE (1614), Hob. 11; 80 E. R. 162; *sub nom.* BARNARD *v.* BRIDGEMAN, Moore, K. B. 918.

*Annotations:*—**Refd.** Manby *v.* Scott (1662), O. Bridg. 229; Johnson *v.* Shippin (1703), 1 Salk. 35; Yates *v.* Hall (1785), 1 Term Rep. 73. **Mentd.** Clerk *v.* Andrews (1689), 1 Show. 9.

**1138.** —— ——.]—A master . . . may pawn to relieve the ship in extremity, for he being constituted master of the ship, has implicitly a power to preserve it in cases of danger (HOLT, C.J.).—KING *v.* PERRY (1689), 3 Salk. 23; 91 E. R. 669.

**1139.** —— ——.]—A master may pawn his ship for relief in extremity; for he being constituted master has implicitly a power to preserve the ship in cases of danger; though he cannot

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**PART IV. SECT. 2, SUB-SECT. 3.**

n. *Credit given to ship—Master not liable.*]—In this case necessaries were supplied to a British ship in a home port. The trial judge found that they were supplied on the credit of the ship, although ordered by the master at the request of the owners:—*Held:* the master had incurred no personal liability in the circumstances.—KANE *v.* THE JOHN IRWIN (1911), 10 E. L. R. 331; 13 Exch. C. R. 502; 1 D. L. R. 447.—**CAN.**

o. *Credit given to master—Letter of credit expended by master for wrongful purposes.*]—PASSMORE *v.* CALCUTTA DOCKING CO., LTD. (1865), 13 L. T. 23.—**IND.**

**PART IV. SECT. 3, SUB-SECT. 1.**

**1137** 1. *General rule—Master has authority.*]—HALIFAX GRAVING DOCK CO. *v.* MAGLIULO (1908), 43 N. S. R. 174; 5 E. L. R. 553; *affd.* (1909), 6 E. L. R. 333.—**CAN.**

do it for his own debt, because he has neither a property or power for that purpose (HOLT, C.J.). —ANON. (1701), Holt, K. B. 650; 90 E. R. 1260.

**1140.** —— ——.]—A master, under circumstances of necessity, has a general right to hypothecate either of them, or to sell the cargo, or to throw any part of it overboard (SIR WILLIAM SCOTT).—THE COPENHAGEN (1799), 1 Ch. Rob. 289; 165 E. R. 180.

*Annotations:*—**Mentd.** Hallett *v.* Wigram (1850), 9 C. B. 580; Hall *v.* Janson (1855), 4 E. & B. 500; Atwood *v.* Sellar (1880), 5 Q. B. D. 286; Svensden *v.* Wallace (1884), 13 Q. B. D. 69; Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298.

**1141.** —— ——.]—THE ATLAS, No. 1154, *post.*

**1142.** —— —— **Limited by necessity of the circumstances.**]—(1) A ship was freighted & insured from London to Calcutta & back: the master employed, as agents at Calcutta, G. & co., upon whom he had a limited credit to complete a return cargo; he exhausted that credit; & took a cargo under their advice to the Mauritius; & in a series of voyages, in defiance of letters from his owners to return home, came back to Calcutta, chartered to G. & co. who, on a fresh cargo to the Mauritius, received the freight, & for a small balance took a bottomry bond. The bond was without premium: it included the above freight:—*Held:* except as to the letter of credit, G. & co. had acted as the agents & on the credit & responsibility of the master, & there being shown no absolute necessity for the bottomry bond to secure the return of the ship to England, that the bond was invalid.

Before a master can exercise the extraordinary power of hypothecation, he must show that there is an absolute necessity for it, to secure the return of the ship (SIR JOHN NICHOLL).

(2) Bottomry bonds, where given *bonâ fide* & for legitimate purposes, are to be liberally protected. It is important for the interests of commerce that a master, in a foreign port, standing in need of assistance arising out of some unforeseen necessity, to complete a voyage, & having no credit, should for that object be invested with a power to pledge the ship, & charge upon it the repayment of the loan in case of her safe arrival; but on the other hand, it is highly necessary for the protection of shipowners that the master's power in that respect should be limited by the necessity of the case; the transaction should be cautiously watched; for otherwise, masters entrusted with valuable ships in very distant parts of the world may, in conjunction with merchants, tempted by the profit of agency & commission on all sales & advances, employ ships for years on their own speculations & adventures; & at last, under colour of advances to enable the ship to return home, grant bottomry bonds, thus adding to losses & injuries already suffered by the owners, & which bonds may also be to the prejudice of creditors (SIR JOHN NICHOLL).—THE RELIANCE (1833), 3 Hag. Adm. 66; 166 E. R. 331.

*Annotation:*—*As to* (1) **Reld.** The Orelia (1833), 3 Hag. Adm. 75.

**1143.** —— —— ——.] — THE KENNERSLEY CASTLE, No. 1178, *post.*

**1144.** —— —— ——.]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante.*

**1145.** —— —— ——.]—(1) To render a bottomry-bond valid, there must be a double necessity: (*a*) a necessity of obtaining supplies in order to prosecute the voyage; (*b*) the impossibility of obtaining those supplies in any other way than by an hypothecation of the ship.

A bottomry-bond, given at Hobart Town, under a threat of arrest, by the owner's agent, & for whose benefit, at least in part, the bond was entered into, on the day before the vessel sailed, & reciting that it was to enable the master to pay for "necessaries supplied for the intended voyage, & for the use of the brig," such bond not having been conditioned for previously, pronounced against, with costs.

The master is not the owner of the property so as to have a right to bind it at his own will & pleasure. . . . The hypothecation may be unjust, not only as it affects the property of his owners, but, by giving a priority of payment to one creditor, & thereby operating to the injury of other creditors & of mtgees., for if the hypothecation be valid, it has a preference to all other liens, except seamen's wages. . . . Necessity is the vital principle of hypothecation-bonds (SIR JOHN NICHOLL).

(2) It is not till after three months, during which time the master was in full communication with O., the agent, that a long account of debts due from the ship is produced & a bottomry bond taken. Were, then, such debts so incurred as to constitute a lien on the ship & to give the master a right to hypothecate her? If the funds were advanced by O. before the bottomry bond was contemplated, they were advanced by him on the credit of the owners or master. If they were advanced on the guarantee of O., the debts were simple contract debts, not entitled to priority of payment, nor authorising the hypothecation of the ship (SIR J. NICHOLL).—THE HERSEY (1837), 3 Hag. Adm. 404; 3 L. T. 825; 166 E. R. 455; *affd. sub. nom.* GORE *v.* GARDINER, THE HERSEY (1840), 3 Moo. P. C. C. 79, P. C.

*Annotations:*—*As to* (1) **Reld.** The Karnak (1868), L. R. 2 A. & E. 289; Grant *v.* St. George Yacht, The St. George, Douglas *v.* St. George Yacht, The St. George (1926), 136 L. T. 252; The St. George, [1926] P. 217. *As to* (2) **Reld.** The Ariadne (1842), 1 Wm. Rob. 411.

**1146.** —— —— ——.] — THE PONTIDA, No. 1387, *post.*

**1147. Extent of authority—How governed.**]—DROEGE *v.* SUART, THE KARNAK, No. 1509, *post.*

**1148. Foundation of rule—Prospect of benefit to owner.**]—THE GRATITUDINE, No. 1518, *post.*

**1149. Sale of bottomry bonds—Whether favoured by court.**]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante.*

**1150. How construed—By tenor of contents.**]—THE EMANCIPATION, No. 1492, *post.*

**1151.** —— **According to general scope.**]—THE INDOMITABLE, No. 1357, *post.*

**1152. Master acts exclusively as owner's agent.**]—A master of a ship who borrows money on bottomry, for the repairs of the ship, acts exclusively as the agent of the owner.—BENSON *v.* DUNCAN (1849), 3 Exch. 644; 18 L. J. Ex. 169; 12 L. T. O. S. 516; 14 Jur. 218; 154 E. R. 1003, Ex. Ch.; *affg.* S. C. *sub nom.* DUNCAN *v.* BENSON (1847), 1 Exch. 537.

*Annotations:*—**Reld.** Lloyd *v.* Guibert (1865), 6 B. & S. 100; The Staffordshire (1871), 25 L. T. 137; Atwood *v.* Sellar (1879), 4 Q. B. D. 342. **Mentd.** Hallett *v.* Wigram (1850), 9 C. B. 580; Atkinson *v.* Stephens (1852), 7 Exch. 567; Stainbank *v.* Shepard (1853), 13 C. B. 418; Grey *v.* Gibbs (1857), 2 H. & N. 22; The Union (1860), 30 L. J. P. M. & A. 17; The Olivier (1862), Lush. 484; The Lizzie (1868), 19 L. T. 71; The Eugenie (1873), L. R. 4 A. & E. 123; The Onward (1873), L. R. 4 A. & E. 38; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579.

**1153. Hypothecation of ship & cargo—Cargo owner's right of action against shipowner—For costs & charges.**]—(1) To render valid a bottomry bond where communication is practicable between the port of distress & the owner, it is not sufficient that the owner should be made aware of the

*Sect.* 3.—*Authority to hypothecate ship and freight: Sub-sects.* 1, 2, 3, 4 & 5.]

disaster which has happened to his ship; he should also be informed of the intention to hypothecate.

(2) In considering an objection to a bottomry bond on ship & cargo, by owners of cargo, upon the ground that the master had not communicated with the owner of the cargo before giving the bonds, the ct. will consider the probable effect of the delay arising from such communication, & not only whether it was possible, but also whether it was reasonable & practicable for the master or the lender of the money to have any such communication with the owner or consignee of the cargo before entering into the bond.

(3) If it is intended to rely upon such a ground to invalidate a bond, such objection ought to be specifically set forth in the pleading.

(4) Where money has been advanced upon bottomry of a British ship & her cargo, the owner of the cargo so hypothecated has his right of action for all costs & charges against the owner of the ship.—THE OLIVIER (1862), 1 Lush. 484; 31 L. J. P. M. & A. 137; 1 Mar. L. C. 214; *sub nom.* THE OLLIVIER, 6 L. T. 259.

*Annotation:—As to* (1) **Consd.** The Staffordshire (1871), 25 L. T. 137.

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SUB-SECT. 2.—NATURE OF BOTTOMRY BONDS.

**1154. Contract in nature of mortgage.**]—In bottomry bonds, which are contracts in the nature of mtges., the lender runs the risk of the loss of the vessel; & in case of her safe arrival receives large interest, called maritime interest, *faenus nauticum usura maritima, pretium periculi.*

Bottomry bonds are contracts in the nature of mtges. of a ship on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, & pledges the keel or bottom of the ship, *pars pro toto*, as a security for repayment. It is, moreover, stipulated that if the ship is lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship shall arrive safe, then he shall be paid back his principal, & also the interest agreed upon, called marine interest, however this may exceed the legal rate of interest (*per* CUR.).

The hypothecation or bottomry bond . . . is a bond whereby the captain of a vessel, not having any credit in the port, is enabled to obtain money for the repair of the ship, & its equipment for the voyage, upon what is called maritime interest. . . . The extent or value of this security for repayment was not limited, for it was not certain, but only eventual, dependent upon the safe accomplishment of the intended voyage. If the ship arrived safe, the title to repayment became vested; but if the ship perished *in itinere*, the loss fell entirely upon the lender. Upon that account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions (LORD STOWELL).

*Qu.:* whether a bond professing to be a bottomry bond, but excluding maritime risk, is subject to the Admlty. jurisdiction. The ct. directed a search for precedents. Five precedents of such bonds but no judicial decisions on the point being found, the ct., after directing an argument, decided that the interest reserved was maritime interest, & that therefore, *ex concessis*, the bond excluding sea risk was void.—THE ATLAS (1827), 2 Hag. Adm. 48; 166 E. R. 162.

*Annotations:—***Refd.** Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853), 13 C. B. 418; The Royal Arch (1857), 30 L. T. O. S. 198; The James W. Elwell, [1921] P. 351.

**1155. Privileged character.**]—THE ALEXANDER, No. 1174, *post.*

**1156.** ——.]—THE ZODIAC, No. 1240, *post.*

**1157.** ——.]—THE RELIANCE, No. 1142, *ante.*

**1158.** ——.]—THE KENNERSLEY CASTLE, No. 1178, *post.*

**1159.** ——.]—THE ST. CATHERINE, No. 1495, *post.*

**1160. —— Limits of privilege.**]—THE COGNAC, No. 1436, *post.*

**1161.** —— ——.]—THE MARY ANN, No. 1221, *post.*

**1162. Distinguished from respondentia.**]—Bottomry & *respondentia* are totally & essentially distinct & the former does not in any sense include the latter (TINDAL, C.J.).—GORE *v.* WYNNE (1829), L. & Welsb. 39; Mood. & M. 393, N. P.

**1163. Distinguished from mortgage or pledge.**]—STAINBANK *v.* SHEPARD, No. 1349, *post.*

**1164. Contract of insurance for particular voyage.**]—LONDON & MIDLAND BANK *v.* NEILSEN, No. 1398, *post.*

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SUB-SECT. 3.—FORMALITIES OF CONTRACT.

**1165. Form—Bill of sale.**]—(1) The master of a ship may in the course of his voyage hypothecate her for necessaries even upon land.

(2) The master of a ship cannot as such sell the ship or any part of her, & if he makes a bill of sale of the ship in respect of something for which he might expressly have hypothecated it, the bill of sale will be void, & the ship shall be looked upon as hypothecated.—JOHNSON *v.* SHIPPEN (1704), 2 Ld. Raym. 982; Holt, K. B. 48; 11 Mod. Rep. 30; 1 Salk. 35; 92 E. R. 154; *sub nom.* JONSON *v.* SHEPNEY, 6 Mod. Rep. 79.

*Annotations:—As to* (1) **Refd.** The Rhadamanthe (1813), 1 Dods. 201. *As to* (2) **Consd.** Reid *v.* Darby (1808), 10 East, 143. **Expld.** Idle *v.* Royal Exchange Assce. (1819), 8 Taunt. 755. **Consd.** Freeman *v.* East India Co. (1822), 5 B. & Ald. 617. **Refd.** Yates *v.* Hall (1785), 1 Term Rep. 73; Menetone *v.* Gibbons (1789), 3 Term Rep. 267; Stainbank *v.* Shepard (1853), 13 C. B. 418. *Generally*, **Mentd.** Castrique *v.* Imrie (1870), L. R. 4 H. L. 414; The Dictator, [1892] P. 304.

**1166.** —— **Instrument under seal.**]—Whether the Ct. of Admlty. has or has not jurisdiction depends upon the subject matter. Therefore they have cognisance of an hypothecation bond given in the course of a voyage, though it be executed on land & under seal.—MENETONE *v.* GIBBONS (1789), 3 Term Rep. 267; 100 E. R. 568.

*Annotation:—***Refd.** The Catherine (1848), 6 Notes of Cases, Sup. XLIII.

**1167.** —— **Indorsement on charterparty.**]—THE GRECIA (1850), 7 Notes of Cases, 410; 4 L. T. 28.

**1168.** —— **Bill of exchange.**]—(1) An instrument, drawn in the form of a bill of exchange for

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**PART IV. SECT. 3, SUB-SECT. 2.**

p. *Part of agreement to pay void for uncertainty.*]—ASAN KUTHU SAHIB MERCOYAR *v.* RAMANATHAN CHETTI (1898), I. L. R. 22 Mad. 26.—**IND.**

q. *Necessity for liberal construction.*]—Bottomry bonds being in the language of commercial men, & not of lawyers, should receive a liberal construction so as to give effect to the evident intention of the parties.—THE SOURANDER (1860), 4 L. T. 92.—**IR.**

r. *Necessity to comply with Registry Acts.*]—A bottomry bond is not such a transfer of property in a vessel as to require a compliance with the Registry Acts.—BRISTOWE & BRISTOWE *v.* BUTLER & TODRIDGE'S ESTATE (TRUSTEES) (1817), 1 Nfld. L. R. 19.—**NFLD.**

the payment of necessary disbursements of a ship, but which is payable after the arrival of the ship at her destination, & pledges the ship, "except in case of total loss," is, although not stipulating for maritime interest, a bottomry bond.

(2) A claim for necessaries, to secure the payment of which the master has given a bottomry bond on his ship, is merged in the bond, & cannot be enforced by the material men on the simple contract.—THE ELPIS (1872), L. R. 4 A. & E. 1; 42 L. J. Adm. 43; 27 L. T. 664; 21 W. R. 576; 1 Asp. M. L. C. 472.

*Annotation:*—**Consd.** The Haabet, [1899] P. 295.

**1169. Execution—Proof—Execution in foreign port.**]—(1) Of hypothecation bonds, the last executed must be first paid.

(2) The due execution of a bond in a foreign port cannot be proved by a mere formal affidavit of persons resident in this country, swearing to facts of which they have no personal knowledge, nor any information or document on which to found their belief.

(3) Hypothecation bonds can be given only where money is not to be had on personal security. —THE SYDNEY COVE (1815), 2 Dods. 1; 165 E. R. 1396.

**Essential contents.**]—*See* Sub-sect. 7, G., *post.*

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SUB-SECT. 4.—WHO MAY GIVE BOTTOMRY BONDS.

**1170. Master.**]—BRIDGEMAN'S CASE, No. 1137, *ante.*

**1171.** ——.]—SCARREBORROW *v.* LYRIUS (1628), Noy, 95; Lat. 252; 74 E. R. 1061.

**1172.** ——.]—THE ATLAS, No. 1154, *ante.*

**1173.** ——.]—THE RELIANCE, No. 1142, *ante.*

**1174.** —— **Substituted master—Appointed by consignees of cargo.**]—Consignees of a cargo advancing money for the necessary repairs of a ship are justified in taking a bond of hypothecation from a person whom as a measure of necessity they had themselves substituted for the former master.

Bonds of hypothecation are of a very high & privileged nature (SIR WILLIAM SCOTT).—THE ALEXANDER (1812), 1 Dods. 278; 165 E. R. 1310.

*Annotations:*—**Consd.** The Kennersley Castle (1833), 3 Hag. Adm. 1; The Laurel (1863), Brown. & Lush. 191; The Laurel (1864), Brown. & Lush. 317. **Refd.** The Vibilia (1838), 1 Wm. Rob. 1; The Karnak (1868), L. R. 2 A. & E. 289; The St. George, [1926] P. 217.

**1175.** —— —— **Appointed by merchant.**]—THE RUBICON, No. 1184, *post.*

**1176.** —— —— **Appointed by underwriters.**]—THE KENNERSLEY CASTLE, No. 1178, *post.*

**1177.** —— **Master by succession—Bonds given for repairs ordered by predecessors.**]—THE WAKEFIELD (1829), cited in 3 Hag. Adm. at p. 8; 166 E. R. 310.

*Annotation:*—**Refd.** The Kennersley Castle (1833), 3 Hag. Adm. 1.

**1178.** —— ——.]—The owner having abandoned, a substituted master, whether appointed by the underwriter's agent, or by the owner's agent, or by both, not appearing, gives a bottomry bond to a holder of a collateral security. Bond sustained. *Qu.:* whether if a substituted master were appointed by underwriters alone, he can give such a bond.

Bottomry bonds may be given by masters substituted & appointed abroad, & by masters by succession, such a master being the *hæres necessarius* as he is called. Bottomry bonds are the creature of necessity & distress, & may be expected therefore to assume different shapes, which cannot be limited except by the condition of a faithful & beneficial discharge of the authority exercised in granting them as being necessary for the preservation of property. They are favoured instruments (SIR CHRISTOPHER ROBINSON).—THE KENNERSLEY CASTLE (1833), 3 Hag. Adm. 1; 166 E. R. 308.

**1179. Factor.**]— SCARREBORROW *v.* LYRIUS (1628), Noy, 95; Lat. 252; 74 E. R. 1061.

**1180. Purser.**]— SCARREBORROW *v.* LYRIUS (1628), Noy, 95; Lat. 252; 74 E. R. 1061.

**1181. Mate—Capture & recapture—Payment of salvage to recaptors.**]—In a case of capture & recapture, the mate, in the absence of the captain, has a right to hypothecate the ship for the purpose of paying the salvage to the recaptors.—PARMETER *v.* TODHUNTER (1808), 1 Camp. 541; 170 E. R. 1050, N. P.

*Annotations:*—**Mentd.** Mount *v.* Harrison (1827), 4 Bing. 388; Currie & Bombay Native Insce. (1869), 6 Moo. P. C. C. N. S. 302; Russian Bank for Foreign Trade *v.* Excess Insce., [1918] 2 K. B. 123.

**1182. Consul—Master murdered—New master afterwards appointed.**]—THE CYNTHIA, No. 556, *ante.*

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SUB-SECT. 5.—WHO MAY TAKE BOTTOMRY BONDS.

**1183. Consignee of cargo.**]—THE ALEXANDER, No. 1174, *ante.*

**1184.** —— **Bond taken by agent.**]—A bottomry bond given by a substituted master to the merchant who had appointed him upheld. In the charter-party was a stipulation that the disbursements for the ship should be made, free of commission, by "the charterer's agent," not named. The bond holder never saw the charterparty; he disclaimed any knowledge of this clause, & denied that he was agent.

The supplies were the proper subjects of bottomry; & the charges fair. There is therefore nothing to impeach the good faith of the transaction, nor to invalidate the claim of the bond holder (SIR CHRISTOPHER ROBINSON).—THE RUBICON (1833), 3 Hag. Adm. 9; 166 E. R. 311.

**1185. Agent of ship.**]—*Semble:* the agent of the owner may, under circumstances, take a bottomry bond by way of security for advances made by him.—THE HERO (1817), 2 Dods. 139; 165 E. R. 1441.

*Annotations:*—**Consd.** The Kennersley Castle (1833), 3 Hag. Adm. 1; The Orelia (1833), 3 Hag. Adm. 75; Smith *v.* Bank of New South Wales, The Staffordshire (1872), L. R. 4 P. C. 194. **Refd.** The Hersey (1837), 3 Hag. Adm. 404; The Lord Cochrane (1844), 2 Wm. Rob. 320; The Oriental (1850), 3 Wm. Rob. 243; The Royal Arch (1857), 30 L. T. O. S. 198.

**1186.** ——.]—Bottomry bond given at Pernambuco upon the ship, freight & cargo, resisted by the consignees of the cargo, upon the ground, (*a*) that the advances were made by persons acting in the capacity of ship agents at the time the bond was given; (*b*) that the disbursements were made with the understanding that they should be covered by bills of exchange upon the owners of the ship; (*c*) that the repairs upon the vessel were improvidently undertaken, & the vessel should have been sold, & the cargo transhipped. Objection overruled, & the bond sustained.

It is not to be denied that under certain circumstances the master of a vessel . . . may sell &



t. *Agent of owner.*]—WALLACE *v.* FIELDEN (1851), C. R. 2 A. C. 33.—CAN.

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sects. 5, 6 & 7, A. (a) & (b).]*

dispose of the ship but this power . . . is only to be exercised under emergencies of great stringency (DR. LUSHINGTON).—THE LORD COCHRANE (1844), 2 Wm. Rob. 320 ; 3 Notes of Cases, 172 ; 3 L. T. O. S. 487 ; 8 Jur. 714 ; 166 E. R. 775 ; *subsequent proceedings, sub nom.* BENSON *v.* CHAPMAN (1849), 2 H. L. Cas. 696, H. L.

*Annotations :*—**Expld.** The Olivier (1862), 6 L. T. 259. **Reld.** The Don Francisco (1861), Lush. 468 ; The Onward (1873), L. R. 4 A. & E. 38 ; The Pontida (1884), 9 P. D. 102.

**1187.** ——.]—(1) A lender on bottomry, the agent of the ship, cannot include in the bond the expenses of relanding a cargo of his own shipped in an unsafe condition, nor money advanced to the master, without proof of inquiry as to its necessity, & as to its proper application.

(2) When the lender is the agent of the ship, the ct. watches the transaction with great vigilance.

(3) In advancing money to a master, the lender is bound to inquire whether the money is necessary for the ship ; & if the lender be also the agent, he is bound to protect the owner by looking to the proper application of the money.—THE ROYAL STUART (1855), 2 Ecc. & Ad. 258 ; 3 L. T. 824 ; 7 L. T. 24 ; 1 Jur. N. S. 1116 ; 164 E. R. 420.

*Annotation :*—*As to* (3) **Reld.** The Pontida (1884), 9 P. D. 177.

**1188.** ——.]—THE ROYAL ARCH, No. 1230, *post.*

**1189. —— Limitations on right to take bond.]**—It is not a proposition universally true, that an agent cannot, under any circumstances, take a bottomry bond from the master of a vessel consigned to his charge, though it does not follow that in all cases, he has the same right to take a bond as a person wholly unconnected with the ship. An agent must not take advantage of his character of agent to take a bond which, by his discharge of his duty as agent would have been avoided.—THE ORIENTAL (1850), 3 Wm. Rob. 243 ; 7 Notes of Cases, 476 ; 3 L. T. 559 ; 14 Jur. 336 ; 166 E. R. 953 ; *on appeal, sub nom.* WALLACE *v.* FIELDEN, THE ORIENTAL (1851), 7 Moo. P. C. C. 398, P. C.

*Annotations :*—**Consd.** The Onward (1873), L. R. 4 A. & E. 38. **Reld.** The Cynthia (1852), 20 L. T. O. S. 54 ; Edwards *v.* Havill (1854), 2 C. L. R. 1343 ; Sloveking *v.* Maas (1856), 25 L. J. Q. B. 358 ; The Royal Arch (1857), Sw. 269 ; The Sultan (1859), Sw. 504 ; The Olivier (1862), Lush. 484 ; The Staffordshire (1871), 25 L. T. 137 ; Kleinwort, Cohen *v.* The Cassa Marittina of Genoa (1877), 2 App. Cas. 156.

**1190. —— Duty to give opportunity of obtaining advance elsewhere—On owner's personal credit.]**—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE, No. 1506, *post.*

**1191. British Consul.]**—THE ZODIAC, No. 1240, *post.*

**1192. Lienholder—Lien given by law of country where advance made.]**—THE VIBILIA, No. 1283, *post.*

**1193. Purchaser of bond at auction.]**—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante.*

**1194. Debtor of ship.]**—A party cannot lend money upon bottomry of a vessel, if, at the time, he is indebted to the owners, in respect of the vessel.—THE HEBE (1843), 2 Wm. Rob. 146 ; 3 L. T. 824 ; 7 Jur. 564 ; 166 E. R. 710 ; *subsequent proceedings* (1846), 2 Wm. Rob. 412.

*Annotations :*—**Reld.** The Karnak (1868), L. R. 2 A. & E. 289 ; The Empire of Peace (1869), 39 L. J. Adm. 12.

**1195. —— Partial indebtedness—Validity of bond as to excess.]**—The general validity of a bond will not be vitiated by the fact that the lender of the money was himself partially indebted to the ship at the time he lent the money, the bond will be invalidated *pro tanto* only ; & the amount of the deductions must be ascertained by reference to the registrar & merchants.—THE HEBE (1846), 2 Wm. Rob. 412 ; 4 Notes of Cases, 361 ; 10 Jur. 227 ; 166 E. R. 811.

*Annotations :*—**Consd.** The Karnak (1868), L. R. 2 A. & E. 289. **Reld.** The Ocean (1846), 2 Wm. Rob. 429.

**1196. Person concerned with pecuniary affairs of ship—Suspicion of collusion with master.]**—(1) Where the lender, in New South Wales, had mixed himself with the pecuniary affairs of the ship, & taken a commission upon receipts & disbursements, having also purchased debts from creditors at less than their amount, which he charged to the ship, & covered by the bond, & where there were other circumstances exciting a suspicion of collusion with the master, the ct. referred the whole accounts to the registrar & merchants, to report generally & specially.

(2) A bond may be good in part & bad in part ; part being bad does not invalidate the whole bond.

(3) Where the conduct of the bondholder had been such as to give reasonable ground for suspicion, & to justify the opposition, the ct., although it pronounces for the bond will make no order as to costs.—THE OCEAN (1846), 2 Wm. Rob. 429 ; 4 Notes of Cases, 410 ; 4 L. T. 92 ; 10 Jur. 504 ; 166 E. R. 817 ; *subsequent proceedings*, 2 Wm. Rob. 465.

**1197. Person having pledged own credit for expenses—No money actually advanced.]**—THE ROYAL ARCH, No. 1230, *post.*

**1198. Managing owner—Director of company owning ship.]**—THE ST. GEORGE, No. 1338, *post.*

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SUB-SECT. 6.—WHAT SHIPS ARE SUBJECT OF HYPOTHECATION.

**1199. Vessel in service of government—Hired transport.]**—THE JANE, No. 1339, *post.*

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SUB-SECT. 7.—ESSENTIALS OF BOTTOMRY BONDS.

*A. Must be Grounded on Necessity.*

*(a) In General.*

**1200. General rule.]**—BRIDGEMAN'S CASE, No. 1137, *ante.*

**1201.** ——.]—THE COPENHAGEN, No. 1140, *ante.*

**1202.** ——.]—THE RELIANCE, No. 1142, *ante.*

**1203.** ——.]—THE KENNERSLEY CASTLE, No. 1178, *ante.*

**1204.** ——.]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante.*

**1205.** ——.]—THE HERSEY, No. 1145, *ante.*

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**PART IV. SECT. 3, SUB-SECT. 7.—A. (a).**

**1200i.** *General rule.*]—The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage, or for necessaries or provisions required for the same purpose. Furthermore, in order to enable the creditor to benefit by the hypothecation, the following elements must be present in the transaction :—(*a*) The repairs must be performed & the necessaries or provisions supplied on the express condition that the claim is to be secured by a bond ; (*b*) there must be a total absence of personal credit on the part of the owner or master ; (*c*) before pledging the ship, the master should, if it was at all possible to do so, have communicated with the owner ; & (*d*) there must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred.—CHRISTIAN *v.* THE ST. JOSEPH (1893), 3 Exch. C. R. 344.—CAN.

**1206.** ——.]—THE GAUNTLET, No. 1272, *post.*
**1207.** ——.]—THE GRECIA, No. 1347, *post.*
**1208.** ——.]—LYALL *v.* HICKS, No. 1246, *post.*
**1209.** ——.] — LAW *v.* WALLERSTEIN, THE GRAPESHOT, No. 1374, *post.*
**1210.** ——.]—GUNN *v.* ROBERTS, No. 1248, *post.*
**1211.** ——.]—THE PONTIDA, No. 1387, *post.*
**1212. Meaning of "necessity"—Analagous to meaning in other parts of law.**] — DROEGE *v.* SUART, THE KARNAK, No. 1509, *post.*
**1213. Evidence of necessity—Consent of managing part owner.**]—THE ROYAL ARCH, No. 1230, *post.*
**1214. —— How to be ascertained.**]—DROEGE *v.* SUART, THE KARNAK, No. 1509, *post.*
**1215. Presumption that necessaries are fit & proper—Where no clear proof to the contrary.**]—LAW *v.* WALLERSTEIN, THE GRAPESHOT, No. 1374, *post.*

*(b) Necessity Must Arise in Course of Voyage.*

**1216. General rule.**]—(1) The master of a ship cannot hypothecate her except in the course of the voyage.

(2) By the maritime law an hypothecation is implied upon every contract with the master of a ship.—JUSTIN *v.* BALLAM (1702), 2 Ld. Raym. 805; 1 Salk. 34; 92 E. R. 38.

*Annotations:—As to* (1) **Reld.** Cannan *v.* Meaburn (1823), 1 Bing. 243; The Neptune (1833), 3 Hag. Adm. 129. *Generally,* **Reld.** The Gratitudine (1801), 3 Ch. Rob. 240; The Rhadamanthe (1813), 1 Dods. 201; The Gustaf (1862), 7 L. T. 259.

**1217.** ——.]—On a ship's being repaired in the river Thames, & fitted out there with new rigging & apparel, the ship itself is not liable, but the owners. *Secus* if repaired or fitted out at sea, where the master alone may hypothecate.—WATKINSON *v.* BERNADISTON (1726), 2 P. Wms. 367; 2 Eq. Cas. Abr. 512; 24 E. R. 769.

*Annotations:—***Dbtd.** The Orienta, [1894] P. 271. **Reld.** Buxton *v.* Snee (1748), 1 Ves. Sen. 154; Hussey *v.* Christie (1807), 13 Ves. 594; The Neptune (1835), 3 Knapp, 94.

**1218.** ——.]—The master cannot hypothecate the ship before the voyage begins.—LISTER *v.* BAXTER (1726), 2 Stra. 695; 93 E. R. 789.
**1219.** ——.]—THE DUNVEGAN CASTLE, No. 314, *ante.*
**1220.** ——.]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante.*

**1221.** ——.]—(1) Bottomry may legally take place whenever a ship is engaged in a voyage, within the intention of the owners, declared by them in any instrument, or where such intention & consent is to be inferred from the facts of the case, whether the voyage be called intermediate or not; so that a bottomry bond may be valid, whatever number of voyages the adventure may include, provided such voyages be in the legal or *de facto* contemplation of the owners.

Repairs & expenses became necessary in consequence of an accident antecedent to a particular voyage; the bond given to meet these expenses was not dated till after the completion of that voyage:—*Held:* this objection was not fatal, & the bond was not invalidated on that account.

(2) Bottomry bonds duly executed & in proper form are sacred instruments, only so far that the legal presumption is in favour of their validity.

(3) Right of mtgees. to impeach the validity of a bottomry bond.—THE MARY ANN (1846), 4 Notes of Cases, 376; 10 Jur. 253.

*Annotations:—As to* (1) **Reld.** The Louisa Bertha (1850), 16 L. T. O. S. 316; The Union (1860), Lush. 128.

**1222. —— Effect of liability of vessel to arrest—For any debt of owner to creditor—Residing in country where bond given.**] — (1) A bond of bottomry given by the master to release his vessel from an arrest on account of debts owing by the owner to his agent at Malta, upon the balance of accounts current between them, such accounts being incurred anterior to the voyage in which the vessel was engaged at the time, not sustained.

(3) The general principle, that bonds of bottomry can alone be given for the furtherance of the voyage in which the vessel is actually engaged, not affected by the circumstance that by the law of the country where the bond is given, the vessel may be arrested & sold for any debt owing by the owner to a creditor residing in that country.—THE OSMANLI (1850), 3 Wm. Rob. 198; 7 Notes of Cases, 322; 3 L. T. 559; 14 Jur. 93; 166 E. R. 937.

*Annotations:—As to* (1) **Reld.** The Edmond (1860), Lush. 57; The North Star (1860), 29 L. J. P. M. & A. 73; The Edmond (1861), Lush. 211; The Karnak (1868), L. R. 2 A. & E. 289.

**1223. Whether bond given in course of voyage—Bond given on land.**]—If the master of a ship take up moneys during the voyage at any place abroad for necessaries wanted *super altum mare,* & hypothecate the ship, the pawnee may sue on the hypothecation bond, in the Ct. of Admlty., although it was given at land.—COSSART *v.* LAWDLEY (1688), 3 Mod. Rep. 244; 87 E. R. 159.

*Annotation:—***Folld.** Johnson *v.* Shippen (1703), 2 Ld. Raym. 982.

**1224.** —— ——.]—The master of a ship may hypothecate her for necessaries even upon land in the course of the voyage. The Admlty. is the proper ct. to sue in, upon an hypothecation.—BENZEN *v.* JEFFRIES (1697), 1 Ld. Raym. 152; 91 E. R. 999.
**1225.** —— ——.]—JOHNSON *v.* SHIPPEN, No. 1165, *ante.*
**1226.** —— ——.]—MENETONE *v.* GIBBONS, No. 1166, *ante.*

**1227. —— Bond given in English port—By owner.**]—Bond given by owner of British ship in England is valid & can be sued on in Admiralty.—THE PROVIDENCE (1783), Burrell, 330; 167 E. R. 595.

**1228. —— —— By master.**]—A bottomry bond, granted by the master of a British vessel in a port of this country, upheld.

The authority of the ct. to take cognisance of such bonds, does not depend upon the locality of the owner's residence, but upon the necessity of the case.—THE TRIDENT (1839), 1 Wm. Rob. 29; 3 L. T. 682; 166 E. R. 484.

*Annotations:—***Consd.** The Priscilla (1859), Lush. 1. **Reld.** Law *v.* Wallerstein, The Grapeshot (1870), 22 L. T. 376.

**1229.** —— —— ——.]—(1) Advances made to the master for the repairs & service of a British ship in the port of Cowes, the owners being resident at Newcastle, cannot be made the subject of a bottomry transaction.

(2) An alleged bond of bottomry given at Rotterdam pronounced against upon the ground that the advances were made for the repayment of debts incurred by the ship in a former voyage, & also that such advances were not necessary for the immediate exigencies of the ship.

I know of no case which has decided that a vessel can be duly hypothecated upon a bottomry bond for debts incurred before the voyage in question. LORD STOWELL entertained considerable doubt, in the first instance whether a vessel could be well hypothecated merely to avoid detention (DR. LUSHINGTON).

(3) The mtgee. of this vessel has a perfect right to contest in this ct. the validity of such a bond

***Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 7, A. (b) & (c), & B.***

(DR. LUSHINGTON).—THE LOCHIEL (1843), 2 Wm. Rob. 34; 2 Notes of Cases, 177; 3 L. T. 153, 682, 825, 826; 7 Jur. 265; 166 E. R. 668.

*Annotation:—Generally,* **Refd.** The Karnak (1868), L. R. 2 A. & E. 289.

**1230.** —— —— ——.]—(1) A bottomry bond given by the master, with the consent of the owner, upon a British ship, lying in a British port, for a new voyage, cannot be sued upon in the High Ct. of Admlty.; but it is otherwise, if the ship was lying in a foreign port.

(2) A bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred.

(3) No particular rate of interest is essential to a bottomry bond, though, when the ordinary or a low rate of interest is taken, it raises a suspicion that sea risk was not intended, & sea risk is essential to the jurisdiction of the ct.

(4) The consent of a managing part owner to a bottomry bond binds his co-owners, & is strong evidence of the necessity of the bond.

(5) A bottomry bond is entitled to priority of payment over a mtge. during the voyage for which the bond was executed; but when due, should be enforced within reasonable time, & a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, & substitutes a contract, over which the Admlty. Ct., at least, has no jurisdiction.

(6) A British ship, owned at Liverpool, Nova Scotia, terminated at New York a voyage from Glasgow; being in need of repair her master, with the consent of her managing part owner, gave a bottomry bond, payable at New York on her return to a port of discharge in the United States of British North America. After the termination of such contemplated voyage, the bondholder agreed with the same managing part owner to postpone the payment of the bond till after the conclusion of a subsequent voyage & her arrival at a port of discharge as before, the bond to remain a lien on the ship; such voyage was also performed, & on the ship reaching Liverpool, in England, in prosecution of a further voyage, she was arrested by warrant of the ct.; the validity of the bond & agreement was contested by the mtgees. of three-fourths & the owner of one-fourth of the ship:—*Held:* the bond was originally good, but the holder could not now sue upon it in this ct., or upon the agreement.

The consent of an owner is strong proof of the existence of the necessity of the bond.

The master, with consent of the owner, cannot give a bond on a British ship lying in a British port for a new voyage; at least, this ct. has no power to enforce such an instrument.

(7) A bottomry bond cannot be given to cover advances originally made on personal credit; nor would the liability of the vessel to arrest alone & without other circumstances, warrant a bond.

(8) Bottomry bonds must be enforced within reasonable time at the risk of losing their priority.

(9) Where money is advanced on mtge. of a ship, the mtgee. must always be aware that he takes his security subject to all legal liens, & if he suffers therefrom, his only remedy must be against the owners (DR. LUSHINGTON).

(10) A part owner may mortgage his own shares, but he cannot mortgage those of his co-owner without his consent (DR. LUSHINGTON).—THE ROYAL ARCH (1857), Sw. 269; 30 L. T. O. S. 198; 6 W. R. 191; 166 E. R. 1131.

*Annotations:—As to* (1) **Refd.** The St. George, [1926] P. 217. *As to* (5) **Refd.** London & Midland Bank *v.* Neilson (1895), 1 Com. Cas. 18. *Generally,* **Refd.** The James W. Elwell, [1921] P. 351.

**1231.** —— **Bond given in foreign port—Irish port.**]—THE RHADAMANTHE, No. 1237, *post.*

**1232.** —— ——.]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante.*

**1233.** —— ——.]—THE ROYAL ARCH, No. 1230, *ante.*

**1234.** —— **Number of voyages in single adventure—Intention of owners.**]—THE MARY ANN, No. 1221, *ante.*

**1235. Effect of deviation.**]—(1) A bottomry-bond given by a master to the foreign merchant who appointed him, "binding the owners of the ship," & indorsed "as a collateral security for bills of exchange," pronounced valid. The Ct. of Admlty. does not hold, that a bond bad in one part vitiates the rest.

(2) Owners are always bound to a certain extent, to the extent of their property in the ship (LORD STOWELL).

(3) A bottomry bond may be invalidated by a case of fraud & by the ill conduct of the party (LORD STOWELL).—THE TARTAR (1822), 1 Hag. Adm. 1; 166 E. R. 1.

*Annotations:—As to* (1) **Refd.** The Emancipation (1840), 1 Wm. Rob. 124; Stainbank *v.* Fenning (1851), 11 C. B. 51. *Generally,* **Refd.** The Atlas (1827), 2 Hag. Adm. 48; Weston *v.* Foster (1836), 5 L. J. C. P. 242.

**1236. Bond dated after completion of voyage—Effect of.**]—THE MARY ANN, No. 1221, *ante.*

*(c) Credit Not Otherwise Obtainable.*

**1237. General rule.**]—(1) Bottomry bonds of a later date are entitled to priority of payment over those of a former; but this privilege is confined to bonds given under the pressure of necessity in a foreign port, where the master & owners have no personal credit, & no other means of procuring supplies for the repair of the ship.

(2) Ports of Ireland are for purposes of hypothecation to be considered as foreign ports (SIR W. SCOTT).—THE RHADAMANTHE (1813), 1 Dods. 201; 165 E. R. 1283.

*Annotation:—As to* (1) **Refd.** The Boddington (1832), 2 Hag. Adm. 422.

**1238.** ——.]—THE SYDNEY COVE, No. 1169, *ante.*

**1239.** ——.]—THE NELSON, No. 1362, *post.*

**1240.** ——.]—(1) A bottomry bond, reciting "that the outward freight was insufficient to pay the just charges of the British consul, & the necessary disbursements on the vessel"; & which bond was proved to have been given for a loan of money in great part required for the payment of the consul's commission, upheld.

(2) Validity of a bond is not affected by the conduct of a third party.

(3) Bottomry bonds are held in great sanctity by the maritime cts. of Europe generally; they are so in the cts. of this country. . . . They are usually given for the payment of repairs & other necessary expenses incurred in foreign ports, when the owner & captain have no personal credit (LORD STOWELL).

(4) There have been a few instances, though a very few, in which this ct. has exercised, with great caution, a control, in the way of a reduction



1237 i. *General rule.*]—WALLACE *v.* FIELDEN (1851), C. R. 2 A. C. 33.—CAN.

1237 ii. ——.]—THE WAKEFIELD (1861), 3 L. T. 825.—IR.

of the stipulated interest, where it appeared exorbitant (LORD STOWELL).

(5) He [a British consul] cannot be compelled to advance money, nor without adequate security (LORD STOWELL).—THE ZODIAC (1825), 1 Hag. Adm. 320; 166 E. R. 114.

*Annotations:*—*As to* (1) **Refd.** The Cognac (1832), 2 Hag. Adm. 377; The Kennersley Castle (1833), 3 Hag. Adm. 1. *As to* (3) **Refd.** The Karnak (1868), L. R. 2 A. & E. 289. *As to* (5) **Refd.** The Cynthia (1852), 20 L. T. O. S. 54. *Generally*, **Refd.** The Glenmanna (1860), Lush. 115.

**1241.** ——.]—THE DUKE OF BEDFORD, No. 1418, *post*.

**1242.** ——.]—A bottomry bond executed by the master of a ship cannot be supported against the owners, if the master, at the time of executing the bond, had other resources for obtaining the necessary supplies for the ship.—DOBSON *v.* LYALL (1837), as reported in 6 L. J. Ch. 115; 11 Jur. 179, n.; *subsequent proceedings* (1838), 2 Ph. 323, n.

*Annotations:*—**Refd.** Glascott *v.* Lang (1847), 2 Ph. 310; The Don Francisco (1861), 31 L. J. P. M. & A. 14.

**1243.** ——.]—THE HERSEY, No. 1145, *ante*.

**1244.** ——.] — WALLACE *v.* FIELDEN, THE ORIENTAL, No. 1320, *post*.

**1245. Agent of shipowner in port.**]—THE NELSON, No. 1362, *post*.

**1246.** ——.]—(1) A shipowner, in his written instructions to the captain, directed him, in case of emergency, to apply to certain firms abroad, "who would give him any assistance required":—*Held:* this did not authorise the captain to do anything not included in his general power & authority as captain.

(2) To authorise a captain to hypothecate the ship or freight for repairs, the necessity for such hypothecation must exist; if, therefore, the agent of the shipowner in a foreign port has sufficient funds in his hands for the repairs, the captain cannot hypothecate.—LYALL *v.* HICKS (1859), 27 Beav. 616; 54 E. R. 244.

**1247.** ——.]—(1) Where it appeared that at a foreign port, at which the master had taken in necessary supplies, the owner of the vessel had a recognised agent within the possible & probable knowledge of the person making the advance, the ct. held, that the bottomry bond given for such advance was void.

(2) In all disputed cases of bottomry bonds the ct. expects that, where it is practicable, the master will by his affidavit show affirmatively the good faith of his own transaction & the circumstances relating to it.—THE FAITHFUL (1862), 31 L. J. P. M. & A. 81.

*Annotation:*—*Generally*, **Consd.** Gunn *v.* Roberts (1874), L. R. 9 C. P. 331.

**1248.** ——.]—Where the owner of a ship had an agent at the [foreign] port where she was lying, authorised & ready to supply the ship's requirements:—*Held:* the master has no implied authority to pledge the owner's credit at such port for necessaries supplied for the ship's use.

The captain has authority to bind the owners to pay for supplies or repay money advanced, only when the necessity of the case gives him that authority. In order to give rise to that authority . . . two things are necessary; first, it must appear that the money borrowed or goods supplied were . . . reasonably necessary according to the ordinary course of prudent conduct; . . . secondly, it is not sufficient that the moneys lent, or goods supplied, were necessary for the ship's use, but it must be shown also that it was reasonably necessary that the captain should obtain or order them on the owner's credit. . . . The same law applies to the captain's right to sell part of the cargo (BRETT, J.).—GUNN *v.* ROBERTS (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; 30 L. T. 424; 22 W. R. 652; 2 Asp. M. L. C. 250.

*Annotations:*—**Refd.** Adair *v.* Young (1879), 12 Ch. D. 13; The Pontida (1884), 9 P. D. 177; The Orienta, [1894] P. 271.

**1249. Alleged agreement for payment by bills of exchange.**]—THE LORD COCHRANE, No. 1186, *ante*.

*B. Must be in respect of Necessaries.*

Necessaries, generally, *see* Part IV., Sect. 2, sub-sect. 1, *ante*.

**1250. Supplies.**]—BRIDGEMAN'S CASE, No. 1137, *ante*.

**1251.** ——.]—THE DUKE OF BEDFORD, No. 1418, *post*.

**1252.** ——.]—A bottomry bond may be good in part, though void for the residue.

Where, therefore, a bottomry bond was given by the master at New York, as well for advances to obtain his discharge from arrest, at the instance of the consignees, on account of damage done on the voyage to part of the cargo; as for payment of the port duties & other disbursements necessary to enable the ship to prosecute her voyage; the Judicial Committee, reversing so much of the decision of the Admiralty Ct. as rejected the bond *in toto*, sustained the bond to the extent of the sums advanced for necessary supplies & payment of the port duties.—SMITH *v.* GOULD, THE PRINCE GEORGE (1842), 4 Moo. P. C. C. 21; 6 Jur. 543; 13 E. R. 208, P. C.

*Annotations:*—**Consd.** The Osmanli (1849), 3 Wm. Rob. 198. **Apld.** The Edmond (1861), Lush. 211. **Consd.** The Laurel (1864), 11 Jur. N. S. 46. **Apld.** The Karnak (1868), L. R. 2 A. & E. 289. **Consd.** The Ida (1872), L. R. 3 A. & E. 542.

**1253.** ——.]—*Semble:* payment of one bottomry bond was a good consideration for a new bottomry bond.

The inquiry before the master was, what sum of money, on a particular day, was due & payable upon a certain bottomry bond, & what was necessary for discharging such other demands against the ship as were necessary to be discharged, & of defraying such expenses as it was necessary to incur to enable the ship to proceed home:—*Held:* (1) a private debt of the captain was not within the meaning of the inquiry, although it might prevent his returning with the ship; (2) a sum of money, which was required for the purchase of stores & payment of wages at a port into which the ship put on the homeward voyage, was within the meaning of such inquiry, although, on the particular day named, such sum could not be definitely foreseen; (3) a sum which became payable for seamen's wages, dues, & other expenses, immediately upon the completion of the homeward voyage, was also within the meaning of the inquiry.—DOBSON *v.* LYALL (1844), 3 L. T. 682; 8 Jur. 969.

**1254.** ——.]—THE EDMOND, No. 1292, *post*.

**1255.** ——.]—LAW *v.* WALLERSTEIN, THE GRAPESHOT, No. 1374, *post*.

**1256. Repairs.**]—BRIDGEMAN'S CASE, No. 1137, *ante*.

**1257.** ——.]—CORSET *v.* HUSELY (1689), Holt, K. B. 48; Comb. 135; 90 E. R. 924.

*Annotations:*—**Distd.** Justin *v.* Ballam (1702), 2 Ld. Raym. 805. **Refd.** Benzen *v.* Jeffries (1696), 1 Ld. Raym. 152; Clay *v.* Snelgrave (1699), 1 Ld. Raym. 576.

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**1245 1.** *Agent of shipowner in port.*]—BENN & Co. *v.* PORRET (1868), 6 Macph. (Ct. of Sess.) 577.—**SCOT.**

*a. Validity of bond given after advances have been made—Advances made on that understanding.*]—THE ADONIS (1866), 2 S. V. A. R. 125.—**CAN.**

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 7, B., C. & D.*]

**1258.** ——.]—DAY *v.* WALTERS, THE ELIZABETH (1775), Burrell, 325; 167 E. R. 593.

**1259.** ——.]—THE ZODIAC, No. 1240, *ante*.

**1260.** ——.]—THE VIBILIA, No. 1283, *post*.

**1261.** ——.]—THE LORD COCHRANE, No. 1186, *ante*.

**1262.** ——.]—THE EDMOND, No. 1292, *post*.

**1263.** ——.]—LAW *v.* WALLERSTEIN, THE GRAPESHOT, No. 1374, *post*.

**1264. Debt of master.**]—ANON. (1701), No. 1139, *ante*.

**1265.** ——.]—DOBSON *v.* LYALL, No. 1253, *ante*.

**1266. Obtaining master's discharge from arrest.**]—SMITH *v.* GOULD, THE PRINCE GEORGE, No. 1252, *ante*.

**1267.** ——.]—THE HERSEY, No. 1145, *ante*.

**1268.** ——.]—THE GAUNTLET, No. 1272, *post*.

**1269. Port dues.**]—SMITH *v.* GOULD, THE PRINCE GEORGE, No. 1252, *ante*.

**1270.** ——.]—THE GAUNTLET, No. 1272, *post*.

**1271. Wages.**]—DOBSON *v.* LYALL, No. 1253, *ante*.

**1272. Expenses of investigation into mutiny.**]—A vessel carried into a foreign port by a mutinous crew, with the master dispossessed & in irons, the expenses incurred by a party employed by the British Vice-Consul to investigate into the mutiny, & re-invest the master in his command, allowed by the ct. to be a good foundation for a bottomry transaction, although no mention was made of a bottomry bond in the outset of the inquiry, & the bond was taken from the master on the eve of the vessel's sailing from the port.

No bottomry bond of the master, as an honest man, is a purely voluntary transaction, inasmuch that his distress & his necessities are the only grounds upon which he is justified in executing the bond at all . . . looking to the facts of the case, I am of opinion that the circumstance of the vessel being in the possession & under the control of a mutinous crew when she arrived at the port of A., justified the authorities of that place in interfering as they did, & that all proper costs incurred by that interference were just charges against the ship (DR. LUSHINGTON).

Upon general principles, where work has been done, or advances made upon personal security in the first instance, the party doing the work, or making the advances, is not at liberty to turn round upon the owners, & cover himself by exacting a bond of bottomry from the master (DR. LUSHINGTON).—THE GAUNTLET (1848), 3 Wm. Rob. 82; 6 Notes of Cases, 370; 3 L. T. 825; 166 E. R. 893.

**1273. Salvage.**]—THE GAUNTLET, No. 1272, *ante*.

**1274. Expenses of relanding cargo of lender.**]—THE ROYAL STUART, No. 1187, *ante*.

**1275. Commissions—Of consul.**]—THE ZODIAC, No. 1240, *ante*.

**1276. —— Of agent.**]—On taking the ship's accounts in a cause of bottomry it was ascertained that, save as to the agent's commission, no money was due as against the ship; & the registrar & merchants reported that the commission was so excessive that on the balance of account, after reducing the commission to a proper amount, the owners of the ship were creditors & not debtors. Bond pronounced against with costs.—THE RODERICK DHU (1856), Sw. 177; 166 E. R. 1082; *sub nom.* THE RHODERICK DHU, 28 L. T. O. S. 238; 5 W. R. 168.

**1277. Preventing arrest of ship.**]—THE LOCHIEL, No. 1229, *ante*.

**1278.** ——.]—THE ROYAL ARCH, No. 1230, *ante*.

**1279. Premiums for insurance.**]—THE SERAFINA, No. 997, *ante*.

*C. Must Not be for Pre-existing Debt.*

**1280. General rule.**]—THE LOCHIEL, No. 1229, *ante*.

**1281.** ——.]—A British vessel being damaged by tempestuous weather, put into the port of E. for repairs. During the progress of the repairs, S. & co., who had given the orders for, & superintended them, corresponded with the owner of the vessel & part owners of the cargo, but gave no notice to them or to the master of their intention to take a bottomry bond as a security until the vessel was almost on the point of sailing:—*Held*: the bond could not be enforced by reason of the repairs, having been, in the first instance, undertaken on personal credit, & there having been no notice given that a bond would be required.

The agreement for bottomry must precede the advances, or the incurring responsibility. All advances made without such agreement can only be advances on personal credit, & no advances on personal credit can afterwards be converted into a bottomry transaction (DR. LUSHINGTON).—THE WAVE (1851), 17 L. T. O. S. 285; 15 Jur. 518.

**1282. Long account of debts.**]—THE HERSEY, No. 1145, *ante*.

**1283. Advances made without agreement for bond—Small advances.**]—(1) A bottomry bond, granted by the master of a British vessel to a merchant of Philadelphia, who had consented to act as mercantile agent for the ship & cargo during the progress of repairs in the port of Philadelphia, upheld.

(2) The fact of a lien on the ship existing by the law of the country in which the bond is given, is an important ingredient, & furnishes a presumption in favour of bottomry, & against personal credit.

(3) Small advances, originally made without any express stipulation for a bond, but followed by a bond of bottomry, may be included in the bond.

(4) It is not incumbent upon a foreign merchant advancing money upon bottomry for the repairs of a vessel to calculate the expediency of such repairs.

(5) Where once the transaction is proved to have been clearly & indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, & the bond in all essentials apparently correct, then that under such circumstances the strong presumption of law is in favour of its validity & it shall not be impugned save when there shall be clear & conclusive evidence of fraud (DR. LUSHINGTON).—THE VIBILIA (1838), 1 Wm. Rob. 1; 166 E. R. 474.

*Annotations:—As to* (2) **Consd.** The Karnak (1868), L. R. 2 A. & E. 289. **Reid.** The Laurel (1863), Brown. & Lush. 191. *As to* (3) **Reid.** The Trident (1839), 1 Wm. Rob. 29. *As to* (4) **Reid.** Duncan *v.* Benson (1847), 1 Exch. 537; The Staffordshire (1871), 23 L. T. 137. *Generally.* **Reid.** The Lochiel (1843), 2 Wm. Rob. 34; The Mary Ann (1846), 4 Notes of Cases, 376; The Royal Arch (1857), Sw. 269.

**1284. —— Presumption that advances made in contemplation of bottomry security.**]—It is the duty of the master before resorting to bottomry to communicate, or to endeavour to communicate with the owners of the cargo as well as with the owners of the ship, if in the circumstances it be feasible. Where a master fails to obtain funds from the owner to pay for repairs which the necessaries of the ship compel him to order, he is warranted in raising money on bottomry of ship, freight & cargo for that purpose from persons

other than those who had supplied such repairs. In the case of a bottomry bond for money already supplied without any previous agreement, it is to be presumed in the absence of all evidence that the foreign lender made his advances in contemplation of bottomry security & this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand.

The question whether money advanced is to be considered a loan or an advance of freight must principally depend upon what appears upon the face of the instrument.—THE KARNAK (1868), L. R. 2 A. & E. 289; 37 L. J. Adm. 41; 18 L. T. 661; 17 W. R. 56; 3 Mar. L. C. 103; *varied, sub nom.* DROEGE *v.* SUART, THE KARNAK (1869), L. R. 2 P. C. 505, P. C.

*Annotations:*—**Consd.** Currie *v.* Bombay Native Insce. (1869), 6 Moo. P. C. C. N. S. 302. **Apld.** The Ida (1872), L. R. 3 A. & E. 542. **Consd.** The Dora Forster, [1900] P. 241. **Refd.** The Empire of Peace (1869), 39 L. J. Adm. 12; The Staffordshire (1871), 25 L. T. 137; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579; The St. George, [1926] P. 217.

**1285. Expenses of former voyage.]** — THE LOCHIEL, No. 1229, *ante*.

**1286.** ——.]—THE MARY ANN, No. 1221, *ante*.

**1287.** ——.]—THE OSMANLI, No. 1222, *ante*.

**1288.** —— **Damages for non-delivery of cargo.]**—In 1867 an English vessel, then at M., was chartered by W. to proceed with cargo to certain ports in South America. She took in the agreed cargo, & sailed according to orders, first to one & then to another of the ports of discharge named in the charter. A portion of the cargo was delivered, but the master failing to obtain any directions for the discharge of the residue, after considerable delay & after notice to the consignee, sold it to defray expenses. The vessel after having been several other voyages, arrived at B. in 1868, & procured a charter to an English port. After this last-mentioned charter had been entered into, W. instituted legal proceedings at B. to recover damages for the non-delivery of the cargo shipped by him, & caused the vessel to be arrested for the damages so claimed. The arrest was under process valid according to the law in force at B. By the advice of the British Consul at B. the master agreed with W. to compromise the dispute by giving to W. a bottomry bond for a sum of money considerably less than the amount claimed by him. The bond was given, & the vessel was released. In a suit instituted on behalf of W. & his partner in trade against the vessel after her safe arrival home to enforce the bond: —*Held:* the circumstances under which the bond was given rendered it incapable of being enforced. —THE IDA (1872), L. R. 3 A. & E. 542; 41 L. J. Adm. 85; 27 L. T. 457; 21 W. R. 39; 1 Asp. M. L. C. 443.

**1289. Bond to avoid arrest for former debt.]**—THE OSMANLI, No. 1222, *ante*.

**1290. Arrest & sale of ship for former debt—Allowed by lex loci—Effect of.]**—THE OSMANLI, No. 1222, *ante*.

**1291.** ——.]—THE KARNAK, No. 1281, *ante*.

**1292.** —— **Bottomry by master in own name.]**—A master, on his own authority, can bottomry his vessel abroad for the homeward voyage only for necessary repairs & articles supplied to the ship; he cannot include in such a bond charges relating to the outward cargo, even though they constitute debts due from the owner of the ship, unless by the law of the port the ship can be arrested for them.

*Semble:* the owner of the ship might bottomry his ship for such charges.—THE EDMOND (1860), Lush. 57; 2 L. T. 192; 167 E. R. 30; *sub nom.* THE EDMUND, 29 L. J. P. M. & A. 76; *subsequent proceedings* (1861), Lush. 211.

*Annotation:*—**Refd.** The Karnak (1868), L. R. 2 A. & E. 289.

**1293.** —— —— —— **Bottomry by owner.]**—THE EDMOND, No. 1292, *ante*.

**1294. Payment of former bond—Inclusion of amount in fresh bond—Given in same voyage.]**—A bottomry bond having been given, it is allowable to pay that, & to include the amount in a fresh bond during the same voyage, but not in a subsequent one.—THE TOIVO (1853), 1 Ecc. & Ad. 185; 164 E. R. 108.

**1295.** —— —— **Given in subsequent voyage.]**—THE TOIVO, No. 1294, *ante*.

**1296. General average contribution—Lien for contribution—By lex loci.]** — A right to general average contribution from a ship after adjustment made gives the owners of cargo no lien on the ship by the law maritime.

A debt for general average contribution, arising in respect of an outward voyage, being a personal debt only, is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward.

*Qu.:* if a lien upon the ship for general average contribution, given by the law of the foreign port where the bond is given, could support such a bottomry bond.

A bond, given at B. on ship & freight for the voyage to England to pay a general average contribution due upon adjustment from the ship to the outward cargo, pronounced against, but without costs.

The drawing of these bills [of exchange] *per se* would not affect the validity of the bond according to the usual custom they would be considered as a collateral security only.

A master entering a foreign port in need of necessaries from distress or otherwise may incur debts for repairs or necessities. Those debts may be purely personal, but he may borrow money on bottomry from any one not his creditor to pay such debts. On the other hand, a personal debt cannot be converted into a bottomry transaction (DR. LUSHINGTON).—THE NORTH STAR (1860), Lush. 45; 29 L. J. P. M. & A. 73; 2 L. T. 264; 167 E. R. 24.

*Annotations:*—**Distd.** The Edmond (1861), Lush. 211. **Consd.** The Galam MacAndrew *v.* Cleary (1863), Brown. & Lush. 167; The Karnak (1868), L. R. 2 A. & E. 289. **Refd.** The Daring (1868), L. R. 2 A. & E. 260.

### *D. Must be on Credit of Ship.*

**1297. General rule.]**—A bond of hypothecation is valid when no other security is held out than the ship & freight; *secus*, where the lender looks only to the personal security of the borrower. It is not necessary that a bond should be either good or bad *in toto*.—THE AUGUSTA (1813), 1 Dods. 283; 165 E. R. 1312.

*Annotations:*—**Apld.** The Vibilia (1838), 1 Wm. Rob. 1. **Consd.** The Trident (1839), 1 Wm. Rob. 29; The Lord Cochrane (1844), 2 Wm. Rob. 320; The Ocean (1846), 2 Wm. Rob. 429. **Expld.** The Osmanli (1849), 3 Wm. Rob. 198. **Apld.** The Wave (1851), 17 L. T. O. S. 285. **Consd.** The Roderick Dhu (1856), Sw. 177; The Royal Arch (1857), Sw. 269; The North Star (1860), Lush. 45. **Expld.** The Laurel (1863), Brown. & Lush. 191. **Distd.** The Laurel (1864), Brown. & Lush. 317. **Consd.** The Karnak (1868), L. R. 2 A. & E. 289. **Refd.** The Hersey (1837), 3 Hag. Adm. 404; The Emancipation (1840), 1 Wm. Rob. 124; The Lochiel (1843), 2 Wm. Rob. 34; Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853), 13 C. B. 418; The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36; The Staffordshire (1871), 25 L. T. 137; The Pontida (1884), 9 P. D. 102.

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 7, D., E. & F.*]

**1298.** ——.]—THE ATLAS, No. 1154, *ante*.

**1299.** ——.]—THE MINSTREL BOY (1835), 7 Notes of Cases, 341.

**1300.** ——.]—THE WAVE, No. 1281, *ante*.

**1301.** ——.]—THE ROYAL ARCH, No. 1230, *ante*.

**1302.** ——.]—Pltfs. advanced £600 to A., the owner of five-sixth shares in, & sole managing owner of, a foreign ship then in England, & an agreement was drawn up which stated that the advance was made for necessaries supplied, & that A. undertook to return the whole amount so advanced on the return of the ship, & also authorised pltfs. to effect an insurance on the ship to cover the advance:—*Held:* the agreement was not a contract of bottomry, for it created no charge on the ship, but left pltfs. to recover the advance from A. personally.—THE HEINRICH BJÖRN (1885), 10 P. D. 44; 54 L. J. P. 33; 52 L. T. 560; 33 W. R. 719; 1 T. L. R. 266; 5 Asp. M. L. C. 391, C. A.; *affd. sub nom.* NORTHCOTE *v.* HENRICH BJÖRN, THE HENRICH BJÖRN (1886), 11 App. Cas. 270, H. L.

*Annotations:*—**Refd.** The Beeswing (1885), 53 L. T. 554; The Ringdove (1886), 11 P. D. 120; The Lyons (1887), 57 L. T. 818; The Sara (1887), 12 P. D. 158; The Cella (1888), 13 P. D. 82; Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241; The Dictator, [1892] P. 304; The Africano, [1894] P. 141; The Oriental, [1894] P. 271; The Mecca, [1895] P. 95; The Veronas, [1901] P. 304; The André Théodore (1904), 93 L. T. 184; Moran, Galloway *v.* Uzielli, [1905] 2 K. B. 555; Foong Tai *v.* Buchheister, [1908] A. C. 458; The Petone, [1917] P. 198; The Mogileff, [1921] P. 236; The Ambatielos, The Cephalonia, [1923] P. 68; The Stream Fisher, [1927] P. 73.

**1303. Advances made on owner's personal credit.**]—THE MINSTREL BOY (1835), 7 Notes of Cases, 341.

**1304. —— Bond taken by agent of ship.**]—THE ELIZABETH, FISHER *v.* COFFEY (1857), 4 L. T. 27.

**1305. —— & on freight—Further trivial advances.**]—A. & co. agreed to purchase at Akyab cargoes of rice for F. & co., A. & co. to be secured by hypothecation of the bills of lading & a fixed freight of 5*s.* per ton. Whilst the ship *E. P.* was loading one of the cargoes, A. & co. advanced £540 for ship's disbursements, but upon hearing that F. & co. had stopped payment, induced the master to execute a bottomry bond both for the advances already made, & also for a further sum of small amount:—*Held:* (1) the first advances were made partly upon personal security, & partly upon the margin of freight, & could not therefore be secured by a subsequent bottomry; (2) the further advances were too trivial to render the bond valid with respect to them.—THE EMPIRE OF PEACE (1869), 39 L. J. Adm. 12; 21 L. T. 763; 3 Mar. L. C. 324.

**1306. Advances made on master's personal credit.**]—Bottomry bond given by the master upon a threat of arrest, for supplies previously furnished on his personal credit, held void.—GORE *v.* GARDINER, THE HERSEY (1840), 3 Moo. P. C. C. 79; 13 E. R. 37, P. C.

*Annotations:*—**Distd.** The Ariadne (1842), 1 Wm. Rob. 411. **Consd.** The Karnak (1868), L. R. 2 A. & E. 289. **Refd.** The St. George, [1926] P. 217.

**1307.** ——.]—THE GAUNTLET, No. 1272, *ante*.

**1308. Master pledging owner's personal credit—Whether ship may be hypothecated at same time.**]—The master of a vessel has no authority to hypothecate, for money borrowed at a foreign port for necessary repairs & disbursements, & at the same time pledge the personal credit of his owner for such advances, whether maritime interest be stipulated for or not. A vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs & disbursements; to secure which, he drew bills upon his owner, & also executed an instrument which purported to be an hypothecation of the ship, cargo, & freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; & the master took upon himself & his owner the risk of the voyage, making the money payable at all events, & subjecting the ship to seizure & sale by virtue of process "out of Her Majesty's High Ct. of Admlty. of England, or any ct. of Vice-Admlty. possessing jurisdiction at the port at which the vessel might at any time happen to be lying, or to be, according to the maritime law & custom of England," in the event of the bills being refused acceptance, or being dishonoured:—*Held:* this not being such an hypothecation as could be enforced in the Ct. of Admlty., the payment of the money borrowed not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship.—STAINBANK *v.* FENNING (1851), 11 C. B. 51; 20 L. J. C. P. 226; 17 L. T. O. S. 255; 15 Jur. 1082; 138 E. R. 389.

*Annotations:*—**Refd.** Stainbank *v.* Shepard (1853), 13 C. B. 418; Morgan, Galloway *v.* Uzielli, [1905] 2 K. B. 555.

**1309. Effect of lien on ship—Lien by lex loci.**]—(1) A lien on the ship & freight, existing by local law, for advances & commissons, cannot convert a transaction on personal credit into a bottomry transaction, so as to render valid a bond subsequently given, or prevent the ordinary reference of the fairness of the commissions to the registrar & merchants.

(2) The existence of such a local law may be properly pleaded as material evidence to support an allegation that the agreement was to make advances on the credit of the ship & freight, & that the commissions were customary.

(3) The existence of such a law will be assumed by the ct., unless contradicted by plea. If contradicted, either party may produce evidence, the party failing in the particular issue to pay the costs of it.—THE LAUREL (1863), Brown. & Lush. 191; 3 New Rep. 48; 33 L. J. P. M. & A. 17; 9 L. T. 457; 1 Mar. L. C. 405; 167 E. R. 330.

*Annotation:*—*As to* (1) **Consd.** The Karnak (1868), L. R. 2 A. & E. 289.

**1310.** —— ——.]—(1) The master in a port of refuge consigned the vessel to a merchant to advance money for her repairs, the law of the country allowing a lien on the vessel for such advances; no agreement was made at the time whether the advance was to be made on personal security or on bottomry; & the merchant did not himself determine on having bottomry security until shortly before the ship sailed, when he demanded a bond which the master executed. The ct. upheld the bond.

(2) The amount of the commission may be a reason for impeaching a bottomry bond on the ground of fraud, but cannot otherwise affect its validity.

(3) The practice of advertising, though usually expedient, is not as a general rule indispensable to the validity of a bottomry bond.

(4) The existence of a bottomry premium is only important where a question arises whether there is a maritime risk.

(5) As soon as the lenders have determined to demand a bond, they ought to communicate that fact at once to the master, but their failure to do

so will not of necessity invalidate the bond.—THE LAUREL (1864), Brown. & Lush. 317; 5 New Rep. 219; 11 Jur. N. S. 46; 13 W. R. 352; 167 E. R. 382.

*Annotation:—As to* (4) **Refd.** The Mary Ann (1865), L. R. 1 A. & E. 13.

*E. Advertisement.*

**1311. Whether necessary.**]—THE GAUNTLET (1848), as reported in 6 Notes of Cases, 370; 3 L. T. 559.

**1312.** ——.]—THE LAUREL, No. 1310, *ante*.

*F. Communication with Owners.*

**1313. Whether communication essential.**]—(1) A Swedish vessel bound from a port in Sweden to Hull, was driven by stress of weather to put back into another port in Sweden. This took place on Sept. 21, 1848. Ten days afterwards the cargo was unladen, & the ship found to be greatly damaged. The repairs were completed, & the cargo reloaded. The master at once communicated with the owners of the ship, resident in Sweden, who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs, & the British Consul at the port where the vessel lay, wrote on behalf of the master, & as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter, & the master in the month of Mar. 1879, hypothecated the ship, freight, & cargo for the money borrowed for the repairs:—*Held:* such letter to the consignees was a sufficient notice to authorise the master raising money by bottomry on the cargo.

(2) That it is a universal rule that the master . . . before hypothecating the cargo must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, & is a position that could not be maintained; but it may safely . . . be said that in general it is his duty to do so, or it is his duty in general to attempt to do so (KNIGHT BRUCE, L.J.).—WILKINSON *v.* WILSON, THE BONAPARTE (1853), 8 Moo. P. C. C. 459; 14 E. R. 175, P. C.

*Annotations:—As to* (1) **Distd.** The Onward (1873), L. R. 4 A. & E. 38. **Refd.** The Rajah of Cochin (1859), Sw. 473; Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115. *As to* (2) **Distd.** The Olivier (1862), Lush. 484. **Expld.** Duranty *v.* Hart, The Hamburg (1864), 2 Moo. P. C. C. N. S. 289. **Consd.** The Lizzie (1868), L. R. 2 A. & E. 254; Australasian Steam Navigation Co. *v.* Morse (1872), 8 Moo. P. C. C. N. S. 482; Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156; The St. George, [1926] P. 217. **Refd.** The Cynthia (1852), 16 Jur. 748; Sieveking *v.* Maas (1856), 27 L. T. O. S. 264; The Sultan (1859), Sw. 504; Acatos *v.* Burns (1878), 3 Ex. D. 282; The Gaetano & Maria (1881), 7 P. D. 1.

**1314.** ——.]—THE JANET WILSON (1857), 3 L. T. 682; *subsequent proceedings*, Sw. 261.

**1315.** ——.]—THE OLIVIER, No. 1153, *ante*.

**1316.** ——.]—THE KARNAK, No. 1284, *ante*.

**1317.** ——.]—BARRON *v.* STEWART, THE PANAMA, No. 1331, *post*.

**1318.** ——.]—A master cannot bottomry his ship nor *a fortiori* hypothecate his cargo without communication with the owners where practicable, as to the necessity of the course adopted.—KLEINWORT, COHEN & CO. *v.* CASSA MARITTIMA OF GENOA (1877), 2 App. Cas. 156; 36 L. T. 118; 25 W. R. 608; 3 Asp. M. L. C. 358, P. C.

*Annotation:—***Refd.** The Gaetano & Maria (1881), 7 P. D. 1.

**1319. No means of communication—Whether master may hypothecate—In country where owners reside.**]—The master has a right to hypothecate the ship & cargo though lying in a port of the same country in which the owners reside, provided he has no means of communicating with the owners.—LA YSABEL (1812), 1 Dods. 273; 165 E. R. 1308.

*Annotations:—***Consd.** The Trident (1839), 1 Wm. Rob. 29; Wallace *v.* Fielden, The Oriental (1851), 7 Moo. P. C. C. 398. **Refd.** The Staffordshire (1871), 25 L. T. 137.

**1320.** —— —— ——.]—The authority of the master of a ship to pledge by bottomry for the purpose of raising money for the absolute necessaries of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner; & such power to raise money by bottomry is vested in the master, although the owner resides in the same country, provided there is no means of communication with the owner, & the exigency of the case requires it.

A bottomry bond was granted in New York by the master of a ship, to obtain money for necessary repairs; the owner whereof was residing at St. John's, New Brunswick. A communication by electric telegraph existed between the two cities. The bondholder had previously acted as the general agent of the owner, & no intimation of the transaction was made by the master to the owner until after the execution of the bond:—*Held:* the master having the means of communication with the owner, so such absolute necessity existed as to authorise him to pledge the ship without communication with the owner, & the bond declared void.—WALLACE *v.* FIELDEN, THE ORIENTAL (1851), 7 Moo. P. C. C. 398; 3 L. T. 682; 13 E. R. 934, P. C.

*Annotations:—***Apld.** The Cynthia (1852), 20 L. T. O. S. 54. **Consd.** The Olivier (1862), Lush. 484. **Apld.** The Onward (1873), L. R. 4 A. & E. 38. **Refd.** Edwards *v.* Havill (1854), 2 C. L. R. 1343; Sieveking *v.* Maas (1856), 25 L. J. Q. B. 358; The Royal Arch (1857), Sw. 269; The Sultan (1859), Sw. 504; The Staffordshire (1871), 25 L. T. 137; Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156.

**1321. Failure to communicate—Effect of.**]—GLASCOTT *v.* LANG, No. 1469, *post*.

**1322.** —— ——.]—WALLACE *v.* FIELDEN, THE ORIENTAL, No. 1320, *ante*.

**1323.** —— ——.]—THE JANET WILSON (1857), 3 L. T. 682; *subsequent proceedings*, Sw. 261.

**1324.** —— **Matters for consideration of court.**]—THE OLIVIER, No. 1153, *ante*.

**1325.** —— **Invalidity on account of failure—Must be specially pleaded.**]—THE OLIVIER, No. 1153, *ante*.

**1326.** —— **Alleged insolvency of owner—Whether justifying failure.**]—BARRON *v.* STEWART, THE PANAMA, No. 1331, *post*.

**1327. Sufficiency of notice—No direct communication with owner.**]—A bottomry bond on ship, freight, & cargo was granted by the master at the port where A., the owner of the cargo & charterer of the ship, resided. Advertisements for the loan on bottomry were published, & A. was aware of these advertisements, of the unseaworthy condition of the ship, & of the fact that his cargo had been laden & unladen while the ship was in the port, but no more direct communication was made

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**PART IV. SECT. 3, SUB-SECT. 7.—F.**

b. *General rule.*]—The rule that the master has authority to borrow money on the ship & to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity, applies as well to a case where a vessel, subject to Inland Waters Seamen's Act, is in a home port as where she is in a foreign one.—THIRD NATIONAL BANK OF DETROIT & PENINSULAR SAVINGS BANK OF DETROIT *v.* SYMES (1895), 4 Exch. C. R. 400.—**CAN.**

c. *Failure to communicate.*]—WALLACE *v.* FIELDEN (1851), C. R. 2 A. C. 33.—**CAN.**

d. ——.]—SHIP OWNERS' DRY DOCK CO. & WING & CO. *v.* THE FLORA (1897), 6 Exch. C. R. 135.—**CAN.**

e. ——.]—A British ship, under a charter from London to Callao, put into Melbourne for repairs. The

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 7, F. & G. (a) & (b).]*

to him, nor any application for advances :—*Held :* the advertisements were not sufficient notice ; & the bond pronounced against, so far as A.'s interest was affected.—THE NUOVA LOANESE (1852), 3 L. T. 154 ; 17 Jur. 263.

**1328. —— No information as to necessity of case.**]—WILKINSON *v.* WILSON, THE BONAPARTE, No. 1313, *ante.*

**1329. —— No mention of intention to hypothecate.**]—THE OLIVIER, No. 1153, *ante.*

**1330. —— ——.**]—THE ONWARD, No. 1336, *post.*

**1331. —— Notice to mortgagees—Where owner insolvent.**]—Before resorting to bottomry for raising necessary supplies, it is absolutely necessary, where practical, that notice should be given by the master to the owner of the vessel, & an allegation that such owner was insolvent, is no excuse for not communicating to him, unless he has been judicially declared insolvent, & the ownership of the vessel vested in his assignees, to whom such notice must then be given.

*Semble :* notice to the mtgee. of the vessel in such circumstances would not suffice.—BARRON *v.* STEWART, THE PANAMA (1870), L. R. 3 P. C. 199 ; 6 Moo. P. C. C. N. S. 484 ; 39 L. J. Adm. 37 ; 23 L. T. 12 ; 18 W. R. 1011 ; 3 Mar. L. C. 461 ; 16 E. R. 808, P. C.

*Annotations :*—**Reld.** The Staffordshire (1871), 25 L. T. 137 ; The Onward (1873), L. R. 4 A. & E. 38.

**1332. —— Mere statement of injuries—& necessity for repairs.**]—THE ONWARD, No. 1336, *post.*

**1333. Necessity for notice to owners of cargo.**]—THE CYNTHIA (1852), 20 L. T. O. S. 54; 16 Jur. 748.

*Annotation :*—**Reld.** Mackenzie *v.* Poolley (1856), 25 L. J. Ex. 124.

**1334. —— Notice to consignees.**]—WILKINSON *v.* WILSON, THE BONAPARTE, No. 1313, *ante.*

**1335. —— Hypothecation of ship & cargo.**]—THE OLIVIER, No. 1153, *ante.*

**1336. —— ——.**]—The master of a ship, being only the agent of the cargo in special cases of necessity, is bound, when the circumstances permit, to communicate with the owner of the cargo before he does any act which seriously affects the value of the cargo. A master, therefore, putting into Port Louis, Mauritius, for repairs to his ship, & intending to raise money for those repairs upon bottomry, not only on ship & freight, but also upon cargo of an imperishable nature & belonging to one firm residing in Great Britain, is bound to communicate with them before having recourse to bottomry ; otherwise the bond is invalid.

To justify a master in giving a bottomry bond on cargo where communication with the owners is necessary, a mere statement of injuries sustained by the ship & of the consequent necessity for repairs entailing considerable expense, unaccompanied by a statement that a bottomry bond is proposed, is not a sufficient communication : the law does not require the owners from such premises to draw the conclusion that the ship & cargo must be bottomried ; although it may not be required that the words " bottomry of cargo " should be used in the communication, the fact itself should be stated, or at least the necessity for a bottomry bond should be an obvious & irresistible inference from the circumstances stated.

A communication detailing the disasters to the ship, & the probable expense of repair, but not expressing the intention to bottomry the cargo, & requesting the owners of cargo to wait for further information, is not, where any communication is necessary, sufficient ; more especially where the information as to the bottomry has been given to the shipowners, but withheld from the owners of cargo ; & in such circumstances the owners of cargo are not bound to conclude that the master will resort to bottomry, or to reply to the communication.—THE ONWARD (1873), L. R. 4 A. & E. 38 ; 42 L. J. Adm. 61 ; 28 L. T. 204 ; 21 W. R. 601 ; 1 Asp. M. L. C. 540.

*Annotation :*—**Apprvd.** Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156.

**1337. Necessity for notice to mortgagee.**]—THE HELGOLAND, No. 1432, *post*

**1338. ——.**]—The provision in 1894 Act, s. 34, that a mtgor. shall not be deemed to have ceased to be the owner of a mtged. ship, except as far as may be necessary for making the ship available as a security for the mtge. debt, does not prevent the ship from being made the subject of a bottomry bond ; nor is the consent of the mtgee. a prerequisite of such a hypothecation ; but where practicable, the lender on bottomry should see that the mtgee. has notice of the necessity for the hypothecation before obtaining the bond.

Granting the necessity for the loan, the fact that the lender is registered as the managing owner, & is also a director of the co. owning the ship, does not disable him from making advances on bottomry. —THE ST. GEORGE, [1926] P. 217 ; 95 L. J. P. 181 ; 136 L. T. 252 ; 42 T. L. R. 766 ; 17 Asp. M. L. C. 164.

*G. Essential Contents.*

*(a) In General.*

**1339. Voyage.**]—A hired transport in the service of government may be the subject of bottomry as well as any other vessel, & the hypothecation of such hired transport may be valid, though the particular voyage on which she was bound should not be stated in the bond.—THE JANE (1814), 1 Dods. 461 ; 165 E. R. 1378.

*Annotations :*—**Reld.** Stainbank *v.* Shepard (1853), 13 C. B. 418 ; The James W. Elwell, [1921] P. 351.

**1340. ——.**]—Advances were made on the terms of the following document relied on as a bottomry bond :—" Sept. 30, 1919. Bond of bottomry between A. C. Clark, master of American schooner *James W Elwell* . . . & American Express co. . . . I, A. C. Clark . . . do hereby agree to bond & lien said schooner together with her furniture, sails, gear, & future earnings to the amount of frs. 20,000 for value received, said American Express co. to have absolute lien upon vessel until said loan is repaid together with interest accrued & all other charges relating thereto. . . ." Signed, etc. :—*Held :* as neither the voyage on which the maritime risk was to be run, nor the time when the loan was to become repayable, was stated, the bond was not a valid contract of bottomry & gave the lenders no maritime lien.—THE JAMES W. ELWELL, [1921] P. 351 ; 90 L. J. P. 355 ; 125 L. T. 796 ; 37 T. L. R. 835 ; 15 Asp. M. L. C. 418.

**1341. Provision for repayment.**]—THE ATLAS, No. 1154, *ante.*

**1342. —— Time for repayment.**]—THE JAMES W. ELWELL, No. 1340, *ante.*

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master, who was also part owner, fearing that the shipwrights would, unless their claims were paid, detain the vessel, & that she might thus be unable to fulfil her charter, raised the necessary funds from the ship's assets at Melbourne upon a bottomry bond of the ship & freight :—*Held :* the bond was not invalidated by the absence of previous communication between the master & the co-owner.—THE STAFFORDSHIRE (1871), 25 L. T. 137.—IR.

**1343. Bottomry premium.**]—THE LAUREL, No. 1310, *ante*.

**Maritime risk.**]—*See* Sect. 3, sub-sect. 7, G. (*b*), *post*.

**Maritime interest.**]—*See* Sect. 3, sub-sect. 7, G. (*c*), *post*.

(*b*) *Maritime Risk.*

**1344. Necessity for inclusion.**]—THE ATLAS, No. 1154, *ante*.

**1345.** ——.]—THE EMANCIPATION, No. 1492, *post*.

**1346.** ——.]—A ship pledged abroad by the master for expenses, etc., well hypothecated, & the part-owners liable.—SAMSUN *v.* BRAGINGTON (1750), 1 Ves. Sen. 443; 27 E. R. 1132.

*Annotations*:—**Dbtd.** Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853), 13 C. B. 418.

**1347.** ——.]—Additional articles, appended to a charterparty, signed by the master, acknowledging the receipt of money on account of his freight, for which he had paid insurance, which, with other moneys, he stipulated should "on his safe arrival in London," be deducted from his freight, & in case his freight should not be sufficient to pay the same, "the debit shall be retained as a bottomry bond"; on motion to decree payment of these advances, as on bottomry, out of proceeds of sale of the vessel in the registry:—*Held*: there was no maritime risk, nor proof that the advances were for the necessities of the ship.

A bottomry bond must not only include maritime risk, but also it must be for the necessities of the ship, & the ct. must be satisfied, before it can pronounce for the validity of a bottomry bond, & decree it to be paid out of the proceeds of the vessel, that the money was advanced for that purpose (DR. LUSHINGTON).—THE GRECIA (1850), 7 Notes of Cases, 410.

**1348.** ——.]—STAINBANK *v.* FENNING, No. 1308, *ante*.

**1349.** ——.]—(1) The master of a ship on a foreign voyage has no authority to bind his employers for everything which he may deem to be or which may really be for their interest, but has power to pledge, in a foreign country, the personal credit of the owners for necessary repairs; & if that be ineffectual, to hypothecate the ship, but this power does not extend to more than hypothecation.

(2) Hypothecation is distinguishable from a mtge. or pledge, & gives only a right enforceable against the subject of it by Admlty. process.

(3) The master has no power to make an actual transfer by mtge.

(4) It is essential to hypothecation that the sea risk should be incurred by the lender, & that the pledge should take effect only in the event of the ship's safe arrival.

Where the master of a ship, having borrowed money for repairs, gave the lender bills on the owner of the ship & on the consignee of the cargo for the amount, & also an instrument by which he purported to hypothecate the vessel, etc., & stipulated that, in case the bills were not accepted or paid, the lenders might take possession, & sell under process of the Admlty. Ct., & in which it was agreed that the lender should forbear maritime interest, & that the advances were to be recoverable, whether the vessel arrived at its port of destination or not:—*Held*: the instrument was void, & the lender had no insurable interest.—STAINBANK *v.* SHEPARD (1853), 13 C. B. 418; 1 C. L. R. 609; 22 L. J. Ex. 341; 22 L. T. O. S. 158; 17 Jur. 1032; 1 W. R. 505; 138 E. R. 1262, Ex. Ch.

*Annotations*:—*As to* (1) **Reld.** Bristow *v.* Whitmore (1859), 4 De G. & J. 325; Willis *v.* Palmer (1859), 7 C. B. N. S. 340. *As to* (2) **Reld.** Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. *As to* (4) **Reld.** The James W. Elwell, [1921] P. 351. *Generally*, **Reld.** The Onward (1873), L. R. 4 A. & E. 38.

**1350.** ——.]—THE ROYAL ARCH, No. 1230, *ante*.

**1351.** ——.]—THE INDOMITABLE, No. 1357, *post*.

**1352.** ——.]—THE SERAFINA, No. 997, *ante*.

**1353.** ——.]—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE, No. 1506, *post*.

**1354. Circumstances excluding maritime risk—Ship not proceeding on voyage.**]—A. intending to go a voyage, enters into a bottomry bond, but the ship not going the voyage, but lying all along safe in the port of London, the ct. decreed deft. should lose the premium, & accept of his principal with usual interest.—DEGUILDER *v.* DEPEISTER (1684), 1 Vern. 263; 23 E. R. 458.

**1355.** —— **Stipulation for insurance.**]—THE LOVELY ANN (1815), Burrell, 337; 167 E. R. 598.

**1356.** —— ——.]—THE BODDINGTON'S, No. 1446, *post*.

**1357.** —— —— **Premiums to be paid by borrowers—Insurance extending beyond date of arrival.**]—(1) The expression of maritime risk, to be collected from all the terms of the instrument, is essential to the validity of a bottomry bond.

(2) Stipulations in an instrument purporting to be an agreement to hypothecate the ship, which, taken together, exclude the implication of maritime risk. Common rate of interest, to extend beyond the date of arrival at the port of destination & until payment of the principal; insurance of the ship beyond the date of the arrival, the same to be made by the lenders & paid for by the borrowers. This conclusion not rebutted by a stipulation to pay a bill of exchange for the amount of the money lent within thirty-four days after arrival, the bill not being expressed to be drawn as a collateral security

(3) *Semble*: if sea risk is directly expressed, a stipulation that the ship shall be insured for the voyage by the lenders, the premium be repaid by the borrowers, is immaterial.

The insurance of the ship to be made by lenders, & paid for by borrowers, standing alone, might not prejudice the bond. But such insurance, beyond the termination of the voyage negatives sea risks.—THE INDOMITABLE (1859), Sw. 446; 33 L. T. O. S. 127; 5 Jur. N. S. 632.

*Annotations*:—*As to* (1) **Reld.** The James W. Elwell, [1921] P. 351. *As to* (3) **Foll.** The Haabet, [1899] P. 295.

**1358.** —— **Proviso for payment on non-return of ship.**]—An instrument executed in a foreign port by the master of a ship, reciting, that his vessel bound to London, had received considerable damage, & that he had borrowed £1,077 to defray the expenses of repairing her, proceeded as follows:—"I bind myself, my ship, her apparel, tackle, etc., as well as her freight & cargo, to pay the above sum with 12 per cent. bottomry premium; & I further bind myself, said ship, her freight, & cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London, & I do hereby make liable the said vessel, her freight & cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, & must have, preference to all other claims & charges, until such principal sum, with 12 per cent. bottomry premium, & all charges are duly paid":—*Held*: this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 7, G. (b) & (c); sub-sects. 8, 9, & 10, A.*]

voyage; the words "my arrival," must be understood to mean my ship's arrival; & the words, "I make liable the said vessel, her freight & cargo, whether she do or do not arrive at London"; were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, & not to provide for the event of a loss of the ship.—SIMONDS *v.* HODGSON (1832), 3 B. & Ad. 50; 1 L. J. K. B. 51; 110 E. R. 19.

*Annotations:*—**Refd.** Stainbank *v.* Fenning (1851), 11 C. B. 51; The Royal Arch (1857), 30 L. T. O. S. 198; The Mary Ann (1865), L. R. 1 A. & E. 13; The James W. Elwell, [1921] P. 351.

**1359. —— Low rate of interest.**]—THE ROYAL ARCH, No. 1230, *ante*.

**1360. —— Common rate of interest.**]—THE INDOMITABLE, No. 1357, *ante*.

**1361. —— Stipulation for immediate repayment of loan—If vessel puts into port of refuge.**]—THE HAABET, No. 1367, *post*.

**1362. Sufficiency of expression of risk.**]—(1) It is certainly the vital principle of bottomry bonds, that they shall have been taken where the owner was known to have no credit; no resources for obtaining necessary supplies. It is that state of unprovided necessity that alone supports these bonds: the absence of that necessity is their undoing. If the master takes up money from a person who knows that he has a general credit in the place, or at least an empowered consignee, or agent, willing to supply his wants, the giving a bottomry bond is a void transaction, not affecting the property of the owner, only fixing loss & shame on the fraudulent lender; but where honourably transacted, under an honest ignorance of this fact, an ignorance that could not be removed by any reasonable inquiry, it is the disposition of this ct. to uphold such bonds, as necessary for the support of commerce in its extremities of distress, & as such recognised in the maritime codes of all commercial ages & nations (LORD STOWELL).

(2) One objection is that it binds the owners personally, as well as the ship & freight, which it cannot do. That is held in this ct. to be no objection to the efficacy of what it is admitted it can do. Here we do not take this bond *in toto*, as is done in other systems of law, & reject it as unsound in the whole, if vicious, in any part. But we separate the parts, reject the vicious, & respect the efficiency of those which are entitled to operate. The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner or owners, in others not, & where they do not, though the form of the bond affects to bond the owners, that part is insignificant, but does not at all touch upon the efficiency of those parts which have an acknowledged operation. . . . The money is to be paid at such a time "after the ship arrives at her port." If the ship never arrives at her port, or is lost upon the voyage, that is a sufficient description of sea risk (LORD STOWELL).—THE NELSON (1823), 1 Hag. Adm. 169; 166 E. R. 61.

*Annotations:*—*As to* (1) **Refd.** The Hersey (1837), 3 Hag. Adm. 404; The Prince of Saxe Cobourg (1837), 3 Hag. Adm. 387. *As to* (2) **Refd.** The Atlas (1827), 2 Hag. Adm. 48; Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853), 13 C. B. 418; The Royal Arch (1857), 30 L. T. O. S. 198; The Indomitable (1859), Sw. 446. *Generally*, **Refd.** Weston *v.* Foster (1836), 5 L. J. C. P. 242; The Mary Ann (1865), L. R. 1 A. & E. 13.

**1363. Risk must be incurred by lender.**]—STAINBANK *v.* SHEPARD, No. 1349, *ante*.

*(c) Maritime Interest.*

**1364. Whether necessary.**]—THE ATLAS, No. 1154, *ante*.

**1365. ——.**]—THE EMANCIPATION, No. 1492, *post*.

**1366. —— If maritime risk expressed.**]—THE LAUREL, No. 1310, *ante*.

**1367. —— ——.**]—The master of a Norwegian barque at Barbados, being in need of necessaries, obtained a cash advance on the security of an instrument by which he promised to repay the amount "within ten days after arrival at port of discharge in Europe, or at any other place at which the voyage may terminate . . . in an approved banker's sight draft or cheque on London to the order of (the agents of the lender) . . . & for which I hereby pledge the said vessel, her freight & her owners. The claim to have priority over all others that may be presented against the said freight & vessel, with the express agreement, however, that it shall not invalidate or affect the lien upon, or right of process against, the said vessel & freight & owners for the amount of this bill . . . in case of its not being duly accepted & paid. Provided always . . . that if the said vessel shall, in the course of the voyage on which she is now being despatched, go into any port of refuge to repair there, all the moneys for the payment of which the said vessel, her freight, & owners, are hereby pledged, shall forthwith become due & payable, & it shall be lawful for the said (agents) to proceed at once against the said vessel, freight & owners, or any or either of the same, separately, to recover the amount of this bill. . . ." In the margin was a note as to insurance by the lender:—*Held:* the instrument was a valid bottomry bond, for the lender of the money ran the risk of the vessel not reaching her port of discharge, &, therefore, it was immaterial that there was no stipulation as to maritime interest, nor was the bond invalidated by the bill transaction contained in it, or by the loan becoming immediately payable on the vessel putting into a port of refuge, or by the memorandum as to insurance.—THE HAABET, [1899] P. 295; 68 L. J. P. 121; 81 L. T. 463; 48 W. R. 223; 15 T. L. R. 548; 8 Asp. M. L. C. 605.

**1368. Whether particular rate of interest essential.**]—THE ROYAL ARCH, No. 1230, *ante*.

**Payment in enforcement of bond.**]—*See* Sect. 3, sub-sect. 11, D., *post*.

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SUB-SECT. 8.—DUTIES OF LENDERS AND THEIR ASSIGNEES.

**1369. To ascertain that advances were necessary.**]—(1) A bottomry bond, given within three days of sailing, at the Mauritius, by a part owner, the *de facto* master, to a stranger who took no step to ascertain whether the loan was required for the purposes of the ship, such loan being larger than advertised for, & the balance in favour of the agents & consignees small, though in evidence that, till discharged, they would have detained the ship, not valid.

(2) There being no *mala fides* in the bondholder, the ct. declined to condemn him in the costs of the asignees.

(3) It may be a question whether a lender on bottomry is bound to see to the application of the money he advances, but it is clear that he must make due inquiry to ascertain that a necessity exists, & that without money so advanced the ship cannot proceed upon her voyage. When a necessity has been ascertained, the lender may

not be required to see to the application of the loan; but when a ship has arrived with a considerable cargo in a foreign port, & remains there for some time, . . . & where the repairs have been unimportant, & all the stores furnished, & a person then advances money on bottomry without seeing to the necessity, he does so at his own risk (SIR JOHN NICHOLL).—THE ORELIA (1833), 3 Hag. Adm. 75; 166 E. R. 334.

**1370.** ——.]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante*.

**1371.** ——.]—A merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair or otherwise, is not bound to inquire into the expediency of incurring the expense of those repairs with reference to the interest of the owner (POLLOCK, C.B.).—DUNCAN *v.* BENSON (1847), 1 Exch. 537; 17 L. J. Ex. 238; 10 L. T. O. S. 228; 154 E. R. 229; *affd. sub nom.* BENSON *v.* DUNCAN (1849), 3 Exch. 644.

*Annotations:*—**Consd.** The Staffordshire (1871), 25 L. T. 137. **Mentd.** Miedbrodt *v.* Fitzsimon, The Energie (1825), 32 L. T. 579; Hallett *v.* Wigram (1850), 9 C. B. 580; Atkinson *v.* Stephens (1852), 7 Exch. 567; Stainbank *v.* Shepard (1853), 13 C. B. 418; Grey *v.* Gibbs (1857), 2 H. & N. 22; The Union (1860), 30 L. J. P. M. & A. 17; The Olivier (1862), Lush. 484; Lloyd *v.* Guibert (1865), 6 B. & S. 100; The Lizzie (1868), 19 L. T. 71; The Eugenie (1873), L. R. 4 A. & E. 123; The Onward (1873), L. R. 4 A. & E. 38; Atwood *v.* Sellar (1879), 4 Q. B. D. 342.

**1372.** ——.]—THE ROYAL STUART, No. 1187, *ante*.

**1373.** ——.]—THE PONTIDA, No. 1387, *post*.

**1374.** —— **Effect of failure to make inquiries.**]—(1) Where the claim on a bottomry bond is by the material man against the owner, it will always be presumed that supplies & repairs ordered by the master were reasonably fit & proper, unless there is clear proof to the contrary, & also proof of collusion by the material man.

(2) To support hypothecation by bottomry, evidence of actual necessity for repairs & supplies is required, &, if the fact of necessity be left unproved, evidence is also required of due inquiry, & of reasonable grounds of belief that the necessity was real & exigent.

(3) A survey is not indispensable in proof of necessity; but where the repairs alleged to be made are extensive, & the necessity otherwise left in doubt, the absence of such an examination will go far to warrant the conclusion that no real necessity existed.

(4) A bottomry bond may be good in part & bad in part; & the mere omission of the lender to make inquiry, will not vitiate it altogether.—LAW *v.* WALLERSTEIN, THE GRAPESHOT (1870), 22 L. T. 376; 3 Mar. L. C. 388.

**1375. To see that advances are properly applied.**]—THE ORELIA, No. 1369, *ante*.

**1376.** ——.]—THE ROYAL STUART, No. 1187, *ante*.

**1377. To ascertain that advances could not be obtained on credit.**]—The party taking a bottomry bond from the master of a vessel requiring supplies for the further prosecution of her voyage, is bound to ascertain whether such supplies can be procured on the personal credit of the owner, before resort is had to a bottomry bond as security for their amount. *Semble:* where a party has the means of knowing a fact, he is bound to show that he exercised reasonable diligence to ascertain it.—HEATHORN *v.* DARLING, THE ELIZA (1836), 1 Moo. P. C. C. 5; 12 E. R. 712, P. C.

*Annotation:*—**Apld.** The Prince of Saxe Cobourg (1837), 3 Hag. Adm. 387.

**1378.** ——.]—SOARES *v.* RAHN, THE PRINCE OF SAXE COBOURG, No. 470, *ante*.

**1379. To calculate expediency of incurring expense.**]—THE VIBILIA, No. 1283, *ante*.

**1380.** ——.]—DUNCAN *v.* BENSON, No. 1371, *ante*.

**1381. To give notice—Of intention to take bond—To masters—& owner.**]—THE WAVE, No. 1281, *ante*.

**1382.** —— —— ——.]—THE LAUREL, No. 1310, *ante*.

**1383.** —— —— **Effect of failure to give notice.**]—THE LAUREL, No. 1310, *ante*.

**1384.** —— **To mortgagee—Of existence of bond.**]—THE HELGOLAND, No. 1432, *post*.

**1385.** —— —— **Of necessity for hypothecation.**]—THE ST. GEORGE, No. 1338, *ante*.

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SUB-SECT. 9.—LIABILITY OF OWNERS.

**1386. Extent of liability—Extent of property in ship.**]—THE TARTAR, No. 1235, *ante*.

**1387.** —— **Commensurate with necessity.**]—(1) The master of a ship is the agent of the owner to pledge his credit only in the case of necessity, & to the extent of that which is necessary to enable the ship to complete her voyage, & he cannot by giving a bottomry bond for an excessive amount fix the owner with liability for anything beyond that which is necessary.

To take another illustration: as that a ship requires coppering to a certain extent in order to enable her to complete the voyage & the master thinks it better to have five times as much work done as is actually required, in order, by so doing, that she may be reclassed. The lender on bottomry, according to the arguments we have heard, if he does not suspect fraud, & has made some inquiries, has obtained a valid bottomry bond for the whole cost of the work done. But no authority has been cited which carries the law to this length. A bond under such circumstances would be pronounced invalid whether the lender knew or did not know that the repairs were for reclassing the vessel (BRETT, M.R.).

(2) The fact that the person who advances the money may have made reasonable inquiries into the circumstances of the case does not render the owner liable for excessive or unreasonable charges.—THE PONTIDA (1884), 9 P. D. 177; 53 L. J. P. 78; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. L. C. 330, C. A.

**1388. Liability for excessive or unreasonable charges—Reasonable inquiries made by lender.**]—THE PONTIDA, No. 1387, *ante*.

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SUB-SECT. 10.—PAYMENT OF BOTTOMRY BONDS.

*A. In General.*

**1389. Right of bondholder to benefit of insurance—In addition to money due on bond.**]—One lends £250 on a bottomry bond, & afterwards insures on the same ship. The ship is lost. He shall have

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**PART IV. SECT. 3, SUB-SECT. 9.**

*f. General rule.*]—The hypothecation of the ship does not render the owner personally liable.—SHAW *v.* BARTLETT (1864), 5 Nfld. L. R. 85.—**NFLD.**

*g. Master pledging ship without authority—Owner not liable.*]—COCHRANE *v.* GILKISON (1854), 16 Dunl. (Ct. of Sess.) 548; 26 Sc. Jur. 251.—**SCOT.**

*h. Bills of exchange drawn by master—As security for money advanced—Promise to pledge given.*]—MILLER & Co. *v.* POTTER, WILSON & Co. (1875), 3 R. (Ct. of Sess.) 105; 13 Sc. L. R. 70.—**SCOT.**

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 10, A. & B. (a) & (b).]*

both the benefit of the insurance, & the money due on the bond too.—HARMAN *v.* VANHATTON (1716), 2 Vern. 716 ; 23 E. R. 1071, L. C.

**1390. Proof of payment—Bond as primary evidence.**]—A bottomry bond uncancelled & not delivered up, as paid, held not to be discharged by an agreement, on a settlement of accounts, between the owner & the charterer, that the latter should pay the bond, to which agreement the agent of the bondholder was, as partner of the charterer, privy ; but under which there was no evidence that, as agent of the bondholder, he had acted or received the money. Bond pronounced for with costs.

Looking to the peculiar nature of bottomry bonds, as given, usually to strangers & foreigners, for the advance of money for the service of the ship in a distant port, it is the duty of the ct. to look for the discharge of them in the simplest & most unequivocal form. If it should turn aside to averments of collateral or constructive payments, growing out of the complicated relations of individuals, & on disputed facts, it would destroy the security of these engagements, & lead the bondholder into a discussion of particulars, of which he must be totally ignorant, & thus expose him to litigation, that may disappoint all his prospects of a return for the advances which he has made, & involve him in fruitless expenses. . . .

With respect to the common principles that govern all bonds, it is natural to look to the bond itself for the proof of payment ; as it is usual to deliver up the bond, or to note the payment on the instrument itself, or in some collateral receipt (SIR CHRISTOPHER ROBINSON).—THE HUNTCLIFF (1829), 2 Hag. Adm. 281 ; 166 E. R. 247.

*Annotation :*—**Refd.** The Staffordshire (1871), 25 L. T. 137.

**1391. What amounts to payment—Settlement of accounts between owner & charterer—Agreement that charterer should pay bond—Agent of bondholder privy to contract.**]—THE HUNTCLIFF, No. 1390, *ante*.

**1392. Payment of one bond—Whether consideration for new bond.**]—DOBSON *v.* LYALL, No. 1253, *ante*.

**1393. Merger of simple contract debt.**]—THE ELPIS, No. 1168, *ante*.

*B. When Bond Payable.*

*(a) In General.*

**1394. General rule—On completion of voyage.**]—THE ARMADILLO, No. 1396, *post*.

*(b) When Payable Before Completion of Voyage.*

**1395. Deviation of ship.**]—WESTERN *v.* WILDY (1684), Skin. 152 ; 90 E. R. 71.

**1396. ——.**]—A bond of bottomry sought to be enforced prior to the arrival of the ship at her port of destination upon the grounds that the advances for which the bond was given had been obtained from the bondholder by the fraudulent misrepresentations of the master, & that the payment of the bond had become due by unnecessary delay & deviation in the progress of the voyage. Claim of the bondholder dismissed with costs.

The general principle undoubtedly is, that a bond does not become payable until the voyage for which it is given is completed, but if a master, after setting out on a voyage, fraudulently neglects or refuses to proceed with the vessel to the place to which she was destined, I entertain no doubt whatever that the bond becomes instantly due, & payment may be enforced upon it by proceedings in this ct. (DR. LUSHINGTON).—THE ARMADILLO (1841), 1 Wm. Rob. 251 ; 1 Notes of Cases, 75 ; 166 E. R. 566.

**1397. —— Ship pressed into King's service.**]—WILLIAMS *v.* STEADMAN (1693), Holt, K. B. 126 ; Skin. 345 ; 90 E. R. 968.

**1398. —— Not consented to by lenders.**]—Deft. borrowed a sum of money from pltfs. on the security of a bottomry bond on a ship of which he was the owner. The voyage was described in the bottomry bond as from Liverpool to Newhaven, but the ship when at Liverpool was rechartered by deft. to Santos, where she was abandoned :—*Held :* pltfs. not having consented to the deviation the amount secured by the bottomry bond became payable by deft.

Bottomry is a contract of insurance for a particular voyage. If the vessel does not sail on that voyage the consideration fails (MATHEW, J.).—LONDON & MIDLAND BANK *v.* NEILSEN (1895), 1 Com. Cas. 18.

**1399. Delay—By inevitable accident—Embargo—Effect of provision for inevitable accident.**]—INGLEDEW *v.* FOSTER (1713), 2 Eq. Cas. Abr. 189 ; 4 Vin. Abr. 281 ; 22 E. R. 162.

**1400. —— Unnecessary delay.**]—THE ARMADILLO, No. 1396, *ante*.

**1401. Capture by enemy—Clause providing for such event—Subsequent recapture—Arrival at destination.**]—Action on a bottomry bond containing a clause, that if the ship should be taken by the enemy, etc., the bond should be void. The ship was captured & recaptured, & afterwards arrived at her destination, & earned her freight :—*Held :* the obligee was entitled to recover upon the bond. There is no average on salvage on a bottomry bond.

It was contended that the case came within the words of the clause, making the bond void in case of capture by the enemy. But, on consideration, we are all of opinion, that the taking by the enemy there contemplated does not mean merely a temporary taking, which is only an obstruction (LORD MANSFIELD). — JOYCE *v.* WILLIAMSON (1782), 3 Doug. K. B. 164 ; 99 E. R. 593.

**1402. Where ship lost—Recovery dependent on actual total loss.**]—An assured on bottomry cannot recover against the underwriter unless there has been an actual total loss of the ship ; for if the ship exist *in specie*, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond.—THOMSON *v.* ROYAL EXCHANGE ASSURANCE CO. (1813), 1 M. & S. 30 ; 105 E. R. 11.

*Annotations :*—**Apld.** The Elephanta (1851), 18 L. T. O. S. 248. **Folld.** Broomfield *v.* Southern Insce. (1870), L. R. 5 Exch. 192. **Refd.** Barr *v.* Gibson (1838), 3 M. & W. 390 ; The Catharina (formerly The Croxdale) (1851), 17 L. T. O. S. 43 ; Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516.

**1403. —— —— Sale as unseaworthy.**]—A British ship, upon which a bottomry bond had been taken, payable on the ship's arrival in England, was sold by the master, as unseaworthy, at public auction, & with the consent of the British Consul, at Bahia, to a foreigner, who repaired her, changed her name, & sent her to England. There was no evidence of notice of the bond having been given



*Abandonment of ship—For payment of debts.*]—THE TRIUMPH (1861), 3 L. T. 821.—IR.

at the sale :—*Held :* the ship was still subject to the bond.

If a ship was once bottomried, the bond attached to the very last plank, & the bondholder might have that sold for his benefit (DR. LUSHINGTON).—THE CATHARINA (FORMERLY THE CROXDALE) (1851), 17 L. T. O. S. 43 ; 15 Jur. 231.

*Annotation :*—**Refd.** Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516.

**1404.** —— —— ——.]—The master of a ship, to raise money for necessary repairs, hypothecated the ship & freight. The bottomry bond contained a clause which provided that the obligation should be void if the obligors should pay, in consequence of the loss of the ship, such an average as by custom would have become due on the salvage, or if the ship should be utterly lost, cast away, or destroyed, in consequence of the perils of the sea. The ship, on her homeward voyage, met with such bad weather as to be obliged to put into an intermediate port in a damaged state, & after being surveyed was found unseaworthy, & sold while existing *in specie* for a sum less than the amount of the bond :—*Held :* (1) the doctrine of constructive total loss does not apply to bottomry bonds, as in the case of insurance between insurers & insured, & the bondholder's claim to the entire proceeds of the sale upheld ; (2) the above clause in the bond did not apply when the ship remained *in specie*, though so much damaged that it would have cost more to repair her than she was worth.—STEPHENS *v.* BROOMFIELD, THE GREAT PACIFIC (1869), L. R. 2 P. C. 516 ; 6 Moo. P. C. C. N. S. 151 ; 38 L. J. Adm. 45 ; 21 L. T. 38 ; 17 W. R. 933 ; 3 Mar. L. C. 263 ; 16 E. R. 683, P. C.

**1405.** —— **Covenant by owner to pay average due on salvage.**]—STEPHENS *v.* BROOMFIELD, THE GREAT PACIFIC, No. 1404, *ante*.

**1406.** —— ——.]—The condition of a bottomry bond provided for its defeasance on payment of the amount of the bond " or, in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away or destroyed." The ship having become a constructive total loss the bondholder, by a decree in the Admlty. Ct., obtained payment to him of the proceeds of the ship, which had been paid into ct., & which were insufficient ; the ct. holding that a bottomry bond was only discharged by payment or by an absolute total loss, & that the condition providing for defeasance on payment of such average as by custom should have become due did not refer to the case of a constructive total loss. In an action brought by the bondholder on a policy of insurance upon the bond :—*Held :* the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry & the condition of defeasance did not apply to the case of a constructive total loss.—BROOMFIELD *v.* SOUTHERN INSURANCE CO. (1870), L. R. 5 Exch. 192 ; 39 L. J. Ex. 186 ; 22 L. T. 371 ; 18 W. R. 810 ; 3 Mar. L. C. 396.

**1407.** —— **Whether doctrine of constructive total loss applicable.**]—STEPHENS *v.* BROOMFIELD, THE GREAT PACIFIC, No. 1404, *ante*.

**1408.** —— ——.]—BROOMFIELD *v.* SOUTHERN INSURANCE CO., No. 1406, *ante*.

**1409.** —— **Negligence of another ship — Sum awarded as compensation for loss of freight — Whether bondholder may claim.**]—Although pltf. in an action for limitation of liability is ordinarily liable to pay the costs of the action, yet, if defts. raise unnecessary issues on which they fail, he is entitled to the costs of those issues, & he will not be ordered to pay the costs occasioned by a dispute between rival claimants to the proceeds in ct. The master of the ship *C.*, bound from P. to A. obtained at P. from M. a loan of money on freight upon the security of an instrument signed by him by which it was stipulated that the loan should be repaid after arrival of the *C.* at A. or other intermediate port at which the voyage should end, & that if there should be no payment of freight the loan should not be paid back. The *C.* whilst on the course of her voyage to A., came into collision with another ship & sank, & her cargo was lost. The collision was occasioned by the negligence of those in charge of the other ship, & her owners instituted an action for limitation of their liability. In such action a sum of money was awarded out of the proceeds paid into ct. to the owners of the *C.* for loss of freight. M. claimed a portion of this sum in respect of his loan :—*Held :* his claim was well founded. *Semble*, where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by pltf.'s ship, the holder of a bottomry bond on the freight of the vessel run down is entitled to claim, in respect of the loan on bottomry, a portion of the sum awarded for loss of freight.—THE EMPUSA (1879), 5 P. D. 6 ; 48 L. J. P. 36 ; 41 L. T. 383 ; 28 W. R. 263 ; 4 Asp. M. L. C. 185.

*Annotation :*—**Refd.** The Victoria (1888), 37 W. R. 62.

**1410. Advances obtained by fraud.**] — THE ARMADILLO, No. 1396, *ante*.

**1411. Ship compelled to put into port—& condemned as unseaworthy.**]—A bottomry bond granted in the port of London upon an American vessel, stipulating that the payment of the bond should be made within twenty-four hours after the ship's arrival in a port of the United States. The vessel sailed from London, took in a cargo at Shields, & was in the actual progress of her voyage, when she was compelled to put into Plymouth, & was condemned as unseaworthy. Payment of the bond decreed by the ct. ; & the maritime interest allowed, upon the ground that the maritime risk had been partially incurred, & was interrupted by the damaged condition of the vessel. *Semble*, if the vessel had not left the port of London, the maritime interest would not have been allowed.—THE DANTE (1846), 2 Wm. Rob. 427 ; 4 Notes of Cases, 408 ; 166 E. R. 816.

*Annotations :*—**Refd.** The Catharina (formerly The Croxdale) (1851), 17 L. T. O. S. 43 ; Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516 ; London & Midland Bank *v.* Neilsen (1895), 1 Com. Cas. 18.

**1412. Abandonment of ship—As for total loss.**]—Bond on ship, freight & cargo, the money to be paid within twenty-one days of the ship's arrival in the port of London, & not to be demanded or recovered in case the ship & her cargo be lost, miscarry, or be cast away on the voyage. The ship never reached the port of London, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, & the proceeds brought to England, & part put into another ship, & also brought to England. The fact that the ship could not be repaired was not proved :—*Held :* the bond must be pronounced for, & enforced against the proceeds of the cargo, & the cargo transhipped.—THE ELEPHANTA (1851), 18 L. T. O. S. 248 ; 15 Jur. 1185.

*Annotations :*—**Refd.** Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516 ; The Montrosa, [1917] P. 1.

**1413. Abandonment of voyage.**]—THE HELGOLAND, No. 1432, *post*.

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 10, C.; sub-sect. 11, A., B., C. & D.*]

*C. Priority.*

**1414. As between bond holders.**]—DUNLOP *v.* THE NEPTUNE (1769), Burrell, 97; 167 E. R. 490.

**1415.** ——.]—THE RHADAMANTHE, No. 1237, *ante*.

**1416.** ——.]—Where there are two bottomry bonds, the holders of the one last dated bond are entitled to priority of payment though the difference to date is very slight, & though the bonds should be in other respects similar.—THE BETSEY (1813), 1 Dods. 289; 165 E. R. 1314.

**1417.** ——.]—THE SYDNEY COVE, No. 1169, *ante*.

**1418.** ——.]—A bottomry bond, given for the necessities of the voyage by an owner on board the vessel, who could not otherwise obtain money, is valid, & supersedes a previous mtgc. of the ship; the master, who was on board, but to dispossess whom a suit had been instituted, being privy & receiving the supplies as necessary, though refusing to sign the bond.

Sea stores, particularly for the subsistence of passengers, who may be considered as cargo in this view, & by whom a large payment had been made as passage money, in the nature of freight, are objects of a bottomry bond.

It is the general character of bottomry bonds to supersede even former bonds of the same species, on the supposition that they operate for the protection of all prior interests (SIR CHRISTOPHER ROBINSON).—THE DUKE OF BEDFORD (1829), 2 Hag. Adm. 294; 166 E. R. 251.

*Annotations:*—**Reld.** The Marie Glaeser, [1914] P. 218; The St. George, [1926] P. 217.

**1419.** ——.]—THE ELIZA, No. 1505, *post*.

**1420.** ——.]—Where three bonds had been given, the first upon the ship alone, the second upon the cargo alone, & the third upon the ship alone:—*Held:* (1) the last bond was entitled to priority, & must be paid out of the proceeds of the ship only; (2) the first bond was payable out of the same proceeds & if they were insufficient, the bondholder must go unpaid; & the cargo could not be applied to the discharge of the second bond until the proceeds of the ship & the freight were exhausted.—LA CONSTANCIA (1845), 2 Wm. Rob. 404; 4 Notes of Cases, 285; 6 L. T. O. S. 193; 10 Jur. 845; 166 E. R. 807; *subsequent proceedings* (1846), 2 Wm. Rob. 460, 512.

*Annotation:*—**Dbtd.** The Priscilla (1859), Lush. 1.

**1421.** ——.]—Where there are two bottomry bonds, the first in date on a ship & freight only, & the other or last bond on ship, freight & cargo, & ship & freight are insufficient to discharge both bonds, the last bond, which is entitled to priority, must nevertheless be paid out of ship & freight.—THE PRISCILLA (1859), 1 Lush. 1; 1 L. T. 272; 5 Jur. N. S. 1421; 167 E. R. 1.

*Annotations:*—**Consd.** The Union (1860), Lush. 128; The Edward Oliver (1867), L. R. 1 A. & E. 379.

**As between bondholders & mortgagees.**]—*See* Part II., Sect. 3, sub-sect. 3, K. (*b*) iii., *ante*.

**Ranking of liens on bottomry.**]—*See* Part XIX., Sect. 4, *post*.

SUB-SECT. 11.—ENFORCEMENT OF BOTTOMRY BONDS.

*A. In General.*

**1422. Equitable relief against condition.**]—ANON. (1716), 2 Eq. Cas. Abr. 189; 22 E. R. 162, L. C.

**1423. Sale of ship—Proceeds insufficient to discharge bond—Liability of freight.**]—THE JACOB (1802), 4 Ch. Rob. 245; 165 E. R. 600.

*Annotations:*—**Distd.** Smith *v.* Bank of New South Wales, The Staffordshire (1872), L. R. 4 P. C. 194. **Reld.** The Royal Arch (1857), Sw. 269.

**1424. Whether ship alone liable—Terms of bond conclusive.**]—LA CONSTANCIA, No. 1420, *ante*.

**1425. What must be produced—Accounts.**]—THE CATHERINE, No. 1464, *post*.

**1426. —— Original bond.**]—THE ROWENA (1877), 37 L. T. 366; 26 W. R. 82; 3 Asp. M. L. C. 506.

**1427. Proof of amount due—On whom onus lies.**]—THE CATHERINE, No. 1464, *post*.

**1428. Decision of court as to validity—Whether opinion given as to amount due.**]—THE CATHERINE, No. 1464, *post*.

**1429. —— Effect of.**]—THE CATHERINE, No. 1464, *post*.

**1430. Owner not appearing—Actions for claims against ship—Whether bondholder may pay claims—On giving security.**]—In a cause of bottomry, where no appearance is given for the owners, & actions for wages, etc., are entered against the ship, the ct. may allow the bondholders to pay the claims which were the subject of those actions, on giving security for the protection of the owners' interests.—THE JOHN FEHRMAN (1852), 16 Jur. 1122.

*Annotation:*—**Reld.** The Petone, [1917] P. 198.

**1431. Delay—Effect of.**]—THE ROYAL ARCH, No. 1230, *ante*.

**1432. —— —— On rights of mortgagee.**]—A bottomry bond originally valid is not affected by any agreement by the bondholder for the purchase of the ship.

A bottomry bondholder is under no obligation to communicate the existence of the bond to the mtgees. of the ship, & is not affected by the owner concealing it from the mtgees.

A bond becomes payable upon the abandonment of the voyage agreed upon in the bond.

A mtgee. cannot set up as a defence to a bond the laches of the bondholder, unless his position has been thereby prejudiced.—THE HELGOLAND (1859), Sw. 491; 5 Jur. N. S. 1179; 166 E. R. 1228.

*Annotation:*—**Reld.** The St. George, [1926] P. 217.

—— ——.]—*See, also*, ADMIRALTY, Vol. I., pp. 123, 124, Nos. 299, 300.

**1433. Proof of good faith of master—Proof by affidavit.**]—THE FAITHFUL, No. 1247, *ante*.

**1434. Decree for sale—Adverse claims against proceeds—Onus of proof.**]—A bottomry bondholder, having obtained a decree of sale of the vessel, has acquired a *primâ facie* right to the proceeds, & before he can be called upon to defend & maintain such right, those claiming adverse interests in the proceeds must first have established their interests therein.—THE INDIA (1863), 2 New Rep. 42; 32 L. J. P. M. & A. 185; 9 L. T.

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**PART IV. SECT. 3, SUB-SECT. 10.—C.**

**l.** *As between bondholders & master.*]—A., the agent for the ship in port at Bombay, lent the master money on a bond, in the nature of a bottomry bond, which he obtained from the master under pressure of necessity. It appeared that A., at the time of the making of the bond had funds of his principal's in hand:—*Held:* the master's lien for wages had priority over the bondholder.—THE GOOD SUCCESS, MACQUEEN *v.* FUZZUL MAHOMED ESSAU (1866), 1 Ind. Jur. N. S. 303.—**IND.**

**PART IV. SECT. 3, SUB-SECT. 11.—A.**

**m.** *When proceedings will be stayed.*]—In the case of a Dutch vessel, which was arrested at Cork under a bottomry bond, the ct. agreed to stay the proceedings for ten days, as the consul for the kingdom of which the owner was a native made an affidavit admitting the validity of the bond, & intimated that the owner was sending over a trustworthy agent to settle the demand.—THE ALBERT SCHURINGA (1856), 4 L. T. 92.—**IR.**

234; 9 Jur. N. S. 417; 11 W. R. 536; 1 Mar. L. C. 390.
*Annotation:*—**Refd.** The Mecca, [1895] P. 95.

*B. Jurisdiction.*

*See, generally,* ADMIRALTY, Vol. I., pp. 121–126, 158, Nos. 267–317, 663.

**1435. Reduction of interest—Where appearing exorbitant.**]—THE ZODIAC, No. 1240, *ante.*

**1436. Reduction of premiums.**]—The registrars' & merchants' report, reducing the premium on a bond, given in France for a voyage to London, from 20 to 12½ per cent. overruled; but sustained where it disallowed a charge of commission for the unshipping & care of the cargo, at 5 per cent., as unreasonable, though agreeable to the custom of the place; & in lieu thereof substituted an allowance of 5 per cent. on the disbursements; & the ct. also sustained the report, where it disallowed a charge for wages advanced to the crew abroad, on the ground that the payment might never have become due.

The ct. pronounced for the modified amount of the bond, with interest at 4 per cent. from the time it became payable to the date of the decree, & with costs.

These contracts have always been considered free from the restraints proceeding from laws against usury, & have been held to depend chiefly on the agreement of the parties. But . . . they are still subject to the restrictions imposed on all contracts by the principles of good faith (SIR CHRISTOPHER ROBINSON).

When it is admitted, therefore, that fraud or collusion might justify the interference of this ct., we must take those terms with the extension given to them in other cts.; & if this ct. is required to enforce contracts of this kind at all, it must be on such principles as equity demands, & without which neither equity nor justice would be done (SIR CHRISTOPHER ROBINSON).—THE COGNAC (1832), 2 Hag. Adm. 377; 166 E. R. 281.

*Annotations:*—**Consd.** The Heart of Oak (1841), 1 Wm. Rob. 204. **Refd.** The Glenmanna (1860), Lush. 115.

**1437.** ——.]—THE HUNTLEY (1860), 1 Lush. 24; 167 E. R. 13.

**1438. —— Matters for consideration of court.**]—THE HEART OF OAK, No. 1474, *post.*

**1439. Allowance of charges — Wages.**]—THE COGNAC, No. 1436, *ante.*

**1440. —— Commission.**]—THE COGNAC, No. 1436, *ante.*

**1441. In fraud or collusion.**]—THE COGNAC, No. 1436, *ante.*

**1442. Restraint of proceedings in Admiralty Division—Injunction—Concurrent proceedings in Chancery.**]—DUNCAN *v.* M'CALMONT (1841), 3 Beav. 409; 10 L. J. Ch. 335; 3 L. T. 824; 49 E. R. 161, L. C.
*Annotation:*—**Refd.** The Don Francisco (1862), Lush. 468.

*C. Reference to Registrar and Merchants.*

**1443. Matters referred to registrar & merchants —Fairness of commissions—Charges customary where bond given—Whether decision affected.**]—THE LAUREL, No. 1309, *ante.*

**—— Costs.**]—*See* ADMIRALTY, Vol. I., p. 220, Nos. 1453–1459.

——.]—*See, also,* ADMIRALTY, Vol. I., pp. 215, 216, Nos. 1390–1396.

**Reference to registrar & merchants generally.**]—*See* ADMIRALTY, Vol. I., pp. 215–221, Nos. 1390–1477.

*D. Interest.*

**1444. General rule.**]—THE CATHERINE, No. 1464, *post.*

**1445. Unreasonable interest—Whether bond enforceable.**]—A part owner of a ship borrowed money of pltf. upon a bottomry bond, payable on the return of the ship from the voyage she was then going in the service of the East India co., & the East India co. broke up the ship in the Indies; & the owners brought their action against the co. & recovered damages, but they did not amount to a full satisfaction; & the obligee brought his bill to have his proportionable satisfaction out of the money recovered, but his bill was dismissed, & he left to recover as well as he could at law; for a ct. of equity will never assist a bottomry bond which carries an unreasonable interest.—DANDY *v.* TURNER (1701), 1 Eq. Cas. Abr. 372; 21 E. R. 1111.

**1446. Maritime interest allowed only as compensation for maritime risk.**]—The report of the registrar & merchants disallowing, as irregular & unusual where there is a bottomry premium, a charge of insurance on money advanced to the master on bottomry, & forming part of the amount of the bond, confirmed; bottomry bonds, given by the master, binding the owners only for sums necessary for repairs, & for the furtherance of the voyage, & maritime interest being only allowed as a compensation for maritime risk.

This is a bottomry bond executed by the master of the ship, who has no power to bind the ship or the owner by the law of England, except within special limits, for repairs & supplies becoming necessary from the exigencies of the voyage. This is an essential principle of this species of bottomry, & the ct. has hitherto acted with great strictness in not extending the privilege of bottomry against the ship beyond these limits, confining it to sums necessary for repairs, & for the furtherance of the voyage. Another essential principle of all bottomry is, that maritime interest is allowed only as a compensation for maritime risk. . . . Since the introduction of insurance lenders on bottomry, if not restrained by special regulations, may insure their own advances in a distinct contract on their own account, but it would be contrary to the essential character of bottomry to make it a part & condition of the bond; & after hypothecating the ship in maritime interest for maritime risk, to hypothecate it also, in the same bond with the same interest, to take off that risk by other collateral engagements. This is contradictory in form, at least, & in principle. . . .

If this article of expenditure is not properly a subject of bottomry, it cannot be made so, by the mere agreement of the master (SIR CHRISTOPHER ROBINSON).—THE BODDINGTON'S (1832), 2 Hag. Adm. 422; 166 E. R. 298.

**1447. Rate of interest allowed.**]—THE COGNAC, No. 1436, *ante.*

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**PART IV. SECT. 3, SUB-SECT. 11.—B.**

**1440 1.** *Allowance of charges—Commission.*] — Where a ship's agent charges a commission for his general superintendence upon the entire value of the ship & cargo, & upon advances alleged to have been made by him, without stating to what amount, or at what rate of interest, the ct. will consider the several claims, & award a specific sum for his services & advances, & reduce the amount of the bond accordingly.—THE FORTUNA (1861), 4 L. T. 840.—**IR.**

n. *Jurisdiction of Admiralty Court.*] —THE THREE SISTERS (1873), Y. A D. 149.—**CAN.**

**PART IV. SECT. 3, SUB-SECT. 11.—D.**

o. *Right to Indian interest—Whether debt converted into Indian debt.*]—COCHRANE *v.* GILKISON (1857). 20 Dunl. (Ct. of Sess.) 213; 30 Sc. Jur. 111.—**SCOT.**

*Sect.* 3.—*Authority to hypothecate ship and freight: Sub-sect.* 11, *D. & E.; sub-sect.* 12, *A. & B.; sub-sect.* 13.]

**1448. —— Whether bound by stipulation in bond.**]—THE SOPHIA COOK, No. 1454, *post.*

**1449. —— ——.**] — The rate of interest ordinarily payable upon a bottomry loan & the premium thereon after the safe arrival of the ship at the end of the risk is 4 per cent. *per annum*, & a provision in a bond entered into by the master of a ship providing for the payment of 10 per cent. *per annum* interest is not binding on the owners of ship or cargo, provided the provision was entered into without their knowledge.—THE D. H. BILLS (1878), 4 P. D. 32, n.; 38 L. T. 786; 4 Asp. M. L. C. 20.

*Annotation:*—**Apld.** The Sophia Cook (1878), 4 P. D. 30.

**1450. —— —— Interest exorbitant.**]—THE ZODIAC, No. 1240, *ante.*

**1451. —— No stipulation in bond—Usual rate—According to circumstances.**]—In a bottomry bond taken at Calcutta, blanks had been left where the rate of interest ought to have been expressed, the ct. pronounced for the bond, with such interest as the registrar should find to have been usual on such risks at the time & place the bond was taken.—THE CHANGE (1857), Sw. 240; 29 L. T. O. S. 147; 5 W. R. 547.

**1452. —— ——.**]—The master of a Danish vessel being without funds or credit at Hamburg, in order to obtain necessaries to enable his vessel to proceed on a voyage to Africa & back to London, obtained a loan on the security of instruments by which he pledged his vessel & bound himself for the repayment of the sum advanced within six days after the arrival of the vessel in London. No stipulation was made for interest of any kind. In an action of bottomry instituted against the vessel:—*Held:* the instruments were valid bottomry bonds, & the holders were entitled to payment out of the proceeds of the vessel of the sum advanced together with 4 per cent. interest from the time when the bonds became due.—THE CECILIE (1879), 4 P. D. 210; 40 L. T. 200; 4 Asp. M. L. C. 78.

*Annotation:*—**Consd.** The Haabet, [1899] P. 295.

**1453. From when interest payable—Time when bond due.**]—THE COGNAC, No. 1436, *ante.*

**1454. —— ——.**]—A bottomry bond on ship, freight, & cargo provided for payment of a bottomry loan, together with interest at 8 per cent., at or before the expiration of five days after the arrival of the ship at her port of discharge. The bond further provided that an additional premium of 10 per cent. on the loan should become payable if default was made in payment. The ship having arrived at her port of discharge, default was made in payment of the bond, & a suit was instituted by the bondholder against ship, freight, & cargo, to recover the amount of the loan & interest, & the additional premium of 10 per cent.:—*Held:* the additional premium of 10 per cent. could not be enforced against the cargo, but the bondholder was entitled to interest at 4 per cent. from the date when the bond became payable until payment.—THE SOPHIA COOK (1878), 4 P. D. 30; 49 L. J. P. 16.

**1455. —— ——.**]—THE CECILIE, No. 1452, *ante.*

**1456. Bondholder having no agent in this country—Power of attorney authorising receipt of principal—Necessity for.**]—Where the legal holders of an overdue bond of bottomry are resident abroad, & have no agent in this country, interest upon such bond will not be decreed prior to the arrival of a power of attorney authorising the receipt of the principal.—THE NEW BRUNSWICK (1839), 1 Wm. Rob. 28; 166 E. R. 484.

**Inclusion of maritime interest in bond—Necessity for.**]—*See* Sect. 3, sub-sect. 7, G. (*c*), *ante.*

*E. Costs.*

**1457. Bond upheld.**]—THE HUNTCLIFF, No. 1390, *ante.*

**1458. —— Modification of amount.**]—THE COGNAC, No. 1436, *ante.*

**1459. —— Conduct of holder suspicious—No order as to costs.**]—THE OCEAN, No. 1196, *ante.*

**1460. Bond not upheld—No mala fides.**]—THE ORELIA, No. 1369, *ante.*

**1461. —— Unnecessary bond—Costs against bondholder.**]—THE RODERICK DHU, No. 1276, *ante.*

**1462. Dispute as to fairness of charges—Costs of evidence respecting charges—Against party failing in proof.**]—THE LAUREL, No. 1309, *ante.*

**1463. Arrest of ship before bond payable—Costs against bondholder.**]—Where the holders of a bottomry bond, on ship & freight payable seven days after the arrival of the ship, being apprehensive that her cargo would be discharged forthwith, & their security diminished, instituted, a bottomry suit, after the arrival of the ship & before the expiration of the seventh day, & arrested the ship, the ct. on the application of the owners of the ship, who had paid the amount of the bond & interest into ct., condemned pltfs. in costs.—THE EUDORA (1879), 4 P. D. 208; *sub nom.* THE ENDORA, 48 L. J. P. 32; 40 L. T. 166; 4 Asp. M. L. C. 78.

**Bond as collateral security for bill of exchange.**]—*See* No. 1349, *ante.*

SUB-SECT. 12.—AVOIDANCE OF BOTTOMRY BONDS.

*A. Grounds for Avoidance.*

**1464. General rule.**]—When once the ct. has pronounced for the validity of a bond, whether it be done by the consent, or against the will, & in opposition to the wishes, of the party who defends it, in that case the validity of the bond is finally & completely determined, so far as this ct. is concerned, & unless that judgment be appealed from, the ct. must consider it as a valid bond. But when the ct. pronounces for the validity of a bond, it gives no opinion as to the amount due under it. It is one of the most convenient & beneficial practices which this ct. can uphold, to pronounce for the validity of a bond by consent, & refer the amount to the registrar & merchants. It is obviously so to all parties who seek justice, because the party proceeding gets, in the first instance, the realisation of his security, whether it be the ship, cargo, or freight, or whether it be a remedy against the bail, & no man ought to seek to recover more than that which is justly due to him. It is beneficial to the other party, namely, the persons who have to pay the bond, because they have as good a mode of ascertaining the real amount of the expenditure as is possible to be afforded in any other way. I apprehend that a reference to the registrar & merchants is as little expensive & as certain in its results as any reference can be out of ct. to any number of merchants

**PART IV. SECT. 3, SUB-SECT. 12.—A.** *p. Bond given in locality near residence of owners.*]—THE NAPOLEON III., CREIGHTON *v.* MARMAUD (1861), 3 L. T. 825.—**CAN.**

*q.* ——.]—THE MARIETTA (1861), 3 L. T. 825.—**IR.**

*r. Premium excessive.*]—THE BON ACCORD (1861), 4 L. T. 28.—**IR.**

selected in any manner whatsoever. . . . A reference being made to the registrar & merchants, the ct., unless it is called upon by one party or the other, never interferes until the report is made; but it is always ready to interfere if the interests of justice require it. It is always ready to allow more time to the one side or to the other; to the one, to establish the demand if it be just; to the other, to show it is unjust, if, in the opinion of the ct., a sufficient opportunity has not been afforded to the parties of obtaining justice. . . . He who claims under a bond pronounced valid, must show what he has expended, what he is entitled to under the bond, whatever be its nominal amount. Upon him is the *onus probandi*, as he is pltf., as it is upon every person who is to establish an affirmative; & he has every advantage. He ought to keep regular accounts & regular receipts, & to produce those accounts; and if they are fair & just, he is entitled to all his expenses attending the establishing the accounts, and to interest. Bondholders have no right to complain in this ct. that they have not ample, full & complete justice. . . .

When British ships, or any other ships, coming into a British port, may happen to meet with the misfortune of being stranded, & require repairs, in any part of the world whatsoever, if bottomry bonds are taken to an exorbitant extent, & they are put into suit in this ct., I will, on behalf of British merchants, as well as foreign owners, take care to prevent, to the utmost extent of my power, a repetition of any such disgraceful proceedings as have taken place in this cause (DR. LUSHINGTON).—THE CATHERINE (1847), 3 Wm. Rob. 1; 5 Notes of Cases, 398; 10 L. T. O. S. 35; 11 Jur. 739; 166 E. R. 803.

**1465. Fraud.**]—THE TARTAR, No. 1235, *ante*.

**1466.** ——.]—THE COGNAC, No. 1436, *ante*.

**1467.** —— **Necessity for clear proof.**] — THE VIBILIA, No. 1283, *ante*.

**1468.** —— **Extent of repairs exceeding necessity —Intention to improve class of ship.**] — THE PONTIDA, No. 1387, *ante*.

**1469.** —— **Fraud not proved—Whether court may direct inquiries—For ascertainment of amount properly due under bond.**] — If a bill makes a case of actual fraud, &, at the hearing, the fraud is disproved or not established, the ct. will not in general allow the bill to be used for any secondary or inferior kind of relief to which pltf. might otherwise have been entitled, but will dismiss it at once.

But where a bill sought to set aside a bottomry bond, as having been concocted in a fraudulent conspiracy between the captain of the ship & the obligee, though the fraud was disproved at the hearing, the ct., at the request of deft., directed the usual inquiries, for the purpose of ascertaining how much of the sum secured by the bond was a proper subject of bottomry.

*Semble:* a bottomry bond given by the captain of a ship at a foreign port is not necessarily void, because there was time during the ship's stay at such port for the captain to have written home to his employers & to have received an answer: but, at all events, if the omission of the captain, under such circumstances, to communicate with his employers is intended to be relied on as invalidating the bond, it ought to be specifically charged in the bill, otherwise, although it appear in evidence, it will not be regarded.—GLASCOTT *v.* LANG (1847), 2 Ph. 310; 16 L. J. Ch. 429; 9 L. T. O. S. 490; 11 Jur. 642; 41 E. R. 962.

*Annotations:*—**Reld.** The Royal Arch (1857), Sw. 269; The Sultan (1859), Sw. 504; The Bonita (1861), 30 L. J. P. M. & A. 145; The Olivier (1862), Lush. 484; Duranty *v.* Hart (1863), 2 Moo. P. C. C. N. S. 289. **Mentd.** Archbold *v.* Charitable Bequests for Ireland Comrs. (1849), 2 H. L. Cas. 440; Price *v.* Berrington (1851), 3 Mac. & G. 486; Barnard *v.* Hunter (1856), 5 W. R. 92.

**1470. Conduct of third party.**]—THE ZODIAC, No. 1240, *ante*.

**1471. Collusion.**]—THE COGNAC, No. 1436, *ante*.

**1472. Giving bill of exchange with bond.**]—THE ST. CATHERINE, No. 1495, *post*.

**1473.** ——.]—THE EMANCIPATION, No. 1492, *post*.

**1474. Duress.**]—(1) A bottomry bond executed by the master whilst under arrest at the suit of the bondholder upheld. In order to render a bond so executed invalid, it must be shown that the whole of the transaction was compulsorily forced upon the master.

(2) The ct. may pronounce a bond to be good in part & bad in part (DR. LUSHINGTON).

(3) Possessing this jurisdiction [consideration whether rate of premium is fair & reasonable], it would be inconsistent with equity, & this ct. sits as a ct. of law & equity, that the ct. should decline to interpose its authority to reduce the premium when the rate of interest is excessive (DR. LUSHINGTON).—THE HEART OF OAK (1841), 1 Wm. Rob. 204; 3 L. T. 559; 4 L. T. 28, 92; 166 E. R. 549.

**1475. Excessive commissions.**]—THE RODERICK DHU, No. 1276, *ante*.

**1476.** ——.]—THE LAUREL, No. 1309, *ante*.

**1477. Illegal discharge of master.**]—THE JANET WILSON (1857), 3 L. T. 682; *subsequent proceedings*, Sw. 261.

**1478. Illegal appointment of master.**]—THE JANET WILSON (1857), 3 L. T. 682; *subsequent proceedings*, Sw. 261.

**1479. Bond given before actual advance of money.**]—THE ROYAL ARCH, No. 1230, *ante*.

**1480. Agreement for purchase of ship—By bondholder.**]—THE HELGOLAND, No. 1432, *ante*.

**Failure to observe essentials.**]—*See* Sect. 3, sub-sect. 7, *ante*.

*B. Partial Avoidance.*

**1481. Whether bond may be good in part.**]—THE AUGUSTA, No. 1297, *ante*.

**1482.** ——.]—THE TARTAR, No. 1235, *ante*.

**1483.** ——.]—THE NELSON, No. 1362, *ante*.

**1484.** ——.]—THE HEART OF OAK, No. 1474, *ante*.

**1485.** ——.]—SMITH *v.* GOULD, THE PRINCE GEORGE, No. 1252, *ante*.

**1486.** ——.]—THE HEBE, No. 1195, *ante*.

**1487.** ——.]—THE OCEAN, No. 1196, *ante*.

**1488.** ——.]—LAW *v.* WALLERSTEIN, THE GRAPESHOT, No. 1374, *ante*.

**1489.** ——.]—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE, No. 1506, *post*.

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SUB-SECT. 13.—BONDS GIVEN WITH BILLS OF EXCHANGE.

**1490. Bond taken as collateral security for bill.**]—THE TARTAR, No. 1235, *ante*.

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**PART IV. SECT. 3, SUB-SECT. 13.**

**1490 1.** ***Bond taken as collateral security for bill.***]—A party having taken a bill of exchange for a sum advanced for repair of a vessel in a foreign port, & thereafter taken a bond of bottomry in further security, of the same sum:— *Held:* the bond was null, & the party was entitled to recover on the bill.—SWORD *v.* HOWDEN (1826), 4 Sh. (Ct. of Sess.) 757.—**SCOT.**

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sects. 13 & 14.]*

**1491.** ——.]—Pltf., by his agent, advanced a considerable sum for the use of deft., in supplying his ship at Sierra Leone, the agent taking the captain's bills of exchange on deft. for the amount; & subsequently, immediately before the sailing of the ship on her home voyage, the agent took a bottomry bond from the captain. The vessel being lost, & deft. having refused to pay the amount of the bills of exchange, on the ground that the money was advanced on the security of the ship, upon action brought, the jury found that the bond was not taken in full discharge & satisfaction of the debt, but as additional collateral security, & consequently that deft. was liable to pay. The ct. refused to disturb the verdict.—WESTON *v.* FOSTER (1836), 2 Bing. N. C. 693; 2 Hodg. 59, 63; 3 Scott, 155; 5 L. J. C. P. 242; 132 E. R. 267.

**1492.** ——.]—(1) Bonds of bottomry must be construed by the tenor of their contents alone.

(2) It is essential for the validity of such bonds that a maritime risk should be directly or indirectly expressed, either in immediate terms, or by necessary inference from the contents of the bond itself.

(3) A bond of bottomry is not invalidated by the circumstance of its being given as a security for bills of exchange drawn upon the owner.

(4) Not necessary for the validity of a bond of bottomry that it should carry maritime interest.

(5) The fact, however, that only an ordinary rate of interest is demanded is a material circumstance in considering the character of the instrument under litigation.—THE EMANCIPATION (1840), 1 Wm. Rob. 124; 166 E. R. 519.

*Annotations:—As to* (1) **Refd.** The James W. Elwell, [1921] P. 351. *As to* (2) **Apld.** Stainbank *v.* Fenning (1851), 11 C. B. 51. **Refd.** Stainbank *v.* Shepherd (1853), 13 C. B. 418; The Haabet, [1899] P. 295. *As to* (3) **Refd.** Stainbank *v.* Shepherd (1853), 13 C. B. 418

**1493.** ——.]—STAINBANK *v.* SHEPARD, No. 1349, *ante*.

**1494.** ——.]—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE, No. 1506, *post*.

**1495. Bill taken as collateral security for bond—Whether vitiating bond.**]—(1) A bottomry bond, dated Nov. 26, just before the vessel sailed, given at Miramichi, with 20 per cent. interest, to consignees of charterers, they having been directed by the charterers to "value upon the owner" for a reimbursement of other than trivial payments, sustained; it being held that the bond was originally contemplated, that bills of exchange did not affect it, & that the owner's bkpcy. was not known at the date of the bond.

I am not prepared to say, that even if the bkpcy. had been known . . . that would take away the effect of a bottomry bond given by a master in a foreign port, when the merchant who had made advances on the credit of the ship might perhaps detain her till he was repaid & his lien discharged. Assignees are in no better situation in opposing a bond of this nature, than owners, if there were no bkpcy. (SIR JOHN NICHOLL).

(2) Bills of exchange serve as a collateral security; it is a common practice to take them, & have been often held not to vitiate a bottomry bond. . . . When a transaction is so conducted in a distant part of the world, & no advantage taken of distress, it is highly for the interests of commerce to sustain the credit of these bonds. The foreign lender is entitled to the best security (SIR JOHN NICHOLL).—THE ST. CATHERINE (1835), 3 Hag. Adm. 250; 1 Notes of Cases, 502; 166 E. R. 398.

*Annotation:—As to* (2) **Refd.** Stainbank *v.* Shepard (1853), 13 C. B. 418.

**1496.** —— ——.]—THE NORTH STAR, No. 1296, *ante*.

**1497.** ——.]—THE ARIADNE (1842), 1 Wm. Rob. 411; 1 Notes of Cases, 494; 3 L. T. 559; 6 Jur. 513; 166 E. R. 627.

*Annotations:—***Refd.** The Karnak (1868), L. R. 2 A. & E. 289; The Staffordshire (1871), 23 L. T. 137.

**1498. Position of assignees of bond—Where owner not bankrupt.**]—THE ST. CATHERINE, No. 1495, *ante*.

**1499.** —— **Where owner bankrupt—Effect of knowledge of bankruptcy.**]—THE ST. CATHERINE, No. 1495, *ante*.

**1500. Dishonour of bill—Enforceability of bond.**]—THE ARIADNE (1842), 1 Wm. Rob. 411; 1 Notes of Cases, 494; 3 L. T. 559; 6 Jur. 513; 166 E. R. 627.

*Annotations:—***Refd.** The Karnak (1868), L. R. 2 A. & E. 289; The Staffordshire (1871), 23 L. T. 137.

**1501.** —— ——.]—STAINBANK *v.* SHEPARD, No. 1349, *ante*.

**1502.** —— —— **What constitutes sufficient dishonour.**]—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE, No. 1506, *post*.

**1503. Effect of acceptance of bill—Double remedy of creditor.**]—STAINBANK *v.* SHEPARD, No. 1349, *ante*.

**1504.** —— **Whether creditor has direct remedy on bond—Against owner & ship.**]—STAINBANK *v.* SHEPARD, No. 1349, *ante*.

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SUB-SECT. 14.—HYPOTHECATION OF FREIGHT.

**1505. What freight may be hypothecated—Sub-freight.**]—(1) Freight, earned from sub-shippers of goods by permission of the charterers of the whole ship, is liable, as against them, in payment of a bottomry bond given at the port of the charterers, for advances subsequently to the charterparty.

(2) Of two bottomry bonds, the latter has a priority.—THE ELIZA (1833), 3 Hag. Adm. 87; 166 E. R. 338.

**1506.** —— **Freight to be earned before bond becomes due.**]—(1) A bottomry bond on a ship & freight was given by the master for repairs of the ship, already subject to a mtge., with an agreement by the bondholder, the ship's agent, that if a bill of exchange drawn by the master upon the mtgee. should be duly honoured, the bond should not be enforced. The drawee died before the bill was presented, & neither administration nor probate of his will had been taken out, when the holder of the bill, in ignorance of the death of the drawee, presented the bill for acceptance:—*Held:* it was not necessary, in order to entitle the bondholder to enforce the bottomry bond, that there should have been such a dishonour of the bill as might have been necessary to give a right of action against a drawee or indorsee of the bill, & it was sufficient that what was the reasonable course for the purpose of getting the bill accepted & paid should have been taken, which, having regard to the circumstances of the case, appeared to the Judicial Committee to be established; & the bond held good.

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**1497 1.** *Bill taken as collateral security for bond.*]—Although a bottomry transaction cannot be based upon personal security, bills of exchange may be given in addition to the bond.—THE STAFFORDSHIRE (1871), 25 L. T. 137.—IR.

**1500 1.** *Dishonour of bill—Enforceability of bond.*]—COCHRANE *v.* GILKISON (1854), 16 Dunl. (Ct. of Sess.) 548; 26 Sc. Jur. 251.—SCOT.

(2) The bond on the ship & freight was made absolute on the arrival of the ship at Callao, but the bond also hypothecated the freight to be earned by the ship from that place to any other port or ports:—*Held:* the bond was good *pro tanto* as to the ship, but void with respect to the subsequent freight earned in the voyage from Callao to England.

(3) A bottomry bond can only hypothecate something which is in danger of perishing by maritime risk during the time that the bond is running & therefore cannot validly pledge freight to be earned on a voyage after that maritime risk is ended & the bond is forfeited.

An ordinary bottomry bond . . . only pledges the ship, & sometimes the cargo & the freight to be earned on the voyage which is to be accomplished before the bottomry bond becomes payable; & their Lordships have not been referred to any case in which freight to be earned on a subsequent voyage has been included in a bottomry bond (MELLISH, L.J.).

(4) A bottomry bond is not invalid merely because the advance secured by the bond is made by agents of the ship, provided that they could not be expected to advance on the personal credit of the owners, & gave the master an opportunity of obtaining an advance on the owners' personal credit elsewhere by refusing such an advance.—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE (1872), L. R. 4 P. C. 194; 8 Moo. P. C. C. N. S. 443; 41 L. J. Adm. 49; 27 L. T. 46; 20 W. R. 557; 1 Asp. M. L. C. 305, P. C.

*Annotations:—As to* (1) **Consd.** The Onward (1873), L. R. 4 A. & E. 38. **Refd.** Barber *v.* Mackrell (1892), 67 L. T. 108. *Generally*, **Refd.** Louisiana Citizen's Bank *v.* Wendelin (1886), 2 T. L. R. 240; The Dictator, [1892] P. 304; The St. George, [1926] P. 217.

**1507. —— Freight to be earned after bond becomes due.**]—SMITH *v.* BANK OF NEW SOUTH WALES, THE STAFFORDSHIRE, No. 1506, *ante*.

**1508. Advance of freight before bond given—Advance made bonâ fide.**]—Wherever freight has been *bonâ fide* advanced anterior to a bottomry bond, the bond does not attach to that freight.

When a bottomry bond is granted on ship, freight, & cargo, the bond can only attach upon that which properly comes under the name of one or the other; it cannot affect anything *bonâ fide* done before with reference to the freight, though it might be a very erroneous proceeding on the part of a master not to inform the lender of the money on bottomry that the freight had been actually paid, for such might be the case, though it might savour of fraud to keep back such a circumstance, yet even that would not affect a case of this description coming before this ct. . . . wherever freight has been *bonâ fide* advanced anterior to the period when a bottomry bond is taken, the bond does not attach on that freight (DR. LUSHINGTON).—THE JOHN (1849), 3 Wm. Rob. 170; 7 Notes of Cases, 61; 3 L. T. 824; 13 Jur. 754.

*Annotation:*—**Refd.** Droege *v.* Suart, The Karnak (1869), L. R. 2 P. C. 505.

**1509. —— Right of obligee of bond to freight.**]—The extent of the authority conferred on the master of a vessel to bind the owners either of the ship or cargo, is derived from, & governed by, the law of the flag; & the existence of the necessity which the maritime law requires to validate the hypothecation of the ship & cargo by bottomry, is to be ascertained by evidence in the usual manner. The meaning of the term "necessity," in respect of hypothecation by the master, being analogous to its meaning in other parts of the law.

The master of a vessel, chartered from Galveston, U.S., to Liverpool, received before sailing from the charterer various sums in part payment of the freight, & after taking on board a cargo, sailed for the port of destination. The vessel, having in the prosecution of her voyage met with bad weather, & suffered damage, put into Bermuda, where the master incurred heavy expenses for repairs & supplies. The repairs were executed, & the supplies furnished, without any promise of a bottomry bond; but the law of Bermuda giving a right of arrest of the ship to the creditors for the repairs & supplies, the master, to complete the voyage, having written to the agent of the owners, of the ship, & of the cargo, & not receiving any answer within the time an answer might have been returned, raised the funds necessary for the payment for such supplies on bottomry, of the ship, cargo, & freight. On a suit brought by the assignees of the bond, the owners of the ship not opposing, the ct. below pronounced for the validity of the bond, so far as it regarded the ship, cargo, & freight, & the ship was thereupon sold, but produced a sum far less than sufficient to cover the sum due on the bond. The consignees of the cargo, who were also entitled to the freight, claimed to retain in their hands the amount of freight, with interest & insurance, advanced by them in part payment before the commencement of the voyage, & paid the freight, short of that amount, into ct. The ct. below disallowed this abatement, & ordered the whole freight to be paid into ct. On appeal:—*Held:* (1) in the circumstances, the master was warranted in resorting to a bottomry bond, & the necessity of the case warranted the hypothecation of the cargo as well as the ship & freight, but (2) as the latter was, by the agreement between the charterer & the master, in part paid in advance, the retention of the amount of such prepayment by the consignees of the cargo, upheld, as the master by hypothecating the chartered freight could give no right to more freight than the owner had a right to demand from the charterer.—DROEGE *v.* SUART, THE KARNAK (1869), L. R. 2 P. C. 505; 6 Moo. P. C. C. N. S. 136; 38 L. J. Adm. 57; 21 L. T. 159; 3 Mar. L. C. 276; 16 E. R. 677, P. C.

*Annotations:—As to* (1) **Refd.** The Empire of Peace (1869), 39 L. J. Adm. 12; The Staffordshire (1871), 25 L. T. 137; The Ida (1872), L. R. 3 A. & E. 542; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579; The Dora Forster, [1900] P. 241; The St. George, [1926] P. 217. *Generally*, **Refd.** Currie *v.* Bombay Native Insce. (1869), L. R. 3 P. C. 72.

**1510. —— Computation of freight payable by charterers—What may be deducted—Insurance premiums.**]—The charterer may deduct from the freight payable to a bondholder the premium for insurance of part of the freight advanced according to stipulations in the charterparty before the bond was granted.—THE CATHERINE (1857), Sw. 263; 3 L. T. 154.

**1511. —— —— —— Value of goods sold during voyage.**]—THE SALACIA, No. 1513, *post*.

**1512. —— —— —— ——.**]—Where the master of a ship, which is carrying goods under a charter making the freight payable on delivery at the port of destination, sells some of the goods at an intermediate port for repairs of the ship, the charterer is at liberty to treat the amount realised as a loan, & to receive it from the shipowner, & in that case there is no implied contract to pay freight *pro rata* up to the port of sale.—HOPPER *v.* BURNESS (1876), 1 C. P. D. 137; 45 L. J. Q. B. 377; 34 L. T. 528; 24 W. R. 612; 3 Asp. M. L. C. 149.

*Annotations:*—**Folld.** Castel & Latta *v.* Treckmass (1884), Cab. & El. 276. **Consd.** St. Enoch Shipping Co. *v.* Phosphate Mining Co., [1916] 2 K. B. 624. **Refd.** Hill *v.* Wilson (1879), 4 C. P. D. 329.

*Sect. 3.—Authority to hypothecate ship and freight: Sub-sect. 14. Sects. 4, 5 & 6: Sub-sect. 1.]*

**1513. —— —— —— Authorised advances.**]—A ship was chartered to go to a port of loading, there to load & return; freight payable, as *per tale*. On the voyage out, the master hypothecated the ship & the cargo to be shipped, & the freight as per charter. Subsequently, at the port of loading, advances for ship's expenses were made to the master by the charterers' agent, with notice of the bond; & on the voyage home the master sold part of the charterers' goods to pay other expenses of the ship. In computing the amount of freight to be paid into ct. by the charterers, to answer the bond:—*Held:* (1) the charterers might deduct advances made abroad by their agent according to the charter, & by the charter to be deducted on settlement of the freight; (2) they should not be required to pay the sum which would have been payable as freight upon the goods sold, had the goods arrived; (3) the charterers should not deduct from the freight, as *per tale*, advances by their agent, which were not authorised by the charter to be made & deducted; (4) they should not deduct the value of their goods sold by the master.—THE SALACIA (1862), Lush. 578; 1 New Rep. 194; 32 L. J. P. M. & A. 43; 8 L. T. 91; 1 Mar. L. C. 322; 167 E. R. 263.

*Annotations:—As to* (4) **Reid.** The Norway (1864), Brown. & Lush. 377. *Generally*, **Reid.** The Gem of the Nith (1863), Brown. & Lush. 72; The Karnak (1868), L. R. 2 A. & E. 289.

**1514. —— —— —— Unauthorised advances.**]—THE SALACIA, No. 1513, *ante*.

**1515. —— —— —— Sum payable as freight if goods had arrived unsold.**]—THE SALACIA, No. 1513, *ante*.

**1516. Right of bond holder to full freight—On delivery of cargo—Whether cargo owner entitled to reference.**]—The holder of a bottomry bond on ship, freight & cargo is, upon the conclusion of proceedings by default against ship & freight, entitled as of course to have the full freight due upon delivery of the cargo paid to him, to satisfy the sum secured by the bond with costs; & the owner of the cargo who has paid the freight into ct. is not entitled to a reference of the amount due on the bond, notwithstanding that before the execution of the bond part of his cargo was sold by the master, & the proceeds applied to ship's expenses.—THE GEM OF THE NITH (1863), Brown. & Lush. 72; 167 E. R. 304.

## SECT. 4.—AUTHORITY TO HYPOTHECATE CARGO.

*See* Part VII., Sect. 6, sub-sect. 5, B., *post*.

## SECT. 5.—AUTHORITY TO JETTISON.

*See* 1894 Act, ss. 446, 448.

**1517. When exercisable — Necessity.**]—THE COPENHAGEN, No. 1140, *ante*.

**1518. —— Imminent danger.**]—(1) Nothing can be better settled than that the master has a right to exercise this power [jettisoning cargo], in case of imminent danger. He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be that the ship should contribute its average proportion (SIR WILLIAM SCOTT).

(2) The consideration which form is the rule of of law that applies to the hypothecation of a ship in all cases it is the prospect of benefit to the proprietor, that is the foundation of the authority of the master (SIR WILLIAM SCOTT).—THE GRATITUDINE (1801), 3 Ch. Rob. 240; 165 E. R. 450.

*Annotations:—As to* (1) **Consd.** Benson *v.* Duncan (1849), 3 Exch. 644; Cammell *v.* Sewell (1858), 3 H. & N. 617. **Reid.** Hussey *v.* Christie (1807), 13 Ves. 594; Cannan *v.* Meaburn (1823), 1 Bing. 243; La Constancia (1846), 2 Wm. Rob. 487; Hallett *v.* Wigram (1850), 9 C. B. 580; The James Seddon (1866), L. R. 1 A. & E. 62; The St. George, [1926] P. 217. *As to* (2) **Distd.** Freeman *v.* East India Co. (1822), 5 B. & Ald. 617. **Consd.** The Jonathan Goodhue (1858), Sw. 355. **Apld.** The Karnak (1868), L. R. 2 A. & E. 289. **Reid.** Morris *v.* Robinson (1824), 5 Dow. & Ry. K. B. 34; Vlierboom *v.* Chapman (1844), 13 M. & W. 230; The Olivier (1862), Lush. 484; Duranty *v.* Hart (1863), 2 Moo. P. C. C. N. S. 289; The Onward (1873), L. R. 4 A. & E. 38. *Generally*, **Reid.** Idle *v.* Royal Exchange Assce. (1819), 3 Moore, C. P. 115; Robertson *v.* Clarke (1824), 1 Bing. 445; The Cognac (1832), 2 Hag. Adm. 377; Rayne *v.* Benedict (1841), 5 Jur. 1176; The Lord Cochrane (1844), 2 Wm. Rob. 320; La Constancia (1845), 2 Wm. Rob. 404; The Osmanli (1850), 3 Wm. Rob. 198; Wilkinson *v.* Wilson, The Bonaparte (1853), 8 Moo. P. C. C. 459; Gibbs *v.* Grey, Grey *v.* Gibbs (1857), 2 H. & N. 22; The Priscilla (1859), Lush. 1; The Soblomsten (1866), L. R. 1 A. & E. 293; The Lizzie (1868), L. R. 2 A. & E. 254; Notara *v.* Henderson (1870), L. R. 5 Q. B. 346; The Patria (1871), L. R. 3 A. & E. 436; Gunn *v.* Roberts (1874), 43 L. J. C. P. 233; Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613; The Gaetano & Maria (1882), 7 P. D. 137; The Pontida (1884), 9 P. D. 102.

**1519. —— Panic.**]—If the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, & it turns out that the facts do not warrant to exercise in the particular instance, as, for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts (WILLES, J.).—NOTARA *v.* HENDERSON (1872), L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; 26 L. T. 442; 20 W. R. 443; 1 Asp. M. L. C. 278, Exch.

*Annotations:—***Reid.** The Argos, Gaudet *v.* Brown (1873), L. R. 5 P. C. 155; The Kathleen (1874), L. R. 4 A. & E. 269; Hingston *v.* Wendt (1876), 1 Q. B. D. 367; Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613; Prehn *v.* Bailey (1881), 45 L. T. 399; Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362; Rose *v.* Bank of Australasia, [1894] A. C. 687; Nobel's Explosives Co. *v.* Jenkins, [1896] 2 Q. B. 326; The Savona, [1900] P. 252; The Torbryan, [1903] P. 35; Hansen *v.* Dunn (1906), 22 T. L. R. 458; Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1917] 2 K. B. 78; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. **Mentd.** G. N. Ry. *v.* Swaffield (1874), L. R. 9 Exch. 132; Coldman *v.* Hill, [1919] 1 K. B. 443.

**1520. Powers of master—Selection of articles.**]—THE GRATITUDINE, No. 1518, *ante*.

**1521. —— Determination of quantity.**]—THE GRATITUDINE, No. 1518, *ante*.

**1522. What proportion may be jettisoned.**]—THE GRATITUDINE, No. 1518, *ante*.

**1523. Liability of shipowner—Jettison from barge.**]—BIRD *v.* ASTCOCK (1614), 2 Bulst. 280; 80 E. R. 1122.

**1524. ——.**]—HARVEY *v.* THOMPSON (1837), 7 L. T. 442.

**Right of owners to average contribution.**]—*See* Part VII., Sect. 14, sub-sect. 2, C., *post*.

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*PART IV. SECT. 5.

t. *Liability of master.*]—The master of a ship who has signed the usual bill of lading, is not liable for a loss by the jettison of goods which have been laden on deck with the knowledge & consent of the shipper & consignee.—JOHNSTON & KAYE *v.* CRANE (1841), 4 N. B. R. (2 Kerr) 39.—CAN.

## SECT. 6.—AUTHORITY TO SELL SHIP.

### SUB-SECT. 1.—IN GENERAL.

**1525. General rule.**]—TREMENHERE *v.* TRESILLIAN (1672), 1 Sid. 453 ; 3 Keb. 91 ; 82 E. R. 1213.

*Annotations :*—**Consd.** Hayman *v.* Molton (1803), 5 Esp. 65 ; Cannan *v.* Meaburn (1823), 1 Bing. 243 ; The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36. **Refd.** Idle *v.* Royal Exchange Assco. (1819), 3 Moore, C. P. 115. **Mentd.** Carpenter *v.* Thornton (1819), 3 B. & Ald. 52.

**1526.** ——.]—The Vice-Admlty. Cts. abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey not to be seaworthy, or repairable so as to carry the cargo, to its place of destination, but at an expense exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to sell the ship under such circumstances, & to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship & continued the voyage. But supposing he has such authority exercised *bonâ fide* in a case of necessity, still the vessel subsisting as such, & capable of being used for the purposes of navigation, & so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the Register Acts ; & the requisites of those Acts not having been complied with, the sale in question was held to transfer no property to the vendee.—REID *v.* DARBY (1808), 10 East, 143 ; 103 E. R. 730.

*Annotations :*—**Distd.** Idle *v.* Royal Exchange Assco. (1819), 3 Moore, C. P. 115. **Consd.** Freeman *v.* East India Co. (1822), 5 B. & Ald. 617 ; Morris *v.* Robinson (1824), 3 B. & C. 196 ; Hunter *v.* Parker (1840), 7 M. & W. 322 ; The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36. **Refd.** Hunter *v.* Prinsep (1808), 10 East, 378 ; Thompson *v.* Leake (1815), 1 Madd. 39 ; Cannan *v.* Meaburn (1823), 1 Bing. 243 ; Robertson *v.* Clarke (1824), 1 Bing. 445 ; The Catharina (formerly The Croxdale) (1851), 17 L. T. O. S. 43.

**1527.** ——.]—THE GLASGOW (OTHERWISE THE YA MACRAW), No. 1544, *post.*

**1528.** ——.]—(1) The validity of the sale of a British ship in a foreign port is determined by the law usually enforced in the Ct. of Admlty., unless the foreign law be specially pleaded.

(2) The master of a British ship, except under urgent necessity, is not entitled to sell without the authority of the owner ; & the proof of such necessity lies upon the purchaser.

(3) A master before selling the ship is bound, if practicable, to communicate with his owner ; &, *semble*, if he sells without such communication, the sale is invalid.

(4) It is the duty of the master of a British ship before selling her in a foreign port to consult the British Consular Officer there resident, the opinion of the Consul being much considered by the ct. in determining the validity of the sale.

(5) The order of a foreign commercial ct. for the sale of a British ship within twenty-four hours of the application by the master, held not to be a judicial proceeding.—THE BONITA, THE CHARLOTTE (1861), Lush. 252 ; 30 L. J. P. M. & A. 145 ; 5 L. T. 141 ; 1 Mar. L. C. 145 ; 167 E. R. 111.

**1529. Form of sale—Compliance with statutory requirements.**]—REID *v.* DARBY, No. 1526, *ante.*

**1530. Action of trover by owner—Whether purchaser may plead lien.**]—HUNTER *v.* PARKER, No. 1579, *post.*

**1531. Power of attorney to sell—Revocation—Decree of grantor's insolvency in colonial court.**]—(1) A power of attorney to sell a ship may be substantially revoked by parol ; & the attorney selling thereafter is guilty of a breach of trust.

(2) If the grantee of a power of attorney to sell a ship sells fraudulently, or so as to commit a breach of trust, the fraud of the attorney vitiates the title of the purchaser, if the fraud was known to him, or could have been known by reasonable inquiry. Circumstances constituting fraudulent sale & circumstances putting purchaser on inquiry, considered. *Semble*, (3) a power of attorney to sell a ship given to the master, among other reasons, by way of security to cover his advances, does not justify him in selling against his owner's consent, except in a case of necessity. (4) A power of attorney to sell a ship is not revoked by a decree of the grantor's insolvency in a colonial possession, so as to invalidate a *bonâ fide* exercise of the power before notice of the insolvency. (5) A party claiming title to a ship will not be allowed to rely on two conflicting titles.

(6) The sale of a ship by the master abroad without the consent of the owner can only be justified by proof of urgent necessity. Circumstances showing such necessity considered.

The master of a ship, without authority from the owner, but under stress of necessity sold her at S. to R. & transmitted the proceeds to the owner. R. repaired the ship at S., & at W. appointed S. to command her, & gave him a power of attorney authorising him to sell. S. sailed to ship to Europe, & ultimately, in spite of letters from R., advertised her for sale by auction in London, R. being then insolvent under a decree of Her Majesty's Consular Ct. at S., though S. was unaware of that fact. The advertised sale was prevented by the arrest of the ship at suit of M., her original owner. Messrs. Mo. & T. then took a bill of sale of the ship for £4,000 from S., as attorney of R., & another bill of sale for £1,200 from M., the value of the ship being probably at least twice those amounts. Soon after the ship was arrested by the assignees of R. :—*Held :* the sale at S. was justified by the necessity of the case, & had legally divested the property from M., the original owner, vesting it in R., & under all the circumstances of the case, Messrs. Mo. & T. had no good title under the bill of sale from S. as the attorney of R.

(7) All the ingredients which may constitute necessity cannot be enumerated ; some may. The want of repairs, & the degree of want ; the possibility of procuring the repairs at the port where the ship lies ; the expense of repairs ; the expense of remaining in port ; the want of funds or credit ; the impracticability of communicating with the owner ; these & other circumstances may, in combination, constitute the necessity the law requires (DR. LUSHINGTON).

(8) Whoever purchases under a title of this description must, to defend that title, be prepared to prove the necessity (DR. LUSHINGTON).—THE MARGARET MITCHELL (1858), Sw. 382 ; 7 L. T. 803 ; 4 Jur. N. S. 1193 ; 166 E. R. 1174.

**1532.** —— —— **By parol.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1533.** —— —— **Effect of sale after revocation.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1534.** —— **Bonâ fide exercise of power—Before notice of grantor's insolvency—Whether sale avoided.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1535. Fraudulent sale — What constitutes.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1536.** —— **Whether purchaser's title avoided—Purchaser having notice of fraud.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1537. Master failing to exercise authority—In proper case—Validity of sale by British Vice-Consul.**]—THE UNIAO VENCEDORA (OTHERWISE THE GIPSY), No. 1562, *post.*

**1538. Who may purchase—Survey of ship for**

*Sect.* 6.—*Authority to sell ship: Sub-sects.* 1 *&* 2, *A., B. & C.*]

**purpose of sale.**]—LAPRAIK *v.* BURROWS, THE AUSTRALIA, No. 1561, *post.*

**1539. Sale in foreign port—Duty to consult British Consul.**]—THE BONITA, THE CHARLOTTE, No. 1528, *ante.*

SUB-SECT. 2.—WHEN SALE IS JUSTIFIABLE.

*A. In General.*

*See, generally,* INSURANCE, Vol. XXIX., pp. 261–263, 279, 280, Nos. 2107–2124, 2262.

**1540. Extreme necessity.**] — TREMENHERE *v.* TRESILLIAN (1672), 1 Sid. 453; 3 Keb. 91; 82 E. R. 1213.

*Annotations:*—**Refd.** Hayman *v.* Molton (1803), 5 Esp. 65; Idle *v.* Royal Exchange Assce. (1819), 3 Moore, C. P. 115; Cannan *v.* Meaburn (1823), 1 Bing. 243; Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36, **Mentd.** Carpenter *v.* Thornton (1819), 3 B. & Ald. 52.

**1541.** ——.]—American ship restored on salvage to former owner, but without prejudice to the rights of a party claiming under an affected purchase from the master in Ireland.

A sale of the vessel was made in Ireland, by the master, without the authority of his owners; & it is contended that such a sale, being made under the pressure of necessity, will convey a valid title to the purchaser. But, in the first place, it must be shown that there was a necessity, & then it remains to be considered whether it was such as by law would give the master a right to sell (SIR WILLIAM SCOTT).—THE FANNY & ELMIRA (1809), 1 Edw. 117; 165 E. R. 1052.

*Annotations:*—**Refd.** Cannan *v.* Meaburn (1823), 1 Bing. 243; Alcock *v.* Royal Exchange Assce. (1849), 13 Q. B. 292; Knight *v.* Faith (1850), 15 Q. B. 649.

**1542.** ——.]—THE LORD COCHRANE, No. 1186, *ante.*

**1543.** ——.]—THE SEGREDO (OTHERWISE THE ELIZA CORNISH), No. 1557, *post.*

**1544.** ——.]—The *G.* reached Savannah in Mar. 1855, laded a cargo of timber, & in Apr., before she cleared the mouth of the river, drove ashore in a hurricane; she was got off; discharged her cargo, & was surveyed; extensive repairs were found necessary; neither the owner who lived at Gloucester in England, nor the master had any credit, the ship was uninsured, & money could not be raised on bottomry; under these circumstances the master sold her without any express authority from the owner; she was repaired by the purchasers, sailed to Liverpool, & was arrested there at the suit of the former owners:—*Held:* under the circumstances, the sale was a valid one, & the ship was decreed to be restored with costs & demurrage; but, in such cases, the burden of proof lies upon the purchaser, unless the sale took place under the decree of a competent ct.

Master generally no authority to sell the ship; necessity only will justify it.—THE GLASGOW (OTHERWISE THE YA MACRAW) (1856), Sw. 145; 28 L. T. O. S. 13; 2 Jur. N. S. 1147; 5 W. R. 10; 166 E. R. 1065.

**1545.** ——.]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1546.** ——.]—THE BONITA, THE CHARLOTTE, No. 1528, *ante.*

**1547.** —— **Survey made on best information—& in good faith.**]—In cases of extreme necessity, & where a ship having got aground, cannot, in the opinion of the persons competent to judge, be raised, the captain will sell her for the benefit of the owners; but it can only be in cases of extreme necessity & the survey, etc., must be made on the best information, & with the most pure good faith.—HAYMAN *v.* MOLTON (1803), 5 Esp. 65; 170 E. R. 739, N. P.

*Annotations:*—**Consd.** Idle *v.* Royal Exchange Assce. (1819), 3 Moore, C. P. 115. **Refd.** Knight *v.* Faith (1850), 15 Q. B. 649; The Australia (1859), Sw. 480.

**1548.** —— **No alternative to sale.**]—The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity: such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is.—COBEQUID MARINE INSURANCE CO. *v.* BARTEAUX (1875), L. R. 6 P. C. 319; 32 L. T. 510; 23 W. R. 892; 2 Asp. M. L. C. 536, P. C.

*Annotation:*—**Consd.** Hall *v.* Jupe (1880), 49 L. J. Q. B. 721.

**1549. Power of attorney given to master—Security to cover advances.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

*B. What Constitutes Necessity.*

**1550. Question of fact.**]—The necessity which gives the master an implied authority to sell his vessel abroad must be created by, & depend upon, the particular circumstances of each case.

The vessel was at the Cape of Good Hope, & in need of extensive repairs. The master had no credit, & the ship's agents there had a claim of £300, against her, & threatened arrest. The master was unable to repair the ship, even temporarily, so as to bring her to England, & the necessary delay of three months to enable the master to communicate with the owner in England would have been prejudicial to the vessel. The master therefore sold her at the Cape:—*Held:* under the circumstances, an adequate necessity existed for the sale, & therefore the transfer was valid.—THE VICTOR (1865), 13 L. T. 21; 2 Mar. L. C. 261.

**1551. Impossibility of continuing voyage—Ship run aground—Unable to be raised.**]—HAYMAN *v.* MOLTON, No. 1547, *ante.*

**1552.** —— **Damage to ship—No prospect of completion of voyage.**]—HUNTER *v.* PARKER, No. 1579, *post.*

**1553.** —— —— ——.]—IRELAND *v.* THOMSON, No. 1581, *post.*

**1554. Want of repair.**]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1555.** —— **Ship capable of repair.**]—REID *v.* DARBY, No. 1526, *ante.*

**1556.** —— ——.]—THE MARGARET MITCHELL, No. 1531, *ante.*

**1557.** —— —— **Subsequent repair by purchaser.**]—A ship, belonging to a British owner at Liverpool, having been taken by alleged pirates, & recaptured by one of Her Majesty's ships of war after her master had been killed, was placed in charge of a master of the Royal Navy to bring to Liverpool. Having suffered considerable damage, he put into the island of Fayal, & petitioned the director of the customs for an official survey. Three were made. The report was to the effect that the ship could be repaired for about £300. The master being dissatisfied, obtained a private survey, which resulted in a report that the ship was unseaworthy, & should be condemned. The director of the customs then, on the petition of the master, decreed the sale of the ship by public auction, & gave official notice thereof, according to the custom of the place. She was purchased by a Portuguese merchant, who immediately repaired her, & sent her with a cargo to Bristol, where she was arrested by the original owner in a cause of possession:—*Held:* (1) The master had the authority of an ordinary master, & no

more; (2) the validity of the sale must be tried by the law maritime; (3) by the law maritime, as well as by the law of England, the sale of a ship by a master, though *bonâ fide*, can be justified only by urgent necessity; (4) with respect to ships, the *lex loci contractus* cannot prevail if opposed to the law maritime; (5) the circumstances of the case do not show an urgent necessity for the sale; (6) the sale was invalid, & the ship must be restored to the original owner with costs.

Sales of ships by authority of Vice-Admlty. Cts. abroad are invalid, from want of jurisdiction. *Semble:* the ct. would hold a sale made under the authority of a ct. of competent jurisdiction, valid.—THE SEGREDO (OTHERWISE THE ELIZA CORNISH) (1853), 1 Ecc. & Ad. 36; 22 L. T. O. S. 36; 17 Jur. 738; 164 E. R. 22.

*Annotations:*—*As to* (1) **Refd.** The Gaetano & The Muria (1882), 46 L. T. 835, C. A. *As to* (4) **Refd.** Cammell *v.* Sewell (1860), 5 H. & N. 728. *Generally*, **Refd.** The Glasgow (otherwise the Ya Macraw) (1856), 28 L. T. O. S. 13; R. *v.* McCleverty, The Telegrafo (or The Restauracion) (1871), L. R. 3 P. C. 673.

**1558. —— Necessitating delay in port.**]—It appears that there was ample authority given to the captain to sell, both by the conduct of the parties at home, & by the circumstances in which the property was placed. It appears also to me that in the sale all due caution was used, & all due attention shown to the interests of the former owners, & the previous authority of the master was fully confirmed by subsequent recognitions & approvals (LORD STOWELL).—THE PITT (1824), 1 Hag. Adm. 240; 166 E. R. 86.

*Annotations:*—**Refd.** The John (1830), 2 Hag. Adm. 305; The Beatrice (otherwise The Rappahannock) (1866), 36 L. J. Adm. 9.

**1559. —— ——.**]—THE MARGARET MITCHELL, No. 1531, *ante*.

**1560. —— Involving excessive expenditure.**]—THE MARGARET MITCHELL, No. 1531, *ante*.

**1560a. —— ——.**]—Where a ship was so shattered in a storm that upon survey it was found the expense of repairing her would far exceed her original value, & the captain having sold her *bonâ fide* for the benefit of all concerned, the purchaser shortly afterwards broke her up:—*Held:* this was such an urgent necessity as justified the sale.—ROBERTSON *v.* CLARKE (1824), 1 Bing. 445; 8 Moore, C. P. 622; 2 L. J. O. S. C. P. 71; 130 E. R. 179.

*Annotations:*—**Consd.** Cambridge *v.* Anderton (1824), 4 Dow. & Ry. K. B. 203; Knight *v.* Faith (1850), 15 Q. B. 649; Tronson *v.* Dent (1853), 8 Moo. P. C. C. 419. **Apld.** The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36; The Bonita, The Charlotte (1861), Lush. 252. **Refd.** Roux *v.* Salvador (1836), 3 Bing. N. C. 266; The Margaret Mitchell (1858), 4 Jur. N. S. 1193; Cossman *v.* West, Cossman *v.* British America Assce. (1887), 13 App. Cas. 160.

**1561. —— ——.**]—(1) If a ship, being in a foreign port, cannot be sent upon her voyage, without repairs, & the repairs cannot be done except at so great & so certain a loss that no prudent man would venture to encounter it, this constitutes a case of necessity, justifying a sale of the ship by the master.

(2) The first purchaser of the master is bound to prove such necessity; but whether such *onus probandi* attaches to a second purchaser depends on all the circumstances of the case.

(3) An omission by the first purchaser to comply with the Ship Registry Act, 1845 does not affect the title of a subsequent purchaser.

(4) A person surveying a ship with a view to the sale thereof by the master, may be justfied in becoming the purchaser.

(5) Vice-Admlty. Cts. abroad have only the ordinary jurisdiction exercised by the Ct. of Admlty. before the passing of Admiralty Court Act, 1840 (c. 65), they cannot therefore try causes of title to ships.—LAPRAIK *v.* BURROWS, THE AUSTRALIA (1859), 13 Moo. P. C. C. 132; Sw. 480; 7 W. R. 718; 15 E. R. 50, P. C.

*Annotation:*—**Refd.** The Yuri Maru, The Woron, [1927] A. C. 906.

**1562. —— ——.**]—To constitute a valid sale at a port of distress there must be the consent of the master except under most peculiar circumstances, an impossibility of repairs except at a ruinous cost, or an equally ruinous delay & an inexpediency arising from imminent risk of awaiting communication with the owners. *Semble:* if an extreme necessity existed for the sale of a British vessel at a foreign port the British Vice-Consul at the port might, if the master neglected to sell, sanction the sale, which would then be valid notwithstanding the absence of the master's consent.—THE UNIAO VENCEDORA (OTHERWISE THE GIPSY) (1864), 33 L. J. P. M. & A. 195; 11 L. T. 351; 2 Mar. L. C. 146.

**1563. Inability to procure fresh crew.**]—The underwriters on goods insured from London to Demarara are only liable for an average loss where the ship being captured & recaptured was sent into St. Thomas's stript of all her hands, & the captain not being able on his arrival there to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship & cargo, & broke up the adventure.—UNDERWOOD *v.* ROBERTSON (1815), 4 Camp. 138; 171 E. R. 44, N. P.

**1564. Inability to raise money.**]—THE MARGARET MITCHELL, No. 1531, *ante*.

**1565. —— To pay salvage.**]—UNDERWOOD *v.* ROBERTSON, No. 1563, *ante*.

**1566. —— For repairs.**]—ALEXANDER *v.* PRATT (1844), 7 L. T. 225.

*Annotation:*—**Consd.** Gibson *v.* Small (1853), 4 H. L. Cas. 353.

**1567. —— ——.**]—THE GLASGOW (OTHERWISE THE YA MACRAW), No. 1544, *ante*.

**1568. —— ——.**]—THE VICTOR, No. 1550, *ante*.

**1569. Impracticability of communicating with owner.**]—THE MARGARET MITCHELL, No. 1531, *ante*.

**1570. ——.**]—THE UNIAO VENCEDORA (OTHERWISE THE GIPSY), No. 1562, *ante*.

**1571. Ruinous delay.**]—THE UNIAO VENCEDORA (OTHERWISE THE GIPSY), No. 1562, *ante*.

### *C. Proof of Necessity.*

**1572. On whom onus lies—Purchaser.**]—THE GLASGOW (OTHERWISE THE YA MACRAW), No. 1544, *ante*.

**1573. —— ——.**]—THE MARGARET MITCHELL, No. 1531, *ante*.

**1574. —— ——.**]—THE BONITA, THE CHARLOTTE, No. 1528, *ante*.

**PART IV. SECT. 6, SUB-SECT. 2.—B.**

**1561 i.** *Want of repair—Involving excessive expenditure.*]—WOOD *v.* STYMEST (1862), 10 N. B. R. (5 All.) 309.—CAN

**a.** *Moral necessity.*]—Moral necessity is sufficient to justify a master in selling a shipwrecked vessel, & the existence of such necessity is a question of fact for jury.—ORANGE *v.* MCKAY (1864), 5 N. S. R. (1 Old.) 444.—CAN.

**b.** "*Stringent necessity.*"]—PROVIDENCE WASHINGTON INSURANCE CO. *v.* CORBETT (1884), 9 S. C. R. 256.—CAN.

**1571 i.** *Ruinous delay.*]—If a disabled ship is in a place of safety, but cannot be repaired where she is nor taken to a port of repairs, & if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore, & the probability of great deterioration in value during the delay, will justify the master when acting *bonâ fide* & for the benefit of all concerned, in selling without waiting for instructions, & the sale will excuse notice of abandonment.—NOVA SCOTIA MARINE INSURANCE CO. *v.* CHURCHILL & CO. (1896), 26 S. C. R. 65.—CAN.

*Sect.* 6.—*Authority to sell ship: Sub-sect.* 2, *C.; sub-sects.* 3, 4, 5 & 6, *A. & B. Sects.* 7 & 8. *Part V. Sects.* 1, 2 & 3.]

**1575. —— —— First purchaser—Whether onus attaches to second purchaser.**]—LAPRAIK *v.* BURROWS, THE AUSTRALIA, No. 1561, *ante.*

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SUB-SECT. 3.—COMMUNICATION WITH OWNER.

**1576. Duty of master to communicate with owner.**]—ALEXANDER *v.* PRATT (1844), 7 L. T. 225.

*Annotation:*—**Mentd.** Gibson *v.* Small (1853), 4 H. L. Cas. 353.

**1577.** ——.]—THE BONITA, THE CHARLOTTE, No. 1528, *ante.*

**1578. Effect of failure to communicate.**]—THE BONITA, THE CHARLOTTE, No. 1528, *ante.*

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SUB-SECT. 4.—RATIFICATION BY OWNER.

**1579. What amounts to ratification—Receipt of proceeds of sale.**]—(1) *Semble:* the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for benefit of all parties interested. At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him. So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master.

(2) The purchaser of a vessel under such circumstances cannot set up any defence of lien against an action of trover by the owner.—HUNTER *v.* PARKER (1840), 7 M. & W. 322; 10 L. J. Ex. 281; 9 L. T. 53; 151 E. R. 789.

*Annotations:*—*As to* (1) **Refd.** Ridgway *v.* Roberts (1844), 4 Hare, 106; Chapman *v.* Benson (1847), 5 C. B. 330; The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36. *Generally,* **Mentd.** Hobson *v.* Holt (1850), 16 L. T. O. S. 263; Low *v.* Macgill (1864), 4 New Rep. 145; Naylor *v.* Mortimore (1864), 13 W. R. 47.

**1580. —— —— Sale by auction.**]—HUNTER *v.* PARKER, No. 1579, *ante.*

——.]—*See, also,* AGENCY, Vol. I., pp. 405, 413, 414, Nos. 1045, 1100, 1101, 1105.

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SUB-SECT. 5.—PAYMENT OF PURCHASE-MONEY.

**1581. Who may receive payment—Master.**]—Where a ship is so damaged during a voyage that she cannot prosecute it, the master has authority to sell her for all parties interested, & the person whom he may have employed to sell her & receive the money may pay over the proceeds to him or his agent; & such payment, in the absence of any notice not to do so from the parties interested, will be good.—IRELAND *v.* THOMSON (1847), 4 C. B. 149; 17 L. J. C. P. 241; 136 E. R. 460.

*Annotation:*—**Refd.** Walshe *v.* Provan (1853), 8 Exch. 843.

**1582. —— Master's agent.**] — IRELAND *v.* THOMSON, No. 1581, *ante.*

**1583. Whether payment to master good discharge—No notice prohibiting payment—From interested parties.**]—IRELAND *v.* THOMSON, No. 1581, *ante.*

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SUB-SECT. 6.—CONFLICT OF LAWS.

*A. In General.*

*See, generally,* CONFLICT OF LAWS, Vol. XI., pp. 306 *et seq.*

**1584. By what law validity of sale is determined.**]—THE SEGREDO (OTHERWISE THE ELIZA CORNISH), No. 1557, *ante.*

**1585.** ——.]—THE BONITA, THE CHARLOTTE, No. 1528, *ante.*

**Admiralty jurisdiction over title generally.**]—*See* ADMIRALTY, Vol. I., p. 112, Nos. 162–168.

*B. Foreign Judgments.*

**1586. Court must be competent to decree sale—Vice-Admiralty Court.**]—REID *v.* DARBY, No. 1526, *ante.*

**1587.** —— ——.]—Where the master of a ship on a voyage from Calcutta to London, laden with indigo, was obliged to put into Mauritius from unseaworthiness, & there abandoned ship & cargo, which were *bonâ fide* sold by public auction under the orders of the Vice-Admlty. Ct.:—*Held:* in *assumpsit* by the owner against the purchaser of the indigo, there being no pressing necessity for the sale, the master could confer no title upon the vendee.

In this case the sale was conducted under the authority of the Vice-Admlty. Ct., the judge of which made a decree for that purpose; but without intending any disrespect to that ct., I am bound to express my opinion that it had no jurisdiction in this matter, & no power to make any such decree (BAYLEY, J.).—MORRIS *v.* ROBINSON (1824), 3 B. & C. 196; 5 Dow. & Ry. K. B. 34; 107 E. R. 706.

*Annotations:*—**Refd.** Cammell *v.* Sewell (1860), 6 Jur. N. S. 918. **Mentd.** Knight *v.* Legh (1828), 1 Moo. & P. 528; Valpy *v.* Sanders (1848), 5 C. B. 886; Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584; Rice *v.* Reed, [1900] 1 Q. B. 54.

**1588.** —— ——.]—THE SEGREDO (OTHERWISE THE ELIZA CORNISH), No. 1557, *ante.*

**1589.** —— ——.]—LAPRAIK *v.* BURROWS, THE AUSTRALIA, No. 1561, *ante.*

**1590. Judgment must be given in judicial proceeding—Order of foreign commercial court—Sale within twenty-four hours of master's application.**]—THE BONITA, THE CHARLOTTE, No. 1528, *ante.*

**Foreign judgments generally.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 444–472, Nos. 1027–1262.

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SECT. 7.—**AUTHORITY TO SELL CARGO.**

*See* Part VII., Sect. 6, sub-sect. 6, A., *post.*

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SECT. 8.—**AUTHORITY TO TRANSHIP.**

*See* Part VII., Sect. 6, sub-sect. 4, *post.*

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**PART IV. SECT. 6, SUB-SECT. 3.**

1576 i. *Duty of master to communicate with owner.*]—GALLAGHER *v.* TAYLOR (1881), 5 S. C. R. 368.—CAN.

e. *Effect of failure to communicate—Sale "illegal."*]—MORTON *v.* PATILLO (1872), 9 N. S. R. (3 G. & O.) 17.—CAN.

# Part V.—General Statutory Provisions for Safety of Ship and Cargo.

## SECT. 1.—SEAWORTHINESS OF SHIP.

*See* 1894 Act, ss. 457, 458; 1914 Act (c. 50), ss. 18–21, 23; 1921 Act, s. 2; Carriage of Goods by Sea Act, 1924 (c. 22), s. 2; Statutory Rules & Orders, 1927, No. 1183.

**1591. What amounts to unseaworthiness — Failure to use part of equipment—Danger to crew—But not to ship.**]—A ship was sent to sea with stanchion & rails on board, but not shipped as they ought to have been so as to raise the bulwarks at a certain part to the proper height. A storm came on & a seaman engaged in performing his duty on deck fell overboard in consequence of the neglect to ship the stanchions & rails & was drowned. It was not safe for the crew that the ship should leave port with the stanchions & rails unshipped:—*Held:* the neglect of duty on the part of the master did not render the ship "unseaworthy" within Merchant Shipping Act, 1876 (c. 80), s. 5.—HEDLEY *v.* PINKNEY & SONS S.S. Co., [1894] A. C. 222; 63 L. J. Q. B. 419; 70 L. T. 630; 42 W. R. 497; 10 T. L. R. 347; 7 Asp. M. L. C. 483; 6 R. 106, H. L.

*Annotations:*—**Distd.** Morris & Morris *v.* Oceanic Steam Navigation Co. (1900), 16 T. L. R. 533. **Apld.** Leonard *v.* Leyland (1902), 18 T. L. R. 727. **Refd.** Dobell *v.* S.S. Rossmore Co., [1895] 2 Q. B. 408; Ingram & Royle *v.* Services Maritimes du Trépont, [1913] 1 K. B. 538. **Mentd.** Burr *v.* Theatre Royal Drury Lane, [1907] 1 K. B. 544.

**1592. —— Defective hook & davit of lifeboat.**]—LEONARD *v.* LEYLAND & CO. (1902), 18 T. L. R. 727.

**Unseaworthiness generally.**]—*See* Part VII., Sect. 6, sub-sect. 1, *post.*

**Warranty as to seaworthiness in policies of insurance.**]—*See* INSURANCE, Vol. XXIX., pp. 186, *et seq.*

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## SECT. 2.—EQUIPMENT.

*See, generally,* 1894 Act, ss. 285, 290, 427–433; 1914 Act (c. 50); 1919 Act; Statutory Rules & Orders, 1924, Nos. 1056, 1289; Statutory Rules & Orders, 1925, No. 321; Statutory Rules & Orders, 1927, Nos. 303, 1183.

**1593. Life saving appliances—Construction of rules of Board of Trade—Ship employed solely in coasting trade—Not certified to carry passengers.**]—The rule of the Life Saving Appliances Rules made by the Board of Trade under 1894 Act, s. 427 as to steamships not certified to carry passengers & employed solely in the coasting trade, requiring that such ships should carry lifebelts "so that there may be one for each person on board the ship," is not confined to providing a lifebelt for each one of the crew on board but requires a lifebelt for each person on board the ship whether such person is one of the crew or not.

A British ship, not certified to carry passengers & employed solely in the coasting trade, with a crew of seven & twenty-seven other persons on board, proceeded from the pier head in the port of L. for a distance of 12 miles to another vessel which was lying also within the limits of the port of L. to be lightened. She had on board seven lifebelts & no more:—*Held:* the ship was, under the rule, bound to have on board one lifebelt for each of the thirty-four persons on board; & further that she was "proceeding on a voyage or excursion" within 1894 Act, s. 430, & the master was liable to a penalty for not having a lifebelt for each person on board.—GENOCHIO *v.* STEWARD (1909), 100 L. T. 525; 73 J. P. 158; 11 Asp. M. L. C. 226, D. C.

**1594. —— —— Proceeding on "voyage or excursion."**]—GENOCHIO *v.* STEWARD, No. 1593, *ante.*

**Application of regulations to fishing vessels.**]—*See* 1894 Act, s. 375.

**Application of regulations to foreign ships.**]—*See* 1906 Act, ss. 4, 6; 1914 Act (c. 50); Order in Council, Oct. 24, 1908; Statutory Rules & Orders, 1927, No. 1183.

—— **Exemptions.**]—*See* Statutory Rules & Orders, 1909, pp. 580–583; Statutory Rules & Orders, 1910, pp. 473, 474.

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## SECT. 3.—MARKING OF SHIPS.

**1595. Load lines—Penalty for overloading—Liability of owner—Overloading without knowledge or assent of owner.**]—The owner of a British ship, which without his knowledge or assent is overloaded by the master in breach of the provisions of Merchant Shipping Act, 1876 (c. 80), s. 28, is not responsible for the act of the master so as to be liable to the penalty created by the sect.—MASSEY *v.* MORRISS, [1894] 2 Q. B. 412; 63 L. J. M. C. 185; 70 L. T. 873; 58 J. P. 673; 42 W. R. 638; 10 T. L. R. 517; 38 Sol. Jo. 547; 7 Asp. M. L. C. 586; 10 R. 342, D. C.

*Annotation:*—**Refd.** Collman *v.* Mills (1896), 13 T. L. R. 122.

**1596. —— —— Load line becoming submerged during voyage.**]—A British ship loaded at a foreign port a cargo of timber, part of which was carried on deck. When the loading was completed the centre of the disc indicating the load line of the ship was not submerged in salt water. During the voyage, however, the ship encountered bad weather & her deck cargo became saturated with rain & sea water, with the result that it increased in weight, & when the ship arrived at a British

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**PART V. SECT. 1.**

d. *Criminal liability of owner & master.*]—THE CALIFORNIA (1854), 7 L. T. 224.—**IR.**

e. —— *Plea of ignorance.*]—Although it is necessary for the prosecution to show *scienter* in order to establish a breach of Shipping & Seamen Act, 1908, s. 224 (2), which prohibits a master from knowingly taking a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, *scienter* or knowledge is not a necessary ingredient of the offence created by sub-sect. 1 of that sect., which prohibits any person from sending a British ship to sea in such an unseaworthy state.—R. *v.* NEWSON (1909), 29 N. Z. L. R. 373.—**N.Z.**

f. *Sufficiency of crew.*]—FLEMING *v.* RAINEY (1904), 21 N. Z. L. R. 158.—**N.Z.**

**PART V. SECT. 2.**

g. *Application of regulations to fishing vessels.*]—STURGEON *v.* PORT BURWELL FISH CO. (1906), 12 O. L. R. 154.—**CAN.**

**PART V. SECT. 3.**

h. *Load lines—Penalty for overloading.*]—The offence contemplated by Marine Board Navigation Act, 1881, s. 194, is the loading at the port where the cargo is put on board, & not the port of arrival.—STAPLE *v.* STEPHENS (1883), 17 S. A. L. R. 130.—**AUS.**

*Sect.* 3.—*Marking of ships. Sects.* 4, 5, 6 & 7. *Part VI. Sect.* 1.]

port it was found that the centres of her discs were submerged in salt water to the depth of some inches:—*Held:* the words "allows the ship to be so loaded as to submerge in salt water the centre of the disc" in 1894 Act, s. 442 (1) (*a*), did not refer merely to the amount at which the loading was completed, but referred to the condition of the ship at any point of her voyage, even though that condition did not result from any default by the owner or master, &, therefore, the master of the ship in question was guilty of an offence under the sub-sect. at the British port.—RADCLIFFE *v.* BUCKWELL, [1927] 2 K. B. 273; 96 L. J. K. B. 965; 137 L. T. 593; 43 T. L. R. 514; 28 Cox, C. C. 373, D. C.

——.]—*See* 1894 Act, ss. 438–445.

**Deck lines.**]—*See* 1894 Act, s. 437.

**As to marking on registration.**]—*See* Part II., Sect. 2, sub-sect. 3, *ante*.

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SECT. 4.—**CARRIAGE OF DANGEROUS GOODS.**

*See* Part VII., Sect. 1, sub-sect. 8, *post*.

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SECT. 5.—**DECK CARGO.**

*See, generally,* 1894 Act, ss. 85, 294; Carriage of Goods by Sea Act, 1924 (c. 22), Article 1.

**1597. What is "deck cargo"—Horses & cattle.**]—Horses & cattle are "goods" within Merchant Shipping Act, 1876 (c. 80), s. 23, which provides that, where timber, stores, or other goods are carried as deck cargo all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods.

For the purposes of the computation of such tonnage, the measurement ought to include only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, & ought not to include the shed or pens belonging to the ship in which the animals are confined.—RICHMOND HILL S.S. Co. *v.* TRINITY HOUSE CORPN., [1896] 2 Q. B. 134; 65 L. J. Q. B. 561; 75 L. T. 8; 45 W. R. 6; 12 T. L. R. 472; 40 Sol. Jo. 583; 8 Asp. M. L. C. 164; 1 Com. Cas. 404, C. A.

*Annotation:*—**Consd.** Cairn Line of Steamships *v.* Trinity House Corpn., [1908] 1 K. B. 528.

**1598. —— Bunker coal for use on voyage.**]—Coals carried in an uncovered space upon the deck of a ship, though intended for use in the ship's fires upon the voyage, come within the words "stores or other goods," & are carried "as deck cargo," within 1894 Act, s. 85.—CAIRN LINE OF STEAMSHIPS, LTD. *v.* TRINITY HOUSE CORPN., [1908] 1 K. B. 528; 77 L. J. K. B. 363; 98 L. T. 86; 24 T. L. R. 212; 10 Asp. M. L. C. 602; 13 Com. Cas. 175.

**1599. Tonnage measurement of space occupied by goods—For purposes of dues payable—Horses & cattle.**]—RICHMOND HILL S.S. Co. *v.* TRINITY HOUSE CORPN., No. 1597, *ante*.

**1600. Wood goods.**]—Resp., the captain of a foreign vessel, arrived in a port in the United Kingdom between Oct. 31 & Apr. 16, carrying as deck cargo certain pieces of spruce fir wood, varying from 27 feet to 15 feet in length, & with a mean girth of 2 feet 9 inches, which were not carried to a height of 3 feet above the deck:—*Held:* such spruce fir wood came under the definition of "any square, round, waney, or other timber, defendant had, in fact, contravened 1894 Act, s. 451.—MORRISS *v.* THORMODSEN (1896), 60 J. P. 644, D. C.

——.]—*See* 1906 Act, s. 10, & Criminal Justice Act, 1925 (c. 86), s. 30.

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SECT. 6.—**STOWAGE OF GRAIN CARGO.**

*See* 1894 Act, ss. 452, 454, 456, Sched. XVIII.; 1906 Act, ss. 3, 11.

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SECT. 7.—**DETENTION OF UNSAFE SHIPS.**

*See* 1894 Act, ss. 459, 460, 462; 1897 Act, s. 1; 1906 Act, s. 2.

**1601. Reasonable & probable cause for detention—What amounts to.**]—In order to justify the Board of Trade in taking proceedings under 36 & 37 Vict. c. 85, s. 12, it is unnecessary that either the complaint as to a vessel or the report from surveyors should state in express terms that she is unable to "proceed to sea without serious danger to human life"; it is sufficient if it appears from the facts therein respectively mentioned that she is in that condition. *Semble,* under the foregoing statute, the Board of Trade can order a vessel to be detained only for the purpose of being surveyed, repaired, or otherwise dealt with according to its provisions, & they cannot order her detention for an indefinite period of time after its objects have been fulfilled. If the Board of Trade order a ship to be detained in excess of the powers conferred by the above-mentioned statute, her owner is not bound to appeal under 36 & 37 Vict. c. 85, s. 14, to a ct. having Admiralty jurisdiction, but he may obtain redress by either an action or a petition of right.—LEWIS *v.* GRAY (1876), 1 C. P. D. 452; 45 L. J. Q. B. 720; 34 L. T. 421; 3 Asp. M. L. C. 136.

**1602. —— ——.**]—Pltf. was the owner of a British ship named the *L.*, which was at the British port of S., & was intended to be employed in the foreign cattle trade. Certain surveyors of the Board of Trade reported in doubtful terms that owing to her unusual proportions the *L.* was an unsafe ship. The Board of Trade thereupon ordered the *L.* to be provisionally detained. A court of survey was held as to the condition of the *L.*, & the members thereof reported that the *L.* was not unsafe, & that she ought not to have been detained. The *L.* was accordingly released. Pltf. then brought an action against the secretary of the Board of Trade to recover compensation for the loss to him by reason of the provisional detention. At the trial it was admitted that the *L.* was a safe ship. The judge in substance directed the jury to consider whether it was reasonable in the Board of Trade to detain the *L.* for survey without a direct affirmation by their surveyors that in their opinion she was unsafe:—*Held:* a misdirection, for the proper question to be left to the jury was whether the facts with regard to the *L.* as she lay at S., which would have been apparent to a person of ordinary skill on examining her & inquiring about her, would have given him reasons able & probable cause to suspect her safety & to

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PART V. SECT. 7.

k. *Liability of foreign ship to be detained—Service of detention order.*]—LARSEN *v.* HART (1900), 2 F. (Ct. of Sess.) (J.) 54; 37 Sc. L. R. 924; 8 S. L. T. 146.—SCOT.

detain her for survey & inquiry.—THOMPSON *v.* FARRER (1882), 9 Q. B. D. 372; 51 L. J. Q. B. 534; 47 L. T. 117; 4 Asp. M. L. C. 562, C. A.

*Annotations:*—**Refd.** Dixon *v.* Board of Trade Secretary (1887), 3 T. L. R. 478; Howard *v.* Clarke (1888), 20 Q. B. D. 558.

**1603. Powers of Board of Trade—Reasonably satisfied as to condition of ship.**]—LEWIS *v.* GRAY, No. 1601, *ante*.

**1604. —— No power to detain for indefinite period.**]—LEWIS *v.* GRAY, No. 1601, *ante*.

**1605. Action against Board of Trade for unreasonable detention—Place of trial—Right of Crown to change venue.**]—By Crown Suits Act, 1865 (c. 104), s. 46, where in any cause in which the A.-G. is entitled on behalf of the Crown to demand as of right a trial at bar, he states to the ct. that he waives that right, " the ct. on the application of the A.-G. shall change the venue to any county he may select " :—*Held:* an action under 39 & 40 Vict. c. 80, s. 10, against the secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable & probable cause, is within the above sect., the A.-G. is entitled to demand as of right a trial at bar in such an action, & the ct. is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. —DIXON *v.* FARRER (1886), 18 Q. B. D. 43; 56 L. J. Q. B. 53; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. L. C. 52; *sub nom.* DIXON *v.* SECRETARY OF BOARD OF TRADE, 3 T. L. R. 35, C. A.

*Annotations:*—**Mentd.** Graham *v.* Public Works Comrs., [1901] 2 K. B. 781; Public Works Comrs. *v.* Pontypridd Masonic Hall Co., [1920] 2 K. B. 233.

**1606. —— Damages—Direct damages—Loss of reputation of shipowner.**]—39 & 40 Vict. c. 80, s. 6 (1), enacts that the Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed, & sect. 10 enacts that, if it appears that there was not reasonable & probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of & incidental to the detention & survey of the ship, & also compensation for any loss or damage sustained by him by reason of the detention or survey; & that an action under the sect. may be brought against the secretary of the Board of Trade. In an action brought for compensation under sect. 10 of the Act, pltfs. claimed general damages in respect of injury to their reputation as shipowners by reason of the detention of their ship:—*Held:* such damages were not within the words " compensation for loss or damage " in the sect., & therefore were not recoverable.—DIXON *v.* CALCRAFT, [1892] 1 Q. B. 458; 61 L. J. Q. B. 529; 66 L. T. 554; 56 J. P. 388; 40 W. R. 598; 8 T. L. R. 397; 7 Asp. M. L. C. 161, C. A.

**1607. —— Alternative remedy by petition of right.**]—LEWIS *v.* GRAY, No. 1601, *ante*.

**1608. Liability of foreign ship to be detained—Overloading.**]—The provisions contained in 39 & 40 Vict. c. 80, s. 34, as to the detention of ships which are unsafe by reason of overloading, apply to the ships of a foreign state taking in cargo at a port in the United Kingdom, although there has not been any Order in Council under 39 & 40 Vict. c. 80, s. 37, specifically applying such provisions to the ships of such state.—CHALMERS *v.* SCOPENICH, [1892] 1 Q. B. 735; 61 L. J. M. C. 117; 66 L. T. 348; 56 J. P. 521; 40 W. R. 477; 8 T. L. R. 452; 36 Sol. Jo. 361; 7 Asp. M. L. C. 171, D. C.

# Part VI.—Conduct of the Voyage.

## SECT. 1.—CLEARANCES.

*See* 1894 Act, ss. 68, 314-319, 692.

**1609. Meaning of " clearance "—Whether including all ship's papers.**]—*Qu.:* whether a clearance be any single document, or the collection of all the papers necessary to enable a ship legally to sail.—MORGAN *v.* OSWALD (1812), 3 Taunt. 554; 128 E. R. 219.

*Annotations:*—**Mentd.** Robinson *v.* Towray (1813), 1 M. & S. 217; Flindt *v.* Scott, Flindt *v.* Crokatt (1814), 5 Taunt. 674; Robinson *v.* Morris (1814), 5 Taunt. 720; Lemcke *v.* Vaughan (1824), 1 Bing. 473.

**1610. —— Distinguished from sailing.**] — A contract for the sale of wheat for shipment from America contained the following clause: " clearance not later than May 31." On May 28 a certificate of clearance was issued to the master of the ship by the customs authorities authorising the ship to proceed to sea. At that time part only of the cargo had been loaded, but the remainder was alongside waiting to be put into the ship. The certificate was granted under these circumstances in accordance with the usual & recognised practice in America. The loading was completed & the ship sailed on June 2:—*Held:* the provision in the contract as to clearance had been complied with.

The word " clearance " has a well known & definite meaning. It is a certificate issued by the customs showing that the vessel named in it has complied with the customs requirements, & is authorised to proceed to sea; & the acts which have to be done at the customs to procure such a certificate constitute the process of " clearing " the vessel (BIGHAM, J.).

Clearing & sailing are two quite different things, & clearing & being ready to sail are not necessarily the same thing (BIGHAM, J.).—THALMANN FRÈRES & CO. *v.* TEXAS STAR FLOUR MILLS (1899), 15 T. L. R. 471; 4 Com. Cas. 265; *affd.* (1900), 82 L. T. 833; 16 T. L. R. 460; 9 Asp. M. L. C. 87; 5 Com. Cas. 321, C. A.

**1611. Emigrant ship—Discretion of emigration officer to withhold certificate.**]—Action against an emigration officer under 15 & 16 Vict. c. 44, for refusing his certificate to a passenger ship of pltf., on the ground that the vessel was so deeply laden as, in his judgment, to endanger the safety of the ship & passengers, there not being any of the articles enumerated in 15 & 16 Vict. c. 44, s. 26, on board. Plea: Not guilty, by statute. Issue thereon; & demurrer. On the trial, it appeared that the vessel had been surveyed & reported seaworthy: that afterwards she was loaded with



1. *Refusal of clearance in time of war.*]—BLOM *v.* AUSTRALIA COMMONWEALTH (1917), 17 S. R. N. S. W. 469.—**AUS.**

*Sect.* 1.—*Clearances. Sects.* 2, 3, 4 & 5. *Part VII. Sect.* 1: *Sub-sect.* 1.]

a cargo, not objectionable in its nature; but deft., in the *bonâ fide* belief that the vessel was so deeply laden as to endanger the ship & passengers, refused his certificate unless she was lightened; & that she was accordingly lightened under protest, to pltf.'s damage. The judge directed a verdict for deft., subject to leave to enter a verdict for pltf.:—*Held:* under 15 & 16 Vict. c. 44, s. 26, deft. was entitled to withhold his certificate, if, in the exercise of a *bonâ fide* discretion, he thought the quantity of the whole articles on board endangered the ship or passengers, though none of the articles were of the same nature as those enumerated in 15 & 16 Vict. c. 44, s. 26.—STEEL *v.* SCHOMBERG (1855), 4 E. & B. 620; 3 C. L. R. 302; 24 L. J. Q. B. 87; 24 L. T. O. S. 252; 19 J. P. 500; 1 Jur. N. S. 679; 3 W. R. 204; 119 E. R. 227.

**1612. Clearance to be by fixed date—Certificate given before date—& before full cargo loaded.]**—THALMANN FRERES & CO. *v.* TEXAS STAR FLOUR MILLS, No. 1610, *ante.*

**1613. Refusal of clearance in time of war—Acts of belligerent power—Pleading.]**—A Russian vessel after discharging a cargo of oil at Melbourne in July, 1916, was refused a clearance to proceed to Chile for a cargo of nitrates. A clearance was offered if the vessel would take wheat to the United Kingdom. This was declined, & the owners claimed from the Commonwealth damages for the detention of the vessel, & alleged in their statement of claim that the master was excused from making any formal application for a clearance by a notification that it would be granted only if he shipped a cargo of wheat. The Commonwealth denied the authority of the persons alleged to have been their agents in refusing the clearance, & pleaded (*inter alia*) that the ship had failed to comply with certain requirements of law in demanding a clearance, & that the alleged refusal & the restrictive conditions were acts of a belligerent power in right of war & could not be called in question in the High Ct. of Australia:—*Held:* that part of the defence relating to the failure to comply with the clearance conditions was demurrable as there was no sufficient traverse of the statement amounting to an allegation that the Commonwealth had waived the conditions, but the other defence, that the acts complained of were acts of a belligerent power in right of war, was sufficient, & a demurrer to it was properly overruled.—COMMONWEALTH OF AUSTRALIA *v.* ZACHARIASSEN (1920), 36 T. L. R. 655, P. C.

## SECT. 2.—OFFICIAL LOGS.

*See* 1894 Act, ss. 239–243.

**Admissibility in evidence generally.]** — *See* ADMIRALTY, Vol. I., pp. 198, 199, Nos. 1151–1159; EVIDENCE, Vol. XXII., pp. 317, 318, Nos. 3105–3117.

**Use to refresh memory.]**—*See* EVIDENCE. Vol. XXII., p. 470, No. 4941.

## SECT. 3.—CONVOY.

**1614. Warranty to sail with convoy—Breach of warranty—Defence to action—Ship following & joining convoy.]**—On a representation that a ship will sail with convoy, whereby pltf. was induced to put his goods on board; the promise is complied with if she follows the convoy & joins it, so as to prevent pltf. from maintaining an action against the owner for a loss arising from another cause after she has joined. *Aliter* if by reason of this representation the owner of the goods, in an insurance made thereon, was induced to warrant that she would sail with convoy.—CHRISTIN *v.* DITCHELL (1797), Peake, Add. Cas. 141; 170 E. R. 223.

**1615. —— —— —— Every practical effort made to join convoy.]**—In an action against the owner of a ship for breach of an undertaking to sail with convoy it is a sufficient defence to show that the ship was delayed in taking on board pltf.'s goods, & that after receiving them the master having made every practicable exertion to join the convoy with which he ought to have sailed but without effect proceeded on his voyage without convoy.—MAGALHAENS *v.* BUSHER (1814), 4 Camp. 54; 171 E. R. 18, N. P.

**1616. —— —— —— Ship prevented from joining convoy by weather.]**—(1) A bill of lading signed by the captain stating the ship to be bound to the port of destination with convoy, amounts to an undertaking binding on the owner, that the ship shall sail with convoy.

(2) Where there is an undertaking to sail with convoy, it is not a sufficient excuse that the ship was prevented from joining the convoy by the state of the weather.—SANDERSON *v.* BUSHER (1814), 4 Camp. 54, n.; 171 E. R. 18, N. P.

**1617. —— What amounts to warranty—Ship put up at Royal Exchange by broker—Distribution of handbills.]**—If a ship is put up at the Royal Exchange & at the coffee house by the ship's broker, as a general ship warranted to sail with convoy, & handbills are put about to the same effect, this is such a representation as shall bind the principal.—RUNQUIST *v.* DITCHELL (1799), 3 Esp. 64; 170 E. R. 539; *sub nom.* RINQUIST *v.* DITCHELL, 2 Camp. 555, n., N. P.

*Annotations:*—**Consd.** Sanderson *v.* Busher (1814), 4 Camp. 54, n. **Reld.** Baldry *v.* Bates (1885), 52 L. T. 620.

**1618. —— —— Ship advertised to sail with convoy—No mention of convoy in bill of lading.]**—SNELL *v.* MARRYATT (1808), cited in Abbott's Merchant Shipping, 14th ed. p. 468.

**1619. —— —— Bill of lading signed by captain—Stating ship sailing with convoy.]**—SANDERSON *v.* BUSHER, No. 1616, *ante.*

**—— In insurance cases.]**—*See* INSURANCE, Vol. XXIX., p. 179, Nos. 1352–1374.

**1620. Necessity for convoy.]**—A ship cannot legally proceed without convoy from port to port to join convoy, unless a bond has been given that she shall not sail without convoy. A ship licenced to sail without convoy, provided she is armed with a certain force, must take that force on board before she breaks ground. A ship licenced to sail without convoy with a certain force, & clearing out without giving bond to sail with convoy, & without having the force required, cannot legally go round from her port of clearance to a port of convoy.—HINCKLEY *v.* WALTON (1810), 3 Taunt. 131; 128 E. R. 52.

*Annotations:*—**Reld.** Wilson *v.* Foderingham (1813), 1 M. & S. 468; Cundell *v.* Dawson (1847), 4 C. B. 376.

**1621. —— Foreign built ship—British owned.]**—A foreign built ship, British owned, is not required to be registered, & may therefore sail without convoy, being within the exception of 38 Geo. 3, c. 76, s. 6. If a policy of insurance be effected on such



m. *Duty to record ship's draught on leaving port—Leaving foreign port.]*—BOARD OF TRADE *v.* BROWN (1880), 13 R. (Ct. of Sess.) (J.), 58; 23 Sc. L. R. 638.—SCOT

a ship, it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign built.—LONG *v.* DUFF, LONG *v.* BOLTON (1800), 2 Bos. & P. 209; 126 E. R. 1240.

*Annotation :*—**Mentd.** Campbell *v.* Innes (1821), 4 B. & Ald. 426.

**Recovery of payments by insurer—If ship sails with convoy & arrives.**]—*See* INSURANCE, Vol. XXIX., pp. 301, 302, Nos. 2474-2481.

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SECT. 4.—**DEVIATION AND DELAY.**

**Deviation.**]—*See* Part VII., Sect. 6, sub-sect. 2, C. (*a*), *post.*

**Delay.**]—*See* Part VII., Sect. 6, sub-sect. 2, C. (*b*), *post.*

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SECT. 5.—**PROTESTS.**

*See, generally,* ADMIRALTY, Vol. I., pp. 199 *et seq.*

**1622. Admissibility in evidence—To contradict captain's evidence.**]—The protest is of itself evidence only to contradict the captain's evidence; not to show a variance between it & the condemnation.—CHRISTIAN *v.* COOMBE (1796), as reported in 2 Esp. 489; 170 E. R. 430.

**1623. —— In action on insurance policy.**]—Pltf.'s agent showed deft., an underwriter, the captain's protest containing an account of the loss of the ship insured, demanding payment :—*Held :* this did not entitle deft. to read the protest in evidence in an action on the policy.—SENAT *v.* PORTER (1797), 7 Term Rep. 158; 101 E. R. 908.

**1624. —— In collision action.**]—In a cause of collision the protest of the master of a foreign vessel, which being in distress was in tow by the vessel run foul of, in *res alios acta*, & not admissible evidence where no necessity exists.

The smack was performing a very useful service to a foreign vessel, & in the performance of that service was run down & destroyed. If the effect of that collision had been to destroy the persons on board the smack, it would be a reason for admitting evidence not strictly & technically legal; but none of the crew were lost; all survived, all are capable of being witnesses (LORD STOWELL).—THE BETSY CAINES (1826), 2 Hag. Adm. 28; 166 E. R. 154.

*Annotations :*—**Mentd.** The Argentino (1888), 13 P. D. 191; Remorquage à Hélice Soc. Anon. de *v.* Bennetts, [1911] 1 K. B. 243.

**1625. —— ——.**]—THE OSMANLI (1850), 7 Notes of Cases, 507; *sub nom.* THE CAPE PACKET, 7 L. T. 866.

**1626. —— ——.**]—THE JAMES MCQUEEN (1855), 7 L. T. 866; 4 W. R. 91.

**1627. Production of protests—In salvage cases.**]—Rule laid down by the ct. respecting the production of protests, viz. that in all cases of salvage they ought to be brought in.—THE EMMA (1844), 2 Wm. Rob. 315; 3 Notes of Cases, 114; 4 L. T. O. S. 17; 166 E. R. 774.

*Annotations :*—**Apld.** The Ljubica (1870), 23 L. T. 474. **Mentd.** The Longford (1881), 6 P. D. 60.

**1628. Effect of protest—In salvage cases—Check upon statements made on behalf of salvaged vessel.**]—In salvage cases, the protest operates as a check upon the statements made on behalf of the vessel to which assistance has been given; but it cannot be referred to as containing a full statement of all the facts as they relate to the salvors.—THE DIAMOND (1845), 9 Jur. 694.

**1629. —— ——.**]—Protest is of great importance in salvage, but not in collision, cases.—THE ALIWAL (1853), 1 Ecc. & Ad. 96; 18 Jur. 296; 164 E. R. 55; *sub nom.* THE ANN MOORE *v.* THE ALIWAL, 7 L. T. 866.

*Annotations :*—**Mentd.** The James (1856), Sw. 60; Lawson *v.* Carr, The James (1856), 10 Moo. P. C. C. 162.

**1630. —— In collision cases.**]—THE ALIWAL, No. 1629, *ante.*

**1631. East coast coal trade—Whether customary to extend protest.**]—THE DOROTHEA ELIZABETH (1849), 7 L. T. 866.

**1632. Importance of protest.**]—The "protest" is always an important document.—THE HEDWIG (1853), 1 Ecc. & Ad. 19; 164 E. R. 11; *sub nom.* THE HÆDWIG, 17 Jur. 977.

*Annotation :*—**Mentd.** The Racer (1874), 30 L. T. 904.

**1633. ——.**]—THE JAMES MCQUEEN (1855), 7 L. T. 866; 4 W. R. 91.

**1634. When protest should be made.**]—THE OSMANLI (1850), 7 Notes of Cases, 507; *sub nom.* THE CAPE PACKET, 7 L. T. 866.

**1635. Omissions in protest—Damage to goods—Liability of shipowners to owners of goods.**]—In a cause for damage to goods :—*Held :* the omission by the master of certain particulars in his protest is not a breach of duty or contract on the part of the shipowner or his servants so as to give the owner of the damaged goods a right of action, even if such omission had been made from improper motives.—THE SANTA ANNA (1863), 32 L. J. P. M. & A. 198; 9 Jur. N. S. 1205.

*Annotation :*—**Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41.

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# Part VII.—Carriage of Goods.

SECT. 1.—**THE CONTRACT OF CARRIAGE.**

SUB-SECT. 1.—IN GENERAL.

**1636. Terms of the contract—Representation made in handbills.**]—If a ship is put up at the Royal Exchange & at the coffee house by the ship's broker, as a general ship warranted to sail with convoy, & handbills are put about to the same effect, this is such a representation as shall bind the principal.—RUNQUIST *v.* DITCHELL (1799), 3 Esp. 64; 170 E. R. 539; *sub nom.* RINQUIST *v.* DITCHELL, 2 Camp. 555, n., N. P.

*Annotations :*—**Consd.** Sanderson *v.* Busher (1814), 4 Camp. 54, n. **Refd.** Baldry *v.* Bates (1885), 52 L. T. 620.

**1637. —— ——.**]—Defts., owners of a steam vessel plying between Bristol & London, issued every month handbills of the times of their vessels sailing, & which contained a notice that they "received goods for shipment on the conditions & agreement only that they are not liable for inward condition, leakage & breakage, & that they would not receive any goods for conveyance by their vessels except upon the terms that they should not be responsible for any loss or damage of or to such goods from any cause whatever during the voyage." On Mar. 8, pltfs., who had received these handbills, shipped on board one of



n. *Terms of the contract—Conditions in sailing bills—Referred to in consignment notes.*]—SPENCE *v.* LAIRD LINE, LTD. (1915), 49 I. L. T. 193.—IR.

*Sect.* 1.—*The contract of carriage: Sub-sects.* 1 & 2, *A.* (*a*) & (*b*), & *B.*]

defts.' vessels two casks of brandy to be carried to Falmouth. On Mar. 11, the shipping broker delivered to pltfs. a freight note, at the foot of which was a notice that defts. did not hold themselves liable for leakage of oils, spirits or other liquids, unless from bad stowage. In the course of the voyage one of the casks of brandy was stayed in & nearly all its contents lost:—*Held:* the notice in the handbills constituted the terms of the contract under which the goods were shipped, & those terms were not qualified by the notice at the foot of the freight note, & consequently defts. were not responsible.—PHILLIPS *v.* EDWARDS (1858), 3 H. & N. 813; 28 L. J. Ex. 52; 32 L. T. O. S. 147; 157 E. R. 696.

*Annotation:*—**Refd.** John *v.* Bacon (1870), 39 L. J. C. P. 365.

**1638. —— Representation in advertisement—Duty to give notice of alteration.**]—A general ship having been advertised for a particular voyage, if her destination is in any respect altered, the owner is bound to give specific notice of the alteration to every person who ships goods on board.—PEEL *v.* PRICE (1815), 4 Camp. 243; 171 E. R. 77.

**1639. —— —— Whether shipbroker liable as principal.**]—Shipbrokers, not being owners of the particular ship, though they were of others, having issued advertisements & tickets, announcing the times of sailing, & describing the ships as their "line"; evidence being given that if they were owners the announcements would be in the same form, but that it was a form always used by brokers:—*Held:* it was for the jury, on the whole evidence, whether they had held themselves out as owners, or had acted only as agents.—SIMPSON *v.* YOUNG (1861), 2 F. & F. 426, N. P.

**1640. —— Freight notes.**]—Pltf. shipped goods for transit from London to Goole in a ship belonging to defts., & the goods were lost by reason of negligent navigation. It had been a common practice of defts. to stamp upon the advice notes for goods shipped by pltf. a notice stating that "the terms on which goods are accepted are those of the Continental bill of lading in use in this port," but this notice did not appear upon the advice notes given in this case. On the freight notes delivered by defts. to pltf. there was a statement that "bills of lading in the form of the Continental steam bill of lading, will be given when required," but pltf. never required or received a bill of lading. In the Continental bill of lading negligence of owners' servants was excepted:—*Held:* defts. were exempted from liability for negligence.—LIPTON *v.* JESCOTT STEAMERS (1895), 11 T. L. R. 539; 1 Com. Cas. 32, C. A.

**1641. Carriage of goods destined for alien enemy—Without knowledge or consent of shippers—Breach of duty of shipowner.**]—DUNN *v.* BUCKNALL, BROTHERS, DUNN *v.* CURRIE (DONALD) & CO., No. 2552, *post.*

**1642. Declaration as to whether contract binding—When parties entitled thereto.**]—Where sufficient reason is shown, parties to a mercantile contract are entitled to ask the ct. for a declaration whether they are bound by the contract or not. Therefore where a contract, if it had been binding, would have continued in force for a year & a half & the breach of it would have involved pltfs. in heavy damages, the ct. in an action brought by them claiming a declaration that they were not bound to perform the contract granted the declaration as prayed.—SOCIÉTÉ MARITIME ET COMMERCIALE *v.* VENUS STEAM SHIPPING CO., LTD. (1904), 9 Com. Cas. 289.

*Annotations:*—**Refd.** Chapman *v.* Michaelson, [1908] 2 Ch. 612; Guaranty Trust of New York *v.* Hannay, [1915] 2 K. B. 536; Hulton *v.* Hulton, [1916] 2 K. B. 642; *Re* Clay, Clay *v.* Booth, *Re* Deed of Indemnity, [1919] 1 Ch. 66; Consorzio Veneziano di Armamento e Navigazione *v.* Northumberland Shipbuilding Co. (1919), 88 L. J. K. B. 1194.

**Charterparty.**]—*See* Sect. 2, *post.*

**Bills of lading.**]—*See* Sect. 3, *post.*

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SUB-SECT. 2.—CONDITIONS PRECEDENT.

*A. What are Conditions Precedent.*

(*a*) *In General.*

*See, generally,* CONTRACT, Vol. XII., pp. 409 *et seq.*

**1643. Question for court—Determined on facts found by jury.**]—BEHN *v.* BURNESS, No. 1840, *post.*

**1644. —— ——.**]—OPPENHEIM *v.* FRASER, No. 1842, *post.*

**1645. Must go to root of contract.**]—DAVIDSON *v.* GWYNNE, No. 1882, *post.*

**1646. Depends on intention of parties.**]—Pltf., as captain of a South Sea whaler, covenanted with defts., that he would proceed to the fishery & procure a cargo of sperm oil, etc., or as great a proportion as might be, under all circumstances, within his power to obtain; would return to London, & at his own cost deliver the cargo, would obey instructions, be frugal of provisions & not dispose of any of them without accounting for the same, & would not smuggle or trade or permit any on board to do so. Defts. covenanted on the performance of the before-mentioned terms & conditions on the part of pltf. to pay him a certain proportion of the net proceeds of the cargo:—*Held:* pltf.'s covenants were independent, & the performance of them was not a condition precedent to an action on defts.' covenant.

The question whether covenants are to be held dependent or independent of each other is to be determined by the intention & meaning of the parties as it appears on the instrument (TINDAL, C.J.).—STAVERS *v.* CURLING (1836), 3 Bing. N. C. 355; 2 Hodg. 237; 3 Scott, 740; 6 L. J. C. P. 41; 132 E. R. 447.

*Annotations:*—**Folld.** Oliver *v.* Fielden (1849), 18 L. J. Ex. 353. **Apld.** Sibthorp *v.* Brunel (1849), 3 Exch. 826. **Consd.** Grey *v.* Friar (1854), 4 H. L. Cas. 565; Seeger *v.* Duthie (1860), 8 C. B. N. S. 45. **Expld.** Bastin *v.* Bidwell (1881), 18 Ch. D. 238. **Apld.** Kidner *v.* Stimpson (1918), 35 T. L. R. 63. **Refd.** Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131; Newson *v.* Smythies (1858), 28 L. J. Ex. 97; Bradford *v.* Williams (1872), 41 L. J. Ex. 164; Richardson *v.* Stanton, Stanton *v.* Richardson (1872), 41 L. J. C. P. 180. **Mentd.** Parkin *v.* South Hetton Coal Co. (1907), 97 L. T. 98.

**1647. ——.**]—TARRABOCHIA *v.* HICKIE, No. 1836, *post.*

**1648. ——.**]—(1) What is or is not a condition precedent, depends, not on merely technical words, but on the plain intention of the parties, to be deduced from the whole instrument.

A. entered into a contract with B., by which A. was "forthwith" to bring a vessel alongside a particular wharf, & within seven days of his doing so, B. was to pay a sum of £1,000; a further sum of £2,000 in twenty-one days afterwards; & another sum of £2,000 on the ship arriving at the Nore. Certain penalties were to be payable by A. for non-performance of specified acts. There were several other stipulations, & after all came a covenant by which "for the true performance of the covenants by A. hereinbefore contained, & for securing any penalties which he might incur under

these presents, A. & two responsible sureties were "within ten days from the execution of these presents," to execute a bond to B. in the penal sum of £5,000." There was a covenant in exactly similar terms on the part of B. The giving of the bond was not to prejudice their mutual rights & liabilities under the agreement:—*Held:* the covenant to give the bonds was a condition precedent, so that on B.'s refusal to allow A. to ship the cable, A., who had not given his bond, could not maintain an action for damages in respect of such refusal.

(2) The covenants to give the bonds were not mutual & dependent; the fulfilment of his own engagement by each was a necessary preliminary to his right to recover on the contract.

(3) "Forthwith," in this contract, meant a reasonable time.

If the ship had been brought alongside on the day after the execution of the contract, & if the £1,000 had thereon been paid, A. would not have been thereby exempted from the obligation to give his bond within the ten days.—ROBERTS *v.* BRETT (1865), 11 H. L. Cas. 337; 20 C. B. N. S. 148; 34 L. J. C. P. 241; 12 L. T. 286; 11 Jur. N. S. 377; 13 W. R. 587; 2 Mar. L. C. 226; 11 E. R. 1363, H. L.

*Annotation:—As to* (3) **Consd.** Hudson *v.* Hill (1874), 43 L. J. C. P. 273.

**1649.** ——.]—FOREST OAK STEAM SHIPPING CO., LTD. *v.* RICHARD & CO., No. 1861, *post.*

**1650. Where breach would frustrate object of contract.**]—TARRABOCHIA *v.* HICKIE, No. 1836, *post.*

**1651.** ——.]—A charterparty provided that the ship should load a full & complete cargo of sugar in bags, hemp in compressed bales, &/or measurement goods. It likewise specified different rates of freight for dry & wet sugar. A cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from wet sugar, & when the cargo had been nearly all shipped it was found that there was such an accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in her then condition. Owing to the nature of the material & the depth of the hold, the ship's pumps were unable to clear the ship of the drainage from the sugar. The ship was perfectly seaworthy, except with respect to this particular cargo, & the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, & the charterer then refused to reload it or to provide any other cargo. Cross actions were brought, the one by the shipowner against the charterer for refusing to provide a cargo, & the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her. At the trial the jury found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; & that the ship would not, without new pumps & with a reasonable cargo of wet sugar on board, have been seaworthy:—*Held:* the shipowner by entering into the charterparty undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charterparty & consequently of a reasonable cargo of wet sugar, & upon the findings of the jury she was not so fit & could not be made so in such a time as not to frustrate the object of the voyage the charterer was entitled to succeed in both actions.

I apprehend that a stipulation amounting to a condition is necessarily also a warranty, & there may be circumstances preventing its being treated as a condition, & then it is only available as a warranty as, for instance, when the stipulation is that the ship shall be ready to load within a fixed time, or a reasonable time, & the cargo is loaded & carried; though before loading this might be a condition precedent, inasmuch as the charterer has loaded & derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty (BRETT, J.).—STANTON *v.* RICHARDSON, RICHARDSON *v.* STANTON (1872), L. R. 7 C. P. 421; 41 L. J. C. P. 180; 27 L. T. 513; 21 W. R. 71; 1 Asp. M. L. C. 449; *affd.* (1874), L. R. 9 C. P. 390, Ex. Ch.; (1875), 45 L. J. Q. B. 78, H. L.

*Annotations:*—**Refd.** Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; The Maori King *v.* Hughes, [1895] 2 Q. B. 550; Queensland National Bank *v.* Peninsular & Oriental Steam Navigation Co., [1898] 1 Q. B. 567; Rowson *v.* Atlantic Transport Co. (1902), 72 L. J. K. B. 87; Rathbone *v.* MacIver, [1903] 2 K. B. 378; Paterson Zochonis *v.* Elder Dempster, [1923] 1 K. B. 420.

**1652. Right to insist on performance.**]—CENTURY SHIPPING CO., LTD. *v.* SYMONS & CO. (1904), *Times*, Mar. 17, C. A.

### (*b*) *Particular Instances.*

**1653. Condition for holding of court martial—In case of loss of ship.**]—Covenant on a charterparty, whereby, if the ship should be lost, burnt, or taken, & it should appear to a court martial that the master, etc., had made the best defence they could, the freighters covenanted to pay the value of the ship. The holding of a court martial is a condition precedent.—DAVISON *v.* MURE (1781), 3 Doug. K. B. 28; 99 E. R. 522.

**1654. Covenant by master to procure cargo—Where condition precedent to recovery of share of proceeds.**]—STAVERS *v.* CURLING, No. 1646, *ante.*

**1655. Condition for execution of bond.**]—ROBERTS *v.* BRETT, No. 1648, *ante.*

**Conditions as to ship.**]—*See* Sect. 2, sub-sect. 6, *post.*

**Conditions as to voyage.**]—*See* Sect. 2, sub-sect. 7, *post.*

**Conditions as to cargo.**]—*See* Sect. 2, sub-sect. 8, *post.*

**Conditions as to freight.**]—*See* Part VIII., *post.*

**Conditions as to loading.**]—*See* Sect. 5, *post.*

**Conditions as to unloading.**]—*See* Sect. 7, *post.*

### *B. Waiver of Conditions.*

**1656. What amounts to waiver—Part performance by charterer.**]—Assumpsit on charterparty, by which deft. hired a ship from pltfs. to go to Cronstadt, & there take a full cargo of tallow, or of tallow & deals, etc., & proceed thence to London, allowance for laying days & demurrage, averment that the ship went to Cronstadt, breaches, that deft. did not load a cargo as agreed, but shipped deals only & no tallow, & that he detained the ship beyond the time stipulated, whereby pltfs. earned less freight than they otherwise would, & lost the use of the ship during the extra time of detention. Plea, that, at the time of making the charterparty, pltfs. represented to deft. that the ship was at Wyburg in Russia, & deft. entered into the charterparty confiding in such representation, whereas,



o. *Condition to take on passengers after discharge of part of cargo.*]—GARRICK *v.* BRADSHAW (1846), 10 I. L. R. 129.—IR.

*Sect.* 1.—*The contract of carriage: Sub-sect.* 2, *B.; sub-sect.* 3, *A., B. & C.* (*a*).]

at the time, etc., the ship was not at Wyburg. Replication, that, at the time of making the charterparty, & of the said representation, pltfs. also represented to deft., & it was mentioned in the charterparty, that the ship was bound on a voyage from Wyburg to Hull, & pltfs. did then believe that she was at Wyburg, & about to sail to Hull; & in fact she had just sailed on her voyage from Wyburg to Hull. Rejoinder, that the representation mentioned in the plea was contained in the charterparty, & was parcel thereof, & of the contract thereby made; & that the ship was not, at the time of the making of the charterparty, at Wyburg. On special demurrer:—*Held:* the mere representation, as alleged in the plea, was no answer to the declaration, & the rejoinder, if it alleged a warranty, was a departure.—ELLIOT *v.* VON GLEHN (1849), 13 Q. B. 632; 18 L. J. Q. B. 221; 13 L. T. O. S. 117; 116 E. R. 1404.

*Annotations*:—**Refd.** Dimech *v.* Corlett (1859), 33 L. T. O. S. 21; Behn *v.* Burness (1863), 3 B. & S. 751.

**1657. —— User by charterer.**]—HAVELOCK *v.* GEDDES, No. 1834, *post.*

**1658. —— ——.**]—STANTON *v.* RICHARDSON, RICHARDSON *v.* STANTON, No. 1651, *ante.*

**1659. —— ——.**]—Resps., pltfs., in the action, chartered from applts. a steamer which at the date of the charterparty was in fact unseaworthy. The charter was a time charter for nine months from Dec. 19, 1919. The steamer although unseaworthy performed the chartered service satisfactorily for several weeks, but owing to her unseaworthiness she was unable to render any further service after Mar. 8, 1920. Resps. waited until May to give applts. an opportunity of making the steamer efficient, & as applt. failed to make her efficient, resps. on May 22 cancelled the charter. They then brought an action against applts. for breach of their undertaking as shipowners, & the judge before whom the action was tried granted resps. a declaration that the steamer was unseaworthy, & a declaration that applts. had failed to maintain her in an efficient state; & he held that resps. were justified in cancelling the charter. He directed an inquiry before a referee as to damages, & indicated that the damages should be ascertained by treating the charter as one entire contract & estimating the sum which might reasonably be earned under it & deducting from that the freight actually earned while the steamer was able to do its work:—*Held:* the steamer was unseaworthy & resps. were justified in cancelling the charter; but as regards damages, resps. had had the use of the steamer up to Mar. 8, & therefore must pay hire, & could not recover any damages, for that period; for the period from Mar. 8 until the cancellation on May 22 resps. could recover hire which they had paid in advance for that period, & any expenses which they had incurred in respect of that period, & could also recover the ordinary profits which could have been made if they had had the use of the ship. As to the third period, from the cancellation on May 22 to the end of the charter, resps. were bound to take reasonable steps to minimise the damages.—SNIA SOCIETA DI NAVIGAZIONE INDUSTRIA E COMMERCIO *v.* SUZUKI & CO. (1924), 29 Com. Cas. 284, C. A.

**1660. —— Condition not insisted on before time for performance.**]—CENTURY SHIPPING CO., LTD. *v.* SYMONS & CO. (1904), *Times*, Mar. 17, C. A.

**1661. Effect of waiver—Right to damages.**]—HAVELOCK *v.* GEDDES, No. 1834, *post.*

**1662. —— ——.**]—BENTSEN *v.* TAYLOR, SONS & CO. (2), No. 1843, *post.*

**1663. —— ——.**]—CENTURY SHIPPING CO., LTD. *v.* SYMONS & CO. (1904), *Times*, Mar. 17, C. A.

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SUB-SECT. 3.—CONSTRUCTION.

*A. In General.*

*See, generally*, DEEDS, Vol. XVII., pp. 242 *et seq.*

**1664. Outward cargo to Bombay—Return cargo either from Bombay or Calcutta—Whether cargo from Bombay to Calcutta included.**] — Charterparty to take a cargo to Bombay, there to receive a fresh load with which to proceed to a port in the Thames, the merchant having the privilege on payment of an extra freight to send the ship from Bombay to Calcutta. This held not to include a contract that a cargo be taken from Bombay to Calcutta, & another cargo from Calcutta to the Thames.—COCKBURN *v.* WRIGHT (1840), 6 Bing. N. C. 223; 8 Dowl. 260; 8 Scott, 489; 9 L. J. C. P. 166; 4 Jur. 293; 133 E. R. 88; *sub nom.* THE BENGAL, COCKBURN *v.* WRIGHT, 4 L. T. 656.

**1665. Charterparty relating to several consignments—Separate contracts—Effect of abandonment of some.**]—A contract made in Apr. 1913, between applt. co. who were shipowners, & resps., provided for the carriage of six consignments of phosphates from a named port in America to a named port in France at dates ranging from Mar. 1918, to Nov. 1920. The contract was in the ordinary form of a charterparty for carriage from the port of loading to the port of discharge, with a note on the back that it applied to the six parcels with their several dates. The rate of freight was the same throughout, but there was not a lump sum freight for the six voyages. The first three voyages were abandoned by consent in consequence of the war between France & Germany:—*Held:* the contract dealt with six distinct & separate adventures, & the fact that three of them had been abandoned by consent did not disentitle the charterers from insisting on the performance of the remaining three.—LARRINAGA & CO. *v.* SOCIÉTÉ FRANCO-AMERICAINE DES PHOSPHATES DE MEDULLA (1923), 92 L. J. K. B. 455; 129 L. T. 65; 39 T. L. R. 316; 16 Asp. M. L. C. 133; 29 Com. Cas. 1, H. L.

*Annotation*:—**Refd.** Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497.

**1666. Provision in charterparty for cancellation—If survey ordered by Lloyds.**]—By a charterparty dated May 17, 1920, applts., owners of a Danish steamship, the *Ribe*, let her on hire to resps. In a charterparty the vessel was described as "expected ready to load under this charter about the second half of June," & in the margin was a clause which provided as follows:—"Should steamer be ordered by Lloyds to undergo her survey prior to fulfilment of this charter, charterers &/or owners to have the option of cancelling this charter." The *Ribe* would in the ordinary course have been due for survey in Feb. 1919, but owing to the shortage of tonnage caused by the war Lloyds regulations as to surveys had been relaxed. In Apr. 1920, the *Ribe* was at Bordeaux, & applts. arranged with Lloyds surveyors there that the survey should be carried out when the vessel arrived in Denmark. On May 20, 1920, before beginning the chartered service the *Ribe* grounded in the Baltic & was sent to Aalborg, in Denmark, for repairs. The repairs occupied two months,

& while they were being executed applts., without further communication from Lloyds took the opportunity of having the survey carried out. On June 14, 1920, resps. gave notice of cancellation on the ground of delay, & on June 16, 1920, they gave a further notice of cancellation on the ground that the *Ribe* had been ordered by Lloyds to undergo her survey. Applts. brought an action against resps. for breach of the charterparty:—*Held:* the steamer had been ordered by Lloyds to undergo her survey within the meaning of the clause in the charterparty, & resps. were entitled to cancel the charter.—ACTIES NORD-OSTERSO REDERIET *v.* CASPER, EDGAR & CO., LTD. (1923), 28 Com. Cas. 222, H. L.

*B. Functions of Judge and Jury.*

*See, generally,* DEEDS, Vol. XVII., pp. 243–246, Nos. 576–611.

**1667. General rule.**]—BENTSEN *v.* TAYLOR, SONS & CO. (2), No. 1843, *post.*

**1668. Contracts by agents—Whether contract to ship direct or to port of call for orders—Question for jury.**]—Defts., having bought wheat of pltfs., chartered a vessel to fetch it. The charterparty contained an option to call at Cork or Falmouth for orders, or to go to Bristol direct. As the vessel did not arrive out in time, pltfs. themselves chartered a vessel to Bristol direct:—*Held:* whether pltfs. had authority to charter to Bristol direct, or not, was a question of fact which ought to be found by the jury.—CHAPMAN *v.* ADAMS (1863), 2 New Rep. 243.

**1669. What is "safe loading place"—Right of judge to give opinion.**]—SMITH *v.* DART & SON, No. 1875, *post.*

**What is "condition precedent."**]—*See* Sect. 1, sub-sect. 2, *ante.*

*C. Rules of Construction.*

*(a) In General.*

*See, generally,* DEEDS, Vol. XVII., pp. 246–302, Nos. 612–1143.

**1670. Construed according to intention of parties.**]—CONSTABLE *v.* CLOBERIE (1625), Palm. 397; Poph. 161; Lat. 49; 81 E. R. 1141; *sub nom.* CONUSTABLE *v.* CLOWBURY, Noy, 75.

*Annotations:*—**Consd.** Hall *v.* Cazenove (1804), 4 East, 477. **Distd.** Glaholm *v.* Hays (1841), 2 Man. & G. 257; Oliver *v.* Fielden (1849), 4 Exch. 135. **Reld.** Balls & Griffith *v.* Briard (1628), Lat. 225; Havelock *v.* Geddes (1809), 10 East, 555; Davidson *v.* Gwynne (1810), 12 East, 381; Croockewit *v.* Fletcher (1857), 1 H. & N. 893; Seeger *v.* Duthie (1860), 8 C. B. N. S. 45; Stanton *v.* Richardson, Richardson *v.* Stanton (1872), L. R. 7 C. P. 421. **Mentd.** Wynne *v.* Wynne (1840), 2 Man. & G. 8.

**1671.** ——.]—DIMECH *v.* CORLETT, No. 1858, *post.*

**1672.** ——.]—BEHN *v.* BURNESS, No. 1840, *post.*

**1673.** ——.]—By a charterparty, it was stipulated by the charterer & the master, that the vessel should load an outward cargo, proceed to Rangoon, a river port in India, & there load a homeward cargo. The master guaranteed the vessel to carry 3,000 tons dead weight upon a draught of 26 feet; to return to one of the ports mentioned in the charterparty at the charterer's option & there to discharge the cargo. Freight was to be paid in a lump sum, part in advance before sailing from England, part on the voyage, & on arrival at return of port of delivery, & the remainder on the final delivery of the cargo.

The vessel loaded at Rangoon a quantity of rice, as much as she could carry down the river Irrawaddy, but which amounted to less than 3,000 tons dead weight. In consequence of the negligence of a pilot, taken on board by the master, the vessel grounded in that river. She was got off, but afterwards at sea sprang a leak, & to save the vessel, part of the cargo was thrown overboard, & other damaged portions were sold at Mauritius, a port she stopped at to repair on her homeward voyage, where the remaining portion was reshipped. When the vessel arrived at Liverpool, a port of discharge mentioned in the charterparty, the master claimed a sum of money as lump freight, larger than was really due, as well as a sum for general average contribution, & without going the length of refusing to deliver any, he insisted upon keeping in his possession a part of the cargo to cover his demand for freight he considered due. A tender was made by the assignee of the bill of lading of the amount considered by him due, & he undertook to give security for the remainder. The master refused this offer, & took the vessel into a dock, other than that named by the charterer, & the cargo of rice was unladen without assortment, as was customary. In these circumstances the assignee of the bill of lading brought a suit *in rem*, pursuant to Admiralty Court Act, 1861 (c. 10), in the Admiralty Ct., against the vessel for damages in respect of breaches of contract & duty:—*Held:* (1) as both parties contemplated that a cargo might be laden in a river, the guarantee that the vessel would carry 3,000 tons dead weight, in a draught of 26 feet, applied alike to fresh & salt water, & there was a breach of contract; (2) with respect to the cargo jettisoned, & the damaged rice sold in Mauritius in the absence of pltf. proving affirmatively the negligence of the pilot, or the want of prudence on the part of the master, there ought to be no deduction from the lump freight, on account of non-delivery, as it arose from the perils of the sea; (3) the demand by the master of a larger sum than was due, & the refusal by him to deliver the cargo was so made that it amounted to an announcement by him that it would be useless to tender any smaller sum, for if tendered it would be refused, & such refusal constituted a constructive waiver of any tender; & a preemptory claim for general average came within the rule as to dispensation of tender; (4) the master was not liable for damages for the non-assortment of the cargo, as the assignee could by complying with the terms of 25 & 26 Vict. c. 63, sect. 67, have landed the rice himself; (5) in estimating the damages for non-delivery of the cargo, the assignee was entitled under the provisions of Admiralty Act, 1861 (c. 10), to be indemnified for the loss of interest for the wrongful withholding of the cargo, & for insurance & interest.

(6) The holder of a bill of lading, comprising the whole cargo, has by custom a right to deduct "Address commission" from the freight.—THE NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY (1865), 3 Moo. P. C. C. N. S. 245; Brown. & Lush. 404; 13 L. T. 50; 11 Jur. N. S. 892; 13 W. R. 1085; 2 Mar. L. C. 254; 16 E. R. 92, P. C.

*Annotations:*—*As to* (2) **Consd.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106. **Apld.** Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99; Robinson *v.* Knights (1873), L. R. 8 C. P. 465. **Consd.** The Ettrick (1881),

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**PART VII. SECT. 1, SUB-SECT. 3.—B.**

p. "*Deck load to be at risk of owners*"—*Question for court.*]—Where a bill of lading stated that the deck load was to be at the risk of the owners:—*Held:* the construction of the bill was for the ct., not the jury, & the risk was to be that of the owners of the goods, not the owner of the vessel. —MERRITT *v.* IVES (1840), 3 Ont. Dig. 6444.—CAN.

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6 P. D. 127; The Xantho (1886), 11 P. D. 170; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171. **Reld.** Blanchet *v.* Powell's Llantivit Colliery Co. (1874), 43 L. J. Ex. 50; Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; Williams *v.* Canton Insurance Office, [1901] A. C. 462; London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635. *As to* (3) **Reld.** Campbell *v.* Commercial Banking Co. of Sydney, Commercial Banking Co. of Sydney *v.* Campbell (1879), 40 L. T. 137; Huth *v.* Lamport (1886), 16 Q. B. D. 735. *Generally*, **Reld.** The Felix (1868), L. R. 2 A. & E. 273; The Princess Royal (1870), L. R. 3 A. & E. 41; The Madge Wildfire, Simpson *v.* Blues (1872), 41 L. J. C. P. 121.

**1674. Construed according to plain meaning—To men of sense & understanding.**]—CROOCKEWIT *v.* FLETCHER, No. 1870, *post.*

**1675. —— To fair & reasonable men.**]—DAHL *v.* NELSON, DONKIN & Co., No. 3471, *post.*

**1676. Ambiguous words—Construed in favour of shipper—Exceptions for benefit of shipowner.**]—TAYLOR *v.* LIVERPOOL & GREAT WESTERN STEAM CO., No. 2638, *post.*

**1677. Application of maxim expressio unius exclusio alterius.**]—WADE & SONS CO., LTD. *v.* COCKERLINE & Co., No. 2730, *post.*

(*b*) *Application of ejusdem generis Rule.*

*See, generally*, DEEDS, Vol. XVII., pp. 273–276, Nos. 882–903.

**1678. Application to exempted causes of damage—"Or otherwise."**]—A bill of lading contained the following amongst other, exemptions from the shipowner's liability for injury to cargo: "Negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise, loss or damage arising from rain, storage or contact with other goods being excepted, & the ship not being liable for any consequence of the causes herein excepted, however caused or originated." The shipper's goods, after being placed on board, were injured by reason of persons, for whose acts the shipowner was responsible, negligently exposing them to rain & contact with other wet goods:—*Held:* the words "or otherwise" in the bill of lading referred to negligence in bringing about excepted loss or damage other than loss or damage caused in negligently navigating the ship, & the shipowner was not liable.—NORMAN *v.* BINNINGTON (1890), 25 Q. B. D. 475; 59 L. J. Q. B. 490; 63 L. T. 108; 6 T. L. R. 418; 6 Asp. M. L. C. 528, D. C.

*Annotations:*—**Consd.** De Clermont & Donner *v.* General Steam Navigation Co. (1891), 7 T. L. R. 187. **Dbtd.** Baerselman *v.* Bailey, [1895] 2 Q. B. 301. **Reld.** S.S. Knutsford *v.* Tillmanns (1908), 99 L. T. 399.

**1679.** —— ——.]—BAERSELMAN *v.* BAILEY, No. 2703, *post.*

**1680. Application to exempted causes of delay—"Other causes beyond charterer's control."**]—A ship was chartered to proceed to Batoum, & there load with oil from a named factory, & at a specified rate per day. The charterparty excepted among other things "strikes, lock outs accidents to railway" & also "other causes beyond charterer's control." Oil is brought to Batoum by a railway which was injured by floods so that no oil could be sent down & the workmen of the factory were discharged, there being no employment for them. Subsequently to the arrival of the ship in port the railway was repaired, & oil arrived in sufficient quantity to load her; but there was delay in doing so because the workmen who had been discharged could not be got together in sufficient numbers, & such men as were there were employed in loading other vessels according to the order of their arrival, as was the practice of shippers at that port. On a claim for damages for detention of the ship:—*Held:* the general clause excepting "other causes beyond charterer's control" referred to matters *ejusdem generis* with the antecedent exceptions & the delay in loading the ship after the arrival of the oil could not be attributed to accident to the railway, or to anything *ejusdem generis* with a lock out which was confined to the dismissal of workmen arising out of a trade dispute.—*Re* RICHARDSONS & SAMUEL (M.) & Co., [1898] 1 Q. B. 261; 66 L. J. Q. B. 868; 77 L. T. 479; 14 T. L. R. 5; 8 Asp. M. L. C. 330; 3 Com. Cas. 79, C. A.

*Annotations:*—**Consd.** *Re* Allison & Richards (1903), 20 T. L. R. 29; S.S. Knutsford *v.* Tillmanns (1908), 99 L. T. 399. **Apld.** Thorman *v.* Dowgate S.S. Co., [1910] 1 K. B. 410. **Consd.** S.S. Magnhild *v.* McIntyre, [1920] 3 K. B. 321; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185. **Reld.** The Torbryan (1903), 9 Com. Cas. 1; Herman *v.* Morris (1919), 35 T. L. R. 574; Jones *v.* Oceanic Steam Navigation Co., [1924] 2 K. B. 730; Bunge y Born Co. *v.* Brightman, [1925] A. C. 799.

**1681.** —— ——.] — *Re* ALLISON & Co. & RICHARDS (1904), 20 T. L. R. 584, C. A.

*Annotation:*—**Reld.** Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185.

**1682.** —— —— **"Whatsoever."**] — By a charterparty the parties exempted each other from all liability arising from "frosts, floods, strikes . . . & any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo":—*Held:* upon the natural & true construction of the clause, the parties, by inserting the words "of what kind soever," intended to exclude the doctrine or rule of *ejusdem generis*, & the charterers were not liable for delay in loading caused by a block of other ships at the loading port.

"I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the *ejusdem generis* system of construction, because it seems to me that both in law, & also as matter of literary criticism, it is perfectly sound—that is to say, that where there are specific specimens given of what are intended, a deduction is to be made from them applicable to other matters. I base my judgment solely upon this: the parties, I think, have realised, or at least may well be held to have realised, the applicability of that rule to such contracts & they insert these words "of what kind soever" simply for the purpose of excluding (LORD ROBERTSON). —LARSEN *v.* SYLVESTER & Co., [1908] A. C. 295; 77 L. J. K. B. 993; 99 L. T. 94; 24 T. L. R. 640; 11 Asp. M. L. C. 78; 13 Com. Cas. 328, H. L.

*Annotations:*—**Consd.** Leonis S.S. Co. *v.* Rank (1908), 99 L. T. 513. **Distd.** Thorman *v.* Dowgate S.S. Co., [1910] 1 K. B. 410. **Apld.** France, Fenwick *v.* Spackman (1912), 108 L. T. 371. **Consd.** S.S. Magnhild *v.* McIntyre, [1920] 3 K. B. 321. **Reld.** *Ite* Layard, Layard *v.* Bessborough (1915), 85 L. J. Ch. 505; Herman *v.* Morris (1919), 35 T. L. R. 574; Diamond Alkali Export Corpn. *v.* Fl. Bourgeois, [1921] 3 K. B. 443; Jones *v.* Oceanic Steam Navigation Co., [1924] 2 K. B. 730. **Mentd.** Pallin *v.* Northern Employers' Mutual Indemnity Co., [1925] 2 K. B. 73.

**1683.** —— —— ——.]—FRANCE, FENWICK & Co., LTD. *v.* SPACKMAN (PHILIP) & SONS, No. 2836, *post.*

**1684.** —— —— **"Cause or accident."**] — A charterparty contained the following clause: "In case of strikes, lock outs, civil commotions, or any other causes or accidents beyond the control of the consignees, which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage." When the steamer arrived at the port her discharge was delayed on account of shortage of labour in consequence of an outbreak of plague followed by

certain sanitary precautions:—*Held:* the delay was not occasioned by a cause or accident, *ejusdem generis* with strikes, lock outs, or civil commotions.—MUDIE & Co. *v.* STRICK (1909), 100 L. T. 701; 25 T. L. R. 453; 53 Sol. Jo. 400; 11 Asp. M. L. C. 235; 14 Com. Cas. 135.

*Annotation:*—**Refd.** S.S. Magnhild *v.* McIntyre (1920), 124 L. T. 160.

**1685.** —— ——.]—A ship was chartered to proceed to the Alexandra Dock at Hull & there load a cargo of coal in one hundred & twenty hours on conditions of usual colliery guarantee. The colliery guarantee excepted from the loading time Sundays, holidays, strikes, frosts or storms, any accidents stopping the working, leading, or shipping of the cargo, restrictions or suspensions of labour, lock outs, delay on the part of the railway co. either in supplying waggons or leading the coals, "or any other cause beyond the charterer's control." The ship arrived in the dock & gave notice of readiness to load on July 23, but owing to the presence of other vessels which had previously arrived & were waiting to load, the turn of the ship to come under a loading tip was not reached until Aug. 1. On a claim by the owners against the charterer for demurrage:—*Held:* the lay hours commenced to run on the arrival of the ship in dock; the words "any other cause beyond the charterer's control" must be construed as referring to matters *ejusdem generis* with the antecedent exceptions; the cause of the delay, namely, the presence of other ships in the dock, was not a matter *ejusdem generis* with those exceptions, & the charterer was not protected by the exceptions clause & was liable for demurrage.—THORMAN *v.* DOWGATE S.S. Co., LTD., [1910] 1 K. B. 410; 79 L. J. K. B. 287; 102 L. T. 242; 11 Asp. M. L. C. 481; 15 Com. Cas. 67.

*Annotations:*—**Consd.** France, Fenwick *v.* Spackman (1912), 108 L. T. 371. **Apld.** Jenkins *v.* L. Walford (London) (1917), 87 L. J. K. B. 136. **Consd.** S.S. Magnhild *v.* McIntyre, [1920] 3 K. B. 321; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Akt. Frank *v.* Namaqua Copper Co. (1920), 90 L. J. K. B. 36; Jones *v.* Oceanic Steam Navigation Co., [1924] 2 K. B. 730.

**1686.** —— ——.]—NORTHFIELD S.S. Co. *v.* COMPAGNIE L'UNION DES GAZ, No. 3944, *post.*

**1687.** —— ——.]—JENKINS *v.* L. WALFORD (LONDON), LTD., No. 2742, *post.*

**1688.** —— ——.]—Defts. chartered a vessel from pltfs. to convey a cargo of coal to Spezia. The charter provided in a printed clause that in case of strikes, lock outs, civil commotion, or any other causes beyond the control of the consignees which should delay discharging such time should not count in the unloading The charter also contained a written clause whereby the charterers guaranteed, notwithstanding congestion caused by the European war, to pay demurrage if a certain number of tons were not discharged per day. The unloading was delayed by congestion owing to the war & the owners brought an action against the charterers for demurrage:—*Held:* the written clause overruled the printed clause, & even if it did not the rule of *ejusdem generis* prevented the "other causes" mentioned in the printed clause from including delay caused by too much business, & pltfs. were entitled to recover.—HADJIPATERAS *v.* WEIGALL (S.) & Co. (1918), 34 T. L. R. 360.

**1689.** —— —— **Meaning of "etcetera."**]—A charterparty contained the following clauses: "Cargo to be loaded & discharged in fourteen weather working days reversible. Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged." But for a strike over which the charterers had no control the vessel would have been discharged within the lay days allowed by the charter:—*Held:* the governing words were "causes over which the charterers have no control," & the causes mentioned were simply enumerated as instances, & as a strike was a cause over which the charterers had no control they were not liable for demurrage in respect of the period of detention caused by the strike.—AMBATIELOS *v.* ANTON JURGENS MARGARINE WORKS, [1923] A. C. 175; 92 L. J. K. B. 306; 128 L. T. 417; 39 T. L. R. 106; 67 Sol. Jo. 167; 16 Asp. M. L. C. 28; 28 Com. Cas. 285, H. L.

**1690.** ——.]—By a charterparty the sailing ship *Frank*, belonging to pltfs., was chartered to defts., in order to load a cargo at Swansea for carriage to Port Nolloth, South Africa. It was provided (*inter alia*) that the vessel was to be unloaded at an average rate per working day, otherwise charterer to pay demurrage, "except in case of strikes, riots, lockouts, labour disturbances, trade disputes, accidents, or other hindrances beyond charterers' control." Shortly before the arrival of the vessel at Port Nolloth British territory near the port was invaded by the Germans. The Govt. took possession of the port for military purposes; martial law was declared, & all appliances for unloading vessels were under military control, & not available for dealing with vessels carrying commercial cargoes, In an action by the owners claiming damages for demurrage, the charterers contended that they were protected by the terms of the charterparty, as the causes of the demurrage were within the words "accident, or other hindrance beyond charterers' control" in the exception clause:—*Held:* the demurrage, being due to the conscious & intentional acts of the lawfully authorised officer placed in charge of the port, for the better conduct of the war, was not due to "accident"; by the *ejusdem generis* rule, the words "or other hindrance" related only to what could be described as accident; & the charterers were not protected.—AKT. FRANK *v.* NAMAQUA COPPER CO., LTD. (1920), 90 L. J. K. B. 36; 123 L. T. 523; 36 T. L. R. 438; 15 Asp. M. L. C. 20; 25 Com. Cas. 212.

*Annotations:*—**Refd.** Akt. General Gordon *v.* Cape Copper Co. (1921), 26 Com. Cas. 289; Adelaide S.S. Co. *v.* R. (1924), 93 L. J. K. B. 871.

**1691.** —— **"Or other accident."**]—A steamship was chartered for six months at a certain rate of hire per month & was to be employed between safe ports within defined limits. Clause 12 of the charterparty provided that "in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer & lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost & expenses incurred, other than repairs, shall be for charterers' account." During the currency of the charterparty the steamer was ordered to discharge at Marans, which was situated up a river. While proceeding up the river to that port she got aground on soft clay, & remained aground for eight days. She was damaged by

*Sect.* 1.—*The contract of carriage: Sub-sect.* 3, *C.* (*b*), *D. & E.*]

the occurrence, & the repairs occupied a substantial time. Marans was a safe port, & there was no bar in the harbour, river, or port. In an arbn. between the owners & charterers the arbitrator awarded that hire ceased (*a*) during the time the steamer was aground, & (*b*) during the time occupied while the damage to the steamer consequent upon the grounding was being repaired:—*Held:* (1) the *ejusdem generis* rule could not be applied to the words "or other accident" in the first part of clause 12, & those words covered any accident to the steamer preventing her working for more than twenty-four consecutive hours; (2) the words "where there are bars," in the second part of clause 12, which was a qualification of the first part, applied only to "ports," & not to shallow harbours or rivers, & as the grounding which caused the detention took place when the steamer was trading to a river, the time so lost was for charterers' account.—S.S. MAGNHILD *v.* MCINTYRE BROTHERS & Co., [1921] 2 K. B. 97; 90 L. J. K. B. 527; 124 L. T. 771; 37 T. L. R. 413; 15 Asp. M. L. C. 230; 26 Com. Cas. 185, C. A.

*Annotation:—As to* (1) **Apld.** Ambatielos *v.* Anton Jurgens Margarine Works (1922), 38 T. L. R. 294.

**1692. Application to exempted causes of non-delivery—"Or any other cause."**]—S.S. KNUTSFORD, LTD. *v.* TILLMANNS & Co., No. 3504, *post.*

*D. Admission of Extrinsic Evidence.*

*See, generally,* DEEDS, Vol. XVII., pp. 302 *et seq.*

**1693. To vary terms of contract—Charterparty under seal—Subsequent parol agreement—When inconsistent with charterparty.**]—LESLIE *v.* DE LA TORRE (1795), cited 12 East, at p. 584; 104 E. R. 228.

*Annotations:*—**Refd.** Thomson *v.* Brown (1817), 1 Moore, C. P. 358; Nash *v.* Armstrong (1861), 10 C. B. N. S. 259.

**1694.** —— —— —— ——.]—An obligation by deed cannot be altered but by deed; therefore, in an action of covenant on a charterparty in which pltf. covenanted to sail from London to Gibraltar, & there to deliver an outward cargo, & receive from the agents of deft., as freighter, at Gibraltar, or at Malaga, Cadiz, or Seville, as should be ordered by the agents at Gibraltar, such goods as the agents might load on board for the homeward cargo, & that the vessel should return direct to the port of London, & deliver the homeward cargo, the agents of deft. at Gibraltar, having ordered pltf. to proceed to Cadiz, at which place other agents directed by parol that the homeward cargo should be delivered at Liverpool instead of London:—*Held:* pltf. having delivered the cargo at Liverpool, & declared in an action of covenant on the charterparty, could not recover the freight, the substitution by parol of Liverpool for London, being inconsistent with the covenant contained in the charterparty.—THOMPSON *v.* BROWN (1817), 7 Taunt. 656; 1 Moore, C. P. 358; 129 E. R. 261.

*Annotations:*—**Consd.** Cordwent *v.* Hunt (1818), 8 Taunt. 596. **Mentd.** Sellers *v.* Bickford (1817), 8 Taunt. 31; West *v.* Blakeway (1841), 9 Dowl. 846.

**1695.** —— —— —— **When not inconsistent with charterparty.**]—Pltfs. having contracted by charterparty sealed to let a ship, then in the Thames, to freight to defts. for eight months, to commence from the day of her sailing from Gravesend, on the voyage there stated, & having covenanted that she should sail from the Thames to any British port in the English Channel, there to load such goods as the freighters should tender, & sail to the West Indies, & bring back a return cargo to London; afterwards agreed by parol with defts. that the ship, instead of loading at some port in the Channel, should load in the Thames, & that the freight should commence from her entry outwards at the custom house:—*Held:* this subsequent parol contract was distinct from & not inconsistent with the contract by deed, being anterior to it in point of time & execution, & might therefore be enforced by action of *assumpsit.*—WHITE *v.* PARKIN (1810), 12 East, 578; 104 E. R. 225.

*Annotations:*—**Refd.** Thomson *v.* Brown (1817), 1 Moore, C. P. 358; Fletcher *v.* Gillespie (1826), 4 L. J. O. S. C. P. 202. **Mentd.** Lindley *v.* Lacey (1864), 13 W. R. 80.

**1696.** —— **Bill of lading.**]—LEDUC *v.* WARD, No. 3172, *post.*

**1697. To construe terms of contract—Meaning of "privilege."**]—By the contract between the owners & captain of an India ship the latter is to receive a certain compensation in lieu of privilege & primage; a conversation between the parties previous to the contract is evidence to show in what sense they intended to use the word privilege.—BIRCH *v.* DEPEYSTER (1816), 4 Camp. 385; 1 Stark. 210; 171 E. R. 449, N. P.

*Annotations:*—**Refd.** Luckie *v.* Bushby (1853), 13 C. B. 864. **Mentd.** Crampton *v.* Walker (1860), 3 E. & E. 321.

**1698.** —— **Evidence of broker—As to statement made at time of execution of charterparty.**]—If one construction of a charterparty be much in favour of one of the parties, & an opposite construction equally in favour of the other, the evidence of the broker through whom it is entered into, as to what was said at the time of its execution, is of too dangerous a nature to be much relied on.—TAYLOR *v.* BRIGGS (1827), 2 C. & P. 525; Mood. & M. 28; 172 E. R. 238, N. P.

**1699.** —— **Meaning of "forthwith."**]—On a written agreement for the hire of a vessel to be made ready to take on board "forthwith" evidence is inadmissible to show that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is admissible to show how soon she might reasonably be expected to be ready.—SIMPSON *v.* HENDERSON (1829), Mood. & M. 300, N. P.

**1700.** —— **Prior charterparty.**]—The master of a ship entered into a charterparty with B., by which a lump sum of £240 for freight, & a gratuity of 10 per cent. to himself was to be paid; he afterwards entered into a second charterparty with A., under which freight was to be paid by weight. In the second charterparty no notice was taken of the first, but a memorandum was written at the foot of the second charterparty, signed by the master only, & referring to the sums of £240 & £24 as due for freight & gratuity. A. denied all liability under the first charterparty & memorandum:—*Held:* evidence was not admissible to vary the instruments & as A. was not named in the first charterparty, he was liable to pay the freight under the second only, which was less in

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**PART VII. SECT. 1, SUB-SECT. 3.—D.**

q. *To vary terms of contract—Contemporaneous agreement for conditional suspension of operation of charterparty.*]—WATTERS *v.* MILLIGAN (1883), 22 N. B. R. 622.—**CAN.**

r. *To construe terms of contract—Ambiguous terms.*]—DYMENT *v.* NORTHERN & NORTH-WESTERN RY. CO. (1886), 11 O. R. 343.—**CAN.**

t. —— *Meaning of words.*]—Parol evidence will be allowed to prove the usual interpretation to be given to certain words in a charterparty, when without such evidence these words would not have a plain meaning.—CAIRD *v.* WEBSTER (1883), 9 Q. L. R. 178.—**CAN.**

a. —— *Evidence of subsequent deck cargo agreement.*]—In terms in a

amount than the lump sum.—THE LADY DOUGLASS (1849), 4 L. T. 656; 13 Jur. 521.

**1701. —— Meaning of "freight."**] — The words "freight payable in London" in a bill of lading define the place only, not the time, of payment.

Evidence is not admissible to explain the meaning of the word "freight" which is not an ambiguous term.—KRALL *v.* BURNETT (1877), 25 W. R. 305, D. C.

**1702. To show intention of parties—Where clause ambiguous.**]—By charterparty it was agreed between pltfs., shipowners, & defts., charterers, that pltfs.' steamer, then trading, but "expected ready to load about Apr. 10, should, "with all convenient speed, sail & proceed to defts.' loading berth, North Dock, Swansea, & there load, always afloat, a full & complete cargo . . . lighterage, if any necessary, to enable steamer to complete loading at North Dock, Swansea, to be at merchants' risk & expense."

The vessel was delayed by stress of weather on her inward voyage, & did not arrive at the North Dock, Swansea, until Apr. 30, at which time the tides were taking off. Though the vessel could have completed her loading "always afloat" in the North Dock, the owners of the vessel, before all the cargo had been taken in, &, to prevent her being delayed a week before she would be able again to get over the sill of the dock, removed her to another dock, & there took in the remainder of the cargo.

In an action by the shipowners for freight admittedly due, the charterers, as defts., counterclaimed for (*inter alia*) the cost of the carriage of the remainder of the cargo to the other dock:—*Held:* (1) the clause as to lighterage was ambiguous, & on extrinsic evidence being admitted showing that the intention of the parties was that, if the steamer was not able to complete her loading at the North Dock, defts. were to bear the expense of completing the loading elsewhere; (2) the shipowners were liable for the cost of the carriage to the other dock, as the vessel could, within the meaning of the charterparty, have been loaded in the North Dock, always afloat, & the fear of the detention of the vessel did not justify them in removing her.—THE CURFEW, [1891] P. 131; 60 L. J. P. 53; 64 L. T. 330; 39 W. R. 367; 7 T. L. R. 225; 7 Asp. M. L. C. 29, D. C.

*Annotation:*—**Refd.** The Nita, [1892] P. 411.

**1703. To prove authority of agent — Agent signing "by telegraphic authority."**]—A firm of shipbrokers signed a charterparty in the form "by telegraphic authority" of the charterer "as agent." Owing to a mistake made by the officials in its transmission, the rate of freight offered by the charterer had been misrepresented in the telegram which the shipbrokers had received from him. In an action brought by the owners of the ship against the shipbrokers for breach of warranty of authority:—*Held:* evidence of persons engaged in the business was admissible to explain the effect of the form of signature, such evidence showed it was commonly adopted in order to negative the implication of any further warranty by the agent than that he had received a telegram, which, if correct, authorised such a charter as that which he was signing & the shipbrokers were therefore not liable.—LILLY, WILSON & Co. *v.* SMALES, EELES & Co., [1892] 1 Q. B. 456; 40 W. R. 544; 8 T. L. R. 410.

**Evidence of custom.**]—*See* Sect. 15, sub-sect. 3, *post.*

**To prove that party contracted as agent.**]—*See* Nos. 1768–1772, 1775, *post.*

**To prove that party contracted as principal.**]—*See* No. 1775, *post.*

### *E. Printed Words.*

*See, generally,* DEEDS, Vol. XVII., p. 357, Nos. 1673–1678.

**1704. How far binding.**]—A charterparty, made in London, between pltf., shipowner, & defts. "as agents to Samuel Ferguson, of Anamaboe, merchants & charterers," was signed "for D.," pltf., "owner, H. G. as agent. For Samuel Ferguson, Esq., of Anamaboe, G. brothers," defts., "as agents." The charterparty was partly written & partly printed, the words "merchants" & "charterers" being printed, & in the plural, throughout it. Defts. merchants in London, acted in England as agents for Ferguson, a native of Africa, & residing at Anamaboe in that country. By the charterparty, pltf.'s ship was chartered for a voyage from London to Africa & back, & freight was made payable on delivery of the return cargo:—*Held:* defts. were not personally liable, as principals, on the charterparty.—DESLANDES *v.* GREGORY (1860), 2 E. & E. 610; 30 L. J. Q. B. 36; 2 L. T. 634; 6 Jur. N. S. 651; 8 W. R. 585; 121 E. R. 230, Ex. Ch.

*Annotations:*—**Refd.** Pearson *v.* Goschen (1864), 10 L. T. 758; Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482; Universal Steam Navigation Co. *v.* McKelvie, [1923] A. C. 492.

**1705.** ——.]—By a charterparty made between pltfs. & deft., master of an Italian vessel, it was agreed that the ship should load a cargo at Glasgow & proceed therewith to San Francisco, where she should be consigned to the charterers' agents "inwards & outwards, paying the usual commissions," . . . & so end the voyage. A final printed clause contained a stipulation that pltfs.' Glasgow agents should report the ship at the Custom House "on her return to her port of discharge in the United Kingdom." The vessel was duly consigned to the charterers' agents at San Francisco, who, on her arrival there, transacted the "inwards" business, & received the usual commission on the "inwards" freight. They tendered to deft. a homeward cargo which he declined, but he offered to take a cargo to the Mexican coast, whither he was going in order to fulfil another charter. A cargo for that destination, however, could not be obtained, & the ship sailed in ballast to Mexico & carried thence a cargo to Europe in pursuance of the other charterparty, with which pltfs. had no concern. Pltfs. having brought an action for breach of contract to recover, as damages, the outwards commission which would have been earned if deft. had accepted a homeward cargo at San Francisco, & brought it to Europe, as pltfs. contended he was bound to do:—*Held:* no such obligation was created by the above-mentioned clauses of the charterparty, which merely amounted to a proviso that, if the ship were engaged on a voyage "outwards," then the agents should be further employed, & should be paid commission on the "outwards" freight.—CROSS *v.* PAGLIANO (1870), L. R. 6 Exch. 9; 40

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charterparty it was held that the same did not preclude the parties from making a subsequent special arrangement as to deck cargo, but on the contrary rather to contemplate the possibility of such an arrangement. Parol proof of such arrangement was allowed as merely explanatory, not contradictory, of the charterparty itself.—MERROW & FELL *v.* HUTCHINSON & BROWN (1873), 45 Sc. Jur. 334; 10 Sc. L. R. 338.—SCOT.

*Sect. 1.—The contract of carriage: Sub-sect. 3, E., F. & G. (a).*]

L. J. Ex. 18; 23 L. T. 420; 19 W. R. 159; 3 Mar. L. C. 492.

*Annotation:*—**Refd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522.

**1706. —— Unintentional omission to strike out—Effect of knowledge of impossibility of performance.**]—Although a clause, by way of condition or warranty, contained in a charterparty, cannot be got rid of by reason of its being part of a printed form, not adverted to expressly by the parties, & intended by one of them to be omitted; yet, if the other party was aware at the time that it could not be complied with, & after showing that it was broken, treated the charter as subsisting, it will afford him no defence to an action on the charter.—DIXON *v.* HERIOT (1862), 2 F. & F. 760.

*Annotation:*—**Refd.** Bentsen *v.* Taylor (1893), 42 W. R. 8.

**1707. —— —— Rectification.**]—Action by charterer on a charterparty. Defence, that the charterparty was made between deft. & the T. co., & not pltf. Reply, that the agreement was between pltf. & deft.; that in drawing up the charterparty one of the T. co.'s printed forms was used, on which the name of the T. co. appeared as charterers; that by the mistake of pltf. & deft. the T. co.'s name was omitted to be struck out, & remained instead of pltf.'s name; that the charterparty was signed by pltf. & deft., & it was intended & agreed that pltf. should be liable & entitled under it:—*Held:* on demurrer it was unnecessary that the charterpar y should be rectified, & the reply was good.—BRESLAUER *v.* BARWICK (1876), 36 L. T. 52; 24 W. R. 901; 3 Asp. M. L. C. 355; 3 Char. Pr. Cas. 56.

**1708. —— When inconsistent with specific undertaking.**]—By a bill of lading made in England by the master of an English ship certain packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal" . . . "unto the Grand Trunk Railway co., & by them to be forwarded thence per railway to the station nearest to Toronto, & at the aforesaid station delivered to the consignees or to their assigns." The instrument contained, in addition to a long list of excepted special risks, whether arising from negligence or otherwise, the following condition: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." In an action in the Superior Ct. of Lower Canada against the shipowner for the value of damage done to the said packages during the voyage, it appeared that the same were landed, placed in certain shipping sheds, removed therefrom to railway freight sheds, in Montreal, & finally delivered to the consignees in Toronto. No notice of damage was given until thirteen days after the delivery was completed:—*Held:* the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages, conducted with reasonable care & skill at the place of removal, have been discovered. The bill of lading in this case was a contract to be governed & interpreted by English law, & therefore no substantive defence arising from delay in making the claim could be made apart from the express condition contained therein, notwithstanding the provisions of Article 1680 of the Canadian Civil Code.

Where a cargo of grain is found to be heated, a damage which may arise either from its bad condition when shipped, or from some cause existing in the ship, it may be essential to prove the state of the cargo before its shipment. But where, as in this case . . . noxious substances, calculated to produce the peculiar damage actually present, are found to have been used in close proximity to the tea cause & effect are so nearly brought together that a conclusion can be reached without proof of its condition at the time of shipment (SIR MONTAGUE SMITH).

The clause, "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed & stored at the expense of the consignee, & at his risk" is no doubt opposed to the above construction. . . . It is evidently one of the printed clauses & cannot control the specific undertaking to forward the goods to Toronto (SIR MONTAGUE SMITH).—MOORE *v.* HARRIS (1876), 1 App. Cas. 318; 45 L. J. P. C. 55; 34 L. T. 519; 24 W. R. 887; 3 Asp. M. L. C. 173, P. C.

*Annotation:*—**Refd.** Wiener *v.* Wilsons & Furness-Leyland Line (1910), 11 Asp. M. L. C. 413.

**1709. —— When inconsistent with written words—Statement as to weight of cargo.**]—Defts. were charterers of a steamship engaged in the Mediterranean trade, & had ship's agents or consignees at the ports of call. It is the custom for a ship's agent or consignee to sign bills of lading instead of the master, & no difference is recognised in trade usage between the efficacy of his signature & that of the master. Defts.' agents at Genoa signed a bill of lading for manganese, shipped in bulk & not weighed at the time of shipment, which described the manganese as of a certain weight, but contained in print the words, "weight, contents, & value unknown." Pltf. was assignee for full value of this bill, & the whole of the manganese shipped was, on the arrival of the ship, delivered to him, but was found to be short of the weight stated in the bill. In an action brought by him to recover damages for non-delivery of the full weight:—*Held:* (1) the printed words controlled the statement of weight; (2) defts. were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped.

Bills of Lading Act, 1855 (c. 111), s. 3, applies only to the person actually signing the bill of lading.—JESSEL *v.* BATH (1867), L. R. 2 Exch. 267; 36 L. J. Ex. 149; 15 W. R. 1041.

*Annotations:*—*As to* (1) **Followed.** Lebeau *v.* General Steam Navigation Co. (1872), L. R. 8 C. P. 88. **Consd.** Hogarth Shipping Co. *v.* Blyth Greene, Jourdain, [1917] 2 K. B. 534. **Refd.** New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664. *As to* (2) **Explained.** Brown *v.* Powell Coal Co. (1875), L. R. 10 C. P. 562. **Followed.** Thorman *v.* Burt, Boulton (1886), 54 L. T. 349. *Generally,* **Refd.** The Ida (1873), 29 L. T. 623, n.; Parsons *v.* New Zealand Shipping Co., [1900] 1 Q. B. 714.

**1710. —— —— Exceptions from liability for damage.**]—BRISCOE & Co. *v.* POWELL & Co., No. 2686, *post.*

**1711. —— —— Stipulation as to time for loading.**]—FRANCE, FENWICK & Co., LTD. *v.* SPACKMAN (PHILIP) & SONS, No. 2836, *post.*

**1712. —— —— ——.**]—A charterparty provided that a cargo of pit props was "to be loaded *at the rate of* 125 *fathoms daily* & discharged *at the rate of* 125 *fathoms daily reversible* with customary steamship dispatch, as fast as the steamer can receive & deliver, during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays, unless used, in both loading & discharging excepted." The words in italics were interlined in writing: the rest of the clause was printed. "Reversible" signified that

any time saved in loading might be added to the time allowed for discharging & *vice versa*. The daily rate was equivalent to thirteen days for loading & thirteen days for discharging.

When the ship arrived at the port of loading the master of the ship entered into an agreement with the shipper, who was also the vendor, of the cargo that an allowance for "dispatch money" should be made to the shipper for each day saved in loading. The ship was loaded in nine days, & accordingly dispatch money for four days was deducted from the freight. In respect of this purchase of four days by the master the bill of lading contained the statement "thirteen days used for loading." This bill was indorsed to the charterers, & they in knowledge of the transaction between the master & the shipper took delivery of the cargo under the bill. The ship took seventeen & a half days in discharging the cargo, allowing for Sundays & holidays. By the custom of [Newport] the port of discharge, the discharge of pit props was suspended during wet weather & during half of each Saturday, & if the custom of the port applied the ship was discharged in thirteen days. In an action for demurrage incurred in the discharge of the cargo:—*Held:* (1) the parties intended to contract on the basis of a fixed number of lay days & the reference to the custom of the port was inconsistent with that intention, & consequently the time during which the weather was wet & the half of each Saturday could not be deducted; (2) the shipper had no authority from the charterers to alter the charter-party by selling the four days saved in the loading to the ship, & the charterers were not estopped by the false statement in the bill of lading from claiming on the discharge under the word "reversible" the four days saved in the loading; consequently they were liable for demurrage for one half-day only.—LOVE & STEWART, LTD. *v.* ROWTOR S.S. CO., LTD., [1916] 2 A. C. 527; 86 L. J. P. C. 1; 115 L. T. 415; 13 Asp. M. L. C. 500, H. L.

*Annotation:—As to* (1) **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**1713. —— —— Provision for payment of demurrage.**]—By a charterparty the cargo was "to be received from alongside free of expense & risk to the ship according to the customs & laws at the port of destination, with customary dispatch, within thirty-five weather working days after receipt by consignees of captain's written notice that he is ready to discharge. . . . Demurrage in unloading, if any, to be paid by consignees at the rate of 3*d.* per net registered ton per running day, except in cases of unavoidable accidents or hindrances beyond the consignees' control." The words "within thirty-five weather working days" were written in ink, the rest of the clause being in print. At the port of discharge the ship was prevented from unloading within thirty-five days by hindrances beyond their control, & was detained fifty-two days beyond. Upon a claim for fifty-two days' demurrage:—*Held:* the consignees were not liable.

Parties who altered a printed contract must be presumed to give as much effect to the printed as to the written words which might be inserted (LORD HALSBURY, C.).—AKT. ARGENTINA *v.* VON LAER (1903), 20 T. L. R. 9, C. A.

**1714. —— —— ——.**] — HADJIPATERAS *v.* WEIGALL (S.) & Co., No. 1688, *ante*.

**1715. —— When inconsistent with intention of parties.**]—Oranges were shipped on board a steamship under a bill of lading which stated that the ship was then "lying in the port of Malaga, & bound for Liverpool, with liberty to proceed to & stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain & Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The bill of lading contained a clause whereby the shipper expressly agreed to all its stipulations whether written or printed. The deviation clause was printed with the name of the port of shipment left blank & filled up in writing.

The ship left Malaga for a port on the East coast of Spain & out of her course for Liverpool, then returned & made for Liverpool, where the oranges were delivered in a damaged condition owing to the delay. In an action by the shipper against the shipowner for damages for breach of contract:—*Held:* the printed clause must not be construed so as to defeat the main object & intent of the contract, which was to carry the oranges from Malaga to Liverpool; the liberty must be restricted to ports which were in the course of the voyage; the deviation in question was therefore not justified, & the shipowner was liable.—GLYNN *v.* MARGETSON & Co., [1893] A. C. 351; 62 L. J. Q. B. 466; 69 L. T. 1; 9 T. L. R. 437; 7 Asp. M. L. C. 366; 1 R. 193, H. L.; *affg.* S. C. *sub nom.* MARGETSON *v.* GLYNN, [1892] 1 Q. B. 337, C. A.

*Annotations:*—**Expld.** Evans *v.* Cunard S.S. Co. (1902), 18 T. L. R. 374. **Consd.** Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783. **Apld.** A.-G. *v.* Smith (1918), 87 L. J. K. B. 1045. **Refd.** Burstall *v.* Grimsdale (1906), 11 Com. Cas. 280; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781; *Re* Sutro & Hellbut, Symons, [1917] 2 K. B. 348; United States Shipping Board *v.* Bunge y Born Soc. (1925), 134 L. T. 303; Cunard S.S. Co. *v.* Buerger, [1927] A. C. 1. **Mentd.** Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331; Ruffy-Arnell, etc., Co. *v.* R., [1922] 1 K. B. 599.

**1716. —— Application to particular circumstances.**]—GRANT & Co. *v.* COVERDALE, TODD & Co., No. 2735, *post*.

**1717. Effect of striking out—Construction of charterparty.**] — In construing an ambiguous charterparty, the fact that certain words, which were in the printed form of the charterparty, have been struck out is a matter which may be taken into consideration.—ROWLAND & MARWOOD'S S.S. CO., LTD. *v.* NILSON SONS & Co., LTD. (1897), 13 T. L. R. 459; 41 Sol. Jo. 575; 2 Com. Cas. 198.

*F. Conflict of Laws.*

*See, generally,* CONFLICT OF LAWS, Vol. XI., pp. 387 *et seq.*

**Law governing contract.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 389, 390, 396–398, Nos. 645, 646, 690–700.

—— **Jurisdiction of Admiralty Court.**]—*See* ADMIRALTY, Vol. I., pp. 141, 142, 147, 148, Nos. 494, 495, 543–548.

*G. Particular Words and Phrases.*

*(a) In General.*

**1718. Primage & average.**]—How a covenant to pay "primage & average accustomed" shall be construed.—MARKHAM *v.* DUTRA (1719), 11 Mod. Rep. 305; 88 E. R. 1055.

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**PART VII. SECT. 1, SUB-SECT. 3.—G. (a).**

**b. "*Generally & without exception*" —*Indemnity as to claim or time.*]**—Covenant to indemnify "generally & without exception" against a charter-party, which defts. had assumed:—*Held:* under the circumstances to mean rather without exception as to the description of claim, than as to time; & defts. would be liable only for moneys accruing due under it

*Sect.* 1.—*The contract of carriage: Sub-sect.* 3, *G.* (*a*), (*b*) & (*c*).]

**1719. "As soon as sentence of condemnation should have passed"—Legal sentence.**]—In covenant on a charterparty, whereby it was agreed to employ a ship of which pltf. was the captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a legal sentence, & the party who sues for the freight must aver that the ship was condemned by a ct. having competent jurisdiction.—UNWIN *v.* WOLSELEY (1787), 1 Term Rep. 674; 99 E. R. 1314.

*Annotations*:—**Mentd.** Allen *v.* Waldegrave (1818), 8 Taunt. 566; Thompson *v.* Pearce (1819), 1 Brod. & Bing. 25; Gidley *v.* Palmerston (1822), 3 Brod. & Bing. 275; Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445.

**1720. "Days"—For purpose of discharge of cargo.**]—COCHRAN *v.* RETBERG, No. 3965, *post*.

**1721. "Cargo."**]—LEWIS *v.* MARSHALL, No. 1897, *post*.

**1722. "Freight."**]—LEWIS *v.* MARSHALL, No. 1897, *post*.

**1723.** —— **"Payable in London."**]—KRALL *v.* BURNETT, No. 1701, *ante*.

**1724. Foreign words.**]—Pltf. by his declaration alleged that he engaged by charterparty to sail from Sundswall with a cargo on account of deft. to Southampton, where the voyage was to terminate, & that deft. thereby engaged to pay for freight "that freight which the captain could prove to have been the highest paid on the same passage by water when the ship passed Elsinore, but not below 90*s.* per" etc.:—*Held*: (1) this meant freight payable for the same voyage by a ship to Southampton, & it did not extend to freights payable on a passage to the same district of water, which might include London as well as Southampton; & therefore proof by the captain that higher freights than 90*s.* had been earned by vessels on the voyage from Sundswall to London, & the freights to Southampton were at that time 7*s.* 6*d.* higher than the London freights, did not prove that a higher rate than 90*s.* had been earned on the same passage by water as contemplated in the charterparty; (2) the ct. could not decide whether a particular foreign word in a charterparty was correctly translated.—GETHER *v.* CAPPER (1856), 18 C. B. 866; 25 L. J. C. P. 260; 27 L. T. O. S. 298; 2 Jur. N. S. 789; 4 W. R. 644; 139 E. R. 1613, Ex. Ch.

*Annotation*:—*Generally*, **Mentd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69.

**1725. Place of loading in case of "war."**]—AVERY *v.* BOWDEN, No. 2763, *post*.

**1726. "Addressing" of ship.**]—A memorandum in a printed form of a charterparty between two brokers, used by the charterer, "commission to be paid to charterer, to whom the vessel is to be addressed, on her return to London," the charter being only for an outward voyage, & making no mention of a homeward voyage; & the ship not having returned direct from the port of discharge, but taken a cargo elsewhere:—*Held*: (1) to require evidence that the memorandum was understood by the parties to be part of the contract, & that in mercantile usage it applied in such a case to the return cargo, & meant that the charterer should collect the freight & receive commission on it; (2) the vessel being "addressed" meant that it should be consigned to a certain party, who should transact all the business & collect the freight, for which he would be entitled to charge, by way of commission, on the gross freight.—HIBBERT *v.* OWEN (1859), 2 F. & F. 502, N. P.

**1727. "Forthwith"—In covenant to procure ship.**]—ROBERTS *v.* BRETT, No. 1648, *ante*.

**1728. "Inaccessible"—As to port of discharge.**]—S.S. KNUTSFORD, LTD. *v.* TILLMANNS & CO., No. 3504, *post*.

**1729. "Damage to cargo by improper opening of valves."**]—MENDL & CO. *v.* ROPNER & CO., No. 2708, *post*.

**1730. "Shipment."**]—MOWBRAY, ROBINSON & CO. *v.* ROSSER, No. 4440, *post*.

**1731. Construction of London Clauses—In bill of lading.**]—On the construction of a bill of lading:—*Held*: the shipowners were not entitled to collect charges under the London clauses where the ship discharged not at a quay in dock, but at a riverside wharf.—PRODUCE BROKERS CO., LTD. *v.* FURNESS, WITHY & CO., LTD. (1912), 106 L. T. 636; 28 T. L. R. 329; 12 Asp. M. L. C. 188; 17 Com. Cas. 165.

**Method of unloading cargo.**]—*See* Sub-sect. 5, D., *post*.

**In provisions relating to demurrage.**]—*See* Sect. 8, sub-sect. 3, *post*.

**Construction of negligence clause—In excepted perils.**]—*See* Sect. 4, sub-sect. 14, D., *post*.

(*b*) "*Port.*"

*Compare* INSURANCE, Vol. XXIX., p. 70, Nos. 279–287.

**1732. Commercial sense.**]—By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom." The vessel was loaded at Penarth Dock, & was towed by a steam tug seven or eight miles, bringing her out about three miles into the Bristol Channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables & she ultimately ran ashore on Penarth Beach, & the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, & had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, & the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom:—*Held*: the word "port" must be taken in its ordinary commercial sense, & as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, her being driven back into it by the weather made no difference, & the one-third of the freight was payable.—PRICE *v.* LIVINGSTONE (1882), 9 Q. B. D. 679; 53 L. J. Q. B. 118; 47 L. T. 629; 5 Asp. M. L. C. 13, C. A.

*Annotations*:—**Consd.** Garston Sailing Ship Co. *v.* Hickie (1885), 15 Q. B. D. 580. **Reld.** *Re* Goodbody & Balfour, Williamson (1899), 82 L. T. 484; Mersey Mutual Underwriting Assocn. *v.* Poland (1910), 15 Com. Cas. 205.

**1733.** —— **Not fiscal.**]—The word "port" in a charterparty is to be understood in its popular, or

during their co-partnership, & thence to the expiration of their charter by defts.—JONES *v.* WALKER (1852), 9 U. C. R. 136.—**CAN.**

c. "*Summer.*"] — Where action was brought on a contract for the delivery of timber:—*Held*: the word "summer" used in such contract meant, under the circumstances disclosed in the case, the season of navigation which begins in the commencement of May & terminates about the end of Nov., & cannot be understood as limiting the time strictly to the three months which form the season of summer, as the year is divided in the calendar.—THIBODEAU & LEE (1857), 7 L. C. R. 430.—**CAN.**

d. "*Owner's risk.*"]—BRITISH COLUMBIA CANNING CO. *v.* MCGREGOR (1913), 26 W. L. R. 18; 5 W. W. R. 543; 14 D. L. R. 555; 18 B. C. R. 663.—**CAN.**

business, or commercial sense; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes. A charterparty provided that a ship should load a cargo of coals at Cardiff, & then proceed to Bombay, the freight to be paid two-thirds in cash "ten days after the final sailing of the vessel from her last port in Great Britain," & the remainder in cash on delivery of the cargo. The ship loaded the coals in the Bute Docks, at Cardiff, &, having cleared at the custom house, started on her voyage to Bombay. She proceeded down the artificial channel leading from the Docks to the River Taff, & when about 300 yards beyond the junction of the channel with the river, she came into collision with a steamer, & was so much injured that she was compelled to return the next day to the docks for repairs:—*Held:* at the time of the collision the ship was not outside the limits of the port, in the popular, business, or commercial sense of the word; consequently, she had not finally sailed from her last port; & no freight was payable.—GARSTON SAILING SHIP CO. *v.* HICKIE (1885), 15 Q. B. D. 580; 53 L. T. 795; 1 T. L. R. 587; 5 Asp. M. L. C. 499, C. A.

*Annotations:*—**Consd.** Hunter *v.* Northern Marine Insce. (1888), 13 App. Cas. 717; *Re* Goodbody & Balfour, Williamson (1899), 82 L. T. 484. **Reld.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**1734.** —— ——.]—*Re* GOODBODY & CO. & BALFOUR, WILLIAMSON & CO., No. 3511, *post.*

**1735.** —— ——.]—HALL BROTHERS S.S. CO., LTD. *v.* PAUL (R. & W.), LTD., No. 3515, *post.*

**1736. "Liberty to proceed to any port."**]—GLYNN *v.* MARGETSON & CO., No. 1715, *ante.*

**1737. "Port of Manchester."**]—*Re* GOODBODY & CO. & BALFOUR, WILLIAMSON & CO., No. 3511, *post.*

**1738. "Usual port"—Substantial port in common use.**]—The words "usual port" in a charterparty mean one of the substantial ports in common use & do not include ports which are small & little known:—*Held:* Sharpness is a "usual port," & in view of its character, the mode of access to it, the dangers of the voyage in question, & the character of the vessel, it was also a "safe port" within a particular charterparty.—DOLLAR & CO. *v.* BLOOD HOLMAN & CO. (1920), 36 T. L. R. 843.

(*c*) "*Dues and Charges.*"

**1739. "Port charges & other expenses at port"—Coal supplied while in port.**]—By a charterparty between defts., the owners of a steamer, & the charterers, it was agreed that the owners should maintain her in a thoroughly efficient state during the term of the charterparty, & that the charterers should provide & pay for coals & fuel, port charges, pilotages, agencies, commissions, & all other charges whatsoever not appertaining to the working or efficiency of the steamer. It was also agreed that if in consequence of a breakdown of machinery the vessel put into a port other than that to which she was bound, "port charges, pilotages, & other expenses" should be borne by the owners. The steamer put into Vigo, a port to which she was not bound; in consequence, as was alleged by the master, of the breakdown of the condenser. The master sued defts. in an action for disbursements for the price of coals supplied to him at Vigo:—*Held:* even assuming that the putting into Vigo was a necessary consequence of the breakdown of the machinery of the steamer, the price of the coals supplied there was not part of the "port charges, pilotages, & other expenses at the port" within the meaning of the charterparty, & defts. were not liable.—THE DURHAM CITY (1889), 14 P. D. 85; 58 L. J. P. 46; 61 L. T. 339; 6 Asp. M. L. C. 411.

*Annotation:*—**Reld.** S.S. Arild *v.* Soc. Anon. De Navigation Hovrani, [1923] 2 K. B. 141.

**1740. Foreign tonnage dues.**]—TRECHMANN *v.* HORNE & CO. (1892), 8 T. L. R. 586.

**1741. "Port charges"—All charges payable before clearance.**]—Upon a voyage from South American ports to Leith the charterers of a ship exercised an option, reserved to them upon payment of port charges, of discharging part of their cargo at Deptford. In consequence of the ship entering the Port of London the whole of the light dues up to & including Leith became payable. But for this deviation the light dues would have been payable at Leith by the shipowners. To avoid detention in the Port of London the charterers paid all the light dues demanded, but claimed to set them off against balance of freight, upon the ground that they were not port charges:—*Held:* the light dues were port charges, payable by the charterers in the terms of the charterparty.—NEWMAN & DALE *v.* LAMPORT & HOLT, [1896] 1 Q. B. 20; 65 L. J. Q. B. 102; 12 T. L. R. 18; 1 Com. Cas. 161; *sub nom.* NEMAN, DALE & CO. *v.* LAMPORT & HOLT, 73 L. T. 475; 8 Asp. M. L. C. 76.

*Annotation:*—**Consd.** The Katherine (1913), 30 T. L. R. 52.

**1742.** —— **Light dues.**]—NEWMAN & DALE *v.* LAMPORT & HOLT, No. 1741, *ante.*

**1743.** —— **Pilotage dues in shifting ports.**]—WHITTALL & CO. *v.* RAHTKEN'S SHIPPING CO., LTD., No. 3987, *post.*

**1744.** —— **Dues payable to dock company.**]—A charterparty for a voyage from Antwerp to Rio de Janeiro & Santos contained the following clauses:—"The cargo to be dispatched with all possible despatch at Rio f.f.a., at Santos on the quay . . . The charterer paying all dues & duties on the cargo & the steamer all port charges, pilotages, etc., as customary." At Santos dues were payable per kilogramme of cargo discharged, under the following head of the dock co.'s tariff:—"For the use of the quay for loading & discharging goods & any merchandise, & for the dredging & clearing away of obstructions from the port":—*Held:* the dues paid under this heading were not "dues" & duties on the cargo" within the meaning of the charterparty but were "port charges" & therefore that the amount of those dues was payable by the shipowner & not by the charterer.—SOCIETA ANONIMA UNGHERESE DI ARMAMENTI MARITTIMO *v.* HAMBURG SOUTH AMERICAN S.S. CO. (1912), 106 L. T. 957; 12 Asp. M. L. C. 228; 17 Com. Cas. 216.

**1745. "Customs due on cargo"—Spanish "transport tax."**]—By a charterparty a ship was chartered to proceed to a Spanish port & load a cargo of iron rails, "Spanish Customs dues on cargo to be paid by steamer not exceeding 1*s.* per ton." There was a Spanish tax, called a transport tax, levied on goods carried over sea or imported or exported through the land customs houses, & this tax was payable by the shipowner to the Spanish Govt., & was calculated on the weight of the cargo. There was no other tax on iron rails:—*Held:* the transport tax was not a "customs due on cargo" within the meaning of the charterparty, & therefore the shipowners were bound to pay it, although it exceeded 1*s.* per ton.—LONDON TRANSPORT CO., LTD. *v.* BESSLER WAECHTER & CO., LTD. (1908), 24 T. L. R. 531; 52 Sol. Jo. 442, H. L.

**1746. "Dues & duties on the cargo"—Dues payable to dock company.**] — SOCIETA ANONIMA

*Sect.* 1.—*The contract of carriage: Sub-sect.* 3, *G.* (*c*); *sub-sects.* 4, 5, 6, 7, 8 & 9.]

UNGHERESE DI ARMAMENTI MARITTIMO *v.* HAMBURG SOUTH AMERICAN S.S. Co., No. 1744, *ante.*

**1747. "Dock dues"—All charges connected with entrance into & use of dock.**]—A charter-party provided that, "if the cargo or any part thereof is discharged in one of the docks in the River Thames, each consignee is to pay two-thirds of the dock dues payable in respect of the space occupied by his portion of the cargo to be discharged in such dock":—*Held:* this provision meant that all proper charges which could & were imposed by the dock authority in respect of entrance into & use of the dock by the vessel were included in the words "dock dues" & therefore these words included payments charged by the Port of London Authority as & for rent.—THE KATHERINE (1913), 30 T. L. R. 52, D. C.

**1748. —— Rent payable to Port of London Authority.**]—THE KATHERINE, No. 1747, *ante.*

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SUB-SECT. 4.—EXCEPTED PERILS.

*See* Sect. 4, *post.*

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SUB-SECT. 5.—AUTHORITY OF MASTER.

**Authority of master to bind owners generally.**]—*See* Part IV., Sect. 1, *ante.*

**Charterparties.**]—*See* Sect. 2, sub-sect. 3, *post.*

**Bills of lading.**]—*See* Sect. 3, sub-sect. 4, B., *post.*

**Freight.**]—*See* Part VIII., Sect. 2, *post.*

**Transhipment of cargo.**]—*See* Sect. 6, sub-sect. 4, *post.*

**Hypothecation of cargo.**]—*See* Sect. 6, sub-sect. 5, B., *post.*

**Sale of cargo.**]—*See* Sect. 6, sub-sect. 6, A., *post.*

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SUB-SECT. 6.—FRUSTRATION OF ADVENTURE.

**Excepted perils.**]—*See* Sect. 4, *post.*

**Time charters.**]—*See* Sect. 2, sub-sect. 22, *post.*

**Failure to provide cargo.**]—*See* Nos. 2849–2856, *post.*

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SUB-SECT. 7.—REPUDIATION OF CONTRACT.

*See* CONTRACT, Vol. XII., pp. 341–344, Nos. 2846–2849, 2862–2866.

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SUB-SECT. 8.—SHIPMENT OF GOODS LIKELY TO CAUSE DAMAGE OR DELAY TO SHIP OR CARGO.

*See* 1894 Act, ss. 301, 446, 448, 449; Explosives Act, 1875 (c. 17); Carriage of Goods by Sea Act, 1924 (c. 22), Article IV. (6).

**Carriage of explosives & dangerous goods.**]—*See* CARRIERS, Vol. VIII., pp. 135–137, Nos. 894–900.

**1749. Necessity for notice to shipowner—Of dangerous character of goods.**]—Where the law presumes the affirmative of any fact the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty the law presumes the affirmative & throws the burthen of proving the negative on the party who insists on it. Therefore where pltf. declared that defts., who had chartered his ship, put on board a dangerous commodity, by which a loss happened, without due notice to the captain or any other person employed in the navigation it lay upon him to prove such negative averment, & it being shown that the commodity was delivered by defts.' officer & received by the first mate of pltf.'s ship, which first mate was dead & no other person was present to depose to the conversation which passed between them:—*Held:* the best evidence of the fact could only be given by defts.' officer who delivered the commodity on board to such first mate, & the action could not be sustained by secondary evidence.—WILLIAMS *v.* EAST INDIA Co. (1802), 3 East, 192; 102 E. R. 571.

*Annotations:*—**Apld.** Brass *v.* Maitland (1856), 6 E. & B. 470. **Consd.** Farrant *v.* Barnes (1862), 11 C. B. N. S. 553. **Refd.** Thornton *v.* Lance (1815), 4 Camp. 231; R. *v.* Twyning, Gloucestershire (1819), 2 B. & Ald. 386; Langridge *v.* Levy (1837), 2 M. & W. 519; Keates *v.* Cadogan (1851), 15 Jur. 428; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94. **Mentd.** R. *v.* Hawkins (1808), 10 East, 211; R. *v.* Haslingfield (1814), 2 M. & S. 558; Calder *v.* Rutherford (1822), 3 Brod. & Bing. 302; Pearce *v.* Whale (1826), 7 Dow. & Ry. K. B. 512; R. *v.* Whiston (1836), 1 Har. & W. 696; Newman *v.* Hardwicke (1838), 2 J. P. 328; Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90; R. *v.* Lister (1857), 26 L. J. M. C. 196; Aflalo *v.* Lawrence & Bullen, [1903] 1 Ch. 318.

**1750. —— ——.**]—First count: That pltfs. were owners of a general ship; that defts. caused a corrosive substance to be packed in casks, & delivered to pltfs., as casks of bleaching powder, to be carried in the ship; that pltfs. & their agents were ignorant that bleaching powder contained a corrosive substance, & the casks outwardly appeared to be sufficient; but that the casks were insufficient, & the contents so improperly packed, that the corrosive contents escaped & destroyed the cargo. Second count: That defts. shipped a dangerous article, knowing it to be such, without notice of its danger; & pltfs. without knowledge of its dangerous nature, received it, & stowed it in the hold, where it did mischief. Pleas (3): to so much of the first count as relates to the insufficiency of the packages; that defts. purchased the goods ready packed from third persons, named, & were not themselves, or by their servants, guilty of negligence. Plea (4) to first count: that the persons employed on the ship knew & had the means of judging of the sufficiency of the casks. Plea (10) to the second count: that the master of the ship knew, or had the means of knowing, the dangerous nature of the goods. On demurrer to the pleas:—*Held:* (1) (LORD CAMPBELL, C.J., & WIGHTMAN, J.) there is an implied undertaking on the part of shippers of goods on board a general ship that they will not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice; consequently, both counts were good, & the third plea bad. But fourth & tenth pleas, which they construed to amount to an allegation of facts equivalent to notice, were good; (2) (CROMPTON, J.) the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without



e. *Concealment of illegal goods by charterer.*]—MESSERVEY *v.* BESSEN (1838), 9 L. T. 459.—JERSEY.

notice; & on the first count & third plea, taken together, defts. appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their parts, &, therefore, defts. should have judgment on the third plea.—BRASS *v.* MAITLAND (1856), 6 E. & B. 470; 26 L. J. Q. B. 49; 27 L. T. O. S. 249; 2 Jur. N. S. 710; 4 W. R. 647; 119 E. R. 940.

*Annotations:*—*As to* (1) **Apld.** Farrant *v.* Barnes (1862), 11 C. B. N. S. 553. **Consd.** Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412. **Apld.** Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94. **N.F.** Mitchell, Cotts *v.* Steel, [1916] 2 K. B. 610. **Apld.** G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742. **Reid.** Blower *v.* G. W. Ry. (1872), L. R. 7 C. P. 655. *As to* (2) **Apld.** Hutchinson *v.* Guion (1858), 5 C. B. N. S. 149; Farrant *v.* Barnes (1862), 11 C. B. N. S. 553. **Consd.** Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412. **N.F.** Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94. **Apld.** Mitchell, Cotts *v.* Steel, [1916] 2 K. B. 610. **N.F.** G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742. *Generally*, **Reid.** Dutton *v.* Powles (1861), 2 B. & S. 174; Acatos *v.* Burns (1878), 3 Ex. D. 282; Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51. **Mentd.** Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Dunn *v.* Bucknall, Dunn *v.* Donald Currie, [1902] 2 K. B. 614; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533.

**1751.** —— ——.]—HUTCHINSON *v.* GUION, No. 3029, *post.*

**1752.** —— ——.]—Pltf.'s husband was a common carrier of goods, which he conveyed in a keel of which he was the owner & in the working of which he was assisted by pltf. Defts. who carried on business as carriers & forwarding agents on the Aire & Calder Navigation, delivered to pltf.'s husband to be carried from Goole to Sheffield certain goods described by them as general cargo. The goods in question which were packed in casks, consisted of a chemical known as "ferro-silicon," which was always liable to be dangerous by giving off poisonous gases. Pltf.'s husband did not know that the goods delivered to him for carriage on board his keel were of a dangerous character, but defts., who knew that the casks contained ferro-silicon, did not in fact know that ferro-silicon was of a dangerous character, & gave no notice to pltf.'s husband of the contents of the casks. During the carriage of the goods on board the keel of pltf.'s husband, the ferro-silicon gave off poisonous gases in consequence of which the husband died & pltf. suffered from serious illness. In an action by pltf., suing as administratrix & also on her own behalf, to recover damages for the loss of her husband & also in respect of her illness:—*Held:* (1) (FLETCHER MOULTON & FARWELL, L.JJ.) under the circumstances pltf. was entitled to recover, inasmuch as there was an implied undertaking on the part of defts. that the goods delivered to pltf.'s husband for carriage were goods not of a dangerous character, but such as were fit to be carried by pltf.'s husband as a common carrier; (2) (VAUGHAN WILLIAMS, L.J.) pltf. was entitled to recover upon the ground that defts. owed a duty to pltf.'s husband to communicate such information as they had as to the nature of the goods in question, & through their servants they were guilty of negligence & want of care in not communicating to the carrier the name, which they knew, of the somewhat unusual cargo.—BAMFIELD *v.* GOOLE & SHEFFIELD TRANSPORT CO., LTD., [1910] 2 K. B. 94; 79 L. J. K. B. 1070; 103 L. T. 201, C. A.

*Annotations:*—*As to* (1) **Apld.** G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742. **Reid.** The West Cock, [1911] P. 208. *As to* (2) **N.F.** G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742. *Generally*, **Reid.** Transoceanica Soc. Italiana Di Navigazione *v.* Shipton, [1923] 1 K. B. 31. **Mentd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533.

**1753.** —— **Of facts liable to cause danger or delay to ship.**]—Whatever may be the full extent of the obligation upon a shipper of goods, it amounts at least to an undertaking by him that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the shipowner facts which are within his knowledge indicating that there is the risk, provided that the shipowner does not & could not reasonably know those facts.

The shippers of a cargo of rice upon a vessel they had chartered for a voyage to Piraeus knew that the rice could not be discharged there without the permission of the British Govt., although they thought that they might obtain the permission. In fact they were unable to procure it, & the ship was in consequence delayed. The shipowner did not & could not reasonably have known that the permission was necessary:—*Held:* the delay arose from a breach by the charterers of their obligation to the shipowners, & therefore the shipowners had a cause of action against them in respect of the delay so caused.—MITCHELL, COTTS & CO. *v.* STEEL BROTHERS & CO., LTD., [1916] 2 K. B. 610; 85 L. J. K. B. 1747; 115 L. T. 606; 32 T. L. R. 533; 22 Com. Cas. 63; 13 Asp. M. L. C. 497.

*Annotations:*—**Distd.** The Domald, [1920] P. 56; Transoceanica Soc. Italiana Di Navigazione *v.* Shipton, [1923] 1 K. B. 31. **Reid.** Akt. Geysir *v.* Dansk Svovlsyre & Superphosphat Fabrik (1919), 24 Com. Cas. 178; Spanish S.S. Sebastian *v.* De Vizcaya, [1920] 1 K. B. 332; The Lisa, [1921] P. 38.

**1754. Necessity for notice to shipper—That contraband carried as part of cargo.**]—DUNN *v.* BUCKNALL BROTHERS, DUNN *v.* CURRIE (DONALD) & CO., No. 2552, *post.*

**1755. Effect of notice by agents of shipowner.**]—A charterparty dated May 18, 1917, provided that a steamer should proceed to Norfolk, Virginia, & there load a cargo of coal for delivery at Bilbao. On July 9, 1917, the President of the United States issued a Proclamation, which came into force on July 15, prohibiting the export of coal to Spain except under licence from the American Govt. On July 11 a co. which acted as agents at Norfolk for the charterer & also for the shipowners, applied for a licence for the export of the cargo of coal. The steamer arrived at Norfolk on July 14. The cargo was duly loaded, but the steamer was detained at Norfolk while waiting for the licence which, without default on the part of the agents, was not obtained until Aug. 1. The owners claimed damages from the charterer for the detention of the steamer:—*Held:* as the owners had, through their agents, knowledge at the time the cargo was loaded that it was necessary to obtain an export licence, which might involve delay, the charterer was not liable for the detention of the steamer.—SPANISH S.S. SEBASTIAN (OWNERS) *v.* DE VIZCAYA, [1920] 1 K. B. 332; 89 L. J. K. B. 385; 122 L. T. 541; 36 T. L. R. 177; 25 Com. Cas. 134; 14 Asp. M. L. C. 568.

**Proximity of different kinds of goods—Improper stowage.**]—*See* Sect. 5, sub-sect. 5, C. (*a*) ii., *post.*

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SUB-SECT. 9.—THE SHIPOWNER AS COMMON CARRIER.

*See, generally*, CARRIERS, Vol. VIII., pp. 8–10, Nos. 21–35.

**Liability for loss or damage.**]—*See* CARRIERS, Vol. VIII., pp. 18, 20, 21, 227, Nos. 85, 86, 88, 89, 97, 99, 108, 110, 112, 1460.

—— **Limitation of liability.**]—*See* CARRIERS, Vol. VIII., pp. 39–41, 44, 45, 57, Nos. 229–231, 243, 262, 279, 375.

*Sect.* 1.—*The contract of carriage: Sub-sects.* 10, 11 & 12. *Sect.* 2: *Sub-sects.* 1 & 2, *A.*]

SUB-SECT. 10.—CHARTERPARTIES.

*See* Sect. 2, *post.*

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SUB-SECT. 11.—BILLS OF LADING.

*See* Sect. 3, *post.*

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SUB-SECT. 12.—FREIGHT.

*See* Part VIII., *post.*

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## SECT. 2.—CHARTERPARTIES.

### SUB-SECT. 1.—IN GENERAL.

**1756. Derivation of term.**]—LEIGHTON *v.* GREEN & GARRET (1613), Godb. 204; 78 E. R. 124.

**1757. Necessity for writing.**]—LIDGETT *v.* WILLIAMS, No. 1792, *post.*

**1758. Assignability—Rights of assignee.**]—The assignee of a chose in action, or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognisant of them. It is his duty to make inquiries, &, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries & who has not made them.

But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, & if he should not do so, he will be bound to perform the stipulations of the security, & cannot be allowed to take advantage of the equities existing as between the assignor & himself.

The performance, by the creator of a security, of any intermediate stipulations in it, after he has received notice of its assignment, being an act done under both a legal & an equitable liability, can never, in itself, be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound.

A. was the owner of a vessel. B. was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake half the risk, & was to have half the profits. A charterparty was executed, on Apr. 24, 1845, by which the vessel was declared to be let to freight, at 16*s.* a ton per month, to B., & bills were to be given, & payments from time to time made, by B., which, taken together, would cover one-half of the amount stipulated for the freight. On the arrival of the ship at home, B. was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; by the first of which A. was to join in the adventure, &, "after payment or deduction of the freight, & all incidental expenses, the profit or loss" was to be borne by the parties in equal moieties; & by the other A. gave to B. a guarantee for the due performance, by the clerk, of the stipulations he had entered into. On Dec. 1, 1845, while the ship was on the voyage, A. assigned to C. the charterparty, & wrote on the margin thereof a note addressed to B., requesting him to pay "what is due." C. gave B. notice of this assignment & note. The notice was in the ordinary form, & C. made no inquiries of B. B. continued the payments which, by the stipulations in the charterparty, he was bound to make. The vessel returned in Aug. 1846, & the adventure turned out a loss. B. claimed, as against C., to balance the accounts of profit & loss, as he would have been entitled to do with A. had the charterparty not been assigned:—*Held:* in equity he was entitled to do so.—MANGLES *v.* DIXON (1852), 3 H. L. Cas. 702; 19 L. T. O. S. 260; 10 E. R. 278, H. L.

*Annotations:*—**Consd.** Rodger *v.* Comptoir D'Escompte de Paris (1869), L. R. 2 P. C. 393. **Distd.** Leask *v.* Scott (1877), 2 Q. B. D. 376. **Refd.** Rolt *v.* White (1862), 3 De G. J. & Sm. 360; Watson *v.* Mid Wales Ry. (1867), L. R. 2 C. P. 593; Higgs *v.* Northern Assam Tea Co. (1869), L. R. 4 Exch. 387; Stoddart *v.* Union Trust (1911), 81 L. J. K. B. 140. **Mentd.** Watts *v.* Driscoll, [1901] 1 Ch. 294.

**1759.** —— ——.]—DIMECH *v.* CORLETT, No. 1858, *post.*

**1760. Contains contract between shipowner & charterer.**]—RODOCANACHI *v.* MILBURN, No. 3816, *post.*

**1761.** ——.]—The charterparty is the contract between the shipowners & the charterers, & the ct. can only look at the terms of the charterparty.

The contract is to load a full & complete cargo of bricks & cement in casks. That does not refer specifically to bricks & cement made at N.'s cement works. The charterparty applies to any brick or cement in casks, & sufficient bricks & cement in casks to load the ship could have been obtained from other sources (LORD ESHER, M.R.).—THE ROOKWOOD (1894), 10 T. L. R. 314, C. A.

*Annotation:*—**Consd.** Bunge y Born Co. *v.* Brightman, [1925] A. C. 799.

**1762. Variation — Subsequent stipulations amounting to new contract.**]—The stipulations in a charterparty may be varied by subsequent instructions, which may amount to a new contract *pro tanto;* & an insurance of the freight upon the new voyage, though different from that described in the charterparty, may be good. Thus, where a British vessel was chartered for a voyage from Odessa to Rotterdam—war having in the meantime broken out between Great Britain & Holland, the master was instructed by the freighter's agents at Odessa, in case he could not get to Rotterdam, to proceed to Hamburgh or Bremen; but to enter at London or Newcastle in the first instance, where he might receive different orders from the freighters,—the difference in the freight to be settled by arbitration. The vessel was captured among the Grecian Islands, & the master made a declaration, attested on oath by three of the crew, of the capture, before the British consul at Patras in the Morea; in which the ship was described as having been, when captured, on her voyage from Odessa to Rotterdam. An insurance had been effected on the freight for the particular voyage from Odessa to England:—*Held:* the underwriters were bound to settle the loss, on the ground that the instructions formed a new contract, under which the vessel was, at the time of the capture, on her voyage to England, on her arrival, freight would have been earned.—HALL *v.* BROWN (1814), 2 Dow, 367; 3 E. R. 897, H. L.

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**PART VII. SECT. 2, SUB-SECT. 1.**

*1. Whether contract of affreightment requires execution of charterparty for its constitution.*]—The contract of affreightment does not require the execution of a charterparty for its constitution.—REDERI AKT. NORDSTJERNAN *v.* SALVESEN & Co. (1903), 6 F. (Ct. of Sess.) 64.—SCOT.

**1763. Provision of ballast—Who liable—Where owners responsible for navigation.**]—By a charterparty a ship was let to the charterers for their sole use & benefit for the conveyance of merchandise &/or passengers with liberty to sublet, subject to owner's approval of trade, for two or three round voyages at charterers' option, to be placed by a certain day "with clear holds" at the disposal of the charterers, they "having the whole reach or burthen of the vessel," proper & sufficient room being reserved to the owners for the officers, crew, tackle, etc.; the owners undertaking to maintain her in a thoroughly efficient state during the currency of the charter; the captain to use every reasonable dispatch in prosecuting the voyages, &, though appointed by the owners, to be under the orders & directions of the charterers as regards employment, agency & other arrangements; the freight for the hire of the ship to be paid monthly until she was returned by the charterers to the owners:—*Held:* upon the true construction of the whole of the charterparty, without deciding whether the contract more nearly resembled one of demise than of carriage, the responsibility for the navigation of the ship was imposed upon the owners, & the owners were therefore liable to provide any ballast that might be necessary for safe navigation.—WEIR *v.* UNION S.S. CO., LTD., [1900] A. C. 525; 69 L. J. Q. B. 809; 83 L. T. 91; 9 Asp. M. L. C. 111; 5 Com. Cas. 363, H. L.

*Annotation:*—**Refd.** The Sarpen, [1916] P. 306.

**1764. Avoidance.**]—*Semble:* a charterparty may be avoided by an act of the shipowner.—THE TARTAR (1822), 1 Hag. Adm. 1; 166 E. R. 1.

*Annotations:*—**Mentd.** The Atlas (1827), 2 Hag. Adm. 48; Weston *v.* Foster (1836), 5 L. J. C. P. 242; The Emancipation (1840), 1 Wm. Rob. 124; Stainbank *v.* Fenning (1851), 11 C. B. 51; The Staffordshire (1871), 25 L. T. 137.

**Charterparty entered into abroad—Admissibility of secondary evidence.**] — *See* EVIDENCE, Vol. XXII., p. 217, No. 1896.

**Breach of charterparty—Jurisdiction of Admiralty Court.**]—*See* ADMIRALTY, Vol. I., p. 157, Nos. 652, 653.

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SUB-SECT. 2.—PARTIES.

*A. In General.*

**1765. Right of joint covenantee—Effect of release of non-party.**] — SCUDAMORE *v.* VANDERSTENE (1587), 2 Co. Inst. 673.

*Annotations:*—**Refd.** Storer *v.* Gordon (1814), 3 M. & S. 308; Barford *v.* Stuckey (1820), 2 Brod. & Bing. 333. **Mentd.** Vernon *v.* Jefferies (1740), 7 Mod. Rep. 358; Zouch d. Abbot *v.* Parsons (1765), 3 Burr. 1794.

**1766. Right of non-party—Charterparty by deed poll.**]—Indenture of charterparty, not being *inter parties*, covenants to pay to a stranger to the deed.—COOKER *v.* CHILD (1673), 2 Lev. 74; 83 E. R. 456; *sub nom.* COKER *v.* CHILD, 3 Keb. 115.

*Annotations:*—**Mentd.** Gilby *v.* Copley (1683), 3 Lev. 138; Joddrell *v.* Heathcot (1709), 11 Mod. Rep. 258; Vernon *v.* Jefferies (1740), 7 Mod. Rep. 358; Barford *v.* Stuckey (1820), 5 Moore, C. P. 23; Smith *v.* Scott (1859), 6 C. B. N. S. 771.

**1767. Effect of execution by one owner.**]—One of the owners alone having executed the charterparty, without the others being made parties to it:—*Held:* (1) the legal operation of the deed, was that it was the agreement of him alone who executed it; the charterparty was correctly set forth as the agreement of that owner alone, though made on behalf of himself & the other joint owners of the vessel; (2) although all the owners could not sue the freighter jointly upon the charterparty, the deed never having been executed by them, yet it did not follow but that they had a joint right of action against deft., upon a promise of payment of freight to them all; such contract being perfectly collateral to the contract contained in the charterparty.—BUSHELL *v.* BEAVAN (1834), 1 Bing. N. C. 103; 4 Moo. & S. 622; 3 L. J. C. P. 279; 131 E. R. 1056.

*Annotation:*—**Mentd.** Caballero *v.* Slater (1854), 23 L. J. C. P. 67.

**1768. Contract as "owner"—Admissibility of evidence to prove agency only.**]—In *assumpsit* on a charterparty executed, not by pltf., but by a third person who, in the contract, described himself as "owner," of the ship:—*Held:* evidence was not admissible to show that such person contracted merely as pltf.'s agent.—HUMBLE *v.* HUNTER (1848), 12 Q. B. 310; 17 L. J. Q. B. 350; 11 L. T. O. S. 265; 12 Jur. 1021; 116 E. R. 885.

*Annotations:*—**Consd.** Killick *v.* Price & Lingfield S.S. Co. (1896), 12 T. L. R. 263; Formby *v.* Formby (1910), 102 L. T. 116; Drughorn *v.* Rederiakt. Trans-Atlantic, [1919] A. C. 203. **Refd.** Schmaltz *v.* Avery (1851), 16 Q. B. 655; Wake *v.* Harrop (1862), 1 H. & C. 202; Dunlop Pneumatic Tyre Co. *v.* Selfridge, [1915] A. C. 847; Rederiakt. Argonaut *v.* Hani, [1918] 2 K. B. 247. **Mentd.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328; British Waggon Co. *v.* Lea (1880), 5 Q. B. D. 149; Tolhurst *v.* Associated Portland Cement Manufacturers (1900), Ltd., Associated Portland Cement Manufacturers (1900), Ltd. *v.* Tolhurst, [1902] 2 K. B. 660.

**1769. Contract as "agents or owners."**] — DINHAM, FAWCUS & CO. *v.* WITHERINGTON & EVERETT, [1916] W. N. 154.

*Annotation:*—**Followed.** Cork Gas Consumers' Co. *v.* Witherington & Everett (1920), 36 T. L. R. 599.

**1770. ——.**]—Defts. in June, 1914, by a charterparty in which they were described as "agents or owners," agreed with pltfs. to carry a certain quantity of coal from the North East Coast to Cork between July, 1914, & June, 1925. As a result of the outbreak of war & Admlty. requisitions, defts. were left with only two free ships, which could not have carried all the coal required, &, taking the view that they were relieved of their obligations, they made no effect to carry out the contract. In an action for breach of the contract:—*Held:* the use of the words "agents or owners" did not limit the contract to one for carriage in steamers of which defts. were owners or managers at the date of the contract, but it was a general carrying contract, & as defts. had not chartered other ships they were liable in damages.—CORK GAS CONSUMERS' CO. *v.* WITHERINGTON & EVERETT (1920), 36 T. L. R. 599.

**1771. Contract "as charterers"—Whether term of contract.**]—A charterparty was expressed to be made between pltfs., the shipowners, & a limited co. "as charterers." Deft., claiming to be the undisclosed principal of the co. & purporting to act under an arbn. clause in the charterparty, instituted arbn. proceedings by giving pltfs. notice that he had appointed a person to act as his arbitrator. In an action by pltfs for an injunction to restrain deft. from proceeding with the arbn. on the ground that he was not a party to the charterparty:—*Held:* having regard to the provision of the charterparty as a whole & the duties thereby imposed upon the charterers, the words "as charterers" after the name of the co. were a term of the contract, showing that the co. had contracted as principals; & deft. was not entitled to proceed with an arbn. under the charterparty.—REDERIAKT. ARGONAUT *v.* HANI, [1918] 2 K. B. 247; 87 L. J. K. B. 991; 118 L. T. 176; 14 Asp. M. L. C. 310.

*Annotation:*—**Distd.** Drughorn *v.* Rederiakt. Trans-Atlantic, [1919] A. C. 203.

**1772. —— Admissibility of evidence to prove agency only.**]—The description in a charterparty

*Sect. 2.—Charterparties: Sub-sect. 2, A. & B. (a) & (b); sub-sect. 3.]*

of one of the contracting parties as "charterer" does not, of itself, designate him as the only person to fill that position. Where an action for breach of charterparty was brought by persons claiming to be the undisclosed principals of a party described in the contract as "charterer," & objection was taken to the admission of evidence that pltfs. were in fact the charterers, on the ground that such evidence would contradict the written contract:—*Held:* the evidence was admissible.—FRED. DRUGHORN, LTD. *v.* REDERIAKT. TRANS-ATLANTIC, [1919] A. C. 203; 88 L. J. K. B. 233; 120 L. T. 70; 35 T. L. R. 73; 63 Sol. Jo. 99; 14 Asp. M. L. C. 400; 24 Com. Cas. 45, H. L.; *affg.* S. C. *sub nom.* REDERI AKT. TRANSATLANTIC *v.* FRED. DRUGHORN, [1918] 1 K. B. 394.

*Annotation:*—**Reld.** Ariadne S.S. Co. *v.* McKelvie, [1922] 1 K. B. 518.

### *B. Contracts by Agents.*

#### *(a) In General.*

*See, generally*, AGENCY, Vol. I., pp. 257 *et seq.*

**1773. Authority to charter—When implied.**]—Where a person permits another to act as his general agent, he is bound by a contract made by the agent, although the latter declares himself as acting "by procuration," & has received special instructions which he exceeds.

Deft., who formerly carried on the business of a corn merchant at Limerick, came to reside in London, & left his brother M. to conduct his business in Limerick. Deft.'s name remained over the door. For the space of three years M. purchased large quantities of oats, & chartered numerous ships on account of deft. On these occasions deft. usually sent him special instructions. In the year 1858, a ship in the port of Limerick being about to proceed to Quebec for a cargo of timber, M. chartered her to carry on her return from Quebec, a cargo of oats to London. He signed the charterparty "per procuration." In an action against deft. for not loading a cargo pursuant to the charterparty:—*Held:* it was properly left to the jury to say whether deft. had allowed M. to act as his general agent, & if so, he was liable although M. might have exceeded his authority.—SMITH *v.* M'GUIRE (1858), 3 H. & N. 554; 27 L. J. Ex. 465; 31 L. T. O. S. 248; 6 W. R. 726; 157 E. R. 589.

*Annotations:*—**Reld.** The Fanny, The Mathilda (1883), 48 L. T. 771. **Mentd.** Cornish *v.* Abington (1859), 28 L. J. Ex. 262; Stagg *v.* Elliott (1862), 12 C. B. N. S. 373; Aitken, Lilburn *v.* Ernsthausen, [1894] 1 Q. B. 773.

**1774.** ——— ———.]—CHRISTOFFERSEN *v.* HANSEN, No. 1953, *post.*

——— **Authority of master.**]—*See* Part IV., Sect. 1, sub-sect. 1.

**Authority to vary terms of charterparty—Authority of master.**]—*See* Part IV., Sect. 1, sub-sect. 1.

———.]—*See* AGENCY, Vol. I., pp. 322, 323, Nos. 401–403.

**1775. Admissibility of evidence to prove liability as principal.**]—WAKE *v.* HARROP (1862), 1 H. & C. 202; 31 L. J. Ex. 451; 7 L. T. 96; 8 Jur. N. S. 845; 10 W. R. 626; 1 Mar. L. C. 247, Ex. Ch.

*Annotations:*—**Reld.** Bowman *v.* Rossel (1864), 3 New Rep. 471; Cowie *v.* Witt (1874), 23 W. R. 76; Clever *v.* Kirkman (1875), 33 L. T. 672; Ariadne S.S. Co. *v.* McKelvie, [1922] 1 K. B. 518; Universal Steam Navigation Co. *v.* McKelvie, [1923] A. C. 492; Kimber Coal Co. *v.* Stone & Rolfe, [1926] A. C. 414. **Mentd.** Reid & Glasgow *v.* Draper (1861), 4 L. T. 650; Rogers *v.* Hadley (1863), 11 W. R. 1074; Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109; Druiff *v.* Parker (1868), L. R. 5 Eq. 131; Nicoll *v.* Bell (1875), 32 L. T. 815; Gadd *v.* Houghton (1876), 33 L. T. 871.

**1776.** ———.]—Pltfs. & defts. entered into a charter of the ship *R.* to load a cargo of deals. In the body of the charter defts. were described as follows: "It is this day mutually agreed between Messrs. J. H. & co., of Newcastle, for owners of the good ship *R.*" Defts. signed the charterparty at the foot, as follows: "For owners. J. H. & co." A cargo was loaded on board the ship *R.* at H., & the captain signed a bill of lading for the same, stating that he had received it in good condition, etc. The cargo was ultimately delivered to pltfs. at G., & was found on delivery to have been injured to the extent of £50. In an action brought by pltfs. against defts. for the damage, in the county ct. at Gloucester, three letters, which had passed between pltfs. & defts. & their solrs. were admitted in evidence, & as soon as pltfs.' evidence was closed, defts.' solr. objected that there was no evidence against defts. as principals, & applied for a nonsuit, on the ground that it appeared upon the charterparty that defts. were not principals but only agents of the owner. The judge overruled the objection, & decided that defts. were liable as principals:—*Held:* (1) there was evidence to support the decision of the county ct. judge that defts. were liable as principals; (2) the charterparty was to be construed as explained by the letters, & the letters were properly admitted in evidence.—ADAMS *v.* HALL (1877), 37 L. T. 70; 3 Asp. M. L. C. 496.

**1777. Admissibility of evidence to discharge agent—Where contracting personally.**]—Parol evidence cannot be admitted to discharge an agent who has signed an instrument so as to make himself personally liable (BYLES, J.).—WAKE *v.* HARROP (1862), 1 H. & C. 202; 31 L. J. Ex. 451; 7 L. T. 96; 8 Jur. N. S. 845; 10 W. R. 626; 1 Mar. L. C. 247, Ex. Ch.

*Annotations:*—**Reld.** Bowman *v.* Rossel (1864), 3 New Rep. 471; Cowie *v.* Witt (1874), 23 W. R. 76; Clever *v.* Kirkman (1875), 33 L. T. 672; Ariadne S.S. Co. *v.* McKelvie, [1922] 1 K. B. 518; Universal Steam Navigation Co. *v.* McKelvie, [1923] A. C. 492; Kimber Coal Co. *v.* Stone & Rolfe, [1926] A. C. 414. **Mentd.** Nicoll *v.* Bell (1825), 32 L. T. 815; Reid & Glasgow *v.* Draper (1861), 4 L. T. 650; Rogers *v.* Hadley (1863), 11 W. R. 1074; Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109; Druiff *v.* Parker (1868), L. R. 5 Eq. 131; Gadd *v.* Houghton (1876), 33 L. T. 811.

**1778. Authority to accept withdrawal of charterparty.**]—Pltfs., shipowners in Glasgow, placed their ship, the *Holyrood*, with S. & co., chartering brokers in London. Defts., who carried on business in London, after certain negotiations with S. & co., agreed to take the ship on charter for Port Said at 7*s.* per ton, the cancelling date being fixed at Mar. 30, at 9 a.m. S. & co. telegraphed to pltfs. that defts. had agreed to charter the ship on these terms, & pltfs. telegraphed to S. & co. confirming the agreement. Before the receipt of pltfs.' confirming telegram, defts. sent a letter to S. & co. saying, "On reconsideration we must adhere to the 28th for cancelling date." S. & co. telegraphed the withdrawal of defts. to pltfs., who

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**PART VII. SECT. 2, SUB-SECT. 2.—B. (a).**

*g. Authority to charter—For foreign principal—Personal liability of agent.*]—A.-G. *v.* CHABNOCK (1883), 17 S. A. L. R. 1.—**AUS.**

*h.* ——— *Authority of shipbroker.*]—A shipbroker, employed by a shipowner, has no such general authority as will enable him to charter the ship for a voyage in a manner contrary to instructions expressly given to him by the owner, although such instructions have not been communicated to the parties dealing with him.—SPAIGHT *v.* BEYERLIEB (1863), 9 L. T. 31.—**IR.**

*k. Authority to receive notice of renewal of charterparty.*]—DOMINION COAL CO., LTD. *v.* KINGSWELL S.S. CO. LTD. (1900), 33 N. S. R. 499.—**CAN.**

received the telegram after they had sent their confirming wire. Defts. refused to charter the *Holyrood*, which was chartered elsewhere by pltfs. at a loss:—*Held:* S. & co. were not principals for the purpose of receiving the withdrawal of defts.' offer, & as the withdrawal of defts. was subsequent to the acceptance by pltfs., pltfs. were entitled to recover the amount of their loss on the recharter of the ship.—RAEBURN & VEREL *v.* BURNESS (JAMES) & SONS (1895), 11 T. L. R. 399; 1 Com. Cas. 22.

**1779. Mutual promises—By shipbroker to procure charter—By shipowner to charter vessel.**]—A shipbroker agreed with a shipowner to procure him a charter of a vessel, in consideration of the shipowner chartering the same. In an action by shipowner against shipbroker for breach of contract:—*Held:* there was a good consideration for the shipbroker's promise.—GLIDDON *v.* BRODERSEN, VAUGHAN & Co. (1883), 1 Cab. & El. 197.

**1780. Signature as agent only—Whether written clause import personal liability.**]—The owners of a chartered ship sued the K. Coal co. in the Sheriff's Ct. for demurrage at the port of loading under a charterparty expressed to be entered into "between G. T. G. & co., owners' agents, & A. B. co., Copenhagen, charterers. The charterparty, which was on a printed form, provided for payment of demurrage by "the charterers," & at the end of the charterparty the following stipulation was added in writing: "Freight & demurrage, if any in loading, to be paid in Glasgow by the K. Coal co., Ltd." The charterparty was signed as follows: "For the A. B. co., Copenhagen, J. B. J., of the K. Coal co., Ltd. For & by telegraphic authority of owners, for G. T. G. & co., J. M., as agents only." It was admitted that J. B. J. signed on behalf of the K. Coal co.:—*Held:* (1) the K. Coal co. were not by reason of the form of the signature made liable upon the charterparty; (2) the clause in writing did not import a promise of liability sufficient to rebut any inference to the contrary from the form of the signature.—KIMBER COAL CO. *v.* STONE & ROLFE, LTD., [1926] A. C. 414; 95 L. J. K. B. 601; 135 L. T. 161; 42 T. L. R. 430; 17 Asp. M. L. C. 37; 31 Com. Cas. 333, H. L.

**Position of sub-agent.**]—*See* AGENCY, Vol. I., p. 392, No. 956.

**Liability of agent to be sued.**]—*See* AGENCY, Vol. I., pp. 623, 624, 626, 627, 642, Nos. 2479, 2492–2494, 2510, 2512, 2518, 2626.

—— **Breach of warranty of authority.**]—*See* AGENCY, Vol. I., pp. 661–665, Nos. 2768, 2769, 2773, 2774, 2789, 2790, 2793.

**Right of agent to sue.**]—*See* AGENCY, Vol. I., p. 681, No. 2911.

**Notice of limitation of agent's authority.**]—*See* AGENCY, Vol. I., pp. 617, 662, Nos. 2438, 2439, 2773, 2774.

**Construction of contract.**]—*See* AGENCY, Vol. I., pp. 629–640, Nos. 2530, 2532, 2536, 2537, 2539, 2543, 2544, 2548, 2550, 2558, 2565–2568, 2571, 2576, 2603, 2604, 2606, 2607, 2609.

*(b) Charterparties under Seal.*

**1781. Necessity for authority by deed.**]—HORSLEY *v.* RUSH & TOLSON (1788), cited in 7 Term Rep. at p. 209; 101 E. R. 936.

**1782. Authority of master to vary—By contract not under seal.**]—HUNTER *v.* PRINSEP, No. 3441, *post.*

**1783. Right of principal to sue.**]—Where the master of pltfs.' ship entered into a charterparty, as agent for pltfs., with deft., a partner in the house of M. & co. for the delivery of goods upon a stipulated freight, & the goods were delivered to M. & co., who were the consignees named in the bill of lading:—*Held:* pltfs. could not maintain *assumpsit* against deft. for the freight.—SCHACK *v.* ANTHONY (1813), 1 M. & S. 573; 105 E. R. 214.

*Annotations:*—**Expld.** Gardner *v.* Lachlan (1836), 8 Sim. 123. **Reid.** Gardner *v.* Lachlan (1838), 4 My. & Cr. 129. **Mentd.** Middleditch *v.* Ellis (1848), 2 Exch. 623.

**1784. Liability of principal to be sued.**]—Goods conveyed by ship having been spoiled, in consequence of the negligence & unskilfulness of the captain, the freighter sued the owners, one of whom was the captain, for damages, in an action on the case:—*Held:* the action lay, though the captain had entered into a charterparty, under seal, with the freighter & another, by which he engaged to convey the goods to their destination; it not appearing on the charterparty that the captain was part owner, nor that the freighter knew him to be such when the charterparty was executed.—LESLIE *v.* WILSON (1821), 3 Brod. & Bing. 171; 6 Moore, C. P. 415; 129 E. R. 1248.

*Annotation:*—**Reid.** Priestly *v.* Fernie (1865), 3 H. & C. 977.

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SUB-SECT. 3.—AUTHORITY OF MASTER TO BIND OWNERS.

**1785. Express authority.**]—The master of an American vessel arriving in England, authorised by the owners to sell or charter the ship, entered into a charterparty with pltfs. for a voyage to Ceylon & back. A few days afterwards defts. purchased the ship from a party acting under a power of attorney from one of the owners to sell her. The greater part of the cargo had been put on board under the charterparty. Defts. attempted to stop the sailing of the ship:—*Held:* the master having authority to charter the ship, which he had done, & defts. knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship, in pursuance of the charterparty.—MESSAGERIES IMPERIALES Co. *v.* BAINES (1863), 7 L. T. 763; 11 W. R. 322; 1 Mar. L. C. 285.

*Annotations:*—**Reid.** Adamson *v.* Gill (1868), 17 L. T. 464; The Lord Strathcona, [1925] P. 143.

**1786. Implied authority — Shipowner in this country.**]—LE BLANCH *v.* GRANGER, No. 1794, *post.*

**1787. —— Ship abroad—Difficulty in communicating with owners.**]—(1) G., a shipbroker at G. G., chartered the Finnish vessels *F.* & *M.* prior to their arrival at G. G. & without communication with the owners. G. had on several previous occasions chartered the *F.* & *M.* under similar circumstances, & all of these charterparties had been carried into effect. After the arrival of the *F.* & *M.* at G. G. their masters were on several occasions at G.'s office, & were shown their charterparties. A fortnight after the vessels' arrival at G. G., during which time freights had risen, the masters refused to take up the charterparties:—*Held:* the masters by their conduct had not ratified the charterparties in such a way as to make the act a complete ratification.

(2) A master has no authority to bind his owners by writing forward to a broker in a foreign port, prior to the ship's arrival therein, authorising the broker to charter his ship.

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**PART VII. SECT. 2, SUB-SECT. 3.**

1. *General rule.*]—If without fraud the master makes a charterparty the shipowner is not thereby divested of liability, but is still liable for the performance of such duties as are not inconsistent with the stipulations of the charterparty.—TIFFIN *v.* WEBB (1864), 5 Nfld. L. R. 54.—**NFLD.**

(3) The authority of a master to bind his owners by charterparty arises when he is in a foreign port, & his owners are not there, & there is difficulty in communicating with them.

(4) A master is not the agent for his owners to hold out a person as authorised to charter his ship, so as to bind the owners.—THE FANNY, THE MATHILDA (1883), 48 L. T. 771; 5 Asp. M. L. C. 75, C. A.

**1788. —— To authorise broker to charter.**]—THE FANNY, THE MATHILDA, No. 1787, *ante*.

**1789. —— To hold out person as authorised to charter.**]—THE FANNY, THE MATHILDA, No. 1787, *ante*.

**1790. —— To dissolve charterparty.**]—HOLMES *v.* RALLI (1849), 7 L. T. 224.

**1791. Ratification of act of master.**] — THE FANNY, THE MATHILDA, No. 1787, *ante*.

**Provisions relating to freight.**]—*See* Nos. 4525–4532, *post*.

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SUB-SECT. 4.—CONSTRUCTION.

*See* Sect. 1, sub-sect. 3, *ante*.

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SUB-SECT. 5.—ENFORCEMENT OF CONTRACT.

**1792. Performance inconsistent with charterparty—Whether injunction granted.**]—(1) A ship was chartered to proceed to such places on the west coast of Africa as the charterers should direct, & there load from their factor a full cargo of guano, & proceed to a port of the United Kingdom, to be paid at a certain freight per ton. The ship was directed to Ichaboe. The factor there, who was one of the charterers, endeavoured to provide a full cargo, but failed to procure more than a small quantity. The master of the ship, who was also a part owner, after waiting thirty-one days, seeing no probability of obtaining a full cargo from the factor, applied himself to complete the cargo by his own exertions & at his own expense, & finally succeeded in doing so, after having been ninety-three days at Ichaboe:—*Held:* the charterers were not entitled to that part of the cargo which had been procured by the exertions of the master without the assistance of the factor, & which the master claimed to hold as the property of the owners, & not of the charterers.

(2) An agreement, between the owners & the merchants, for the employment of the ship on a certain voyage, not in writing, but acted upon by the parties, is equivalent to a charterparty.

(3) *Qu.:* whether the ct. will grant an injunction restraining a party from taking a ship to any other than a certain port, thereby, in effect, compelling him to proceed to such port.—LIDGETT *v.* WILLIAMS (1845), 4 Hare, 456; 14 L. J. Ch. 459; 10 Jur. 42; 67 E. R. 727; *affd.*, 5 L. T. O. S. 169.

**1793. —— ——.**]—Injunction granted to restrain the owner of a vessel from doing any act inconsistent with the charterparty into which he had entered.—SEVIN *v.* DESLANDES (1860), 30 L. J. Ch. 457; 3 L. T. 461; 7 Jur. N. S. 837; 9 W. R. 218; 1 Mar. L. C. 1.

*Annotation:*—**Distd.** Bucknall *v.* Tatem (1900), 83 L. T. 121.

**1794. —— ——.**]—This ct. cannot decree the specific performance of a charterparty, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty. *Qu.:* whether when the ship & owner are both in this country, the captain can, without the special authority of the owner, charter the ship.—LE BLANCH *v.* GRANGER (1866), 35 Beav. 187; 55 E. R. 866.

*Annotation:*—**Refd.** Adamson *v.* Gill (1868), 17 L. T. 464.

**1795. —— ——.**]—By a charterparty the shipowner agreed that his vessel should proceed to a named port & there load a cargo for the charterer, & it was provided that if the vessel should not be at that port ready to load by a specified date, the charterer should be at liberty to cancel the charterparty. The vessel was then at another port unloading, & was delayed in doing so for so long that it became impossible for her to arrive at the agreed port by the specified date. The charterer refused to extend the time for cancellation, or to promise to load the vessel if she proceeded to the agreed port, & said that if he did load, the rate of freight must be reduced, & he insisted on the vessel proceeding to the agreed port. The shipowner thereupon refused to send his vessel there:—*Held:* an injunction ought not to be granted to restrain the shipowner from using the vessel for any purposes other than those of the charterparty.—BUCKNALL BROTHERS *v.* TATEM & Co. (1900), 83 L. T. 121, C. A.

*Annotation:*—**Consd.** Moel Tryvan Shipping Co. *v.* Weir, [1910] 2 K. B. 844.

**1796. —— ——.**]—In consequence of the public announcement of an intended Royal Naval Review at Spithead on June 28, 1902, an agreement in writing was entered into between pltfs. & deft. that pltfs.' steamship *Cynthia* should be "at the disposal" of deft. on June 28 to take passengers from Herne Bay "for the purpose of viewing the Naval Review & for a day's cruise round the fleet; also on June 29 for similar purposes: price £250 payable, £50 down, balance before ship leaves Herne Bay." On the signing of the agreement deft. paid the £50 deposit. On June 25 the review was officially cancelled, whereupon pltfs. wired to deft. for instructions, stating that the ship was ready to start, & also requesting payment of the balance. Receiving no reply, pltfs., on June 28 & 29, used the ship for their own purposes, thereby making a profit. On June 29 deft. repudiated the contract *in toto*. During the two days in question the fleet remained anchored at Spithead. In an action by pltfs. to recover the balance less the profits made by their use of the ship during the two days:—*Held:* (1) pltfs. were entitled to recover, because the venture was deft.'s, the risk being his alone; & the happening of the Naval Review was not the sole basis of the contract, so that there had been no total failure of consideration, nor a total destruction of the subject-matter of the contract; (2) the contract did not operate as a demise of the ship.

I agree that this contract did not amount to a demise of the ship; it was, however, a contract entered into for valuable consideration as to the employment of the ship on the two days in question; & it at least conferred this interest on deft., that, if pltfs. had attempted to violate it, that attempted violation would have been a ground for an injunction at the instance of pltfs. to prevent it (STIRLING, L.J.).

It is very rarely that a charterparty does contain a demise of a ship. Generally speaking, the ship is not demised at all, but remains under the management & control of her owner (VAUGHAN-WILLIAMS, L.J.).—HERNE BAY STEAM BOAT CO. *v.* HUTTON, [1903] 2 K. B. 683; 72 L. J. K. B. 879; 89 L. T. 422; 52 W. R. 183; 19 T. L. R. 680; 47 Sol. Jo. 708; 9 Asp. M. L. C. 472, C. A.

*Annotations:*—*As to* (1) **Refd.** Metropolitan Water Board *v.* Dick Kerr, [1917] 2 K. B. 1; Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085. *As to* (2) **Refd.** The Lord Strathcona, [1925] P. 143.

**1797.** —— ——.]—A vessel hired by charterers under a time charter was requisitioned by the Admlty. from the shipowners, & kept for a period in its employment, at a lower hire & on different terms from those in the original charterparty. The charterers refused to pay the hire during this period, & the shipowners claimed the right to withdraw the vessel from the charterers' service. A mutual exceptions clause in the charterparty provided for (*inter alia*) "the restraint of princes," & a cesser clause for the cessation of hire in certain events, but not for restraint of princes. The charterers brought an action against the shipowners for an injunction to restrain them from withdrawing the vessel, & the shipowners counterclaimed that they were entitled to withdraw the vessel & to recover the hire:—*Held:* (1) the charterers were liable to pay the hire under the charterparty while the vessel was employed by the Admlty.; (2) the shipowners were not entitled to withdraw the vessel from the charterers' service, as there had been a waiver of their right of withdrawal under the charterparty by a reference of the question of payment of hire to arbn., & they had recovered judgment for hire in respect of a period subsequent to the alleged forfeiture.—MODERN TRANSPORT CO., LTD. *v.* DUNERIC S.S. CO., [1917] 1 K. B. 370; 86 L. J. K. B. 164; 115 L. T. 535; 33 T. L. R. 55; 61 Sol. Jo. 71; 13 Asp. M. L. C. 490; 22 Com. Cas. 125, C. A.

*Annotation:*—*Generally*, **Refd.** Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1917] 2 K. B. 78.

**1798.** —— —— **Against mortgagee with notice.**]—One of the Vice-Chancellors refused to decree the specific performance of a charterparty, or to grant an injunction at the suit of the charterer to restrain a mtgee. of the ship, who had notice of the charterparty, from making a sale in pursuance of his power of sale contained in the mtge.-deed; but the Lords Justices, considering that where property is contracted to be used in a particular manner, & a purchaser buys that property, with notice of that contract, he is bound not to use it otherwise than in accordance with the contract:—*Held:* pltf. was entitled to an injunction to restrain the mtgee. from exercising his power of sale, & from interfering with the ship on her voyage, the injunction to continue till the hearing of the cause, & pltf. undertaking to be answerable in damages.—DE MATTOS *v.* GIBSON (1858), 4 De G. & J. 276; 28 L. J. Ch. 165; 32 L. T. O. S. 268; 5 Jur. N. S. 347; 7 W. R. 152; 45 E. R. 108, L. JJ.

*Annotations:*—**Folld.** Sevin *v.* Deslandes (1860), 30 L. J. Ch. 457; Messageries Imperiales Co. *v.* Baines (1863), 7 L. T. 763; Adamson *v.* Gill (1868), 17 L. T. 464. **Consd.** The Celtic King, [1894] P. 175. **Distd.** Bucknall *v.* Tatem (1900), 83 L. T. 121. **Consd.** The Lord Strathcona, [1925] P. 143. **Folld.** Lord Strathcona S.S. Co. *v.* Dominion Coal Co., [1926] A. C. 108. **Refd.** Peto *v.* Brighton, Uckfield & Tunbridge Wells Ry. (1863), 1 Hem. & M. 468; Catt *v.* Tourle (1869), 4 Ch. App. 654; Montague *v.* Flockton (1873), L. R. 16 Eq. 189; Luker *v.* Dennis (1877), 7 Ch. D. 227; Piperno *v.* Harmston (1886), 3 T. L. R. 219; Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416; Davis *v.* Foreman, [1894] 3 Ch. 654; L. C. C. *v.* Allen (1894), 78 J. P. 449; Formby *v.* Barker, [1903] 2 Ch. 539; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683; Brigg *v.* Thornton, [1904] 1 Ch. 386; L. C. C. *v.* Allen, [1914] 3 K. B. 642; Barker *v.* Stickney, [1919] 1 K. B. 121; Macdonald *v.* Eyles, [1921] 1 Ch. 631. **Mentd.** Wilkes *v.* Spooner, [1911] 2 K. B. 473.

**1799.** —— —— **Against purchaser with notice.**]—MESSAGERIES IMPERIALES CO. *v.* BAINES, No. 1785, *ante*.

**1800.** —— —— ——.]—The purchaser of a ship who has notice of the terms of a charterparty entered into for its employment is in the position of a constructive trustee, & he can be restrained, at the suit of the charterers, from employing the ship in any way inconsistent with the charterparty. It is not material that specific performance cannot be enforced; the ct. can grant an injunction if a negative stipulation is expressed or clearly implied in the charterparty. Notice does not, however, impose upon the purchaser a liability in damages to the charterers for failure to perform the charterparty.—LORD STRATHCONA S.S. CO. *v.* DOMINION COAL CO., [1926] A. C. 108; 95 L. J. P. C. 71; 134 L. T. 227; 42 T. L. R. 86; 16 Asp. M. L. C. 585; 31 Com. Cas. 80, P. C.

*Annotations:*—**Distd.** Ontario Jockey Club *v.* McBride, [1927] A. C. 916. **Mentd.** Torbay Hotel *v.* Jenkins, [1927] 2 Ch. 225.

**1801.** —— —— **Owner declining to reship cargo on ground of dangerous condition—Injunction pending inquiry as to condition of cargo.**]—A vessel having been chartered to convey a cargo of coals to China, & having become damaged, the master was forced to discharge the cargo, & the owner declined to reship it on the ground that having become wet it was liable to spontaneous combustion. On a bill by the charterers to restrain the owner from employing the ship in any manner inconsistent with the charterparty, the ct. directed an inquiry as to the state of the cargo, & granted an injunction pending such inquiry.—HERIOT *v.* NICHOLAS (1864), 12 W. R. 844, L. JJ.

*Annotations:*—**Expld.** Adamson *v.* Gill (1868), 17 L. T. 461. **Refd.** Adamson *v.* Gill (1868), 18 L. T. 278.

**1802.** —— —— **Contract impossible of performance.**]—Pltfs. chartered deft.'s vessel to carry a cargo of coal from an English port to Bombay, & fulfilled their part of the contract. The ship sailed, but received damage in a storm & was obliged to put into Belfast to repair. Here the coal was unloaded, & deft., being advised that by reloading it in its damaged state he would run the risk of spontaneous combustion, sold the greater part & delivered it to the purchaser. He then entered into another engagement for the employment of his vessel, & pltfs. filed this bill for an injunction. Upon pltf.'s undertaking to supply at the English port a second cargo of coal, & to compensate deft. for his loss of time upon the voyage to Belfast & back as the ct. might direct, the Vice-Chancellor granted an injunction restraining deft. from using the vessel in any manner inconsistent with the charterparty:—*Held:* the only right in pltfs. was to have the charterparty carried into effect; that had become impossible; there was no right to compel deft. to do what was never in the contemplation of the parties, & the injunction could not be maintained.—ADAMSON *v.* GILL (1868), 18 L. T. 278; 16 W. R. 639; 3 Mar. L. C. 49, L. J.

**1803.** —— **Whether action lies—Consent of owners.**]—If a ship be chartered to the East India co. for the purpose of trade or warfare, & they order her on a voyage of discovery, against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Aliter*, if the owners consent to the voyage.—LEWIN *v.* EAST INDIA CO. (1794), Peake, 318; 170 E. R. 170, N. P.

**1804. Specific performance of charterparty—Whether granted.**]—A. being equitably entitled to a ship entered into a charterparty with C. & afterwards mortgaged the ship to B., B., the mtgee., having notice of the charterparty. The ship proceeded on its voyage, but shortly afterwards was obliged to put into port for repairs, which were paid for by B., & B. took possession of the ship. C. filed a bill against A. & B., praying specific performance of the charterparty & for an injunction to restrain the use of the vessel for

*Sect.* 2.—*Charterparties: Sub-sects.* 5 *&* 6, *A., B., C., D. & E.*]

any other purpose than in performance of the contract entered into with C. One of the Vice-Chancellors dismissed the bill; &, on appeal, this decision was affirmed, the Lord Chancellor considering that specific performance of the charterparty could not be decreed, the highest right against B. being to prevent him from actively interfering to stop the performance of the contract, while the contract remained in force, but that under the circumstances of the case the contract was virtually at an end upon B.'s taking possession of the ship.—DE MATTOS *v.* GIBSON (1859), 4 De G. & J. 276, 284; 28 L. J. Ch. 498; 33 L. T. O. S. 193; 5 Jur. N. S. 555; 7 W. R. 514; 45 E. R. 108, 111, L. C.

*Annotation*:—**Refd.** Greenhill *v.* Isle of Wight Newport Junction Ry. (1871), 23 L. T. 885.

**1805.** —— ——.]—LE BLANCH *v.* GRANGER, No. 1794, *ante*.

**1806.** —— ——.]—LORD STRATHCONA S.S. CO. *v.* DOMINION COAL CO., No. 1800, *ante*.

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SUB-SECT. 6.—PROVISIONS AS TO SHIP.

*A. Name.*

**1807. Ship "to be named"—Liability of owner to provide ship—Owners' ships requisitioned.**]—DINHAM, FAWCUS & CO. *v.* WITHERINGTON & EVERETT, [1916] W. N. 154.

*Annotation*:—**Folld.** Cork Gas Consumers Co. *v.* Witherington & Everett (1920), 36 T. L. R. 599.

**1808. Charter of named vessel—Vessel already sold.**]—Pltfs. chartered a steamer from defts. by a charterparty in which defts. were described "as owners" of a named steamer & which provided that defts. might substitute a reasonably similar steamer. Before the charterparty was signed defts. had sold the named steamer, but pltfs. were unaware of this at the date of signing. In an action for breach of the charterparty:—*Held:* defts.' primary obligation was to supply the named steamer, & as they were no longer owners of the named steamer at the date of the charter they were liable to pltfs. in damages.—SOCIÉTÉ NAVALE DE L'OUEST *v.* SUTHERLAND & CO. (1920), 36 T. L. R. 682.

*B. Nationality.*

**1809. Whether condition precedent—In time of war.**]—BEHN *v.* BURNESS, No. 1840, *post*.

**1810. Description of nationality.**]—To prove that a ship is British-built, a British register so describing her is by itself no evidence.

A ship was described in a memorandum for charter as "the Swedish ship or vessel called the *Maria*." In fact, she was British-built, & had a British register, but she had a complete set of Swedish papers & a Treasury licence to sail as a Swedish ship, which particulars were known to the freighter:—*Held:* in an action against him for not loading & dispatching the ship according to the memorandum for charter, he could not set up as a defence that she was in point of fact a British & not a Swedish ship.—REUSSE *v.* MEYERS (1813), 3 Camp. 475; 170 E. R. 1451, N. P.

**1811. Change of flag during currency of charterparty.**]—The owner of a chartered ship commits a breach of the charterparty by causing the flag of the ship to be changed during the currency of the charterparty; but whether any & what damage is thereby sustained by the charterer depends upon the circumstances of the particular case.—ISAACS (M.) & SONS, LTD. *v.* MCALLUM (W.) & CO., [1921] 3 K. B. 377; 90 L. J. K. B. 1105; 125 L. T. 794; 37 T. L. R. 408; 15 Asp. M. L. C. 411.

*C. Nature and Classification.*

**1812. Nature—"Coppered"—Ship not coppered at date of charterparty.**]—DIMECH *v.* CORLETT, No. 1858, *post*.

**1813.** —— **"Steamer."**]—Goods were shipped by pltfs. on board defts.' vessel, under a bill of lading, "shipped on board the steamship *Hibernia* . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive & discharge coals . . . etc., & to tranship the goods by any other steamer":—*Held:* the contract of defts. was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam.

The bill of lading . . . must be taken to be the contract under which goods are shipped, & until I am told differently by a ct. of error I shall so hold (BLACKBURN, J.).—FRASER *v.* TELEGRAPH CONSTRUCTION CO. (1872), L. R. 7 Q. B. 566; 41 L. J. Q. B. 249; 27 L. T. 373; 20 W. R. 724.

*Annotations*:—**Refd.** Leduc *v.* Ward (1888), 20 Q. B. D. 475; Searle *v.* Lund (1903), 88 L. T. 863.

**1814. Classification—Warranty of class at date of charterparty only.**]—By a charterparty between pltf. as shipowner, & deft. as shipper, the vessel, which was therein described as A 1, was to proceed to a port of loading with all convenient speed, & there take on board a cargo of corn. The vessel was delayed, by stress of weather & the necessity of undergoing repairs, from Sept. to the following Apr., when she presented herself for cargo, but deft. then refused to load her. The vessel ran out her letter whilst under repairs:—*Held:* the warranty, that the vessel was A 1 was not a continuing warranty, but limited to the time when the charterparty was made.—HURST *v.* USBORNE (1856), 18 C. B. 144; 25 L. J. C. P. 209; 27 L. T. O. S. 80; 4 W. R. 458; 139 E. R. 1321.

*Annotations*:—**Refd.** Dimech *v.* Corlett (1859), 33 L. T. O. S. 21; Gelpel *v.* Smith (1872), 20 W. R. 332; Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; French *v.* Newgass (1878), 47 L. J. Q. B. 361.

**1815.** —— ——.]—In a charterparty made at New York between British subjects, a vessel was described as "the A 1 Br. brig *Hannah Eastee*, of Liverpool":—*Held:* this description was a warranty by the owners that the vessel was at the time classed A 1 at Lloyd's in London.—ROUTH *v.* MACMILLAN (1863), 2 H. & C. 750; 3 New Rep. 391; 33 L. J. Ex. 38; 9 L. T. 541; 10 Jur. N. S. 158; 12 W. R. 381; 1 Mar. L. C. 402.

**1816.** —— ——.]—A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made.—FRENCH *v.* NEWGASS (1878), 3 C. P. D. 163; 47 L. J. Q. B. 361; 38 L. T. 164; 26 W. R. 430; 3 Asp. M. L. C. 574, C. A.

**1817.** —— **Blank left in charterparty—Wrongly filled in by mutual mistake.**]—Pltfs. were the owners of a steamship, & defts. agreed to charter her without anything having been said by either party as to the vessel's class. After the bargain had been made defts.' agent took to pltfs.' agents a printed form of charterparty, the space for the vessel's class being left blank, & owing to a clerk of pltfs.' agents being wrongly informed as to the class the words "British Corpn." were inserted. The vessel was in fact unclassed. In an action by the owners against the charterers for rectifica-

tion of the charterparty by striking out the words "British Corpn." on the ground that they had been inserted by mistake, the charterers counterclaimed for damages on the ground that they had had to pay a higher insurance than if the ship had been classed "British Corpn." :—*Held:* as the bargain was complete before anything was said about the vessel's class & as it was left to one of the parties to fill up the blank, there was a mistake common to both parties & pltfs. were entitled to rectification & the counterclaim must be dismissed.—VERGOTTIS & Co. *v.* FORD (H.) & Co., LTD. (1918), 34 T. L. R. 233.

*D. Tonnage.*

**1818. Whether description material.**]—By a charterparty a ship was described to be of the burden of 261 tons, & the freighter covenanted to load a full & complete cargo :—*Held:* the loading of goods equal in number of tons to the tonnage described in the charterparty, was not a performance of this covenant; but the freighter was bound to put on board as much goods as the ship was capable of carrying with safety.

The mention of a ship's burden in the description of a ship in the charterparty . . . is an immaterial circumstance; although it may be made material by the allegation of fraud or other matter (ABBOTT, C.J.).—HUNTER *v.* FRY (1819), 2 B. & Ald. 421; 106 E. R. 420.

*Annotations :*—**Refd.** Barker *v.* Windle (1856), 2 Jur. N. S. 1069; Morris *v.* Levison (1876), 1 C. P. D. 155; The Resolven (1892), 9 T. L. R. 75.

**1819.** ——.]—To an action for not loading a ship according to the terms of a charterparty, in which pltf. was described as "of the ship *A.*, of the measurement of 180 to 200 tons, or thereabouts," deft. pleaded that by the said charterparty the ship was warranted to be of the measurement of 180 tons to 200 tons, or thereabouts; & that the said ship was of a measurement greatly & unreasonably exceeding 200 tons, & was not of the measurement of 180 tons to 200 tons or thereabouts; whereupon deft. did not load :—*Held:* the plea was not proved, inasmuch as the statement of tonnage in the charterparty was matter of description only, & did not amount to a warranty.—BARKER *v.* WINDLE (1856), 6 E. & B. 675; 2 Jur. N. S. 1069; 4 W. R. 603; 119 E. R. 1015; *sub nom.* WINDLE *v.* BARKER, 25 L. J. Q. B. 349; 27 L. T. O. S. 206, Ex. Ch.

*Annotations :*—**Consd.** Behn *v.* Burness (1863), 2 New Rep. 184. **Refd.** Corkling *v.* Massey (1873), 42 L. J. C. P. 153. **Mentd.** Young *v.* Moeller (1856), 6 E. & B. 681; Wheelton *v.* Hardisty (1858), 27 L. J. Q. B. 241.

*E. Carrying Capacity.*

**1820. Whether stated capacity condition precedent.**]—By a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to "pay for the use & hire of the vessel, in respect of the voyage, £1,550 in full, on condition of her taking a cargo of not less than 1,000 tons of weight & measurement" :—*Held:* (1) this was no condition precedent, &, even if it were so originally, deft., having had a substantial part of the consideration for the promise to pay, could not plead it in bar to the action; (2) the "1,000 tons of weight & measurement," meant 1,000 tons at a cargo of goods in the ordinary proportions at the port of lading, viz., one-third weight, & two-thirds measurement, & did not refer to a cargo for the Sydney market, in which the proportions were different.—PUST *v.* DOWIE (1865), 5 B. & S. 33; 5 New Rep. 338; 34 L. J. Q. B. 127; 13 W. R. 459; 122 E. R. 745, Ex. Ch.; *affg.* (1864), 5 B. & S. 20.

*Annotations :*—*As to* (1) **Refd.** The Norway (1864), Brown. & Lush. 377. *Generally,* **Refd.** Kish *v.* Taylor (1910), 80 L. J. K. B. 601. **Mentd.** Sheffield Nickel Co. *v.* Unwin (1877), 2 Q. B. D. 214.

**1821. Whether amounting to warranty.**]—During negotiations for the chartering of a vessel the owner's agents represented that the vessel had carried a certain quantity of cargo. The charterer acted on the representation, which, in fact, was untrue, & entered into a charterparty containing no reference to the previous cargo :—*Held:* the representation being untrue, the charterer could recover as for breach of a collateral verbal warranty.—HASSAN *v.* RUNCIMAN & Co. & LOHNE (1904), 91 L. T. 808; 10 Asp. M. L. C. 31; 10 Com. Cas. 19.

**1822. Guarantee to carry specified dead weight—Construction—From surrounding circumstances.**]—THE NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante.*

**1823.** —— —— ——.]—By a charterparty made between resps. & applts., it was agreed that applts.' vessel should proceed to Glasgow & there "load all such goods & merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow & carry," etc. It was provided that the freight should be a lump sum of £2,200, & the charterparty contained this guarantee: "Owners guarantee that the vessel shall carry not less than 2,000 tons dead weight," & this provision: "Should the vessel not carry the guaranteed dead weight as above, any expenses incurred from this cause to be borne by the owners, & a *pro rata* reduction per ton to be made from the first payment of freight." The cargo intended to be carried was a general cargo consisting in part of railway locomotive machinery, & a note was by consent of the parties written upon the margin of the charterparty specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, & measurement. The charterers tendered a cargo not in excess of 2,000 tons dead weight, consisting of railway machinery, including locomotives & tenders, two parcels of coals, & general goods. The large pieces of machinery were much more numerous than specified in the marginal note. The vessel sailed with only 1,691 tons dead weight. It was not disputed that she contained a carrying capacity up to the guarantee: & it was admitted that 2,000 tons dead weight of the cargo tendered could not have been carried on the vessel unless the coal had been packed with the machinery, which was not done. The charterers claimed a deduction in the freight :—*Held:* the marginal note amounted to a representation, & the cargo being such a cargo as was not contemplated, & the fact being that the vessel carried less than the guaranteed dead weight because the charterers tendered large machinery in excess of their representation, they were not entitled to the benefit of the stipulation for reduction of the freight, & the whole lump freight was payable :—*Held:* the stowage of coal among machinery without the consent of the shippers of the machinery & of the coal was not proper stowage, & it was the duty of resps. & not the duty of applts. to obtain such consent.—MACKILL *v.* WRIGHT BROTHERS & Co. (1888), 14 App. Cas. 106, H. L.

*Annotations :*—**Distd.** Millar *v.* S.S. Freden, [1918] 1 K. B. 611. **Consd.** *Re* Thomson & Brocklebank, [1918] 1 K. B. 655.

PART VII. SECT. 2, SUB-SECT. 6.—D.

**1818 1.** *Whether description material.*]—OCEANIC STEAM NAVIGATION CO., LTD. *v.* SOONDERDAS DHURUMSEY (1890), I. L. R. 15 Bom. 389.—IND.

*Sect. 2.—Charterparties: Sub-sect. 6, E. & F.]*

**1824. —— —— Carrying capacity.**]—A charterparty, which provided that the ship should "load a cargo of creosoted sleepers & timbers," contained the following clauses: "Charterer has option of shipping 100/200 tons of general cargo"; & "Owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons dead weight of cargo":—*Held:* the latter clause did not amount to a warranty that the ship should be able to carry about 90,000 cubic feet of the description of cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship.—CARNEGIE *v.* CONNER (1889), 24 Q. B. D. 45; 59 L. J. Q. B. 122; 61 L. T. 691; 6 T. L. R. 12; 6 Asp. M. L. C. 447, D. C.

*Annotations:*—**Distd.** Millar *v.* S.S. Froden, [1917] 2 K. B. 657. **Apld.** *Re* Thomson & Brocklebank, [1918] 1 K. B. 655. **Refd.** Miller *v.* Borner (1900), 69 L. J. Q. B. 429.

**1825. —— —— Lifting capacity.**]—By a charterparty it was provided that a steamship described as of about the cubic capacity for cargo of 300,000 feet bale space & of 5,600 tons dead weight cargo capacity as per builders' plan should proceed from Singapore to Calcutta & there load a full & complete cargo of unobjectionable merchandise not exceeding what she could reasonably stow & carry & proceed to certain ports. The vessel's holds were to be sufficiently ventilated as customary & all requisite mats & dunnage were to be found by the steamer. By a guarantee contained in the charterparty the owners guaranteed to place 5,600 tons dead weight cargo capacity & 300,000 cubic feet bale space as per builders' plan at disposal of charterers. If the dead weight or bale space placed at charterers' disposal were less than the above then the lump sum freight was to be reduced *pro rata*. The charterers did, in fact, load a cargo on board the ship of a kind contemplated by the charterparty but the dead weight cargo capacity placed at their disposal was, owing to various causes not in any way attributable to the charterers, less than 5,600 tons, & was occupied to the extent of 32 tons by dunnage provided & used by the shipowners in stowing the cargo of the ship, & by reason thereof cargo to the extent of 32 tons which the charterers were ready to ship remained unshipped. The dunnage was necessary to enable the shipowners to fulfil their obligations under the charterparty to properly stow & ventilate the cargo in the ship, & the only question which arose was whether or not the lump sum for freight ought to be reduced in respect of the 32 tons:—*Held:* in the absence of special circumstances the shipowners' guarantee was a guarantee of the abstract lifting capacity of the ship. The shipowners were therefore entitled to the lump sum freight without any deduction in respect of the 32 tons.—*Re* THOMSON & Co. & BROCKLEBANK, LTD., [1918] 1 K. B. 655; *sub nom.* THOMSON & Co. *v.* BROCKLEBANK (T. & J.), LTD., 87 L. J. K. B. 616; 118 L. T. 573; 34 T. L. R. 284; 14 Asp. M. L. C. 253.

**1826. —— —— ——.**]—A printed form of charterparty provided that the ship should load & the charterers provide a full & complete cargo of maize, the words "wheat & [or flour &] or other lawful merchandise," which were in the printed form being struck out. The ship was then to proceed & discharge at one of a number of ports as ordered by the charterers. The freight was to be payable at & after rates varying according to the port of discharge. Then followed the clause "The owners guarantee the ship's dead-weight capacity to be 3,200 tons & freight to be paid on this quantity." That clause was substituted for a printed clause which made freight payable per ton of wheat & [or flour delivered, or if other cargo was shipped on a full cargo of wheat, &] or flour. The effect of the alteration was to make the charterparty one at a lump sum freight, varying with the port of discharge. The ship in fact had a lifting capacity of 3,200 tons, but she had not cubic capacity to take on board that weight of maize:—*Held:* the primary meaning of the phrase "ship's dead weight capacity" was not her capacity to carry tons of maize, but her abstract lifting capacity, & the mere fact that maize was mentioned as the cargo to be carried in the earlier part of the charterparty did not change the meaning of the phrase from a designation of the ship's lifting capacity in the abstract to a designation of her combined lifting & cubic capacity applied to the ratio of bulk to weight existing in maize.—MILLAR (W). & Co., LTD. *v.* FREDEN (OWNERS), [1918] 1 K. B. 611; 87 L. J. K. B. 524; 118 L. T. 522; 34 T. L. R. 234; 62 Sol. Jo. 307; 14 Asp. M. L. C. 247, C. A.

*Annotation:*—**Consd.** *Re* Thomson & Brocklebank, [1918] 1 K. B. 655.

**1827. —— ——.**]—By the terms of a charterparty the freight to be paid for the hire of a vessel for a voyage was the lump sum of £10,000, the ship to take on board at the port of loading all such goods & lawful merchandise as the charterers or their agents should tender alongside for shipment, including explosives & deck cargo not exceeding what she could reasonably stow & carry. The charterparty contained the following provision: "The lump sum is based on owners' guarantee that the said steamer shall carry a dead weight of 6,000 tons of cargo when loaded according to Lloyd's rules, exclusive of 1,100 tons of coal, which steamer may carry for steaming purposes, etc., of which about 800 to be carried in the hold, & the necessary stores for steamer's use for the voyage, & also that the steamer shall place at the disposal of the charterers for cargo not less than 8,450 tons of forty cubic feet cargo space grain measurement; failing which, a *pro rata* reduction shall be made."

The cubic space of 8,450 tons of 40 cubic feet cargo space grain measurement in the vessel was placed at the disposal of the charterers; but if she had taken on board a cargo of 6,000 tons dead weight it would have been necessary to limit the quantity of coals on leaving the port of loading to 728 tons in order to comply with Lloyd's rules as to freeboard. The charterers, in fact, loaded a cargo which filled all the available space but did not weight 6,000 tons, & the master thereupon took on board 1,250 tons of coal for steaming purposes. The charterers deducted from the £10,000 named in the charterparty as the lump sum freight the sum of £523 18*s.* 10*d.*, being the proportion of the £10,000 corresponding to the difference between 7,100 tons (6,000 + 1,100) & 6,728 tons, the total dead weight capacity of the vessel, upon the ground that she was not of the guaranteed dead weight capacity of 6,000 tons when loaded according to Lloyd's rules, exclusive of 1,100 tons of coal for steaming purposes. In an action by the shipowners to recover the £523 18*s.* 10*d.* so deducted:—*Held:* the deduction had been rightly made by the charterers, & the shipowners were therefore not entitled to recover.—SOCIETA ANONYMA UNGHERESE DI ARMAMENTO MARITTIMO ORIENTE *v.* TYSER LINE, LTD. (1902), 8 Com. Cas. 25.

**1828. —— Breach of guarantee—Measure of damages.**]—SCARAMANGA MANOUSSIN & CO. *v.* ENGLISH & CO., No. 2831, *post.*

**1829. "One thousand tons of weight & measurement"—Meaning of.**]—PUST *v.* DOWIE, No. 1820, *ante.*

**1830. "Two thousand tons or thereabouts"—What margin allowed.**]—In a charterparty it was agreed that a vessel was to carry "2,000 tons or thereabouts":—*Held:* the word "thereabouts" must be taken to qualify the 2,000 to some extent, & 5 per cent. was a fair margin to allow.—THE RESOLVEN (1892), 9 T. L. R. 75.

**1831. "About six hundred tons but no guarantee given."**]—A steamship was described in a charterparty of Apr. 24, 1917, as being "supposed to carry about 600 tons but no guarantee given deadweight on Board of Trade summer freeboard inclusive of bunkers." The charterers on the same day sub-chartered the vessel describing her in the sub-charter as "carrying about 600 tons deadweight on Board of Trade summer freeboard inclusive of bunkers without guarantee." At all material times the ship had some 100 to 150 tons of hard cement fixed & irremovable in her holds, which reduced her deadweight capacity to about 497 tons:—*Held:* (1) on giving the whole reach & burthen of the ship as they existed at the date of the contract, the owners had performed their contract that the whole reach & lawful burthen of the ship should be at charterers' disposal; (2) that the words "no guarantee given" relieved the owners of liability in respect of the deadweight capacity being less than 600 tons.—JAPY FRÈRES & CO. *v.* SUTHERLAND (R. W. J.) & CO., SUTHERLAND (R. W. J.) & CO. *v.* THOEGER (OWNERS) (1921), 91 L. J. K. B. 19; 125 L. T. 211; 37 T. L. R. 446; 15 Asp. M. L. C. 198; 26 Com. Cas. 227, C. A.

**1832. "Not less than six thousand five hundred tons but not exceeding seven thousand tons"—Obligation on charterers to load to full capacity.**]—JARDINE, MATHESON & CO. *v.* CLYDE SHIPPING CO., No. 4764, *post.*

**Amount of cargo.**]—*See* Part VII., Sect. 2, sub-sect. 8, C., *post.*

*F. Fitness.*

**1833. "Tight, staunch, strong."**]—In a declaration on a charterparty, by which the ship was to sail from Hamburgh, being tight, staunch, strong, & every way fitted for the voyage, in the course of the next Nov., & proceed to Lima, & having discharged her outward cargo, forthwith to be made ready & proceed to Costa Rica, & there take on board a cargo, & then proceed to Liverpool—breaches were alleged as follows: That the vessel was not in Nov. or afterwards, until or when she sailed, to wit, on Dec. 20, tight, staunch, strong, or in any way fitted for the voyage; & that though she did then sail from Hamburgh, yet by reason of her not being tight, etc., when she so sailed, she was obliged to, & did, put back into Altona, & was detained there for a long time, to wit, until, etc.; though she did then again set sail on her voyage from Altona, she did not proceed on the voyage according to its due course, or with proper dispatch, but was unnecessarily delayed, & deviated, etc.; by means of which several premises the vessel did not arrive at Lima until, etc., & pltf. lost the benefit of a homeward cargo from Costa Rica, etc. Deft. pleaded, amongst other things, as to so much of the declaration as related to the vessel not being fitted for the voyage, & by reason thereof being obliged to put back into Altona, & being detained there for such time as was necessary to put further ballast on board, payment into ct. of 1*s.*, & no damages ultra; & as to so much as related to her being detained at Altona beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, staunch, etc., *modo et forma*:—*Held:* the latter plea was bad, as answering only a part of the breach to which it applied, viz. the detention at Altona, & the subsequent delay & deviation; even if that was a breach, & was not merely a statement of special damage.—PORTER *v.* IZAT (1836), 1 M. & W. 381; 2 Gale, 54; Tyr. & Gr. 639; 150 E. R. 481.

**1834. ——.**]—(1) A covenant in a charterparty of affreightment, that the owner shall at his expense forthwith, make the ship tight & strong, etc., for a voyage for twelve months, etc., & keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service & used her for a certain period, but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages, but if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, & might have been insisted on as a bar to the action.

(2) A ship having been let to freight for twelve months, & for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of two, six, ten & fourteen months, etc., it is no answer to a breach for non-payment of six months' freight due at the end of the ten months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, & that she was not in repair when the freighter shipped goods on board her during the twelve months, which made it necessary for him to unload & repair her, whereby she was unserviceable for part of the six months; & that he had paid the freight for all the time she was serviceable; & that she was not in his service for ten months in the whole: for *non constat* but that after she had been used by the freighter, she wanted repair without any default of the owner, or that he was guilty of any delay in making the repairs; & the freight would still run on during the time of repair.

(3) The freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from four months to four months, & the ship was lost before the end of fourteen months.

(4) An allowance for extra men being covenanted to be paid by the freighter, the residue of which, after part payment was not to be paid till the ship's discharge or return from her voyage, & the ship having sailed on a voyage to St. Domingo, where she arrived, but was burnt before her return:—*Held:* such loss was a discharge of her from the freighter's employment, as if by the act of the freighter: on which such extra allowance became payable.—HAVELOCK *v.* GEDDES (1809), 10 East, 555; 103 E. R. 886.

*Annotations:—As to* (1) **Reid.** Clipsham *v.* Vertue (1843), 5 Q. B. 265; McAndrew *v.* Chapple (1866), 14 W. R. 891; Stanton *v.* Richardson, Richardson *v.* Stanton (1872), L. R. 7 C. P. 421; Jackson *v.* Union Marine Insce. (1873), L. R.



1828 i. *Guarantee to carry specified dead-weight—Breach of guarantee—Measure of damages.*]—M'CULLY *v.* M'DONALD, M'DONALD *v.* M'CULLY (1870), 22 L. T. 628.—**SCOT.**

m. *About fifty tons not exceeding what she can reasonably stow & carry—What margin allowed.*]—DAVIS *v.* YOUNG (1869), 8 N. S. W. S. C. R. (L.) 259.—**AUS.**

*Sect. 2.—Charterparties: Sub-sect. 6, F. & G.*]

8 C. P. 572; The Europa, [1908] P. 84. *As to* (2) **Consd.** Tully *v.* Howling (1877), 2 Q. B. D. 182; Inman S.S. Co. *v.* Bischoff (1882), 7 App. Cas. 670. *As to* (3) **Distd.** Crozier *v.* Smith (1840), 1 Man. & G. 407. *Generally*, **Refd.** Fothergill *v.* Walton (1818), 2 Moore, C. P. 630; Thompson *v.* Gillespy (1855), 5 E. & B. 209; Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377. **Mentd.** Carpenter *v.* Cresswell (1827), 4 Bing. 409.

**1835. —— Whether condition precedent.**]—(1) Declaration stated that a charterparty was made by pltfs., owners of a ship then at Sunderland, & deft. whereby it was agreed that the ship, "being tight, staunch & strong, & every way fitted for the voyage," should at Sunderland load a cargo from the merchant's factor, &, being so loaded, should therewith proceed to Constantinople for orders, to deliver there, or at other places named, being paid freight at rates named; "one-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less 5 per cent. for insurance, interest & commission." That deft. caused the ship to be loaded, & "the ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter party"; that pltfs. did & were ready to do all things necessary on their part, & all things necessary happened & were done, to entitle pltfs., by their agent in London, to receive, & render deft. liable to pay to him, the fourth part of the freight, less 5 per cent., etc., yet deft. had not paid it. Plea: that the ship was not, at the commencement of the voyage, tight, staunch, & strong, & every way fitted for the voyage, & that, by reason of the premises, the ship & the cargo were wholly lost:—*Held:* a good plea; for that the sailing of the ship in a seaworthy condition was made by the charterparty a condition precedent to the payment of the fourth of the freight. But the plea could not be supported on the ground of avoiding circuity of action.

(2) Deft. also pleaded that pltfs. not only sent the ship to sea in an unseaworthy state, but that, after she was so sent, pltfs. permitted the master to leave the ship & go on shore, & permitted her to be near the shore without a master or sufficient crew; & she, by reason of the premises, sunk & was lost, & the cargo was wholly lost:—*Held:* a bad plea: inasmuch as it did not traverse the sailing of the ship according to the charterparty; & the subsequent misconduct of pltf. was ground only for a cross action.

(3) Deft. also pleaded that the ship did not sail as alleged; on which issue was joined. On the trial, it appeared that she loaded in Sunderland Dock, &, being duly cleared crossed the bar, came out of Sunderland Harbour [to save a spring tide] into the roads, & there cast anchor 3 miles from Sunderland: The shrouds & cables were not in a proper condition for sailing; the bills of lading not signed; the mate was not on board; & the master soon after left her. There was no intention that she should afterwards return to the harbour. She was lost on the night of the day she so cast anchor, none of the above-mentioned deficiencies having been supplied:—*Held:* upon these facts, it appeared that the ship had not sailed, but merely gone into the roads to complete her preparation for sailing: & deft. was entitled to the verdict.—THOMPSON *v.* GILLESPY (1855), 5 E. & B. 209; 3 C. L. R. 1368; 24 L. J. Q. B. 340; 25 L. T. O. S. 174; 1 Jur. N. S. 779; 3 W. R. 505; 119 E. R. 459.

*Annotation:—As to* (3) **Apld.** Hudson *v.* Bilton (1856), 6 E. & B. 565.

**1836. —— ——.**]—The stipulations in a charterparty that the vessel, being tight, staunch & strong, shall sail with all convenient speed, are not conditions precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated.

In *Abbott on Shipping* . . . it is said—"Whether or not a particular covenant by one party be a condition precedent . . . or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them (POLLOCK, C.B.).—TARRABOCHIA *v.* HICKIE (1856), 1 H. & N. 183; 26 L. J. Ex. 26; 156 E. R. 1168.

*Annotations:—***Refd.** Croockewit *v.* Fletcher (1857), 1 H. & N. 893; Dimech *v.* Corlett (1858), 12 Moo. P. C. C. 199; Seeger *v.* Duthie (1860), 8 C. B. N. S. 45; Behn *v.* Burness (1863), 3 B. & S. 751; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; Stanton *v.* Richardson, Richardson *v.* Stanton (1874), L. R. 9 C. P. 390.

**1837. —— ——.**]—THE COLLIER, SYDNEY, ETC. *v.* NICHOL (1857), 4 L. T. 683.

**1838. —— ——.**]—Pltf. chartered a ship from defts. for a single voyage. By the charterparty defts. warranted that the vessel was "in every way fitted for the voyage & service, & to be so maintained by the owners." During the currency of the charterparty a stevedore engaged on the ship in the work of unloading sustained injuries by reason of the defective condition of an iron ladder leading to the hold. The stevedore sued the charterer for damages. The charterer defended the action, & in so doing acted reasonably, & judgment was given against him for damages & costs on the ground that he had committed a breach of duty towards the stevedore in not making an inspection of the vessel before inviting the stevedore on board:—*Held:* the charterer's liability to the stevedore was the natural consequence of defts.' breach of warranty; & the charterer was entitled to recover from defts. the damages & costs paid by him to the stevedore, & his own costs, as between solr. & client, incurred in defending the action.—SCOTT *v.* FOLEY, AIKMAN & Co. (1899), 16 T. L. R. 55; 5 Com. Cas. 53.

*G. Position.*

**1839. Whether condition precedent.**] — To an action for not loading a vessel in pursuance of the terms of a charterparty, deft. pleaded, setting out the whole of the charterparty, which stated, that it was agreed between pltf., "original charterer of the good ship or vessel called *The Dove* A. I, of the measurement of 149 tons, or thereabouts, now at sea, having sailed three weeks ago, or thereabouts," & deft., that the ship, being tight, staunch, etc., should proceed to M. (after having delivered her cargo at G., & there load certain goods of deft., & therewith proceed to a safe port in the United Kingdom, calling at C. or F. for a certain rate of freight; thirty working days to be allowed, Sundays excepted. The plea then averred, that time was an essential & material part of the contract; & the probable situation of the vessel with reference to the date of her sailing, & the object of her voyage, was also an essential & material

**PART VII. SECT. 2, SUB-SECT. 6.—G.**

**1839** 1. *Whether condition precedent.*]—By a charter party made between pltf. & deft. it was agreed "that pltf.'s vessel *P.* now lying at C. should sail for J. direct & load a full cargo of guano, to be supplied by defts. & after loading, the said vessel was to proceed to H. The vessel was not lying at C. at the time the contract was entered into. There was no evidence to show that it was a matter of importance where the ship was at the time the contract was made:—*Held:* the words "now lying at C." were words of description, & did not constitute a condition precedent.—BECKWOLDT *v.* COLONIAL GUANO CO. (1890), 16 V. L. R. 166.—**AUS.**

part of the contract, & that, in point of fact, at the time of the making the charterparty, the vessel had not sailed three weeks, but a materially & unreasonably later time, of which deft. had no notice or knowledge, for which cause deft. neglected & refused to load the vessel:—*Held:* the time at which the vessel sailed was material; that statement in the charterparty amounted to a warranty; & deft. was entitled to retain his verdict upon the plea, on motion for judgment *non obstante veredicto*.—OLLIVE *v.* BOOKER (1847), 1 Exch. 416; 17 L. J. Ex. 21; 154 E. R. 177; *sub nom.* OLIVE *v.* BOOKER, 10 L. T. O. S. 137.

*Annotations:*—**Apld.** Oliver *v.* Fielden (1849), 4 Exch. 135. **Consd.** Seeger *v.* Duthie (1860), 8 C. B. N. S. 45. **Apprvd.** Behn *v.* Burness (1863), 3 B. & S. 751. **Reid.** Elliot *v.* Von Glehn (1849), 13 Q. B. 632; Hurst *v.* Usborne (1856), 25 L. J. C. P. 209; Croockewit *v.* Fletcher (1857), 1 H. & N. 893; Gorrissen *v.* Perrin (1857), 2 C. B. N. S. 681; Wheelton *v.* Hardisty (1858), 8 E. & B. 285; Dimech *v.* Corlett (1859), 33 L. T. O. S. 21; Corkling *v.* Massey (1873), L. R. 8 C. P. 395; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125. **Mentd.** Bannerman *v.* White (1861), 10 C. B. N. S. 844.

**1840.** ——.]—(1) Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the ct., & not the jury, must determine.

(2) By memorandum of charterparty, dated London, it was agreed between A. B., therein described as "owner of the good ship or vessel called the *M.*, of 420 tons or thereabouts, now in the port of Amsterdam," & C. D., that the said ship, being tight, staunch, strong, & every way fitted & ready for the voyage, should, "with all possible dispatch, proceed direct to N., etc." In an action by the shipowner against the charterer for not loading the agreed cargo:—*Held:* the words "now in the port of Amsterdam" amounted to a warranty or condition precedent to the contract that the ship was there at the time of making the memorandum of charterparty.

(3) For instance, if it was made in the time of war, the national character of the vessel is of such importance that a statement of it in the charterparty might properly be regarded as part of the shipowner's contract (WILLIAMS, J.).

(4) A charterparty must be construed with reference to the intention of the parties at the time it was made, & irrespective of subsequent events.—BEHN *v.* BURNESS (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L. J. Q. B. 204; 8 L. T. 207; 9 Jur. N. S. 620; 11 W. R. 496; 1 Mar. L. C. 329; 122 E. R. 281, Ex. Ch.

*Annotations:*—*As to* (1) **Reid.** Carr *v.* Montefiore (1864), 5 B. & S. 408; The Resolven (1892), 9 T. L. R. 75; *Re* Comptoir Commercial Anversois Power, [1920] 1 K. B. 868. *As to* (2) **Apld.** Aron *v.* Comptoir Wegimont, [1921] 3 K. B. 435. **Reid.** MacAndrew *v.* Chapple (1866), Har. & Ruth. 745; Bentsen *v.* Taylor (2), [1893] 2 Q. B. 274. *Generally*, **Reid.** Neill *v.* Whitworth (1865), 18 C. B. N. S. 435; Pust *v.* Dowie (1865), 5 B. & S. 33; Corkling *v.* Massey (1873), L. R. 8 C. P. 395; Oppenheim *v.* Fraser (1876), 34 L. T. 524; Vergottis *v.* Ford (1918), 34 T. L. R. 233. **Mentd.** Mallan *v.* Radloff (1864), 17 C. B. N. S. 589; Heilbutt *v.* Hickson (1872), L. R. 7 C. P. 438; Bettini *v.* Gye (1875), 24 W. R. 551; Sheffield Nickel Co. *v.* Unwin (1877), 2 Q. B. D. 214; Lodwick *v.* Perth (1884), 1 T. L. R. 76; Wallis & Wells *v.* Pratt & Haynes, [1910] 2 K. B. 1003; Westacott *v.* Hahn, [1918] 1 K. B. 495; Meyrick *v.* Dyson (1925), 41 T. L. R. 368; British American Continental Bank *v.* British Bank for Foreign Trade, [1926] 1 K. B. 328.

**1841.** ——.]—By a charterparty it was mutually agreed between pltf. & deft. that a ship expected to be at A. about Dec. 15, should proceed to A., or as near thereto as she could safely get, & there load a cargo:—*Held:* the words expected to be at A. about Dec. 15, were a matter of contract for the breach whereof an action is maintainable, also that they mean that the ship is in such a place that she may reasonably expect to be at A. at the time named.—CORKLING *v.* MASSEY (1873), L. R. 8 C. P. 395; 42 L. J. C. P. 153; 28 L. T. 636; 21 W. R. 680; 2 Asp. M. L. C. 18.

*Annotation:*—**Reid.** Sanday *v.* Keighley Maxted (1922), 38 T. L. R. 273.

**1842.** ——.]—In an action brought by the vendors against their vendees for refusal to accept, evidence was given to show the circumstances under which the contract was made, & that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "ship now at Rangoon," had not been fulfilled, & that it was a condition absolutely vital:—*Held:* (1) it was rightly left to the jury to say under what circumstances the contract was made, & the words "ship now at Rangoon" amounted to a warranty justifying deft. in saying that there had been a failure of performance of a condition precedent & in refusing to carry out the contract; (2) the finding of the jury was rightly taken as an element in enabling the ct. to say that the words amounted to a condition precedent.—OPPENHEIM *v.* FRASER (1876), 34 L. T. 524; 3 Asp. M. L. C. 146.

*Annotation:*—*As to* (2) **Reid.** *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868.

**1843.** ——.]—A charterparty, dated Mar. 29, between pltf., a shipowner, & defts., described the ship as "now sailed or about to sail from a pitch pine port to the United Kingdom," & provided that the ship should, after discharging homeward cargo, proceed to Quebec, & there load a cargo of timber, & being so loaded should therewith proceed to Greenock, Barrow, or Liverpool, as ordered on signing the bill of lading, & deliver the same on being paid freight. At the date of the charterparty both parties knew that the ship was, or had just been, at Mobile, in America, loading a cargo of timber, which she was to carry to Greenock. She did not, in fact, sail from Mobile until Apr. 23. On May 16, defts. were aware of the date of the sailing, & they then wrote to pltf.'s brokers, asking if they had any proposal respecting the charter. No proposal was made by pltf., & on June 5, the ship arrived at Greenock. Further correspondence took place, & ultimately the defts., on June 16, wrote to pltf.'s brokers, "If you send the ship to load under our charterparty we shall protest against loading & difference of freight & insurance upon goods then shipped."

The ship sailed from Greenock on June 18, & after she had arrived at Quebec, defts. refused to load her:—*Held:* (1) the description of the ship as "now sailed or about to sail," was of the substance of the contract; it was a condition precedent & not a mere warranty; & on breach of the condition defts. would have been entitled to repudiate the contract.

(2) The conduct of defts., & in particular the letter of June 16, amounted to a waiver of such right to repudiate the contract, & they were liable for the freight under the charterparty, but were entitled as against pltf. to such damages as they could prove that they had sustained by reason of the breach of the condition.

(3) If there is any doubt about the facts it is for the jury to determine upon the evidence what they were & when they have done this it is for the ct. to construe the contract (LORD ESHER, M.R.).—BENTSEN *v.* TAYLOR, SONS & CO. (2), [1893] 2 Q. B. 274; 63 L. J. Q. B. 15; 69 L. T. 487; 42 W. R. 8; 9 T. L. R. 552; 7 Asp. M. L. C. 385; 4 R. 510, C. A.

*Annotations:*—*As to* (2) **Consd.** Hartley *v.* Hymans, [1920] 3 K. B. 475. **Reid.** Panoutsos *v.* Raymond Hadley Corpn. of New York, [1917] 2 K. B. 473; Ayrey *v.* British Legal

*Sect. 2.—Charterparties: Sub-sect. 6, G.; sub-sect. 7, A. & B.*]

& United Provident Assce., [1918] 1 K. B. 136. *Generally,* **Refd.** Compagnie Chemin de Fer Paris-Orleans *v.* Leeston Shipping Co. (1919), 36 T. L. R. 68. **Mentd.** Meyrick *v.* Dyson (1925), 41 T. L. R. 368.

**1844.** ——.]—A charterparty provided that a ship "now in Finland, bound to London," should proceed to Archangel from London & there load a cargo of timber for Great Yarmouth:—*Held:* the words "now in Finland, bound to London" were a warranty that the ship was in some port in Finland from which she was under engagement to proceed direct to London.—ENGMAN *v.* PALGRAVE, BROWN & SON (1898), 15 T. L. R. 113; 4 Com. Cas. 75.

**1845.** —— **"Expected ready to load."**]—A clause in a contract that a ship is "expected ready to load" at a given date does not mean that the ship must be in such a position, whether that position be known to the parties or not, that she will, according to all probable reckoning, be able to load by the date indicated. It means that there must be an honest belief, founded on reasonable grounds, in the minds of the sellers making the representation that she will be able to load at that date. Where such a representation was made, & there were no reasonable grounds for making it, & the ship was not ready to load until a long time afterwards, there was a breach of condition entitling the buyers to avoid the contract.—SANDAY & Co. *v.* KEIGHLEY, MAXTED & Co., SANDAY (S.) & Co. *v.* HILLERNS & FOX VLER (1922), 91 L. J. K. B. 624; 127 L. T. 327; 38 T. L. R. 561; 66 Sol. Jo. 437; 15 Asp. M. L. C. 596; 27 Com. Cas. 296, C. A.

**1846. Whether amounting to warranty.**]—ELLIOT *v.* VON GLEHN, No. 1656, *ante.*

**1847. Failure to be at stated position—Liability of charterers to purchasers of cargo—Recovery over against shipowner.**]—PROCTER GARRETT MARSTON, LTD. *v.* OAKWIN S.S. Co., No. 3479, *post.*

### SUB-SECT. 7.—PROVISIONS AS TO VOYAGE.

#### *A. In General.*

**1848. Meaning of voyage.**]—"Voyage" in the usual exception inserted in charterparties as to enemies, perils of war, etc., does not include the period during which the vessel is being loaded before the commencement of the voyage.——— *v.* ——— (1846), 6 L. T. O. S. 345.

**1849.** ——.]—THE CARRON PARK, No. 2680, *post.*

**1850. Charter to ports of particular island—Some ports neutral some hostile—Covenant to procure licence to trade—Breach of covenant.**]—If a vessel be chartered to any ports of an island, part of which is hostile, & part neutral, & the freighter covenants to procure a licence; if the ship trades to a neutral port of the island, it is no breach of the covenant that the freighter has procured a licence which would not authorise the like trade to an hostile port.—JOHNSON *v.* GREAVES (1810), 2 Taunt. 344; 127 E. R. 1111.

**1851. Charter for consecutive voyages—Within specified time—Whether completion of all voyages or expiry of time terminates contract.**]—In an action for the breach of a charterparty of affreightment by the freighters against the owner of the vessel, the declaration stated, that it was agreed by the parties to the charterparty, that the vessel should proceed with all convenient speed to S., & there load a cargo of coals, & therewith proceed to L., & deliver the cargo at a safe wharf, a certain amount of freight being payable per ton, the act of God, the Queen's enemies, fire, & all & every other dangers & accidents of the seas, rivers, & navigation, of whatever nature & kind, during the said voyage always excepted, that the charterparty should be in force for six successive voyages; & that they should be made not later than the last day of Feb. 1853. The declaration then averred that pltfs. did all things necessary to be done on their part to entitle them to have six successive voyages performed under the charterparty; & that they had always been ready & willing to do all things required, yet the vessel did not make six successive voyages as agreed; & that deft. would not permit the said vessel, for the fourth successive time, or for any time except three times after the making of the charterparty, to proceed to S., & there to load a cargo of coals on board. Plea, that, after the making of the charterparty, & before the alleged breach, the last day of Feb. had expired on demurrer:—*Held:* the plea was no answer to the action; & the declaration was good, although it did not contain any averment negativing the fact of deft. being within any of the exceptions contained in the charterparty; & if deft. relied upon such fact, he was bound to plead it.—WHEELER *v.* BAVIDGE (1854), 9 Exch. 668; 2 C. L. R. 1077; 23 L. J. Ex. 221; 156 E. R. 286.

*Annotations:*—**Consd.** Munro, Brice *v.* War Risks Assocn., [1918] 2 K. B. 78. **Refd.** Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125. **Mentd.** Hurst *v.* Evans (1916), 86 L. J. K. B. 305.

**1852.** —— ——— ———.]—A declaration on a charterparty stated, that it was agreed between deft., the shipowner, & pltf., that the ship should proceed to S. & there take on board from the agents of the freighter a full & complete cargo of coals & therewith proceed to L., & deliver the same at a wharf to the order of the freighter, the act of God, the Queen's enemies, fire, & all & every other dangers & accidents of the seas, rivers, & navigation of whatever nature or kind during the said voyage always excepted; that the charter should be in force for six successive voyages, & that they should be made not later than the last day of Feb. 1853. Breaches that the ship did not make six successive voyages, & that deft. would not permit the ship to make more than three voyages. Plea, that during the three voyages the ship sustained great damage by dangers & accidents of the seas & navigation, which damage was necessary to be repaired before the ship could commence her fourth voyage; that deft. forthwith on the completion of the said three voyages proceeded to repair, & did repair, the damage; but it could not be repaired, nor could the ship be made fit to commence the fourth voyage until after the last day of Feb. 1853, had elapsed:—*Held:* the plea was bad, inasmuch as the inability to perform the voyages within the time specified did not discharge the contract, or afford any excuse for not commencing the fourth voyage.—POPE *v.* BAVIDGE (1854), 10 Exch. 73; 156 E. R. 361.

*Annotation:*—**N.F.** Dunford *v.* Cia Anonima Maritima Union (1911), 104 L. T. 811.

**1853.** ——— ——— ———.]—A charterparty contained the following clause: This charter to remain in force for six or seven, in charterers' option, consecutive voyages during 1910. The ship was ready to load on Jan. 3, 1910, but the charterers were unable to load her at Newcastle in consequence of a strike which lasted until Jan. 11. The ship accordingly went on a voyage to Italy for other charterers with a cargo of coal from South Wales, the judge finding that this was reasonable. She did not get home from her

sixth voyage until Jan. 6, 1911, when the charterers purported to exercise their option to load her for a seventh voyage:—*Held:* on the true construction of the charterparty, the words "during 1910" were words of description & protection for both parties, the one being only bound to load, & the other only bound to supply the ship during 1910, & therefore the charterers were not entitled to exercise the option claimed.—DUNFORD & CO., LTD. *v.* CIA ANONIMA MARITIMA UNION (1911), 104 L. T. 811; 55 Sol. Jo. 424; 12 Asp. M. L. C. 32; 16 Com. Cas. 181.

*B. Proceeding to Port of Loading.*

**1854. Whether general words condition precedent —To sail with next wind.**]—CONSTABLE *v.* CLOBERIE (1625), Palm. 397; Poph. 161; Lat. 49; 81 E. R. 1141; *sub nom.* CONUSTABLE *v.* CLOWBURY, Noy, 75.

*Annotations:*—**Consd.** Hall *v.* Cazenove (1804), 4 East, 477. **Distd.** Glaholm *v.* Hays (1841), 2 Man. & G. 257; Oliver *v.* Fielden (1849), 4 Exch. 135; Croockewit *v.* Fletcher (1857), 1 H. & N. 893. **Refd.** Ballo & Griffith *v.* Briard (1628), Lat. 225; Havelock *v.* Geddes (1809), 10 East, 555; Davidson *v.* Gwynne (1810), 12 East, 381; Seeger *v.* Duthie (1860), 8 C. B. N. S. 45; Stanton *v.* Richardson, Richardson *v.* Stanton (1872), L. R. 7 C. P. 421. **Mentd.** Wynne *v.* Wynne (1840), 2 Man. & G. 8.

**1855. —— "Unload & directly sail."**]—Covenant on charterparty, that the ship having unloaded her outward cargo at St. T. should directly sail for Dominica, where deft. should load a homeward cargo. Breach, deft. did not load, etc. Plea, the ship did not unload her outward cargo at St. T. Demurrer:—*Held:* the plea was bad, as the unloading at St. T. was not a condition precedent.—OHLSEN *v.* DRUMMOND (1785), 4 Doug. K. B. 356; 99 E. R. 920; *sub nom.* OLHSEN *v.* DRUMMOND, 2 Chit. 705.

**1856. —— "With all convenient speed."**]—By charterparty, pltf., owner, agreed to proceed to the Cape, & having discharged goods, thence to proceed with all convenient speed to Bombay. In consideration whereof & of everything beforementioned, deft., the freighter, promised to find a cargo. Pltf. delayed at the Cape, & then sailed out of his course to the Mauritius, & so arrived at Bombay six weeks later than if he had sailed direct from the Cape; in which time, other vessels which had sailed later from England, had arrived. In *assumpsit*, for not finding a cargo, it was left to the jury, to find whether pltf.'s conduct entirely frustrated deft.'s object in chartering the ship:—*Held:* the direction was right; & the proceeding to Bombay was a condition precedent, by breach of which deft.'s object was entirely frustrated, &, consequently, pltf. could not recover.—FREEMAN *v.* TAYLOR (1831), 8 Bing. 124; 1 Moo. & S. 182; 1 L. J. C. P. 26; 131 E. R. 348.

*Annotations:*—**Consd.** Tarrabochia *v.* Hickie (1856), 1 H. & N. 183; MacAndrew *v.* Chapple (1866), L. R. 1 C. P. 643. **Refd.** M'Andrew *v.* Adams (1834), 1 Bing. N. C. 29; Behn *v.* Burners (1863), 2 New Rep. 184; Stanton *v.* Richardson, Richardson *v.* Stanton (1872), L. R. 7 C. P. 421; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125.

**1857. —— ——.**]—TARRABOCHIA *v.* HICKIE, No. 1836, *ante*.

**1858. —— ——.**]—It is important not to give to mercantile instruments, such as a charterparty, an unnecessary strict construction; but such a construction as, with reference to the context, & the object of the contract, would effectuate the obvious & expressed intention of the parties.

By a charterparty made at Malta, dated Feb. 24, 1854, the chartered ship was described as "coppered, A 1 of Malta," of a certain measurement, "now at anchor at this port," & it was agreed that she being tight, staunch, & strong, & properly manned, & every way fitted for the voyage, should with all convenient speed proceed in ballast to Alexandria, in Egypt, & there load from the charterer, a cargo of beans, wheat, etc. Forty working days were to be allowed for loading & unloading, the lay days to commence when the vessel should be ready to receive her cargo at her port of loading, & ten days on demurrage, over & above the lay days, at £8 sterling, the penalty for non-performance of this agreement to be the amount of freight. At the date of the charterparty the ship was not coppered, nor was she lying at anchor in port, nor had she obtained her register. She was an entire new vessel, still in dry dock, her coppering being in course of completion. The ship was not ready to sail until Mar. 28 following, when, from the state of the weather, she did not sail until Mar. 30, & reached Alexandria on Apr. 12, 1854. No objection was made by the charterer at the time of the delay. On her arrival, the master gave notice to the charterer's agent there, that he would be ready to receive cargo on Apr. 14. Before the ship's arrival at Alexandria the charterer's agent had made a cession of the charterparty, & the agent referred the master to the cessionary, informing him that his principal had nothing more to do with the charterparty than to guarantee the solvency of the cessionary. Freights had fallen considerably below the rates named in the charterparty between the date of the charterparty & the date of the cession. The cessionary sought to invalidate the cession on account of the delay in the arrival of the ship, & on that ground refused to give the captain any cargo. The captain refused to acknowledge the cessionary, or to release the charterer; but at the same time expressed his readiness to receive a cargo from any one under the order of the charterer's agent. The ship lay at Alexandria waiting for cargo the whole of her lay days & the ten demurrage days, but received no cargo from the charterer. The captain afterwards took a small cargo & returned to Malta:—*Held:* (1) upon the true construction of the charterparty, it was unnecessary to determine, whether the completion of the coppering of the ship was a condition precedent or not to the maintaining an action against the charterer, as it was clear, that that statement had reference to the time of sailing, & not to the date of the charterparty; (2) as to the stipulation, that the ship should sail "with all convenient speed," as the parties had not expressly stated for themselves in the charterparty, that unless the ship sailed on a specified day, the charterparty was to be at an end; & as the charterer resided at Malta, & had made no objection at the time to the delay, or had given evidence that any other loss than that occasioned by the falling of freights had taken place in consequence of the delay, his position not thereby altered, & an action was, therefore, maintainable against the charterer upon the charterparty; (3) as one of the parties to the charterparty had not the power, without the privity or consent of the other, to substitute a third person in his place, simply on condition of being responsible for the solvency of that third person; the change of the party on the one side, even with a guarantee, altering the condition of the other party, as affected the remedy, so as to make the contract a new one; the captain, therefore, was justified in refusing to accept the cessionary in lieu of the charterer.—DIMECH *v.* CORLETT (1858), 12 Moo. P. C. C. 199; 33 L. T. O. S. 21; 14 E. R. 887, P. C.

*Annotations:*—*As to* (1) **Refd.** Fratelli Sorrentino *v.* Buerger, [1915] 3 K. B. 367. *As to* (2) **Expld.** Behn *v.* Burness

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(1863), 3 B. & S. 751. *Generally*, **Refd.** Wilson & Coventry *v.* Otto Thoresen's Linie, [1910] 2 K. B. 405; Wall *v.* Rederiakt. Luggude, [1915] 3 K. B. 66.

**1859. —— "With all possible dispatch"—Ship delayed by accident.**]—Pltf., a shipowner, in Nov. 1871, entered into a charterparty, by which the ship was to proceed with all possible dispatch, dangers & accidents of navigation excepted, from Liverpool to Newport, & there load a cargo of iron rails for San Francisco. Pltf. effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on Jan. 2, 1872, & on Jan. 3, got aground in Carnarvon Bay. She was got off by Feb. 18, & repaired, the time necessary for the completion of such repairs extending to the end of Aug. In the meantime, on Feb. 15, the charterers had thrown up the charter & chartered another ship to carry the rails, which were wanted for the construction of a railway, to San Francisco. In an action by pltf. on the policy of insurance on the chartered freight, the jury found that the time necessary for getting the ship off & repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner & the charterers:—*Held:* the charterers were, by reason of the delay, not bound to load the ship, & there was therefore a loss of the chartered freight by perils of the sea.

If this charterparty be read as a charter for a definite voyage or adventure, then it follows that there is necessarily an implied condition that the ship shall arrive at Newport in time for it (BRAMWELL, B.).

The shipowner . . . impliedly agrees that the ship shall arrive in time for the voyage, that is a condition precedent as well as an agreement; & its non-performance not only gives the charterer a cause of action, but also releases him (BRAMWELL, B.).—JACKSON *v.* UNION MARINE INSURANCE CO. (1874), L. R. 10 C. P. 125; 44 L. J. C. P. 27; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. L. C. 435, Ex. Ch.

*Annotations:*—**Expld.** Hudson *v.* Hill (1874), 43 L. J. C. P. 273. **Consd.** Dahl *v.* Nelson, Donkin (1881), 6 App. Cas. 38. **Distd.** Inman S.S. Co. *v.* Bischoff (1882), 7 App. Cas. 670. **Consd.** The Alps, [1893] P. 109; *Re* Jamieson & Newcastle Steamship Freight Insce. Assocn., [1895] 2 Q. B. 90; Bensaude *v.* Thames & Mersey Marine Insce. (1896), 75 L. T. 155. **Distd.** Turnbull, Martin *v.* Hull Underwriters' Assocn., [1900] 2 Q. B. 402; *Re* Carver & Sassoon (1911), 17 Com. Cas. 59. **Consd.** Dunford *v.* Cia Anon. Maritima Union (1911), 104 L. T. 811. **Expld.** Embiricos *v.* Reid, [1914] 3 K. B. 45. **Distd.** F. A. Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193. **Apld.** Heilgers *v.* Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348; Scottish Navigation Co. *v.* Souter, Admiral Shipping Co. *v.* Weidner Hopkins, [1917] 1 K. B. 222. **Consd.** Countess of Warwick S.S. Co. *v.* Nickel Soc. Anon., Anglo-Northern Trading Co. *v.* Emlyn, Jones & Williams, [1918] 1 K. B. 372. **Apld.** Akt. Olivebank *v.* Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162. **Expld.** Bank Line *v.* Capel, [1919] A. C. 435. **Consd.** Larrinaga *v.* Soc. Franco-Americaine des Phosphates de Medulla (1923), 92 L. J. K. B. 455; Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497. **Refd.** De Wolf *v.* Archangel Bank & Insce. (1874), L. R. 9 Q. B. 451; King *v.* Parker (1876), 34 L. T. 887; Poussard *v.* Spiers & Pond (1876), 1 Q. B. D. 410; Bush *v.* Whitehaven Town & Harbour Trustees (1888), 52 J. P. 392; Carlton S.S. Co. *v.* Castle Mail Packets Co. (1898), 78 L. T. 661; Weir *v.* Pirie (No. 2) (1898), 3 Com. Cas. 271; Nickoll & Knight *v.* Ashton, Edridge (1900), 69 L. J. Q. B. 640; Manchester Liners *v.* British & Foreign Marine Insce. (1901), 18 T. L. R. 183; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683; Krell *v.* Henry, [1903] 2 K. B. 740; Storey *v.* Fulham Steel Works Co. (1907), 24 T. L. R. 89; Porter *v.* Tottenham U. C., [1915] 1 K. B. 776; Smith, Coney, & Barrett *v.* Becker, Gray (1915), 112 L. T. 914; Horlock *v.* Beal, [1916] 1 A. C. 486; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. D. C., [1916] 2 K. B. 428; Millar *v.* Taylor, [1916] 1 K. B. 402; Blackburn Bobbin Co. *v.* Allen, [1918] 2 K. B. 467; Metropolitan Water Board *v.* Dick, Kerr, [1918] A. C. 119; Naylor, Benzon *v.* Krainische Industrie-Gesellschaft, [1918] 1 K. B. 331; *Re* Comptoir Commercial Anversois *v.* Power, [1920] 1 K. B. 868.

**1860. —— "Forthwith."**]—HUDSON *v.* HILL, No. 1874, *post.*

**1861. —— "Immediately."**]—By two charterparties of even date, a steamer was chartered to proceed on successive voyages to a port in America & there load a cargo, & to proceed therewith to Rotterdam. The second charterparty contained a clause, that, on the completion of the first voyage, the steamer should "proceed immediately" to fulfill that charterparty. On the completion of the first voyage the steamer left Rotterdam & went to Cardiff to coal, & thence proceeded to America, where she arrived before the cancelling date provided by the charterparty. The charterers refused to load the steamer under the charterparty on the ground that by reason of the steamer going to Cardiff, there had been a breach of the above clause:—*Held:* (1) there had been no breach of the charterparty, it being the ordinary course of business for steamers proceeding from Rotterdan to America to go to Cardiff to coal; (2) the above clause was not a condition precedent, the breach of which would entitle the charterers to repudiate the charterparty.

If parties to a contract stipulate that something is to be done at a particular moment of time, as, for example, that a ship shall sail on or before a certain date, they intend that in such a case time shall be of the essence of the contract, & that if the condition is not performed the contract may be put an end to. But when the parties agree in a contract of this kind that something is to be done with all dispatch, or immediately, then there is a certain amount of elasticity introduced into the performance of the agreement, which negatives the idea that the parties have intended to make time the essence of the contract, & therefore if such an agreement is not strictly observed, the only remedy is damages (BIGHAM, J.).—FOREST OAK STEAM SHIPPING CO., LTD. *v.* RICHARD & CO. (1899), 5 Com. Cas. 100.

**1862. To arrive by specified day.**]—Pltf. wanted a ship at Winyaw in Carolina, to load with rice, & therefore he covenanted with deft. "to freight his ship there," & deft. covenanted absolutely "to go thither"; & in order to quicken the ship's arrival there, there is a proviso "that if he gets there by Mar. 1, he is to be certain of a freight; but if he does not arrive there before Mar. 1, then pltf. was to declare in forty-eight hours, whether he would freight the ship or not." Deft. therefore thereby became the insuree of the risk of his getting there before Mar. 1, in which event, he was sure of a freight, but he still had a general chance of getting a freight even though he should not arrive there till after that time.

The words are positive & express "that he should go thither." The parties plainly meant

**PART VII. SECT. 2, SUB-SECT. 7.—B.**

**1859 i.** *Whether general words condition precedent—"With all possible dispatch"—Ship delayed by accident.*]—CARVILL *v.* SCHOFIELD (1883), 9 S. C. R. 370.—CAN.

n. *To arrive "between the opening of navigation"—What amounts to substantial compliance.*] — MCSHANE *v.* HENDERSON (1884), M. L. R. 1 Q. B. 264.—CAN.

o. —— ——.]—MCSHANE *v.* HALL (1885), M. L. R. 2 Q. B. 42.—CAN.

p. —— ——.]—Where a charterparty provided that a steamer should arrive in the Port of Montreal "between the opening of navigation of 1879," her arrival on May 18, was not a substantial compliance with the stipulation, it being proved that navigation opened about May 1.—MCSHANE *v.* MILBURN (1885), 29 L. C. J. 274.—CAN.

that the ship was to go thither, & the consideration fails by his not going (LORD MANSFIELD).—SHUBRICK *v.* SALMOND (1765), 3 Burr. 1637; 97 E. R. 1022.

*Annotations:*—**Consd.** M'Andrew *v.* Adams (1834), 3 L. J. C. P. 236. **Apld.** Moel Tryvan Shipping Co. *v.* Weir, [1910] 2 K. B. 844. **Reld.** Harper *v.* M'Carthy (1806), 2 Bos. & P. N. R. 258.

**1863.** ——.]—Where a ship was freighted to go in ballast to Jamaica, & bring home a cargo from thence, & the freighter undertook to provide a full cargo for her, in time for the July convoy provided she arrived out & was ready by June 25:—*Held:* as she did not arrive out till after June 25, the freighter was entirely discharged from his contract to furnish a cargo.—SHADFORTH *v.* HIGGIN (1813), 3 Camp. 385; 170 E. R. 1419, N. P.

**1864.** ——.]—By mutual covenants in a charterparty of affreightment it was agreed on the part of the shipowner, that he should provide a ship, which should proceed to Jamaica, & receive on board, from the agents of the shipper, a cargo to be provided by him, according to his covenant after-mentioned, & should sail with the June convoy, etc., provided the ship arrived out, & was ready to load sixty-five running days before the sailing of the convoy, which were to be accounted from the day of arrival, & being reported ready to receive goods, etc.; & on the part of the shipper, that he would provide 650 casks of produce in time for the ship to load the same, & join the June convoy, provided she arrived out & was ready to load, & notice thereof given by the agents of the shipper sixty-five running days before the sailing of the convoy, etc., & should pay, etc.:—*Held:* the provision as to the sixty-five running days was not a condition precedent to the obligation of the freighter to furnish a cargo of 650 casks of produce, but applied only to the obligation of the shipowner, that the vessel in such case should sail with the June convoy.—DEFFELL *v.* BROCKLEBANK (1821), 3 Bli. 561; 4 E. R. 706, H. L.

**1865.** ——.]—(1) A clause in a charterparty provided that "the charterers or their agents have the option of cancelling this charterparty provided the ship is not arrived as within described at Newcastle, New South Wales, by Dec. 15, 1907." The charterers were informed by the shipowners shortly before Dec. 15, 1907, that the ship was detained, & could not arrive by the cancelling date. Being asked to say whether they would exercise their option to cancel or not, they refused to state whether they would or not, & required the shipowners to send the ship to Newcastle in accordance with the charterparty The ship arrived at Newcastle on June 15, 1908, & thereupon the charterers exercised their right to cancel the charterparty & refused to load. The shipowners being only able to employ the ship at a lower freight than that specified in the charterparty claimed damages from the charterers for breach of contract:—*Held:* the charterers were not bound to exercise their option under the cancelling clause before the arrival of the ship, & the action therefore failed.

(2) The contractual duty of the shipowner to proceed to the port of loading does not cease because, before the ship arrives there, the day comes after which, if the ship has not arrived, the charterers' contractual duty to load her, when she does arrive, is converted by the special clause of the charterparty, into a matter of their free choice (KENNEDY, L.J.).

(3) The law reads into a contract "a reasonable time" for an act, be it for giving of a notice, or doing a work, or paying money or exercising an option, where the intention of the parties to a contract, which has no fixed time, either expressly or by just implication, must be presumed to have included such an implication. There is no room for it otherwise (KENNEDY, L.J.).—MOEL TRYVAN SHIP CO., LTD. *v.* WEIR (ANDREW) & Co., [1910] 2 K. B. 844; 79 L. J. K. B. 898; 103 L. T. 161; 11 Asp. M. L. C. 469; 15 Com. Cas. 307, C. A.

**1866. To sail on or before specified day—Whether condition precedent.**]—HALL *v.* CAZENOVE, No. 1886, *post.*

**1867.** —— ——.]—By a memorandum of charter it is agreed that a vessel shall proceed to Trieste, & there load a full cargo, & being so loaded shall proceed to a port in the United Kingdom, & deliver the same, upon payment of freight at a certain rate; that forty running days shall be allowed the merchants, if not sooner dispatched, for loading at Trieste, & for unloading at the port of discharge; & twelve days on demurrage, at £6 per day; the vessel to sail from England on or before Feb. 4 next, & the vessel shall be addressed to the charterer's agents at the port of loading & discharge:—*Held:* the sailing on or before Feb. 4 was a condition precedent.—GLAHOLM *v.* HAYS (1841), 2 Man. & G. 257; Drinkwater, 130; 2 Scott, N. R. 471; 10 L. J. C. P. 98; 8 L. T. 93; 133 E. R. 743.

*Annotations:*—**Apld.** Ollive *v.* Booker (1847), 1 Exch. 416; Oliver *v.* Fielden (1849), 4 Exch. 135. **Distd.** Tarrabochia *v.* Hickie (1856), 1 H. & N. 183. **Apld.** Croockewit *v.* Fletcher (1857), 1 H. & N. 893. **Distd.** Dimech *v.* Corlett (1858), 12 Moo. P. C. C. 200. **Consd.** Valente *v.* Gibbs (1859), 6 C. B. N. S. 270. **Apld.** Seeger *v.* Duttrie (1860), 8 C. B. N. S. 45; Behn *v.* Burness (1863), 3 B. & S. 751. **Apld.** Tidey *v.* Mollett (1864), 16 C. B. N. S. 298; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125. **Mentd.** Wheelton *v.* Hardisty (1858), 27 L. J. Q. B. 241.

**1868.** —— **Qualification in subsequent memorandum.**]—WILSON *v.* GADSDEN (1850), 15 L. T. O. S. 522.

**1869.** —— **What amounts to sailing.**]—A ship was chartered "to sail & proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all Mar." On Mar. 30, the ship, having a portion of her ballast on board, left the docks at Amsterdam, & on the same evening got to the entrance of the North Holland Canal. On Mar. 31, she proceeded to Alkmaar, where she remained during Apr. 1 & 2, taking in the remainder of her ballast. On Apr. 3 she proceeded on her voyage, & quitted Nieuve Diep, where she completed her crew, on Apr. 9 & arrived at Liverpool on Apr. 17:—*Held:* the term "leave Amsterdam" did not mean "sail on her voyage from Amsterdam"; & consequently the stipulation in the charterparty had been complied with.—VAN BAGGEN *v.* BAINES (1854), 9 Exch. 523; 2 C. L. R. 543; 23 L. J. Ex. 213; 8 L. T. 93; 156 E. R. 223.

**1870.** —— ——.]—Shipbrokers at Liverpool, as agents for pltf., a merchant at Amsterdam, negotiated with deft., a merchant at Liverpool, for the charter of a ship, then at Amsterdam, belonging to pltf. On Feb. 28, 1856, deft. signed the charterparty, which stipulated that the ship was to sail from Amsterdam to Liverpool on or before Mar. 15 then next; that the vessel being tight, staunch, etc., should with all convenient speed be made ready, as in the usual printed form of charterparty, with the exception, as follows: "restrictions of princes & rulers, the dangers & accidents of the seas & navigation, the act of God, fire, pirates & enemies throughout this charterparty always excepted." It was to be forwarded at once to pltf. for his signature, & was so, but not returned for a few posts afterwards.

*Sect. 2.—Charterparties: Sub-sect. 7, B.*]

The morning after its return to the shipbrokers, signed, they inserted the following words in the margin, "wind & weather permitting, with cargo or in ballast for ship's benefit." They then took it to deft., explaining how & why they had made this alteration. Deft. objected to it altogether, & then declined the charter, as it was not sent back per return of post, & also because it was altered in form. The ship did not sail from Amsterdam, being delayed by the act of God, stress of weather, until Mar. 18:—*Held:* the stipulation in the charterparty that the ship was to sail from Amsterdam for Liverpool on or before Mar. 15 was a condition precedent; the word "throughout" made no difference; & notwithstanding she was prevented from doing so "by the act of God" deft. was not bound, under the charterparty, to accept her.

(2) All mercantile contracts ought to be construed according to their plain meaning to men of sense & understanding (MARTIN, B.).—CROOCKEWIT *v.* FLETCHER (1857), 1 H. & N. 893; 26 L. J. Ex. 153; 28 L. T. O. S. 322; 5 W. R. 348; 156 E. R. 1463.

*Annotations:—As to* (1) **Refd.** Roberts *v.* Brett (1859), 6 C. B. N. S. 611; Behn *v.* Burness (1863), 3 B. & S. 751; Nelson *v.* Nelson Line (Liverpool) (No. 3), *Re* Nelson & Nelson Line (Liverpool) (1907), 77 L. J. K. B. 97. *Generally*, **Refd.** *Re* Salomon & Naudszus (1899), 81 L. T. 325. **Mentd.** Pattinson *v.* Luckley (1875), L. R. 10 Exch. 330.

**1871. —— Exception of unavoidable impediment.**]—Proviso in a charterparty, that if the ship do not arrive at her port of loading on or before, etc., unless prevented by stress of weather or other unavoidable impediment, the freighter should not be obliged to ship a cargo:—*Held:* if ordinary diligence were used in the voyage to reach the port of loading, the owners were within the exception of the proviso though the ship was delayed till after the stipulated time by causes which extraordinary exertion might have counteracted.—GRANGER *v.* DENT (1829), Mood. & M. 475; L. & Welsb. 270, N. P.

*Annotation:*—**Refd.** Glaholm *v.* Hays (1841), 2 Man. & G. 257.

**1872. —— Exception of perils of the sea—Peril occurring before arrival at port of loading.**]—By a charterparty it was agreed that the ship, then at Newcastle, "being tight, staunch, & strong, & every way fitted for the voyage," should with all convenient speed "sail & proceed to the usual loading place, guaranteed for cargo in all this month, Oct., or so near thereunto as she might safely get, & there load in the customary manner a full & complete cargo of coal," &, being so loaded, should proceed therewith to Alexandria, & deliver the same on being paid certain freight, "the act of God, the Queen's enemies, restraints of princes & rulers, fire, & all & every other dangers & accidents of the seas, rivers, & navigation of whatever nature & kind soever during the said voyage always excepted." To an action upon this charterparty, alleging for breach that the vessel was not ready to receive, & did not in fact receive the agreed cargo until long after the time stipulated, deft. pleaded that, at the time of the making of the charterparty, the vessel, so being at Newcastle, was at a place there far distant from the usual place there for loading to which she was to sail & proceed, & before reaching such usual place would necessarily be exposed to divers dangers of seas, rivers, & navigation, all which pltfs. & deft. at the time well knew; that the voyage in the charterparty mentioned was a voyage from the place at Newcastle at which the vessel was at the time of making it to the said usual place for loading, & from thence to Alexandria; & that the vessel, during the said voyage, that is to say, during such part of the said voyage as took place before she sailed or proceeded from the said usual place on her way to Alexandria, & after she had received on board part of the said cargo, & before any breach of the charterparty, was hindered & prevented by the dangers of seas, rivers, & navigation then happening, from receiving on board & from being ready to receive on board the residue of the said cargo, etc.:—*Held:* the plea was a good answer to the action, the exception in the charterparty applying as well to the preliminary transit of the vessel to the place of loading as to the subsequent part of the voyage; the expression in the charterparty, "guaranteed for cargo in all this month," which was admitted to mean "ready to receive cargo within the month" did not take the case out of the exception.—BARKER *v.* M'ANDREW (1865), 18 C. B. N. S. 759; 6 New Rep. 227; 34 L. J. C. P. 191; 12 L. T 459; 11 Jur. N. S. 637; 13 W. R. 779; 2 Mar. L. C. 205; 144 E. R. 643.

*Annotations:*—**Apld.** Harrison *v.* Garthorne (1872), 26 L. T. 508; Hudson *v.* Hill (1874), 43 L. J. C. P. 273. **Refd.** Cohn *v.* Davidson (1877), 2 Q. B. D. 455; Nottebohn *v.* Richter (1886), 18 Q. B. D. 63; The Carron Park (1890), 15 P. D. 203.

**1873. —— —— ——.**]—By a charterparty, pltfs., as owners, agreed with defts., as charterers of a good screw steamship, name to be given up as soon as known, expected to carry from 1,100 to 1,200 tons cargo, that the said ship, being tight, staunch, & strong, & every way fitted for the voyage, should, with all convenient speed, sail & proceed to Alexandria, to arrive within a margin of three weeks from Nov. 15, 1870; & with liberty to take a cargo out for owner's benefit, either direct or from or to any neighbouring ports; & there load a cargo from charterer's agents, & proceed to Hull or London at certain rates in full of all pilotages & port charges during the said voyage, all dangers & accidents of the seas, etc., "during the said voyage always excepted." Pltfs. alleged, as a breach of the charterparty, that the said steamship, although duly named by defts., did not arrive at Alexandria within the stipulated period. Defts. pleaded dangers of the seas after the name of the ship was given up by pltfs., & whilst on her voyage to Alexandria pursuant to the charterparty, which prevented her reaching her destination at Alexandria:—*Held:* upon demurrer, this plea was good.—HARRISON *v.* GARTHORNE (1872), 26 L. T. 508; 20 W. R. 722; 1 Asp. M. L. C. 303.

**1874. —— —— ——.**]—By a charterparty dated Dec. 28, pltfs.' ship was to "forthwith" proceed from England to B., an island in the West Indies, & having there loaded a cargo of sugar for defts., to return to England. The vessel was to be allowed to take an outward cargo of coals to specified places, & the charterparty contained a clause excusing the performance thereof if it could not be complied with owing to perils of the seas. At the time of entering upon the charterparty, the ship was undergoing repairs, but she came out of dock upon Jan. 6, & having taken on board a cargo of coals for R., one of the specified places, she sailed on Feb. 8. Delay on her voyage outwards was occasioned by unfavour-

**1871 i.** *To sail on or before specified day—Exception of unavoidable impediment.*]—CANADIAN TRADING CO., LTD. *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LTD., [1922] 3 W. W. R. 197; 69 D. L. R. 544.—**CAN.**

**q.** *Delay in arrival — Unreasonable deviation for repairs.*]—CASSELS *v.* BURNS (1887), 14 S. C. R. 256.—**CAN.**

able winds, & she was injured by a collision with a steamer, which rendered necessary further repairs. She finally sailed for R. on Mar. 9, & reached R. on May 26, having there discharged the cargo of coals, she started on July 1, & reached B. on July 28. The season for exporting sugar from B. begins with the month of Apr. & ends with July in every year, & the agents of defts. declined to provide a cargo of sugar for pltfs.' vessel on the ground that she had arrived at B. too late in the season. They offered to provide a cargo of sugar if pltfs.' vessel would go under protest to V., an island ninety miles off. The captain refused this offer, & remained at B., insisting upon the performance of the charterparty by defts.' agent. The captain at last agreed with other parties for a charter, & left B. on Oct. 14. Pltfs. having sued for a breach of the charterparty in refusing to load a cargo at B., the judge at the trial directed the jury that if the vessel sailed without unreasonable delay, she proceeded "forthwith" within the meaning of the charterparty; the clause excusing performance thereof, on the ground of perils of the seas, applied to the preliminary voyage to R., & the captain might reasonably think that if he shipped a cargo elsewhere than at B., he might put an end to the original charterparty:—*Held:* a right direction. —HUDSON *v.* HILL (1874), 43 L. J. C. P. 273; 30 L. T. 555; 2 Asp. M. L. C. 278.

*Annotations:*—**Refd.** F. A. Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 1 K. B. 485; Scottish Navigation Co. *v.* Souter, [1916] 1 K. B. 675.

**1875.** —— —— ——.]—By a charterparty of a steamship it was agreed that she should go to "three safe loading places" between two named ports & there load from the charterers a cargo of oranges & being so loaded proceed to London . . . & deliver the same pursuant to bills of lading . . . (the act of God . . . & all dangers of the seas, rivers, & steam navigation of what nature & kind soever during the said voyage always excepted), & the charterers thereby promised to load the cargo, & stipulated, after a provision for working & lay-days, that "should the steamer not be arrived at first loading port free of pratique & ready to load on or before Dec. 15 next, charterers have the option of cancelling or confirming this charterparty." By dangers of the seas, the steamer, although arrived at the first loading port, was not free of pratique & ready to load on Dec. 15, & the charterers therefore cancelled the charterparty. At the trial of an action against them for not loading the cargo, the judge left to the jury the disputed question whether the port was a "safe loading place," but being asked by them for his opinion thereon, gave it, & they found in the affirmative:—*Held:* (1) this expression of opinion was under the circumstances no misdirection; (2) the excepted dangers clause applied only to the voyage, & not to the clause giving the option to cancel the charterparty if the ship was not ready to load on the day fixed, & therefore the cancellation was justified.—SMITH *v.* DART & SON (1884), 14 Q. B. D. 105; 54 L. J. Q. B. 121; 52 L. T. 218; 33 W. R. 455; 1 T. L. R. 99; 5 Asp. M. L. C. 360, D. C.

*Annotation:*—*As to* (2) **Distd.** The Austin Friars (1894), 71 L. T. 27.

**1876.** —— **Exception of restraint of princes—Limited to voyage after loading.**]—Pltf. & defts. agreed by charterparty that a ship, then at Liverpool, of which pltf. was master, should, with all convenient speed, be made ready, & should, at L., receive & load from the charterers' agents a full cargo, &, being so loaded, should proceed to Stettin & deliver the same & so end the voyage, restraints of princes, etc., "during the said voyage, always mutually excepted"; & the ship was to be loaded at L. without detention; & defts. thereby agreed to load the vessel at L., as in the charterparty stated, with the said cargo, at L. On general demurrer to a declaration in *assumpsit*, assigning for breach of the above agreement that defts. did not load the ship at L. without detention, but detained her at L. an unreasonable time, not negativing restraints of princes, etc.:—*Held:* the exception as to restraints of princes, etc., was applicable only after the ship quitted Liverpool. —CROW *v.* FALK (1846), 8 Q. B. 467; 15 L. J. Q. B. 183; 10 Jur. 374; 115 E. R. 952.

*Annotations:*—**Dbtd. & Distd.** Bruce *v.* Nicolopulo (1855), 11 Exch. 129. **Folld.** Hurst *v.* Usborne (1856), 25 L. J. C. P. 209. **Consd.** Valente *v.* Gibbs (1859), 6 C. B. N. S. 270. **Distd.** Barker *v.* M'Andrew (1865), 18 C. B. N. S. 759. **N.F.** The Carron Park (1890), 15 P. D. 203. **Refd.** Munro, Brice *v.* War Risks Assocn., [1918] 2 K. B. 78. **Mentd.** Hurst *v.* Evans (1916), 86 L. J. K. B. 305.

**1877. To sail to a "safe port."**]—A declaration on a charterparty in an action by the charterer against the shipowner, stated that it was agreed that the ship should sail in ballast to a safe port near Cape Town, & there take in a cargo. The declaration then stated, that pltf. was ready & willing to appoint & put on board a supercargo, with instructions to indicate, & which supercargo would have indicated to the master of the ship a safe port near Cape Town, for the receiving on board such cargo, but omitted to state that pltf. named any "safe port." Breach, that deft. would not suffer the ship to sail in ballast on the said intended voyage:—*Held:* on demurrer to the declaration, the naming of a "safe port" was a condition precedent, & the declaration was bad in omitting to state that pltf. named such "safe port."—RAE *v.* HACKETT (1844), 12 M. & W. 724; 13 L. J. Ex. 216; 8 Jur. 427; 152 E. R. 1390.

**1878. To sail within twenty-one days of arrival at intermediate port—Penalty for failure.**]—Pltf. & deft. agreed by charterparty that pltf.'s vessel should sail to Sydney &/or Moreton Bay, & thence proceed to Callao, Peru, where the captain should report his arrival to Messrs. G., who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed; & after completing her loading, proceed to any safe port in the United Kingdom: freight to be paid at the rate of £4 sterling per ton weight of guano. "The owners guarantee that for the freight of £4 per ton, the ship shall be dispatched from Australia within twenty-one days after arrival; if detained over twenty-one days, etc., £3 10*s.* per ton to be the rate of freight. If ordered from Sydney to Moreton Bay the time so occupied not to be reckoned in the days as above." The vessel sailed from Liverpool on July 5, 1853, & anchored inside Sydney Heads on Oct. 25, 1853. She was ordered to Moreton Bay, but bad weather & the insubordination of a portion of the crew prevented the vessel from leaving Sydney Harbour until Nov. 4, when she proceeded on her voyage, & on Nov. 12, anchored inside the Flanders Rocks & outside Moreton Bay. She was taken in charge of a pilot up the channel & on Nov. 14, arrived at her anchorage where she remained until Dec. 5. Some of the crew having deserted & others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, & no addition to the crew could be procured at Moreton Bay. On Dec. 5, the master caused the anchor to be got up & the sails set by the men who were willing to work, with the assistance of the harbour master

& pilot's crew, & the vessel proceeded on her voyage to Callao, but shortly afterwards stopped from the wind failing. During the night several of the seamen deserted. On Dec. 6, the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, & they compelled the captain to return to Sydney. The vessel arrived at Sydney on Dec. 12, & remained there until Jan. 6, 1854, when she sailed to Callao, where she ultimately arrived, & brought home a cargo of guano :—*Held :* under the above circumstances, the ship was not dispatched from Australia within twenty-one days after her arrival, & consequently pltf. was not entitled to the freight of £4 per ton.—SHARP *v.* GIBBS (1857), 1 H. & N. 801 ; 8 L. T. 93 ; 156 E. R. 1424.

**1879. Authority of agent to substitute more distant port.**]—An agent at a foreign port to whom a ship is addressed for loading under a charterparty, has no implied authority to vary the contract by substituting another & a distant port of loading, or a different quality or description of cargo.—SICKENS *v.* IRVING (1859), 7 C. B. N. S. 165 ; 29 L. J. C. P. 25 ; 6 Jur. N. S. 200 ; 141 E. R. 715.

*Annotation :*—**Refd.** Pearson *v.* Göschen (1864), 4 New Rep. 404.

*C. Proceeding to Port of Discharge.*

*(a) In General.*

**1880. Duty to proceed with all expedition.**]—THE WILHELM, No. 3196, *post.*

**1881. —— Whether performance condition precedent—To right to freight.**]—By a charterparty between pltf., the captain of a ship, & deft.'s agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen where she was detained several weeks, by means whereof deft. was put to considerable expense in having fresh insurances done upon her cargo. In an action of *indebitatus assumpsit* for the freight :—*Held :* pltf.'s covenant to sail direct to Portsmouth was not a condition precedent ; & the deviation could not be given in evidence, either as a bar to the action, or to diminish the damages.—BORNMANN *v.* TOOKE (1808), 1 Camp. 377 ; 170 E. R. 991, N. P.

*Annotations :*—**Apld.** Havelock *v.* Geddes (1809), 10 East, 555. **Distd.** Glaholm *v.* Hays (1841), 2 Man. & G. 257.

**1882. According to directions of charterer or shipper—Power to countermand order—Reversal of countermand by agent.**]—Where the master of a vessel covenanted with the freighter (*inter alia*), that the vessel should proceed with the first convoy from England for Spain & Portugal, or either, as he should be directed by the freighter or his agents, & there make a right & true delivery of the cargo agreeably to the bills of lading signed for the same ; & to take in a home cargo, & return & make a right & true delivery thereof at London, etc. In consideration whereof, & of everything above mentioned, the freighter covenanted (*inter alia*) to load the vessel out & home, & pay certain freight per ton per month, part before, & the remainder on the right & true delivery of the homeward cargo at London :—*Held :* (1) the freighter having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods & signed bills of lading for that port, could not afterwards countermand that order, & order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon ; (2) supposing the freighter had such a power, yet his supercargo & agent, who was on board the vessel, had the like authority in the absence of his principal, even before the vessel sailed from his country, to alter again the destination to Lisbon.

From the nature of the appointment of a supercargo, where he is on board the ship & the freighter is absent, it follows that he should have the same power in this respect as the freighter himself ; for he is to take advantage of every circumstance as it arises, to act for the benefit of his employer in the adventure (LE BLANC, J.).

(3) The master having proceeded with the outward cargo to Lisbon under the first order, & brought home a return cargo, & delivered the same of the freighter at London, was entitled to his freight for that voyage, though he had not sailed with the first convoy ; the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order, but a distinct covenant, for the breach of which he was liable in damages.

Unless the non-performance alleged in breach of the contract goes to the whole root & consideration of it, the covenant broken is not to be considered as a condition precedent (LORD ELLENBOROUGH, C.J.).

(4) He was entitled to recover such freight as upon a right & true delivery of the cargo, agreeably to the bills of lading, upon proof of having delivered the entire number of chests, etc., for which bills of lading had been signed ; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master & crew on board, in not ventilating them sufficiently ; the party injured having his counter remedy by action for such negligence.—DAVIDSON *v.* GWYNNE (1810), 12 East, 381 ; 104 E. R. 149.

*Annotations :*—*As to* (3) **Distd.** Glaholm *v.* Hays (1841), 2 Man. & G. 257. **Apld.** Tarrabochia *v.* Hickie (1856), 1 H. & N. 183. **Refd.** Seegor *v.* Duthie (1860), 8 C. B. N. S. 45 ; MacAndrew *v.* Chapple (1866), L. R. 1 C. P. 643 ; Bradford *v.* Williams (1872), 26 L. T. 641. *As to* (4) **Apld** Garrett *v.* Melhuish (1858), 33 L. T. O. S. 25. **Refd** Gibson *v.* Sturge (1855), 10 Exch. 622 ; Dakin *v.* Oxley (1864), 15 C. B. N. S. 646 ; MacAndrew *v.* Chapple (1866), L. R. 1 C. P. 643.

**1883. —— Liability of charterer for expenses in particular port named—Ship detained & fine imposed by government at intermediate port—Whether charterer liable.**]—Deft. chartered pltf.'s vessel to Puerto Cabello & home from Maracaibo at a fixed freight, & an additional clause was subsequently inserted in the charterparty, giving the charterers the option of sending a part of the outward cargo on to Maracaibo, & stipulating that " any & every expense the vessel may incur in consequence of this additional clause shall be borne by the charterers." Deft. loaded the vessel with a cargo, part for Puerto Cabello & part for Maracaibo, & made out two manifests. On arriving at Puerto Cabello, the custom house authorities insisted on seeing both manifests, & prohibited the discharge of the part of the cargo intended for Puerto Cabello on the false ground that there were contraband goods on board, by which the cargo was confiscated, & they also imposed a fine of 500 dollars on the master for having two manifests, & prohibited the discharge of the cargo or the clearing out until the fine was paid. The master appealed to the tribunals of the country, & made counterclaims

for delay. A revolution occurred in Venezuela about the same time, which prevented all commercial & legal proceedings; but eventually the govt. agreed with the master to pay him 5,000 dollars as compensation for the detention of the ship; & after a further delay, she proceeded to Maracaibo. The 5,000 dollars were not paid:—*Held:* pltf. was not entitled to recover from deft. the damages or expenses he had been put to, either in repairing damage to the vessel occasioned by the delay, or the costs attendant upon the proceedings, or otherwise, such damages not being contemplated by the additional clause.—SULLY *v.* DURANTY (1864), 3 H. & C. 270; 33 L. J. Ex. 319; 159 E. R. 533.

**1884. —— Failure to give directions—Duty of master.**]—When a ship at a foreign port is by charterparty to load there, & proceed with the cargo as ordered by the shipper, the master is not bound to wait longer than a reasonable time for orders, & if no orders come within that time, he is not bound to communicate with the shipper before sailing, but may proceed to such a port as a reasonable man would judge, upon the charter, to be advantageous to the parties.—SIEVEKING *v.* SMITH (1856), 27 L. T. O. S. 79.

**1885. —— Implied condition that freight may be earned — Order to proceed to closed port.**] — A charterparty provided that pltfs.' vessel should proceed with a cargo of nitrate to one of several ports in the United Kingdom for orders to discharge at a safe port in the United Kingdom or one of several named ports in Denmark, arrest & restraints of princes being mutually excluded. When the vessel arrived at one of the ports for orders, defts., holders of a bill of lading which incorporated the above terms of the charterparty, ordered her to one of the named Danish ports, which had become an impossible port owing to the fact, known to defts., that the further importation of nitrate into Denmark had been prohibited by the British Govt. The master, being unable to go to the port ordered, discharged the cargo in the United Kingdom. In an action against defts. for freight:—*Held:* it was an implied term of the bill of lading that defts. should order the ship to a possible port & so give pltfs. an opportunity of earning freight, & as defts. had failed to do this, pltfs. were entitled to discharge the cargo where they did & to claim freight.—AKT. OLIVEBANK *v.* DANSK SVOVLSYRE FABRIK, [1919] 2 K. B. 162; 120 L. T. 629; 14 Asp. M. L. C. 426; *sub nom.* AKT. GEYSER *v.* DANSK SVOVLSYRE & SUPHERPHOSPHAT FABRIK, AKT. OLIVEBANK *v.* SAME, 88 L. J. K. B. 745; 35 T. L. R. 373; 24 Com. Cas. 178, C. A.

**1886. Time of departure for port—Covenant fixing date—Whether fulfilment condition precedent to payment of freight.**] — One may declare in covenant that the deed was indented, made, & concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made, & concluded. Where a charterparty, dated Feb. 6, but averred not to be executed till Mar. 15, contained a covenant by the owner that the ship should & would proceed from D. where she then lay on or before Feb. 12, on her outward bound voyage, & return, etc., & a covenant by the freighter that in consideration of everything above-mentioned, etc., he would pay certain freight for the voyage; the voyage being averred to be performed, & the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed on or before Feb. 12; such covenant that the ship should sail on or before Feb. 12, being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, & earning the freight; or being rendered impossible to be performed by the parties themselves, not having executed the deed till after the time appointed for doing the act, & thereby dispensing with the performance of it.—HALL *v.* CAZENOVE (1804), 4 East, 477; 1 Smith, K. B. 272; 102 E. R. 913.

*Annotations:*—**Consd.** Tarrabochia *v.* Hickie (1856), 1 H. & N. 183. **Refd.** Davidson *v.* Gwynne (1810), 12 East, 381; Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139. **Mentd.** *Re* Slater, *Ex p.* Slater (1897), 76 L. T. 529.

**1887. —— Warranty to sail on or before fixed date—Leaving harbour without sufficient crew.**]—A warranty to sail on or before a particular day, is not complied with by leaving the harbour on that day without having a sufficient crew on board, although the remainder of the crew are engaged & ready to sail.—GRAHAM *v.* BARRAS (1834), 5 B. & Ad. 1011; 3 Nev. & M. K. B. 125; 110 E. R. 1065.

*Annotations:*—**Apld.** Sharp *v.* Gibbs (1857), 1 H. & N. 801. **Refd.** Roelandts *v.* Harrison (1854), 2 C. L. R. 995.

**1888. Hostile ships in proximity to port of discharge—Refusal to proceed thither—Whether breach of contract.**] — By a charterparty, the captain of an Austrian vessel engaged to go to Havana & there load a cargo from the factors of the charterers, & proceed therewith to Falmouth for orders as to his port of ultimate destination, which by a memorandum subsequently indorsed upon the charterparty included Copenhagen. On his arrival at Falmouth on June 18, the captain gave the charterers notice, & was by them ordered, by telegram of June 28, to proceed to Copenhagen. At this time war had broken out between France & Austria, &, there being several French cruisers in the offing, the captain sent a telegram & also a letter apprising the charterers of his danger, & intimating that he awaited their "further decision." On the following day, the charterers sent their clerk down to Falmouth with a letter to deft. directing him to follow the clerk's instructions. The clerk accordingly told the captain that he would direct him to go to Plymouth, but it would be under protest. The captain, however, declined to go without a "clean order": & ultimately, on July 1, the clerk gave him a written order to proceed to Plymouth, & there deliver the cargo; which was done:—*Held:* upon these facts the jury were warranted in finding that deft. had not been guilty of a breach of contract in refusing to go to Copenhagen.—POLE *v.* CETCOVICH (1860), 9 C. B. N. S. 430; 30 L. J. C. P. 102; 3 L. T. 438; 7 Jur. N. S. 604; 9 W. R. 279; 1 Mar. L. C. 2; 142 E. R. 169.

*Annotations:*—**Distd.** The Patria (1871), L. R. 3 A. & E. 436. **Apld.** Duncan *v.* Köster, The Teutonia (1872), L. R. 4 P. C. 171.

**1889. Proceeding with or before other vessel in berth.**]—A declaration stated that, in consideration pltf. would ship goods on board a certain vessel, deft. guaranteed that the vessel should sail with, if not before, any other vessel in the berth for Havana, under a penalty of forfeiting one-half the freight of the goods. It then averred that pltf. had performed all conditions precedent, & all things had happened, etc., entitling him to maintain the action; & assigned, as a breach, that the vessel did not sail with or before any other vessel in the berth for Havana, & by reason of the premises pltf. became entitled to the half freight. Deft. pleaded payment into ct. of £10 & pltf. replied damages ultra. At the trial it appeared

*Sect.* 2.—*Charterparties: Sub-sect.* 7, *C.* (*a*), (*b*) & (*c*): *sub-sect.* 8, *A.* & *B.*]

that the whole freight exceeded £20 but no actual damage was proved :—*Held :* the half freight was liquidated damage & not a penalty.—SPARROW *v.* PARIS (1862), 7 H. & N. 594 ; 31 L. J. Ex. 137; 5 L. T. 799 ; 8 Jur. N. S. 391 ; 158 E. R. 608.

*Annotations :*—**Mentd.** Magee *v.* Lavell (1874), 43 L. J. C. P. 131 ; Wallis *v.* Smith (1882), 21 Ch. D. 243 ; Willson *v.* Love, [1896] 1 Q. B. 626.

**1890. Telegraphic instructions to master—Mistake in name of port—Confirming letter amounting to warranty—Right of shipowner to damages.**]—Resp.'s ship was in a port in Australia under orders to proceed to R. Resp. entered into a contract with applts. in the United Kingdom to purchase a cargo of coal, to be loaded in Australia. Applts. telegraphed to their agents in Australia as to the terms & conditions of the sale, & added instructions as to the destination of the ship. They had no authority from resp. to give any orders as to the destination. By a mistake of a telegraph clerk, C. was given as the destination instead of R. Applts.' agents in Australia informed the master of the ship that they had instructions to direct him to proceed to C. The master hesitated to change his destination, & applts.' agents then gave him a letter "to confirm our verbal instructions as to your destination "—naming C. as his destination, &, continuing, "this letter will be a sufficient guarantee for your proceeding on your voyage ".:—*Held :* the letter amounted to a warranty upon which resp. could sue for the damages he had sustained through the ship proceeding to C. instead of to R.—BROWN *v.* LAW (1895), 72 L. T. 779 ; 11 T. L. R. 395 ; 8 Asp. M. L. C. 230, H. L.

**Deviation & delay.**]—*See* Sect. 6, sub-sect. 2, C., *post.*

(*b*) *Delay in Arrival.*

*See* Part VII., Sect. 6, sub-sect. 2, C. (*b*), *post.*

(*c*) *Deviation.*

*See* Part VII., Sect. 6, sub-sect. 2, C. (*a*), *post.*

SUB-SECT. 8.—PROVISIONS AS TO CARGO.

*A. Description.*

**1891. General rule.**]—Pltfs. delivered to defts., for carriage on board defts.' ship, a closed case containing silk goods. The bill of lading, as tendered by pltfs. for signature, described the contents of the case as linen goods ; but before signing it the captain impressed upon it with a stamp the words, "Weight, value, & contents unknown." The freight charged for silk was higher than that for linen goods, & the freight paid for the goods so delivered was that for linen goods; but pltfs. represented the goods to be linen inadvertently & without fraudulent intention. On the ship's arrival at her destination it was found that two pieces of silk had been abstracted from the case. In an action by pltfs. against defts. as common carriers for non-delivery of the silk goods so lost :—*Held :* the result of the addition of the words "Weight, value, & contents unknown" to the bill of lading was completely to do away with the effect of the description of the goods as linen, & consequently defts.' contract was to carry the case & its contents, whatever they might be ; & pltfs. were entitled to maintain the action. *Qu. :* whether, even without the additional words, the misrepresentation, having been made without fraud, could have had the effect of avoiding the contract for carriage of the goods by defts. as common carriers.

Where a party entering into a contract for carriage of goods even without fraud describes the goods to be carried as goods of a certain character, the contract is to carry goods of that character, & not of another character (GROVE, J.). —LEBEAU *v.* GENERAL STEAM NAVIGATION CO. (1872), L. R. 8 C. P. 88 ; 42 L. J. C. P. 1 ; 27 L. T. 447 ; 21 W. R. 146 ; 1 Asp. M. L. C. 435.

*Annotation :*—**Reid.** New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664.

**1892. Produce—Goods ordinarily shipped from port of loading.**]—By a charterparty it was agreed that the ship should proceed to Baltimore, & there load a full cargo of produce, & proceed therewith to the United Kingdom, & deliver the same, on being paid freight "at & after the rate of 5*s.* 6*d.* per barrel of flour, meal, & naval stores, & 11*s.* per quarter of 480 pounds for indian corn or other grain" ; that the cargo was not to consist of less that 3,000 barrels of flour, meal, or naval stores ; & that not less flour or meal than naval stores was to be shipped. The vessel arrived here with a cargo consisting of 769 hogsheads of tobacco, 6,047 bushels of bran, 2,000 bushels of oats, 5,000 oak-staves, & 3 barrels of flour. The evidence showed, that a quarter of indian corn or wheat weighing 480 pounds would occupy a space of 10½ cubic feet, & that a quarter of American oats, which weighed upon an average 272 pounds, would occupy a space of 16 cubic feet. It also appeared that oats were not a usual shipment from America :—*Held :* "other grain," in this charterparty, must be taken to mean such description of grain as would average 480 pounds to the quarter, & therefore to exclude oats ; & the shipowner was entitled to receive freight upon the supposition that 3,000 barrels of flour, meal, or naval stores had been shipped, &, for the rest of the space, at the rate of 11*s.* per quarter of indian corn, or other grain of the average weight of 480 pounds to the quarter.

The cargo the freighter engaged to furnish, was, "a full & complete cargo of produce," which would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port (MAULE, J.).—WARREN *v.* PEABODY (1849), 8 C. B. 800 ; 19 L. J. C. P. 43 ; 14 L. T. O. S. 417 ; 14 Jur. 150 ; 137 E. R. 722.

*Annotations :*—**Consd.** Southampton Steam Colliery Co. *v.* Clarke (1868), L. R. 4 Exch. 73. **Reid.** Gether *v.* Capper (1854), 15 C. B. 39 ; Gether *v.* Capper (1855), 15 C. B. 696.

**1893. Lawful merchandise—Government stores—Evidence of usage.**]—VANDERSPAR & CO. *v.* DUNCAN & CO. (1891), 8 T. L. R. 30.

**1894. Misdescription.**] — LEBEAU *v.* GENERAL STEAM NAVIGATION CO., No. 1891, *ante.*

**1895. Weight—Evidence of words descriptive of weight.**]—DREYFUS & CO. *v.* ALLEN (1892), 9 T. L. R. 1, C. A.

**1896. Cargo intended to be obtained from particular source—Effect of failure of source.**]—THE ROOKWOOD, No. 1761, *ante.*

**1897. Whether "cargo" applicable to goods only.**]—A., a ship broker, engaged with B., a shipowner, to have "a full cargo for the ship, the rates of freight for which would average 40*s.* per ton, & at least nine cabin passengers, passage money to average £75." The contract was fulfilled as to the cabin passengers, but the average rate of freight for goods put on board by A. amounted to 32*s.* only per ton ; he shipped on board, however, several steerage passengers for the voyage, the passage money paid by whom

after deducting the expense of their diet, etc., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton, amount to more than 40*s.* :—*Held :* (1) this was not a performance of the stipulation of the contract, "cargo" & "freight" being terms applicable to goods only; (2) as this was an unusual contract, evidence was not admissible to show that the terms "cargo" & "freight" used with reference to the voyage on which the ship was engaged [voyage to Sydney] would, by the general usage & course of the trade, be considered to comprise steerage passengers, & the net profit arising from their passage money.—LEWIS *v.* MARSHALL (1844), 7 Man. & G. 729; 8 Scott, N. R. 477; 13 L. J. C. P. 193; 3 L. T. O. S. 261; 8 Jur. 848; 135 E. R. 293.

*Annotations :—Generally,* **Reld.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361; Hutchinson *v.* Tatham (1873), 42 L. J. C. P. 260. **Mentd.** Spartali *v.* Benecke (1850), 10 C. B. 212.

**1898. Authority of agent to vary cargo—Agent at foreign port—To whom ship addressed for loading.**]—SICKENS *v.* IRVING, No. 1879, *ante.*

*B. Option to Select Cargo.*

**1899. General rule—Right of freighter to select.**]—A charterparty provided that a ship then at Hong Kong should, after discharging her inward cargo with all proper dispatch, sail to Manilla, & there or at a port named take in a full cargo of sugar &/or other specified goods, & sail therewith with all proper dispatch to a port in Europe. Different freights were to be paid for the different kinds of cargo; for dry sugar £4 2*s.* 6*d.*, for wet sugar £4 5*s.* a ton. The shipowner engaged that the ship before & when receiving cargo should be a good risk for insurance, & that he would provide a survey report declaring her to be so. He also engaged that the master should take proper means to keep the ship tight, staunch, strong, well manned & fit for the voyage. The vessel went with proper dispatch to the port of loading, where she arrived in the rainy season. She was surveyed & reported to be a good risk for insurance, & the master took proper means to keep her tight, etc., during the voyage to the port of loading. At that port a full cargo of wet sugar was provided by the freighter, & it was shipped. But before the vessel left the port the greater part of it had to be unshipped, & the rest was wholly spoilt, because the pumps, though adequate for every other purpose, were found insufficient to pump up the liquid matter which came from the sugar bags in great quantity, owing to the rainy season, & mixed with the ordinary leakage of the vessel. Adequate pumps could not be supplied to the ship within such a time as would not have defeated the object of the venture. The ship was fit in all respects to carry a cargo of dry sugar, or of any of the other articles mentioned in the charterparty, except wet sugar. The shipowner was not, & the freighter was, aware at the time the charterparty was executed that pumps of a very large capacity were requisite in a ship carrying wet sugar loaded in the rainy season. The freighter chartered & put his sugar on board another vessel, & refused to wait or to reship the same or any other cargo on board the vessel first chartered :—*Held :* under the charterparty the cargo provided was a reasonable cargo, such as the shipowner had contracted to carry if provided; there was an implied warranty on his part that his ship should be reasonably fit to carry such a cargo, & not merely that she should be a good risk, & be tight, etc., during the voyage to the port of loading; the charterer was entitled to expect, & was not bound beforehand to ascertain, that the ship he chartered was fit or suitably provided for a cargo of wet sugar; the shipowner was not, & the freighter was, entitled to select from the various kinds of merchandise mentioned in the charterparty the particular kind of cargo to be carried, & at the option of the latter the cargo might be all of one description; the freighter was entitled to refuse either to reload the sugar which had been unloaded, or to wait while the necessary alterations were made in the ship, & the shipowner was not entitled to recover anything on account of the freight lost by such refusal; & also the freighter was entitled to recover damages for the sugar that was spoilt through the ship not being in a reasonably fit state, nor capable within a reasonable time of being put in a fit state, to carry the cargo provided for her.

These words "and" & "or" are not without some significance, because they appear to show that this specification of different kinds of cargo was to be read either disjunctively or conjunctively. It might be all one kind or it might be a mixture the two kinds mentioned (LORD CAIRNS, C.).—STANTON *v.* RICHARDSON (1875), 45 L. J. Q. B. 78; 33 L. T. 193; 24 W. R. 324; 3 Asp. M. L. C. 23, H. L.; *affg.* S. C. *sub nom.* STANTON *v.* RICHARDSON, RICHARDSON *v.* STANTON (1874), L. R. 9 C. P. 390, Ex. Ch.

*Annotations :—***Reld.** Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; The Maori King *v.* Hughes, [1895] 2 Q. B. 550; Queensland National Bank *v.* Peninsular & Oriental Steam Navigation Co., [1898] 1 Q. B. 567; Rowson *v.* Atlantic Transport Co. (1902), 72 L. J. K. B. 87; Rathbone *v.* MacIver, [1903] 2 K. B. 378; Paterson Zochonis *v.* Elder Dempster, [1923] 1 K. B. 420.

**1900. Cargo partly specified—Portion at option insufficient to fill ship—Whether freighter liable for deficiency.**]—By the terms of a charterparty, the freighter was to proceed to certain ports, & there load a full & complete cargo of merchandise, the fore-cabin or dining-room included, to be filled with light goods. The instrument then specified a certain scale of payment of freight, for sugar, coffee, rice, pepper, & for all other goods in a just & fair proportion. The freighter was also to ship, previous to any other loading, 100 tons of rice or sugar to ballast the vessel, & keep her in proper trim. The freighter duly complied with the last condition, & then took on board a full cargo of pepper; in consequence of which, the 100 tons of rice were not sufficient to trim the vessel, & the owner was obliged to make up for the deficiency of cargo by ballast.

In an action to recover the amount of freight for merchandise, which should, it was alleged, have been taken on board, so assorted as to render ballast unnecessary :—*Held :* by the charterparty the freighter was not obliged to put on board a cargo so assorted; & having loaded the vessel with 100 tons of rice, it was optional with him to complete the cargo as he thought proper.—IRVING *v.* CLEGG (1834), 1 Bing. N. C. 53; 4 Moo. & S. 572; 3 L. J. C. P. 265; 131 E. R. 1037.

*Annotations :—***Folld.** Ridgway *v.* Ewbank (1841), 10 L. J. Q. B. 109. **Reld.** Cockburn *v.* Alexander (1849), 12 L. T. O. S. 349; Southampton Steam Colliery Co. *v.* Clarke (1870), L. R. 6 Exch. 53; Weir *v.* Union S.S. Co., [1900] A. C. 525.

**1901. Effect of general words—"Other goods."**]—(1) Where by a charterparty the freighter covenanted to provide for the ship a full & complete cargo consisting of copper, tallow, & hides, or other goods, on which separate rates of freight were to be paid, held that having supplied her with as large a quantity of tallow & hides as she chose to take on board, he was not bound to provide any copper, although for the want of it

*Sect. 2.—Charterparties: Sub-sect. 8, B. & C. (a).]*

the ship was obliged to keep in her ballast, & did not make so advantageous a freight as she otherwise would have done.

(2) Under a covenant in a charterparty to pay freight on skins by the pound, net weight at the King's beam, freight is due on the outside skins in which the packages are contained.—MOORSOM *v.* PAGE (1814), 4 Camp. 103; 171 E. R. 34, N. P.

*Annotations:—As to* (1) **Distd.** Irving *v.* Clegg (1834), 1 Bing. N. C. 53. **Folld.** Ridgway *v.* Ewbank (1841), 10 L. J. Q. B. 109. **Distd.** Cole *v.* Meek (1864), 15 C. B. N. S. 795. **Folld.** Southampton Steam Colliery Co. *v.* Clarke (1870), L. R. 6 Exch. 53. **Refd.** Weir *v.* Union S.S. Co., [1900] A. C. 525.

**1902. —— "Other legal merchandise."]** — A ship was chartered to proceed to Port Phillip, & there load from the freighter's factors "a full & complete cargo of wool, tallow, bark, or other legal merchandise," the quantity of bark not to exceed 100 tons, & the quantity of tallow & hides not to exceed 80 tons, & was to proceed therewith to London, & deliver the same, "on being paid freight as follows: for wool, 1½*d.* per lb. pressed, & 1½*d.* & one-eighth of a penny per lb. unpressed, gross weight; tallow, £3 per ton; bark, £4 per ton; & hides, £2 per ton—the latter not to exceed 20 tons, without consent of the captain, etc.; one-third of the freight to be paid in cash, on unloading & right delivery of the cargo, & the remainder in cash, or by approved bills, at two months following":—*Held:* (1) the freighter was entitled to load the ship with an assorted cargo of any "legal merchandise"; but the owners were entitled to be paid freight upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz. 100 tons of bark, 60 tons of tallow, & 20 tons of hides, & the residue of wool, pressed or unpressed; (2) parol evidence was not admissible to show, that, by the custom of the place of loading, the cost of pressing wool was to be borne by the shipowner.—COCKBURN *v.* ALEXANDER (1848), 6 C. B. 791; 18 L. J. C. P. 74; 12 L. T. O. S. 349; 13 Jur. 13; 136 E. R. 1459.

*Annotations:—As to* (1) **Folld.** Warren *v.* Peabody (1849), 8 C. B. 800. **Refd.** Gether *v.* Capper (1855), 15 C. B. 696; Southampton Steam Colliery Co. *v.* Clarke (1868), 38 L. J. Ex. 54. *Generally,* **Mentd.** Deverill *v.* Burnell (1873), L. R. 8 C. P. 475; McIlquham *v.* Taylor, [1895] 1 Ch. 53; County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251.

**1903. —— ——.]**—By a charterparty deft., the charterer, undertook to load at Archangel "a full & complete cargo of oats or other lawful merchandise," & pltfs., the shipowners, to deliver the same on being paid freight as follows: "4*s.* 6*d.* sterling per 320 lbs. weight delivered for oats: & if any other cargo be shipped, in full & fair proportion thereto, according to the London Baltic printed rates." Deft. put on board at Archangel a full & complete cargo of flax, tow, & codilla, being three of the articles mentioned in the Baltic printed rates, & paid to pltfs. the freight earned by the goods thus shipped according to a scale derived from the tables which constitute the Baltic rates. Pltfs. claimed in addition the difference between this amount & the larger amount which would have been earned by a full & complete cargo of oats:—*Held:* flax, tow, & codilla being "lawful merchandise" within the meaning of the charterparty, deft. had fulfilled his contract by loading a full & complete cargo of those articles, & therefore, was not, on the true construction of the charterparty, liable for the additional freight claimed by pltfs. as upon a full cargo of oats.—SOUTHAMPTON STEAM COLLIERY CO. *v.* CLARKE (1870), L. R. 6 Exch. 53; 40 L. J. Ex. 8; 19 W. R. 214, Ex. Ch.

*Annotation:—***Refd.** S.S. Isis Co. *v.* Bahr, [1899] 2 Q. B. 364.

**1904. —— "Other grain."]**—WARREN *v.* PEABODY, No. 1892, *ante.*

**1905. Effect of words "&/or"—Contract left open.]**—By charterparty, deft. agreed to load on board a vessel at Trinidad "a full & complete cargo of sugar, molasses &/or other produce": —*Held:* evidence was admissible of a custom at Trinidad to load sugar in hogsheads, & molasses in puncheons; & therefore a full & complete cargo of sugar & molasses so packed was a compliance with the contract.

The contract on the face of the charterparty was, "to load a full & complete cargo of sugar, molasses, &/or other lawful produce"; so that according to the contract the parties were either to load a full & complete cargo of sugar & molasses & other lawful produce, or a full & complete cargo of sugar & molasses, or a full & complete cargo of other lawful produce, leaving it open in every way by reason of the "&" & "or" being introduced in the charterparty (ALDERSON, B.). —CUTHBERT *v.* CUMMING (1855), 10 Exch. 809; 3 C. L. R. 401; 24 L. J. Ex. 198; 25 L. T. O. S. 23; 3 W. R. 244; 156 E. R. 668; *affd.,* 11 Exch. 405, Ex. Ch.

*Annotations:—***Consd.** Greaves *v.* Legg (1856), 11 Exch. 642; Tancred, Arrol *v.* Steel Co. of Scotland (1890), 15 App. Cas. 125. **Distd.** Mikkelsen *v.* Arcos (1925), 134 L. T. 92. **Refd.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361.

**1906. —— Read disjunctively or conjunctively.]** —STANTON *v.* RICHARDSON, No. 1899, *ante.*

### *C. Amount of Cargo.*

#### *(a) In General.*

**1907. Tonnage of ship stated in charterparty—Whether amount controlled by such tonnage.]**—JAMES (LADY) *v.* EAST INDIA CO. (1789), cited in Abbott's Merchant Shipping, 14th ed. p. 679.

**1908. —— ——.]**—(1) In an action for not supplying a cargo under a charterparty according to the terms of which, different articles of freight are to be paid for at different rates by weight, & the freighter is at liberty to supply which articles he pleases, an average value of freight, calculated upon the various rates of freight in the proportion of different articles usually carried on such a voyage, is the proper measure of damages.

(2) In an action by the owner against the freighter of a chartered ship for not supplying a cargo according to the terms of the charterparty, the freighter cannot insist upon the precise burthen stated in the charterparty.—THOMAS *v.* CLARK & TODD (1818), 2 Stark. 450; 171 E. R. 702, N. P.

*Annotations:—As to* (1) **Apld.** Capper *v.* Forster (1837), 3 Bing. N. C. 938. **Apprvd.** Cockburn *v.* Alexander (1848), 6 C. B. 791. **Refd.** Warren *v.* Peabody (1849), 19 L. J. C. P. 43. *As to* (2) **Refd.** Morris *v.* Levison (1876), 1 C. P. D. 155; The Resolven (1892), 9 T. L. R. 75.

**1909. Shortage of tonnage—Conditions governing claim for shortage—Whether performance condition precedent to recovery.]** — A covenant in a charterparty "that no claim should be admitted, or allowance made, for short tonnage, unless such short tonnage be found & made to appear on her arrival on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," is not a condition precedent to pltf.'s right of recovering for short tonnage; but is a matter of defence, to be taken advantage of by defts., & the not averring the performance is no ground for arresting the judgment. If defts. prevent the performance of a condition precedent by their neglect &

default, it is equal to performance by pltfs.—HOTHAM *v.* EAST INDIA Co. (1787), 1 Term Rep. 638; 99 E. R. 1295.

*Annotations:*—**Consd.** Smith *v.* Wilson (1807), 8 East, 437. **Refd.** Worsley *v.* Wood (1796), 6 Term Rep. 710; Richards *v.* Bluck (1848), 6 C. B. 437; M'Intosh *v.* G. W. Ry. (1850), 2 H. & Tw. 250; Weedon *v.* Woodbridge (1850), 13 Q. B. 470; Edwards *v.* Aberayron Mutual Ship Insce. Soc. (1876), 1 Q. B. D. 563; The Europa, [1908] P. 84; Colley *v.* Overseas Exporters, [1921] 3 K. B. 302; British & Benningtons *v.* North Western Cachar Tea Co., [1923] A. C. 48. **Mentd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Braunstein *v.* Accidental Death Insce. (1861), 1 B. & S. 782; Bliss *v.* Smith (1865), 34 Beav. 508; *Re* Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204.

**1910. Cargo as ballast.**]—MOORSOM *v.* PAGE, No. 1901, *ante*.

**1911.** ——.]—(1) A shipowner is entitled to take merchandise on board as ballast, provided it occupies no more space than the ballast would have done, & leaves to the charterer the full space of the vessel for his cargo.

(2) There is no undertaking on the part of the shipowner that the vessel which he charters shall be free from suspicion of unseaworthiness or any other matter.—TOWSE *v.* HENDERSON (1850), 4 Exch. 890; 19 L. J. Ex. 163; 14 L. T. O. S. 400.

*Annotations:*—*As to* (1) **Refd.** Lyderhorn Sailing Ship Co. *v.* Duncan Fox (1909), 79 L. J. K. B. 105. *As to* (2) **Refd.** Cator *v.* Great Western Insce. of New York (1873), L. R. 8 C. P. 552. *Generally*, **Refd.** Southampton Steam Colliery Co. *v.* Clarke (1870), L. R. 6 Exch. 53; Queensland National Bank *v.* Peninsular & Oriental Steam Navigation Co. (1897), 2 Com. Cas. 228; Weir *v.* Union S.S. Co., [1900] A. C. 525.

**1912. No agreement as to quantity—Rights of charterer.**]—A. chartered a vessel, of which B. was master & part-owner, for a voyage from London to Sydney, for a gross sum of £1,600, payable two months after clearance at the custom-house. A. bought goods of C. to be shipped on A.'s own account on board the vessel, & to be paid for before the vessel left the port of London. The goods were accordingly shipped by C., who took from the mate receipts as for goods shipped on C.'s account, & which receipts were still kept by C. Two days after the goods were shipped, A. became insolvent & unable to perform his contract with C., & subsequently agreed with C. to rescind it, & signed an order directing B. to deliver the goods to them. The goods were demanded on behalf of C., both before & after the rescission of the contract, C. offering at the same time to pay all reasonable charges attending such re-delivery, & every lawful claim the owners might have upon the goods. B. refused to deliver the goods to C., on the ground that, they having been shipped for the voyage stated in the charter-party, it was the duty of B. to convey them to their destination:—*Held:* assuming the property in the goods passed to A. by the shipment, yet, as A. had neither become bkpt. nor taken the benefit of the insolvent Act, but continued *sui juris* up to the time of making the agreement to rescind the contract—by the operation of that agreement & the delivery order given by A., the property in the goods re-vested in C., either in his original right as vendor, or as a new right derived from the assignment of the vendee; & the refusal of B., upon the ground stated by him, to re-deliver the goods after the demand by C., the contract with A. being rescinded, & the offer then made of the payment of the reasonable charges & all lawful claims, was a wrongful conversion; there being nothing in the terms of the charterparty that could restrain the charterer from dealing with the cargo as he thought proper, or prevent him from taking out the cargo before the sailing of the vessel, or to entitle the master to insist on carrying it to its destination. *Qu.:* whether or not C. derived a new right from retaining the mate's receipt & the demand made by them before the rescission of the contract?

[The charterer] had the entire use of the ship under the charter; & there was nothing to prevent him from taking out the cargo before the ship sailed . . . & changing such cargo for another; or from sending the ship empty to Sydney . . . there being no agreement on his part to put a full cargo or indeed any cargo on board (TINDAL, C.J.).—THOMPSON *v.* SMALL (1845), 1 C. B. 328; 14 L. J. C. P. 157; 4 L. T. O. S. 396; 9 Jur. 412; 135 E. R. 566.

*Annotations:*—**Refd.** Tindall *v.* Taylor (1854), 4 E. & B. 219; Pearson *v.* Goschen (1864), 17 C. B. N. S. 352; Casebourne *v.* Avery & Houston (1887), 3 T. L. R. 795.

**1913. Ship not filled—Although ship down to marks with loaded cargo.**]—Ships chartered by pltfs. in their trade loaded nickel ore in New Caledonia & proceeded to New Zealand ports to fill up, under sub-charters, unoccupied space with cargo of a dry & perishable kind. It was contemplated that in the ordinary course of business this cargo would be wool. Under a sub-charter with defts. the s.s. *Strathord*, proceeded from New Caledonia to New Zealand to take in cargo for London. Pltfs. guaranteed some 5,000 tons space at a freight of 30*s.* per ton of forty cubic feet. Defts. failed to secure an entire cargo of wool in New Zealand, & loaded grain instead, which brought the ship down to her marks, leaving an unoccupied space in her of 901 tons. Defts. denied their liability to pay freight for this space:—*Held:* a wool cargo had been contemplated which would have filled the ship without putting her down to her marks; it had not been contemplated that she should come home partly empty; & defts. were liable to pay freight for the 901 tons unoccupied space.—POTTER & Co. *v.* NEW ZEALAND SHIPPING Co., LTD. (1895), 64 L. J. Q. B. 689; 11 T. L. R. 502; 1 Com. Cas. 114.

*Annotation:*—**Apld.** Jardine, Matheson *v.* Clyde Shipping Co. (1910), 79 L. J. K. B. 634.

**1914. One half goods shipped to consist of weight—Meaning of "weight."**]—By the terms of a charterparty, it was agreed, that the ship should load, from the factors of defts., at Calcutta, a full & complete cargo of the usual East India produce, "one half of which is to be weight," & if any linseed, the same not to exceed 100 tons, or if any paddy, the same not to exceed 200 tons; it being, however, understood that the quantity of linseed & paddy together is not to exceed 250 tons; freight to be at & after the rate of five guineas per ton, delivered; paddy & linseed, if any, to be 20 cwt. to the ton as usual, & all other articles to be computed according to the East India Co.'s scale of tonnage. As to that scale, the principal distinctions were in goods charged by "weight," & goods charged by "measurement." At the trial, the judge put to the jury the meaning of the word "weight," who found that it was not used in the sense of "heavy," as opposed to "light" goods, but in the sense of goods to be charged by the ton "weight," in contradistinction to goods to be charged by the ton "measurement." Upon their finding, the judge ruled, that the words, "one half of which is to be weight," were to be considered as restrictive to that quantity, & that the remainder were to be goods charged by "measurement":—*Held:* the correctness of this ruling by the judge, was sufficiently doubtful, to induce the ct. to send the case to a new trial, in order, that if necessary, upon a similar direction, the parties might take

*Sect.* 2.—*Charterparties: Sub-sect.* 8, *C.* (*a*), (*b*) & (*c*).]

the opinion of a ct. of error.—RIDGWAY *v.* EWBANK (1841), 10 L. J. Q. B. 109.

*Annotation* :—**Refd.** Ashby *v.* Bates (1843), 15 L. J. Ex. 349.

**Carrying capacity of vessel.**]—*See* Part VII., Sect. 2, sub-sect. 6, E., *ante*.

(*b*) *Full and Complete Cargo.*

**1915. Cargo loaded to amount of tonnage of ship stated in charterparty—Whether contract performed.**]—HUNTER *v.* FRY, No. 1818, *ante*.

**1916.** ——— ———.]—By a charterparty a ship was "guaranteed by owners to carry 2,600 tons dead weight." The charterparty provided that the ship should load "a full & complete cargo" at a certain freight, "all per ton dead weight capacity as above." The charterers refused to load more than 2,673 tons. A full & complete cargo would have been 2,950 tons :—*Held* : the charterers ought to have loaded a full & complete cargo, & freight was payable accordingly.—S.S. HEATHFIELD CO., LTD. *v.* RODENACHER (1896), 2 Com. Cas. 53, C. A.

**1917. Deficiency due to variation in mode of stowage—Parties present during loading.**]—Where the cause of complaint, in an action on a charterparty by the freighters against the owner of a vessel, was, that a full cargo was not taken in, in consequence of arrangements in the stowage varying from those contemplated by the charterparty :—*Held* : pltfs. were not entitled to recover, as it appeared that one of them & the broker, who managed the business, were present from time to time during the loading & cognisant of the arrangements, but did not make any objection.—HOVILL *v.* STEPHENSON (1830), 4 C. & P. 469 ; 172 E. R. 785, N. P.

**1918. Part of cargo loaded—Destruction by fire—Duty of charterer to load balance on repair of ship.**]—A charterparty containing the usual clauses, provided that the ship was, with all convenient speed to proceed to P., & there load from the charterer's agents "a full & complete cargo" of cotton. The ship proceeded to P., a part of the cargo was loaded, & another part was in a lighter alongside, ready to be loaded, the two together not amounting to a full cargo, when a fire occurred. The cargo on board was destroyed, that lying alongside was sent forward, in another ship by the master. The ship was repaired, which took two months, & then tendered to the charterer's agents to load the rest of her cargo ; but the agents refused to furnish any :—*Held* : deft. was bound to furnish so much cargo as would, with that already furnished, have made up a full & complete cargo.—JONES *v.* HOLM (1867), L. R. 2 Exch. 335 ; 36 L. J. Ex. 192 ; 16 L. T. 794 ; 16 W. R. 62 ; 2 Mar. L. C. 551.

*Annotation* :—**Refd.** Jackson *v.* Union Marine Insce. (1873), L. R. 8 C. P. 572.

**1919. Bulk differing as cargo frozen or unfrozen—Loaded frozen.**]—By a charterparty made in contemplation of a mid winter loading the charterers agreed to load at a port in the United States "a full & complete cargo of wet wood pulp which contains about 50 per cent. of water." The charterers loaded pulp of that description which was frozen. Frozen pulp is not compressible, & occupies more space than when unfrozen ; consequently the cargo was less in quantity than it would have been in summer. The shipowners having brought an action against the charterers for the loss of freight thus caused, evidence was given that in winter wet pulp was usually loaded in a frozen condition :—*Held* : the obligation to load a full & complete cargo had been performed by loading as much pulp in a frozen condition as the ship would carry.—ISIS S.S. CO. *v.* BAHR, [1900] A. C. 340 ; 69 L. J. Q. B. 660 ; 82 L. T. 571 ; 16 T. L. R. 381 ; 9 Asp. M. L. C. 109 ; 5 Com. Cas. 277, H. L.

**1920. Deficiency due to faulty loading.**]—Under two charterparties of June, 1924, the steamship *H.* was to proceed to Leningrad & there load a full & complete cargo of Russian timber & convey the same to an English port as specified in the bills of lading. The charterparties provided that the charterers should supply sufficient ends for broken stowage, & clause 5 provided that any dispute arising at the port of loading should be settled before the signing of the bills of lading, otherwise claims were to be endorsed on the bills of lading, & if for any reason the master was prevented from so doing, he was to give notice of the claim & the amount thereof to the charterers by telegraph. The steamship *H.* performed two voyages, & on each occasion the master complained of the bad & insufficient loading. On the second voyage the ship was directed to proceed to Great Yarmouth, but on arrival the charterers said this was a mistake & the correct destination was Boston. Pltfs. claimed damages for dead freight of the cargoes that should have been carried but were not carried, & for expenses incurred by the change of destination :—*Held* : (1) the contract was to load a complete & full cargo, & bad loading due to want of supervision or inexperience was no excuse ; (2) clause 5 was an ordinary condition of policies & did not invalidate the claim ; (3) pltf. was entitled to reasonable compensation for the services rendered on account of the change of port of destination.—MIKKELSEN *v.* ARCOS, LTD. (1925), 134 L. T. 92 ; 42 T. L. R. 3 ; 16 Asp. M. L. C. 576.

**1921. Proof of completeness—Insufficient proof by shipowners.**]—A charterparty provided that a vessel should load a full & complete cargo of pit props at Petrograd for Granton, freight to be paid at a specified rate "per intaken piled fathom of 216 cubic feet." The charterers having paid freight on 595 fathoms, the figure which had been entered under protest from the shipowners, in the bill of lading, the shipowners, who maintained that the cargo amounted to 653 fathoms, brought an action against the charterers for the balance of the freight. It was proved that the cargo as it was loaded was measured on behalf of the pursuers by the first officer & a tallyman at the fore hatch, & by the second officer & another tallyman at the aft hatch. These measurements, which brought out the figure of 653 fathoms, had not been checked at the time by defenders, who relied on measurements taken in the forest where the timber had been cut. Both the first & second officers, but neither of the tallymen were examined as witnesses, & none of the tally books were produced. For certain short periods daily during the loading the first officer was admittedly absent upon other duties, & for these periods he got the figures from the tallyman. Certain evidence was led by the pursuers with the object of showing that the vessel was fully loaded, & that her average carrying capacity for pit props when fully loaded was 660 fathoms :—*Held* : the fact that the first officer had been absent during part



*r. Deficiency due to insufficient depth of water to permit full loading.*]—GRAY *v.* SCHOOLEY (1878), 43 U. C. R. 209.—CAN.

of the period of loading, & that the tallyman from whom he derived the figures for that period had not been examined as a witness, formed a fatal flaw in the pursuers' evidence, & they had, in consequence, failed to prove that more than the admitted number of 595 fathoms had been shipped.—DAMPSKIBSSELSKABET SVENDBORG *v.* LOVE & STEWART, LTD., S.S. CHASSIE MAERSK, [1916] S. C. (H. L.) 187.

**1922. Completeness varying in summer or winter.**]—A charterparty provided that a ship should load a "full & complete" cargo of wood goods & thereafter proceed to one of certain specified ports. Provision was made in the charterparty for loading at an agreed rate & for payment of demurrage for delay. The charterers did not load at the agreed rate, with the result that the ship left the port of loading too late to enable her to enter the port of destination lawfully with a full & complete summer cargo, & she was able to carry to that port only a full & complete winter cargo. The shipowners brought an action for "dead freight," which was the difference between the summer & winter cargo. Defts. contended that the cargo carried by the ship was a "full & complete cargo" within the meaning of the charterparty, & further that, if they were not correct in this contention, the damages for which they were liable were included in the amount payable on demurrage:—*Held:* (1) "full & complete cargo" meant that which would have been a full & complete cargo, if the charterers had fulfilled their obligations to load at the agreed rate, that is, a summer cargo; (2) the provision in regard to demurrage referred only to damage occasioned by the detention of the ship, & the shipowners were not debarred thereby from claiming additional damages for the charterers' breach of their obligation to load a "full & complete cargo."—AKT. REIDAR *v.* ARCOS, LTD., [1927] 1 K. B. 352; 96 L. J. K. B. 33; 136 L. T. 1; 42 T. L. R. 737; 17 Asp. M. L. C. 144; 32 Com. Cas. 34, C. A.

*Annotation:—As to* (2) **Reid.** *Re* Ropner Shipping Co. & Cleeves Western Valleys Anthracite Collieries (1927), 137 L. T. 221.

**Mode of stowage.**]—*See* Sub-sect. 8, C. (*c*), *post.*

**Failure to provide full cargo.**] —*See* Sect. 5, sub-sect. 3, B., *post.*

(*c*) *Qualifying Words.*

**1923. As to maximum.**]—A stipulation in a charter to load a cargo of soda, nitrate of soda, guano, or copper ore, etc., not exceeding one-third more than the ship's registered tonnage, old measurement, is intended to protect ship from being overloaded, & does not oblige charterer to ship the full amount. The shipowner's claim for dead freight depends on whether so much cargo has been shipped as the vessel can conveniently carry.—THE BALGOWNIE, NICHOL *v.* ELLIS (1851), 6 L. T. 229.

**1924.** ——.]—By a charterparty dated Nov. 16, 1921, the owner of a steamer let her on hire to charterers to carry a grain cargo from the Danube & Black Sea. A minimum of half the cargo, but not exceeding river draft, was to be loaded at one or two Danube ports, & loading was then to be completed at Kustendji. A complete cargo would have amounted to 5,225 tons. The steamer loaded 2,578 tons at Danube ports, but owing to the river becoming frozen, was unable to proceed to Kustendji when ordered by the charterers to do so to complete loading. Owing to ice the steamer was detained at Galatz for several weeks, & the owner claimed demurrage & damages for detention:—*Held:* by loading 2,578 tons at the Danube ports the charterers had loaded half the cargo of 5,225 tons, the difference between 2,578 tons & half of 5,225 tons being commercially immaterial.—WILLIAMS *v.* MANISSALIAN FRÈRES (1923), 29 Com. Cas. 42, C. A.

**1925. Latitude allowed—"More or less."**]—The question is, what contract, if any, the master can make obligatory upon the merchant in regard to the conveyance by the substituted ship when the merchant has an agent, or a house of business, to the knowledge of the master, at the intermediate port into which the ship has put in distress? Can he, without communication with them or giving them the option of receiving the cargo there, put it on board another ship & forward it to the port of discharge? We are not aware of any authority in the English law in which the master is said to have such powers. We are very strongly inclined to be of opinion that the master of a ship has not authority under such circumstances as the present, to charter a ship & bind the merchant to provide a full cargo, or in other words, for the payment of dead freight. If he has such authority, what is the limit to it? Can he, when the goods of the merchant are sufficient to fill the ship to the extent of one-half or three-fourths capacity, enter into a contract obligatory upon the merchant to pay for the unoccupied space? It may be that the master of a disabled ship has power to send forward the cargo to the port of discharge by another ship, & upon that taking place which would be a performance of the contract if the original ship had arrived in safety, the master or owners may be entitled to the freight originally contracted for; the conveyance of the cargo by, & the right & true delivery from the substituted ship being deemed a substantial performance of the voyage, & equivalent to the conveyance by, & right & true delivery from the original ship. But we think in this case that all which by the charterparty was contracted to be loaded was the cargo of the *Oriente*. The words of the charterparty are, "the cargo put on board the bulk, forming the cargo brought to Valparaiso by the *Oriente*, being 470 tons of guano, more or less." It is clear from the charterparty itself, & proved beyond all doubt by the evidence, that the cargo was represented to be 470 tons at the least; but we do not think there is a warranty to this effect. If there be no warranty, the only liability which could exist would be for a false, & fraudulent representation; this is not alleged to have been the case, for the statement of the captain of the *Oriente* is admitted to have been an honest one; but if it were not, defts. would not be responsible for it. There is no authority or principle for holding that the owners of cargo are under such circumstances liable for a false & fraudulent representation by the master (POLLOCK, C.B.).—GIBBS *v.* GREY, GREY *v.* GIBBS (1857), 2 H. & N. 22; 26 L. J. Ex. 286; 29 L. T. O. S. 162; 3 Jur. N. S. 543; 5. W. R. 608; 157 E. R. 10.

*Annotations:*—**Reid.** Cammell *v.* Sewell (1858), 3 H. & N. 617; Hickie *v.* Rodocanachi (1859), 4 H. & N. 455.

**1926.** —— **"About."**]—MORRIS *v.* LEVISON, No. 4013, *post.*

**1927.** —— ——.]—Under a charterparty providing that the ship shall load empty petroleum barrels as many as required by the master, say about five thousand; the word "about" entitles the master to require at his option the shipment of 10 per cent. more or less than the amount specified. —ALCOCK *v.* LEEUW & Co. (1883), Cab. & El. 98.

*Annotation:*—**Reid.** The Resolven (1892), 9 T. L. R. 75.

*Sect. 2.—Charterparties: Sub-sect. 8, C. (c), (d) & (e); sub-sects. 9 & 10.]*

**1928.** ——— ———.]—By a contract of charterparty the charterer undertook to load "a cargo of ore, say about 2,800 tons." The actual capacity of the ship was 2,880 tons. The charterer loaded 2,840 tons:—*Held:* he had satisfied his contract.—MILLER *v.* BORNER & Co., [1900] 1 Q. B. 691; 69 L. J. Q. B. 429; 82 L. T. 258; 48 W. R. 588; 9 Asp. M. L. C. 31; 5 Com. Cas. 175, D. C.

*Annotation:*—**Reld.** Jardine, Matheson *v.* Clyde Shipping Co., [1910] 1 K. B. 627.

*(d) Whether Entire Capacity Hired.*

**1929. "Cargo."**]—Pltfs. sold to deft. "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum . . . to be shipped from New York . . . & vessel to call for orders off the coast for any safe floating port in the United Kingdom, or on the Continent between Havre & Hamburg, both inclusive (buyer's option)." Pltfs. chartered a vessel, on which were placed 3,000 barrels of petroleum, & a bill of lading was signed making them deliverable to pltfs.; but as this quantity did not constitute a full cargo, 300 additional barrels were placed on board, which were marked with a different mark, & for which a separate bill of lading was signed. Pltfs. gave notice to deft. of the shipment of the 3,000 barrels, & were ready to order the vessel from its port of call to any port of delivery within the contract, & there to deliver to deft. the 3,000 barrels, & to take the 300 barrels themselves, or to deliver to deft. at any such port 2,750 barrels as the mean between 2,500 & 3,000, but deft. refused to accept either the 3,000 barrels or any other quantity. Pltfs. having brought an action for non-acceptance:—*Held:* on the true construction of the contract, "cargo" meant the entire load of the vessel which carried it; deft. was therefore not bound to accept part of a cargo, & the action was not maintainable.—BORROWMAN *v.* DRAYTON (1876), 2 Ex. D. 15; 46 L. J. Q. B. 273; 35 L. T. 727; 25 W. R. 194; 3 Asp. M. L. C. 303, C. A.

*Annotations:*—**Consd.** *Re* Harrison & Micks, Lambert, [1917] 1 K. B. 755. **Distd.** Paul *v.* Pim, [1922] 2 K. B. 360. **Reld.** Caffin *v.* Aldridge (1895), 1 Com. Cas. 181.

**1930.** ———.]—By a charterparty which was on a printed form filled in with writing, & which commenced with a statement that the ship was of a dead weight capacity of 125 tons, it was agreed between pltf. & deft., the shipowner, that the ship should load at Rotherhithe from pltf. "a cargo or estimated quantity of 470 quarters of wheat" & proceed with it to Gosport, & there deliver it, on being paid freight at 1*s.* per quarter of 496 lbs. delivered. The words "full & complete" which preceded the word "cargo" in the printed form had been struck out. The charterparty contained the usual exception of sea perils. It was also thereby provided that the ship should have "liberty to call at any ports in any order." Four hundred & seventy quarters of wheat represent 102 tons. The ship, having loaded the wheat, proceeded to Millwall, where she took on board from another shipper some wire torpedo netting for carriage to Portsmouth Dockyard. The ship proceeded to Portsmouth Dockyard, where she discharged the netting, & was crossing the harbour to Gosport when by an accident arising from sea perils she sprang a leak, whereby the wheat was damaged. Pltf. claimed to recover damages for the injury to the wheat on the ground that the ship had deviated in not proceeding direct to Gosport:—*Held:* the liberty "to call at any ports" included liberty to call for the purpose of loading or discharging other cargo there, for the charterparty, notwithstanding the use of the term "cargo," did not amount to a hiring of the full carrying capacity of the ship, & there had consequently been no deviation, & the pltf. could not recover.—CAFFIN *v.* ALDRIDGE, [1895] 2 Q. B. 648; 65 L. J. Q. B. 85; 73 L. T. 426; 44 W. R. 129; 12 T. L. R. 27; 40 Sol. Jo. 49; 8 Asp. M. L. C. 233; 1 Com. Cas. 181, C. A.

*Annotation:*—**Reld.** Jardine, Matheson *v.* Clyde Shipping Co., [1910] 1 K. B. 627.

**1931.** ———.]—JARDINE, MATHESON & Co. *v.* CLYDE SHIPPING Co., No. 4764, *post.*

**1932. Use of cabins.**]—Deft., a merchant in London, chartered a vessel of pltf.'s to bring from Bombay a full & complete cargo at £3 5*s.* per ton. Deft.'s agents at Bombay filled the carrying part of the vessel, & also the cabin, with their own goods, & consigned them to deft., as their factor, for sale. There was contradictory evidence as to the terms upon which the cabin was filled. The bill of lading was annexed to a bill of exchange, drawn by the agents upon deft., which bill of exchange was sold to a third party. On the arrival of the ship in London, pltf. claimed freight for the cabin at the then current rate of £7 per ton. Deft. insisted that he was entitled to the use of the cabin as well as the other part of the ship at the rate of £3 5*s.* per ton, but he charged his agents for freight at the rate of £7 per ton, & allowed them commission at that rate. The goods were stopped, the bill of exchange not having arrived at maturity, when this action was brought to recover the above rate of freight for the use of the cabin. Deft., after action brought, paid the bill, & obtained possession of the goods:—*Held:* (1) deft. was not, under the terms of the charterparty, entitled to load the cabin; (2) the judge properly directed the jury, that, although deft.'s agents at Bombay had no authorty from deft. to put goods in the cabin, yet, as deft. adopted their act by accepting the goods & charging his agents freight in respect of them, he was bound to pay pltf. the current rate of freight at the time of loading; (3) the action was not brought too soon since the taking to the goods for the purpose of obtaining freight rendered deft. liable irrespectively of his actual possession after action brought.—MITCHESON *v.* NICOL (1852), 7 Ex. Ch. 929; 155 E. R. 1228; *sub nom.* MICHESON *v.* NICOL, 21 L. J. Ex. 323; 19 L. T. O. S. 229.

**1933.** ———.]—A charterparty, not amounting to a demise of the ship, provided for the carriage of a full & complete cargo of lawful produce, & merchandise, for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put:—*Held:* the charterers were not entitled to carry passengers in the cabins. Under the above circumstances, there is no custom (*a*) entitling the charterer to carry passengers, or (*b*) entitling the shipowner to have passengers carried for his benefit.—SHAW, SAVILL & Co. *v.* AITKEN, LILBURN & Co. (1883), Cab. & El. 195.

**1934. Use of deck.**]—By charterparty it was "agreed that the cabin & state rooms, & sufficient room for the cables, ships' stores, provisions, water, & crew, throughout this charterparty, being excepted, reserving, however, such room only for that purpose as the owners would, were the ship to be loaded for their exclusive benefit, the vessel shall immediately be made ready, & take on board from the charterers, who are to have the full reach of the vessel's hold from bulkhead to bulkhead, including the half-deck, a full & complete cargo," & thereupon proceed to Halifax:—*Held:* under this charterparty, the owners of the vessel, & not the charterers, were entitled to the freight

for goods loaded on the deck of the vessel.—NEILL *v.* RIDLEY (1854), 9 Exch. 677; 2 C. L. R. 1017; 6 L. T. 229; 156 E. R. 291.

**1935.** ——.] — The Anglo-American Cotton charterparty provided that the charterer was to have the option of shipping damaged cotton on deck, consistent with the seaworthiness of the steamer, such to be at the shipper's risk & expense, & that the charterer was to fully insure the freight thereon. The charterparty contained no provision for the payment of freight on such deck cargo:—*Held:* the shipowner was entitled to a reasonable freight upon cotton so shipped.—URSULA BRIGHT S.S. CO. *v.* RIPLEY (1903), 8 Com. Cas. 171, C. A.

*(e) Mode of Stowage.*

**1936. Compressed or uncompressed bales.**]—Where a practice prevailed of compressing bales of cotton wool by machinery, to improve their stowage, the furnishing a cargo of cotton wool in uncompressed bales, as they came from the grower, was held not to be a compliance with a contract to load a full & complete cargo.

Where the freighter had an option to load a whole ship with one species of goods at a higher rate of freight, or a part with goods at a higher rate, & a part with another species of goods at a lower rate, but the latter, if laden at all, required to be first laden on board, the freighter, by beginning to load with the goods at the higher rate, was deemed to elect to furnish an entire cargo of those goods at the higher rate, & he having so elected, but failing to load a complete cargo thereof:—*Held:* the jury were warranted in giving damages for the entire complement at the higher rate, without regarding the liberty he once had to load goods at a lower rate.—BENSON *v.* SCHNEIDER (1817), 7 Taunt. 272; 1 Moore, C. P. 21; 129 E. R. 109.

*Annotation:*—**Reld.** Cuthbert *v.* Cumming (1864), 3 C. L. R. 1301.

**1937. Removal of part of boat.**]—Deft. agreed to convey on board his ship a boat for pltf., of certain dimensions. Pltf. presented a decked boat, within the size agreed on:—*Held:* evidence was properly received of a practice to take off the decks of such boats when they were stowed on board ships; & pltf. having declined to permit his deck to be removed, could not sue deft. for breach of agreement.—HAYNES *v.* HOLLIDAY (1831), 7 Bing. 587; 5 Moo. & P. 572; 9 L. J. O. S. C. P. 179; 131 E. R. 227.

*Annotation:*—**Mentd.** Pettitt *v.* Mitchell (1842), 5 Scott, N. R. 721.

**1938. Sugar in hogshead or bags.**]—CUTHBERT *v.* CUMMING, No. 1905, *ante*.

**1939.** ——.]—By a charterparty made between pltf., the owner of a steamship, & defts., her affreighters, it was provided that the ship should proceed to a specified port, & there load from the factor of the affreighters a "full & complete cargo of sugar in hogsheads &/or bags, or other lawful merchandise," & being loaded should therewith proceed to another port & deliver the same at such place as the consignees might direct, on being paid freight at the rate therein mentioned.

The cargo of sugar, with which the ship was loaded, was not, pltf. said a "full & complete" one, inasmuch as the parts of the ship known as the "lazarette" & the "alleyways" were not filled with bags of sugar as they ought to have been. The defence was, that the master of the ship did not stow the cargo properly: that defts. tendered more hogsheads of sugar, which were too large to go into the alleyways; & that, if the bags had been put there, there would have been space for more hogsheads in the hold:—*Held:* defts. were not bound to send the cargo in any particular form: &, as they sent part of it in bags & hogsheads, & the master chose to assume that the remainder would be in bags, & to leave stowage which was only suitable for bags, & not for hogsheads, which defts. had an equal right to send, they could not be made liable for dead freight.—FURNESS *v.* TENNANT, SONS & CO. (1892), 66 L. T. 635; 8 T. L. R. 336; 7 Asp. M. L. C. 179, C. A.

**1940. Molasses in puncheons.**]—CUTHBERT *v.* CUMMING, No. 1905, *ante*.

**1941. Mode governed by usage—At port of loading.**]—CUTHBERT *v.* CUMMING, No. 1905, *ante*.

**1942. Supply of cargo for broken stowage.**]—By a charterparty the charterer bound himself to load at Havana "a full & complete cargo of sugar & other lawful produce." Certain goods were enumerated, including timber, & certain rates of freight were mentioned; & the charterparty proceeded, "other goods, if any should be shipped, to pay in proportion to the foregoing rates, except what might be shipped for broken stowage, which should pay as customary" half freight. A full cargo of mahogany logs was shipped, but no broken stowage was supplied to fill up the interstices, & the vessel was in consequence obliged to retain 30 tons of ballast:—*Held:* it being impossible to ship a "full & complete cargo," without broken stowage, the charterer was bound by his contract to furnish it.—COLE *v.* MEEK (1864), 15 C. B. N. S. 795; 3 New Rep. 388; 33 L. J. C. P. 183; 9 L. T. 653; 12 W. R. 349; 1 Mar. L. C. 415; 143 E. R. 997.

*Annotation:*—**Reld.** Southampton Steam Colliery Co. *v.* Clarke (1870), L. R. 6 Exch. 53.

**1943.** ——.]—By a charterparty the merchant contracted to load "a full & complete cargo of sugar in cases, or other lawful merchandise, with sufficient bags for broken stowage," at a certain rate of freight per ton for sugar, "& for other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of the port of loading." By the custom of the loading port, a given quantity of cotton was to be taken as equal to a ton of sugar. The charterer filled the ship with cotton, putting on board a reasonable quantity of stone for ballast:—*Held:* the stipulation for "sufficient bags, of sugar, for broken stowage" was only applicable to a cargo of sugar in cases or casks, & consequently that the engagement to ship a full cargo of lawful merchandise was performed.—DUCKETT *v.* SATTERFIELD (1868), L. R. 3 C. P. 227; 37 L. J. C. P. 144.

**Cargo or ballast.**]—*See* Nos. 1910, 1911, *ante*.

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SUB-SECT. 9.—FREIGHT.

*See* Part VII., Sect. 11, *post*.

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SUB-SECT. 10.—PROVISIONS AS TO BILLS OF LADING.

*See* Part VII., Sect. 3, *post*.



t. *Authority of charterer's agent to consent to change in order of loading.*]—LINDSAY & SON *v.* SCHOLEFIELD (1897), 24 R. (Ct. of Sess.) 404; 34 Sc. L. R. 404; 4 S. L. T. 291.—SCOT.

*Sect.* 2.—*Charterparties: Sub-sects.* 11, 12, 13 & 14, *A., B. & C.*]

SUB-SECT. 11.—DEMURRAGE.

*See* Part VII., Sect. 8, *post.*

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SUB-SECT. 12.—DAMAGES FOR DETENTION.

*See* Part VII., Sect. 9, *post.*

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SUB-SECT. 13.—DISPATCH MONEY.

*See* Part VII., Sect. 10, *post.*

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SUB-SECT. 14.—CESSER OF LIABILITY CLAUSE.

*A. Future Liabilities.*

**1944. Balance of freight.**]—A charterparty provided for the cesser of liability of B. & co., the charterers of a ship, on loading & payment of advance freight at port of shipment. B. & co. were consignees of the cargo, & the bills of lading made the cargo deliverable " unto order or assigns, he or they paying freight & other conditions as per charterparty." In an action for balance of freight against B. & co. :—*Held :* they were not liable.—BARWICK *v.* BURNYEAT, BROWN & CO. (1877), 36 L. T. 250 ; 25 W. R. 395 ; 3 Asp. M. L. C. 376.

**1945. Where charterer also consignee.**]—BARWICK *v.* BURNYEAT, BROWN & Co., No. 1944, *ante.*

**1946.** ——.]—Goods were shipped on board pltf.'s ship under two bills of lading, by which they were made deliverable at the port of discharge to defts. or their assigns, " they paying freight & all other conditions as per charterparty." The charterparty, which was entered into by defts. as charterers for account of another party, stipulated for payment of freight & demurrage, & also that the liability of defts., as charterers should cease as soon as the cargo was on board, the vessel holding a lien upon the cargo for freight & demurrage. In an action against defts., as consignees of the goods, for demurrage incurred at the port of discharge :—*Held :* as the cesser clause in the charterparty was inconsistent with the contract contained in the bill of lading, it could not be incorporated into the bill of lading, &, consequently, defts. as consignees were not absolved from liability for demurrage incurred at the port of discharge.—GULLISCHEN *v.* STEWART BROTHERS (1884), 13 Q. B. D. 317 ; 53 L. J. Q. B. 173 ; 50 L. T. 47 ; 32 W. R. 763 ; 5 Asp. M. L. C. 200, C. A.

*Annotations :*—**Consd.** Serraino *v.* Campbell, [1891] 1 Q. B. 283. **Reld.** East Yorkshire S.S. Co. *v.* Hancock (1900), 5 Com. Cas. 266 ; Repetto *v.* Millar's Karri & Jarrah Forests, [1901] 2 K. B. 306 ; Temperley S.S. Co. *v.* Smyth, [1905] 2 K. B. 791.

**1947.** ——.]—(1) A charterparty provided that the vessel should proceed to Malta for orders, which were to be given from London within 24 hours after receipt of notice or lay days to count :—*Held :* the orders not having been given within the time prescribed, the lay days did not begin to count till the expiration of the 24 hours.

(2) A clause in a charterparty providing for the cesser of the charterer's responsibility on the goods being loaded, does not absolve the charterer, if he be also the indorsee & holder of a bill of lading incorporating the conditions of the charterparty, from liability for damage incurred at an intermediate port.—BRYDEN *v.* NIEBUHR (1884), Cab. & El. 241.

**Cesser clause in time charter.**]—*See* Sub-sect. 22, B. (*c*) ii., *post.*

**Effect of lien clause.**]—*See* Sub-sect. 14, C., *post.*

**Demurrage at port of discharge.**]—*See* No. 3908, *post.*

*B. Antecedent Liabilities.*

**1948. Undue detention at loading port.**]—LOCKHART *v.* FALK, No. 3864, *post.*

**1949.** ——.]—RESTITUTION S.S. CO., LTD. *v.* SIR JOHN PIRIE & CO., No. 3849, *post.*

**1950.** ——.]—CLINK *v.* RADFORD & CO., No. 1962, *post.*

**1951.** ——.]—DUNLOP & SONS *v.* BALFOUR, WILLIAMSON & CO., No. 4008, *post.*

**1952. Irregularity or delay in shipment.**]—By a charterparty made between pltfs., shipowners, & defts., agents in England for foreign charterers, pltfs.' ship the *B.* should proceed to J., & there load in regular turn, in the customary manner, from defts., a full & complete cargo of coke. Further, as defts. were acting for foreign principals, " all liability of " defts. " in every respect, & as to all matters & things, as well before & during as after the shipping of the said cargo," should " cease as soon as they " had " shipped the cargo." Defts. having loaded & shipped the agreed cargo, pltfs. afterwards sued them in this action for not having shipped it in regular turn :—*Held :* the action would not lie, for the charterparty limited defts.' liability to the actual shipment of the cargo, & protected them from responsibility for any irregularity or delay in the shipment.—MILVAIN *v.* PEREZ (1861), 3 E. & E. 495 ; 30 L. J. Q. B. 90 ; 3 L. T. 736 ; 7 Jur. N. S. 336 ; 9 W. R. 269 ; 1 Mar. L. C. 32 ; 121 E. R. 528.

*Annotations :*—**Consd.** Bannister *v.* Breslauer (1867), L. R. 2 C. P. 497 ; Francesco *v.* Massey (1873), L. R. 8 Exch. 101 ; Kish *v.* Cory (1875), L. R. 10 Q. B. 553 ; French *v.* Gerber (1876), 1 C. P. D. 737. **Reld.** Christoffersen *v.* Hansen (1872), L. R. 7 Q. B. 509 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507.

**1953.** ——.]—By a charterparty between pltf. & deft. it was agreed, that pltf.'s ship should, with all convenient speed, proceed to Sunderland, & that deft. should there load the ship in regular turn with a full cargo of coals, & the ship should proceed with it to Kiel, & deliver to freighter or assigns, on payment of certain freight : " & that, the charter being concluded by deft. on behalf of another party resident abroad, all liability of deft. should cease as soon as he had shipped the cargo " :—*Held :* this clause only exempted deft. from liability accruing after the loading of the cargo ; & he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo.

In a charterparty, as in every contract, if the agent chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted, though on behalf of another, or he may sue the principal who has contracted through his agent ; & this, whether the principal was known at the time or not, or whether it was or was not known that there was a principal (BLACKBURN, J.).—CHRISTOFFERSEN *v.* HANSEN (1872), L. R. 7 Q. B. 509 ; 41 L. J. Q. B. 217 ; 26 L. T. 547 ; 20 W. R. 626 ; 1 Asp. M. L. C. 305.

*Annotations :*—**Consd.** Francesco *v.* Massey (1873), L. R. 8 Exch. 101 ; French *v.* Gerber (1876), 1 C. P. D. 737. **Reld.** Kish *v.* Cory (1875), L. R. 10 Q. B. 553 ; Lockhart *v.* Falk (1875), 33 L. T. 96 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507 ; Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998.

**1954.** ——.]—A charterparty contained the following clause : " This charter being concluded by defts. for & on behalf of another party, it is agreed

that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners & master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage & all other claims, which lien it is hereby agreed they shall have " :—*Held :* the shipowner, pltf., was entitled to recover damages from the defts. for delay in loading, as the exception extended to all liability of the latter connected with the loading, & was not satisfied merely by loading a complete cargo.—LISTER *v.* VAN HAANSBERGEN (1876), 1 Q. B. D. 269 ; 45 L. J. Q. B. 495 ; 34 L. T. 446 ; 24 W. R. 395 ; 3 Asp. M. L. C. 145.

*Annotations :*—**Refd.** French *v.* Gerber (1876), 1 C. P. D. 737 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507.

**1955. Where charterer also consignee.**]—Statement of claim, that defts. chartered pltf.'s ship for a voyage from Cardiff to Callao with a cargo of coals, to be consigned to defts.' agent at Callao. By the charterparty the ship was to be loaded at the rate of 75 tons per day, commencing when she was wholly unballasted ; stiffening coal to be supplied at the ship's expense at the rate of 40 tons per working day, all days on which stiffening coal was taken on board or the ship was detained for the same, to be excluded from the working days allowed for loading ; the vessel to be discharged at the rate of 40 tons per day ; demurrage to be paid for each day beyond the said days allowed for loading & discharging at the rate of 3*d.* per registered ton per day ; the master to have a lien on the cargo for all freight & demurrage ; all liability of the charterers to cease as soon as the cargo was on board ; & all questions, whether of short delivery, demurrage, or otherwise, to be settled with charterer's agent at the port of destination, which settlement to be binding on the owners ; the owners & master to have a lien on the cargo for all freight, dead freight & demurrage. That the ship was detained by the default of defts. in providing stiffening coal ; that the cargo was ultimately loaded ; that pltf. requested defts.' agent at Callao to settle the claims as to demurrage, etc., of pltf., which he refused to do ; but defts.' agent required pltf. to deliver the cargo, which pltf. accordingly did, without enforcing his lien for demurrage. Pltf. claimed £350 from defts. for demurrage or damages for detention. Defts. demurred to so much of the claim as alleged liability under the charterparty, on the ground that the liability of defts. had ceased on the loading of the cargo :—*Held :* (1) the demurrage clause applied to the loading of the stiffening coal as well as to the loading of cargo proper ; (2) even if it did not, the lien for " demurrage " would extend to damages for detention by not loading stiffening coal, as well as to demurrage proper ; & the cesser of liability clause applied to liability in respect of both ; (3) the fact that defts. were themselves consignees as well as charterers made no difference in the construction of the cesser of liability clause ; (4) the rest of the clause, giving defts.' agent power to settle claims for short delivery & demurrage made no difference in the construction as to cesser of liability ; (5) the facts that defts.' agent refused to settle the demurrage, & that pltf. had delivered the cargo at the request of defts.' agent without enforcing the lien, did not revive defts.' liability under, or give rise to an action on, the charterparty.—SANGUINETTI *v.* PACIFIC STEAM NAVIGATION CO. (1876), 2 Q. B. D. 238 ; 46 L. J. Q. B. 105 ; 35 L. T. 658 ; 25 W. R. 150 ; 3 Asp. M. L. C. 300, C. A.

*Annotations :*—*As to* (2) **Consd.** Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507. **Refd.** Clink *v.* Radford (1871), 7 T. L. R. 327 ; Harris *v.* Jacobs (1885), 15 Q. B. D. 247 ; Restitution S.S. Co. *v.* Pirie (1889), 61 L. T. 330. *As to* (3) **Refd.** Barwick *v.* Burnyeat, Brown (1877), 36 L. T. 250.

**1956. Agent empowered to settle claims.**]—SANGUINETTI *v.* PACIFIC STEAM NAVIGATION CO., No. 1955, *ante.*

**Demurrage at port of loading.**]—*See* No. 3907, *post.*

*C. Effect of Lien Clause.*

**1957. How far cesser clause operative.**]—By a charterparty for a voyage from London to Antwerp, the cargo was to be loaded & discharged with all dispatch, & freight to be paid in cash on unloading & right delivery : " the charterers' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge ; the captain having an absolute lien on it for freight, dead freight, & demurrage, which he, or owner, shall be bound to exercise " :—*Held :* a plea setting out the above condition, & averring " that the cargo was shipped, & that the same was worth the said freight on arrival at the port of discharge, & that thereupon defts.' liability as charterers upon & under the charterparty ceased," was a good answer to an action by the shipowner against the charterers for delay in loading the vessel in London.—BANNISTER *v.* BRESLAUER (1867), L. R. 2 C. P. 497 ; 36 L. J. C. P. 195 ; 16 L. T. 418 ; 2 Mar. L. C. 490 ; *sub nom.* BANISTER *v.* BRESLAUER, 15 W. R. 840.

*Annotations :*—**Dbtd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Consd.** Christoffersen *v.* Hansen (1872), L. R. 7 Q. B. 509 ; Francesco *v.* Massey (1873), L. R. 8 Exch. 101 ; Kish *v.* Cory (1875), L. R. 10 Q. B. 553 ; French *v.* Gerber (1876), 1 C. P. D. 737 ; Clink *v.* Radford, [1891] 1 Q. B. 625. **Refd.** Lockhart *v.* Falk (1875), L. R. 10 Exch. 132 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507.

**1958.** ——.]—Pltf., on Aug. 18, 1866, chartered his vessel, *Superior,* to R., for a voyage from Sulina to London. By the charterparty the ship was to proceed to Sulina, & there load a full cargo of staves &/or grain, or other lawful merchandise, which the charterer bound himself to ship, & thence proceed to London, & deliver the same on being paid freight at 8*s.* per 100 oak staves, & other merchandise, if shipped, in fair proportion : fifty running days to be allowed for loading & ten days on demurrage over & above the said laying days at £8 per day. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, & average ; & the charterer's responsibility to cease on shipment of the cargo, provided it be of sufficient value to cover the freight & charges on arrival at port of discharge. The ship arrived at Sulina, & after considerable delay the loading, as far as it went, was completed on Jan. 5, 1867, & on that day bills of lading were signed by the captain, under protest : " Shipped by R. on the ship *Superior,* of whom H. is captain, now lying in the port of Sulina, & bound to consign his cargo as per charterparty of Aug. 18, 1866, 283,682 oak

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**PART VII. SECT. 2, SUB-SECT. 14.—C.**

**1957 i.** *How far cesser clause operative.*]—A charterparty contained the following clause : " It is agreed that the responsibility of the charterer ceases as soon as the cargo is on board, the vessel holding a lien on the cargo for freight & demurrage." Pltfs. sued defts., the charterer, for the freight, setting out in their declaration that the vessel was loaded & proceeded to sea with her cargo & delivered the cargo : —*Held :* defts. was not liable.—COOK *v.* MCLEOD (1873), 9 N. S. R. (3 G. & O.) 307.—**CAN.**

**1957 ii.** ——.]—GARDINER *v.* MACFARLANE, M'CRINDELL & CO. (1889), 16 R. (Ct. of Sess.) 658 ; 26 Sc. L. R. 492.—**SCOT.**

*Sect. 2.—Charterparties: Sub-sect. 14, C.; sub-sects. 15 & 16.]*

staves, which are to be delivered at the port of discharge, as per the aforesaid charterparty . . . unto order, or to his or their assigns, he or they paying freight & all other conditions or demurrage, if any should be incurred, for the said goods, as per the aforesaid charterparty." The words " & all other conditions " were added in writing. A full & complete cargo was not shipped, & the vessel sailed from Sulina, & performed her voyage with a short cargo. She was also detained at her port of loading during the ten days on demurrage, & also eighteen days beyond the ten days. The cargo was of value sufficient to cover pltf.'s claims for freight, dead freight, & demurrage. On the ship's arrival in London, pltf. claimed a lien on the cargo for the amount of dead freight, & of demurrage, & for damages for her detention during the eighteen days. Defts. claimed the cargo as the consignees named in the bills of lading; they had no notice until the arrival of the ship in London of the said claim, but a copy of the charterparty had been sent to defts. with the original bill of lading:—*Held:* (1) there was no lien given for damages for short loading under the term " dead freight " in the charterparty; (2) a lien was given by the charterparty for demurrage proper under the term " demurrage," but not for damages for detention beyond the demurrage days; & this lien for demurrage at the port of loading was retained by the terms of the bill of lading.

(3) Dead freight is an expression having a well-known signification, viz. the freight which would have been payable for that part of the vessel which has not been occupied by merchandise, but ought to have been (CLEASBY, B.).

(4) These claims are, first, £80 for demurrage incurred by the detention of the ship at the port of loading for ten days, during which, according to the terms of the charterparty, the charterer, if he detained the ship, was to pay £8 per day demurrage; secondly, a further claim for damages for the ship's detention for a further period of eighteen days beyond the ten days; & thirdly, a claim for what is called dead freight, which is said to be incurred in consequence of a full cargo not having been loaded. It is clear that the pltf. can only have a lien for any of these claims by express contract, inasmuch as the lien which, as shipowner, he would have independently of any contract would only extend to the actual freight of the goods carried. Further, although the charterparty may contain an express contract giving him such a lien on the goods as against the charterer, yet he could not have the lien as against the indorsee of a bill of lading, unless it is stipulated for in the bill of lading, either by the incorporation of the clause in the charterparty, or by its being expressly mentioned (CHANNELL, B.).—GRAY *v.* CARR (1871), L. R. 6 Q. B. 522; 40 L. J. Q. B. 257; 25 L. T. 215; 1 Asp. M. L. C. 115; *sub nom.* GREY *v.* CARR, 19 W. R. 1173, Ex. Ch.

*Annotations:—As to* (1) **Consd.** Serraino *v.* Campbell, [1891] 1 Q. B. 283. **N.F.** Kish *v.* Taylor, [1910] 1 K. B. 309. **Reld.** McLean *v.* Fleming (1871), 1 Asp. M. L. C. 160; Porteus *v.* Watney (1878), 3 Q. B. D. 534; Red R S.S. Co. *v.* Allatini (1909), 100 L. T. 268. *As to* (2) **Reld.** Kish *v.* Cory (1875), 32 L. T. 670; Lockhart *v.* Falk (1875), 44 L. J. Ex. 105; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507; Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998. *As to* (4) **Reld.** French *v.* Gerber (1876), 1 C. P. D. 737; The Lizzie (1918), 34 T. L. R. 421. *Generally,* **Reld.** Christoffersen *v.* Hansen (1872), L. R. 7 Q. B. 509; Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534.

**1959.** ——.]—A charterparty made by pltf. to deft. contained the following clause: " Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight & demurrage." In an action brought for demurrage at the port of loading:—*Held:* (1) the lien extended to demurrage at the port of loading, as well as at the port of discharge; (2) the ship, having been loaded, the charterer could not be sued for demurrage incurred during the loading.—FRANCESCO *v.* MASSEY (1873), L. R. 8 Exch. 101; 42 L. J. Ex. 75; 21 W. R. 440.

*Annotations:—As to* (1) **Apprvd.** Kish *v.* Cory (1875), L. R. 10 Q. B. 553. **Reld.** Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998; Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352. *As to* (2) **Reld.** Lockhart *v.* Falk (1875), L. R. 10 Exch. 132; French *v.* Gerber (1876), 1 C. P. D. 737. *Generally,* **Reld.** Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507.

**1960.** ——.]—KISH *v.* CORY, No. 4005, *post.*

**1961.** ——.]—Defts. chartered pltfs.' ship to carry a cargo of rice to a good & safe port, calling at another port for orders which were to be forwarded within forty-eight hours after notice of her arrival or lay days to count. Twelve working laying days to be allowed the freighters for loading the ship at port of loading & waiting for orders at port of call, & fifteen days on demurrage allowed over & above the laying days, at 4*d.* per ton per day. It was further agreed " that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, & demurrage, which they shall be bound to exercise." The ship arrived at the port of call with a cargo worth the freight, & notice was given to defts. In an action against the charterers, who had sold the cargo before arrival at the port of call, two breaches of contract were assigned: that defts. did not give orders as to the ship's port of discharge; that they gave orders for the ship to discharge at a port which was not a good & safe port; whereby pltfs. were delayed & put to expense in obtaining payment of the freight:—*Held:* the exoneration clause discharged defts. from liability for the breaches.—FRENCH *v.* GERBER (1877), 2 C. P. D. 247; 46 L. J. Q. B. 320; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. L. C. 403, C. A.

*Annotations:—***Reld.** Barwick *v.* Burnyeat, Brown (1877), 36 L. T. 250; Sanguinetti *v.* Pacific Steam Navigation Co. (1877), 2 Q. B. D. 238; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507; Hansen *v.* Harrold (1894), 9 R. 315; Brankelow S.S. Co. *v.* Canton Insce. Office, [1899] 2 Q. B. 178.

**1962.** ——.]—By a charterparty the ship was to load a cargo in the usual & customary manner & proceed to the port of discharge, & there deliver the same " to be unloaded at the average rate of not less than 100 tons per working day . . . or charterers to pay demurrage at the rate of 4*d.* per ton register *per diem* . . . the charterers' liability under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight & demurrage." In an action by the shipowner against the charterers to recover damages for detention at the port of loading:—*Held:* the word " demurrage " in the lien clause did not cover damages for undue detention at the port of loading, & therefore the cesser clause did not exempt the charterers from liability for the delay.

In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charterparty, is that the ct. will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is

expressed in terms that prohibit such a conclusion (LORD ESHER, M.R.).

The rule that we are *primâ facie* to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, & it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charterparty the breach of which would create a legal liability; there would then be a cesser clause destroying that liability; & there would then come a lien clause which did not recreate that liability in anybody else (FRY, L.J.). —CLINK *v.* RADFORD & Co., [1891] 1 Q. B. 625; 60 L. J. Q. B. 388; 64 L. T. 491; 39 W. R. 355; 7 T. L. R. 327; 7 Asp. M. L. C. 10, C. A.

*Annotations:*—**Apld.** Hansen *v.* Harrold, [1894] 1 Q. B. 612; Jenneson, Taylor *v.* Secretary of State for India, [1916] 2 K. B. 702. **Reld.** Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507; Brankelow S.S. Co. *v.* Canton Insce. Office, [1899] 2 Q. B. 178.

**1963.** ——.]—HANSEN *v.* HARROLD BROTHERS, No. 4600, *post*.

**1964.** ——.]—Shipowners chartered a ship for a voyage at a lump freight, the charterers' liability to cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, & demurrage on arrival, & the vessel to have a lien on the cargo for the recovery of all freight, dead freight, demurrage, & all other charges. The shipowners & charterers jointly insured the lump freight "chartered or as if chartered value" at the lump sum "on board or not on board." The charterers loaded the ship with a general cargo, & the master signed bills of lading by which the goods mentioned in each bill were made deliverable upon payment of the bill of lading freight payable in respect of those goods. The aggregate of the bill of lading freight exceeded the chartered freight. On the voyage part of the cargo was lost by jettison upon the ship running aground. The cargo which arrived was worth the freight, dead freight, & demurrage. Owing to the loss of cargo the bill of lading freight payable on the cargo delivered was less than the chartered freight. To recover the difference an action was brought on the policy by the shipowners & charterers jointly:—*Held:* (1) the action was not maintainable, the loss having been caused not by perils of the seas, but by the master's not having reserved in the bills of lading the lien over the whole cargo for the chartered freight.

(2) A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; &, although only payable on the right & true delivery of the cargo, those words are not taken literally, but are understood to mean right & true delivery having regard to & excluding the excepted perils. In other words, the cargo does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that affords no defence to a claim for the lump sum freight although such non-delivery, if wrongful, will give rise to a cross-action (LORD LINDLEY).—WILLIAMS & Co. *v.* CANTON INSURANCE OFFICE, LTD., [1901] A. C. 462; 70 L. J. K. B. 962; 85 L. T. 317; 17 T. L. R. 696; 9 Asp. M. L. C. 247; 9 Com. Cas. 256, H. L.; *affg.* S. C. *sub nom.* BRANKELOW S.S. Co. *v.* CANTON INSURANCE OFFICE, [1899] 2 Q. B. 178.

*Annotations:*—*As to* (1) **Reld.** Scottish Shire Line *v.* London & Provincial Marine & General Insce., [1912] 3 K. B. 51. *As to* (2) **Consd.** Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171. *Generally*, **Reld.** Thomas *v.* Harrowing S.S. Co., [1915] A. C. 58.

**1965.** ——.]—A charterparty provided that the captain should sign bills of lading in a prescribed form without prejudice to the charterparty, that the discharge should be at a specified rate per day, that the captain should have a lien on the cargo for freight, demurrage, & any other lawful claim against the charterer, & that the charterer's liability should cease on completion of shipment provided the cargo was worth the freight & demurrage. The captain signed bills of lading in the prescribed form which did not provide for any rate of discharge & under which no lien was given to the shipowners for demurrage or other claims. The cargo was not discharged within the time provided for in the charterparty:—*Held:* the cesser clause did not exempt the charterer from liability for the delay at the port of discharge.—JENNESON, TAYLOR & Co. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, [1916] 2 K. B. 702; 86 L. J. K. B. 283; 116 L. T. 570; 14 Asp. M. L. C. 41; 22 Com. Cas. 1.

**1966.** —— **Delivery without enforcement of lien.**]—SANGUINETTI *v.* PACIFIC STEAM NAVIGATION Co., No. 1955, *ante*.

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SUB-SECT. 15.—LIEN CLAUSE.

**Lien for demurrage.**]—*See* Sect. 8, sub-sect. 4, *post*.

**Lien for freight.**]—*See* Sect. 13, sub-sect. 3, *post*.

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SUB-SECT. 16.—PENALTY CLAUSE.

**1967. Effect of penalty clause—Whether damages recoverable—In excess of penalty.**]—One may recover more than the penalty of a charterparty in damages, by action on the case for breach of contract.—WINTER *v.* TRIMMER (1762), 1 Wm. Bl. 395; 96 E. R. 225.

*Annotations:*—**Folld.** Harrison *v.* Wright (1811), 13 East, 343. **Mentd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579.

**1968.** —— —— ——.]—In *assumpsit* upon a memorandum for a charterparty, describing the agreement of deft., the shipowner, to proceed with all convenient speed to a foreign port, & there load, within twenty running days, a cargo from pltf.'s factors, & therewith return home, & in fifteen running days deliver the same, on payment of certain freight, concluding with a certain penalty for non-performance:—*Held:* pltf. might recover damages on the breach of the contract, in deft.'s not permitting the vessel to proceed on the voyage, beyond the amount of the penalty.—HARRISON *v.* WRIGHT (1811), 13 East, 343; 104 E. R. 402.

*Annotations:*—**Consd.** Wall *v.* Rederiakt. Luggude, [1915] 3 K. B. 66. **Mentd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579.

**1969.** —— —— ——.]—Such a clause [penalty clause] is not the absolute limit of damages on either side; the party may ground his action upon other clauses or covenants & may in such an action recover damages beyond the amount of the penalty if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause he cannot in effect recover more than the damage actually sustained (BLACKBURN, J.).—GODARD *v.* GRAY (1870), L. R. 6 Q. B. 139; 40 L. J. Q. B. 62; 24 L. T. 89; 19 W. R. 348.

*Annotations:*—**Reld.** Thorp *v.* Hibbard (1887), 4 T. L. R. 54; Wall *v.* Rederiakt. Luggude, [1915] 3 K. B. 66. **Mentd.** Schibsby *v.* Westenholz (1870), L. R. 6 Q. B. 155; Ochsenbein *v.* Papelier (1873), 8 Ch. App. 695; Copin *v.* Adamson, Copin *v.* Strachan (1874), 31 L. T. 242; Meyer *v.* Ralli (1876), 1 C. P. D. 358; *Re* St. Nazaire Co. (1877), 36 L. T. 358; Roussillon *v.* Roussillon (1880), 42 L. T. 679; Abouloff *v.* Oppenheimer (1882), 10 Q. B. D.

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295; Voinet *v.* Barrett (1885), 55 L. J. Q. B. 39; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600; Nouvion *v.* Freeman, *Re* Henderson (1889), 15 App. Cas. 1; Crozat *v.* Brogden (1894), 42 W. R. 317; Pemberton *v.* Hughes, [1899] 1 Ch. 781; Emanuel *v.* Symon, [1908] 1 K. B. 302; Robinson *v.* Fenner, [1913] 3 K. B. 835.

**1970.** —— —— ——.]—WATTS, WATTS & CO., LTD. *v.* MITSUI & CO., LTD., No. 2549, *post.*

**1971.** —— —— ——.]—A charterparty contained the following clause: "Penalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight":—*Held:* the clause provided a penalty & not a limitation of liability, & did not prevent the party complaining of non-performance from recovering the actual damages though exceeding the estimated amount of freight.—WALL *v.* REDERIAKT. LUGGUDE, [1915] 3 K. B. 66; 84 L. J. K. B. 1663; 114 L. T. 286; 31 T. L. R. 487; 13 Asp. M. L. C. 271; 21 Com. Cas. 132.

*Annotation:*—**Consd.** Watts, Watts *v.* Mitsui, [1917] A. C. 227.

**1972. Whether penalty recoverable as liquidated damages.**]—SPARROW *v.* PARIS, No. 1889, *ante.*

**1973.** ——.]—GODARD *v.* GRAY, No. 1969, *ante.*

**1974.** ——.] — THORP *v.* HIBBARD (1887), 4 T. L. R. 54.

**Liquidated damages or penalty generally.**]—*See* DAMAGES, Vol. XVII., pp. 136 *et seq.*

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SUB-SECT. 17.—ARBITRATION CLAUSE.

*See, generally,* ARBITRATION, Vol. II., pp. 305 *et seq.*

**Incorporation in bill of lading.**]—*See* ARBITRATION, Vol. II., pp. 331, 332, Nos. 138–141.

**Whether clause in colliery agreement incorporated in charterparty.**]—*See* ARBITRATION, Vol. II., p. 332, Nos. 142, 143.

**Appointment of arbitrator within limited time.**]—*See* ARBITRATION, Supp. III., Nos. 165a, 165b, 165d.

**Construction of clause.**]—*See* ARBITRATION, Vol. II., p. 347, Nos. 236, 238.

**Stay of proceedings.**]—*See* ARBITRATION, Vol. II., pp. 361, 362, Nos. 312–314.

**Restraint of arbitration by injunction.**]—*See* ARBITRATION, Vol. II., p. 378, No. 419.

**Revocation of agreement to submit to arbitration.**]—*See* ARBITRATION, Vol. II., p. 393, No. 521.

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SUB-SECT. 18.—PROVISIONS AS TO INSURANCE.

**1975. Provision for payment by owners—Effect on liability of charterers—Ship damaged by negligence of charterers' servants.**]—A clause in a charterparty, "owners shall pay for the insurance on the vessel":—*Held:* not to exonerate the charterers from liability for damage to the ship caused by the negligence of their servants.—AIRA FORCE S.S. CO., LTD. *v.* CHRISTIE & CO. (1892), 8 T. L. R. 104, C. A.

**1976.** —— **Special clause as to war risks—Construction.**] — In a time charterparty dated Sept. 17, 1912, & made between the owners of a Dutch steamer & a British firm, who were the charterers, clause 2 provided (*inter alia*) that the owners should "pay & provide for the insurance on the vessel," & clause 23 that nothing in the charterparty was to be construed as a demise of the ship to the charterers, the owners remaining responsible (*inter alia*) for the insurance "same as when trading for their own account." At the end of the charterparty was the following special clause: "War risks, if any required for charterers' account. It is understood & agreed that value for war risk at all times to be based on value stated in owners' annual policy." At the outbreak of war between England & Germany the ship was engaged in carrying a cargo of wheat from Portland, Oregon, for delivery to merchants of Belfast & Dublin. The ship was sunk at sea by a German cruiser on Sept. 21, 1914. No insurance against war risk had been effected. The ship was insured by the owners for £20,000 by annual yearly policies in which the value of the ship was stated as £24,000. In addition the owners had effected two yearly p.p.i. policies for sums amounting to some £6,500, on the excess value of the ship. Before the loss of the ship was known, the owners had been pressing the charterers to insure against war risk, & had informed them that the ship's insuring value was £30,500. In an action by the owners claiming damages from the charterers for their breach of the charterparty in failing to insure against war risk:—*Held:* (1) the special clause of the charterparty did not impose on the charterers the obligation of insuring against war risk, when requisite, but only made them liable to pay the costs of any insurance when effected by the owners; (2) even if the obligation to insure had rested on the charterers, it must be a condition precedent that the owners should correctly inform the charterers as to the "value stated in owners' annual policy"; & this had never been done, as the correct amount was £24,000 & not £30,500.—HOLLAND GULF STOOMVAART MAATSCHAPPIJ *v.* WATSON, MUNRO & CO. (1915), 85 L. J. K. B. 451; 114 L. T. 255; 32 T. L. R. 169; 60 Sol. Jo. 174; 13 Asp. M. L. C. 279, C. A.

**1977.** —— **Subsequent agreement for refund of war risk premiums—If vessel trading "in war region."**]—By an agreement supplemental to a charterparty it was agreed that if the vessel was ordered by the charterers to trade "in the war region" war risk insurance premiums payable by the owners should be refunded to them by the charterers. In Oct. 1916, the charterers were running the vessel in American waters, & owing to the appearance of a German submarine, which destroyed six vessels in an area proximate to that in which the vessel was trading & was ordered by the charterers to trade in the future, the owners paid an increased insurance premium. In an action by the owners against the charterers to recover the amount:—*Held:* the vessel had been ordered by the charterers to trade "in the war region," & pltfs. were entitled to recover.—MASKINONGE S.S. CO. *v.* DOMINION COAL CO. (1917), 33 T. L. R. 340, C. A.; *affd. sub nom.* DOMINION COAL CO., LTD. *v.* MASKINONGE S.S. CO., LTD. (1918), 87 L. J. K. B. 459, H. L.

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SUB-SECT. 19.—PROVISIONS AS TO ADVANCES AND OTHER PAYMENTS.

**1978. Advances to master—Amount limited by charterparty—Liability of owners for excess payment.**]—A charterparty contained a clause that "sufficient money should be advanced to the master for disbursements not exceeding £200." The party to whom it was addressed having advanced to the master when abroad a larger sum for the use of the ship:—*Held:* he was entitled to recover the full amount against the owners.—VAUGHAN *v.* FITZHUGH (1839), 3 L. T. 153; 3 Jur. 1002.

**1979. —— Construction of clause.**]—THE PRIMULA, No. 4935, *post.*

**1980. Payment of port charges by owner—Charge for use of quay—"Port charge" not "due on cargo."**]—SOCIETA ANONIMA UNGHERESE DI ARMAMENTI MARITTIMO *v.* HAMBURG SOUTH AMERICAN S.S. Co., No. 1744, *ante.*

**Advance freight.**]—*See* Part VIII., Sect. 4, *post.*

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SUB-SECT. 20.—BROKERAGE AND OTHER COMMISSIONS.

*A. Right to Commission.*

*(a) Brokerage.*

i. *In General.*

*See, generally,* AGENCY, Vol. I., pp. 488–528, Nos. 1664–1861.

**1981. Right by usage—Amount of commission.**]—By the usage of trade in London, a broker who acts as such in chartering a ship to the Baltic is entitled to a commission of 5 per cent. upon the amount of the freight.—COHEN *v.* PAGET (1814), 4 Camp. 96; 171 E. R. 31, N. P.

**1982. —— ——.**]—*Semble:* the broker's commission on the freight of a ship is 5 per cent. unless there be a special agreement or the ship be chartered upon a tender.—BROWN *v.* NAIRNE (1839), 9 C. & P. 204; 4 L. T. 341, N. P.

**1983. —— —— Admissibility of evidence.**]—Where pltf. relies upon a mercantile custom to support his claim, for commission to a certain amount, deft. may, without any special plea, produce evidence to show that under certain circumstances the custom is to pay but half that amount. The evidence being offered to show that the contingent reduction was part of the original contract, & not that it was a subsequent alteration so as to create a new contract.—BROAD *v.* M'AYLMER (1835), 1 Har. & W. 532; *sub nom.* BROAD *v.* M'CALMAR, 5 Nev. & M. K. B. 413; 5 L. J. K. B. 3.

**1984. —— —— Payable only in respect of hire earned.**]—In the shipping trade there is an established custom that chartering brokers' commission is only payable in respect of hire actually earned.—HARLEY & Co. *v.* NAGATA (1917), 34 T. L. R. 124; 23 Com. Cas. 121.

*Annotation:*—**Refd.** Les Affréteurs Réunis Soc. Anon. *v.* Walford (London), [1919] A. C. 801.

**1985. —— —— —— Effect of express clause in charterparty.**]—A clause in a time charterparty provided that "a commission of 3 per cent. on the estimated gross amount of hire is due to L. W. (London), Limited, on signing this charter, ship lost or not lost." No hire was in fact earned under the charterparty:—*Held:* (1) the charterers, as trustees for the brokers, could enforce the clause against the shipowners; (2) a custom by which commission was payable only if hire was earned under the charterparty could not be set up by the shipowners as an answer to the brokers' claim, inasmuch as it was inconsistent with the terms of the clause.—LES AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME *v.* LEOPOLD WALFORD (LONDON), LTD., [1919] A. C. 801; 88 L. J. K. B. 861; 121 L. T. 393; 35 T. L. R. 542; 14 Asp. M. L. C. 451; 24 Com. Cas. 268, H. L.; *affg.* S. C. *sub nom.* LEOPOLD WALFORD (LONDON) *v.* LES AFFRETEURS REUNIS SOCIETE ANONYME, [1918] 2 K. B. 498, C. A.

*Annotation:*—*As to* (1) **Apld.** French *v.* Leeston Shipping Co. (1921), 37 T. L. R. 453.

**1986. When right accrues—When charterparty executed—Amount dependent on contingency.**]—A broker charters ships, at a commission of 2½ per cent. on their outward freight, & the like on homeward freight: if the charterparty makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined.—WINTER *v.* MAIR (1811), 3 Taunt. 531; 128 E. R. 210.

**1987. —— ——.**]—Commission on freight held to be due when charterparty executed.—THE CORONATION, GOODCLIFFE & SMART *v.* NICOL (1858), 4 L. T. 528.

**1988. Legality of voyage doubtful—Dependent on licences to be obtained by charterer.**]—It is no answer to an action by a broker for commission for procuring freight, that the charterparty procured was such, that if the charterer failed to obtain certain licences, the voyage would be illegal.—HAINES *v.* BUSK (1814), 5 Taunt. 521; 1 Marsh. 191; 128 E. R. 793.

*Annotations:*—**Distd.** Hamond *v.* Holliday (1824), 1 C. & P. 384. **Apld.** Norwich Corpn. *v.* Norfolk Ry. (1855), 4 E. & B. 397. **Mentd.** Gray *v.* Oxford (1905), 21 T. L. R. 664.

**1989. General voyage—Charter for indefinite period—Construction of charter party.**]—HOLL *v.* PINSENT (1821), 6 Moore, C. P. 228.

**1990. Lack of skill of broker—No benefit resulting from charter.**]—If the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble.—HAMOND *v.* HOLIDAY (1824), 1 C. & P. 384; 171 E. R. 1241, N. P.

**1991. Necessity for insertion of broker's name in charterparty.**]—A ship broker must have his name inserted in a charterparty to entitle him to sue for commission on it.—THE TRADE WIND, KIRKHAM *v.* FERNIE (1851), 4 L. T. 528.

**1992. Agreement for reduction of amount—Validity.**]—A shipbroker, having effected a home charter for a shipowner, in respect of which he was entitled to 5 per cent. commission on the freight, signed an agreement to allow one-half of that commisson if the vessel discharged her outward cargo at a particular port, the charterer having the option of discharging at several other ports:—*Held:* the agreement was binding upon him, the giving up of the old & the entering into the new agreement being a sufficient consideration, under the circumstances, to support the new agreement.—WOOLLISCROFT *v.* WATSON (1858), 31 L. T. O. S. 13.

**1993. Agreement for payment by brokers of new owners—In consideration of abandonment of right to receive freight.**]—A declaration stated that pltf. was a shipbroker, & that he was employed by the owners of a ship to procure for them a charter of that ship, upon the terms that he should be entitled to receive the freight, & so thereout to satisfy himself his commission: & that he did accordingly procure a charterparty on certain terms; that the ship sailed & performed her voyage, & returned to England; that a change of ownership in some of the shares of the ship had accrued before her return; that, after her return pltf. was about to collect & would have collected the freight, so as thereout to satisfy himself his commission; that defts. were the brokers for the new owners, & it became desirable for them to obtain immediate possession of the ship, & they were therefore anxious that pltf. should abandon



a. *Right to commission on new agreement—Negotiations independent of broker.*]—DAWSON BROTHERS *v.* FISHER & SONS 1900), 2 F. (Ct. of Sess.) 941.—SCOT.

*Sect. 2.—Charterparties: Sub-sect. 20, A. (a) i., ii. & iii.*]

his right of receiving the freight that, in consideration of the premises, & that pltf. would relinquish his right to collect the freight, defts. promised to pay him his commission; that pltf. did relinquish his right, but that defts. would not pay him his commission:—*Held:* this was an agreement by defts. to pay, in consideration of the pltf. abandoning his rights, arising from several matters stated by way of inducement, the inducement, as stated, being material; & the declaration was not supported by proof of an agreement in consideration of the pltf. not asserting any lien on the freight, without its appearing whether or not he was entitled to such lien.—GULL *v.* LINDSAY & YOUNG (1849), 4 Exch. 45; 18 L. J. Ex. 354; 13 L. T. O. S. 305; 154 E. R. 1118.

**1994. Right of managing owner acting as broker.**]—In the absence of any special bargain, the managing owner of a ship is not entitled to retain, or to charge against the ship, any profit for himself, either by way of commission or otherwise, for procuring charters or freights, whether he be a ship broker & procures them himself, or employs another broker for the purpose, the procuring of charters & freights being part of the duties incidental to the office of managing owner.—WILLIAMSON *v.* HINE, [1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 682; 39 W. R. 239; 7 T. L. R. 130; 6 Asp. M. L. C. 559.

ii. *Charter Not Completed.*

*See, generally,* AGENCY, Vol. I., pp. 508–518, Nos. 1753–1801.

**1995. Right to quantum meruit.**]—A broker who procures a charterparty for a vessel to Rio Janiero, where a gross sum is to be paid for the voyage out & home, is entitled on a *quantum meruit* to 5 per cent. on the gross sum although the payment of part be contingent on the arrival of the vessel home.—ROBERTS *v.* JACKSON (1817), 2 Stark. 225; 171 E. R. 628, N. P.

**1996. —— Voyage not commenced.**]—A ship broker who has procured a bargain for the hire of a vessel is, by the usage in the City of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise:—*Held:* where a broker had negotiated the hire of a vessel, & a memorandum for a charter was signed by the parties, but the bargain afterwards went off, & the ship was not employed, the broker could not maintain an action against the shipowner to recover the commission or a compensation for his work & labour.—READ *v.* RANN (1830), 10 B. & C. 438; L. & Welsb. 121; 8 L. J. O. S. K. B. 144; 109 E. R. 513.

**1997. —— —— Contract broken off by owner.**]—*Semble:* by the usage of trade a ship broker is not entitled to charge a shipowner for his trouble in procuring a charterer for the ship, where the contract is not completed, though it be broken off by the owner.—BROAD *v.* THOMAS (1830), 7 Bing. 99; 4 Moo. & P. 732; 9 L. J. O. S. C. P. 32; 131 E. R. 38; *previous proceedings*, 4 C. & P. 338, N. P.

**1998. —— —— Default of broker.**]—Where a broker is employed by a shipowner to procure a charterparty, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration, nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, & have been incurred in consequence of the shipowners having urged him to extraordinary expedition in the matter. & *semble*, where the negotiation is not carried into effect, but there is no fault in the broker, he is not entitled to anything, unless the charterparty is actually signed.—DALTON *v.* IRVIN (1830), 4 C. & P. 289; 172 E. R. 708, N. P.

**1999. —— Where no freight earned.**]—The actual earning of freight under a charterparty, is not a condition precedent to the right of the shipbroker to his commission for procuring the execution of the charter. A., a shipbroker, procured a charterparty to be made between B., a shipowner, & C., under which the owner contracted to bring home a cargo of guano, & the merchant agreed to pay freight at the rate of £4 15*s.* per ton, to be reduced to £4 12*s.* 6*d.* if the ship did not arrive off Cork or Falmouth on or before a given day. There was no express engagement on the part of C. to ship a cargo:—*Held:* A. was entitled to recover from B., upon a *quantum meruit*, for his work & labour in procuring the charter to be executed, without showing the arrival of the vessel on or before the day mentioned, & notwithstanding only a very small quantity of guano had been shipped, & a small amount of freight actually earned.—HILL *v.* KITCHING (1846), 3 C. B. 299; 15 L. J. C. P. 251; 7 L. T. O. S. 257; 136 E. R. 120.

**2000. —— Unsuccessful attempt to procure charter.**]—A ship broker is only entitled to commission upon a charterparty, where he has substantially procured the charter; & he cannot recover commission as upon a *quantum meruit* for his endeavours to procure the charter.—COUSENS *v.* MITCHESON (1863), 1 New Rep. 240; *previous proceedings* (1862), 3 F. & F. 236, N. P.

**2001. —— Sale of ship to charterers—Where terms expressed in commission note.**]—Pltfs., who were shipbrokers, negotiated on behalf of defts., the owners of a steamship, a charterparty of the steamship which was to be in force from Oct. 1920, for five years, & which contained a clause providing that the charterers should have the option of purchasing the steamship at any time between the signing of the charter & the completion of the charter period for £125,000. On the day when the charterparty was signed defts. signed & gave to pltfs. a commission note in these terms: "We hereby agree to pay you . . . 5 per cent. brokerage on hire. . . . Should the option of purchase contained in the charter be availed of, the brokerage on purchase to be 3½ per cent. . . ." The charterparty was acted upon until June, 1921, when defts. sold the steamship to the charterers for £65,000. Pltfs. brought an action against defts., claiming (*inter alia*) 3½ per cent. commission on £65,000, the price paid by the charterers for the steamship; &, in the alternative, a *quantum meruit* for their alleged services in effecting the same:—*Held:* (1) the former of these claims failed, the option of purchase mentioned in the commission note never having been exercised, & the sale effected being a sale at a different price from that upon which alone the brokerage of 3½ per cent. was to become payable; (2) the latter claim also failed inasmuch as, the parties having reduced their bargain into writing in the commission note, there was no scope for the operation of the principle of *quantum meruit*.—HOWARD HOULDER & PARTNERS, LTD. *v.* MANX ISLES S.S. CO., [1923]



b. *Loss of ship before arrival at port of loading.*]—SIBSON & KERR *v.* SHIP BARCRAIG CO. (1896), 24 R. (Ct. of Sess.) 91; 34 Sc. L. R. 114; 4 S. L. T. 129.—SCOT.

1 K. B. 110; 92 L. J. K. B. 233; 128 L. T. 347; 38 T. L. R. 757; 66 Sol. Jo. 682; 16 Asp. M. L. C. 95; 28 Com. Cas. 15.

**2002. Right to whole commission—Charter not used by owner—Contract to pay implied from charterparty.**]—SMITH *v.* BOUTCHER (1845), 4 L. T. O. S. 398; *previous proceedings* (1844), 1 Car. & Kir. 573, N. P.

**2003. —— Charterparties not fulfilled by charterers.**]—CROZIER *v.* HUTCHINSON (1849), 18 L. J. Ex. 316; 5 L. T. 774.

*Annotation:*—**Mentd.** Howe *v.* Pike (1849), 4 Exch. 495.

**2004. —— Loss of ship.**]—LA BONNE MERE, PROWSE *v.* WILLIAMS (1854), 5 L. T. 774.

**2005. —— Cancellation of charterparty—Construction of contract.**]—Pltf., acting as broker for defts., obtained a time charterparty for their ship upon terms of being paid a commission on all hire earned. During the currency of the charterparty litigation arose between defts. & the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charterparty, there being no wilful act or default on the part of defts. in bringing about this result:—*Held:* upon the true construction if the contract, the intention of the parties was that pltf. should not be entitled to commission if the earning of hire was prevented by reason of causes such as had in fact put an end to the charterparty.—WHITE *v.* TURNBULL, MARTIN & Co. (1898), 78 L. T. 726; 14 T. L. R. 401; 8 Asp. M. L. C. 406; 3 Com. Cas. 183, C. A.

*Annotation:*—**Apprvd.** French *v.* Leeston Shipping Co., [1922] 1 A. C. 451.

**2006. —— —— Sale of ship to charterers.**]—Shipbrokers employed to effect a charter of a steamship procured a charter for eighteen months, but after four months of the charter had run the owner sold the vessel to the charterers & the charterparty was cancelled. The charterparty provided for payment of a commission of 2½ per cent. on the hire paid & earned under the said charterparty & on any continuation thereof.

In an action by the brokers to recover commission for the remainder of the charter period:—*Held:* it was not an implied term of the contract that the shipowners should not agree to put an end to the charterparty by the sale of the ship to the charterers, & the action failed.—FRENCH (L.) & Co. *v.* LEESTON SHIPPING Co., [1922] 1 A. C. 451; 91 L. J. K. B. 655; 127 L. T. 169; 38 T. L. R. 459; 15 Asp. M. L. C. 544; 27 Com. Cas. 257, H. L.

*Annotation:*—**Apld.** Howard Houlder & Partners *v.* Manx Isles S.S. Co., [1923] 1 K. B. 110.

**2007. Right to recover on commission note—Sale at different price.**]—HOWARD HOULDER & PARTNERS, LTD. *v.* MANX ISLES S.S. Co., No. 2001, *ante.*

### -iii. *Several Brokers Negotiating.*

*See, generally,* AGENCY, Vol. I., pp. 493–502, 505, 506, Nos. 1693–1721, 1742–1745.

**2008. One broker procuring cargo—Other paying charges for clearing ship.**]—Where two brokers are referred to in advertisements by a shipowner, & one procures the cargo & receives the freight, & the other pays the charges for clearing out the ship, etc., the latter must share the commission, etc., with the former, & cannot, by the usage of trade, maintain an action against the shipowner.—HALL *v.* BENSON (1836), 7 C. & P. 711, N. P.

**2009. Right of broker effecting introduction.**]—UMM *v.* ROXBY (1838), 5 L. T. 695.

**2010. ——.**]—The usage is, that when a broker has introduced the captain of a ship & a merchant together, & they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charterparty be effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves.

If a broker be authorised by both parties, & acting as the agent of each, communicates to the merchant what the shipowner charges, & also communicates to the shipowner what the merchant will give, & he names the ship & the parties so as to identify the transaction, & a charterparty be ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other.

A., a broker, introduced a merchant & a shipowner together to treat for a charterparty: they finally made the charterparty through B., another broker. In an action, by A. for his commission, the particulars of demand were "for commission due to pltf. for procuring a charter for a vessel called the W., etc.":—*Held:* sufficient.—BURNETT *v.* BOUCH (1840), 9 C. & P. 620; 5 L. T. 695, N. P.

*Annotation:*—**Reld.** Gibson *v.* Crick (1862), 6 L. T. 392.

**2011. —— Usage—Effect of written agreement—Renewal of charter.**]—Pltf., a steamship broker, introduced deft., a steamship broker, to certain shipowners for the purpose of engaging charters for them, & an agreement was come to between the parties. Deft. did engage charters & obtained his commission for it. Pltf. claimed, as introducing broker, 1 per cent. commission thereon from deft. not only as according to custom, but as the terms of the bargain between them, those charters being renewed for the same ships & renewed commission paid to defts. Pltf. also claimed, under such custom, his renewal commission:—*Held:* evidence of such a custom, & of the agreement, was admissible.—ALLAN *v.* SUNDIUS (1862), 1 H. & C. 123; 31 L. J. Ex. 307; 6 L. T. 359; 10 W. R. 648; 1 Mar. L. C. 222; 158 E. R. 827.

**2012. —— ——.**]—Where pltf., a shipbroker, introduced deft., the shipowner, to a person who introduced another broker, & also a merchant, at whose suggestion, for his own interest, another merchant chartered the ship through the second broker:—*Held:* pltf., the first broker, was not entitled to commission, & a witness could not be asked as to the effect of a supposed custom in such a case to pay the broker originally employed, the result being too remote, so that a custom would not be legal or reasonable.—GIBSON *v.* CRICK (1862), 1 H. & C. 142; 2 F. & F. 766; 31 L. J. Ex. 304; 6 L. T. 392; 10 W. R. 525; 158 E. R. 835.

**2013. ——.**]—COUSENS *v.* MITCHESON, No. 2000, *ante.*

**2014. —— Question for jury.**]—Pltf., a shipbroker, introduced one of defts. to another broker, B. B. was also a merchant & shipowner, & through B. defts. were introduced to a third shipbroker, C., & through C. defts.' ship was chartered by S. & co. Pltf. sued defts. for commission in respect of that charter; the question being left to the jury, the jury found a verdict for pltf.:—*Held:* upon the point reserved at the trial, whether there was any evidence which the judge should have submitted to the jury on the question of commission, it was a question upon the evidence under the circumstances for the jury to decide, & the judge at the trial being not dissatisfied with the verdict, the ct. refused to set it aside.—KYNASTON *v.* NICHOLSON (1863), 8 L. T. 671; 1 Mar. L. C. 350.

*Sect. 2.—Charterparties: Sub-sect. 20, A. (a) iii., (b), & B.; sub-sect. 21, A. & B.*]

**2015. Broker employed by broker—Admissibility of evidence of custom.**]—Where A. employs B., a broker, to procure a charter for a ship, & B. employs C.; another broker, *semble*, evidence of a custom of trade is admissible, to show which of the brokers is entitled to be paid the commission by A.—SMITH *v.* BOUTCHER (1844), 1 Car. & Kir. 573, N. P.; *subsequent proceedings* (1845), 4 L. T. O. S. 398.

**2016. Right of broker actually procuring charter.**]—Where two brokers are concerned in procuring a charterparty although one of them may have had something to do in procuring the charter, still the broker actually procuring such charter is the party entitled to the commission.—AITKEN *v.* FAITH (1844), 1 Car. & Kir. 575, N. P.

**2017.** ——.]—COUSENS *v.* MITCHESON, No. 2000, *ante*.

**2018. Agreement between brokers—To share commission—Validity.**]—B., a shipbroker in Liverpool, & C., a shipbroker in London, entered into a contract to "exclusively correspond" with each other in the ports of Liverpool & London respectively in the matter of freighting vessels with iron for the American market, denoting by the term "exclusive correspondence" that each party should have a reciprocal right of refusal of all ships to be engaged by either of them. The commissions received were to be divided in equal moieties between them. In Feb. 1851, B. & C. appointed D. their agent at Havre for chartering American ships in that port to carry cargoes of iron from South Wales to America. This agreement was to continue in force till Jan. 1, 1852, D. to receive half the usual commission, the other half to be divided between B. & C. This business was carried on till 1855, when the question arose as to the terms upon which it was carried on after Jan. 1852, B. contending that the old agreement still continued, in which case he was entitled to a moiety of the net commission; C. insisting that the agreement was at an end, & that the usual mode must be adopted, & each receive the commission according to the number of ships he had influenced. B. also claimed, under an agreement dated Jan. 1852, half the net amount of commissions on all vessels chartered by C. to the United States from London or any other port in England: —*Held:* the agreement entered into had been continued to be acted on by both parties, & B. was entitled to half the net amount of all commissions earned since Jan. 1, 1852.—PEARCE *v.* LINDSAY (1860), 1 L. T. 456, L. JJ.

*(b) Other Commissions.*

**2019. Right of charterer's agent—Admissibility of evidence of usage.**]—PHILLIPPS *v.* BRIARD, No. 4383, *post*.

**2020. —— Commission on outwards freight.**]—CROSS *v.* PAGLIANO, No. 1705, *ante*.

**2021. Right of charterers—When ship lost.**]—A charterparty provided that a ship "now at Philadelphia & chartered for Japan" should, after discharging at Japan, proceed to British Columbia, & there load a cargo for London. The charterparty contained the following clause:—"A commission of 3¼ per cent. shall be paid to charterers . . . on amount of this charterparty on the completion of the loading, or should the vessel be lost." The ship was lost on the voyage from Philadelphia to Japan:—*Held:* the charterers were entitled to the commission payable to them under the charterparty.—WARD & CO., LTD. *v.* WEIR & CO. (1899), 4 Com. Cas. 216.

**2022. —— Commission on demurrage.**]—By a charterparty a ship was to load a cargo & proceed to a named port & there deliver her cargo on being paid freight. The cargo was to be received at the port of discharge at a certain rate, in default of which demurrage was to be paid at a certain sum per day. The charterparty contained the following clause: "A commission of 2½ per cent. is due on shipment of cargo to" the charterers, "vessel lost or not lost, whose agents at port of loading are to attend to ship's business on customary terms":—*Held:* the charterers were not entitled to commission on demurrage at the port of discharge payable by the charterers to the shipowners.—MOOR LINE, LTD. *v.* DREYFUS (LOUIS) & CO., [1918] 1 K. B. 89; 87 L. J. K. B. 126; 118 L. T. 87; 14 Asp. M. L. C. 185, C. A.

*B. Recovery of Commission.*

**2023. Who may recover—Charterers—As trustees for consignee.**]—Pltfs. chartered a vessel of defts. to carry a cargo from Liverpool to Calcutta. The charterparty contained a clause that the vessel was to be consigned to E. & co., merchants at Calcutta, on the usual terms. One of those terms was, that E. & co. might procure the homeward freight at 5 per cent. commission. Defts. consigned the vessel to E. & co. but contracted with another party for the homeward freight. Pltfs., having agreed with E. & co. for a share in the commission, brought an action against defts. for their breach of contract, but failed to prove in what proportion the commission was to be divided:—*Held:* as the clause was inserted for the benefit of E. & co., pltfs. were entitled to recover as trustees on their behalf, notwithstanding they failed to show their interest in the commission.—ROBERTSON *v.* WAIT (1853), 8 Exch. 299; 22 L. J. Ex. 209; 1 W. R. 132; 155 E. R. 1360.

*Annotations:*—**Folld.** Les Affréteurs Réunis Soc. Anon. *v.* Walford (London), [1919] A. C. 801. **Reld.** Phillipps *v.* Briard (1856), 1 H. & N. 21; Wright *v.* Chappell (1869), 20 L. T. 369; The Nuova Raffaelina (1871), L. R. 3 A. & E. 483; The Wilhelm Schmidt (1871), 25 L. T. 34; West *v.* Houghton (1879), 4 C. P. D. 197.

**2024. —— —— As trustees for brokers.**]—LES AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME *v.* LEOPOLD WALFORD (LONDON), LTD., No. 1985, *ante*.

**2025. Consignment "free of commission"—Right of shipowner to recover from charterers—Commission paid to brokers for clearing cargo.**]—An action maintained by shipowner against charterers, who had agreed that the ship shall be consigned to their agents free of commission, & the cargo cleared free of expense to the shipowner. The ship having been addressed to the consignee, who was not in a position to clear the ship, & the captain having been led by the charterers to have recourse to brokers, who cleared the ship, & charged commission for so doing, which the captain on behalf of pltf. had paid.—RUSSELL *v.* GRIFFITH (1860), 2 F. & F. 118, N. P.

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SUB-SECT. 21.—CHARTERPARTIES BY DEMISE.

*A. In General.*

**2026. What amounts to—Locatio navis—Demise of ship with furniture & apparel.**]—(1) Where for

a lump sum a vessel is chartered in a fit state for mercantile adventure, *i.e.*, where there is a *locatio navis et operarum magistri*, & the vessel is put up by the charterer as a general ship, although the contract on the bills of lading is with the charterer, the owner is liable to a shipper in respect of a conversion of his goods by the master, especially if it appears that the owner has given instructions to the master in reference to the goods.

(2) Where a mate's receipt for goods shipped has been given, a bill of lading issued without the shipper's knowledge will not, even in the hands of a *bonâ fide* indorsee for value, give any title to the goods as against the shipper, who has retained the mate's receipt; & the right of the shipper to insist on his title is not affected by a delay in applying for a bill of lading in exchange for the mate's receipt.

(3) The ship had been chartered by him to Von Nolten & co. . . . for a lump sum. The master & crew were employed & paid by the owner, & this certainly cannot be considered *locatio navis* a demise of the ship itself with its furniture & apparel, it amounts to *locatio navis et operarum magistri et nauticorum*, a demise of the ship in a state fit for mercantile adventure which is to be distinguished from *locatio operis vehendarum mercium*, a contract for the carriage of the merchant's goods in the owner's ship & by his servants, where the owner has all the responsibility of a carrier of the goods (LORD CAMPBELL, C.J.).—SCHUSTER *v.* MCKELLAR (1857), 7 E. & B. 704; 26 L. J. Q. B. 281; 29 L. T. O. S. 225; 3 Jur. N. S. 1320; 5 W. R. 656; 119 E. R. 1407.

*Annotations:—As to* (1) **Consd.** The St. Cloud (1863), Brown. & Lush. 4. **Refd.** Dalyell *v.* Tyrer (1858), E. B. & E. 899; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; Wagstaff *v.* Anderson (1879), 4 C. P. D. 283; Baumvoll Manufactur Von Scheibler *v.* Gilchrist & Furness, [1891] 2 Q. B. 310. *As to* (2) **Distd.** Hathesing *v.* Laing, Laing *v.* Zeden (1873), L. R. 17 Eq. 92. *Generally*, **Refd.** Omoa Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464.

**2027. —— Locatio navis et operarum magistri et nauticorum—Demise of ship in fit state for mercantile adventure.**]—SCHUSTER *v.* MCKELLAR, No. 2026, *ante*.

**2028. —— Dependent on construction of charterparty.**]—SANDEMAN *v.* SCURR, No. 2038, *post*.

**2029. —— Hire of services of ship, master & crew.**]—By a time charterparty the use of a ship & her master & crew were placed at the disposal of the charterers for twelve months from a certain date. The charterers agreed to pay hire monthly in advance commencing on the day of the vessel's "delivery as aforesaid" & continuing until "her redelivery" at a port in West Italy or the United Kingdom at the charterers' option. Failing punctual & regular payment of the hire the owner had liberty to withdraw the vessel from the service of the charterers without prejudice to any claim he might otherwise have against them.

On Jan. 10, 1917, a month's hire fell due & was not paid. On the following day, while the ship was on her way to Barry under the charterers' orders, the owner wrote to the charterers withdrawing her from their serivce. The ship arrived at Barry on Jan. 23.

In an action by the charterers against the owner for a declaration that the charterparty was still subsisting, the owner counterclaimed for hire of the ship from Jan. 11 to Jan. 23 when, as he contended, the ship was first redelivered to him:—*Held:* (1) the charterparty not being a demise of the ship but a contract for the hire of services, the word "redelivery" could not be construed literally; (2) the ship was redelivered when the owner was enabled to resume control of her; (3) the owner by withdrawing the ship from the service of the charterers on Jan. 11 had prevented any further action by them in the way of redelivering her after that date; (4) the owner admitting that he could only recover hire for that part of a month during which the ship was at the service of the charterers, he could not recover hire for the use of the ship after Jan. 11.—ITALIAN STATE RYS. *v.* MAVROGORDATOS, [1919] 2 K. B. 305; 88 L. J. K. B. 1099; 121 L. T. 183; 14 Asp. M. L. C. 504, C. A.

*Annotation:—As to* (4) **Refd.** Wye Shipping Co. *v.* Chemin De Fer Paris Orleans, [1922] 1 K. B. 617.

**2030. —— Tug requisitioned by Admiralty—Master & crew servants of Crown.**]—A tug was requisitioned by the Admlty. acting under the powers of the Royal Proclamation of Aug. 3, 1914, upon a gross basis of hire, *i.e.*, the owners were to pay the wages of the officers & crew & all the running expenses of the steamer & were to undertake all risks except war risks; & it was agreed that all salvage was to be for the owners' benefit. Subsequently, with the consent or acquiescence of the owners, the basis of hire was changed from gross to net, & thereafter the master & crew became the servants of the Crown & the tug was employed at the sole risk & expense of the Admlty. The tug rendered salvage services to another vessel in respect of which a salvage award was made:—*Held:* (1) the change in the basis of hire imported a demise of the tug to the Admlty.; (2) in the absence of any express stipulation to the contrary, the Admlty., & not the owners of the tug, were entitled to the salvage award.—ELLIOTT STEAM TUG CO. *v.* ADMIRALTY COMRS., PAGE *v.* ADMIRALTY COMRS., [1921] 1 A. C. 137; 89 L. J. K. B. 977; 123 L. T. 754; 64 Sol. Jo. 634; 15 Asp. M. L. C. 81, H. L.; *affg.* S. C. *sub nom.* ADMIRALTY COMRS. *v.* PAGE, [1919] 1 K. B. 299, C. A.; [1918] 2 K. B. 447.

*Annotation:—As to* (2) **Refd.** The Matti, [1918] P. 314.

**2031. Distinguished from locatio operis vehendarum mercium—Contract for carriage of merchants' goods in owner's ship.**]—SCHUSTER *v.* MCKELLAR, No. 2026, *ante*.

**2032. Distinguished from contract leaving ship in possession & control of owner.**]—HERNE BAY STEAM BOAT CO. *v.* HUTTON, No. 1790, *ante*.

**2033. ——.**]—ITALIAN STATE RYS. *v.* MAVROGORDATOS, No. 2029, *ante*.

**Transfer of ownership.**]—*See* Sub-sect. 21, B., *post*.

*B. Transfer of Ownership to Charterers.*

**2034. Whether ownership passes.**]—JAMES *v.* JONES (1799), 3 Esp. 27; 170 E. R. 526, N. P.

*Annotations:—*Refd. Hutton *v.* Bragg (1816), 7 Taunt. 14; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86.

**2035. ——.**]—HUTTON *v.* BRAGG, No. 4068, *post*.

**2036. ——.**]—Where the owner of a ship appointed G. to the command, & agreed that he should proceed to Calcutta & return to London, & that he might make intermediate voyages, paying a certain sum in consideration thereof; & the owner further agreed to supply the ship with stores, in consideration of which G. agreed to take the command, & receive the ship into his service, for twelve months certain, or for such time as would be necessary to complete the voyage, paying at a certain rate per ton per month for the ship:—*Held:* although G. was further bound by the

*Sect. 2.—Charterparties: Sub-sect. 21, B.*]

agreement to remit the freight bills to London as security, & such bills were to be vested in trustees who were to receive the freight, & hand over the surplus to him, & although the owner was to have an agent on board, who was to have the sole management of the stores, & to have power to displace G. for breach of any covenant in the charterparty, & appoint another commander, G. was the owner of the vessel during the continuance of the charterparty, & was as such alone liable to persons who, knowing its provisions, had shipped goods on board the vessel for the homeward voyage.—COLVIN *v.* NEWBERRY & BENSON (1832), 1 Cl. & Fin. 283; 6 Bli. N. S. 167; 6 E. R. 923, H. L.; *affg.* S. C. *sub nom.* NEWBERRY *v.* COLVIN (1830), 7 Bing. 190, Ex. Ch.

*Annotations:*—**Consd.** Campion *v.* Colvin (1836), 3 Bing. N. C. 17. **Distd.** Gilkison *v.* Middleton (1857), 2 C. B. N. S. 134. **Consd.** Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; Wagstaff *v.* Anderson (1880), 5 C. P. D. 171; Herman *v.* Royal Exchange Shipping Co. & Patton (1884), Cab. & El. 413; Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1893] A. C. 8. **Distd.** Manchester Trust *v.* Furness, [1895] 2 Q. B. 539. **Consd.** Weir *v.* Union S.S. Co., [1900] 1 Q. B. 28. **Distd.** Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826. **Consd.** Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1. **Refd.** Marquand *v.* Banner (1856), 6 E. & B. 232; Schuster *v.* McKellar (1857), 7 E. & B. 704; Erichsen *v.* Barkworth (1858), 5 Jur. N. S. 517; Foster *v.* Colby (1858), 28 L. J. Ex. 81; The St. Cloud (1863), Brown. & Lush. 4; Sir John Jackson, Ltd. *v.* S.S. Blanche, [1908] A. C. 126. **Mentd.** Marshall *v.* York, Newcastle & Berwick Ry. (1851), 16 Jur. 124.

**2037.** ——.]—BELCHER *v.* CAPPER, No. 2046, *post.*

**2038.** ——.]—A ship was chartered for a voyage from Oporto to the United Kingdom to load from the factors of the affreighter a full cargo of wine or other merchandise at 18*s.* per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter: the ship to be addressed to charter's agents at Oporto on usual terms. The ship was accordingly consigned to the charterer's agents at Oporto, & was put up by them as a general ship, without any intimation that she was under charter; pltf. shipped some casks of wine, & received bills of lading in the common form signed by the master. The wine was stowed by a stevedore appointed by the charterer's agents & paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage:—*Held:* (1) as the charter did not amount to a demise of the ship, & the owners remained in possession by their servants, the master & crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine: inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, & had dealt with the master, who was still the owner's master, as clothed with the ordinary authority of a master to receive goods & give bills of lading by which his owners would be bound; (2) the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, & had a right to look to the owners for the safe stowage of the goods, as part of the carrier's duty, in the absence of any special agreement; *qu.:* whether the charterer also would not have been liable to the shipper on the bills of lading signed by the master in furtherance of the charterparty.

In construing a charterparty with reference to the liability of the owners of the chartered ship, it is necessary to look to the charterparty to see whether it operates as a demise of the ship itself, to which the services of the master & crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, &, as subsidiary thereto, to have the use of the vessel & the services of the master & crew. In the first case, the charterer becomes for the time the owner of the vessel, the master & crew become to all intents & purposes his servants, & through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded & conveyed in the vessel, the ownership remains in the original owner, & through the master & the crew, who continue to be their servants, the possession of the ship also (COCKBURN, C.J.).—SANDEMAN *v.* SCURR (1866), L. R. 2 Q. B. 86; 8 B. & S. 50; 36 L. J. Q. B. 58; 15 L. T. 608; 15 W. R. 277; 2 Mar. L. C. 446.

*Annotations:*—*As to* (1) **Apld.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106. **Consd.** The Patria (1871), L. R. 3 A. & E. 436; Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1893] A. C. 8. **Refd.** Meiklereid *v.* West (1876), 34 L. T. 353; Hayn, Roman *v.* Culliford (1879), 27 W. R. 541.

**2039.** —— **Liability of owner—Debts incurred by charterer—Goods supplied.**]—The registered owner of a ship, having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer during the charterparty.

To say that the registered owner who divests himself by the charterparty of all control & possession of the vessel for the time being in favour of another, who has the use & benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be pushing the effect of those Acts (the register Acts] much too far (LORD ELLENBOROUGH, C.J.).—FRAZER *v.* MARSH (1811), 13 East, 238; 2 Camp. 517; 104 E. R. 362.

*Annotations:*—**Apld.** Reeve *v.* Davis (1834), 1 Ad. & El. 312. **Distd.** Frost *v.* Oliver (1853), 2 E. & B. 301; Steel *v.* Lester (1877), 3 C. P. D. 121. **Apld.** Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1893] A. C. 8. **Refd.** M'Iver *v.* Humble (1812), 16 East, 169; Hutton *v.* Bragg (1816), 7 Taunt. 14; Helme *v.* Smith (1831), 9 L. J. O. S. C. P. 206; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; Sir John Jackson, Ltd. *v.* S.S. Blanche, [1908] A. C. 126; Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1.

**2040.** —— —— —— **Repairs to ship.**]—A steam vessel was let by charterparty for twelve months, the registered owners engaging to keep the engine in repairs, but the charterer binding himself to do all other repairs, to pay all wages & charges of navigating, etc., & to indemnify the owners against all debts, costs, damages, expenses, etc., incurred in respect of the charterparty & employment of the vessel. The owners were to appoint the engineers. The charterer who acted as captain had repairs done to the vessel by persons unacquainted with the above contract:—*Held:* no action lay, in respect of those repairs against the registered owners.—REEVE *v.* DAVIS (1834), 1 Ad. & El. 312; 3 Nev. & M. K. B. 873; 110 E. R. 1224.

*Annotations:*—**Consd.** Frost *v.* Oliver (1853), 2 E. & B. 301. **Refd.** Meiklereid *v.* West (1876), 34 L. T. 353.

**2041.** —— —— **Allotment note drawn by master on charterer—Owner engaging & paying crew.**]—By Merchant Shipping Act, 1854 (c. 104), s. 169, the wife of any seaman in whose favour an allotment note of part of his wages is made, may recover by summary procedure the sum allotted, with costs, from the owner or any agent who has authorised the drawing of the note. Applt. was the registered owner of the ship *Sydney Hall*, & entered into a charterparty with H., by which he demised the ship to him for a stipulated period, & parted with all control over it. H. took possession

of the ship, & appointed a master who engaged resp.'s husband as one of the crew & gave her an allotment note, allotting & requiring the charterer to pay her £6 monthly out of her husband's wages. H. having become insolvent:—*Held:* the sect. did not, under the circumstances make applt. as registered owner liable to pay the arrears due under the note.—MEIKLEREID *v.* WEST (1876), 1 Q. B. D. 428; 54 L. J. M. C. 91; 34 L. T. 353; 40 J. P. 708; 24 W. R. 703; 3 Asp. M. L. C. 129, D. C.

*Annotations:*—**Consd.** Hughes *v.* Sutherland (1881), 7 Q. B. D. 160. **Reld.** Dittmar *v.* Ship V 593 (1908), 78 L. J. K. B. 523; Sir John Jackson, Ltd. *v.* S.S. Blanche, [1908] A. C. 126.

**2042. —— —— Credit pledged by master.**]—The owner of a ship, registered as such & as the managing owner under Merchant Shipping Act, 1876 (c. 80), who has parted with the possession & control of the ship under a charterparty to the charterer, is not liable for the loss of goods shipped under bills of lading signed by the captain who is the servant of the charterer & not of the owner & who has no authority from the owner to pledge his credit, although the shipper of the goods has no notice of those facts.

The owner of a ship, registered as such & also registered as the managing owner under the Merchant Shipping Act, 1876 (c. 80), let her by charterparty for a term of four months. The charterparty provided that the captain, officers & crew should be paid by the charterer, that the captain should be under the orders of the charterer as regards employment, agency or other arrangements; that the charterer should indemnify the owner from all liabilities arising from the captain signing bills of lading; & that the owner should maintain the ship in a thoroughly efficient state in hull & machinery for the service & should pay for the insurance on the ship.

The charterer took possession of the ship & appointed the captain, officers & crew, except the chief engineer who was appointed by the owner in exercise of the option given him by the charterparty. The charterer sent the ship to New Orleans, where goods were shipped under bills of lading, some of which were signed by the captain & some by the agents of the charterer. Neither the captain nor the charterer's agents had any authority in fact from the owner to pledge his credit. The bills of lading contained no reference to the charterparty & the shippers had no notice of its terms. The goods having been lost at sea during the currency of the charter, owing, as was alleged, to the unseaworthiness of the ship, the shippers sued the owner for the loss:—*Held:* the captain not being the servant or agent of the owner & having no authority to pledge his credit the owner was not liable.—BAUMWOLL MANUFACTUR VON CARL SCHEIBLER *v.* FURNESS, [1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1; 9 T. L. R. 71; 7 Asp. M. L. C. 263; *sub nom.* SCHEIBLER *v.* FURNESS, 1 R. 59, H. L.; *affg.* S. C. *sub nom.* BAUMVOLL MANUFACTUR VON SCHEIBLER *v.* GILCHREST & Co., [1892] 1 Q. B. 253, C. A.

*Annotations:*—**Distd.** Manchester Trust *v.* Furness, [1895] 2 Q. B. 539; Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1. **Reld.** Barraclough *v.* Brown (1896), 65 L. J. Q. B. 333; Rowland & Marwood's S.S. Co. *v.* Nilson (1897), 13 T. L. R. 459; Sir John Jackson, Ltd. *v.* S.S. Blanche, [1908] A. C. 126; Kish *v.* Taylor, [1912] A. C. 604.

**2043. —— —— Negligence of master & crew.**]—Pltfs. hired from defts. a vessel under a charterparty, by which the vessel was let to pltfs. for a specified time, & they were to have the whole reach of her holds except what was reserved to the owner for the crew; the crew were to assist in loading & discharging, & the captain was to sign bills of lading & to furnish to the charterers a copy of the log. Deft. engaged & paid the master & crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to pltfs., she & her cargo were lost by the negligence of the master & crew:—*Held:* the master & crew were the servants of deft. for the purpose of navigating the vessel, & he was liable to compensate pltfs. for the loss sustained by them.—OMOA COAL & IRON CO. *v.* HUNTLEY (1877), 2 C. P. D. 464; 37 L. T. 184; 25 W. R. 675; 3 Asp. M. L. C. 501, D. C.

*Annotations:*—**Apld.** Weir *v.* Union S.S. Co., [1900] A. C. 525. **Reld.** Paterson Zochonis *v.* Elder Dempster, [1923] 1 K. B. 420.

**2044. —— Liability for lighthouse dues, etc.**]—Where deft. chartered his ship to the Commissioners of the Transport Service on behalf of the Crown, to be employed as a transport, & the ship in the course of such employment made several voyages from Deptford to foreign ports & back:—*Held:* by the terms of the charterparty, coupled with the nature of the service, a temporary ownership passed to the Crown, so that deft. during the time of such service, was not to be considered as owner within the charters granted to the Trinity House, which impose lighthouse duties, & for buoyage & beaconage, on the masters & owners of ships.—TRINITY HOUSE MASTER *v.* CLARK (1815), 4 M. & S. 288; 105 E. R. 841.

*Annotations:*—**Consd.** Saville *v.* Campion (1819), 2 B. & Ald. 503; Christie *v.* Lewis (1821), 2 Brod. & Bing. 410; Hamilton *v.* Stone (1822), 1 Dow. & Ry. K. B. 274; Weir *v.* Union S.S. Co., [1900] A. C. 525; The Sarpen, [1916] P. 306. **Reld.** Smithett *v.* Blythe (1830), 1 B. & Ad. 509; Dean *v.* Hogg (1834), 3 L. J. C. P. 113; Hodgkinson *v.* Fernie (1857), 2 C. B. N. S. 415.

**2045. —— Effect of words of demise.**]—CHRISTIE *v.* LEWIS, No. 4098, *post.*

**2046. —— ——.**]—In construing a charterparty, with the view of ascertaining whether the owner had relinquished possession of the ship to the charterer, or whether he has retained a right of lien upon the cargo, for the payment of the freight agreed on, the ct. will not rely implicitly upon particular expressions of demise, or otherwise, but will collect the intention of the parties from the whole scope of the instrument.

By charterparty, the owner agreed to let, & the charterer to hire, a vessel for six months. The owner gave the charterer the power of appointing his own master, & required him to be responsible for his conduct The charterer appointed a master accordingly. The freight on the goods was to be paid, according to the bills of lading, to the said master, without any stipulation that it should be applied in payment of the price of the hire of the vessel. The charterer agreed to pay at the rate of 22*s.* per ton per month, for so long as she should be employed by him, such payments to be made from month to month, leaving one month's pay in abeyance, & the balance in cash on her final discharge:—*Held:* possession was given up by the owner to the charterer; the master was in possession of the cargo, as the agent of the charterer; & no lien upon the cargo was intended to be reserved to the owner.—BELCHER *v.* CAPPER (1842), 4 Man. & G. 502; 5 Scott, N. R. 257; 11 L. J. C. P. 274; 134 E. R. 207.

**2047. —— —— Absence of words.**]—By charterparty it was covenanted that the owner should receive on board, in London, all such goods as the freighter thought fit to load, & should proceed therewith to Madras, & there, after delivering her outward cargo, receive from the freighter's agents a homeward cargo, & deliver the same in London; & that all the cabins but one, which was reserved for the use of the captain,

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should be at the disposal of the freighter, who was to appoint a supercargo, to superintend the stowage of the goods. Freight to be paid at so much per ton on the register tonnage of the ship. The captain & crew were employed & paid by the owner:—*Held:* there being no express words of demise of the ship itself in the charterparty, the freighter did not thereby become the owner for the voyage; but the possession continued in the owner, & he, therefore, had a lien upon the cargo for his freight.—SAVILLE *v.* CAMPION (1819), 2 B. & Ald. 503; 106 E. R. 449.

*Annotations:*—**Consd.** Christie *v.* Lewis (1821), 2 Brod. & Bing. 410. **Apld.** Campion *v.* Colvin (1836), 3 Bing. N. C. 17.

**2048. —— Vessel hired for trip—Power to exclude person on board with permission of master.**]—Defts. hired a steam vessel for the day to convey a party to Richmond & back to London. The vessel was navigated by the master, engineer, & crew of the owners, & at their expense:—*Held:* defts. had not such an exclusive possession of the vessel as to entitle them forcibly to expel pltf., who had come on board, with the permission of the master, for the purpose of being conveyed to Richmond.—DEAN *v.* HOGG (1834), 10 Bing. 345; 4 Moo. & S. 188; 3 L. J. C. P. 113; 131 E. R. 937.

*Annotations:*—**Reld.** Fenton *v.* City of Dublin Steam Packet Co. (1838), 8 Ad. & El. 835; The Great Eastern (1868), L. R. 2 A. & E. 88. **Mentd.** R. *v.* Sherard (1863), 33 L. J. M. C. 5; Roads *v.* Trumpington Overseers (1870), L. R. 6 Q. B. 56.

**2049. —— Whole scope of instrument considered.**]—BELCHER *v.* CAPPER, No. 2046, *ante.*

**2050. —— Limitation of liability of "owner"—1894 & 1896 Acts.**]—The charterer of a ship by demise who has control over her & navigates her by his own master & crew is "owner" of the ship within 1894 Act, ss. 503 & 504, & entitled to the limitation of liability to damages conferred upon "owners" by those sects.—SIR JOHN JACKSON, LTD. *v.* BLANCHE (OWNERS), THE HOPPER NO. 66, [1908] A. C. 126; 98 L. T. 464; 24 T. L. R. 384; 52 Sol. Jo. 334; 11 Asp. M. L. C. 37; *sub nom.* THE STEAM HOPPER NO. 66, 77 L. J. P. 84, H. L.; *revsg.* S. C. *sub nom.* THE HOPPER NO. 66, [1907] P. 254, C. A.

*Annotation:*—**Reld.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

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SUB-SECT. 22.—TIME CHARTERS.

*A. In General.*

**2051. Allowance for extra men—Payable by charterer on discharge of ship—Loss before completion of voyage—Loss equivalent to discharge.**]—HAVELOCK *v.* GEDDES, No. 1834, *ante.*

**2052. Failure to deliver ship to charterer—Right to repudiate contract—Failure to deliver on specified day.**]—Pltf. agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage & when pltf. was ready to load the ship she was detained as unseaworthy; & the repairs were not finished until more than two months after the completion of the voyage:—*Held:* pltf. was entitled to throw up the charterparty.—TULLY *v.* HOWLING (1877), 2 Q. B. D. 182; 46 L. J. Q. B. 388; 36 L. T. 163; 25 W. R. 290; 3 Asp. M. L. C. 368, C. A.

*Annotations:*—**Consd.** F. A. Tamplin, S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397. **Mentd.** Wilson *v.* Finch Hatton (1877), 2 Ex. D. 336.

**2053. —— —— Failure of charterer to take over on specified day.**]—A steamship owner at Hastings, with the view of carrying on more effectually passenger traffic during the summer months between that & other ports in the south of England entered into a charterparty with the owner of the steamship *Victoria*, then being fitted out on the Clyde.

By the charterparty dated July 3, 1891, he agreed "to hire the steamship till Sept. 30, 1891, she being placed at the disposal of the charterers in the part of Greenock or Port Glasgow, in such berths as charterers may direct. Such orders to be given to owner's agents before arrival of the steamer. No date was fixed for delivery of the vessel. The charterparty bore that the charterer should pay the hire at a certain rate per month "commencing the day of delivery in good order & ready for sea in the Clyde, notice whereof to be given to charterers." "Payment of hire to be made in cash monthly, in advance, to owners in Glasgow, first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of hire-money & in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the steamer from the service of the charterers." On July 13, the charterer received a telegram, that vessel would be handed over at Glasgow on July 15, when banker's guarantee & month's hire must be forthcoming. Charterer, on July 15, sent a telegram, "Leave for Glasgow to-night, am prepared to take *Victoria*." Charterer did not set out till the following night but sent no explanation of his delay. He reached Glasgow on the morning of July 17, & went to the vessel at 11.30 a.m. There was no one on board to give delivery. He endeavoured to communicate with the deft.'s brokers, but failed to do so till 4.30 p.m. when he was informed that the vessel had been let to another person about 12.30 p.m. of the same day. In answer to an action of damages for breach of contract in failing to deliver the vessel the owner pleaded that pursuer's conduct prior to July 17 was such as to justify deft. in believing that he did not intend to fulfil the contract:—*Held:* deft. was not entitled to assume from pursuer's conduct that he would not fulfil the contract.—CARSWELL *v.* COLLARD, THE VICTORIA, [1893] A. C. 635; 20 R. (Ct. of Sess.) 47; 30 Sc. L. R. 939, H. L.

**2054. Loss of ship after expiry of charter—While in possession of charterer—Liability in absence of agreement.**]—A vessel was lost through stress of weather, & without negligence:—*Held:* in the absence of express stipulation, there was no liability implied by law on the part of the person in possession for a loss so occasioned.—SMITH *v.* DRUMMOND (1883), Cab. & El. 160.

**2055. Form of charter—Series of ship at intervals—Later ship delayed through detention of earlier one—Damages.**]—POTTER (JOHN) & CO. *v.* BURRELL & SON, No. 3181, *post.*

**2056. —— —— Two voyages per month fortnightly.**]—THE MELROSE ABBEY (1898), 14 T. L. R. 202, D. C.

**2057. Salvage award to ship under time charter—Apportionment of award as between charterers & shipowners.**]—A charterparty provided (clause 2)



e. *Failure of owner to continue running of vessel for specified time—Measure of damages.*]—THOMPSON *v.* LEACH (1868), 18 C. P. 141.—CAN.

that the shipowner should maintain the chartered vessel the *Pocklington* in a thoroughly efficient state for & during the service. Clause 6 provided that if any damage prevented the working of the vessel for more than twenty-four hours the hire should cease. By clause 13 the vessel had liberty to tow & assist vessels in distress, & to deviate for the purpose of saving life or property. By clause 20 all derelicts & salvage were to be " for owners' & charterers' equal benefit." The shipowners obtained an award in the Admlty. Ct. for a large sum for salvage services rendered by the *Pocklington* in towing another vessel in distress. Through performing those services the hull, engines, & towing gear of the *Pocklington* were strained & damaged, & she incurred expenses & losses attributable to the salvage services in respect of repairs, the costs of gear used in towage, loss of hire for several days whilst she was under repair, & other matters. In an action by the charterers against the shipowners to recover a moiety of the salvage earned by the *Pocklington* :—*Held :* defts. were entitled to deduct from the amount awarded by the Admlty. Ct. all such losses & expenses incurred by them, including loss of hire as were attributable to the salvage services, & the balance only ought to be divided between themselves & the pltfs.—BOOKER & CO. *v.* POCKLINGTON S.S. CO., LTD., [1899] 2 Q. B. 690 ; 69 L. J. Q. B. 10 ; 81 L. T. 524 ; 16 T. L. R. 19 ; 9 Asp. M. L. C. 22 ; 5 Com. Cas. 15.

**2058. Contracts contained in bills of lading—Made with shipowner not charterer—Master under direction & control of charterer.**]—WEHNER *v.* DENE S.S. CO., No. 2496, *post.*

**2059. Liability of owner for default of master—Management or navigation of ship—Sufficiency of proof.**]—A charterparty by which applts. agreed to let & resps. agreed to hire a steamship for six calendar months, provided that " 9. The captain shall prosecute his voyages with the utmost dispatch & shall render all customary assistance with the ship's crew . . . " & " 14. Throughout this charter losses or damages whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes shall be absolutely excepted, viz. . . . negligence, default or error in judgment of the pilot, master or crew or other servants of the owners in the management or navigation of the steamer." Resps. alleged that the captain had not prosecuted a voyage under the charter with the dispatch required by clause 9. Applts., while disputing that allegation, contended that the breach, if any, of clause 9 was occasioned by the negligence or default of the master in the management or navigation of the steamer, & that they were, therefore, exempted by clause 14 from liability. There was no shortage of coal, & it appeared to be common ground that the lack of speed of the vessel was due to insufficient coal consumption on the voyage :—*Held :* assuming that a breach of clause 9 was not actionable if caused by negligence within the meaning of clause 14, applts. to succeed in their defence must establish negligence within the meaning of clause 14 to the satisfaction of the judge of fact, here an arbitrator, & that they had failed to do, & they were, therefore, liable to resps. in damages.—SUZUKI & CO. *v.* BENYON (T.) & CO. (1926), 95 L. J. K. B. 397 ; 134 L. T. 449 ; 42 T. L. R. 269 ; 17 Asp. M. L. C. 1 ; 31 Com. Cas 183, H. L.

*B. Payment of Hire.*

*(a) In General.*

**2060. Hire payable monthly—Meaning of month.**]—Where a ship is freighted by the month, the months are calendar not lunar ones.—JOLLY *v.* YOUNG (1794), 1 Esp. 185 ; 170 E. R. 323, N. P.

*Annotations :*—**Mentd.** Simpson *v.* Margitson (1847), 11 Q. B. 23 ; Bruner *v.* Moore, [1904] 1 Ch. 305.

**2061.** —— ——.]—Clause 5 of a time charterparty provided that the charterers should pay as hire a certain sum " per calendar month, commencing from the time the steamer is placed at the disposal of charterers, & *pro rata* for any fractional part of a month . . . until her redelivery. . . . That the payment of hire shall be made . . . in cash . . . monthly in advance." A further clause provided that in the event of loss of time from various specified causes preventing the working of the steamer & lasting more than twenty-four consecutive hours the hire should cease from the commencement of such loss of time until the steamer should be again in an efficient state to resume her service. The steamer having been placed at the charterers' disposal, one month's hire in advance was paid on Nov. 7, 1915; on Nov. 20, 1915, the vessel went off hire & was not again efficient until Jan. 6, 1916 :—*Held :* that each payment of hire under clause 5 was a payment for the ensuing calendar month & not for the next thirty or thirty-one days on which the steamer should in fact be on hire ; there had been a failure of consideration in respect of so much of the amount paid in advance on Nov. 7, 1915, as represented hire from Nov. 20, to Dec. 7, 1915; & that the charterers were entitled to recover the amount attributable to those days.—STEWART (C. A.) & CO. *v.* PHS. VAN OMMEREN (LONDON), LTD., [1918] 2 K. B. 560 ; 88 L. J. K. B. 32 ; 119 L. T. 637 ; 62 Sol. Jo. 739 ; 14 Asp. M. L. C. 359, C. A.

**2062.** —— **Earned at end of each month—Stipulated times of payment every four months.**]—HAVELOCK *v.* GEDDES, No. 1834, *ante.*

**2063.** —— **Pro rata payment for part of month—Delay in re-delivering ship—On expiry of charterparty.**]—A charterparty provided that the hire of a vessel should commence at noon of a certain day, & freight was payable at so much per calendar month, & " at & after the same rates for any part of the month," until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 p.m. :—*Held :* the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery.—ANGIER BROTHERS *v.* STEWART BROTHERS (1884), Cab. & El. 357.

**2064. Whether efficiency of vessel condition precedent to payment.**]—A ship was chartered for time on monthly hire, the charterers agreeing to pay the freight during employment & efficient performance of the service & the owner covenanting that the ship should be seaworthy during the continuance of the charter ; provided that if at any time it should appear to the charterers that the ship became inefficient it should be lawful for them to put her out of pay, or to make such abatement by way of mulct out of the hire or freight as they should adjudge fit. The owner effected a time policy of insurance " on freight outstanding." During the time the ship became inefficient through perils of the seas & the charterers refused to pay freight after that date. The owner having brought



*f. Hire payable monthly—Payment conditional on return to port—Effect of loss of ship.*]—HEIMDAL, AKT. *v.* NOBLE, [1907] S. C. 249 ; 44 Sc. L. R. 209 ; 14 S. L. T. 606.—SCOT.

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an action on the policy:—*Held:* on the true construction of the charterparty the efficiency of the ship was not a condition precedent to the earning of the freight; the pecuniary loss was caused by the charterers availing themselves of the abatement clause & not by the perils of the seas; & the underwriters were not liable.—INMAN S.S. CO., LTD. *v.* BISCHOFF (1882), 7 App. Cas. 670; 52 L. J. Q. B. 169; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. L. C. 6, H. L.

*Annotations:*—**Consd. & Distd.** The Alps, [1893] P. 109. **Consd.** Asfar *v.* Blundell, [1896] 1 Q. B. 123. **Reid.** The Bodouin, [1894] P. 1; Manchester Liners *v.* British & Foreign Marine Insce. Co. (1901), 18 T. L. R. 183; Williams *v.* Canton Insce. Office, [1901] A. C. 462; Adelaide S.S. Co. *v.* A.-G., [1926] A. C. 172.

**2065. Extra payment for increased risk—Voyage in danger area.**]—MEYER *v.* SANDERSON (R. F.) & Co., No. 2123, *post.*

**Insurance against loss of freight.**]—*See* INSURANCE, Vol. XXIX., pp. 209–211, 257–260, Nos. 1677–1690, 2078–2101.

*(b) Hire Payable in Advance.*

**2066. Ship to be re-delivered before expiry of period paid for.**]—A charterparty provided that the charterer should pay the hire of a vessel at the rate of £709 " per calendar month," & at the same rate " for any part of a month," " hire to continue until her re-delivery to the owners," " payment of the said hire to be made in cash, in London, monthly, in advance, without deduction ":—*Held:* the charterer was liable to pay a month's hire to the owners at the beginning of each month, even if it was clear that the ship would be re-delivered to the owners before the month had expired.—TONNELIER *v.* SMITH (1897), 77 L. T. 277; 13 T. L. R. 560; 8 Asp. M. L. C. 327; 2 Com. Cas. 258, C. A.

*Annotations:*—**Consd.** Stewart *v.* Phs. Van Ommeren (London), [1918] 2 K. B. 560. **Folld.** French Marine *v.* Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz., [1921] 2 A. C. 494. **Reid.** S.S. Langford *v.* Canadian Forwarding & Export Co. (1907), 96 L. T. 559.

**2067. Half monthly except last half month—Last half month calculated with reference to date of redelivery of ship.**]—By a charterparty, pltfs. agreed to let & defts. to hire pltfs.' steamship for the term of six calendar months on certain conditions. Among these conditions were: the charterers shall pay for the use & hire of the said vessel at the rate of £675 per calendar month . . . & at & after the same rate for any part of a month; hire to continue from the time specified for terminating the charter, until her re-delivery to owners at a port in the United Kingdom. . . . That the payment of hire shall be made as follows: half-monthly in advance in London except for the last half-month, which time to be estimated & paid in advance up to such time as steamer is expected to be re-delivered." The charterers had the option of continuing the charter for two further periods of six calendar months. The charterers contended that they were entitled to re-deliver the vessel during the currency of the last half-month, & that on doing so they were only liable for a proportionate part of the last half-month's hire:—*Held:* the clause as to the mode of payment of hire did not alter the duration of the hiring, which was for six months certain; the meaning of the clause as to the last half-month's hire was, that the charterers were to pay, along with that instalment, for any extra period beyond the six months till the vessel should be re-delivered; &, therefore, the charterers were not entitled to re-deliver the vessel during the currency of the last half-month & claim an abatement in respect of the hire.—REINDEER S.S. CO., LTD. *v.* FORSLIND & SON (1908), 24 T. L. R. 529; 52 Sol. Jo. 425; 13 Com. Cas. 214, C. A.

**2068. Returnable in event of cesser.**]—STEWART (C. A.) & Co. *v.* PHS. VAN OMMEREN (LONDON), LTD., No. 2061, *ante.*

**2069. —— Detention by British government.**]—LLOYD ROYAL BELGE SOCIÉTÉ ANONYME *v.* STATHATOS, No. 4931, *post.*

**2070. —— Detention by foreign government.**]—WEIDNER, HOPKINS & Co. *v.* ADMIRAL SHIPPING Co., LTD. (1918), 145 L. T. Jo. 192.

**2071. —— Ship lost.**] — NAEYAERT *v.* STOTT (T. B.) & Co., No. 2104, *post.*

**2072. —— Unseaworthiness of ship.**] — SNIA SOCIETA DI NAVIGAZIONE INDUSTRIA E COMMERCIO *v.* SUZUKI & Co., No. 1659, *ante.*

**2073. Application to extension of charter term.**] —FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ, No. 2140, *post.*

*(c) Cesser of Right to Payment.*

i. *In General.*

**2074. Charterparty providing for two voyages—Completion of first voyage—Loss of vessel on second.**]—A charterparty, whereby the owners let a vessel to freight by the month, for such time as she should be taken up in performing a voyage from London to Plymouth, the island of Grenada, & from thence back to London, on the terms that the owners should receive & the freighters should load & unload a cargo at Grenada, on such outward & homeward voyage, is to be construed to mean as two distinct voyages from London to Grenada, & thence back to London, & not as one entire voyage; & the vessel having unloaded a cargo at Grenada, & loaded another, but was on her return to London was, with the cargo, entirely lost:—*Held:* the owners were entitled to freight for the voyage to Grenada.—MACKRELL *v.* SIMOND (1776), 2 Chit. 666.

*Annotation:*—**Distd.** Gibbon *v.* Mendez (1818), 2 B. & Ald. 17.

**2075. Non-fulfilment of condition precedent—Arrival & discharge at given port—Notwithstanding efforts of owner to complete voyage.**]—By a charterparty of affreightment the owner of the ship covenanted to take on board at London the freighter's goods, & proceed therewith to Monte Video, & there to deliver them to the freighter's agent, & receive from him another cargo, &, wind & weather permitting, proceed therewith to his port of discharge in G. B., & there deliver the same to the freighter, & end the said voyage. In consideration whereof the freighter covenanted to pay £670 per month for freight, during the said intended voyage to M. V., & back to her port of discharge; such freight to commence from the day the ship should be ready to receive her outward bound cargo, & to end when she should have finally discharged the whole; & also to pay two-thirds of all pilotage & port charges during the said voyage; such freight, pilotage, & port charges to be paid on the arrival & discharge of the ship at her destined port in G. B. In covenant by the owner for an alleged breach in non-payment of freight, pilotage, & port charges, it is not enough to show that the ship, after having taken in a cargo in G. B. & proceeded part way on the voyage, but before her arrival at M. V., was without the default of the owner or crew, wrongfully seized & brought back to London, & there detained for some time till she was restored to the owner; in consequence of which she required repairs, which were done

with all necessary dispatch; & that the owner was then ready & willing to cause the ship to prosecute & complete her voyage, & gave notice thereof to the freighter, & tendered him the ship properly fitted, etc., for that purpose, & requested him to give the necessary instructions in that behalf, & offered to observe the same, etc.: but that the freighter would not give any such instructions, etc., nor permit the ship to prosecute or complete the voyage; but refused to do so, & wholly renounced the charterparty, & the further prosecution of the voyage, & wholly discharged the owner from further prosecuting or completing the voyage, & dispensed therewith. For the freight, *qua* freight, pilotage, & port charges, are only covenanted to be paid by the freighter on the arrival & discharge of the ship at her destined port in G. B.; & therefore such arrival & discharge, which must be understood after the stipulated voyage performed, are conditions precedent to the owner's right to freight, etc. It is not enough to show that the owner did all in his power towards earning the freight, etc., by the tender of his ship to complete the voyage, & his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, & which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage & earn the freight, etc.: but such completion was still liable to be defeated by the act of God, or the accidents of the voyage; & the performance of the condition which was to entitle the owner to freight, etc., would still have been contingent, although such his offers had been accepted by the freighter. Therefore this is not like the case where a party tendering to do that which he had undertaken, & which he has the immediate power of doing at the time, in order to entitle himself to a correspondent duty from another, is, by a refusal of that other to accept such tender, dispensed with averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty.—SMITH *v.* WILSON (1807), 8 East, 437; 103 E. R. 410.

*Annotations*:—**Distd.** Ritchie *v.* Atkinson (1808), 10 East, 295. **Apld.** Gibbon *v.* Mendez (1818), 2 B. & Ald. 17.

**2076. —— Arrival at first destined port.**]—By charterparty the freighter covenanted to pay to the owner freight at & after the rate of so much per ton per month, for the term of six months at least, & so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz. so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, & the remainder of the freight at specific periods:—*Held*: this constituted one entire covenant, & the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, & that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss.—GIBBON *v.* MENDEZ (1818), 2 B. & Ald. 17; 106 E. R. 274.

**2077. Ship out of repair—At beginning of charterparty.**]—HAVELOCK *v.* GEDDES, No. 1834, *ante*.

**2078. —— During running of charterparty.**]—HAVELOCK *v.* GEDDES, No. 1834, *ante*.

**2079. —— ——.**]—Where a vessel was chartered for six months certain, the freighter to pay £200 per month, & so in proportion for any longer time she might be employed, the owner to keep the ship in repair during the voyage: & in consequence of perils of the sea the vessel was obliged to be repaired twice in the course of the voyage, which detained her uselessly to the freighter for thirty-eight days:—*Held*: he was still liable for freight during such detention.—RIPLEY *v.* SCAIFE (1826), 5 B. & C. 167; 7 Dow. & Ry. K. B. 818; 108 E. R. 62.

*Annotation*:—**Reld.** The Leitrim, [1902] P. 256.

**2080. Ship unseaworthy—Damages for unexpired portion of charterparty—Measure of damages.**]—SNIA SOCIETA DI NAVIGAZIONE INDUSTRIA E. COMMERCIO *v.* SUZUKI & Co., No. 1659, *ante*.

**2081. Detention of ship—Seizure in blockade.**]—A ship let to freight by the month, in attempting to enter a blockaded port by order of the freighters, is seized & her cargo condemned; but being afterwards released, takes in other goods & delivers them to the freighters, according to the charterparty:—*Held*: there was no suspension of the freight during the detention of the ship.—MOORSOM *v.* GREAVES (1811), 2 Camp. 627; 170 E. R. 1274, N. P.

**2082. Frustration of adventure.**]—BRAEMOUNT S.S. Co., LTD. *v.* WEIR (ANDREW) & Co., No. 2539, *post*.

**2083. ——.**]—In the first case pltfs. by a charterparty, headed "Time Charter," let their steamship *Dunolly* to defts. for "one Baltic round," at a certain rate of hire per month until redelivery unless lost to pltfs. at a coal port in the United Kingdom. Arrests & restraints of princes were mutually excepted. No voyage was to be undertaken that would involve risk of seizure or capture, & in the event of Great Britain or other European power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter defts. had the option of cancelling the charter or insuring the steamer against all war risks for full value. *The Dunolly* came on hire on July 4, 1914, & the first month's hire was paid; she was sub-chartered by defts., & she proceeded to the Baltic & was loading a cargo for the sub-charterers at a port in Finland when war broke out between Russia & Germany on Aug. 1 & between Great Britain & Germany on Aug. 4. After Aug. 1, in consequence of orders of the Russian authorities, *The Dunolly* was not allowed to leave the Gulf of Finland & she was still there. She was quite uninsurable against war risks. On Aug. 5, by which date *The Dunolly* was partly loaded & the master had given bills of lading which were held by the sub-charterers, defts. purported to cancel the charter, reserving certain claims. Pltfs. brought an action on Nov. 6, 1914, to recover the hire of the vessel to Nov. 4, 1914. In the second case the charterparty was in the same form, & the facts were for all material purposes similar to those in the first case except that the steamship *Auldmuir* was chartered for "two Baltic rounds," & no notice of cancellation was given. A claim by the shipowners to recover the hire of the vessel after her detention by the Russian authorities was referred to arbn. & the arbitrators found in effect that there had been a frustration of the commercial adventure:—*Held*: both parties to the contract contemplated a commercial adventure, namely a Baltic round; the enforced delay was of such indefinite duration as completely to frustrate the commercial adventure; & the contract was consequently determined, & the shipowners were not entitled to the hire claimed.—SCOTTISH NAVIGATION CO., LTD.

*Sect. 2.—Charterparties: Sub-sect. 22, B. (c) i. & ii.]*

*v.* SOUTER (W. A.) & Co., ADMIRAL SHIPPING CO., LTD. *v.* WEIDNER, HOPKINS & Co., [1917] 1 K. B. 222; 86 L. J. K. B. 336; 115 L. T. 8121; 33 T. L. R. 70; 61 Sol. Jo. 85; 13 Asp. M. L. C. 539; 22 Com. Cas. 154, C. A.; *revsg.*, [1916] 1 K. B. 675; [1916] 1 K. B. 429.

*Annotations:*—**Consd.** Lloyd Royal Belge Soc. Anon. *v.* Stathatos (1917), 33 T. L. R. 390. **Refd.** F. A. Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1917] 2 K. B. 78; Heilgers *v.* Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348; Bank Line *v.* Capel, [1919] A. C. 435; *Ite* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868. **Mentd.** Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085; Naylor, Benzon *v.* Krainische Industrie Gesellschaft (1918), 87 L. J. K. B. 1066.

**2084.** ——.]—LLOYD ROYAL BELGE SOCIÉTÉ ANONYME *v.* STATHATOS, No. 4931, *post.*

**2085.** ——.]—PACIFIC PHOSPHATE CO., LTD. *v.* EMPIRE TRANSPORT CO., LTD., No. 2097, *post.*

**2086. —— How far doctrine applicable.**]—The doctrine of commercial frustration is applicable to a time charterparty. It does not apply, however, when the time charterer has the use of the vessel for some purpose for which under the terms of the time charterparty he is entitled to use her, even though that purpose is not the particular purpose for which he desired to use her. Whether in a given case the doctrine applies to a particular time charterparty depends upon the circumstances, & in determining this the main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charterparty. The party desirous of relying upon the doctrine of frustration is in a position to claim his right so to do as soon as the event upon which the claim is based happens. . . . The question then is what estimate a reasonable man of business, on all the materials before him, could make of the probable length of the withdrawal of the vessel from service, & it is immaterial whether his anticipation is justified or falsified by the event.—COUNTESS OF WARWICK S.S. Co. *v.* LE NICKEL SOCIÉTÉ ANONYME, [1918] 1 K. B. 372; 87 L. J. K. B. 309; 118 L. T. 196; 34 T. L. R. 27; 14 Asp. M. L. C. 242, C. A.; *affg.* (1917), 33 T. L. R. 291.

*Annotations:*—**Apld.** Heilgers *v.* Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348. **Refd.** Bank Line *v.* Capel, [1919] A. C. 435; Larrinaga *v.* Soc. Franco-Américaine des Phosphates de Medulla (1922), 27 Com. Cas. 160.

**2087.** —— ——.]—ANGLO-NORTHERN TRADING CO., LTD. *v.* EMLYN JONES & WILLIAMS, [1918] 1 K. B. 372; 87 L. J. K. B. 309; 118 L. T. 196; 34 T. L. R. 27; 14 Asp. M. L. C. 242, C. A.; *affg.*, [1917] 2 K. B. 78.

*Annotations:*—**Refd.** Heilgers *v.* Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348; Bank Line *v.* Capel, [1919] A. C. 435; Larrinaga *v.* Soc. Franco-Américaine des Phosphates de Medulla (1922), 27 Com. Cas. 160.

**2088. —— Time for raising plea of frustration—On happening of determining event.**]—COUNTESS OF WARWICK S.S. Co. *v.* LE NICKEL SOCIÉTÉ ANONYME, No. 2086, *ante.*

**2089. —— Whether excluded by terms of charter.**]—BANK LINE, LTD. *v.* CAPEL (ARTHUR) & Co., No. 2136, *post.*

**—— Requisition of ship by Government.**]—*See* Sub-sect. 22, D., *post.*

**2090. What payments affected—Payment for coal consumed while vessel off hire.**]—A time charterparty provided that the owner was to maintain the steamship in a thoroughly efficient state for & during the service; that the charterers were to provide & pay for all coal; & that in the event of loss of time through (*inter alia*) breakdown or other accident preventing the working of the steamer & lasting more than twenty-four consecutive hours the hire should cease until the vessel was again in an efficient state to resume her service.

During the currency of the charterparty the vessel was off hire for repairs, & while so off hire bunker coal to the value of £105 15*s.* was consumed:—*Held:* notwithstanding the fact that the vessel was off hire the charterers were bound to pay for the coal consumed during that period.—ARILD (OWNER) *v.* SOCIÉTÉ ANONYME DE NAVIGATION HOVRANI, [1923] 2 K. B. 141; 92 L. J. K. B. 616; 28 Com. Cas. 328.

ii. *Special Stipulations.*

**2091. Ground for cesser of hire—"Break down of machinery"—Towage required.**]—(1) The term "efficient," as applied in a charterparty to a ship, must be construed with reference to the several classes of work which she has from time to time to accomplish.

In a charterparty it was stipulated that applts. should provide & pay for the provisions & wages of the captain & crew, & maintain the ship in a thoroughly efficient state in hull & machinery for the service; & that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage whereby the working of the vessel was stopped for more than forty-eight consecutive hours, the payment of hire should cease until she should be again in an efficient state to resume her service." When the vessel was on a voyage under the charterparty, her high-pressure engine broke down, & it was found necessary to employ a tug in aid of the ship's low-pressure engine, to tow the ship to her destination:—*Held:* applts. had no claim for hire for the voyage on which the tug's assistance was required, the ship not being independently efficient for that purpose.

(2) On the ship's arrival in port, she discharged her cargo, for which her steam winches were available:—*Held:* applts. were entitled to payment of hire for the full time actually occupied in discharging the cargo, the ship being in an efficient state for that particular employment.—HOGARTH *v.* MILLER, BROTHER & Co., [1891] A. C. 48; 60 L. J. P. C. 1; 64 L. T. 205; 7 T. L. R. 120; 7 Asp. M. L. C. 1, H. L.

*Annotation:*—*As to* (1) **Refd.** Smailes *v.* Evans & Reid, [1917] 2 K. B. 54.

**2092. —— —— Causing detention by ice.**]—By a charterparty a steamer was chartered for about two months, to be employed on a voyage from one of certain ports in South Wales to Spain, thence to the Baltic, & back to a port in the United Kingdom or on the Continent between Bordeaux & Hamburg, at a certain sum per month. The charterparty, which contained the usual exception of perils of the sea, provided, amongst other things, that, in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running

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**PART VII. SECT. 2, SUB-SECT. 22.—B. (c) ii.**

*g. Ground for cesser of hire—"Breakdown of machinery."*]—GIERTSEN *v.* TURNBULL & Co., [1908] S. C. 1101; 45 Sc. L. R. 916; 16 S. L. T. 250.—**SCOT.**

*h. —— "Restraints of princes"—Detention of ship in quarantine.*]—A time charterparty contained a condition that payment of the stipulated hire should cease during loss of time occasioned by certain specified circumstances. Among these circumstances detention in quarantine was not mentioned. By a further clause "restraints of princes & rulers" were mutually excepted. The vessel having been detained for some days in quarantine, the charterers declined to pay the

hours, the payment of hire should cease until she should be again in an efficient state to resume her service, but should the vessel be driven into port, or to anchorage by stress of weather, or from any accident to cargo, such detention or loss of time should be at the charterer's risk & expense, & that " detention by ice " was " to be for account of charterers, unless caused by breakdown of steamer." The ship while proceeding from Spain to St. Petersburg under the charter, was stranded in the Baltic, & thereby so much damaged as to be unfit to continue the voyage without repair. She put into Copenhagen for repairs, &, after the necessary repairs had been there effected, she sailed for St. Petersburg; but, on arrival at Reval, she was unable to proceed further towards St. Petersburg by reason of ice, though not herself frozen in, & was detained at Reval awaiting the breaking up of the ice at St. Petersburg. If it had not been for the damage occasioned by the stranding she could have reached St. Petersburg, discharged her cargo, & got away from that port before it was closed by ice:—*Held:* there had been a detention of the ship by ice caused by breakdown of the steamer within the meaning of the charterparty, & the hire of the ship ceased to be payable by the charterers during that detention.—*Re* TRAAE & LENNARD & SONS, LTD., [1904] 2 K. B. 377; 90 L. T. 407; 20 T. L. R. 394; 9 Asp. M. L. C. 553; *sub nom. Re* S.S. RIKARD NORDRAAK & LENNARD & SONS, 73 L. J. K. B. 553; 9 Com. Cas. 235, C. A.

**2093. —— " Damage preventing working "—Grounding—Negligence of pilot paid by charterer.**]—Pltfs. chartered deft.'s ship for a specified period, the ship to be employed between safe ports of the Continent of Europe where she might always safely lie. By the charterparty the charterers were to pay for pilotages & in the event of loss of time from damage preventing the working of the ship the payment of hire was to cease until the ship should be again in an efficient state to resume her services. While under the charge of a pilot the ship grounded in getting to her berth in a harbour &, in consequence, she was prevented working for a time. The berth was a safe berth, & the grounding was due to the negligence of the pilot:—*Held:* the pilot, though paid by the charterers, was not their servant, & the charterers were not bound to pay for the hire of the ship during the period she was prevented from working.—FRASER & WHITE *v.* BEE (1900), 49 W. R. 336; 17 T. L. R. 101; 45 Sol. Jo. 102.

**2094. —— —— Stress of weather shifting cargo—Repairs necessitated.**]—A ship was chartered for a voyage at a certain sum per calendar month. The charterparty contained the following clause:—" In the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accident, or damage preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers, including first twenty-four hours . . .; but should the vessel be driven into port or to anchorage by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense.

The ship was loaded by the charterers with a cargo of lumber including a deck cargo. Soon after starting she encountered heavy weather; the deck cargo shifted & damaged the ship. She was taken into port; the cargo was discharged & repairs were done to the ship. These repairs occupied nine days & twelve hours & were rendered necessary by the combined effect of stress of weather & the shifting of the deck cargo:—*Held:* the nine days & twelve hours were time lost from " damage preventing the working of the vessel " & were not " detention or loss of time " from the ship being " driven into port by stress of weather, or from accident to the cargo," within the meaning of the above clause, & the ship was off hire for that period.—BURRELL & SONS *v.* GREEN (F.) & CO., [1914] 1 K. B. 293; 83 L. J. K. B. 499; 109 L. T. 970; 12 Asp. M. L. C. 411; 19 Com. Cas. 81; *on appeal, sub nom.* BURRELL & SONS *v.* HIND, ROLPH & CO., [1915] 1 K. B. 391.

**2095. —— Hindrance through strikes—Ship ordered to port where strike in existence.**]—BROWN *v.* TURNER, BRIGHTMAN & CO., No. 2758, *post.*

**2096. —— Deficiency in men or stores—Ship ordered to be armed—& gunners provided.**]—A charterparty provided that the owners should " maintain the vessel in a thoroughly efficient state in hull & machinery for & during the service," that " in the event of loss of time from deficiency of men or stores . . . for more than twenty-four running hours the payment of hire shall cease until she be again in an efficient state to resume her service," & that nothing done under Govt. orders should be deemed a deviation. By order of the British Admlty. the ship was delayed in order that she might be armed, & owing to an order of the French Govt. she was further delayed in order that she might obtain gunners & ammunition:—*Held:* (1) the parties never contemplated that the expression " fitted for the service " would apply to the circumstances which had happened; (2) the expression " deficiency in men " could not include men to be provided by the Admlty., & therefore the charterers were not entitled to deduct from the hire a sum representing the time lost & the coal consumed by reason of the delay.—RADCLIFFE & CO. *v.* COMPAGNIE GÉNÉRALE TRANSATLANTIQUE (1918), 35 T. L. R. 65; 24 Com. Cas. 40, C. A.

*Annotations:—Generally,* **Refd.** Denholm *v.* Shipping Controller (1920), 124 L. T. 378. **Mentd.** Lake *v.* Simmons, [1926] 1 K. B. 366.

**2097. —— Outbreak of war—Application of doctrine of frustration.**]—In 1913 defts. agreed to supply to pltfs. twelve steamers for each year from 1914 to 1918 for the carriage of phosphate to Europe. The contract contained the following suspension clause: " In the event of circumstances beyond the control of the charterers relieving the buyers for whom the shipments were intended from their obligation to take delivery the charterers may give three months' notice to the shipowners to suspend shipments during the continuance of such circumstances, & any period during which this contract remains so suspended shall be added on to the end of the contract period. In the event of a war in which Great Britain is engaged & which is likely to affect the safety of the steamers or their cargoes, shipments may at the option of either party be suspended until the termination of the war, & the period of such suspension shall be added on to the end of the contract

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hire for that period on the ground that quarantine fell within the exception of " restraints of princes & rulers." In an action by the owners against the charterers:—*Held:* the charterers were liable for the hire during the period the vessel was in quarantine.—LINA, ART. *v.* TURNBULL & CO., [1907] S. C. 507; 44 Sc. L. R. 367; 14 S. L. T. 753.—SCOT.

k. —— *Loss of ship from any other cause than carelessness or bad management of master or crew.*]—COUNTER *v.* HAMILTON (1842), 6 O. S. 612.—CAN.

*Sect. 2.—Charterparties: Sub-sect. 22, B. (c) ii., (d), & C.]*

period." In Aug. 1914, defts. claimed to suspend the operation of the contract, & in June, 1919, they intimated that they regarded the adventure as frustrated :—*Held :* the change in circumstances was so great that the doctrine of frustration applied.—PACIFIC PHOSPHATE CO., LTD. *v.* EMPIRE TRANSPORT CO., LTD. (1920), 36 T. L. R. 750.

*Annotation :*—**Refd.** Larrinaga *v.* Soc. Franco-Américaine des Phosphates de Medulla (1922), 27 Com. Cas. 160.

**2098. —— If requisitioned by government.]**—By clause 31 of a charterparty it was provided : "Delivery to be given when steamer is released by the British Govt. & permission obtained from them on cessation of hostilities, but if such release is not given within six months of the declaration of peace any further time for which the steamer is requisitioned by the British Govt. shall be deducted from the first three years' period of the charter. In no case, however, shall the time so deducted exceed twelve months. The duration of this charter after steamer has commenced same is not to exceed four years from the first delivery. Any time if requisitioned after first delivery to be added provided, however, as already stipulated that the total time from first delivery is not to exceed four years." The steamer was duly released & delivered to the charterers. She then proceeded to load a cargo of coal for a French port. After she was so loaded the Shipping Controller directed her after carrying & delivering the coal to proceed to Australia to load grain for the Royal Commission on Wheat Supplies. A dispute had arisen between the parties as to the meaning of clause 31 of the charterparty & as to the effect of the directions given by the Shipping Controller :—*Held :* the steamer had been requisitioned by the Shipping Controller within the meaning of clause 31 of the charterparty with the result that the charterparty was suspended during the period of her voyage to Australia & back.—SUTHERLAND (R. W. J.) & CO. *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ, STELLA SHIPPING CO., LTD. *v.* SUTHERLAND (R. W. J.) & CO. (1920), 36 T. L. R. 724, C. A.

*Annotation :*—**Refd.** France Fenwick *v.* R., [1927] 1 K. B. 458.

**2099. —— Accident necessitating discharge of cargo or bunkers—Meaning of "accident."]**—A sub-clause in a charterparty provided that "if through accident any part of the cargo or bunkers have to be discharged, the time occupied in discharging & reloading same to be deducted from the hire" :—*Held :* the word "accident" in the sub-clause included an accident to the cargo as well as an accident to the ship.—DENHOLME, LTD. *v.* SHIPPING CONTROLLER (1921), 90 L. J. K. B. 856 ; 125 L. T. 455 ; 37 T. L. R. 656 ; 15 Asp. M. L. C. 277, C. A.

**2100. Duration of cesser—Until vessel "efficient"—Meaning of "efficient."]**—HOGARTH *v.* MILLER, BROTHER & CO., No. 2091, *ante.*

**2101. —— From completion of repair—Interval between completion & resumption of voyage.]**—A charterparty provided that in the event of loss of time from "detention by average accidents to ship," the payment of hire should cease for the time thereby lost. An average accident having occurred to the ship while on a voyage from Hamburg to New York, she put back to Queenstown for repairs. After being repaired, the voyage was resumed :—*Held :* the charterer was liable to pay hire during the time occupied after leaving Queenstown in arriving back at the place where the accident had occurred.—VOGEMANN *v.* ZANZIBAR S.S. CO. (1902), 7 Com. Cas. 254, C. A.

*Annotations :*—**Consd.** Smailes *v.* Evans & Reid, [1917] 2 K. B. 54. **Apld.** S.S. Arild *v.* Soc. Anon. De Navigation Hovrani, [1923] 2 K. B. 141.

**2102. —— —— ——.]**—By a charterparty it was provided that "in the event of loss of time from . . . damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service." After the vessel had loaded a portion of her cargo, & while she was proceeding from one loading place to another, she went aground, & although, after the discharge of a part of the cargo, she was eventually got off, it was found that she was seriously damaged. The master therefore decided to discharge a further portion of the cargo & he did so at a place some miles distant from where the vessel grounded, & thereupon the vessel proceeded to the nearest port of refuge where the necessary repairs could be effected. At that port the repairs were completed & the vessel left the dry dock on Oct. 18. She then proceeded back to the two places where portions of the cargo had been discharged & reloaded those portions, the reloading being completed on Oct. 30. The charterers contended that after the grounding hire ceased to be payable until the whole of the discharged cargo had been reloaded :—*Held :* the vessel was "in an efficient state to resume her service" when the repairs were finished, & consequently, hire again became payable from that time.—SMAILES (THOMAS) & SON *v.* EVANS & REID, LTD., [1917] 2 K. B. 54 ; 86 L. J. K. B. 1072 ; 116 L. T. 595 ; 33 T. L. R. 233 ; 14 Asp. M. L. C. 59 ; 22 Com. Cas. 225.

*Annotation :*—**Refd.** Denholme *v.* Shipping Controller (1921), 90 L. J. K. B. 856.

**2103. —— Incapacity "for more than forty-eight hours"—Reckoning includes forty-eight hours.]**—A charterparty of a steamer for three years & nine months, under which the hire was payable monthly in advance, provided that "in the event of loss of time through deficiency of men or stores, repairs . . . or damage preventing the efficient working of the vessel for more than forty-eight running hours the payment of hire shall cease until she be again in an efficient state to resume her service" :—*Held :* in the event of loss of time for a period exceeding forty-eight running hours through any of the specified causes, payment of hire ceased for the whole period including the first forty-eight hours. —MEADE-KING, ROBINSON & CO. *v.* JACOBS & CO., [1915] 2 K. B. 640 ; 84 L. J. K. B. 1133 ; 113 L. T. 298 ; 31 T. L. R. 316 ; 13 Asp. M. L. C. 105 ; 20 Com. Cas. 288, C. A.

**2104. —— Vessel lost while being towed for repair.]**—A charterparty provided that hire should be payable monthly in advance, & should not be returnable in the event of the loss of the steamer, & that in the event of loss of time from breakdown of machinery the hire should cease until the steamer should be in an efficient state to resume her service. The vessel broke down, & when she was being towed back to England for repair she was lost. In an action by the charterers against the owners : —*Held :* as the adventure was frustrated on the date of the loss of the vessel she ceased from that date to "lose time" within the meaning of the charterparty, & the charterers were entitled to recover back hire for the period between the breakdown & the loss of the vessel, as the rights which had vested before her loss were not thereby divested.—NAEYAERT *v.* STOTT (T. B.) & CO. (1919), 35 T. L. R. 343.

**2105. Construction of clause—General words—"Or other accident"—Ejusdem generis rule.**]—S.S. MAGNHILD *v.* MCINTYRE BROTHERS & CO., No. 1691, *ante.*

**2106. —— Harbours, rivers or ports "where there are bars"—Qualification applying only to ports.**]—S.S. MAGNHILD *v.* MCINTYRE BROTHERS & CO., No. 1691, *ante.*

*(d) Withdrawal of Ship in Default of Payment.*

**2107. Effect of withdrawal—On exercise of lien on sub-freights.**]—WEHNER *v.* DENE S.S. CO., No. 2496, *post.*

**2108. —— On recovery of hire—Between notice of withdrawal & redelivery of ship.**]—ITALIAN STATE RYS. *v.* MAVROGORDATOS, No. 2029, *ante.*

**2109. —— On charterer's powers to redeliver.**]—ITALIAN STATE RYS. *v.* MAVROGORDATOS, No. 2029, *ante.*

**2110. —— On recovery of damages for loss of hire.**]—A charterparty, by which a steamship was let for thirty-six months, provided that payment of the agreed hire should be made monthly in advance, & that "In default of such payment . . . the owners shall have the faculty of withdrawing the steamer from the service of the charterers, without prejudice to any claim they, the owners, may otherwise have on the charterers under this charter." The charterer made default in paying the third & fourth months' hire, & the shipowners thereupon withdrew the steamship. The shipowners brought an action against the charterer claiming the hire in arrear at the date of the withdrawal & also damages for loss of hire under the charterparty during the remainder of the chartered period, the damages being based upon the difference between the rate of hire fixed by the charter & the hire that could be got apart from the charter:—*Held:* pltfs. were entitled to recover, besides the hire in arrear, damages for loss of the future hire measured as aforesaid, inasmuch as these damages were the natural & probable result of the default of deft. in paying the hire, & not of the withdrawal of the steamship by pltfs.—LESLIE SHIPPING CO. *v.* WELSTEAD, THE RAITHWAITE, [1921] 3 K. B. 420; 91 L. J. K. B. 12; 125 L. T. 858; 15 Asp. M. L. C. 413.

**2111. Waiver of notice of withdrawal—Acceptance of cargo by captain—When hire unpaid.**]—A steamer was chartered for three months at a monthly hire, payment to be made monthly in advance, &, "failing the punctual & regular payment of the hire," the owners were to be at liberty to withdraw the vessel from the services of the charterers. The second month's hire became due on July 12, but was not then paid. The vessel arrived on that day at Wabana, Nova Scotia, where she loaded a cargo, & sailed on July 14. The owners, on July 14, gave notice to the charterers that they withdrew the ship, the hire not having been paid. The charterers on receipt of the notice tendered the amount of the hire, which the owners refused to accept:—*Held:* there had been a punctual & regular payment of the hire, &, if not, the act of the captain in taking cargo on board when the hire was due & unpaid amounted to a waiver by the owners of their right to withdraw the steamer.—NOVA SCOTIA STEEL CO. *v.* SUTHERLAND S.S. CO. (1899), 5 Com. Cas. 106.

*Annotations:*—**Expld.** *Re* Tyrer & Hessler (1901), 84 L. T. 653. **Reld.** Maclaine *v.* Gatty, [1921] 1 A. C. 376.

**2112. —— Order by captain to hold cargo ready.**]—By a charterparty a ship was let for nine months, the charterers to pay for the hire of the ship at an agreed rate, fortnightly in advance, & in default of such payment the owners to have the faculty of withdrawing the ship from the service of the charterers. The owners were to pay the wages of captain & crew, but the charterers were to pay for coals, port charges, etc., & the captain was to be under their orders & directions as regarded employment. After the charterers had had the use of the ship for two months, they made default in making the fortnightly payment due on June 21. The ship was then on a voyage to S. where she arrived on June 25, & while there the captain telegraphed to H. to order the cargo to be ready. After lying two days at S. the ship started on June 27 for H. On June 28 the owners gave notice to the charterers of their withdrawal of the ship by reason of the charterers' default in the payment due on June 21:—*Held:* upon these facts there was no evidence of any waiver by the shipowners of their right to withdraw the vessel, nor of any conduct on their part estopping them from insisting on their right.—*Re* TYRER & CO. & HESSLER & CO. (1902), 86 L. T. 697; 18 T. L. R. 589; 9 Asp. M. L. C. 292; 7 Com. Cas. 166, C. A.

*Annotation:*—**Expld.** Panoutsos *v.* Raymond Hadley Corpn. of New York, [1917] 2 K. B. 473.

**2113. —— Issue of writ for hire due.**]—Under a charterparty a month's hire payable in advance became due on Aug. 8, 1914. On Aug. 13, it being still unpaid, the owners gave notice to the charterers under the terms of the charterparty of withdrawal of the ship, & a few hours later issued a writ against them for the hire due on Aug. 8. The notice reached the charterers a few hours before the issue of the writ:—*Held:* the issue of the writ did not constitute a waiver of the notice of withdrawal.—WULFSBERG & CO. *v.* WEARDALE (OWNERS) (1916), 85 L. J. K. B. 1717; 115 L. T. 146; 13 Asp. M. L. C. 416, C. A.

**2114. Notice of withdrawal while ship on voyage—Payment of hire before arrival in port—Subsequent withdrawal breach of contract.**]—A charterparty contained a clause providing: "Payment of the hire to be made in cash monthly in advance . . . & in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the steamer from the service of the charterers." A month's hire became due on Sept. 11. On Oct. 1 it was still unpaid, & the owners gave notice that they withdrew the ship, which was at that time at sea. On Oct. 2 the month's hire was paid, & on the same day the ship arrived in port. On Oct. 4 the master, under instructions from the owners, withdrew the ship:—*Held:* that there was a breach of the charterparty for which the owners were liable in damages.—LANGFOND (OWNERS) *v.* CANADIAN FORWARDING & EXPORT CO. (1907), 96 L. T. 559; 10 Asp. M. L. C. 414, P. C.

*Annotation:*—**Reld.** Wulfsberg *v.* S.S. Weardale (1916), 85 L. J. K. B. 1717.

*C. Duration of Charter and Redelivery of Ship to Owner.*

**2115. Duration—Option to charterer or owner—To determine.**]—Pltfs., on July 29, 1875, chartered their ship *G.* for a voyage from New York to Odessa. The freight was agreed "during the voyage aforesaid" at £5,500 in cash at Hull,

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**PART VII. SECT. 2, SUB-SECT. 22.—C.**

1. *Re-delivery—In original condition reasonable wear & tear excepted—Liability for loss of anchor.*]—ANGLIN *v.* HENDERSON & COEPOYS (1861), 21 U. C. R. 27.—CAN.

m. —— —— *Measure of damages.*]—COLLINS BAY RAFTING & FORWARDING CO. *v.* KAINE (1898), 29 S. C. R. 247.—CAN.

*Sect. 2.—Charterparties: Sub-sect. 22, C.*]

England, on the discharge of the cargo in Odessa. "If the vessel has not arrived at the port of New York on or before Sept. 1, 1875, charterers have option of cancelling this charterparty." Pltfs., on Aug. 7, 1875, effected an insurance with deft. "at & from London to New York while there, & thence to Odessa, via Constantinople," on their chartered freight, including, besides the ordinary ones, all risks "incident to steam navigation." The clause in the charterparty giving the option to cancel was not mentioned to deft.

The ship started from England on Aug. 7, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after Sept. 1, whereupon the charterers cancelled the charter & the freight was lost:—*Held:* (1) the interest in the chartered freight had commenced at the time when the charter was cancelled; (2) deft. was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; (3) the withholding from deft. information as to the power to cancel vitiated the policy.—MERCANTILE S.S. Co. *v.* TYSER (1881), 7 Q. B. D. 73; 29 W. R. 790; 5 Asp. M. L. C. 6, n.

*Annotations:—As to* (2) **Refd.** The Alps (1893), 41 W. R. 527. **Refd.** Manchester Liners *v.* British & Foreign Marine Insce. (1901), 18 T. L. R. 183.

**2116. —— —— To renew—Effect of failure to exercise on contract with sub-charterer.**]—Under a charterparty from the owners the charterers were entitled to a steamship until Sept. 29, 1920, with the option on giving thirty days' notice before that date, of continuing the charterparty for three months longer. A sub-charterparty of the steamship granted by the charterers, which would otherwise have continued in force up to Dec. 22, 1920, was, in consequence of a breach by the sub-charterers, terminated on Oct. 2, 1920. The charterers did not exercise their option of renewal & their charterparty accordingly terminated on the date first above mentioned. On Sept. 25, 1920, the owners chartered the steamship to the sub-charterers as from the time when it was delivered to them. On Oct. 2, 1920, the steamship was redelivered by the sub-charterers to the charterers, & by the latter to the owners. The charterers claimed from the sub-charterers as damages for the breach by the latter of their contract the loss of the profits which they would have made during the period from Oct. 2, 1920, when the steamship was redelivered, to Dec. 22, 1920, when but for the breach the sub-charterparty would have expired:—*Held:* the charterers could not recover the damages claimed, inasmuch as, owing to their not having exercised their option of renewal, they could not have given the sub-charterers the use of the steamship during the above period; & it made no difference that the sub-charterers had themselves obtained a charter of the steamer from the owner.—RUTHERFORD, SENDER & Co. *v.* GOLDTHORPE, SCOTT & WRIGHT, LTD., THE STARTFORTH, [1922] 1 K. B. 508; 91 L. J. K. B. 493.

**2117. —— —— To suspend in event of war—Whether charterparty dissolved or suspended.**]—By a charterparty dated Jan. 18, 1913, pltfs., as the owners of the British S.S. *Ferngarth*, agreed to let, & the Vulcaan co. agreed to hire, the *Ferngarth* for about five years. The Vulcaan co. was a Dutch co., but all its shares were held by Germans; it was managed by directors who were Germans resident in Holland who were subject to the control of a supervisory committee of Germans resident in Germany; & it existed for the purpose of furthering the operations of certain German cos. The charterparty provided that the vessel should only be employed in lawful trades, & it contained the following clause: "(27) That in the event of war between the nation to whose flag the chartered steamer belongs & any European Power or any other Power operating or likely to operate in European waters, charters, &/or owners shall have the option of suspending this charter for the time during which hostilities are in progress." On the outbreak of war between Great Britain & Germany on Aug. 4, 1914, the Vulcaan co. gave notice suspending the charterparty during the continuance of hostilities. Pltfs. brought an action claiming a declaration that the charterparty was dissolved as being a contract with or on behalf of alien enemies:—*Held:* the charterparty was dissolved & not merely suspended by the outbreak of war, inasmuch as to keep it alive would on the one hand assure to alien enemies the use of the vessel at the end of the war, thus fortifying their commercial position during the war by enabling them to commit their own shipping without being hampered by the necessity of having it free when peace should be declared, & on the other hand it would prevent pltfs. from committing the vessel on pain of being liable in damages if on the conclusion of peace they should be unable to resume the fulfilment of their contract under the charterparty.—CLAPHAM S.S. Co., LTD. *v.* HANDELS-EN-TRANSPORT-MAATSCHAPPIJ VULCAAN OF ROTTERDAM, [1917] 2 K. B. 639; 86 L. J. K. B. 1439; 116 L. T. 826; 33 T. L. R. 546; 14 Asp. M. L. C. 104; 23 Com. Cas. 13.

*Annotations:—***Refd.** Naylor, Benzon *v.* Krainische Industrie Gesellschaft (1918), 87 L. J. K. B. 1066; *Re* Badische Co., Bayer Co., etc., [1921] 2 Ch. 331.

**2118. —— Ship employed beyond date of termination—Whether date of termination of essence of contract—Construction of charter as voyage charter.**]—GRAY & Co. *v.* CHRISTIE & Co. (1889), 5 T. L. R. 577.

*Annotation:—***Expld.** Watson S.S. Co. *v.* Merryweather (1913), 108 L. T. 1031.

**2119. —— —— ——.**]—Under a charterparty a ship was hired within certain limits for a "term of about six calendar months" from the date when she was placed at the charterers' disposal. The charterparty provided that should the steamer be upon a voyage at the expiration of the term, the charterers were to have the use of the steamer at the same rate & conditions for such extended time as might be necessary for the completion of the contemplated voyage, & in order to bring the steamer to the port of redelivery. The steamer came on hire on May 12. On Oct. 26 the charterers sent the steamer on a voyage within the prescribed limits, which it was obvious could not be completed so as to permit of the redelivery of the steamer to the owners at the end of the period of about six months, & the steamer was, in fact, delivered to the owners nearly two months after the expiration of that period:—*Held:* the charterers had not committed a breach of the charterparty.—DENE S.S. Co., LTD. *v.* BUCKNALL BROTHERS (1900), 5 Com. Cas. 372.

**2120. —— —— —— Provision for ship being on voyage at date of termination.**]—A charterparty was expressed to be for "about six calendar months"; hire to be paid per month or part of a month, & to continue until redelivery of the steamer to the owner at a port in the United Kingdom or the United States. If the vessel was upon a voyage at the expiration of the named period, the charterers were to have the use of

steamer until completion of the voyage & in order to bring her to a port of redelivery. If the charterers redelivered the steamer in the United Kingdom they were to pay a penalty of £500. At the expiration of six calendar months the vessel was on a voyage to a port in the United States :—*Held :* the owner was entitled to redelivery of the steamer on completion of her voyage to such port, & charterers were not entitled to send her on a fresh voyage to, & to redeliver her in, the United Kingdom.—BUCKNALL BROTHERS *v.* MURRAY (1900), 5 Com. Cas. 312.

**2121.** —— —— ——.]—A steamer was chartered for twelve calendar months, payment of hire to be at a certain rate per month, & " at & after the same rate for any part of a month, used to complete a voyage," hire to continue from the time specified for terminating the charterparty until delivery of the steamer to the owners at a port in the United Kingdom in the charterer's option. The twelve months expired on Aug. 12. On Aug. 18, the vessel finished discharging a cargo at Cronstadt, which had been carried under a sub-charterparty for a voyage from Cardiff to that port. The charterer intended that the vessel, after discharging at Cronstadt, should proceed to Lulea in ballast, load a cargo there, & proceed therewith to Rotterdam, & thence to Gravesend, where the vessel would be delivered to the owners, according to reasonable calculations, before Sept. 12 :—*Held :* to send the ship to Lulea would be to cause her to commence a fresh voyage, & the owners were therefore entitled to have her redelivered to them at Cronstadt.—*Re* ISTOK (OWNERS) & DRUGHORN (1902), 18 T. L. R. 603 ; 7 Com. Cas. 190, C. A.

**2122.** —— —— ——.]—By the terms of a charterparty a vessel was chartered from May 15–31, 1912, until Oct. 15–31, 1912, at the rate of £615 per current month, " hire to continue from the time specified for terminating the charter until her redelivery to owners, unless lost, at a port on East coast of United Kingdom between Oct. 15 & 31, 1912.

On Oct. 18, 1912, the vessel was at West Hartlepool, & upon that day she was dispatched by the charterers on a voyage from which to the knowledge of the charterers it was impossible that she could return in time to be redelivered to the owners by Oct. 31. She was in fact redelivered on Nov. 20. The current rate obtainable for the vessel on Oct. 31 was £900 per month, & the owner sought to recover from the charterers damages for twenty days detention of the ship calculated at the difference between the current rate & the chartered rate for the period in question :—*Held :* the clause in the charterparty set out above indicated an intention on the part of the parties to make the time specified in the charter for the redelivery of the vessel of the essence of the contract, & as she was not redelivered by Oct. 31, the charterers had committed a breach of contract for which they were liable in damages at the rate claimed.—WATSON S.S. CO., LTD. *v.* MERRYWEATHER & CO. (1913), 108 L. T. 1031 ; 12 Asp. M. L. C. 353 ; 18 Com. Cas. 294.

**2123.** —— —— ——.]—A steamship was chartered on the terms (*inter alia*) that the hire was to be " for about six months " & the vessel was to be employed between Wales & part of France, there being a prohibition against trading in waters where military operations were in progress. The owner subsequently agreed with the charterers to enlarge the trading area, so as to include voyages between Liverpool or Manchester & Nantes. On Dec. 18, 1914, the vessel was taken over by the charterers & was employed in carrying coal & steel bars from Manchester to Nantes. In Feb. 1915, Germany issued a decree that every hostile merchant ship in the waters around Great Britain would be destroyed & a number of vessels were sunk by submarines, & the owner informed the charterers that he would consider the charter cancelled unless the vessel was sent to trade where no military operations could be expected. Eventually the parties agreed that she should go on trading between Manchester & Nantes, & that the question whether an agreed extra sum should be paid by the charterers to the owner should be decided by arbn. On June 18, 1915, the six months expired, but the charterers sent the vessel on one more voyage & she did not return till June 30. It was then agreed that if the arbitrators decided that the hire had continued for more than " about six months " the charterers should pay the owner a further sum. The arbitrators decided in favour of the owner on both points :—*Held :* (1) the arbitrators were justified in finding that the vessel was trading in waters where military operations were in progress ; (2) the charterers had not acted reasonably in sending out the vessel on the day of the completion of the six months, & the award must be affirmed.—MEYER *v.* SANDERSON (R. F.) & CO. (1916), 32 T. L. R. 428.

**2124.** —— **Until stipulated notice by charterer—Notice by owners ineffective.**]—(1) By a charterparty a steamship was hired for one calendar month for a certain sum, the hiring to continue at the same rate until the charterers should determine it by fourteen days' notice. Several months afterwards the owners gave fourteen days' notice purporting to determine the hiring, & later the steamship was requisitioned by the British Govt. : —*Held :* the charterparty meant that the hiring was to continue indefinitely as long as the steamship continued to exist subject to the right of the charterers to put an end to it at any time by giving the stipulated notice ; & the hiring was not determined either by the owners' notice, or by the requisitioning.

(2) While the owners of a steamship were detaining her from the charterers in breach of the charterparty, she was requisitioned by the British Govt. In an action by the charterers against the owners for damages for their detention of the steamship :—*Held :* in the absence of proof to that effect, the requisitioning could not be regarded as arising out of the detention of the vessel by the owners, & the damages which the charterers were entitled to recover for the detention by the owners did not include damages in respect of the period of did not include damages in respect of the period of the requisition.—ELLIOTT STEAM TUG CO. *v.* JOHN PAYNE & CO., [1920] 2 K. B. 693 ; 90 L. J. K. B. 89 ; 123 L. T. 619 ; 36 T. L. R. 401 ; 15 Asp. M. L. C. 78 ; 25 Com. Cas. 208.

*Annotation :—As to* (2) **Refd.** Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132.

**2125.** —— **Invalid determination by owners—Subsequent requisition by Government—Damages for period of requisition.**]—ELLIOTT STEAM TUG CO. *v.* JOHN PAYNE & CO., No. 2124, *ante.*

—— **Frustration of adventure.**]—*See* Nos. 2083–2086, *ante ;* Nos. 2129-2140, *post.*

**2126. Redelivery—What amounts to—Owner enabled to resume control.**]—ITALIAN STATE RYS. *v.* MAVROGORDATOS, No. 2029, *ante.*

**2127.** —— **Tender of redelivery refused pending examination—Examination revealing necessity for repairs—Liability of charterers for repair & loss during repairs.**]—A charterparty stipulated that the ship was to be redelivered at the expiration of the charterparty " in same good order as when delivered." She was damaged owing to the

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charterers' default, & was tendered for redelivery in that state. The redelivery was refused by the owners until the ship was "in same good order as when delivered," & they claimed hire for the period occupied in repairs, at the conclusion of which period they accepted redelivery:—*Held:* the charterparty involved two obligations on the charterers; (*a*) to redeliver, & (*b*) to redeliver in good order; & as the ship was tendered for redelivery at the proper time, no hire was payable in respect of the time subsequent to the tender during which repairs were being executed, but damages only, for detention & cost of repairs, were payable.—WYE SHIPPING CO. *v.* CHEMIN DE FER PARIS-ORLÉANS, [1922] 1 K. B. 617; 91 L. J. K. B. 553; 38 T. L. R. 274; 66 Sol. Jo. 406.

**2128.** —— —— —— **Liability of charterer for hire after tender.**]—WYE SHIPPING CO. *v.* CHEMIN DE FER PARIS-ORLÉANS, No. 2127, *ante*.

*D. Requisition of Ship by Government.*

**2129. Whether adventure frustrated.**]—By a time charterparty a steamship was chartered for sixty months at a fixed sum per month. The charterparty contained an exception of arrests & restraints of princes, & the charterers had the liberty of subletting the steamer on Admlty. or other service. After the outbreak of the war, when the charterparty had nearly three years to run, the steamer was requisitioned by the Admlty., & employed by them in the transport of troops:—*Held:* the interruption was not of such a character as that the ct. ought to imply a condition that the parties should be excused from further performance of the contract, & that the requisition did not determine or suspend the contract.—F. A. TAMPLIN S.S. CO., LTD. *v.* ANGLO MEXICAN PETROLEUM PRODUCTS CO., LTD., [1916] 2 A. C. 397; 85 L. J. K. B. 1389; 32 T. L. R. 677; 21 Com. Cas. 299; *sub nom. Re* F. A. TAMPLIN S.S. CO., LTD. & ANGLO MEXICAN PETROLEUM PRODUCTS CO., LTD., 115 L. T. 315; 13 Asp. M. L. C. 467, H. L.

*Annotations:*—**Consd.** Chinese Mining & Engineering Co. *v.* Sale, [1917] 2 K. B. 599. **Apld.** Lloyd Royal Belge Soc. Anon. *v.* Stathatos (1917), 34 T. L. R. 70; Marshall *v.* Glanvill, [1917] 2 K. B. 87. **Foll.** Modern Transport Co. *v.* Duneric S.S. Co., [1917] 1 K. B. 370. **Consd.** Scottish Navigation Co. *v.* Souter, Admiralty Shipping Co. *v.* Weidner Hopkins, [1917] 1 K. B. 222; Countess of Warwick S.S. Co. *v.* Le Nickel Soc. Anon., Anglo Northern Trading Co. *v.* Emlyn Jones & Williams, [1918] 1 K. B. 372; Metropolitan Water Board *v.* Dick Kerr, [1918] A. C. 119. **Apld.** Elliott Steam Tug. Co. *v.* Duncan (1918), 34 T. L. R. 583; Naylor, Benzon *v.* Krainische Industrie Gesellschaft (1918), 87 L. J. K. B. 1066. **Consd.** Bank Line *v.* Capel, [1919] A. C. 435. **Apld.** Dominion Coal Co. *v.* Roberts (1920), 36 T. L. R. 837. **Consd.** *Re* Badische Co., Bayer Co., etc., [1921] 2 Ch. 331. **Apld.** Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132. **Refd.** Clapham S.S. Co. *v.* Handels-en Transport Maatschappij Vulcan of Rotterdam, [1917] 2 K. B. 639; Heilgers *v.* Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348; Blackburn Bobbin Co. *v.* Allen, [1918] 2 K. B. 467; *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868; *Re* Thornett & Fehr & Yuills, [1921] 1 K. B. 219; Larrinaga *v.* Soc. Franco-Americaine des Phosphates de Medulla (1923), 92 L. J. K. B. 455; Hirji Muljі *v.* Cheong Yue S.S. Co., [1926] A. C. 497. **Mentd.** Leiston Gas Co. *v.* Leiston-Cum-Sizewell U. D. C. (1915), 80 J. P. 95; Nordman *v.* Rayner & Sturges (1916), 33 T. L. R. 87; Orconera Iron Ore Co. *v.* Fried Krupp Akt. (1917), 86 L. J. Ch. 613; Hulton *v.* Chadwick & Taylor (1918), 34 T. L. R. 230; Kensington Electric Lighting Co. *v.* Notting Hill Electric Lighting Co. (1918), 82 J. P. 197; Schostall *v.* Johnson (1919), 36 T. L. R. 75; *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735; Willis *v.* Willis (1927), 96 L. J. P. 177.

**2130.** ——.]—DINHAM, FAWCUS & CO. *v.* WITHERINGTON & EVERETT, [1916] W. N. 154.

*Annotation:*—**Foll.** Cork Gas Consumers Co. *v.* Witherington & Everett (1920), 36 T. L. R. 599.

**2131.** ——.]—Pltfs. chartered three steamers. The owners were to pay for the insurance of the vessels & maintain them in efficiency. The Admlty., during the course of the war & after the delivery to the charterers, requisitioned each of the steamers:—*Held:* (1) the charterparties had not been terminated by the requisitions; (2) as the Admlty. charters took effect partly out of the interests of the charterers & partly out of the interests of the shipowners, the Admlty. hire must be divided between the two.—CHINESE MINING & ENGINEERING CO., LTD. *v.* SALE & CO., [1917] 2 K. B. 599; 86 L. J. K. B. 1465; 117 L. T. 32; 33 T. L. R. 464; 14 Asp. M. L. C. 95; 22 Com. Cas. 352.

*Annotations:*—*As to* (2) **Apld.** Elliott Steam Tug Co. *v.* Duncan (1918), 34 T. L. R. 583. *Generally*, **Refd.** Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132.

**2132.** ——.]—MODERN TRANSPORT CO., LTD. *v.* DUNERIC S.S. CO., No. 1797, *ante*.

**2133.** ——.]—By a charterparty dated Aug. 5, 1914, pltfs. chartered a steamer from defts. for about 15 months, & the steamer entered on the charter in Dec. 1914. In Oct. 1915, the Admlty. requisitioned the steamer at a higher rate than the rate of hire fixed by the charterparty. In an action by the charterers against the owners of a declaration that the charter had not been determined by the requisition & that pltfs. were entitled to the benefit of the difference between the rate fixed by the charter & the rate paid by the Admlty.:—*Held:* the doctrine of frustration of adventure was applicable, & therefore the action failed.—HEILGERS & CO. *v.* CAMBRIAN STEAM NAVIGATION CO., LTD. (1917), 34 T. L. R. 72, C. A.

**2134.** ——.]—Pltfs. chartered a steamship from defts. for one month, pltfs. to have the option of continuing the hire for any further period. The charter contained an exception of restraints of princes. Pltf. exercised their option to continue the hire after the first month, & while the charter was still in force the vessel was requisitioned by the Admlty. During the period of requisition the vessel was transferred from the gross to the net basis, & was engaged in word more arduous than that contemplated by the charter & at a place not contemplated by the charter:—*Held:* the requisition did not put an end to the charter, but the question whether the owners were entitled to a share of the sum received by the charterers from the Admlty. for hire was a matter for a referee.—ELLIOTT STEAM TUG CO., LTD. *v.* DUNCAN (CHARLES) & SONS, LTD. (1918), 34 T. L. R. 583.

*Annotations:*—**Foll.** Elliott Steam Tug Co. *v.* Payne, [1920] 2 K. B. 693. **Refd.** Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132.

**2135.** ——.]—COUNTESS OF WARWICK S.S. CO. *v.* LE NICKEL SOCIÉTÉ ANONYME, No. 2086, *ante*.

**2136.** ——.]—The principle of frustration of the adventure applies to a time charter.

By a charterparty of Feb. 16, 1915, defts. agreed to let a steamer to pltfs., the charterers, for twelve months from the time the vessel should be delivered & placed at the disposal of the charterers at a coal port in the United Kingdom as ordered by the charterers, to trade between safe ports within certain specified limits. The charterparty excepted loss of damage arising from restraints of princes. It also provided (*a*) (clause 26) that, should the steamer not have been delivered on Apr. 30, 1915, the charterers should have the option of cancelling the charter, & that, should it be proved that the steamer through unforeseen circumstances could not be delivered by the cancelling date, the charterers, if required, should, within a prescribed time after receiving notice thereof, declare whether they would cancel or take delivery; (*b*) (clause 31) that the charterers

should have the option of cancelling should the steamer be commandeered by the Govt. during the currency of the charter. The steamer was not delivered on Apr. 30, & on May 11, before delivery, the steamer was requisitioned by the Govt., but pltfs. did not exercise their option to cancel. In Aug. defts. agreed to sell the steamer to third parties conditionally on obtaining her release from the Govt., & the Govt. consented to release the steamer on being provided with a substitute. The ship was released in Sept. & the sale was effected. Pltfs. claimed damages for non-delivery of the steamer:—*Held:* (1) the application of the principle of frustration was not excluded by the special terms of the charterparty; (2) the requisition & detention of the steamer destroyed the identity of the chartered service & entitled defts. to treat the charterparty as an end.—BANK LINE, LTD. *v.* CAPEL (ARTHUR) & CO., [1919] A. C. 435; 88 L. J. K. B. 211; 120 L. T. 129; 35 T. L. R. 150; 63 Sol. Jo. 177; 14 Asp. M. L. C. 370, H. L.

*Annotations:—As to* (1) **Refd.** *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868; *Re* Badische Co., Bayer Co., etc., [1921] 2 Ch. 331. *As to* (2) **Apld.** Woodfield S.S. Co. *v.* Thompson (1919), 36 T. L. R. 43; Snia Societa di Navigazione Industria e Commercio *v.* Suzuki (1924), 29 Com. Cas. 284; Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497. *Generally,* **Refd.** Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132; Larrinaga *v.* Soc. Franco-Americaine des Phosphates de Medulla (1922), 92 L. J. K. B. 455. **Mentd.** Moriarty *v.* Regent's Garage & Engineering Co., [1921] 1 K. B. 423; Matthey *v.* Curling, [1922] 2 A. C. 180; Cohen *v.* Sellar, [1926] 1 K. B. 536.

**2137.** ——.]—ELLIOTT STEAM TUG CO. *v.* JOHN PAYNE & CO., No. 2124, *ante.*

**2138.** ——.]—Pltfs. in 1909 chartered a vessel from defts., the owners, by a charterparty which entitled pltfs. to the use of the vessel for seven consecutive St. Lawrence seasons (*i.e.*, during the portion of each year when the water was not liable to be blocked by ice), with an option for three more seasons. The option had been duly exercised. In 1915, just before the vessel should have been tendered for the coming season, the Govt. requisitioned her, & she remained on requisition till 1919:—*Held:* the contract was not divisible into contracts for 10 separate seasons, &, as the requisition did not destroy it as a whole, defts. were liable to account to pltfs. for the excess of the amount paid to pltfs. by the Govt. over the amount of hire under the charter.—DOMINION COAL CO. *v.* ROBERTS (1920), 36 T. L. R. 837.

*Annotation:*—**Apld.** Dominion Coal Co. *v.* Maskinonge S.S. Co., [1922] 2 K. B. 132.

**2139.** ——.]—By a charterparty made in Nov. 1916, resps. agreed to place their steamship at the disposal of applts. at Singapore on Mar. 1, 1917, & applts. agreed to employ her on specified terms for ten months from the date when she was delivered to them. The charterparty contained a clause by which all disputes arising out of the contract were submitted to arbitration in Hong Kong. The ship was requisitioned by the Govt. before Mar. 1, 1917, & was not released until Feb. 1919. Applts. then refused to take delivery of her. An arbitrator awarded resps. damages for breach of contract, & they brought an action upon the award:—*Held:* there had been in 1917 a frustration of the charterparty which forthwith brought to an end the whole contract, including the submission to arbitration.—HIRJI MULJI *v.* CHEONG YUE S.S. CO., LTD., [1926] A. C. 497; 95 L. J. P. C. 121; 134 L. T. 737; 42 T. L. R. 359; 17 Asp. M. L. C. 8; 31 Com. Cas. 199, P. C.

*Annotation:*—**Mentd** De La Garde *v.* Worsnop (1927), 96 L. J. Ch. 446.

**2140.** —— **Adjustment of hire pro rata.**]—A steamer was chartered for four months by a charterparty which provided for payment of a fixed hire per month & *pro rata* for any fractional part of a month until redelivery to owners as therein stipulated, payment of hire to be made in London monthly in advance. Redelivery was to be at a United Kingdom coal port. Should the steamer be on a voyage at the expiration of the period fixed by the charter, the charterers were to have the use of the steamer at the rate & on the conditions therein stipulated to enable them to complete the voyage, provided that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter. Money in dispute to be deposited at a bank in the joint names of the parties at the place of payment of the hire until the settlement of the dispute by arbn. Provision was made for the cesser of hire in the event of a breakdown of machinery or of the steamer being lost or missing. The period fixed by the charter expired on Aug. 10, 1919. In July, 1919, the charterers loaded the steamer at Antwerp with a cargo for Toulon with the intention that she should return to Great Britain with a cargo from Toulon. The steamer arrived at Toulon, but the discharge of her cargo was not completed until Aug. 16, when she was requisitioned by the Shipping Controller & sent to Australia:—*Held:* (1) the stipulation for payment in advance applied to a case of extension of the charter beyond the charter term, & on Aug. 10 a full month's hire was payable by the charterers; (2) the charterers were not entitled to a *pro rata* adjustment by reason of the frustration of the adventure.—FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ, [1921] 2 A. C. 494; 90 L. J. K. B. 1068; 125 L. T. 833; 37 T. L. R. 923; 15 Asp. M. L. C. 358; 27 Com. Cas. 69, H. L.

*Annotation:*—**Refd.** Cantiare San Rocco S. A. *v.* Clyde Shipbuilding & Engineering Co., [1924] A. C. 226.

**2141. Government paying hire in excess of charterparty—Title to excess as between owner & charterer.**]—CHINESE MINING & ENGINEERING CO., LTD. *v.* SALE & CO., No. 2131, *ante.*

**2142.** —— ——.]—ELLIOTT STEAM TUG CO., LTD. *v.* DUNCAN (CHARLES) & SONS, LTD., No. 2134, *ante.*

**2143.** —— ——.]—In Nov. 1909, pltfs. chartered a steamship from the owners for seven consecutive St. Lawrence seasons commencing with the spring 1912. The charter contained the usual exceptions including "Restraint of Princes." In Oct. 1915, defts. took over from the owners all rights & obligations under the charterparty. In Feb. 1915, the steamship was requisitioned by the Govt. & was employed in Govt. service from May to Sept. 1915. For this period £10,500 was paid to defts. by the Govt. by way of compensation. The amount payable by pltfs. to defts. under the charterparty would have been about £6,000 & pltfs. claimed £4,500, the difference between these two sums, from defts. The ship was again requisitioned in 1916, & pltfs. made a similar claim for £500 in respect of this period. Upon this amount they also claimed interest:—*Held:* (1) pltfs. were entitled to recover the excess of Govt. payments over charterparty hire for the years 1915 & 1916; (2) in respect of the excess due to pltfs. for 1916, defts. were in the position of quasi-trustees for pltfs. & were liable to them for interest at 5 per cent. thereon as from the end of 1916.—DOMINION COAL CO., LTD. *v.* MASKINONGE S.S. CO., LTD., [1922] 2 K. B. 132; 91 L. J. K. B. 673; 127 L. T. 307; 38 T. L. R. 591; 16 Asp. M. L. C. 8; 27 Com. Cas. 337.

**2144. Sale by owner during requisition—No arrangement with purchaser for performance of**

*Sect.* 2.—*Charterparties: Sub-sect.* 22, *D.; sub-sect.* 23, *A. & B. Sect.* 3: *Sub-sect.* 1.]

**charterparty.**]—By a charterparty in 1916 the steamship *R.*, then building, was chartered by deft. to pltfs. for three years from the time she was fit to sail. The charterparty provided that should the steamer that was to carry out the charter be lost either before or during its fulfilment deft. was to provide another steamer of a similar size, class & description on the same terms & conditions; & that should the steamer be requisitioned by the Admlty. the owner & charterers were to be held harmless, & any time during which the steamer might be used by the Admlty. during the existence of the contract should be for owner's account & hire under the contract should cease for such period, the contract to be prolonged by such period as the steamer might be under requisition, so that the full three years' contract between owner & charterers should be carried out. The steamer, when completed, was requisitioned by the Admlty. & still remained under requisition. While the steamer was under requisition deft. sold her free from charter engagements, & the purchasers refused to undertake to carry out the charterparty. Pltfs. claimed damages from deft. for breach of the charterparty, contending that by the sale of the steamer deft. had wrongfully repudiated the charterparty & put it out of his power to perform it:—*Held:* deft., by the sale of the steamer, had repudiated the charterparty, & was liable in damages.—OMNIUM D'ENTERPRISES *v.* SUTHERLAND, [1919] 1 K. B. 618; 88 L. J. K. B. 566; 120 L. T. 265; 14 Asp. M. L. C. 402, C. A.

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SUB-SECT. 23.—STAMPS.

*A. In General.*

*See* Stamp Act, 1891 (c. 39), ss. 8, 49 (1) (2), 50, 51, sched. I.

**2145. Time for stamping—Charterparty wholly executed abroad.**]—A charterparty executed entirely abroad & stamped within two months after it has been received in this country can be received in evidence, since it falls within the provisions of Stamp Act, 1870 (c. 97), s. 15, & not of sects. 67 & 68 of that Act.

*Semble*, such a charterparty must be stamped with an impressed & not an adhesive stamp.—THE BELFORT (1884), 9 P. D. 215; 53 L. J. P. 88; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. L. C. 291, D. C.

*See, now*, Stamp Act, 1891 (c. 39), s. 15 (3).

**2146. What documents require stamp—Guarantee for performance of charterparty.**]—A guarantee for the due performance of a charterparty does not require to be stamped as "charterparty or agreement for the charter of any ship or any memorandum, letter or other writing between the captain or owner of any ship & any other person, for or relating to the freight or conveyance of goods, etc., on board such ship, etc." within 5 & 6 Vict. c. 79, s. 2, & Sched.—REIN *v.* LANE (1867), L. R. 2 Q. B. 144; 8 B. & S. 83; 36 L. J. Q. B. 81; 15 L. T. 466; 15 W. R. 345; 2 Mar. L. C. 448.

*Annotation:*—**Expld.** Horsey *v.* Graham (1869), L. R. 5 C. P. 9.

**2147. Whether impressed or adhesive stamp necessary—Charterparty wholly executed abroad.**]—THE BELFORT, No. 2145, *ante*.

*B. Evidence.*

**2148. Admissibility in evidence of unstamped charterparty.**]—Where the declaration alleged that deft. had falsely represented himself as an agent of the master of a vessel, & so entered into a charterparty with pltf.:—*Held:* under the plea "not guilty," the contract must be proved by pltfs., & not the misrepresentation only, & the charterparty being unstamped could not be read in evidence; though deft. was not an agent of any "master, or captain, or owner" of a vessel.—BRINK *v.* WINGUARD (1847), 2 Car. & Kir. 656, N. P.

**2149.** ——.]—MACDONALD *v.* HIGHFIELD (1847), 4 L. T. 656.

**2150.** —— **Unstamped copy—Evidence as to original being stamped—Sufficiency of.**]—(1) In an action on a charterparty against the charterer, a copy of the charter signed by or on his behalf, though that copy is signed by the shipowner, is a copy, & admissible unstamped, notwithstanding 5 & 6 Vict. c. 79, if there is any evidence that the original was stamped.

(2) It is for the objector to a copy, even if a charterparty, on the ground that the original was not stamped under 5 & 6 Vict. c. 79, to make out that fact; at all events, very slight evidence to the contrary will be sufficient to rebut the objection, & a memorandum on the charter "the brokers hold the original stamped," is sufficient.—SMITH *v.* MAGUIRE (1858), 1 F. & F. 199; *subsequent proceedings*, 3 H. & N. 554.

**2151.** —— —— **Objection on ground that original not stamped—Onus on objector.**]—SMITH *v.* MAGUIRE, No. 2150, *ante*.

**2152. Presumption as to stamping—Charterparty lost—Admissibility of secondary evidence of contents.**]—An unstamped charterparty was within the fourteen days allowed by 5 & 6 Vict. c. 79, s. 21, for stamping such instruments without payment of a penalty, delivered at the office of the sub-distributor of stamps at C., for the purpose of its being transmitted to London to be stamped, the proper amount of stamp duty & postage being left with it. The clerk in that office to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands; but they said, that, if it did, it would in usual course be returned to the district office in the country. The clerk at C. could not say whether the document was returned to him or not; but he stated, that, on search being made for it, no trace of it could be discovered:—*Held:* this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents.—CLOSMADEUC *v.* CARREL (1856), 18 C. B. 36; 25

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**PART VII. SECT. 2, SUB-SECT. 23.—A.**

n. *Charterparty not under seal.*]—An agreement for the hiring of a steam-vessel for a certain period, at a certain sum, payable weekly, for the carriage of passengers & goods, not under seal, is within 5 & 6 Vict. c. 82, although strictly not a charterparty, & requires a 5*s.* stamp.—LONDONDERRY STEAMBOAT CO., LTD. *v.* MIDDLETON & POLLEXFEN (1857), 7 I. C. L. R. 361; 10 Ir. Jur. 18.—**IR.**

o. *Time for stamping — Charterparty stamped out of time—Whether action maintainable on charterparty.*]—GREEN *v.* JONES (1859), 8 I. C. L. R. 338; 11 Ir. Jur. 27.—**IR.**

**PART VII. SECT. 2, SUB-SECT. 23.—B.**

p. *Admissibility in evidence of unstamped letter adopting stamped charterparty.*]—A regular stamped charterparty was signed by A. as agent for B. A subsequent letter from B. having been tendered as evidence of his adoption of it, was objected to as unstamped & impro-

L. J. C. P. 216; 27 L. T. O. S. 135; 2 Jur. N. S. 474; 4 W. R. 547; 139 E. R. 1276.
*Annotations:*—**Refd.** Arbor *v.* Fussell (1862), 11 W. R. 26; Marine Investment Co. *v.* Haviside (1872), L. R. 5 H. L. 624.

**2153. Document executed wholly abroad.**]—THE BELFORT, No. 2145, *ante*.
*See, now*, Stamp Act, 1891 (c. 39), s. 15 (3).

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## SECT. 3.—BILLS OF LADING.

### SUB-SECT. 1.—IN GENERAL.

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22).

**2154. What amounts to—Delivery order.**]—A., of London, had ordered beans of B. & C. of Leghorn, through D., their agent. B. & C. shipped more than the quantity ordered, & drew two bills upon A., one for the quantity ordered, & the other for the residue; & they transmitted those bills to A. through D., with a letter of advice & an indorsed bill of lading for the whole cargo. The beans were shipped in 3,932 sacks. A. accepted the bill for the beans ordered, but declined to take the residue, amounting to 1,442¾ sacks, or to accept the bill drawn against them. D. consented to take the residue of the beans, & A. thereupon wrote a letter to him, acknowledging such residue to be his, & enclosed an order to the captain to deliver to the bearer the 1,442¾ sacks. D. thereupon handed over the bill of lading to A. D. accepted the bill drawn against the residue of the cargo, & paid it at maturity. Before the arrival of the ship D. sold the residue to E., who accepted a bill for the amount, drawn by B. who happened to be in London, & D. handed to E. A.'s letter & delivery order. E. afterwards applied to F. for an advance of cash, & handed him over as a security (*inter alia*) such letter & delivery order; & F. gave his acceptance to E. for the amount of cash required: which acceptance was honoured at maturity. Before E.'s acceptance became due, & before the arrival of the ship, E. stopped payment. When the ship arrived, the portion of the cargo which A. had accepted the bill was delivered to him:—*Held:* (1) the delivery order given by A. was not equivalent to a bill of lading.

(2) The delivery of a bill of lading indorsed . . . puts it in the power of the indorsee to transfer the property . . . but as between the original parties, the consignor & the consignee the question whether the property passed will depend upon what the real contract was (TINDAL, C.J.).—JENKYNS *v.* USBORNE (1844), 7 Man. & G. 678; 8 Scott, N. R. 505; 13 L. J. C. P. 196; 3 L. T. O. S. 300; 8 Jur. 1139; 135 E. R. 273.
*Annotations:*—*As to* (1) **Refd.** Grant *v.* Norway (1851), 10 C. B. 665. *Generally*, **Mentd.** Fuentes *v.* Montis (1868), L. R. 3 C. P. 268; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Folkes *v.* King, [1923] 1 K. B. 282; Lowther *v.* Harris, [1927] 1 K. B. 393.

**2155. —— Receipt of goods to be transported.**]—SEWELL *v.* BURDICK, No. 2180, *post*.

**2156. —— —— Admiralty Court Act, 1861 (c. 10), s. 6.**]—A document whereby the receipt of goods is acknowledged for shipment on board a named ship, or on some other ship for carriage by sea & delivery to the shipper's order, the document being signed on behalf of the master, is a bill of lading for the purposes of the Bills of Lading Act, 1855 (c. 111) & Admiralty Court Act, 1861 (c. 10), s. 6. Parcels of goods were accepted in New York for delivery at Sydney to the shippers' order, there being given to each shipper a document in the above-mentioned character. Upon the named ship arriving at Sydney the goods were not delivered. Resps., twenty firms, each being indorsees of one of the documents, issued a joint writ *in rem* claiming severally to recover damages. The writ stated that pltfs. claimed as consignees or indorsees of bills of lading for non-delivery of goods agreed to be carried by the named ship, or agreed to be shipped within a reasonable time by some other vessel of the same line. On affidavits sworn separately by pltfs., alleging that the goods were either lost or were not shipped on any other vessel within a reasonable time, the ship was arrested. The owners of the ship took out a summons to set aside the writ & all proceedings thereunder:—*Held:* the documents in question were bills of lading within the Admiralty Court Act, 1861 (c. 10), s. 6, & the proceedings being to set aside the writ & it not being denied that some of the goods were received on board, the action should proceed.—THE MARLBOROUGH HILL *v.* COWAN & SONS, [1921] 1 A. C. 444; 90 L. J. P. C. 87; 124 L. T. 645; 37 T. L. R. 190; 15 Asp. M. L. C. 163; 26 Com. Cas. 121, P. C.
*Annotation:*—**Expld.** Diamond Alkali Export Corpn. *v.* Fl. Bourgeois, [1921] 3 K. B. 443.

**2157. —— —— Necessity for acknowledgment of shipment.**]—Under a contract for the sale of goods to be shipped from American seaboard c.i.f. .Gothenburg, the sellers tendered, with an invoice for the goods, (*a*) a document purporting to be a bill of lading, in the following form: "Received in apparent good order & condition from D. to be transported by the *Anglia* now lying in the Port of Philadelphia . . . or failing shipment by steamer in & upon a following steamer, 280 bags Dense Soda," & (*b*) a certificate of insurance issued by an American insurance corpn., which, as the certificate declared, "represents & takes the place of the policy & conveys all the rights of the signed policy holder . . . as fully as if the property was covered by a special policy direct to the holder of this certificate":—*Held:* the buyers were entitled to reject upon the ground that proper documents had not been tendered by the sellers in conformity with the contract; for document (*a*) did not acknowledge shipment, & was therefore not a bill of lading within the c.i.f. contract, & as to (*b*), a document of insurance is not good tender in England under an ordinary c.i.f. contract unless it be an actual policy, & unless it falls within the provisions of Marine Insurance Act, 1906 (c. 41).—DIAMOND ALKALI EXPORT CORPN. *v.* FL. BOURGEOIS, [1921] 3 K. B. 443; 91 L. J. K. B. 147; 126 L. T. 379; 15 Asp. M. L. C. 455; 26 Com. Cas. 310.
*Annotations:*—**Apprvd.** Scott *v.* Barclays Bank, [1923] 2 K. B. 1. **Refd.** Aron (Incorporated) *v.* Comptoir Wegimont, [1921] 3 K. B. 435; Harper *v.* Mackechnie, [1925] 2 K. B. 423; Koskas *v.* Standard Marine Insce. (1927), 137 L. T. 165.

**2158. —— "Clean bill"—Bill having no marginal qualifying words.**]—RESTITUTION S.S. Co. *v.* SIR JOHN PIRIE & Co., No. 3849, *post*.

**2159. Whether essential to transfer of property in cargo.**]—MEYER *v.* SHARPE, No. 2328, *post*.

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bative.—GRAY *v.* SUTHERLAND (1849), 12 Dunl. (Ct. of Sess.) 438.—**SCOT.**

**PART VII. SECT. 3, SUB-SECT. 1.**
**2158 1.** *What amounts to—"Clean bill"—Bill having no marginal qualifying words.*]—ARROSPE *v.* BARR (1881), 8 R. (Ct. of Sess.) 602; 18 Sc. L. R. 411.—**SCOT.**
q. *Construction—Clause exempting shipper from liability.*]—Stipulations in contracts for the carriage of goods & in bill of lading, exempting the carrier from liability in certain cases, are construed strictly.—ALEXANDER

*Sect. 3.—Bills of lading: Sub-sects. 1 & 2, A. & B. (a).]*

**2160.** ——.]—NATHAN *v.* GILES, GILES *v.* NATHAN, No. 2387, *post.*

**2161.** ——.]—Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, & remaining unindorsed, will not prevent its passing.—JOYCE *v.* SWANN (1864), 17 C. B. N. S. 84; 144 E. R. 34.

*Annotations:*—**Refd.** Moakes *v.* Nicolson (1865), 19 C. B. N. S. 290; Seagrave *v.* Union Marine Insce. (1866), L. R. 1 C. P. 305; Williams *v.* Cohen (1871), 25 L. T. 300; Anderson *v.* Morice (1876), 1 App. Cas. 713; The Parchim, [1918] A. C. 157.

**2162. Construction—Of freight clause.**]—(1) A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the goods £4 5*s.* per ton of 20 cwt. net, delivered, with primage & average accustomed," etc.:—*Held:* that the two forms of expression were in effect the same, & constituted the ordinary condition that the goods were to be deliverable only on paying freight.

(2) Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, & the goods are by the bill of lading deliverable to their order. T. & co., who acted as the London bankers for Holm, of Stockholm, consented to open a credit in his favour with merchants at Akyab for the purchase of "rice for the English market, shipped by vessels of my own, the *Java*, etc., at, etc., f.o.b." The rice was purchased, & shipped on board the *Java*, & made deliverable to the order of T. & co., who accepted bills to cover the purchase. The bill of lading was indorsed to them; it described the goods "to be delivered in like good order, etc., unto T. & co., or their assigns; freight for the goods £4 5*s.* per ton of 20 cwt. net, delivered, with primage & average accustomed." While the *Java* was on its voyage, Holm obtained advances from C. & co., to whom he assigned the freight as security:—*Held:* under these circumstances C. & co. were entitled to the freight, & T. & co. were, like all other consignees of a cargo, liable to pay it under the terms of the bill of lading, although the cargo was, in fact, brought to England in Holm's own vessel, the *Java*.—WEGUELIN *v.* CELLIER (1873), L. R. 6 H. L. 286; 42 L. J. Ch. 758; 22 W. R. 26, H. L.

**2163.** —— **Clause as to ports of call.**]—GLYNN *v.* MARGETSON & Co., No. 1715, *ante.*

**2164.** —— **To be construed as a whole.**]—ELDERSLIE S.S. Co. *v.* BORTHWICK, No. 2800, *post.*

—— ——.]—*See, generally,* DEEDS, Vol. XVII., pp. 259-263.

—— **Of contract of carriage generally.**]—*See* Part VII., Sect. 1, sub-sect. 3, *ante.*

**2165. Purpose of bill—To provide for rights & liabilities of parties.**]—CROOKS *v.* ALLAN, No. 4294, *post.*

**2166.** —— ——.]—GRANGE & Co. *v.* TAYLOR, No. 3826, *post.*

**2167. Duration of bill.**]—MEYERSTEIN *v.* BARBER, No. 3780, *post.*

**2168. Time for delivery.**]—A bill of lading should be delivered as soon after its arrival as possible, without reference to the arrival or unloading of the cargo.

A cargo with the bill of lading, arrived on Apr. 21. On Apr. 24, the bill of lading was offered to the vendee under conditions he was not bound to accept, & was refused. The next day, the vendee not being able to obtain the bill of lading, declared the contract at an end. On May 3, the bill of lading was tendered, duly indorsed, & was refused on the ground that the transaction had been repudiated. The cargo was not discharged from the vessel until May 8, & there was no imputation of delay in unloading:—*Held:* the vendee was entitled to the bill of lading forthwith, & there had been unreasonable delay in delivering it.—BARBER *v.* TAYLOR (1839), 5 M. & W. 527; 9 L. J. Ex. 21; 151 E. R. 223.

**2169. Introduction of unusual clauses—Necessity for clear expression.**]—CROOKS *v.* ALLAN, No. 4294, *post.*

**2170. Wrongful detainer of bills by custom house agent.**]—LIGHTLY *v.* BUCHANAN (1847), 9 L. T. O. S. 126.

**2171. Stamp on bill—When necessary.**]—The shipping note of goods put on board ship in a port in Scotland, to be brought to a port in England, is not such a bill of lading of goods to be exported as requires a stamp under 48 Geo. 3, c. 149.—SCOTLAND *v.* WILSON (1814), 5 Taunt. 533; 1 Marsh. 204; 128 E. R. 798.

*See, now,* Stamp Act, 1891 (c. 39), s. 40, sched. I.

**Through bills.**]—*See* Sub-sect. 6, *post.*

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SUB-SECT. 2.—NATURE OF BILL OF LADING.

*A. In General.*

**2172. Symbol of property.**]—(1) The property is consigned by the bill of loading, & not by the invoice.

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*v.* CANADIAN PACIFIC RY. Co. (1908), Q. R. 33 S. C. 438.—**CAN.**

r. —— ——.]—BLACK *v.* ILLAWARRA STEAM NAVIGATION Co. (1880), 1 N. S. W. L. R. (L.) 258.—**AUS.**

t. *Introduction of unusual clauses—Penalty for.*]—DAVIS Co., LTD. *v.* DOLLAR STEAMSHIP LINES, LTD. (B. C.), [1922] 1 W. W. R. 522.—**CAN.**

a. *Necessity for actual delivery of bill.*]—An action on a bill of lading will lie by the consignor against the master of a vessel, although the bill of lading after being signed was not delivered to the consignor, but to the master's agent to be held until called for by the consignor.—HAMILTON *v.* RITCHIE (1876), 14 N. S. W. S. C. R. (L.) 274.—**AUS.**

b. *Right of shipper to bill.*]—Where pltfs. shipped a quantity of flour on board a vessel of which deft. was master, & deft. refused to sign or deliver bills of lading therefor:—*Held:* according to the usage of trade a shipper was entitled to bills of lading of the goods shipped.—MCCULLOCK & HATFIELD (1863), 7 L. C. J. 229; 13 L. C. R. 321.—**CAN.**

c. —— *When right arises.*]—A shipper has no right to ask for a bill of lading, nor has a shipowner any right to force such a bill of lading upon the shipper as evidencing his contract, until the goods are actually on board the ship.—ROSS & GLENDINING, LTD. *v.* SHAW, SAVILL & ALBION Co., LTD. (1907), 26 N. Z. L. R. 845.—**N.Z.**

d. *How far conclusive of shipment.*]—Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business & seeks to vary terms of a prior mutual assent.—NORTH WEST TRANSPORTATION Co. *v.* MCKENZIE (1895), 25 S. C. R. 38.—**CAN.**

e. *Authority of shipping agent—Receipt of bill after ship sailed.*]—A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, & the bill of lading so received is not a record of the terms on which the goods are shipped.—NORTH WEST TRANSPORTATION Co. *v.* MCKENZIE (1895), 25 S. C. R. 38.—**CAN.**

**PART VII. SECT. 3, SUB-SECT. 2.—A.**

1. *Whether representation of value to third parties.*]—ERB *v.* GREAT

(2) A bill of lading is assignable.

(3) An action against the master of a vessel for the loss of goods must be brought by the person in whom the property in them is vested.

(4) Upon a general consignment the property vests in the consignee, notwithstanding it appears upon the invoices that he is a trustee only. But on a consignment to A. for the use of B. the property is in B.—EVANS *v.* MARTELL (OR MARLETT) (1697), 12 Mod. Rep. 156; 3 Salk. 290; 1 Ld. Raym. 271; 88 E. R. 1231.

*Annotations:*—*As to* (1) **Refd.** Lickbarrow *v.* Mason (1787), 2 Term Rep. 63. *As to* (2) **Refd.** Caldwell *v.* Ball (1786), 1 Term Rep. 205. *As to* (3) **Refd.** Martini *v.* Coles (1813), 1 M. & S. 140; Amos *v.* Temperley (1841), 8 M. & W. 798; Burdick *v.* Sewell (1884), 13 Q. B. D. 159. *As to* (4) **Apld.** Sargent *v.* Morris (1820), 3 B. & Ald. 277.

**2173.** ——.]—GURNEY *v.* BEHREND, No. 2297, *post.*

**2174.** ——.]—A bill of lading is a mere symbol of property (LORD CRANWORTH, C.).—DIXON *v.* BOVILL (1856), 3 Macq. 1; 28 L. T. O. S. 130; 2 Jur. N. S. 933; 4 W. R. 813, H. L.

*Annotations:*—**Mentd.** Mackenzie *v.* Dunlop (1857), 28 L. T. O. S. 313; Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374; Goodwin *v.* Robarts (1876), 1 App. Cas. 476; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658.

**2175.** ——.]—BARBER *v.* MEYERSTEIN, No. 2371, *post.*

**2176.** ——.]—GLYN MILLS & CO. *v.* EAST & WEST INDIA DOCK CO., No. 2362, *post.*

**2177.** ——.]—SANDERS *v.* MACLEAN, No. 2373, *post.*

—— **Transfer.**]—*See* Sub-sects. 8, 9, *post.*

**2178. How far revocable—As to consignee of goods.**]—As between the owner & the shipper of the goods & the captain, it [the bill of lading] fixes & determines the duty of the latter as to the person to whom it is (at the time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose at any rate before delivery of the goods themselves or of the bill of lading to the party named in it (DENMAN, C.J.).—MITCHEL *v.* EDE (1840), 11 Ad. & El. 888; 3 Per. & Dav. 513; 9 L. J. Q. B. 187; 113 E. R. 651.

*Annotations:*—**Refd.** Evans *v.* Nichol (1841), 4 Scott, N. R. 43; Van Casteel *v.* Booker (1848), 2 Exch. 691; Turner *v.* Liverpool Docks Trustees (1851), 6 Exch. 543; Browne *v.* Hare (1858), 3 H. & N. 484; Berndtson *v.* Strang (1867), L. R. 4 Eq. 481; Schotsmans *v.* L. & Y. Ry. (1867), 2 Ch. App. 332.

**2179.** —— **As to shipment—Indemnity to master.**]—After goods have been taken on board a general ship to be conveyed on freight, & bills of lading signed by the captain, the owner of the goods cannot, before the sailing of the ship, insist upon the goods being re-delivered to him without paying the freight that might be earned, & indemnifying the master against the consequences of the bills of lading signed by him.—TINDALL *v.* TAYLOR (1854), 4 E. & B. 219; 3 C. L. R. 199; 24 L. J. Q. B. 12; 24 L. T. O. S. 144; 1 Jur. N. S. 112; 119 E. R. 85.

*Annotations:*—**Apld.** Casebourne *v.* Avery & Houston (1887), 3 T. L. R. 795. **Refd.** The Bahia (1864), Brown. & Lush. 292; Pearson *v.* Göscher (1864), 4 New Rep. 404.

**Negotiability.**]—*See* Sub-sect. 10, *post.*

*B. Contract of Carriage.*

*(a) Where Ship Not Chartered.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Art. I.

**2180. Whether bill of lading contract or evidence of contract.**]—L., S., & co., the correspondents at Rio of B. & co., merchants at Liverpool, purchased a quantity of coffee, on their own credit principally, but in part with funds supplied by B. & co. For the amount of the purchase on their credit, L., S., & co. drew bills on B. & co., & the coffee they shipped on board a vessel of B. & co., bound for "Cork & a market." An invoice was made out, stating the coffee to be shipped by order & on account & risk of B. & co.; but L., S., & co. procured the captain to sign bills of lading, making the coffee deliverable to their order or assigns, "freight free." One of these bills they indorsed in blank, & transmitted by post to B. & co. on Sept. 21. At the end of Sept., A. W., the agent in England of L., S., & co., asked the principal partner in the firm of B. & co. to cause the bill of lading to be placed in third hands, to secure the bills drawn on account of the purchase, to which he agreed, & on Oct. 16, gave a written order to that effect. On Nov. 12, which was after B. & co. had committed an act of bkpcy., the bill of lading arrived, & was, in pursuance of the above-mentioned agreement, delivered to A. W. for the above-mentioned purpose, who, after the fiat, pledged it for a large advance with pltfs., merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it, & trover was brought by pltfs., as indorsees of the bill of lading:—*Held:* though the contract was *primâ facie* made on behalf of the vendors, it was a question for the jury looking at the form of the bill of lading & language of the invoice, etc., whether the goods were not really delivered on board, to be carried for & on account & at the risk of the bkpts.; & if they were, the right of stoppage *in transitu*, & also the power of rescinding by the bkpts., so as to defeat the rights of their creditors, were both at an end; but if the jury should think, from the form of the bill of lading, that it was intended to preserve the rights of the unpaid vendors until some further act was done, by transferring the bill of lading, the right to stop the goods *in transitu*, & also the power of rescinding, would continue until the bill of lading, indorsed, reached the hands of the bkpts.; in which latter case it was competent for them to give the unpaid vendors a lien on the whole for the part not paid.—VAN CASTEEL *v.* BOOKER (1848), 2 Exch. 691; 18 L. J. Ex. 9; 12 L. T. O. S. 65; 154 E. R. 668.

*Annotations:*—**Consd.** Berndtson *v.* Strang (1867), L. R. 4 Eq. 481. **Apld.** Colonial Insce. Co. of New Zealand *v.* Adelaide Marine Insce. (1886), 12 App. Cas. 128. **Refd.** Jenkyns *v.* Brown (1849), 14 Q. B. 496; Turner *v.* Liverpool Docks Trustees (1851), 6 Exch. 543; Sheridan *v.* New Quay Co. (1858), 4 C. B. N. S. 618; Browne *v.* Hare (1859), 4 H. & N. 822; Gumm *v.* Tyrie (1864), 4 B. & S. 680; Joyce *v.* Swann (1864), 17 C. B. N. S. 84; The Marie Joseph (1866), Brown. & Lush. 449; Schotsmans *v.* L. & Y. Ry. (1867), 2 Ch. App. 332; Shepherd *v.* Harrison (1869), 17 W. R. 609; Gabarron *v.* Kreeft, Kreeft *v.* Thompson (1875), L. R. 10 Exch. 274; Ogg *v.* Shuter

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WESTERN RY. CO. (1879), 3 A. R. 446.—CAN.

*g. Receipt for freight.*]—Where a bill of lading, dated at the port of shipment, contains the words "freight for the said goods being paid here," it operates as a receipt for the freight.—SOOMAR JAFFER *v.* ABDOOL KURREEM (1866), 1 Ind. Jur. N. S. 230.—IND.

*h. Receipt for goods shipped.*]—A bill of lading as known to merchants is a receipt for goods actually delivered over & shipped on board the ship named therein & signed by the captain or his representative.—NISSIM ISAAC BEKHOR *v.* HAGI SULTANALI SHASTARY & CO. (1916), I. L. R. 40 Bom. 11.—IND.

PART VII. SECT. 3, SUB-SECT. 2.—B. (a).

**2180 i.** *Whether bill of lading contract or evidence of contract.*]—A bill of lading is, at first, a written acknowledgment by the owners of a ship or their agents, of the receipt of certain goods entrusted to them, & of their undertaking to transport & deliver them to the consignee or his assigns; but it becomes a binding contract, if it be accepted by the shipper, or his representative, without any objection, as he is then presumed to have agreed to its terms, & in the absence of fraud or mistake, he cannot plead that he did not read it & did not know its contents.—DEANS *v.* FURNESS WITHY & CO., LTD. (1899), Q. R. 9 Q. B. 81.—CAN.

*Sect. 3.—Bills of lading: Sub-sect. 2, B. (a) & (b); sub-sects. 3 & 4, A. & B.; sub-sect. 5.]*

(1875), L. R. 10 C. P. 159; Mirabita *v.* Imperial Ottoman Bank (1878), 3 Ex. D. 164; The Parchim, [1918] A. C. 157. **Mentd.** Edwards *v.* Glyn (1859), 2 E. & E. 29; Graham *v.* Candy (1862), 3 F. & F. 206; Bills *v.* Smith (1865), 11 Jur. N. S. 155; Moakes *v.* Nicholson (1865), 34 L. J. C. P. 273; Smith *v.* Hudson (1865), 6 B. & S. 431.

**2181.** ——.]—FRASER *v.* TELEGRAPH CONSTRUCTION CO., No. 1813, *ante*.

**2182.** ——.]—HAYN *v.* CULLIFORD, No. 2699, *post*.

**2183.** ——.]—CROOKS *v.* ALLAN, No. 4294, *post*.

**2184.** ——.]—GLYN, MILLS & CO. *v.* EAST & WEST INDIA DOCK CO., No. 2362, *post*.

**2185.** ——.]—CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO., No. 2648, *post*.

**2186.** ——.]—(1) The mere indorsement & delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within Bills of Lading Act, 1855 (c. 111), s. 1. Goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived & been warehoused the shipper indorsed the bills of lading in blank & deposited them with the indorsees as security for a loan. The indorsees never took possession of or dealt with the goods:—*Held:* "the property" in the goods did not "pass" to the indorsees within the meaning of the Bills of Lading Act, 1855 (c. 111), so as to make them liable in an action by the shipowner for the freight.

(2) Take, for instance, goods shipped under a charterparty, & a bill of lading differing from the charterparty; as between shipowner & shipper at least the charterparty is binding (LORD BRAMWELL).

(3) To my mind there is no contract in it [the bill of lading]. It is a receipt for the goods, stating the terms on which they were delivered to & received by the ship, & therefore excellent evidence of those terms, but it is not a contract (LORD BRAMWELL).

(4) LORD HARDWICKE (in *Snee* v. *Prescott* (1743), 1 Atk. 249), thought that there was a difference between an indorsement of a bill of lading in blank & a personal indorsement, &, for some purposes, I think there is much reason for that opinion. . . . So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement (LORD SELBORNE, C.).

(5) At common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, & by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party (LORD BLACKBURN).—SEWELL *v.* BURDICK (1884), 10 App. Cas. 74; 54 L. J. Q. B. 156; 52 L. T. 445; 33 W. R. 461; 1 T. L. R. 128; 5 Asp. M. L. C. 376, H. L.; *revsg.* S. C. *sub nom.* BURDICK *v.* SEWELL, 13 Q. B. D. 159, C. A.; *restg.* (1883), 10 Q. B. D. 363.

*Annotations:—As to* (1) **Refd.** Allen *v.* Coltart (1883), 11 Q. B. D. 782; The Rona (1884), 51 L. T. 28; Rodoconachi *v.* Milburn (1886), 18 Q. B. D. 67; Bristol & West of England Bank *v.* Mid. Ry., [1891] 2 Q. B. 653; Montgomery *v.* Hutchins (1905), 94 L. T. 207; Burgos *v.* Nascimento, McKeand Claimant (1907), 100 L. T. 71; The Odessa, The Woolston, [1916] 1 A. C. 145; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. *As to* (3) **Refd.** Armour *v.* Leopold Walford (London), [1921] 3 K. B. 473. *Generally*, **Refd.** Rew *v.* Payne, Douthwaite (1885), 53 L. T. 932; Temperley S.S. Co. *v.* Smyth, [1905] 2 K. B. 791; Calcutta S.S. Co. *v.* Weir, [1910] 1 K. B. 759. **Mentd.** Inglis *v.* Robertson, [1898] A. C. 616; Rimmer *v.* Webster, [1902] 2 Ch. 163.

**2187.** ——.]—The bill of lading was the contract between the shipowner & the holder of the bill. It was a contract dealing with goods loaded, not with goods which never came on board. Supposing that the stipulations were parts of the effective bill of lading, they were beyond the authority of the master to make, not because they contravened any secret instructions of which the bill of lading holder had no notice, but because they contravened thoroughly established law by affecting to make the ship liable for goods never shipped.—THIN *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD. (1901), 18 T. L. R. 226.

**2188.** —— **How far conclusive—Incorporation of unusual clauses—Without protest.**]—A bill of lading is not conclusive of the true contract between shipper & shipowner; but if a shipper chooses to accept from the shipowner a bill of lading in a certain form without protest he is ordinarily bound by it. A booking slip relating to shipment by defts. of a quantity of candles belonging to pltfs. from London to Antwerp contained the words "All engagements are made subject to the conditions, terms &/or exceptions of our bills of lading. . . . No insurances of any description are booked without special instructions. No cargo shipped unless Walford bills of lading are used: no other bills of lading are accepted." This booking slip was approved by pltfs., & defts. then sent their usual bill of lading, which contained the words, clause 11, "The co. has the right to carry the goods below deck &/or on deck . . . & shall not be liable for any loss, damage or injury within the exceptions in this bill of lading whether due to negligence or not." The goods were placed on deck by defts., & although carefully protected & arranged they were injured on the voyage by sea water through the ordinary perils of the sea:—*Held:* (1) pltfs. had accepted the booking slip & bill of lading as being in proper form & were bound by them; (2) the effect of clause 11 of the bill of lading was not limited to goods which by usual practice would be placed on deck, but extended to the goods in question, which were actually named in the bill of lading; (3) defts. owed no duty to pltfs. under the contract to inform them that the goods were about to be or had been placed on deck & not below deck.—ARMOUR & CO. *v.* LEOPOLD WALFORD (LONDON), LTD., [1921] 3 K. B. 473; 91 L. J. K. B. 26; 125 L. T. 860; 15 Asp. M. L. C. 415; 27 Com. Cas. 37.

*(b) Where Ship Chartered.*

*See* Sub-sect. 11, *post*.

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SUB-SECT. 3.—FORM AND CONTENTS OF BILL OF LADING.

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22).

**2189. Value of contents—Failure to insert—Limitation of shipowner's liability—To specific**



**k.** *Words or conditions in margin at time of acceptance.*]—Words or conditions stated in the margin of a bill of lading, & which appeared there at the moment of acceptance, form part of the contract.—NICHOLSON *v.* HAMBURG AMERICAN PACKET CO. (1904), Q. R. 25 S. C. 34.—CAN.

**l.** *Amount of cargo in blank—Whether validity as negotiable instrument affected.*]—COWDENBEATH COAL CO., LTD. *v.* CLYDESDALE BANK (1895), 22 R. (Ct. of Sess.) 682.—SCOT.

sum.]—PENDLE & RIVETT, LTD. *v.* ELLERMAN LINES, LTD., No. 2724, *post.*

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SUB-SECT. 4.—SIGNATURE OF BILLS OF LADING.

*A. In General.*

**2190. By whom signed—Broker.**]—Evidence was given . . . & admitted subject to objection, that in the case of steamships it is uniformly the custom for the broker of the ship, & not the master, to sign the bills of lading (DENMAN, J.).—HAYN *v.* CULLIFORD (1878), 3 C. P. D. 410; 47 L. J. Q. B. 755; 39 L. T. 288; 4 Asp. M. L. C. 48; *on appeal* (1879), 4 C. P. D. 182, C. A.

*Annotations:*—**Mentd.** Foulkes *v.* Met. Dist. Ry. (1880), 49 L. J. Q. B. 361; Norman *v.* Binnington (1890), 25 Q. B. D. 475; Baumvoll Manufactur von Scheibler *v.* Gilchrest & Furness, [1893] A. C. 8; The Ferro, [1893] P. 38; Meux *v.* G. E. Ry., [1895] 2 Q. B. 387; Dunn *v.* Bucknall, Dunn *v.* Donald Currie, [1902] 2 K. B. 614; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522; Standard Oil Co. of New York *v.* Clan Line Steamers, [1924] A. C. 100.

**2191. —— Agent.**] — THORMAN *v.* BURT, BOULTON & CO., No. 2272, *post.*

**2192. —— Charterers.**]—S.S. KNUTSFORD, LTD. *v.* TILLMANNS & CO., No. 3504, *post.*

**—— Master.**]—*See* Sub-sect. 4, B., *post.*

**Where ship chartered.**]—*See* Sub-sect. 11, C. (*a*), *post.*

*B. Authority of Master to Bind Owners.*

**2193. General rule.**]—SANDEMAN *v.* SCURR, No. 2038, *ante.*

**2194. ——.**] — MCLEAN & HOPE *v.* FLEMING, No. 2949, *post.*

**2195. In respect of goods not shipped.**]—EVANS *v.* NICHOLSON (1842), 9 L. T. 238.

**2196. ——.**]—GRANT *v.* NORWAY, No. 4524, *post.*

**2197. To sign second bill of lading—Cargo under first bill actually on board.**]—75 quarters of wheat having been shipped, pltfs. made an advance thereon, & a bill of lading was signed. 70 quarters more were then shipped, & a bill of lading made & pledged in the same manner to pltfs. The captain had also been fraudulently induced to sign another bill of lading for the whole 145 quarters:—*Held:* when a captain has once signed bills of lading for cargo on board his vessel his power is exhausted; & pltfs. were entitled to recover.—HUBBERSTY *v.* WARD (1853), 8 Exch. 330; 22 L. J. Ex. 113; 20 L. T. O. S. 279; 155 E. R. 1374.

*Annotation:*—**Reld.** Coleman *v.* Riches (1855), 16 C. B. 104.

**2198. Change of ownership—Authority to bind new owners—By contracts pursuant to original authority.**]—F. & co., shipowners at Liverpool, requested defts. to purchase for them, through defts.' Calcutta house, a quantity of cotton to be shipped on board two ships of F. & co., which were then on their way to Calcutta consigned to defts.; &, as the goods were to be shipped on owners' account, they consented to a nominal rate of freight being inserted in the bill of lading. Before the execution of the order, one of the ships, *The Royal Sovereign*, was transferred to pltfs. Defts., through their Calcutta house, executed the order, &, having no notice of the transfer to pltfs., shipped part of the cotton on board *The Royal Sovereign*, the master, who also had no notice of the transfer, signing bills of lading to defts.' order "freight for the goods free on owners' account." Before the arrival of the ship in England, F. & co. stopped payment, & defts. claimed to stop the goods *in transitu*. On her arrival pltfs. immediately took possession of the ship & claimed freight. On a case stated, raising the question whether pltfs. were entitled as against defts. to freight, or to a sum equivalent to freight, for the carriage of the goods:—*Held:* (1) pltfs. were not so entitled; (2) the master, until he received notice of the change of ownership, retained the powers which had been conferred upon him by the original owners, so far as to bind the new owners by contracts for the carriage of goods entered into by him pursuant to his original instructions.—MERCANTILE BANK *v.* GLADSTONE (1868), L. R. 3 Exch. 233; 37 L. J. Ex. 130; 18 L. T. 641; 17 W. R. 11; 3 Mar. L. C. 86.

*Annotation:*—*As to* (1) **Apld.** Keith *v.* Burrows (1877), 2 App. Cas. 636.

**2199. To sign for greater quantity of goods than actually shipped.**]—MCLEAN & HOPE *v.* FLEMING, No. 2949, *post.*

**2200. Onus of falsifying bills.**]—MCLEAN & HOPE *v.* FLEMING, No. 2949, *post.*

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SUB-SECT. 5.—MATE'S RECEIPT.

**2201. Exchange of mate's receipt for bill of lading—Duty of master—To deliver bill of lading only to holder of mate's receipt.**]—If this verdict disturbed any rule of law, the ct. would be very desirous that it should go to a further inquiry; but it went on a question of fact as to the custom; viz. that the bill of lading is never delivered, except to the party who is in a condition to give the receipt in exchange (PARK, J.).—CRAVEN *v.* RYDER (1816), as reported in 2 Marsh. 127.

*Annotations:*—**Reld.** Cowas-Jee *v.* Thompson (1845), 5 Moo. P. C. C. 165; Schuster *v.* M'Kellar & Young (1857), 3 Jur. N. S. 1320. **Mentd.** Fragano *v.* Long (1825), 6 Dow. & Ry. K. B. 283; Dixon *v.* Yates (1833), 5 B. & Ad. 313; Scott *v.* England (1844), 4 L. T. O. S. 141; *Re* Cock, *Ex p.* Rosevear China Clay Co. (1879), 11 Ch. D. 560.

**2202. —— —— —— On delivery up of receipt.**]—Where the master of a ship gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up.—THOMPSON *v.* TRAIL (1826), 2 C. & P. 334; 172 E. R. 150, N. P.; *subsequent proceedings*, 6 B. & C. 36.

*Annotations:*—**Reld.** Thompson *v.* Small (1845), 1 C. B. 328; Tindall *v.* Taylor (1854), 4 E. & B. 219; The Bahia (1864), 11 Jur. N. S. 90.

**2203. —— —— —— ——.**]—SCHUSTER *v.* MCKELLAR, No. 2026, *ante.*

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**PART VII. SECT. 3, SUB-SECT. 4.—A.**

**2191 i.** *By whom signed—Agent.*]—ROYAL CANADIAN BANK *v.* GRAND TRUNK RY. CO. (1873), 23 C. P. 225.—**CAN.**

m. —— *Purser.*]—A bill of lading is valid, though signed by the purser & not by the master.—ROYAL CANADIAN BANK *v.* CARRUTHERS (1870), 28 U. C. R. 578; *affd.*, 29 U. C. R. 283.—**CAN.**

n. *Necessity for signature—Where bill recognised & acted on.*]—ROUNE *v.* MONTREAL S.S. CO. (1886), 19 N. S. R. (7 R. & G.) 312; 7 C. L. T. 375.—**CAN.**

o. *Conclusiveness of signature.*]—The bill of lading in the hands of the consignee, is conclusive evidence against the party signing it.—HART *v.* PEARSON & BANK OF MONTREAL (1897), Q. R. 12 S. C. 540.—**CAN.**

**PART VII. SECT. 3, SUB-SECT. 4.—B.**

**2195 i.** *In respect of goods not shipped.*]—The master of a ship, by signing a bill of lading, does not bind the owner for of greater quantity of goods than is actually shipped.—M'LEAN & HOPE *v.* MUNCK (1867), 5 Macph. (Ct. of Sess.) 893; 39 Sc. Jur. 504.—**SCOT.**

**2195 ii.** ——.]—GRIEVE, SON & CO. *v.* KONEG & CO. (1880), 17 Sc. L. R. 825.—**SCOT.**

p. *In respect of time allowed for discharge of cargo.*]—ALLAN *v.* JOHNSTONE, THE ARCHDRUID (1892), 19 R. (Ct. of Sess.) 364; 29 Sc. L. R. 311.—**SCOT.**

**PART VII. SECT. 3, SUB-SECT. 5.**

q. *Duty to secure receipt before delivery of goods.*]—NATCHEAPPA CHETTY *v.* IRRAWADDY FLOTILLA CO. (1913), I. L. R. 41 Calc. 670.—**IND.**

*Sect. 3.—Bills of lading: Sub-sects. 5 & 6.*]

**2204. —— Improper refusal of bill of lading—Conversion.**]—Pltf., a salt merchant at Liverpool, was in the habit of shipping cargoes of salt there for M., a merchant in London, on board vessels chartered by M., charging him a commission in addition to the price, & getting bills of lading making the salt deliverable to his order, which bills of lading he sent with the invoice & a draft at four months to M. In Nov. 1863, M. chartered the ship *S. F.*, belonging to deft., to carry a cargo of salt from Liverpool to Calcutta, freight to be paid one-third by freighter's acceptance at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from M., pltf. proceeded to load the *S. F.*, & had shipped 1,007 tons, for which he took the mate's receipts in his own name, when he learned that M. had stopped payment. He thereupon refused to load any more, & defts. filled up the loading themselves. Pltf. then produced to defts. the mate's receipts for the 1,007 tons, & demanded a bill of lading for that quantity, making it deliverable to his order. This defts. refused, & the vessel sailed with the salt on board: —*Held:* it was properly left to the jury to say whether or not pltf. put the salt on board the *S. F.* with the intention of passing the property therein to M.; & the jury having found that pltf. did not intend to pass the property to M., the sailing from Liverpool without giving pltf. a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; & the proper measure of damages was, the value of the salt at Liverpool at the time of sailing.—FALK *v.* FLETCHER (1865), 18 C. B. N. S. 403; 5 New Rep. 272; 34 L. J. C. P. 146; 11 Jur. N. S. 176; 13 W. R. 346; 144 E. R. 501.

*Annotations:*—**Reld.** Gabarron *v.* Kreeft, Kreeft *v.* Thompson (1875), L. R. 10 Exch. 274; Jones *v.* Hough (1879), 5 Ex. D. 115. **Mentd.** Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797.

**2205. Duty of shipper—To deliver receipt to consignee—After receipt of payment.**]—Goods contracted to be sold & delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, & receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers appraised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent:—*Held:* trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; & the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller & purchaser.—COWAS-JEE *v.* THOMPSON (1845), 5 Moo. P. C. C. 165; 3 Moo. Ind. App. 422; 13 E. R. 454, P. C.

*Annotations:*—**Reld.** Browne *v.* Hare (1859), 4 H. & N. 822; Meyer *v.* Dresser (1864), 16 C. B. N. S. 646; Berndtson *v.* Strang (1867), L. R. 4 Eq. 481; Schotsman *v.* L. & Y. Ry. (1867), 2 Ch. App. 332.

**2206. —— To obtain bill of lading—Mate's receipt only obtained.**]—Pltfs. wrote to their agents, defts., regarding certain goods which S. had proposed to purchase—"*Les informations sur S. sont. telles que nous ne pouvons lui livrer les* 2,500 *caisses que contre connaissement. Si vous voulez nous vous enverrons les connaissements, et vous ne les lui delivrerez que contre payement.*" Pltfs., who carried on business in Holland, consigned the goods to defts., with bill of lading of Dutch ship, & defts. put them on board of a ship named by S., & they received & kept the mate's receipt, but no bills of lading of export ship were made up, nor was the price paid by S. when the ship sailed. In an action for delivering the goods without obtaining the price:—*Held:* the instructions to defts. were not carried out by obtaining the mate's receipt; "*connaissement*" meant bill of lading; & as the control over the goods had been lost without payment of the price, defts. were liable.—STEARINE KAARSEN FABRICK GONDA CO. *v.* HEINTZMANN (1864), 17 C. B. N. S. 56; 11 L. T. 272; 10 Jur. N. S. 881; 144 E. R. 22.

**2207. Negotiability of mate's receipt—Local custom—Whether binding elsewhere.**]—A local custom of trade was alleged to exist at Bombay by virtue of which the mate's receipts for goods shipped on board a vessel are negotiable instruments, & pass the property in the goods in the same manner as bills of lading, & that masters of ships are bound to have the mate's receipt returned to them before signing any bill of lading for the goods mentioned in that receipt, & that if a captain signed a bill of lading without production & delivery to him of the mate's receipt for the goods he would be bound, on the production of that receipt, to sign a fresh bill of lading, & to deliver the same to the person producing the mate's receipt, & that the goods mentioned in the receipt ought to be delivered to the person who produced the second bill of lading:—*Held:* such a custom if proved to exist, would be inoperative as against the captain & the shipowners.

A local custom making mate's receipts negotiable would not bind the goods elsewhere.—HATHESING *v.* LAING, LAING *v.* ZEDEN (1873), L. R. 17 Eq. 92; 43 L. J. Ch. 233; 29 L. T. 734; 2 Asp. M. L. C. 170.

**2208. Receipt given subject to condition to be contained in bill of lading to be issued—Loss of goods before bill of lading issued—Operation of exceptions in bill of lading.**]—DE CLERMONT & DONNER *v.* GENERAL STEAM NAVIGATION CO., No. 2682, *post*.

**2209. Whether conclusive evidence as to quantity shipped.**]—Pltfs. having verbally chartered the ship of deft. to carry iron from Glasgow to Swansea, the ship was loaded with iron bought by pltfs. from W. & co. The iron was weighed by the agents of W. & co., to whom the mate gave a receipt signed by him for 330 tons, but there was no bill of lading. On delivery at Swansea, the quantity of iron was discovered to be 326½ tons only, but the mate deposed, & was not contradicted, to the delivery of all that had been shipped. Pltfs. having paid on the full amount of 330 tons to W. & co., who refused to repay them the difference, sued deft. for short delivery:—*Held:* there was no evidence of negligence in defts., & if there had been, it would not be negligence causing loss to pltfs.—BIDDULPH *v.* BINGHAM (1874), 30 L. T. 30; 2 Asp. M. L. C. 225.

**2210. "Clean receipt" to be given—Condition in shipping note—Refusal to give clean receipt or redeliver goods.**]—Pltfs., N. & co., engaged with defts., who were shipowners, for the shipment of a large quantity of oil to Montreal during the season, & it was arranged that defts. were to receive no goods on board unless a clean receipt were given. Pltf. A. sold fifty barrels of oil to N. & co. & delivered them to defts. Defts. received the oil, but refused to give a clean receipt

for it. Pltf. A. demanded redelivery, which defts. refused, as other cargo had been stowed on the top of it. N. & co. having agreed to pay A. for the oil in cash in exchange for mate's receipt, refused to pay for the fifty barrels. A. brought an action against defts. for conversion, & afterwards amended the writ by adding N. & co. The consignees at Montreal accepted the oil & paid N. & co., who thereupon paid A.:—*Held:* A. had waived the right of saying that the property in the goods had not passed to N. & co., & therefore, since the goods were not his at the time that redelivery was refused, no action lay for conversion; & further, no action lay for his loss of interest through the delay in payment to him of the price of the goods.—ARMSTRONG *v.* ALLAN BROTHERS (1892), 67 L. T. 738; 9 T. L. R. 38; 7 Asp. M. L. C. 293; 4 R. 107, C. A.

**2211. Delivery of goods to consignee named in mate's receipt—No bill of lading executed.**]—A. has a sufficient property in goods shipped by B. for the specific purpose of placing funds in the hands of A. to meet a bill drawn by B. upon A., to entitle A. to maintain trover, although no bill of lading is executed, & A. holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods—to be delivered to A. —EVANS *v.* NICHOL (1841), 3 Man. & G. 614; 4 Scott, N. R. 43; 11 L. J. C. P. 6; 5 Jur. 1110; 133 E. R. 1286.

*Annotation:*—**Refd.** Kerford *v.* Mondel (1859), 28 L. J. Ex. 303.

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SUB-SECT. 6.—THROUGH BILLS OF LADING.

**2212. What amount to—Whole transit must be covered.**]—A Swedish merchant agreed to sell to an English co. a quantity of guano in bags c.i.f. Norway to Kobe or Yokohama, terms net cash against documents in London; time of shipping as to the first instalment Mar.–Apr. 1920. The seller, in anticipation of his obligations under the contract, agreed with L., the agent at Hamburg of a Japanese co., which ran a line of steamers from Hamburg to Japan but ran no steamers from Norway, for the conveyance of the guana from Hamburg to Japan on the terms that L. should sign through bills of lading as soon as the goods were in his possession. Between Apr. 20 & 22 the guano was shipped by the sellers in several lots from various Norwegian ports, including B., on the steamship *K.* to Hamburg. On the arrival of the goods at Hamburg L. signed several documents in identical terms called through bills of lading bearing date May 5. The bill of lading relating to the B. consignment stated that the goods were shipped in apparent good order & condition on board the *K.* lying at B., & bound for Hamburg, for transhipment into the Japanese co.'s steamer *A.*, to be delivered in the like good order & condition at the port of Yokohama unto "order," & the margin contained the statement: "Shipped from B. according to bill of lading on Apr. 22, 1920." On May 12 the seller tendered to the buyers documents relating to the first instalment including the ocean bills of lading but the buyers rejected the documents & refused to take up the goods. In an action for the price of the goods:—*Held:* (1) the ocean bills of lading were not through bills of lading, inasmuch as they afforded no protection to the buyers on the initial voyage, & did not satisfy the conditions of the contract; (2) on a sale on c.i.f. terms the contract of affreightment must be procured on shipment, & a bill of lading issued thirteen days after the original shipment at another port in another country was not procured on shipment. Therefore the action failed.—HANSSON *v.* HAMEL & HORLEY, LTD., [1922] 2 A. C. 36; 91 L. J. K. B. 433; 127 L. T. 74; 38 T. L. R. 466; 66 Sol. Jo. 421; 15 Asp. M. L. C. 546; 27 Com. Cas. 321, H. L.

**2213. Liability for loss during transit—Loss of ship—Whether whole freight apportioned.**]—Pltfs. shipped goods at Liverpool on board deft.'s ship, to be carried & conveyed as stated by the bill of lading, "via Colon (Aspinwall) & Panama to San Francisco; that is to say, by arrangement between the West India & Pacific Steamship co. (Ltd.) the Panama Ry. co., & the Pacific Mail Steamship co., to be carried to Colon (Aspinwall) by the packets of the West India & Pacific Steamship co. from Colon (Aspinwall) to Panama, by the Panama Railroad co., & thence to the port of destination by the Pacific Mail Steamship co. . . . freight & primage to be considered as earned ship lost or not lost"; the freight being £14 5*s.* per ton, payable in Liverpool. The whole freight at the aforesaid rate was paid to defts.' agent at Liverpool, & the bill of lading was signed by him "for the service from London to Colon (Aspinwall)," & by the agent of the two other cos., "for the service from Colon (Aspinwall) to San Francisco." The private arrangement entered into between the three cos. for the division of the freight between themselves was set forth in the case, to which was added also a copy of the handbook published by defts. containing the rates of freight charged for the carriage of goods from Liverpool to Colon (Aspinwall), to Panama, & to San Francisco, but not the charges for conveyance from one to another of the three last-mentioned places.

The ship having sailed from Liverpool, was lost with all her cargo, before reaching Colon (Aspinwall) & defts, after receiving notice of the loss paid over to the two other cos. their proportion of the freight, which had been paid by pltfs. Pltfs. having brought an action against defts. for money had & received to recover the proportion of freight so paid over to the two other cos., viz. for the carriage of the goods from Colon (Aspinwall) to Panama, & from Panama to San Francisco:—*Held:* the bill of lading formed one contract between pltfs., & defts. for the conveyance of pltfs.' goods from Liverpool to San Francisco, for one entire consideration, viz. the amount of freight paid & not several contracts between pltfs. & each of the cos.; & therefore, as the consideration for which the freight was paid had not wholly failed, pltfs. could not maintain the action against defts.—GREEVES *v.* WEST INDIA & PACIFIC S.S. CO., LTD. (1870), 22 L. T. 615; 3 Mar. L. C. 426, Ex. Ch.

**2214. —— Land & sea transit—Loss at sea—Lien for inland freight.**]—Goods were carried under a through bill of lading at a through rate to include land & sea transit. Some of the goods were lost during the sea transit, & on delivery of the remainder the shipowner claimed, & was held entitled—to add to the through freight on the quantity delivered the inland charges paid by him to the railway co. on the portion not delivered,

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r. *Liability for loss during transit—Land & sea transit—Whether whole freight apportioned.*]—HAYES *v.* SOUTH WALES RY. (1859), 9 I. C. L. R. 474.—IR.

*Sect.* 3.—*Bills of lading: Sub-sects.* 6 & 7, *A.* (*a*).]

for the joint effect of the through bill of lading, & of the shipowner's regular form of bill of lading incorporated therewith, was to subject the goods not only to a lien in favour of the shipowner in respect of the sea transit, but also to a lien, arising prior to shipment, in favour of the railway co. for the land transit of the whole parcel, which lien, on payment by the shipowner of the proper inland charges to the railway co., was transferred to the shipowner, & could be enforced by him against the goods actually delivered.—THE HIBERNIAN, [1907] P. 277; 76 L. J. P. 122; 97 L. T. 363; 23 T. L. R. 519; 10 Asp. M. L. C. 501, C. A.

*Annotation*:—**Mentd.** County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251.

**2215. —— Bills signed "on behalf of carriers severally but not jointly"—Whether excess freight paid recoverable from all carriers.**]—Certain parcels of hay of which pltf. was consignee were respectively delivered to railway cos. at certain places in the United States of America to be carried to New York, & thence by defts. to London under through bills of lading signed by an agent "on behalf of carriers severally but not jointly." By the terms of the through bills of lading, with respect to the service until delivery at New York all liability under the contract terminated on delivery of the property to the steamship at New York, & the inland freight was a first lien, due & payable by defts.: & with respect to the service after delivery at New York, & until delivery at London, payment of freight was to be made on the gross weight landed from ocean steamship unless otherwise agreed or so provided in the bill of lading, or unless the carriers elected to take the freight on the bill of lading weight. The through freight was made up by the railway cos. in America after the transport rates of defts. had been ascertained:—*Held*: (1) upon the construction of the bills of lading if there was no election to take the bill of lading freight, & defts. demanded too much before the goods could be obtained by pltf., they would be liable to be sued for the return of the excess of freight paid, & would not be entitled to say to pltf. that he must recover from the land carriers in America so much as represented the overcharge for the inland carriage. (2) Upon the facts as pltf. although he objected, had paid the bill of lading, through freight, & had accepted a rebate of the ocean freight only, in all cases where the bill of lading freight was greater than the quantity delivered, he was not entitled to recover the overpayment for inland freight as having been made under a mistake of fact.—KITTS *v.* ATLANTIC TRANSPORT CO., LTD. (1902), 18 T. L. R. 739; 7 Com. Cas. 227.

*Annotation*:—**Refd.** The Hibernian (1906), 95 L. T. 395.

**2216. —— —— Estoppel by conduct.**]—KITTS *v.* ATLANTIC TRANSPORT CO., LTD., No. 2215, *ante*.

**2217. —— ——.**]—CRAWFORD & LAW *v.* ALLAN LINE S.S. CO., LTD., No. 2290, *post*.

**2218. —— When liability attaches—Damage on barge conveying goods to vessel.**]—A through bill of lading provided for the shipment of certain goods from London to Gloversville, United States, & contained a clause of exceptions which included (*inter alia*) damage arising from "rain . . . boilers, tanks, pipes, & steam machinery . . . submerging or sinking of ship or admission of water into the vessel . . . unseaworthiness or unfitness of the vessel at commencement of or before or at any time during the voyage, perils of the sea, rivers, navigation or land transit of whatever nature or kind, & all damage, loss, injury arising from the perils or things above mentioned." At the end of the bill of lading was the following clause: "All the above exceptions & conditions shall apply from the time when the goods come into the possession or custody of the carriers or their agents in warehouse, on wharf, in craft, in course of land or water transit or in any other situation." In an action by the shippers for damage to the goods caused by the unseaworthiness of a barge in which the cargo was conveyed from the wharf to the carrying steamer:—*Held*: the barge was a "vessel" within the meaning of that expression in the bill of lading; the last clause of the bill of lading applied to the barge the earlier provision regarding unseaworthiness; & the shipowners were protected from liability.—WIENER & CO. *v.* WILSONS & FURNESS-LEYLAND LINE, LTD. (1910), 103 L. T. 168; 11 Asp. M. L. C. 413; 15 Com. Cas. 294, C. A.

*Annotations*:—**Refd.** Bank of Australasia *v.* Clan Line Steamers, [1916] 1 K. B. 39; Atlantic Shipping & Trading Co. *v.* Dreyfus, [1922] 2 A. C. 250; Paterson, Zochonis *v.* Elder, Dempster, [1923] 1 K. B. 420.

**2219. —— —— Damage on lighter.**]—Pltfs. shipped a parcel of machinery at New York on board defts.' steamship under a through bill of lading for carriage to Norrköping in Sweden via Hull. By the bill of lading the goods were "to be delivered in like good order & condition at the port of Hull & to be thence transhipped at ship's expense & shipper's risk to the port of Norrköping"; & it was thereby mutually agreed that the carrier should have "liberty to convey goods in craft &/or lighters to & from the steamer at the risk of the owners of the goods" & that he should not be liable "for risk of craft, hulk, or transhipment."

On the arrival of the steamship in Hull defts. hired a lighter & placed the goods therein whilst waiting to be transhipped in another of defts.' steamships for conveyance to Norrköping. The lighter was left unattended in a crowded harbour & part of its planking was rotten, & next day it was found sunk with a hole in its side, apparently made by a boat hook from a neighbouring lighter, with the result that pltfs.' goods were damaged:—*Held*: the damage was caused by the negligence of defts. in placing the goods in an unattended lighter without seeing that it was fit for the purpose, & defts. were not exempted from liability by the terms of the bill of lading.—WILSON (THOMAS) SONS & CO., LTD. *v.* S.S. GALILEO, (CARGO EX), THE GALILEO, [1915] A. C. 199; 83 L. J. P. 102; 111 L. T. 656; 30 T. L. R. 612; 12 Asp. M. L. C. 534; 19 Com. Cas. 459, H. L.

*Annotations*:—**Refd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; Reed *v.* Page & East, [1927] 1 K. B. 743.

**2220. —— Proviso exonerating shipowner after transhipment—Loss during transhipment.**]—Goods shipped on board the *V.*, bound from A. to B., were "to be forwarded at ship's expense & owner's risk" to C. Part was damaged by negligent

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2217 *i*. —— *Bills signed "on behalf of carriers severally but not jointly."*]—HATELY *v.* MERCHANTS DESPATCH TRANSPORTATION CO. (1885), 12 A. R. 201.—CAN.

*t*. —— *Proviso exonerating shipowner after transhipment.*]—PERKINS *v.* MISSISSIPPI & DOMINION S.S. CO., LTD. (1884), 10 P. R. 198.—CAN.

*s*. —— *Limitation of liability of shipowner during sea transit.*]—COYLE *v.* GRAND TRUNK RY. CO., MATTHEWS *v.* GRAND TRUNK RY. CO., [1926] 4 D. L. R. 360; 59 O. L. R. 252.—CAN.

*b*. *Bill of lading for part only of route—Admissibility of parol evidence to extend.*]—Where a co. agreed to carry from Victoria to Yale, & gave a bill of lading for part of the route, *viz.*, from Victoria to New Westminster, parol evidence was admitted to prove

handling in transhipment & part by negligent stowage on the vessels in which the goods were carried to C.:—*Held:* the owners of the *V.* were liable for the first part of the damage & not for the second.—ALLAN BROTHERS & Co. *v.* JAMES BROTHERS & Co. (1897), 3 Com. Cas. 10.

*Annotation:*—**Distd.** The Galileo, [1914] P. 9.

**2221. —— —— Loss after transhipment.**]—ALLAN BROTHERS & Co. *v.* JAMES BROTHERS & Co., No. 2220, *ante.*

**2222. What terms inconsistent with through bill—Liability to cease before completion of transit.**]—MOORE *v.* HARRIS, No. 1708, *ante.*

**2223. —— Notification of arrival clause.**]—A through bill of lading contained the clause "Party to be notified; E. Clemens Horst":—*Held:* (1) the words were words of contract; (2) notification by post would have been sufficient even though the letter did not arrive; (3) a "notification clause" in an ocean bill of lading incorporated by the through bill of lading to the effect that "no claim shall, under any circumstances whatever, attach to the steamer, her owners or agents, for failure to notify consignees of arrival of goods" does not contradict the through bill of lading containing the contract to notify, but relieves the shipowner from liability to pay damages if he fails to carry out the obligation to notify.

(4) Where there is no express contract for a lien for interest on freight it cannot be implied.—E. CLEMENS HORST Co. *v.* NORFOLK & NORTH AMERICAN S.S. Co., LTD. (1906), 22 T. L. R. 403; 11 Com. Cas. 141.

**2224. Notification clause—Amounting to words of contract.**]—E. CLEMENS HORST Co. *v.* NORFOLK & NORTH AMERICAN S.S. Co., LTD., No. 2223, *ante.*

**2225. —— Sufficiency of compliance—Notification by post.**]—E. CLEMENS HORST Co. *v.* NORFOLK & NORTH AMERICAN S.S. Co., LTD., No. 2223, *ante.*

**2226. Contract to carry "all sugar which shippers shall have for shipment" from named port—Effect of issue of through bills of lading.**]—Defts., who owned sugar estates on the river Zambesi, were in the habit of sending sugar from one of their estates down the river in barges to the port of Chinde. It being impossible for ocean-going steamers to load at Chinde owing to a bar, the sugar was carried thence by lighters or coasting steamers to Beira, where it was loaded into ocean-going steamers for carriage to Europe, & bills of lading were issued from that port. By an agreement made between defts., therein called "the shippers," & pltfs., a steamship co., therein called "the owners," the shippers bound themselves to ship & the owners agreed to carry "all the sugar which the shippers shall have for shipment from Beira" to certain specified European ports for a year from the date of the agreement at a certain rate per ton, & the owners undertook to provide a minimum tonnage per month for the shipment, if required. During the currency of the agreement defts. proceeded to send sugar from the estate by a German line to European ports covered by the agreement. The sugar was sent from Chinde to Beira by lighters belonging to the German line, & it was then transhipped into the ocean-going steamers of that line & through bills of lading were issued for the carriage of the sugar from Chinde to the European port. In an action for breach of the agreement:—*Held:* this sugar was sugar which defts. had for shipment from Beira within the meaning of the agreement, notwithstanding the issue of through bills of lading.—UNION CASTLE MAIL S.S. Co. *v.* SENA SUGAR ESTATES, LTD., [1925] A. C. 782; 94 L. J. K. B. 877; 133 L. T. 707; 16 Asp. M. L. C. 542, H. L.

**C.i.f. contract—Necessity to tender bill of lading to cover whole transit—Custom.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 577, 578, Nos. 1811–1814.

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SUB-SECT. 7.—HOW FAR CONCLUSIVE OF RECEIPT OF CARGO.

*A. Quantity Shipped.*

*(a) In General.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), s. 5, Article III.

**2227. Primâ facie evidence.**]—The evidence of the bill of lading would go against the owner, & the larger amount appearing in the bill of lading was strong evidence against him, & the *onus probandi* lay upon him to show that the cases were not shipped, & to discharge the *primâ facie* presumption arising from his own document (KENNEDY, J.).—HARROWING *v.* KATZ & Co. (1893), 10 T. L. R. 115; *affd.* (1894), 10 T. L. R. 400, C. A.; (1895), 12 T. L. R. 66, H. L.

*Annotation:*—**Consd.** Sanday *v.* Strath S.S. Co. (1921), 90 L. J. K. B. 1349.

**2228. ——.**]—SMITH & Co. *v.* BEDOUIN STEAM NAVIGATION Co., No. 2246, *post.*

**2229. ——.**]—Where a bill of lading states that certain goods have been shipped, the shipowner is liable for their non-delivery, unless he can show conclusively that the goods were not shipped in fact.

The shipowner is liable for short delivery to the holder of a bill of lading, unless he can show to the satisfaction of the tribunal trying the case that his agent has signed a bill of lading for goods which were not put on board the ship. The whole burden of proof lies upon the shipowner. Pltf. proves his case by putting in the bill of lading & showing that there was a non-delivery of the quantity mentioned in the bill of lading when he asked for it at the port of destination (LORD ESHER, M.R.).—BENNETT & YOUNG *v.* JOHN BACON, LTD. (1897), 13 T. L. R. 204; 2 Com. Cas. 102, C. A.

*Annotations:*—**Refd.** Hine *v.* Free, Rodwell (1897), 2 Com. Cas. 149; Sanday *v.* Strath S.S. Co. (1921), 90 L. J. K. B. 1349.

**2230. ——.**]—SANDAY *v.* STRATH S.S. Co., No. 2248, *post.*

**2231. Goods or some of them not in fact shipped.**]—GRANT *v.* NORWAY, No. 4524, *post.*

**2232. ——.**]—JESSEL *v.* BATH, No. 1709, *ante.*

**2233. ——.**]—MCLEAN & HOPE *v.* FLEMING, No. 2949, *post.*

**2234. ——.**]—BROWN *v.* POWELL COAL Co., No. 2271, *post.*

**2235. ——.**]—LEDUC *v.* WARD, No. 3172, *post.*

**2236. ——.**]—SMITH & Co. *v.* BEDOUIN STEAM NAVIGATION Co., No. 2246, *post.*

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the agreement to carry as far as Yale.—HAMILTON *v.* HUDSON'S BAY Co. & IRVING & BRIGGS (1884), 1 B. C. R. pt. 2, 1, 176.—**CAN.**

**PART VII. SECT. 3, SUB-SECT. 7.—A. (a).**

**2227 i.** *Primâ facie evidence.*]—The bill of lading is not conclusive evidence as to the amount of cargo shipped.—THE IMMANUEL (OWNERS) *v.* DENHOLM & Co. (1887), 15 R. (Ct. of Sess.) 152; 25 Sc. L. R. 112.—**SCOT.**

**2227 ii.** ——.]—HARROWER WELSH & Co. *v.* M'WILLIAM & SONS, [1928] S. C. 326.—**SCOT.**

**2231 i.** *Goods or some of them not in fact shipped.*]—HOWLAND *v.* BETHUNE (1856), 13 U. C. R. 270.—**CAN.**

**2231 ii.** ——.]—DODS *v.* STEWART (1871), 8 B. L. R. 340; 17 W. R. 49.—**IND.**

*c. Shipment exceeding quantity given in bill of lading—Mistake.*]—MURTON *v.* KINGSTON & MONTREAL FORWARDING Co. (1882), 32 C. P. 366.—**CAN.**

*Sect.* 3.—*Bills of lading: Sub-sect.* 7, *A.* (*a*) & (*b*), & *B.*]

**2237.** ——.]—Where a bill of lading states that certain goods have been shipped, the shipowner is not liable for their non-delivery if he can show that the goods were not shipped in fact.—HINE BROTHERS *v.* FREE, RODWELL & CO., LTD. (1897), 2 Com. Cas. 149.

**2238.** —— **Fraud of shipper's agent.**]—A bill of lading is not conclusive between the shippers of the goods, & the owners of the ship; but the owners may show that less goods than specified in the bill of lading were shipped, the master, who signed the bill of lading, having been misled by the fraud of the agent of the shippers.—BATES *v.* TODD (1831), 1 Mood. & R. 106, N. P.

**2239.** —— **Knowledge of shipper's agent.**]—Declaration, in *assumpsit*, stated that defts. W. & N. were owners of a ship; that, in consideration that pltf. at their request shipped goods on board to be delivered to him, W. & N. promised to deliver: breach, non-delivery. N. pleaded separately, & traversed the shipment. On the trial, pltf. produced a bill of lading, signed by the captain of the ship, transmitted to pltf. by W., stating the goods to be shipped by W., to be delivered to pltf. or his assigns. Proof also was given to show that pltf. held the bill for value. W. was the managing owner:—*Held:* N. might produce evidence that the goods were not shipped in fact, & was not estopped by the bill of lading, supposing such estoppel to exist in general, inasmuch as pltf. could support his issue only by making W. his agent, & if W. was so, pltf. was cognisant, through him, of the fact.—BERKLEY *v.* WATLING (1837), 7 Ad. & El. 29; Will. Woll. & Dav. 429; 2 Nev. & P. K. B. 178; 6 L. J. K. B. 195; 1 Jur. 378; 112 E. R. 382.

*Annotations:*—**Reld.** Thompson *v.* Dominy (1845), 14 M. & W. 403; Grant *v.* Norway (1851), 10 C. B. 665.

**2240.** —— **Loss at time of loading.**]—A charterparty provided that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received. The cargo, timber, was floated alongside the vessel, & receipts by the mate then given for the same. Part of the cargo was lost by perils of the sea before shipment. The loss was notified by the master to the agent of the charterer; but, at the latter's request, the master was induced to sign bills of lading for the whole quantity of timber received alongside:—*Held:* the charterer had no claim against the shipowner in respect of the difference between the amount of cargo received alongside, & the amount shipped on board.—PYMAN *v.* BURT (1884), Cab. & El. 207.

*Annotations:*—**Dbtd. & Distd.** Lishman *v.* Christie (1887), 19 Q. B. D. 333. **Expld.** Crossfield *v.* Kyle Shipping Co., [1916] 2 K. B. 885.

**2241.** —— ——.]—THORMAN *v.* BURT, BOULTON & CO., No. 2272, *post.*

**2242.** —— **Signature by ship brokers.**]—Ship brokers who signed a false bill of lading for goods not shipped, found liable in damages.—FOURCHON *v.* REDHEAD (1839), 4 L. T. 341.

**Effect of qualification of statement as to cargo.**]—*See* Sub-sect. 7, D., *post.*

(*b*) *Onus of Proof.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), s. 5, Article III.

**2243. On shipowner.**]—If a cargo weighing a certain weight be delivered to a carrier to be carried & when the cargo arrives at its destination, the weight be deficient, this is evidence from which a jury may infer negligence in the carrier; & if the deficiency did not arise from the negligence of the carrier it is incumbent on him to show that.—HAWKES *v.* SMITH (1842), Car. & M. 72, N. P.

**2244.** ——.]—ELLIOTT, LOWREY & CO. *v.* DOBELL (1887), 3 T. L. R. 691, C. A.

**2245.** ——.]—HARROWING *v.* KATZ & CO., No. 2227, *ante.*

**2246.** ——.]—A shipowner is bound to deliver the full amount of goods signed for by the master in a bill of lading, unless he can prove that the whole or some part of it was in fact not shipped.

In an action for freight for the conveyance of 1,000 bales of jute against applts., onerous indorsees of the bills of lading, applts. claimed to retain the value of 12 bales short delivered of the 1,000 shown by the bills of lading signed by the master to have been shipped at the port of loading. There was no clear evidence as to how or where the missing bales had disappeared:—*Held:* there was nothing to displace the evidence supplied by the bills of lading that the missing bales had been received on board the vessel, & applts. were entitled to the deduction claimed by them.

The bill of lading founded on the other documents . . . was *primâ facie* evidence in favour of applt. which threw upon the resp. the onus of displacing it by evidence that the full quantity of the goods was not in fact shipped (LORD DAVEY).—SMITH & CO. *v.* BEDOUIN STEAM NAVIGATION CO., [1896] A. C. 70; 65 L. J. P. C. 8; 12 T. L. R. 65, H. L.

*Annotations:*—**Consd.** Bennett & Young *v.* Bacon (1896), 13 T. L. R. 16. **Distd.** New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664. **Consd.** Sanday *v.* Strath S.S. Co. (1921), 90 L. J. K. B. 1349. **Folld.** North Shipping Co. *v.* Rank (1926), 136 L. T. 415. **Reld.** Hine *v.* Free, Rodwell (1897), 2 Com. Cas. 149; Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534.

**2247.** ——.]—BENNETT & YOUNG *v.* JOHN BACON, LTD., No. 2229, *ante.*

**2248.** ——.]—In an action against a shipowner for short delivery of cargo the owner of the cargo must succeed if he proves the delivery of a less number, weight, or measure of goods than that admitted on the bill of lading unless the shipowner can establish that the number, weight, or measure admitted on the bill of lading is wrong. The shipowner can discharge the *onus* which is upon him either by direct evidence showing that a mistake has been made in the tallies from which the bill of lading is made out, or by indirect evidence showing beyond reasonable doubt that none of the goods were lost or stolen after receipt by him & that he has delivered all received.—SANDAY *v.* STRATH S.S. CO. (1921), 90 L. J. K. B. 1349; 125 L. T. 557; 37 T. L. R. 665; 15 Asp. M. L. C. 280; 26 Com. Cas. 277, C. A.

*Annotation:*—**Consd.** North Shipping Co. *v.* Rank (1926), 136 L. T. 415.

**2249.** ——.]—A charterparty contained clauses which provided that bills of lading should be signed in accordance with mate's receipts, & "quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless error or fraud can be proved." The ship loaded a full & complete cargo of sugar in bags including a parcel of sugar marked "San Lino," in respect of which the mate gave a receipt for 2,860 bags in accordance with the tallies & the captain signed a bill of lading for 2,860 bags. When the ship was discharged the out turn tallies showed only 2,677 bags of sugar of the "San Lino" mark, & claimants, who were



2243. *On shipowner.*]—JONES & CO., LTD. *v.* NEW ZEALAND SHIPPING CO. (1916), 12 Tas. L. R. 113.—AUS.

4. *On party claiming for deficiency.*]—WAH LEE *v.* CANADIAN PACIFIC RY. CO. (B. C.) (1927), 33 Can. Ry. Cas. 77.—CAN.

the charterers & consignees of the sugar, claimed against the shipowners in respect of the shortage of 183 bags. On reference to arbn. no attempt was made to prove by direct evidence that any error had arisen in making out the bill of lading, or that the tallies were inaccurate, or that they had been wrongly cast, or that entries had been duplicated, or that they contained mistakes of any kind. The arbitrator found that all the bags of sugar shipped under the mark "San Lino" were discharged & that there was no evidence to show how the discrepancy between the bill of lading number & the out turn number arose. The shipowners contended that an "error," within the meaning of the conclusive evidence clause, had been proved by, or might be inferred from, evidence that all the sugar shipped had been discharged:—*Held:* it was for the shipowners to prove that they came within the condition or limitation in the conclusive evidence clause upon which they relied, & in order to do so it was not enough for them to give evidence from which it might be inferred that a mistake had been made in the bill of lading; there must be actual proof of a mistake to show how the discrepancy arose.—SUGAR SUPPLY COMMISSION *v.* HARTLEPOOLS SEATONIA S.S. Co., [1927] 2 K. B. 419; 96 L. J. K. B. 959; 137 L. T. 791; 43 T. L. R. 542; 32 Com. Cas. 300.

**2250. Discharge of onus—Direct evidence—Mistake in tallies.**]—SANDAY *v.* STRATH S.S. Co., No. 2248, *ante.*

**2251. —— Indirect evidence—No goods lost or stolen.**]—SANDAY *v.* STRATH S.S. Co., No. 2248, *ante.*

**2252. —— —— —— Natural shrinkage.**]—Shipowners are bound to deliver their cargo according to weights & quantities specified in the bills of lading, but where they claim for freight & there is a counterclaim for short delivery, they can avoid the weights & quantities specified in the bills of lading by showing that what was shipped was delivered & that no loss occurred in transit other than what can be accounted for by natural shrinkage.—NORTH SHIPPING CO., LTD. *v.* RANK (JOSEPH), LTD., (1926) 136 L. T. 415; 43 T. L. R. 82; 17 Asp. M. L. C. 189.

**2253. —— Necessity for conclusive proof of mistake.**]—SUGAR SUPPLY COMMISSION *v.* HARTLEPOOLS SEATONIA S.S. Co., No. 2249, *ante.*

*B. Quality and Condition.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article III.

**2254. Quality—Distinguished from condition.**]—(1) The words "shipped in good order & condition" in a bill of lading are not words of contract in the sense of a promise, but are in the nature of an affirmation of fact.

(2) Where goods are shipped in apparent damaged condition, & the bill of lading states that they are "shipped in good order & condition," though the incorrect statement cannot be sued upon directly as a breach of contract, the shipowner, who is bound by the master so signing the bills of lading, is estopped from denying the condition of the goods so stated if, on the strength of such statement, the indorsee of the bill of lading has acted to his prejudice.

(3) The addition of the words "quality & measure unknown" in the bill of lading do not in effect strike out the words "good order & condition."

(4) "Condition" refers to external & apparent condition; "quality" to that which is not usually apparent, at any rate, to an unskilled person.

(5) A master of a ship is expected to notice the apparent condition, though not the quality, of goods shipped on his vessel.

(6) Though a charterparty provides a form of the bill of lading to be used which contains the words "shipped in good order & condition" & "quality & measure unknown," the master is not bound to make an untrue statement in the bills of lading.

(7) Where an indorsee, who has acted on the strength of such an untrue statement in the bill of lading, has taken delivery of damaged goods not in accordance with his contract with the shippers, a foreign solvent firm, & has obtained an award against them in respect of the depreciation of the goods, it is not necessary for the indorsee to sue on the award before suing the shipowner.—COMPANIA NAVIERA VASCONZADA *v.* CHURCHILL & SIM, SAME *v.* BURTON & Co., [1906] 1 K. B. 237; 75 L. J. K. B. 94; 94 L. T. 59; 54 W. R. 406; 22 T. L. R. 85; 50 Sol. Jo. 76; 10 Asp. M. L. C. 177; 11 Com. Cas. 49.

*Annotations:—As to* (2) **Folld.** Martineaus *v.* Royal Mail Steam Packet Co. (1912), 106 L. T. 638. **Apprvd.** Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. **Reid.** Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534; New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664. *As to* (4) **Consd.** The Tromp, [1921] P. 337.

**2255. Duty of master to notice condition.**]—COMPANIA NAVIERA VASCONZADA *v.* CHURCHILL & SIM, SAME *v.* BURTON & Co., No. 2254, *ante.*

**2256. Insertion of wrong quality marks—Whether binding on owners.**]—A bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision: "If quality marks are used, they are to be of the same size as the leading marks & contiguous thereto, &, if such quality marks are inserted in the shipping notes, & the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, & the ship be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions, specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks & more marked with another of such marks indicating an inferior quality than stated in the bill of lading:—*Held:* on the above facts, an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading.—COX *v.* BRUCE (1886), 18 Q. B. D. 147; 56 L. J. Q. B. 121; 57 L. T. 128; 35 W. R. 207; 3 T. L. R. 167; 6 Asp. M. L. C. 152, C. A.

*Annotations:*—**Reid.** Parsons *v.* New Zealand Shipping Co., [1901] 1 K. B. 548; Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237.

**2257. Goods stated to be in apparent good order & condition.**]—A number of bags of zinc ashes

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PART VII. SECT. 3, SUB-SECT. 7.—B.

**2255 1.** *Duty of master to notice condition.*]—MADHUR CHUNDER DEY *v.* LAW (1874), 13 B. L. R. 394.—IND.

**2257 1.** *Goods stated to be in apparent good order & condition.*]—COURT (GEO.) & SON, LTD. *v.* THE PIAKO, [1923] N. Z. L. R. 911.—N.Z.

**e.** *Condition—Prima facie evidence.*]—CHAPMAN *v.* ZEALAND (1874), 24 C. P. 421.—CAN.

**f.** —— ——.]—RONNE *v.* MON-

*Sect. 3.—Bills of lading: Sub-sect. 7, B. & C. (a) & (b).]*

were shipped on board a vessel at Buenos Aires for carriage to Liverpool. Some of the bags had been wetted by rain before shipment & the upper layers of bags in one of the holds became heated. The shipowners gave a bill of lading stating that the bags were shipped in apparent good order & condition.

The master of the vessel, fearing damage to the ship & other cargo, discharged most of the bags at Buenos Aires & placed them in a warehouse; & after unnecessary delay they were reconditioned & reshipped on another vessel & forwarded to their destination at an expenditure of £748. The goods arrived at Liverpool three months after the arrival of the first vessel. In the meantime the value of zinc ashes had fallen. The bill of lading was indorsed to pledgees, who on the faith thereof made an advance to the shipper. When the second vessel arrived the indorsees presented the bill of lading, & paid the freight &, under protest, the £748, for which the shipowners claimed a lien on the cargo. In an action by the indorsees against the shipowners for damages for delay in forwarding the good & for repayment of the £748:—*Held:* (1) although pltfs., not being indorsees of the bill of lading to whom the property in the goods passed within Bills of Lading Act, 1855 (c. 111), s. 1, could not sue on the contract contained therein, yet from the acts of presentation of the bill of lading, payment of the freight, & delivery & acceptance of goods specified in the bill of lading, there might & ought to be inferred a contract between the parties to deliver & accept the goods according to the terms of the bill of lading; (2) defts. were estopped from denying that the goods were shipped in apparent good order & condition, &, as the wetting which caused the delay did not occur after shipment, they were liable in damages for the delay unless they were excused by the conditions in the bill of lading; (3) pltfs. were entitled to recover the amount paid to defts. under protest, inasmuch as they were precluded by the estoppel from showing the only cause there was for discharging, warehousing, & reconditioning the goods.—BRANDT *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD., [1924] 1 K. B. 575; 93 L. J. K. B. 646; 130 L. T. 392; 16 Asp. M. L. C. 262; 29 Com. Cas. 57, C. A.

**Effect of qualification of statement as to cargo.**]—*See* Sub-sect. 7, D., *post.*

*C. Provision that Bill be Conclusive.*

*(a) Provision in Charterparty or Bill of Lading.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article V.

**2258. Loss before shipment—Signature at charterer's request.**]—PYMAN *v.* BURT, No. 2240, *ante.*

**2259. —— Signature at request of agent of ship's broker.**]—Defts. chartered pltf.'s ship for the carriage of a cargo of timber from Memel. The charterparty provided that the ship should there load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to & taken from alongside the ship at merchants' risk & expense, & that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. There was a custom at Memel, which, however, did not apply to charterparties in the form of the above-mentioned charterparty, that the captain should take delivery of the timber to be shipped at timber ponds up the river at some distance from the ship, the timber being then rafted down by fishermen to the ship, but being at the shipowner's risk during the process. The captain of pltf.'s ship, on her arrival at Memel, not being aware of the provisions of the charterparty, allowed the mate to give receipts for the cargo at the timber ponds. Part of the timber included in such receipts was lost during the process of rafting the timber down to the ship, owing to the force of the current. The captain, having become aware of such loss & of the provisions of the charterparty, stated to the agent at Memel of the shippers, who had sold the timber to defts., that he did not see his way to signing clean bills of lading for the full quantity mentioned in the mate's receipts, a portion of the timber having been lost; but on being told by such agent & a clerk of the ship's brokers that he was bound to sign clean bills of lading for the full quantity, he did so. The bills of lading stated that such quantity was shipped in good order & well conditioned to be delivered on payment of freight & all other conditions as per charterparty. In an action for balance of chartered freight defts. counterclaimed in respect of short delivery of cargo:—*Held:* the bills of lading estopped pltf. from denying that the full amount of cargo stated therein was shipped.—LISHMAN *v.* CHRISTIE (1887), 19 Q. B. D. 333; 56 L. J. Q. B. 538; 57 L. T. 552; 35 W. R. 744; 3 T. L. R. 710; 6 Asp. M. L. C. 186, C. A.

*Annotations:*—**Followed.** Crossfield *v.* Kyle Shipping Co., [1916] 2 K. B. 885. **Distd.** Hogarth Shipping Co. *v.* Blythe, Greene, Jourdain, [1917] 2 K. B. 534. **Refd.** The Nifa, [1892] P. 411; Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70.

**2260. ——.**]—By a charterparty it was agreed that the bills of lading should be "conclusive evidence against the owners of the quantity of cargo shipped on board as stated therein." The master signed bills of lading for a quantity of cargo which included not only the cargo actually shipped but also cargo which had been received by the shipowners' agents alongside the vessel & had been lost before being put on board. In an action by the consignees against the shipowners for the value of the cargo so lost:—*Held:* the consignees were entitled to recover.—FISHER, RENWICK & CO. *v.* CALDER & CO. (1896), 1 Com. Cas. 456.

*Annotation:*—**Consd.** Crossfield *v.* Kyle Shipping Co., [1916] 2 K. B. 885.

**2261. ——.**]—THIN *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD., No. 2187, *ante.*

**2262. ——.**]—The sellers of timber in New Brunswick chartered defts.' ship for the carriage of a cargo of timber to Manchester. The charterparty provided that "all responsibility of charterers hereunder ceases as soon as the cargo is alongside . . . captain or agent to sign bills of lading as per surveyors' return for the cargo . . . bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The charterparty contained an exception of perils of the sea. The timber was brought down to the ship on lighters, &

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TREAL S.S. Co. (1886), 19 N. S. R. 7 R. & G.) 312; 7 C. L. T. 375.—CAN.

f. —— ——.]—A clean bill of lading is *prima facie* evidence that the goods were shipped in the condition therein described.—BIBBY BROTHERS *v.* COWIE (C. R.) & CO. (1923), I. L. R. 1 Ran. 146.—IND.

h. *Omission of usual words "in good order"—Whether receipt in good order & condition implied—By undertaking to deliver "in like good order."*]—MADSEN *v.* SCOTT (1899), 16 S. C. 385.—S. AF.

through rough weather a portion of it was washed overboard from the lighters & lost. The captain's agent signed bills of lading for the timber, in which the full quantity as per surveyors' return was described as "shipped on board." All the timber actually placed on board was delivered at Manchester. Pltfs., who were the indorsees of the bills of lading, sued defts. for short delivery:—*Held:* the bills of lading estopped defts. from denying that the full amount of cargo stated therein was shipped.—CROSSFIELD & Co. *v.* KYLE SHIPPING CO., LTD., [1916] 2 K. B. 885; 85 L. J. K. B. 1310; 115 L. T. 285; 13 Asp. M. L. C. 410; 22 Com. Cas. 67, C. A.

**2263. Different classes of goods—Short delivery of one class—Over delivery of another.**]—MEDITERRANEAN & NEW YORK S.S. CO. *v.* MACKAY, No. 4904, *post.*

**2264. Goods in bags—Whether conclusive as to weight or contents—As well as to number.**]—SIMMONDS *v.* ROSE (1893), 10 T. L. R. 125, D. C.

2265. —— —— ——.]—By charterparty, it was provided that a steamer should load a cargo of sugar in bags & proceed to one of several named ports & there deliver it. A clause of the charterparty provided: "The captain to sign eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, & their conditions to form part of this charterparty." The captain signed a bill of lading for a specified number of bags of sugar, one of the exceptions & conditions of the bill of lading being "weight, measure, quality, contents & value unknown"; the bill of lading also contained the clause "freight & all other conditions & exceptions as per charterparty." At the port of discharge there was a shortage in the number of bags of sugar, but evidence was given that all the bags placed on board had been delivered. The judge held that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles & not as to their contents:—*Held:* the conclusive evidence clause of the charterparty was not incorporated in the bill of lading, & the shipowners were not estopped from showing that all the bags of sugar shipped on board had been in fact delivered.—HOGARTH SHIPPING CO., LTD. *v.* BLYTH, GREENE, JOURDAIN & CO., LTD., [1917] 2 K. B. 534; 86 L. J. K. B. 1426; 117 L. T. 290; 33 T. L. R. 429; 61 Sol. Jo. 544; 14 Asp. M. L. C. 124; 22 Com. Cas. 334, C. A.

*Annotation:*—**Refd.** New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664.

**2266. Whether sufficiently incorporated in bill of lading.**]—LOHDEN (J.) & CO. *v.* CALDER (C.) & CO. (1898), 14 T. L. R. 311.

*Annotation:*—**Consd.** Crossfield *v.* Kyle Shipping Co., [1916] 2 K. B. 885.

2267. ——.]—HOGARTH SHIPPING CO., LTD. *v.* BLYTH, GREENE, JOURDAIN & CO., LTD., No. 2265, *ante.*

2268. —— **Express incorporation.**]—A bill of lading was signed in respect of 284, 690 pieces of pitprops measuring 55,782·32 cubic feet to be delivered in right number of pieces, on payment of freight at 9*s.* 6*d.* "for every load of 50 English cubic feet & all other conditions as per charterparty." The bill of lading contained the following clause: "responsible for number of pieces, but not for quality & measure." By the charterparty it was provided that the cargo was to be delivered at the rate of 9*s.* 6*d.* "for every intaken load of 50 English cubic feet," & that bills of lading were to be conclusive evidence against the owners as to the quantity of cargo shipped. At the port of discharge an excess number of pieces beyond that specified in the bill of lading was delivered. In a question between the consignees of the cargo & the shipowners:—*Held:* the conditions in the charterparty as to freight being payable at 9*s.* 6*d.* on every intaken load were incorporated in the bill of lading, & therefore freight was only payable on the number of pieces specified in the bill of lading.—OOSTZEE STOOMVART MAATS *v.* BELL & HARRISON (1906), 22 T. L. R. 643; 11 Com. Cas. 214.

*(b) Statutory Provision.*

*See* Bills of Lading Act, 1855 (c. 111), s. 3; Carriage of Goods by Sea Act, 1924 (c. 22), Article III. (5).

**2269. Application restricted to person signing.**]—JESSEL *v.* BATH, No. 1709, *ante.*

2270. —— **Master part owner.**]—MEYER *v.* DRESSER, No. 4366, *post.*

2271. —— **Or on whose behalf signed.**]—By a charterparty for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charterparty." On arrival at the port of discharge it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, & the owners were called upon to pay, & paid, the difference of value to the consignees. In an action by the owners against the charterers to recover the amount paid:—*Held:* (1) inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, 1855 (c. 111), to pay for such deficiency, the action was not maintainable. (2) A shipowner is not estopped by the signature of the bill of lading by the master from showing that the goods or some of them were never actually put on board.—BROWN *v.* POWELL COAL CO. (1875), L. R. 10 C. P. 562; 44 L. J. C. P. 289; 32 L. T. 621; 23 W. R. 549; 2 Asp. M. L. C. 578.

2272. —— ——.]—To an action for freight by a shipowner against the indorsees of the bill of lading, defts. counterclaimed in respect of short delivery. All the goods that were actually put on board had been delivered to them; but the bill of lading acknowledged the receipt of a larger quantity. All the goods mentioned in the bill of lading had been floated alongside the ships in rafts, & mate's receipts given for them; but some of them were lost before they were shipped. The bill of lading was signed, "By authority of the captain, G. as agent." G. was the ship's broker at the shipping port:—*Held:* apart from Bills of Lading Act, 1855 (c. 111), a bill of lading is not conclusive against a shipowner, & he is not liable in respect of any goods not actually shipped; &, in the present case, he was not liable under that

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**PART VII. SECT. 3, SUB-SECT. 7.—C. (b).**

2271 i. *Application restricted to person signing—Or on whose behalf signed.*]—Goods Act, 1915, s. 72, provides that "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped shall be in all civil proceedings conclusive evidence of such shipment against the master or other person signing the same notwithstanding that such goods or some part thereof were not so shipped":—*Held:* the sect. operates only against the person who has actually signed a bill of lading or the person in whose name & with whose authority it has been signed & does not make a bill of lading which has been signed by the agent of the shipowner in his own name conclusive evidence against the shipowner.—ROSENFELD, HILLAS & CO., PROPRIETARY, LTD. *v.* THE FORT LARAMIE (1922), 31 C. L. R. 56.—**AUS.**

k. *Application restricted to masters & consignees.*]—33 Vict. c. 19, s. 3, making a bill of lading conclusive

*Sect. 3.—Bills of lading: Sub-sect. 7, C. (b) & D.*]

Act, as the bill of lading was not signed by or for him.—THORMAN *v.* BURT, BOULTON & Co. (1886), 54 L. T. 349; 2 T. L. R. 367; 5 Asp. M. L. C. 563, C. A.

**2273. Exclusion of provision—Fraud of shipper.**]—A bill of lading represented a larger number of bales to have been shipped on board a vessel than were really shipped. This arose from the mistake of the mate, which there was some evidence to show was caused by the fraud of the person who put the goods on board. The latter was either agent of the person named as shipper in the bill of lading or his vendor:—*Held:* there was evidence to go to a jury that the misrepresentation was caused "wholly by the fraud of the shipper or of the holder, or some person under whom the holder claimed," within the meaning of the Bills of Lading Act, 1855 (c. 111), s. 3.—VALIERI *v.* BOYLAND (1866), L. R. 1 C. P. 382; 35 L. J. C. P. 215; 14 L. T. 362; 12 Jur. N. S. 566; 14 W. R. 637; 2 Mar. L. C. 336.

*Annotation:*—**Refd.** Pyman *v.* Burt (1883), Cab. & El. 207.

**2274. —— Mistake in bill of lading.**]—BLANCHET *v.* POWELL'S LLANTIVIT COLLIERIES Co., No. 4839, *post.*

**2275. —— Incorrect marking—"Goods marked as in margin"—Delivery of goods otherwise marked.**]—By a bill of lading signed by the shipowners' agents goods shipped for carriage from New Zealand to London were described as a certain number of frozen carcases of lambs "marked & numbered as in the margin." The carcases were described in the margin of the bill of lading as bearing a certain mark & a number consisting of three figures. The mark indicated the quality of the carcase as being of a particular brand; one figure of the number indicated approximately its weight; & the other two figures of the number were private marks of the shippers which indicated certain particulars with regard to the carcase for their own purposes, but had no bearing on the nature, quality or commercial value of the goods. The bill of lading contained a clause stating that the ship would not be responsible for correct delivery unless each package was distinctly, correctly & permanently marked by the merchant before shipment with a mark & number or address. The mark & number mentioned in the margin in the bill of lading were inserted by the shippers. On the discharge of the ship in London it was found that a portion of the carcases in fact shipped under the bill of lading bore a mark & number which corresponded with the description in the margin of the bill of lading as regards the mark, & the figure indicating weight but which differed from that description as regards one of the figures forming the private marks of the shippers. An indorsee of the bill of lading for valuable consideration refused to take delivery of these carcases as forming part of his shipment, & sued the shipowners' agents for short delivery, relying on the provisions of Bills of Lading Act, 1855 (c. 111), s. 3:—*Held:* the action was not maintainable.

The case came within the clause of the bill of lading which exonerated the ship from responsibility for correct delivery unless the goods were correctly marked & numbered (A. L. SMITH, M.R.).—PARSONS *v.* NEW ZEALAND SHIPPING Co., [1901] 1 K. B. 548; 70 L. J. K. B. 404; 84 L. T. 218; 49 W. R. 355; 17 T. L. R. 274; 9 Asp. M. L. C. 170; 6 Com. Cas. 41, C. A.

*D. Effect of Qualifications of Statements as to Cargo.*

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22).

**2276. Bill of lading no longer conclusive.**]—A bill of lading, signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee.—HADDOW *v.* PARRY (1810), 3 Taunt. 303; 128 E. R. 120.

*Annotations:*—**Refd.** The Ida (1873), 29 L. T. 623, n.; Tully *v.* Terry (1873), 29 L. T. 36. **Mentd.** Middleton *v.* Melton (1829), 10 B. & C. 317.

**2277.** ——.]—JESSEL *v.* BATH, No. 1709, *ante.*

**2278.** ——.]—A bill of lading for antimony oxide ore stated that 937 tons had been shipped on board; in the margin was a typewritten clause: "A quantity said to be 937 tons," & in the body of the bill of lading was printed in ordinary type the clause: "weight, measurement, contents & value, except for the purpose of estimating freight, unknown":—*Held:* the bill of lading was not even *primâ facie* evidence of the quantity of ore shipped, & in an action against the shipowners for short delivery the *onus* was upon pltfs. of proving that 937 tons had in fact been shipped.—NEW CHINESE ANTIMONY Co., LTD. *v.* OCEAN S.S. Co., LTD., [1917] 2 K. B. 664; 86 L. J. K. B. 1417; 117 L. T. 297; 14 Asp. M. L. C. 131; 23 Com. Cas. 1, C. A.

*Annotation:*—**Folld.** North Shipping Co. *v.* Rank (1926), 136 L. T. 415.

**2279. Qualification relating to weight & contents—Specific statement as to weight & contents.**]—Bags of meal, 1,670 in number, all marked S.S.C.M., some weighing 12 stones, some 8 stones, were shipped on board deft.'s ship, & stowed indiscriminately. Deft., the master, signed two bills of lading in respect of two different portions of this cargo, one of which described the property intended to pass under it thus: "467 bags meal, gross 35 tons 9 cwt., under the subjoined marks, S.S.C.M." It also added, "Contents unknown, & not responsible for weight," etc.:—*Held:* under this bill of lading the defendant was bound to deliver 467 of the 12 stone bags, as the description of the

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evidence of the shipment of goods as represented therein, does not apply to cases between masters of vessels & owners of goods, but only between masters & consignees or indorsees for value.—ALLEN *v.* CHISHOLM (1873), 33 U. C. R. 237.—CAN.

1. *Whether statutory provision renders bill conclusive.*]—Notwithstanding Mercantile Law Act, 1880, s. 23 (sect. 15 of Act of 1908), a representation contained in a bill of lading that the goods therein specified have been shipped is not conclusive evidence of the fact, & the shipowner is entitled to show that the goods were not in fact shipped.—ROWE & SONS, LTD. *v.* UNION S.S. Co. OF NEW ZEALAND, LTD. (1909), 29 N. Z. L. R. 97.—N.Z.

**PART VII. SECT. 3, SUB-SECT. 7.—D.**

**2276 i.** *Bill of lading no longer conclusive.*]—A bill of lading purporting to be for fifty tons of coal & containing a printed clause, "weight, contents, & value unknown," & similar words written above the signature of the master, does not amount to an admission by the master that he has received fifty tons of coal on board. Upon the true construction of Bills of Lading Act, 1856, s. 3, a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the master of the shipment of fifty tons.—NICOL & Co. *v.* CASTLE (1872), 9 Bom. 331.—IND.

**2276 ii.** ——.]—CRAIG LINE S.S. Co. *v.* NORTH BRITISH STORAGE & TRANSIT Co., S.S. CRAIGFORTH, [1921] S. C. 114; 58 Sc. L. R. 132; [1920] 2 S. L. T. 418.—SCOT.

**2279 i.** *Qualification relating to weight & contents—Specific statement as to weight & contents.*]—Where a bill of lading contained the words, "weight & contents unknown":—*Held:* the owner of the goods covered by it had

weight given in the bill of lading could only be satisfied by all the bags delivered being of the larger size.

It may be that the weight of those bags would not be exactly that mentioned in the bill of lading, & that the provision in the memorandum would protect the captain from being responsible if the bags were not full weight; but the mention of the weight in the contract is important, for the purpose of indicating to which bags the contract applied (WIGHTMAN, J.).—BRADLEY *v.* DUNIPACE (1862), 1 H. & C. 521; 32 L. J. Ex. 22, Ex. Ch.

*Annotations:*—**Consd.** Parsons *v.* New Zealand Shipping Co., [1901] 1 K. B. 548. **Mentd.** Spence *v.* Union Marine Insce. (1868), 37 L. J. C. P. 169.

**2280. —— —— Effect of qualification on erroneous statement.**]—LEBEAU *v.* GENERAL STEAM NAVIGATION CO., No. 1891, *ante*.

**2281. —— Liability for loss—Necessity for proof of shipment.**]—THE LEITH, BRIDREGOS *v.* GENERAL STEAM NAVIGATION CO. (1854), 3 L. T. 481.

**2282. Qualification relating to quantity & quality—Right to freight on invoice quantity.**]—*The Avoca* was chartered to ship a cargo of grain at Ibraila & deliver at a port in the United Kingdom on being paid freight, "7*s.* per imperial quarter delivered," & in event of any part of the cargo being delivered in a damaged condition, the freight should be payable "on the invoice quantity taken on board as per bill of lading, or half freight on the damaged or heated portion, at the captain's option." The cargo was shipped under a bill of lading, describing the quantity as 1,021 kilos., & the captain before signing the bill of lading added a memorandum, "quantity & quality unknown." The captain, on his arrival at a port in England, having experienced bad weather, gave notice to the indorsee of the bill of lading that he claimed to exercise the option given to him by the charter-party, & requested to be paid freight on the invoice quantity:—*Held:* the addition of the memorandum to the bill of lading, "quantity & quality unknown," did not take away the captain's right to be paid freight on the invoice quantity taken on board.—TULLY *v.* TERRY (1873), L. R. 8 C. P. 679; 42 L. J. C. P. 240; 29 L. T. 36; 2 Asp. M. L. C. 61.

**2283. —— Statement that cargo shipped in good order & well conditioned—Onus of proof as to damage.**]—In a suit against shipowners for damage to cargo the *onus* is upon pltfs. to show in the first instance that the goods were shipped in good order & condition before they can call upon the shipowners to show excuse for the injury done to the goods.

A bill of lading stating that goods were shipped in good order & condition, but also containing an indorsement by the master, "quantity & quality unknown," does not admit, as against the shipowners, that the goods were shipped in good order & condition.

Evidence of the condition of goods on delivery tending to show that the damage sustained could not be accounted for by any damage existing at the time of shipment, & that such damage, had it existed, must have been noticed by the master or officer in charge of the ship at the time of shipment, will not, where goods are shipped under a bill of lading indorsed "quantity & quality unknown," satisfy the *onus* cast upon pltfs. seeking to recover against shipowners for damage to the goods. Positive evidence of the condition of the goods when shipped must be given.—THE PROSPERINO PALASSO (1873), 29 L. T. 622; 2 Asp. M. L. C. 158.

*Annotation:*—**Dbtd. & N.F.** The Ida (1875), 32 L. T. 541.

**2284. —— —— ——.**]—A bill of lading, stating goods to have been shipped in good order & condition, but indorsed by the master with the words "quality & quantity unknown" does not admit as against the shipowner that the goods were shipped in good order & condition.

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order & condition, but containing the words "quantity & quality unknown" is bound to show that the goods were shipped in good order & condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to show that the damage which it sustained is traceable to causes for which the shipowner is responsible.—THE IDA (1875), 32 L. T. 541; 2 Asp. M. L. C. 551, P. C.

*Annotations:*—**Reld.** Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237; New Chinese Antimony Co. *v.* Ocean S.S. Co. (1917), 86 L. J. K. B. 1417.

**2285. —— ——.**]—COMPANIA NAVIERA VASCONZADA *v.* CHURCHILL & SIM, SAME *v.* BURTON & CO., No. 2254, *ante*.

**2286. —— ——.**]—A master signing a bill of lading in which it is stated that the goods were "shipped in good order & condition" but which contained a memorandum of "weight, contents

condition & if they arrive damaged the *onus* lies upon the shipowner to excuse himself from the damage.—THE PETER DER GROSSE (1876), 34 L. T. 749; 3 Asp. M. L. C. 195, C. A.

*Annotation:*—**Consd.** Crawford & Law *v.* Allan Line S.S. Co., [1912] A. C. 130.

**2287. —— ——.**]—A cargo of sugar in bags was shipped at a Mexican port for carriage to London. At the time of shipment the bags were in such a state that the mate made the following note on the receipt given by him:—"Very wet & stained by contents." The bills of lading signed by the master stated that the goods were "shipped in apparent good order & condition"; they also contained the following clause: "Weight, contents . . . unknown." When the vessel arrived in London it was found that the bags were much stained & the contents damaged, partly by moisture, partly by the leakage of moisture, through red marks on the bags which had, because of the moisture, stained the sugar. This damage was due, the judge found, to the sugar having been externally damaged before shipment, by water both fresh & salt. Pltfs., who were the indorsees of the bills of lading & had acted on them to their prejudice, sued the shipowners in respect of the damage:—*Held:* as the master had signed clean bills of lading, the shipowners were estopped from proving, in accordance with the fact, that the bags of sugar were in bad condition externally when shipped, & as, acco[illegible] to the bills of lading, the sugar was shipped apparently in good order & condition, & was in

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no right to require them to be weighed to ascertain if the weight agreed with the quantity stated in the bill of lading.—DOMVILLE *v.* FERGUSON (1877), 17 N. B. R. (1 P. & B.) 40.—CAN.

m. —— *Statement that cargo shipped in good order & well conditioned.*]—NEW ZEALAND SHIPPING CO., LTD. *v.* LEWIS'S, LTD., [1920] N. Z. L. R. 243.—N.Z.

n. —— ——.]—SESE *v.* TURNBULL, MARTIN & CO., [1927] N. Z. L. R. 476.—N.Z.

**2285 i.** *Qualification relating to quantity & quality—Statement that cargo shipped in good order & well conditioned.*]—THE BRITISH YEOMAN *v.* HUNT, LEUCHARS & HEPBURN, LTD. (1912), 33 N. L. R. 418.—S. AF.

*Sect.* 3.—*Bills of lading: Sub-sect.* 7, *D.; sub-sect.* 8, *A., B. & C.*]

fact delivered damaged by an external cause, the shipowners were liable to pltfs. for the difference between the value of sound sugar & the sugar as delivered.—MARTINEAUS, LTD. *v.* ROYAL STEAM PACKET CO., LTD. (1912), 106 L. T. 638; 28 T. L. R. 364; 56 Sol. Jo. 445; 12 Asp. M. L. C. 190; 17 Com. Cas. 176.

*Annotation*:—**Refd.** Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575.

**2288.** —— ——.]—Pltfs. were the indorsees of a bill of lading for a cargo of potatoes shipped on board the defts.' vessel. Under the bill of lading the potatoes were described as "shipped in good order & condition," but at the foot of the bill of lading there were the qualifying words, "weight, quality, condition & measure unknown." The potatoes, to the knowledge of defts.' master who signed the bill of lading, were shipped in wet bags & in a damaged condition:—*Held:* (1) although defts. had guarded themselves by the qualifying words from making any representation as to the internal condition or quality of the potatoes, they had represented the external condition of the bags & were estopped from denying that the bags were dry when shipped; (2) as the main cause of the rotting of the potatoes was the wetness of the bags, the damage must be attributed to the treatment of the cargo by defts.' servants after shipment.—THE TROMP, [1921] P. 337; 90 L. J. P. 379; 125 L. T. 637; 37 T. L. R. 752; 15 Asp. M. L. C. 338.

**2289. Qualification as to condition—Statement that cargo "shipped in good order & well conditioned"— Internal & external condition distinguished.**]—THE TROMP, No. 2288, *ante*.

**2290. Qualification "save as noted"—Statement that goods received in apparent good order & condition.**]—In an action for damages to flour carried in defenders' steamship from New York to Glasgow, it appeared that the flour was dispatched under a through bill of lading from Minneapolis to Glasgow via New York, signed by an agent "on behalf of carriers severally & not jointly," & stating that the goods had been received at Minneapolis "in apparent good order except as noted." This bill of lading was subject to conditions dealing with the service up to the port of New York, which provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route nor after the property was ready for delivery to the next carrier or to consignee, & also that claims for loss or damage must be made to the agent at point of delivery promptly after arrival of the property, & if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof no carrier should be liable thereunder, & provided that the contract was executed & accomplished & all liability thereunder terminated on the delivery of the property to the steamer, her master, agents, or servants. Another part of the bill of lading dealing with the service after delivery at New York & until delivery at Glasgow provided that the steamer should not be liable for inland damage & should "only be responsible for such part of the goods as had been actually delivered to her at the port" of New York, & should not be liable for any loss or damage that might have occurred before such delivery, & also that the shipment until delivery at Glasgow should be subject to the American statute called the Harter Act. The receipts signed by defenders' agent & given to the inland carriers stated that 110 bags of flour were damaged by "caking." The flour was contained in over 41,000 bags. The flour after its arrival at Glasgow was found to be damaged by "caking" to the extent of 4,132 bags:—*Held:* defenders were bound by the statement contained in the bill of lading that the goods were received by them in "apparent good order & condition" save as noted, *i.e.*, save as to 110 bags, & were therefore subject to the *onus* of proving that the damage, except so far as they had notified the inland carrier, was in fact done before they had possession of the flour; this *onus* had not been discharged; & defenders were liable.—CRAWFORD & LAW *v.* ALLAN LINE S.S. CO., LTD., [1912] A. C. 130; 81 L. J. P. C. 113; 105 L. T. 964; 28 T. L. R. 168; 12 Asp. M. L. C. 100; 17 Com. Cas. 135, H. L.

SUB-SECT. 8.—TRANSFER OF BILLS OF LADING.

*A. In General.*

**2291. Whether transferable.**]—EVANS *v.* MARTELL (OR MARLETT), No. 2172, *ante*.

**2292.** ——.]—Bills of lading are transferable & negotiable by the custom of merchants.—LICKBARROW *v.* MASON (1794), 5 Term Rep. 683; 101 E. R. 380; *subsequent proceedings*, 6 Term Rep. 131.

*Annotations*:—**Expld.** Thompson *v.* Dominy (1845), 14 M. & W. 403. **Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Expld.** Diamond Alkali Export Corpn. *v.* Bourgeois, [1921] 3 K. B. 443. **Refd.** Morison *v.* Gray (1824), 9 Moore, C. P. 484; Gurney *v.* Behrend (1854), 3 E. & B. 622; Griffiths *v.* Perry (1859), 1 E. & E. 680; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337; Glyn, Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591; Bristol & West of England Bank *v.* Mid. Ry. (1891), 65 L. T. 234; Smith *v.* Prosser, [1907] 2 K. B. 735. **Mentd.** Slubey *v.* Heyward (1795), 2 Hy. Bl. 504; Brown *v.* Clarke (1843), 7 Jur. 1043; Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797.

**2293. Bill a living instrument—Until shipowner's engagement fully completed.**]—BARBER *v.* MEYERSTEIN, No. 2371, *post*.

**2294. Assignment in part payment of debt—Debt due from assignor to assignee—Whether assignment for valuable consideration.**]—(1) An assignee of a bill of lading may have a better right against the shipowner to recover for breach of the contract of carriage than the assignor.

(2) A bill of lading assigned in part payment of a debt already due from assignor to assignee is assigned for valuable consideration.

(3) The rights of an innocent holder of a bill of lading are not affected by the fact that the master signed as agent for the charterers, unless the holder has notice of the charterparty, or that the master signed in that capacity.

(4) An assignee of a bill of lading who has given valuable consideration without notice of any arrangement between the shipper & the various consignees giving priority to the holders of the other bills of lading in the case of short shipment may claim from the shipowner full delivery of the cargo specified in his bill of lading, even though the arrangement has been made without the privity of the shipowner & the master has indorsed

**2289** i. *Qualification as to condition—Statement that cargo "shipped in good order & well conditioned"—Internal & external condition distinguished.*]—ARNDT & COHEN *v.* D. A. DAMPSCHIFFS GESELLSCHAFT (1906), 23 S. C. 324.—**S. AF.**

o. —— —— *Condition apparent to master.*]—BLAINE & CO. *v.* MOLLER (1882), 2 S. C. 133.—**S. AF.**

p. —— ——.]—A shipping co. is not estopped, by the recital in a bill of lading that the goods were received in good order & condition, from showing that damage sustained in transit was caused by the insufficient protection provided by the cases in which the goods were conveyed.—KOCH *v.* UNION CASTLE S.S. CO., LTD., [1913] E. D. L. 286.—**S. AF.**

the bill of lading with the words "weight unknown."

(5) An indorsee of a bill of lading has the same rights & liabilities as if the original contract had been made with him.

(6) When a ship is sub-chartered the ct. generally will not conclude that the master has signed as agent for the sub-charterers, unless he signs in terms as agent for them or gives notice of the sub-charter.

(7) A letter written by an assignor of a bill of lading to his assignee, informing the latter that the bankruptcy of the shipper & consignor (who has indorsed to the assignor) may possibly interfere with the proceeds of the shipment, so far as the assignor is concerned, & that he thinks it best to prevent the possibility of a hitch to send the bill of lading for the assignees to deal with, the latter having advanced money thereon, is not such a notice as will oblige the assignee to make inquiries as to the quantity of & the various rights to the cargo, so as to bind the assignee with constructive notice of any arrangement between the shipper & various consignees, giving priority to the holders of other bills of lading in the case of short shipment.—THE EMILIEN MARIE (1875), 44 L. J. Adm. 9; 32 L. T. 435; 2 Asp. M. L. C. 514.

*Annotation:—Generally,* **Refd.** Parsons *v.* New Zealand Shipping Co. (1900), 69 L. J. Q. B. 419.

**Sufficiency of delivery by bill of lading.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 575–578, Nos. 1801–1803, 1809–1814.

*B. Mode of Transfer.*

**2295. Distinction between indorsement in blank & special indorsement.**]—There is no distinction between a bill of lading indorsed in blank & an indorsement to a particular person.—LICKBARROW *v.* MASON (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n.; 2 E. R. 39, H. L.; *revsg.* S. C. *sub nom.* MASON *v.* LICKBARROW (1790), 1 Hy. Bl. 357, Ex. Ch.; *subsequent proceedings* (1794), 5 Term Rep. 683.

*Annotations:*—**Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Refd.** Salomons *v.* Nissen (1788), 2 Term Rep. 674; Coxe *v.* Harden (1803), 4 East, 211; Walley *v.* Montgomery (1803), 3 East, 585; Newsom *v.* Thornton (1805), 6 East, 17; Christy *v.* Row (1808), 1 Taunt. 300; Martini *v.* Coles (1813), 1 M. & S. 140; Patten *v.* Thompson (1816), 5 M. & S. 350; *Re* Westzynthius (1833), 2 Nev. & M. K. B. 644; Grant *v.* Norway (1851), 10 C. B. 665; Gurney *v.* Behrend (1854), 3 E. & B. 622; Griffiths *v.* Perry (1859), 1 E. & E. 680; *Re* North British Australasian Co. & Joint Stock Cos. Acts, 1856 & 1857, *Ex p.* Swan (1859), 7 C. B. N. S. 400; Swan *v.* North British Australasian Co. (1863), 2 H. & C. 175; The Tigress (1863), Brown. & Lush. 38; The Marie Joseph (1866), Brown. & Lush. 449; The Freedom (1871), L. R. 3 P. C. 594; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337; Leask *v.* Scott (1877), 2 Q. B. D. 376; Glyn, Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. **Mentd.** Slubey *v.* Heyward (1795), 2 Hy. Bl. 504; Bloxam *v.* Sanders (1825), 4 B. & C. 941; Giles *v.* Grover (1832), 9 Bing. 128; Gibson *v.* Carruthers (1841), 8 M. & W. 321; Brown *v.* Clarke (1843), 7 Jur. 1043; Taylor *v.* Great Indian Peninsular Ry. (1859), 28 L. J. Ch. 285; The Figlia Maggiore (1868), L. R. 2 A. & E. 106; Rodger *v.* Comptoir D'Escompte de Paris (1869), L. R. 2 P. C. 393; Chartered Bank of India, Australia & China *v.* Henderson (1874), L. R. 5 P. C. 501; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; *Re* Knight, *Ex p.* Golding Davis (1880), 42 L. T. 270; Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797; Nahmaschinen Fabrik Act. *v.* Pickford & Lee & Harris (1888), 4 T. L. R. 617; Bank of England *v.* Vagliano, [1891] A. C. 107; Nash *v.* De Freville, [1900] 2 Q. B. 72; Farquharson *v.* King, [1902] A. C. 325; Rimmer *v.* Webster, [1902] 2 Ch. 163; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777; McDonald *v.* Nash, [1924] A. C. 625; Commonwealth Trust *v.* Akotey, [1926] A. C. 72; Jones *v.* Waring & Gillow, [1926] A. C. 670.

**2296.** ——.]—SEWELL *v.* BURDICK, No. 2186, *ante.*

**2297. Whether mere delivery sufficient.**]—(1) The *bonâ fide* transferee, for value, of a bill of lading, indorsed by the shipper or his consignee, & put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop *in transitu*, as against the purchaser.

(2) A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. . . . The bill of lading only represents the goods; &, in this instance, the transfer of the symbol does not operate more than a transfer of what is represented (LORD CAMPBELL, C.J.).—GURNEY *v.* BEHREND (1854), 3 E. & B. 622; 23 L. J. Q. B. 265; 23 L. T. O. S. 89; 18 Jur. 856; 2 W. R. 425; 118 E. R. 1275.

*Annotations:—As to* (1) **Apld.** The Argentina (1867), L. R. 1 A. & E. 370. **Consd.** Coventry *v.* Gladstone (1867), L. R. 4 Eq. 493. **Refd.** The Tigress (1863), Brown. & Lush. 38; Leask *v.* Scott (1877), 46 L. J. Q. B. 576; Glyn, Mills *v.* East & West India Dock Co. (1882), 47 L. T. 309. *As to* (2) **Consd.** Pease *v.* Gloahec, The Marie Joseph (1866), L. R. 1 P. C. 219. *Generally,* **Refd.** Shepherd *v.* Harrison (1869), L. R. 4 Q. B. 196.

**2298. Indorsement & delivery.**]—SANDERS *v.* MACLEAN, No. 2373, *post.*

**2299. Nature of indorsement in blank.**]—SEWELL *v.* BURDICK, No. 2186, *ante.*

*C. Bills in a Set.*

**2300. Who is holder of bill of lading—First indorsee.**]—(1) Where several bills of lading have been signed of different imports, no reference is to be had to the time when they were signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment.

(2) Where such bills of lading, though different upon the face of them, are constructively the same, & the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all.—CALDWELL *v.* BALL (1786), 1 Term Rep. 205; 99 E. R. 1053.

*Annotations:—As to* (1) **Apld.** Hibbert *v.* Carter (1787), 1 Term Rep. 745. **Refd.** Lickbarrow *v.* Mason (1793), 6 East, 21, n.

**2301. —— —— Shipowner's contract to deliver not completed—Goods remaining subject to lien for freight.**]—BARBER *v.* MEYERSTEIN, No. 2371, *post.*

**2302. —— —— Indorsee having notice of defect in assignor's title—Indorsed till inadvertently sent to consignee.**]—Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, & made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, & transferred to

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**PART VII. SECT. 3, SUB-SECT. 8.—B.**

**2297 i.** *Whether mere delivery sufficient.*]—In an action for freight in which the question of liability arose:—*Held:* a bill of lading could be transferred by mere delivery without indorsement.—FOWLER *v.* MEIKLEHAM (1858), 7 L. C. R. 367.—**CAN.**

**2297 ii.** ——.]—FOWLER *v.* STIRLING (1858), 3 L. C. J. 103.—**CAN.**

*q. Whether indorsement in blank sufficient.*]—Indorsement of the bill of lading in blank is sufficient, without specifying that it is indorsed to secure the note discounted.—ROYAL CANADIAN BANK *v.* CARRUTHERS (1870), 28 U. C. R. 578; *affd.*, 29 U. C. R. 283.—**CAN.**

*r. Retransfer by cancellation of indorsement.*]—Goods assigned *in transitu* by indorsement of a bill of lading may be revested in the assignor by cancelling the indorsement on the bill of lading.—STALKER *v.* WIER (1854), 2 N. S. R. (James) 248.—**CAN.**

*Sect.* 3.—*Bills of lading: Sub-sect.* 8, *C., D., E. & F.*]

a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, & by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—*Held:* (1) the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; (2) the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; & the English bank had no priority; (3) *qu.:* whether the miller might not have refused to accept the bills of exchange unless the bills of lading were delivered to him.

In no other way can the vendor protect himself, under these circumstances, against the contingency of the acceptance even of the bills of exchange being refused. The contract that he is to be reimbursed by acceptances against bills of lading cannot possibly disable him from dealing in the ordinary course of mercantile business with the bills of lading for his own protection so as to secure himself against liabilities upon the bills that he draws, at all events before they are accepted (LORD SELBORNE, C.).—GILBERT *v.* GUIGNON (1872), 8 Ch. App. 16; 27 L. T. 733; 21 W. R. 281; 1 Asp. M. L. C. 498, L. C.

**2303. —— Variation in parts of bill—Whether time of captain's signature considered.**]—CALDWELL *v.* BALL, No. 2300, *ante.*

**2304. Indorsement & delivery of one bill—Whether indorsement of all.**]—THE TIGRESS, No. 2368, *post.*

**To whom delivery may be made.**]—*See* Sect. 7, sub-sect. 4, B., *post.*

*D. Transfer by Agent.*

**2305. Factor.**]—WRIGHT *v.* CAMPBELL (1767), 4 Burr. 2046; 1 Wm. Bl. 628; 98 E. R. 66.

*Annotations:*—**Consd.** Salomons *v.* Nissen (1738), 2 Term Rep. 674. **Apld.** Lickbarrow *v.* Mason (1793), 6 East, 21, n. **Distd.** Newsom *v.* Thornton (1805), 6 East, 17. **Reld.** Caldwell *v.* Ball (1786), 1 Term Rep. 205; Kinloch *v.* Craig (1790), 3 Term Rep. 783; Pickering *v.* Busk (1812), 15 East, 38; Glyn, Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**2306. —— Indorsee not knowing that agent is factor.**]—A factor cannot pledge the goods of his principal by indorsement & delivery of the bill of lading, any more than by the delivery of the goods themselves; though the indorsee knew not that he was factor, & where goods were consigned on the joint account of the consignors & consignee & a bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards indorsed & delivered it to defts. upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances:—*Held:* such indorsement & delivery of the bill of lading did not devest the consignors' right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them.—NEWSOM *v.* THORNTON (1805), 6 East, 17; 2 Smith, K. B. 207; 102 E. R. 1189.

*Annotations* **Apprvd.** Rodger *v.* P. C. 393.

**2307. —— ——.**]—A factor cannot pledge the goods of his principal: therefore where goods were consigned from abroad to a factor to be sold on account of the consignor, & a bill of lading was sent to deliver the goods to the factor or his assigns, & the factor afterwards indorsed & delivered the bill of lading, together with the goods, to defts., as brokers, with instructions to do the needful, & defts. made advances to him on the credit of those & other goods, without knowing that he was not the owner of them:—*Held:* defts. could not retain the goods against the consignor until payment of the debt due to them from the factor on account of these advances.—MARTINI *v.* COLES (1813), 1 M. & S. 140; 105 E. R. 53.

*Annotations:*—**Apld.** Guichard *v.* Morgan (1819), 4 Moore, C. P. 36. **Consd.** Fielding *v.* Kymer (1821), 2 Brod. & Bing. 639. **Apld.** Mellish *v.* Cattley (1826), 5 L. J. O. S. K. B. 74. **Reld.** Wilson *v.* Moore (1834), 1 My. & K. 337

**2308. —— Indorsement by way of pledge.**]—VAN CASTEEL *v.* BOOKER, No. 2180, *ante.*

**2309. Agent for management of property consigned from abroad.**]—Where sugars were shipped from abroad under a bill of lading, which expressed that they were on account of pltfs. & were to be delivered to assigns & W. who were the agents of pltfs. for the management of their property consigned from abroad, indorsed the bill of lading together with the other bills of lading comprising the rest of the cargo to defts. & drew bills upon them for the amount of the whole cargo, which defts. accepted & paid, & sold the sugars at two months' credit, at the expiration of which they carried the amount of the proceeds to the account of W. who in the interval between the sale & the expiration of the credit had become bkpts.:—*Held:* pltfs. were entitled to recover the proceeds of such sale from defts.—SHIPLEY *v.* KYMER (1813), 1 M. & S. 484; 105 E. R. 181.

*Annotation:*—**Consd.** Graham *v.* Dyster (1817), 6 M. & S. 1.

**2310. ——.**]—An assignee of a bill of lading is entitled to the goods therein named if he is a *bonâ fide* assignee for value, without notice of fraud or insolvency on the part of the person to whom the goods were consigned. G., jun., a merchant of New York, shipped for Bristol in the *Argentina*, three parcels of oilcake, two parcels for G., sen., his correspondent there, & the third for S. The bills of lading for all three parcels, in triplicate, he sent to G., sen., strictly enjoining him not to part with the bill of lading of S.'s parcel to him "without first receiving payment." G., jun., drew a bill of exchange for the whole value of the parcels on G., sen., which was discounted. S. subsequently induced G., sen., to deliver to him his bill of lading, on giving a bill of exchange on one B., & a promise of immediate payment of the cash. S., having indorsed the bill of lading to R. for value, became bkpt., as also did B. On the arrival of the vessel, R. had notice served on the master not to deliver the goods but to his order. G., sen., presented one of the copies of the bill of lading, which he had retained, & demanded the delivery of the third parcel shipped for S., as well as the other two, to which his title was undisputed. The master refused to deliver the third parcel, & retained thirty-two barrels out of the other parcels for the alleged non-payment of freight, & also refused to deliver the third parcel to R. Two suits were brought against the vessel, one by G., sen., for the non-delivery of the third parcel & the thirty-two barrels retained for freight; & the other by R., for the non-delivery of the third parcel to his order. The two suits having been heard together, the ct. dismissed the claim of G., sen., with costs:—*Held:* R. was a *bonâ fide* assignee for value, without notice of fraud; G., sen., had authority to deliver the bill to S., as the words in the instruction from G., jun., were ambiguous; R. was entitled

to the goods, & to the costs of his suit against the owners of the vessel.—THE ARGENTINA (1867), L. R. 1 A. & E. 370; 16 L. T. 743; 2 Mar. L. C. 529.

*E. Transfer to Agent.*

**2311. Whether property passes—Transfer to enable agent to receive goods on behalf of principal.**]—The consignor of goods abroad upon receipt of orders from a correspondent here, ships goods on account & at the risk of the consignee & takes bills of lading from the captain making the goods deliverable to the consignor's own order & transmits one of such bills unindorsed with the invoice to the consignee, inclosed in a letter informing him that he had drawn upon him for the amount; which he doubted not would meet due honour & close the account; & the consignor by way of precaution, also sent another bill of lading indorsed to his own agent:—*Held:* upon the shipment on account & at the risk of the consignee the property in the goods vested in him, subject only to be divested by the consignor's stopping them while *in transitu;* & upon the arrival of the goods the consignee having obtained possession of them from the captain by the production of his unindorsed bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper & however answerable the captain might be to the shipper on that account. *Qu.:* whether the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of his principal without any consideration will enable such agent to maintain trover in his own name for the goods. *Semble:* not.—COXE *v.* HARDEN (1803), 4 East, 211; 1 Smith, K. B. 20; 102 E. R. 811.

*Annotations:*—**Distd.** Morison *v.* Gray (1824), 2 Bing. 260; Brandt *v.* Bowlby (1831), 2 B. & Ad. 932; Mitchel *v.* Ede (1840), 11 Ad. & El. 888. **Expld.** Turner *v.* Liverpool Docks Trustees (1851), 6 Exch. 543. **Consd.** Shepherd *v.* Harrison (1871), L. R. 5 H. L. 116; Burgos *v.* Nascimento (1908), 100 L. T. 71. **Reld.** Seagrave *v.* Union Marine Insce. (1866), L. R. 1 C. P. 305.

**2312. —— Agent authorised to stop goods in transitu.**]—The indorsement of a bill of lading without consideration, does not transfer any property in the goods; & therefore the mere indorsement of a bill of lading by the consignor to an agent to authorise him to stop the goods *in transitu* on account of the principal, will not enable such agent to maintain *assumpsit* or trover for the goods in his own name.—WARING *v.* COX (1808), 1 Camp. 369; 170 E. R. 989, N. P.

*Annotations:*—**Distd.** Morison *v.* Gray (1824), 2 Bing. 260. **Consd.** Thompson *v.* Dominy (1845), 14 M. & W. 403; Burgos *v.* Nascimento (1908), 100 L. T. 71. **Mentd.** Johnston *v.* Orr Ewing (1882), 7 App. Cas. 219.

**2313. —— ——.**]—H. shipped goods at Dundee to the order of, & for P. in London. H. having ascertained shortly after the goods had been forwarded that P. had stopped payment, indorsed & forwarded the bill of lading to pltf., who demanded the goods of defts., wharfingers, in whose custody they were. Defts. having refused to deliver the goods to pltf.:—*Held:* he had a sufficient title to sue for them in trover.—MORISON *v.* GRAY (1824), 2 Bing. 260; 9 Moore, C. P. 484; 3 L. J. O. S. C. P. 261; 130 E. R. 305.

*Annotation:*—**Expld.** Burgos *v.* Nascimento (1908), 100 L. T. 71.

**2314. —— Instruction to sell goods for consignor.**]—Pltf. consigned to E. F. certain goods under a bill of lading. E. F. on receiving the bill of lading, & before he had taken physical possession of the goods, indorsed it to G. his clerk, & directed him to sell the goods & account for the proceeds to pltf.; he then executed a deed of assignment to G. for the benefit of his creditors, & was subsequently adjudged bkpt. Pltf. & the trustee in bkpcy., deft. in the action, both claimed the proceeds of the sale, & an interpleader issue was directed. At the trial the jury found that the property in the goods had passed to E. F. & that he had acted as he had done, because he believed the goods were pltf.'s & not because he wished to prefer the latter:—*Held:* the indorsement of the bill of lading to G. did not pass the property to G. as agent for pltf. or otherwise, & the goods were still part of E. F.'s estate at the moment of executing the deed of assignment, & under Bankruptcy Act, 1883 (c. 52), s. 43, the trustee in bkpcy. was entitled to recover the proceeds of the sale.—LAURITZEN *v.* CARR (1894), 72 L. T. 56; 11 T. L. R. 164.

**2315. —— Transfer to enable agent to warehouse goods for consignee.**]—BURGOS *v.* NASCIMENTO, MCKEAND, CLAIMANT, No. 2358, *post.*

**2316. Factor entrusted with bill of lading—For purpose of selling goods—Whether factor entrusted with dock warrant.**]—A party entrusted with the bill of lading for the purpose of selling the goods mentioned in it, is not, in consequence of being so entrusted, to be considered as entrusted with the dock warrant, notwithstanding that his possession of the bill of lading, & of the goods under it, enables him to obtain the dock warrant.

A., residing abroad, being the owner of goods, consigned them by a bill of lading, making them deliverable in London to the consignee or his assigns; & having indorsed the bill of lading in blank, transmitted it to his factor, with instructions to receive & sell the goods. The factor received the goods, entered them in his own name at the custom house, & obtained, without the privity or express consent of the owner, a dock warrant in his own name, it being the usage at the docks to give such document to the person in whose name they are entered, & pledged such dock warrant for advances beyond the charges for which the factor had a lien:—*Held:* under these circumstances, the factor was not entrusted with a dock warrant, within 6 Geo. 4. c. 94, s. 2.—HATFIELD *v.* PHILLIPS (1845), 14 M. & W. 665; 12 Cl. & Fin. 343; 10 Jur. 189; 153 E. R. 642, H. L.; *affg.* (1842), 9 M. & W. 647, Ex. Ch.

*Annotations:*—**Reld.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295; Sheppard *v.* Union Bank of London (1862), 7 H. & N. 661; Baines *v.* Swainson (1863), 8 L. T. 536; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354.

*F. Transfer by Way of Mortgage or Pledge.*

**2317. What constitutes pledge—Delivery of bill to secure advances—Necessity for transfer of possession of goods.**]—BARBER *v.* MEYERSTEIN, No. 2371, *post.*

**2318. —— Sale of draft to banker—Bill of lading indorsed & attached.**]—A shipper of goods deliverable to his order who sells to bankers a draft on the buyers for the price in a foreign currency, with the bill of lading & policy indorsed & attached,

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PART VII. SECT. 3, SUB-SECT. 3.—E.

t. *Whether property passes.*]—BLAKE *v.* BELFAST DISCOUNT CO. (1880), 5 L. R. Ir. 410.—IR.

PART VII. SECT. 3, SUB-SECT. 3.—F.

a. *Effect of indorsement—Transfer of property—Valid against execution creditor.*]—LANARK & RENFREW CORPNS. *v.* CAMERON (1859), 9 C. P. 109.—CAN.

*Sect. 3.—Bills of lading: Sub-sect. 8, F. & G. (a)*

does not thereby indicate an intention to pass the property in the goods to the bankers.

The claimant . . . was intending to describe the usual transaction, in which he would retain the general property & transfer to the bank only a special property by way of security (LORD SUMNER).—THE ORTERIC, [1920] A. C. 724; 123 L. T. 448; 15 Asp. M. L. C. 10; *sub nom.* NEWING *v.* PROCURATOR-GENERAL, ORTERIC (PART CARGO EX), 89 L. J. P. 209, P. C.

**2319. Effect of indorsement—Whether valid against assignees in bankruptcy—Act of bankruptcy committed by assignor—Between assignment of goods & indorsement of bill of lading.**]—An assignment of goods at sea as a collateral security for a debt, & a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bkpcy. between the assignment of the goods & the indorsement of the bill of lading. Goods delivered to a person claiming them wrongfully, who pays freight & other charges, cannot be detained for those expenses against the rightful owner.—LEMPRIÈRE *v.* PASLEY (1788), 2 Term Rep. 485; 100 E. R. 262.

*Annotations:*—**Refd.** Walley *v.* Montgomery (1803), 3 East, 585; Lucas *v.* Dorrien (1817), 7 Taunt. 278; Nichols *v.* Clent (1817), 3 Price, 547; Burn *v.* Carvalho (1834), 1 Ad. & El. 883; Belcher *v.* Oldfield (1839), 6 Bing. N. C. 102; Belcher *v.* Capper (1842), 4 Man. & G. 502; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n. **Mentd.** *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67.

**2320. —— Whether pledge operates as pledge of freight—Shipowner part owner of goods specified in bill—Pledge with shipowner's consent.**]—The owner of a vessel & part owner of the cargo sanctioning a pledge by his partners of the bills of lading, which were signed for the delivery of the goods on payment of freight, pledges the goods & the freight of them together, unless the freight be expressed to be excepted.—GROTE *v.* MILNE (1811), 4 Taunt. 133; 128 E. R. 279.

**2321. —— Transfer of property—Intention to operate by way of pledge.**]—SEWELL *v.* BURDICK, No. 2186, *ante*.

**2322. —— —— What title conferred on indorsee.**]—SEWELL *v.* BURDICK, No. 2186, *ante*.

**2323. —— —— How indorsee assumes title—Claiming & taking delivery of goods by virtue of title.**]—SEWELL *v.* BURDICK, No. 2186, *ante*.

**2324. —— —— Sale of draft to banker—Bill of lading indorsed & attached.**]—THE ORTERIC, No. 2318, *ante*.

**2325. —— —— Under Bills of Lading Act, 1855 (c. 111), s. 1.**]—BRANDT *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD., No. 2257, *ante*.

**2326. —— Whether pledgor divested of all interest in goods.**]—Where pltfs. in an action for damage to cargo had indorsed their bills of lading to the bank to secure advances:—*Held:* they retained an interest in the cargo sufficient to enable them to maintain their suit, the money recovered to be for the benefit of the parties shown to be entitled thereto.—THE GLAMORGANSHIRE (1888), 13 App. Cas. 454; 59 L. T. 572; 6 Asp. M. L. C. 344, P. C.

*Annotation:*—**Apld.** The Joannis Vatis, [1922], P. 92.

**2327. Improper detention of bill of lading—Right of pledgee to recover.**]—Pltf. was in the habit of receiving goods consigned to him by L. for sale upon commission, & in order to place L. in funds for the purchase of the goods, agreed to allow L. to draw upon him. The documents of title of the goods were hypothecated to pltf. to enable him to provide funds to meet the bills so drawn by L. Pltf. accordingly, & at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, & L., having drawn upon pltf. for that purpose, purchased & shipped the goods. The bill of lading was handed to L., but never forwarded to pltf., & L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of defts. with instructions not to part with it until they were paid the value of the goods, & they accordingly refused to give it up to pltf.:—*Held:* pltf. had an equitable right to the bill of lading, & was entitled to sue defts. for the wrongful detention of it.—LUTSCHER *v.* COMPTOIR D'ESCOMPTE DE PARIS (1876), 1 Q. B. D. 709; 34 L. T. 798; 3 Asp. M. L. C. 209, D. C.

**2328. Pledge by principal—Security substituted by agent for goods sold by him—Recovery of substituted goods by assignees in bankruptcy of principal—Against pledgees.**]—(1) A merchant pledges for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested in a certain proportion. His agents without the knowledge of the owner or the pawnees, disposed of part of the cargo abroad, after which the owner becomes a bkpt.; he induces the agents to replace the goods disposed of, by others, of which the agents give him bills of lading, & he sends them to the pawnees, to make good their security:—*Held:* the assignees of the bkpt. might recover the substituted goods against the pawnees.

(2) A bill of lading is not a necessary instrument of the transfer of property in goods consigned to the owner. An agent who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods.—MEYER *v.* SHARPE (1813), 5 Taunt. 74; 128 E. R. 614.

**2329. Who are pledgees — Transferees of pledgees.**]—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., No. 2435, *post*.

### *G. Protection of Seller.*

#### *(a) Reservation of Right of Disposal.*

*See, generally,* SALE OF GOODS, Vol. XXXIX., pp. 512–521, Nos. 1302–1365.

#### *(b) Drawing on Consignees for Price.*

##### *i. In General.*

*See, generally,* SALE OF GOODS, Vol. XXXIX., pp. 518–521.

**2330. Transmission of bills of exchange for acceptance with bills of lading—Transaction based on genuine character of bill of lading.**]—H. drew a bill of exchange on pltf., & induced him to accept it, by sending with it a forged bill of lading. H. then indorsed the bill of exchange to defts. for value without notice of the forgery. Pltf. filed a bill against the indorsees to restrain them from suing him at law, & praying that the bill might be delivered up to be cancelled:—*Held:* the fraud practised on the acceptor was no defence against the indorsees for value.—THIEDEMANN *v.* GOLDSCHMIDT (1859), 1 De G. F. & J. 4; 1 L. T. 50; 8 W. R. 14; 45 E. R. 260, L. C. & L. JJ.

*Annotations:*—**Consd.** Leather *v.* Simpson (1871), L. R. 11 Eq. 398. **Mentd.** G. W. Ry. *v.* London & County Banking Co., [1900] 2 Q. B. 464; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623.

**2331. —— Representation that bill of lading authentic.**]—THIEDEMANN *v.* GOLDSCHMIDT, No. 2330, *ante*.

**2332. —— Forged bill of lading—Enforcement of payment restrained.**]—THIEDEMANN *v.* GOLDSCHMIDT, No. 2330, *ante*.

**2333. Agreement to accept at ninety days' sight—At what period shipper may draw bill.**]—A. & B., merchants in London, being applied to on behalf of C., resident at Demerara, to give him a letter of credit for £30,000 to enable him to purchase produce to load certain vessels for the port of London, & to accept his drafts at ninety days' sight on receiving invoice, bill of lading, & orders for insurance to the extent of certain fixed prices for various kinds of produce, wrote to C., stating that they consented to make the advances required upon the terms described; & that upon receiving the documents before mentioned, & no irregularity appearing, they would accept his drafts at the usual date to the extent of £30,000. C. shipped produce to the value of £800 on board one vessel, & to the value of £1,600 on board another, & sent the necessary documents to B. & C., & directed the surplus of the proceeds of the first cargo, after repaying the advances of A. & B., should be paid to D. in London, & that the surplus of the second should be held by them to abide by his future advice. C. afterwards drew a bill upon A. & B. for £500 at six months' sight, & did not specify to the account of which cargo it was to be charged. A. & B. refused to accept it, & C. having thereupon brought an action against them:—*Held:* (1) C. was not bound to draw at ninety days, but might draw at any usual date, & that six months could not be considered unusual, the jury not having found it to be so; (2) C. was not bound to specify to which cargo the bill was to be charged; for, in the absence of any direction by him, A. & B. might charge it to either at their election.—LAING *v.* BARCLAY (1823), 1 B. & C. 398; 2 Dow. & Ry. K. B. 530; 1 L. J. O. S. K. B. 135; 107 E. R. 148.

**2334. Whether drawer must specify cargo to which bill is to attach.**]—LAING *v.* BARCLAY, No. 2333, *ante*.

**2335. Right to refuse bills of exchange—No privity of contract—Necessity for express contract between parties—Effect of indorsement of bill of lading.**]—Pltfs., merchants at New York, by direction & on account of B., forwarded to deft., a commission agent at Hull, employed by B., the invoices & bills of lading of two cargoes, against which they drew upon deft. bills, which he accepted & paid. Deft. sold the cargoes, which did not realise enough to cover the amount of his acceptances. Pltfs. afterwards by direction of B., forwarded to deft. the invoice & bill of lading of another cargo, which had been purchased by B. with money supplied by pltfs. & the bills of lading of which had been specially indorsed to them as a security, & were by them specially indorsed to deft.; pltfs. at the same time stating that they had, by direction of B. drawn upon deft. for part of the price. Deft., without knowing that pltfs. had made advances to B. took the bill of lading, disposed of the cargo, & placed the proceeds to the credit of B.:—*Held:* deft. was not bound, as between himself & pltfs., to accept the bills drawn against the last cargo, because no privity could arise between pltfs. & deft. except by express contract; & the indorsement of the bill of lading by pltfs. to deft. & his receiving it & disposing of the cargo, did not, under the circumstances, create such a contract.—DEPPERMAN *v.* HUBBERSTY (1852), 17 Q. B. 766; 117 E. R. 1474.

**2336. —— Objection to bill of lading—Inclusion of other goods—Waiver of objection.**]—Pltfs., a continental bank, having contracted to sell & ship to defts. 1,400 quarters of rye, to be paid for by an acceptance at three months, put the rye on board the *Agatha*. The vessel proved to be capable of containing from 200 to 300 quarters more grain than the quantity shipped, & therefore pltfs. filled up the vacant space with maize. One bill of lading only was given for the cargo, & pltfs. wrote on Apr. 24 to defts., with the invoices & drafts: "The maize is on the same bill of lading as the rye . . . as there would, no doubt, be a loss on the maize, we presume you will wish to leave it for account of shippers; but if you will accept the bill we will get an undertaking from the bank to hold you harmless for so doing." Defts., who had made a subsale of the cargo, replied: "The drafts & invoices of this cargo are to hand, & we observe that the bills of lading are in the hands of the . . . bank. We think . . . we are entitled to ask a guarantee from the bank that the *Agatha* shall deliver the weight specified in the invoice. Would you have the kindness to ask the bank for this, & telegraph to us . . . their acquiescence, or the contrary. We would be obliged also by a copy, or the original, of the charterparty, & copy of the bill of lading for our Govt. We leave, as you suggest, the maize to the shippers; the transaction in rye is a very bad one. We return you enclosed draft invoices of maize." On May 8 defts. refused to accept the bill of exchange for the rye, upon the ground that pltfs. had not given them a proper bill of lading. In an action for such non-acceptance:—*Held:* defts. had, by a new agreement, waived any objection to the bill of lading in respect of the maize being included therein, & were therefore liable.—IMPERIAL OTTOMAN BANK *v.* COWAN (1874), 31 L. T. 336; 2 Asp. M. L. C. 418, Ex. Ch.

**2337. —— Unless bill of lading delivered.**]—GILBERT *v.* GUIGNON, No. 2302, *ante*.

**2338. Right to bills of lading after acceptance.**]—The agent & manager of the business of a London firm who resided in Sweden, gave to a merchant there about to draw bills on that firm an assurance that the bills would be accepted; whereon bills of lading of cargoes of timber were transmitted to the London firm, & bills of exchange were drawn against them:—*Held:* this assurance, though thus made & acted on, was not as between the London firm & the foreign merchants to be treated as equivalent to an acceptance of the bills, so as to vest in the London firm legal rights from the time of such assurance given.—HOARE *v.* DRESSER (1859), 7 H. L. Cas. 290; 28 L. J. Ch. 611; 33 L. T. O. S. 63; 5 Jur. N. S. 371; 7 W. R. 374; 11 E. R. 116, H. L.; *revsg.* S. C. *sub nom.* DRESSER *v.* HOARE (1856), 26 L. J. Ch. 51, L. JJ.

*Annotation:*—**Consd.** *Ite* Wait, [1927] 1 Ch. 606.

**2339. Assurance of acceptance by consignee—Whether equivalent to acceptance.**]—HOARE *v.* DRESSER, No. 2338, *ante*.

**2340. Appropriation of cargo to bill of exchange.**]—A direction by consignor to consignee to place the invoice price of goods to his credit & the bills drawn against him to his debit does not amount to an appropriation of the goods to protect the bills.

A firm of merchants in England employed a firm of merchants in South America as their agents to purchase goods & send them to England. The foreign firm drew bills on the English firm & sold them in South America, & with the proceeds purchased goods which they shipped to England, sending the bills of lading directly to the English firm, & at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, & requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation, & the foreign firm also became bkpt. When the English

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firm stopped payment a cargo of goods was *in transitu*, & some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, & others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the goods appropriated to meet the bills drawn in respect of them :—*Held :* the foreign firm, whether regarded as the agents of the English firm or as vendors, had parted with all property in the goods, & had no power to direct the appropriation of the proceeds ; &, therefore, no equity arose on the insolvency of the two firms in favour of the holders of the bills to have the proceeds applied in payment of the bills.—*Re* TAPPENBECK, *Ex p.* BANNER (1876), 2 Ch. D. 278 ; 45 L. J. Bcy. 73 ; 34 L. T. 199 ; 24 W. R. 476, C. A.

*Annotations :*—**Apld.** Phelps, Stokes *v.* Comber (1884), 26 Ch. D. 755. **Refd.** König *v.* Brandt (1901), 84 L. T. 748 ; The Hilding (1920), 37 T. L. R. 199 ; The Kronprinsessan Margareta, The Parana, [1921] 1 A. C. 486.

—— **Lien of holders of bills of exchange.**]—*See* Nos. 2344–2350, *post.*

**2341. Whether passing of property suspended—Presumption of passing on acceptance—Rebuttal of presumption—Rules arising from existence of state of war.**]—When shippers of goods discount a draft upon the consignee & authorise the discounters to hand to him a bill of lading, to the order of, & indorsed by, the shippers, upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the ownership of the goods is to pass to the consignee when he accepts the draft. That inference may be modified, or rebutted, by particular arrangements between the shippers & the consignee, & is subject to the rules which arise out of a state of war existing, or imminent at the beginning of the transaction. The transfer of the property upon the acceptance of the draft is consistent with the consignee being either a purchaser from the shippers or their agent for the sale of the goods.

When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading, indorsed in this way, & discounts it with a banker, he makes himself liable on the instrument as drawer, & he further makes the goods, which the bill of lading represents, security for its payment (LORD SUMNER).—THE PRINZ ADALBERT, [1917] A. C. 586 ; 86 L. J. P. C. 165 ; 116 L. T. 802 ; 33 T. L. R. 490 ; 61 Sol. Jo. 610 ; 14 Asp. M. L. C. 81, P. C.

*Annotations :*—**Refd.** The Zaanland, [1918] P. 303 ; The Frogner, [1919] P. 127 ; The Palm Branch, [1919] A. C. 272 ; The Orteric, [1920] A. C. 724.

**2342.** —— —— —— **Special arrangement between shipper & consignee.**]—THE PRINZ ADALBERT, No. 2341, *ante.*

**2343.** —— —— **Consignee being agent for sale.**]—THE PRINZ ADALBERT, No. 2341, *ante.*

.]—*See, also,* SALE OF GOODS, Vol. XXXIX., pp. 518–521, Nos. 1345–1364.

### ii. *Lien of Holders of Bills of Exchange.*

**2344. Transmission of letter of advice—Whether equivalent to indorsed bill of lading.**]—Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment are not equivalent in effect to bills of lading indorsed.—NICHOLS *v.* CLENT (1817), 3 Price, 547 ; 146 E. R. 348.

*Annotation :*—**Refd.** Bryans *v.* Nix (1839), 4 M. & W. 775.

**2345.** —— **Whether amounting to appropriation of cargo—To meet bill of exchange.**]—B. S. & co. of Calcutta having consigned certain goods to G. B. in England, on which they had a lien for the price, wrote him word that they intended to draw in favour of G. K. & co. for the balance of such shipments, & that they inclosed on bills of lading & policies of insurance for the goods in question ; & they also drew a bill for the amount on G. B. in favour of G. K. & co. which they directed G. B. to " place to account of shipments per ' Gardner.' " Before the goods reached England G. B. became bkpt., & the goods came into the possession of his assignees :—*Held :* the above expressions in the bill & the letter amounted to a specific appropriation of the goods for the payment of the bill, & the assignees were bound to account to G. K. & co. for the proceeds.—*Re* GARDNER BOGGS, *Ex p.* GLEDSTANES (1842), 3 Mont. D. & De G. 109.

*Annotations :*—**Distd.** *Re* Boggs, *Ex p.* Gemmell (1843), 3 Mont. D. & De G. 199. **Consd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793. **Refd.** Inman *v.* Clare (1858), John. 769.

**2346.** —— —— ——.]—The general lien of a consignee cannot be set up against the express directions of the consignor given to him at the time when the cargo is accepted.

B. & co. consigned a cargo to defts. & sent to them the bill of lading in a letter saying : " The present serves to cover bill of lading for, etc., shipped per China against which we have valued on you at six months in favour of F. S. & co. for £1,200, which please kindly protect." On the same day B. & co. sent to F. S. & co. the bill of exchange which was drawn on defts. to the order of F. S. & co., & concluded " place the same with or without advice to account consignment per China." After the bill of lading arrived F. S. & co. presented the bill, but defts. refused to accept it. Shortly afterwards B. & co. stopped payment, & afterwards the cargo arrived :—*Held :* it was effectually appropriated to meet the bill, & that F. S. & co. had a lien upon it in priority to the claim of defts. for the balance due to them on their general account as consignees.—FRITH *v.* FORBES (1862), 4 De G. F. & J. 409 ; 32 L. J. Ch. 10 ; 7 L. T. 261 ; 8 Jur. N. S. 1115 ; 11 W. R. 4 ; 1 Mar. L. C. 253 ; 45 E. R. 1242, L. JJ.

*Annotations :*—**Consd.** Robey's Perseverance Ironworks *v.* Ollier (1872), 7 Ch. App. 695. The decision in *Frith* v. *Forbes* turned upon special circumstances, & can hardly be treated as governing any other case (JAMES, L.J.). **Expld.** *Re* Entwistle, *Ex p.* Arbuthnot (1876), 3 Ch. D. 477. **Distd.** Ranken *v.* Alfaro (1877), 5 Ch. D. 786 ; *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766. **Consd.** Brown, Shipley *v.* Kough (1885), 29 Ch. D. 848. **N.F.** Phelps, Stokes *v.* Comber (1885), 29 Ch. D. 813.

**2347.** —— —— ——.]—Bills of exchange were drawn by the vendor & shipper of goods upon the purchaser for the invoice prices of the goods, with a direction to place the same to account of the shipments. On the acceptance of the bills by the purchaser the bills of lading were handed over to him. The bills of exchange were dishonoured at maturity, & the purchaser became bkpt. :—*Held :* there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange.—*Re* ENTWISTLE, *Ex p.* ARBUTHNOT (1876), 3 Ch. D. 477 ; 25 W. R. 238, C. A.

*Annotation :*—**Refd.** Brown, Shipley *v.* Kough (1885), 29 Ch. D. 848.

**2348.** —— —— ——.]—Bankers in London, at the request of M., who was acting as the agent in London of S., a merchant at Shanghai, on Mar. 16, 1883, granted to S. a letter of credit for £20,000. The letter authorised S. " to draw on us four months' sight for any sums not exceeding £20,000, such draft or drafts to be accompanied by bills of lading & invoices of tea, purchased according to order of M., & shipped by steamers to London, & marine insurance policies relating thereto, & these documents to be surrendered to us against our acceptances, & we hereby agree with you, & also

as a separate engagement with the *bonâ fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation & paid at maturity, if drawn & negotiated on or before Dec. 31, 1883." It was agreed that a commission of 1 per cent. should be paid to the bankers on all drafts drawn under the credit, & M. agreed that he would meet all the acceptances on or before their due dates, "the usual rate of 2½ per cent. being allowed on all prepayments." Bills were drawn by S. under this credit against various parcels of tea consigned by him to M. for sale. In each case the bill mentioned the parcel of tea against which it was drawn, & purported to be drawn under the letter of credit, the date of which was mentioned, & the bills of lading & other shipping documents were in each case attached to the bill. S., in each case, advised the bankers of the drawing of the bill, mentioning the tea against which it was drawn & the name of the vessel by which it was shipped. S. discounted the bills with a Chinese bank, & their agent in London presented the bills for acceptance, & in exchange for the acceptance delivered the bills of lading & other documents attached to the London bankers, in whose name the tea was then warehoused with a dock co. As M. from time to time required portions of the tea for delivery to purchasers the bankers handed to him warrants or delivery orders, he paying them the value of the tea comprised therein. The moneys thus received were paid to the credit of the general current account of the bankers with their own bankers. In an account in their books with M., they debited him with the amounts of the acceptances & credited him with the amounts received by the sales & with 2½ per cent. according to the agreement. The London bankers suspended payment & filed a liquidation petition before their acceptances matured:—*Held:* (1) having regard to the terms of the letter of credit, the bill holders could not claim any specific appropriation of the teas to meet the acceptances; (2) S. was entitled to have the teas which remained in specie at the date of the suspension, but not the proceeds of the sale of the teas which were sold before the suspension applied in payment of the acceptances.

The form of the bill of exchange & of the letter of advice, written at the time by the drawer to the acceptors, did not give the bill holders any lien on the goods. We must have regard to the terms of the letter of credit, which the bill holders saw, & they are conclusive on this point. The bills of exchange were to be accompanied by the bills of lading, but the bills of lading were to be surrendered to the acceptors of the bills of exchange against their acceptances. What is the meaning of that? So long as the bill of lading is annexed to the bill of exchange, the bill holder has a lien on the goods. But the bill of lading is to be surrendered to the acceptor on his acceptance of the bill of exchange. That must mean that it is to be delivered up free from the lien of the bill holder. If the bill of exchange & the letter of advice are ambiguous, they must be taken subject to the terms of the letter of credit which was shown to the person who discounted the bill. In my opinion, the terms of the letter of credit are conclusive against the claim of the bill holders (COTTON, L.J.).—*Re* SUSE, *Ex p.* DEVER (1884), 13 Q. B. D. 766; 51 L. T. 437; 33 W. R. 290, C. A.

*Annotation:—Generally,* **Refd.** Phelp, Stokes *v.* Comber (1885), 29 Ch. D. 813.

**2349.** —— —— ——.]—A firm at Liverpool & a firm at Pernambuco employed B. as their agents at New York. According to their course of business the firm at Pernambuco received orders from persons there to purchase goods at New York. The firm instructed the Liverpool firm who instructed B. B., then purchased the goods in New York & shipped them to the firm at Pernambuco with the bills of lading. B. drew bills on the Liverpool firm to pay for the goods, but not for the precise amount of the shipments, & sold the bills in New York. B. advised the Liverpool firm of the bills & with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft" & containing a memorandum of amount of the bill & the name of the drawer, with the words "Against shipments per, naming the vessel, please protect the draft as advised above." The Liverpool firm on the bills being presented to them for acceptance detached the counterfoils & kept them in their own possession. Pltfs. were the holders for value of bills drawn on the Liverpool firm in accordance with this course of dealing, the goods having been shipped by B. to the Pernambuco firm & the bills of lading being also sent to that firm. On June 10, 1879, the Liverpool firm stopped payment, & on the same day B. telegraphed to the Pernambuco firm as follows: "Having pledged documents & shipments, naming the vessel, hold proceeds for P. & co., pltfs." The ship arrived on June 11, but the bills of lading had been previously delivered to the purchasers of the goods. The three bills having been dishonoured by the Liverpool firm pltfs. brought an action against the Pernambuco firm claiming to have the bills paid out of the proceeds of the goods as having been specifically appropriated to meet the bills; & also relying on the telegram as having stopped the goods *in transitu*:—*Held:* there was no specific appropriation of the goods either by the course of dealing or by the "advice of draft" attached to the bills.

I am by no means satisfied that merely saying that the bill is drawn against a certain cargo, even when that notice is sent to the person to whom the cargo is consigned, will give a lien or charge on the cargo (COTTON, L.J.).—PHELPS, STOKES & CO. *v.* COMBER (1885), 29 Ch. D. 813; 54 L. J. Ch. 1017; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. L. C. 428, C. A.

*Annotation:*—**Refd.** Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570.

**2350.** —— —— ——.]—A. purchased from B. & co. in America a bill of exchange dated Aug. 5, 1875, payable sixty days after sight, for £2,500 drawn upon K. in London, on the face of which was a direction "to charge the same on account of cheese per *Britannic* & lard per Greece as advised," & on the same day B. & co. wrote to K. a letter of advice, inclosing bills of lading for the cheese & lard, & informing K. that as against these they valued on his at sixty days' sight for £2,500 favour A. The bill was not accepted, K. having heard that B. & co. had suspended payment on Aug. 7; but, on the arrival of the consignments in England, K. took possession of them & realised them, receiving the proceeds, out of which he claimed to retain a balance due to him on the general account between him & B. & co. From the evidence as to the course dealing between A. & B. & co. it appeared that B. & co. had for many years previously been in the habit of consigning American produce to K., & drawing bills on him in a similar form to that of Aug. 5, but that there had not been any practice of specifically appropriating the remittances to meet any particular bills. A. brought an action against

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K. & the trustee in bkpcy. of B. & co., claiming to be entitled to a charge on the proceeds of the cheese & lard in priority to all other persons. No question was raised as between K. & the trustee in bkpcy. as to their respective rights:—*Held:* A. was not entitled to the charge claimed, either (*a*) on the ground that the direction on the face of the bill of exchange operated as an equitable assignment; or (*b*) that on the authority of *Frith* v. *Forbes*, No. 2346, *ante*, the letter of advice created a specific appropriation of the remittances to meet the bill in favour of B. & co., the benefit of which was transferred to A. by the direction on the bill of exchange.—BROWN, SHIPLEY & CO. *v.* KOUGH (1885), 29 Ch. D. 848; 54 L. J. Ch. 1024; 52 L. T. 878; 34 W. R. 2; 5 Asp. M. L. C. 433, C. A.

*Annotations:*—**Apld.** König *v.* Brandt (1901), 84 L. T. 748. **Reid.** Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623.

**2351. —— Bill of exchange not operating as equitable assignment.**]—BROWN, SHIPLEY & CO. *v.* KOUGH, No. 2350, *ante*.

(*c*) *Indorsement of Bill to Bank.*

**2352. General rule.**]—GILBERT *v.* GUIGNON, No. 2302, *ante*.

**2353. How far goods are security for bill of exchange—Conditional acceptance.**]—R. & co. consigned goods to H. for sale, drew bills on him which they indorsed to B., to whom they handed the bills of lading as a security, & wrote to H., asking him to accept the bills as against the goods. H. gave an acceptance "Accepted, payable at the I. Bank on the delivery up of the bills of lading." At the time when the bills became payable the affairs of H. were in course of liquidation by arrangement:—*Held:* the conditional acceptance made the security of B. virtually a security on property of H., & B. could not prove against the estate of H. without deducting the value of the security.—*Re* HOWE, *Ex p.* BRETT (1871), 6 Ch. App. 838; 40 L. J. Bcy. 54; 25 L. T. 252; 19 W. R. 1101, L. JJ.

*Annotation:*—**Apld.** *Re* Baumann, *Ex p.* Oriental Bank Corpn. (1874), 30 L. T. 803.

**2354. —— Bankruptcy of seller & buyer—Rights of bank against seller.**]—A Bombay firm drew bills upon a London firm, who accepted them against certain consignments. The Bombay firm pledged the bills & shipping documents with a bank under a letter of hypothecation to which the London firm was not a party. The Bombay & London firms both became bkpt. The bank thereupon sold the goods, & sought to prove against the estate of the London firm for the balance due after deducting the proceeds of sale less one-half per cent. broker's commission & two & a half per cent. merchant's commission:—*Held:* the London firm was not bound by the terms of the letter of hypothecation, the bank was in the position of a mtgee. or pledgee of the goods, & was entitled only to deduct from the purchase-money the bare expense of realisation, namely, the broker's commission, & to prove for the balance of the bills after deducting the proceeds of the goods, less the broker's commission.—*Re* BAUMANN & CO., *Ex p.* ORIENTAL BANK CORPN. (1874), 30 L. T. 803, C. A.

**2355. —— Policy of insurance transferred to bank—& letter of hypothecation.**]—A shipper at Bombay having consigned goods to merchants in England, drew on them for £1,200, & insured the goods for £1,700. He sold the draft to defts., a bank, & handed them at the same time the policy of insurance & the bills of lading, with a letter of hypothecation signed by him. This letter stated that the shipper, having sold the bills to the bank, & having at the same time handed to them, "as collateral securities for the due payment of" the bill, "the bills of lading & shipping documents of the several goods stated at foot," thereby authorised the bank, "on default being made in acceptance on presentment, or in payment at maturity" of the bill, to sell the goods & apply the proceeds in payment of the bill; "the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank." The only documents stated at foot were the bill of exchange & the bill of lading. The ship was burnt at sea & the cargo lost. The draft for £1,200 was duly accepted, but the acceptors failing, it was dishonoured at maturity. The bank recouped themselves out of the policy moneys which had been paid to them by the insurance office, & had a balance in their hands. This balance having been claimed by pltfs., who were assignees for value of it from the shipper, the bank claimed it as a collateral security for a debt due to them from the shipper on another account. He had shipped goods to other consignees, & had drawn against the goods bills, which were also in the hands of the same bank. When the bills fell due, the drawees had requested the bank to defer presentment of the bills. The bills had not been presented, but the goods had been sold at a loss, & the bank had redrawn upon the shipper for the deficiency; but he had failed:—*Held:* the letter of hypothecation did not extend to any other liability of the shipper to the bank than that arising upon the £1,200 bill; the bank, having, at the request of the drawees, refrained from presenting the bills, had practically given them time, & had thus released the drawer, & the shipper was not indebted to the bank on this account; pltfs. were entitled to the surplus in the hands of the bank.

The contract is clear, plain, usual, ordinary, open to no doubt or question. Nobody has questioned the right of the bank to have the bills which were mentioned in this memorandum satisfied, & they have been satisfied, not exactly in the mode here contemplated, but by means of the delivery to them of the policy of insurance, which was so delivered to them, only that they might have the bills paid when they arrived at maturity. It would be putting a construction upon these words wholly at a variance, not only with the intention of the parties, but with the very expressions themselves, if I were to hold that, by means of this transaction, this letter of hypothecation, & the policy of insurance which accompanied it, the bank were entitled to any more than the very sum which was expressed in the bills of exchange (BACON, V.-C.).—LATHAM *v.* CHARTERED BANK OF INDIA (1874), L. R. 17 Eq. 205; 43 L. J. Ch. 612; 29 L. T. 795; 2 Asp. M. L. C. 178.

**2356. Agreement not to present bills of exchange—Whether shipper discharged.**]—LATHAM *v.* CHARTERED BANK OF INDIA, No. 2355, *ante*.



b. *Duty of bank to preserve value of security.*]—SALTER (JOSEPH) SONS, LTD. *v.* BANK OF NOVA SCOTIA, [1926] 1 D. L. R. 581; 58 N. S. R. 389.—CAN.

**2357. Whether bank entitled to seller's lien—Bill of lading in buyer's name.**]—A contract provided for a sale of certain oil to P. & co. on the terms of cash against documents. P. & co.'s name was inserted in the bill of lading at their request as shippers, & the bill of lading provided for the oil to be delivered to them or their order. A draft attached to a bill of lading was then sold by the vendors of the oil to certain bill brokers, & they subsequently sold the same to a bank at Amsterdam, who had an account with pltfs. On the arrival of the oil in London on May 2, 1910, P. & co. obtained delivery of it from defts., who were the agents of the shipping co. by whose vessel the oil was carried, without tendering the bill of lading. P. & co. merely giving an indemnity. P. & co. then approached pltfs. who had credited in their books the amount of the draft to the Amsterdam bank, & were holding the bill of lading as against the draft, & on May 4 arranged with them for an advance of the money to take up the draft. The loan was then arranged, pltfs. retaining the bill of lading, which P. & co. thereupon indorsed. On pltfs. subsequently applying to defts. for the oil, they were then informed that it had been delivered to P. & co. on May 2. In an action for wrongful conversion & non-delivery of the oil:—*Held:* P. & co. were not entitled to possession of the bill of lading until they had paid the draft; pltfs. took over the rights of the Amsterdam bank on crediting them with the amount of the draft, which rights were perfected by the indorsement by P. & co. of the bill of lading; & the delivery of the oil to P. & co. being wrongful, pltfs. were entitled to succeed.—LONDON JOINT STOCK BANK, LTD. *v.* BRITISH AMSTERDAM MARITIME AGENCY, LTD. (1910), 104 L. T. 143; 11 Asp. M. L. C. 571; 16 Com. Cas. 102.

**Acceptance of bill of exchange—Failure of consideration—Bill of lading not genuine.**]—*See* BILLS OF EXCHANGE, Vol. VI., p. 161, Nos. 1035–1037.

*H. Stoppage in transitu.*

*See* SALE OF GOODS, Vol. XXXIX., pp. 612–631, Nos. 2097–2289.

**What sellers can exercise right.**]—*See, generally,* SALE OF GOODS, Vol. XXXIX., pp. 606, 607, Nos. 2030–2046.

**Effect of disposition by buyer.**]—*See, generally,* SALE OF GOODS, Vol. XXXIX., pp. 632–636, Nos. 2290–2324.

**Effect of exercise of right by seller.**]—*See, generally,* SALE OF GOODS, Vol. XXXIX., pp. 636–638, Nos. 2325–2345.

**Agent's right of stoppage in transitu.**]—*See* AGENCY, Vol. I., pp. 556–558, Nos. 2055–2070.

*J. Effect of Transfer.*

*See* Sect. 3, sub-sect. 9, *post.*

SUB-SECT. 9.—EFFECT OF TRANSFER OF BILLS OF LADING.

*A. In General.*

*See* Bills of Lading Act, 1855 (c. 111).

**2358. General rule.**]—The effect of the indorsement of a bill of lading depends upon the intention of the parties. Accordingly where a bill of lading is indorsed to an agent it confers no property in the goods, but only clothes the agent with authority to take possession for the consignees.—BURGOS *v.* NASCIMENTO, MCKEAND, CLAIMANT (1908), 100 L. T. 71; 53 Sol. Jo. 60; 11 Asp. M. L. C. 181.

**2359. Effect of transfer at common law.**]—The possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained had no greater effect at common law than the transfer of the actual possession (BLACKBURN, J.).—COLE *v.* NORTH WESTERN BANK (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 233; 32 L. T. 733, Ex. Ch.

*Annotations:*—**Refd.** Johnson *v.* Credit Lyonnais Co. (1877), 3 C. P. D. 32; City Bank *v.* Barrow (1880), 5 App. Cas. 664; Mildred *v.* Maspons (1883), 8 App. Cas. 874; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643. **Mentd.** Hellings *v.* Russell (1875), 33 L. T. 380; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426; Nähmaschinen Fabrik Act. *v.* Pickford & Lee & Harris (1888), 4 T. L. R. 617; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201; Tremoille *v.* Christie (1893), 69 L. T. 338; Brocklesby *v.* Temperance Bldg. Soc., [1895] A. C. 173; Farquharson *v.* King, [1901] 2 K. B. 697; Oppenheimer *v.* Attenborough (1906), 12 Com. Cas. 88; Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50; Folkes *v.* King, [1923] 1 K. B. 282; Lowther *v.* Harris, [1927] 1 K. B. 393.

**2360. Whether original contract transferred.**]—THOMPSON *v.* DOMINY, No. 2462, *post.*

**2361.** ——.]—THE EMILIEN MARIE, No. 2294, *ante.*

**2362.** ——.]—(1) When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under 25 & 26 Vict. c. 63, ss. 66–78, is justified in delivering to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be *bonâ fide* & without notice or knowledge of such prior indorsement. Goods having been shipped for London consigned to C. & co. the shipmaster signed a set of three bills of lading marked "First," "Second," & "Third," respectively, making the goods deliverable to C. & co., or their assigns, freight payable in London, the one of the bills being accomplished, the others to stand void. During the voyage C. & co. indorsed the bill of lading marked "First" to a bank in consideration of a loan. Upon the arrival of the ship at London the goods were landed & placed in the custody of a dock co. in their warehouses; the master lodging with them notice under 25 & 26 Vict. c. 63, s. 68, etc., to detain the cargo until the freight should be paid. C. & co. then produced to the dock co. the bill of lading marked "Second" unindorsed, & the dock co. entered C. & co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the dock co. *bonâ fide* & without notice or knowledge of the bank's claim delivered the goods to other persons upon delivery orders signed by C. & co.:—*Held:* the dock co. had not been guilty of a conversion, & the bank could not maintain any action against them.

(2) Every one claiming as assignee under a bill of lading must be bound by its terms, & by the contract between the shipper of the goods & the shipowner therein expressed. The primary office & purpose of a bill of lading, although by mercantile law & usage it is a symbol of the right of property in the goods, is to express the terms of the

*Sect. 3.—Bills of lading: Sub-sect. 9, A. & B. (a).*]

contract between the shipper & the shipowner (LORD SELBORNE, C.).

(3) I further think that a warehouseman taking the custody of the goods . . . is under an obligation . . . to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, & is justified or excused by the same things as would justify or excuse the master (LORD BLACKBURN).

(4) Where he has notice or probably even knowledge of the other indorsement, I think he must deliver at his peril, to the rightful owner or interplead (LORD BLACKBURN).

(5) The master appears to have been in a hurry to get his vessel empty, & to have resolved to avail himself of the provisions of 25 & 26 Vict. c. 63, ss. 66–78. He had not, in strictness, any right to do so till default had been made in making entry (LORD BLACKBURN).

(6) If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear; he would fulfil the contract if he delivered to C. & co. on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to any one producing the bill of lading with a genuine indorsement by C. & co. He would not fulfil his contract if he delivered them to any one else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract (LORD BLACKBURN).—GLYN, MILLS & Co. *v.* EAST & WEST INDIA DOCK CO. (1882), 7 App. Cas. 591; 52 L. J. Q. B. 146; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. L. C. 580, H. L.

*Annotations:—As to* (1) **Consd.** Sanders *v.* Maclean (1883), 11 Q. B. D. 327; Sewell *v.* Burdick (1884), 10 App. Cas. 74. *As to* (2) **Consd.** Leduc *v.* Ward (1888), 20 Q. B. D. 475. *Generally,* **Mentd.** National Mercantile Bank *v.* Rymill (1881), 44 L. T. 767.

**2363. To whom rights & liabilities pass—Consignee of indorsee.**]—Under Bills of Lading Act, 1855 (c. 111), the rights & liabilities of the consignee or indorsee of the bill of lading pass from him by indorsement over to a third person.—SMURTHWAITE *v.* WILKINS (1862), 11 C. B. N. S. 842; 31 L. J. C. P. 214; 5 L. T. 842; 7 L. T. 65; 10 W. R. 386; 1 Mar. L. C. 198; 142 E. R. 1026.

*Annotations:—***Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Refd.** The Felix (1868), L. R. 2 A. & E. 273; The Wilhelm Schmidt (1871), 25 L. T. 34; Fowler *v.* Knoop (1878), 40 L. T. 180.

**2364. —— Assignee of unindorsed bill—Bill indorsed to assignor.**]—SHORT *v.* SIMPSON, No. 2439, *post.*

**Right to sue.**]—*See* Sub-sect. 9, C. (*b*) ii., *post.*

**Liabilities.**]—*See* Sub-sect. 9, D. (*b*), *post.*

**Rights & liabilities depending on incorporation of charterparty.**]—*See* Sub-sect. 11, E. (*b*), *post.*

### *B. Transfer of Property in Goods.*

#### *(a) In General.*

**2365. Whether property passes—General rule.**]—The indorsement & delivery of a bill of lading to a creditor *primâ facie* conveys the whole property in the goods from the time of its delivery. But if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser, after such indorsement, is good.—HIBBERT *v.* CARTER (1787), 1 Term Rep. 745; 99 E. R. 1355.

*Annotations:—***Expld.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357. **Consd.** Burdick *v.* Sewell (1884), 13 Q. B. D. 159.

**2366.** —— ——.]—THOMPSON *v.* DOMINY, No. 2462, *post.*

**2367.** —— ——.]—GURNEY *v.* BEHREND, No. 2297, *ante.*

**2368.** —— ——.]—(1) Though the indorsement of a bill of lading passes the property in the goods, yet the indorsement to the consignee of one bill of a triplicate set is not such a negotiation as to prevent the right of stoppage.

(2) If bills of lading are presented to the master by two different holders, & he delivers to one, no right of action against him accrues thereby to the disappointed holder, as it is not for the master to inquire who has the best right.—THE TIGRESS (1863), Brown. & Lush. 38; 32 L. J. P. M. & A. 97; 8 L. T. 117; 9 Jur. N. S. 361; 11 W. R. 538; 1 Mar. L. C. 323; 167 E. R. 286.

*Annotations:—As to* (2) **Refd.** The Patria (1871), L. R. 3 A. & E. 436; Gaudet *v.* Brown, Argos (Cargo Ex), Geipel *v.* Cornforth, The Hewsons (1873), 28 L. T. 77; Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. *Generally,* **Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570.

**2369.** —— ——.]—PEASE *v.* GLOAHEC, THE MARIE JOSEPH, No. 2465, *post.*

**2370.** —— ——.]—In an action upon a bill of lading by an indorsee against the shipowners, for not delivering the goods, pltf. put in the bill of lading, & proved that the consignors had indorsed & delivered it to A., & that A. had indorsed & delivered it to pltf. for value:—*Held:* evidence to go to the jury of such an indorsement & delivery of the bill of lading as to vest the property in the goods in pltf.; & so to transfer to him the right of action, under 18 & 19 Vict. c. 111, s. 1.—DRACACHI *v.* ANGLO-EGYPTIAN NAVIGATION CO. (1868), L. R. 3 C. P. 190; 37 L. J. C. P. 71; 17 L. T. 472; 16 W. R. 277; 3 Mar. L. C. 27.

*Annotation:—***Refd.** Burdick *v.* Sewell (1884), 13 Q. B. D. 159.

**2371.** —— ——.]—(1) Where goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. (2) The same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf. (3) As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, & the transfer of it for value passes the absolute property in the goods. (4) It has not been fulfilled when the goods, though actually landed at a wharf, are subject to a stop order. (5) The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents, he need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, & any subsequent dealings with the others of the set are subordinate to the rights passed by that one. (6) Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the

PART VII. SECT. 3, SUB-SECT. 9.—B. (a).

**2365 i.** *Whether property passes General rule.*]—A bill of lading is not conclusive proof of the change of property, like a bill of sale; it is a question of evidence whether such an operation should be given to it.—KYLE *v.* BUFFALO & LAKE HURON RY. CO. (1865), 16 C. P. 76.—CAN.

c. —— *Property in goods remaining in vendor until paid for.*]—BATEMAN *v.* GREEN (1867), I. R. 2 C. L. 607.—IR.

holders of the two bills of lading. (7) The Acts relating to landing goods at a sufferance wharf were intended for the protection of the shipowner. (8) Goods shipped from India having been landed & warehoused at a bonded sufferance wharf in London were under a stop put upon them by the master for freight:—*Held:* the transfer of the bill of lading operated as a transfer of the goods so as to constitute a valid pledge of them for an advance without the necessity of the pledgee getting actual possession of them, inasmuch as the bill of lading remained in full force so long as complete delivery of the goods had not been made to some person claiming under it.—BARBER *v.* MEYERSTEIN (1870), L. R. 4 H. L. 317; 39 L. J. C. P. 187; 22 L. T. 808; 18 W. R. 1041; 3 Mar. L. C. 449, H. L.; *affg.* S. C. *sub nom.* MEYERSTEIN *v.* BARBER (1867), L. R. 2 C. P. 661, Ex. Ch.

*Annotations:*—*As to* (1) **Consd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. *As to* (5) **Consd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. **Reld.** The John Bellamy (1870), L. R. 3 A. & E. 129. *As to* (7) **Reld.** Furness, Withy *v.* White, [1894] 1 Q. B. 483; *As to* (8) **Reld.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. *Generally*, **Reld.** Young *v.* Lambert (1870), L. R. 3 P. C. 142; Mors-Le-Blanch *v.* Wilson (1873), L. R. 8 C. P. 227; The Rona (1884), 51 L. T. 28. **Mentd.** Hilton *v.* Tucker (1888), 39 Ch. D. 669; Mills *v.* Charlesworth (1890), 25 Q. B. D. 421; Morris *v.* Delobbel Flipo (1892), 66 L. T. 320; Dublin City Distillery *v.* Doherty, [1914] A. C. 823.

**2372.** —— ——.]—CHARTERED BANK OF INDIA, AUSTRALIA, & CHINA *v.* HENDERSON, No. 2402, *post.*

**2373.** —— ——.]—A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit & voyage, the bill of lading by the law merchant is universally recognised as its symbol & the indorsement & delivery of the bill of lading operates as a symbolical delivery of the cargo (BOWEN, L.J.).—SANDERS *v.* MACLEAN (1883), 11 Q. B. D. 327; 52 L. J. Q. B. 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. L. C. 160, C. A.

*Annotations:*—**Consd.** Biddell *v.* E. Clemens Horst Co., [1911] 1 K. B. 934; Arnhold Karberg *v.* Blythe, Green Jourdain, Theodor Schneider *v.* Burgett & Newsam, [1916] 1 K. B. 495. **Reld.** Cederberg *v.* Borries, Craig (1885), 2 T. L. R. 201; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643; Landauer *v.* Craven & Speeding, [1912] 2 K. B. 94; Orient Co. *v.* Brekke & Howlid, [1913] 1 K. B. 531; Sharpe *v.* Nosawa, [1917] 2 K. B. 814; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Manbre Saccharine Co. *v.* Corn Products Co., [1919] 1 K. B. 198. **Mentd.** Glasgow Assce. Corpn. *v.* Symondson (1911), 104 L. T. 254.

**2374.** —— ——.]—DANISH DAIRIES CO-OPERATIVE SOCIETY *v.* MIDLAND RY. CO. (1892), 8 T. L. R. 212, D.C.

**2375.** —— ——.]—MONTGOMERY *v.* HUTCHINS, No. 3828, *post.*

**2376.** —— **Different intention of parties.**]—HIBBERT *v.* CARTER, No. 2365, *ante.*

**2377.** —— **As between consignor & consignee—Consignee a trustee.**]—EVANS *v.* MARTELL (OR MARLETT), No. 2172, *ante.*

**2378.** —— —— **Dependent on terms of contract.**]—JENKYNS *v.* USBORNE, No. 2154, *ante.*

**2379.** —— **Transfer of bill with contract of sale.**]—It has even been contended that a mere delivery of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of a bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, & all others, cannot well be doubted (SIR WILLIAM SCOTT).—THE VROW MARGARETHA (1799), 1 Ch. Rob. 336; 1 Eng. Pr. Cas. 149; 165 E. R. 197.

*Annotations:*—**Consd.** The Southfield (1915), 85 L. J. P. 78. **Reld.** The Soglasie (1854), 2 Eco. & Ad. 101; Sorensen *v.* R., The Baltica (1857), 11 Moo. P. C. C. 141; The Miramichi, [1915] P. 71; The United States, [1917] P. 30; The Bawean, [1918] P. 58; The Hilding (1920), 37 T. L. R. 199; The Kronprinsessan Margareta, The Parana, [1921] 1 A. C. 486; The Vesta, etc., [1921] 1 A. C. 774.

**2380.** —— **As between indorsee & third party.**]—JENKYNS *v.* USBORNE, No. 2154, *ante.*

**2381.** —— **Notice of defect in assignor's title—Prior equitable title.**]—If A. has an equitable title to goods on board a ship, & B. knowing of such title gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover, but the captain will be justified in delivering the goods to A.—DICK *v.* LUMSDEN (1793), Peake, 250; 170 E. R. 146, N. P.

**2382.** —— —— **Fraud.**]—THE ARGENTINA, No. 2310, *ante.*

**2383.** —— —— **Insolvency.**]—THE ARGENTINA, No. 2310, *ante.*

**2384.** —— **No consideration.**]—WARING *v.* COX, No. 2312, *ante.*

**2385.** —— **Valuable consideration.**] — CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* HENDERSON, No. 2402, *post.*

**2386.** —— —— **Without collusion with consignee—Knowledge of indorsee that consignor not paid.**]—The property of goods passes by the indorsement & delivery of the bill of lading by the consignee to another *bonâ fide* for a valuable consideration & without collusion with the consignee although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee acceptances payable at a future day not then arrived.—CUMING *v.* BROWN (1808), 9 East, 506; 103 E. R. 666.

*Annotation:*—**Reld.** Jones *v.* Jones (1841), 8 M. & W. 431.

**2387.** —— —— **Previous transfer of goods without indorsement of bill of lading.**]—The property in a cargo for which the master of a ship has signed bills of lading may be transferred by delivery without indorsement of the bill of lading; & the transfer will be good against all the world, except subsequent indorsees of the bill of lading for a valuable consideration.—NATHAN *v.* GILES, GILES *v.* NATHAN (1814), 5 Taunt. 558; 1 Marsh. 226; 128 E. R. 808.

*Annotations:*—**Mentd.** Smidt *v.* Ogle (1815), 6 Taunt. 74; Giles *v.* Hutt (1848), 1 Exch. 701; Dearie *v.* Ker (1849), 4 Exch. 82.

**2388.** —— **Conditional transfer.**] — MITCHEL *v.* EDE, No. 2178, *ante.*

**2389.** —— —— **Transfer dependent on payment of balance of freight.**]—TAMVACO *v.* SIMPSON, No. 4101, *post.*

**2390.** —— **Intent to defraud consignor.**]—TOULMIN *v.* JOHNSON (1851), 10 L. T. 791.

**2391.** —— **Transfer after loss of goods—Jettison.**]—TRUMPLER *v.* LOCKETT (1850), 3 L. T. 448.

**2392.** —— **Transferor having no property in goods.**]—FINLAY *v.* LIVERPOOL & GREAT WESTERN S.S. CO., LTD., No. 2553, *post.*

**2393.** —— ——.] — GABARRON *v.* KREEFT, KREEFT *v.* THOMPSON, No. 3572, *post.*

**2394.** —— **Where goods at sea.**]—BARBER *v.* MEYERSTEIN, No. 2371, *ante.*

**2395.** —— **Goods landed at wharf—Sufferance wharf.**]—BARBER *v.* MEYERSTEIN, No. 2371, *ante.*

**2396.** —— —— **Subject to stop order.**]—BARBER *v.* MEYERSTEIN, No. 2371, *ante.*

**2397. Evidence — Indorsement.**]—DRACACHI *v.* ANGLO-EGYPTIAN NAVIGATION CO., No. 2370, *ante.*

**2398.** —— —— **& acts of ownership done by indorsee.**]—DRACACHI *v.* ANGLO-EGYPTIAN NAVIGATION CO., No. 2370, *ante.*

*Sect.* 3.—*Bills of lading: Sub-sect.* 9, *B.* (*a*), (*b*), (*c*), (*d*) & (*e*), *C.* (*a*) & (*b*) *i.* & *ii.*]

**2399. Averment of indorsement in statement of claim—Whether sufficient to show property in indorsee.**] — FINLAY *v.* LIVERPOOL & GREAT WESTERN S.S. CO., LTD., No. 2553, *post.*

**Transfer operating as delivery of goods.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 575–581.

(*b*) *Transfer to Agent.*

*See* Sub-sect. 8, D., *ante.*

(*c*) *Transfer by Mortgage or Pledge.*

*See* Nos. 2321–2325, *ante.*

(*d*) *What Title Conferred.*

**2400. Equitable title—Indorsement & delivery.**] —Applts., a firm in Manchester, purchased goods, shipped from London to Hong Kong, pledging their own credit on behalf of L. & co., a firm in London, having a branch at Hong Kong. By the invoice for these goods, L. & co., of Hong Kong, were to realise the goods & to transmit the proceeds to L. & co., in London, for the purpose of meeting their acceptances to applts. The bill of lading for the goods was in the usual form, except that the words " or order, or assigns," were omitted. L. & co., at Hong Kong, having received the invoice & bill of lading, indorsed the latter to the respondents, bankers at Hong Kong, as a security for payment of a loan due on a promissory note. On the arrival of the goods they were delivered to the respondents, who then gave up the bill of lading to L. & co., who gave a receipt for it, engaging to pay the proceeds of the goods as collected on account of the promissory note, it being understood that the goods belonged to the respondents until such proceeds were paid. In accordance with the terms of the receipt, L. & co. sold the goods, & remitted the proceeds to the resps. in part payment of the promissory note:—*Held:* (1) resps. had, under the circumstances stated, an equitable title to the goods by the indorsement & delivery to them of the bill of lading, & a legal title to the goods, the transaction amounting to an actual delivery of the goods to them; (2) the mere omission of the words " or order, or assigns," in the bill of lading, did not affect resps. with constructive notices of the trust existing under the arrangements between applts. & L. & co., & was not such an omission as ought to have excited the suspicion of resps., & put them on inquiry as to the said arrangements. (3) *Semble*, that in order to make bills of lading negotiable, some such words as " or order, or assigns," ought to be in them.—HENDERSON & CO. *v.* COMPTOIR D'ESCOMPTE DE PARIS (1873), L. R. 5 P. C. 253; 42 L. J. P. C. 60; 29 L. T. 192; 21 W. R. 873; 2 Asp. M. L. C. 98, P. C.

*Annotations:—As to* (1) **Folld.** Chartered Bank of India, Australia & China *v.* Henderson (1874), L. R. 5 P. C. 501. *Generally*, **Mentd.** Hogarth *v.* Wherley (1875), L. R. 10 C. P. 630.

**2401. Legal title.**]—HENDERSON & CO. *v.* COMPTOIR D'ESCOMPTE DE PARIS, No. 2400, *ante.*

**2402.** ——.]—A., a merchant in London & in Hong Kong, purchased goods for shipment from B., & paid for them by his acceptance of B.'s draft against the shipment, on the terms that A. should send them to his firm at Hong Kong, & that the proceeds should be remitted to A. in bills specially to meet such acceptance. A's firm at Hong Kong owed a large sum to C., & were under engagement to secure the debt by depositing shipping documents with him. Being threatened by C. with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, & would release them from their obligation to deposit shipping documents they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from B. was accordingly indorsed to C. who had no knowledge of the terms made with B., & it was returned by C. according to agreement, on receipt of an equivalent sum:—*Held:* (1) C. by such forbearance & release gave valuable consideration; (2) the legal interest in the goods passed by the indorsement of the bill of lading, & B. could not enforce his claim against the proceeds of sale received by C. in respect thereof.—CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* HENDERSON (1874), L. R. 5 P. C. 501; 30 L. T. 578, P. C.

*Annotation:—As to* (2) **Consd.** Leask *v.* Scott (1879), 46 L. J. Q. B. 329.

(*e*) *When Passing of Property Suspended.*

**Bill of lading taken to seller's order.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 512–515, Nos. 1305–1319.

**Delivery in exchange for payment.**] — *See, generally,* SALE OF GOODS, Vol. XXXIX., pp. 516–518, Nos. 1326–1344.

**Delivery of bill of exchange with bill of lading.**]—*See* SALE OF GOODS, Vol. XXXIX., pp. 518–521, Nos. 1345–1364.

*C. Transfer of Rights.*

(*a*) *In General.*

*See* Bills of Lading Act, 1855 (c. 111).

**2403. Right to take delivery.**]—THE VROW MARGARETHA, No. 2379, *ante.*

**2404.** ——.]—A cargo of potatoes was shipped from Dunkirk to London under a charterparty by which the charterer contracted to pay certain freight, & was to have sixteen days for loading & unloading, & to pay £2 per day for any detention of the vessel beyond that period. By the bill of lading, the cargo was deliverable to the consignees in London, or order, " he or they paying freight as per charterparty." In the margin of the bill of lading was the following memorandum:—" There are eight working days for unloading in London ":—*Held:* the consignees, by accepting the cargo under this bill of lading, incurred no liability for demurrage, although the vessel was detained for four days beyond the time mentioned.

If a bill of lading is signed by the master, & that bill of lading comes to the hands of an assignee for value, the latter is entitled to have the goods delivered to him on the terms mentioned in the bill of lading, & properly speaking he is not bound to refer to the charterparty at all (WILLES, J.).—CHAPPEL *v.* COMFORT (1861), 10 C. B. N. S. 802; 31 L. J. C. P. 58; 8 Jur. N. S. 177; 9 W. R. 694; 142 E. R. 669; *sub nom.* CAPEL *v.* COMFORT, 4 L. T. 448; 1 Mar. L. C. 78.

*Annotations:—***Apld.** The Norway (1864), Brown. & Lush. 226; Fry *v.* Chartered Mercantile Bank of India, London & China (1866), L. R. 1 C. P. 689. **Consd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Expld.** Porteus *v.* Watney (1878), 3 Q. B. D. 534. **Reld.** Cawthorn *v.* Trickett (1864), 12 W. R. 311; Ohrloff *v.* Briscall, The Helene (1866), L. R. 1 P. C. 231; Sewell *v.* Burdick (1884), 54 L. J. Q. B. 156.

**2405. —— Arrangement between shipper & other consignees—Made without privity of shipowner.**]—THE EMILIEN MARIE, No. 2294, *ante.*

**2406. Lien—Consignor & consignee partners—Endorsement of bill of lading to consignee—Lien for advances to consignor.**]—One of several partners in

a contract with Govt. cannot pledge goods consigned to him by another partner for the purpose of performing the contract. The indorsing of the bill of lading by such consignor to the consignee does not constitute a lien in favour of the latter for his advances to the consignor.—SNAITH *v.* BURRIDGE (1812), 4 Taunt. 684; 128 E. R. 499.

*Annotation :*—**Mentd.** Heilbut *v.* Nevill (1870), 39 L. J. C. P. 245.

— **Indorsement to bank—Whether bank entitled to seller's lien.**]—*See* No. 2357, *ante*.

**2407. Right to transfer property—To bonâ fide purchaser for value.**]—JENKYNS *v.* USBORNE, No. 2154, *ante*.

**2408. —— —— Responsibility to consignor.**]—At common law it may be very true that, by a bill of lading, property may be so vested in the consignee that he may be capable of selling it, though he would be responsible to the consignor (DR. LUSHINGTON).—THE ABO (1854), Ecc. & Ad. 347; Spinks, 42; 24 L. T. O. S. 5; 18 Jur. 965; 164 E. R. 200.

*Annotation :*—**Refd.** The Miramichi, [1915] P. 71.

**2409. Master signing bill as agent for charterers—Whether rights of innocent holder affected—Necessity for notice—Of charterparty.**]—THE EMILIEN MARIE, No. 2294, *ante*.

**2410. —— —— —— Of master's agency.**]—THE EMILIEN MARIE, No. 2294, *ante*.

### (*b*) *Right to Sue.*

#### i. *In General.*

*See* Bills of Lading Act, 1855 (c. 111); Admiralty Court Act, 1861 (c. 10).

**2411. General rule—Right follows property in goods.**]—EVANS *v.* MARTELL (OR MARLETT), No. 2172, *ante*.

**2412.** —— ——.]—C., a merchant at Waterford, who had been in the habit of consigning cargoes of grain to B., a corn factor at Bristol, wrote to latter stating that he was about to ship him a cargo of oats, & that he had drawn on him for £550, & desiring him to effect an insurance on the cargo. B. accepted the bill. Before the vessel sailed, C. stopped payment, & he then sent the bill of lading, indorsed in blank to H., not informing him of his engagement with B. On the arrival of the vessel, H. sent the bill of lading to B., desiring him to act for him. B. paid the freight, & took possession of the cargo, which was afterwards seized by defts.', creditors of C. under a foreign attachment :—*Held :* B. had not such a property in the goods as to enable him to maintain trover against defts.—BRUCE *v.* WAIT (1837), 3 M. & W. 15; Murp. & H. 339; 7 L. J. Ex. 17; 150 E. R. 1036.

*Annotations :*—**Distd.** Evans *v.* Nichol (1841), 3 Man. & G. 614. **Refd.** Bryans *v.* Nix (1839), 4 M. & W. 775.

**2413.** —— ——.]—THE FREEDOM, No. 2600, *post*.

**2414.** —— ——.]—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., No. 2435, *post*.

**2415. Whether payment of freight condition precedent—Trover against agent of consignor.**]—The consignor's agent having obtained possession of the cargo under another bill of lading, & having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated :—*Held :* the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, deft. having possessed himself of the goods wrongfully.—WALLEY *v.* MONTGOMERY (1803), 3 East, 585; 102 E. R. 721.

*Annotations :*—**Consd.** Mitchel *v.* Ede (1840), 11 Ad. & El. 888. **Refd.** Wilmshurst *v.* Bowker (1841), 2 Man. & G. 792; Shepherd *v.* Harrison (1871), L. R. 5 H. L. 116.

**2416. Action for non-delivery.**]—HOWARD *v.* SHEPHERD, No. 3782, *post*.

**2417. —— Mistake in drawing up bill of lading.**]—A c.i.f. contract provided for the sale of goods by defts. to pltfs., shipment to be from Calcutta to Tripoli. There are two ports called Tripoli, one in Africa & the other in Syria. The contract was intended to refer to the former. Defts. made arrangements with a shipping co. for the carriage of the goods to Tripoli in Africa, but the goods were shipped under a bill of lading, drawn in such a form that it was on its face a bill of lading for Tripoli in Syria, & the goods were delivered at that port. Defts. were not guilty of negligence, &, without knowing that it was not a bill of lading for Tripoli in Africa, indorsed it to pltfs. :—*Held :* pltfs. had a right of action against defts. under the contract of sale for non-delivery of the goods.—LECKY & CO., LTD. *v.* OGILVY, GILLANDERS & CO. (1897), 3 Com. Cas. 29, C. A.

*Annotation :*—**Mentd.** Sanders *v.* Sadler (1906), 95 L. T. 872.

**2418. Contents of bill unauthorised—Bill signed for goods not received on board.**]—GRANT *v.* NORWAY, No. 4524, *post*.

**2419. —— Quality marks different from marks on goods shipped.**]—COX *v.* BRUCE, No. 2256, *ante*.

**2420. Action for cause arising out of original contract.**]—THOMPSON *v.* DOMINY, No. 2462, *post*.

**2421.** ——.]—THE EMILIEN MARIE, No. 2294, *ante*.

**2422. Right independent of Bills of Lading Act, 1855 (c. 111).**]—SHORT *v.* SIMPSON, No. 2439, *post*.

**2423.** ——.]—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., No. 2435, *post*.

**2424.** ——.]—BRANDT *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD., No. 2257, *ante*.

**2425. Right under Admiralty Court Act, 1861 (c. 10).**]—THE WILHELM SCHMIDT, No. 3199, *post*.

——.]—*See, also*, ADMIRALTY, Vol. I., pp. 146, 147, Nos. 534-541.

#### ii. *To Whom Right Transferred.*

*See* Bills of Lading Act, 1855 (c. 111).

**2426. Indorsee having notice of prior equitable title.**]—DICK *v.* LUMSDEN, No. 2381, *ante*.

**2427. Holder by way of security.**]—A. of Liverpool wishing to draw upon the banking house of B. in London to a large amount, agreed among other securities given, to consign goods to a mercantile house consisting of the same partners as the banking house, though under the firm of B. & C.; accordingly he remitted the invoice of a cargo & the bill of lading indorsed in blank to B. & C. but the cargo was prevented from leaving Liverpool by an embargo; A. then became bkpt., being considerably indebted to B. & the cargo was delivered to his assignees by the captain :—*Held :* B. & C. might maintain trover for it against the captain.—HAILLE *v.* SMITH (1796), 1 Bos. & P. 563; 126 E. R. 1066, Ex. Ch.

*Annotations :*—**Distd.** Patten *v.* Thompson (1816), 5 M. & S. 350. **Consd.** Mitchel *v.* Ede (1840), 11 Ad. & El. 888.

**PART VII. SECT. 3, SUB-SECT. 9.—C. (b) i.**

**2411 i.** *General rule—Right follows property in goods.*]—DELAURIER & Co. *v.* WYLLIE (1889), 17 R. (Ct. of Sess.) 167.—**SCOT.**

**d.** *Action for non-delivery — Right of indorsee to sue.*]—WINCHESTER *v.* BUSBY (1889), 26 S. C. R. 336.—**CAN.**

**e.** *Right of action by indorser over against shipowner—When sued by indorsee.*]—HATELY *v.* MERCHANTS DESPATCH CO. (1883), 2 O. R. 385.—**CAN.**

*Sect. 3.—Bills of lading: Sub-sect. 9, C. (b) ii., & iii., & D. (a).*]

**Reld.** Bruce *v.* Wait (1837), Murp. & H. 339; Bryans *v.* Nix (1839), 4 M. & W. 775; Leask *v.* Scott (1877), 25 W. R. 654; Burdick *v.* Sewell (1884), 13 Q. B. D. 159.

**2428.** ——.]—A. having accepted bills of exchange for B.'s accommodation, B., by way of collateral security, lodges in his hands a bill of lading of certain goods deliverable to C., who had no interest in them. A. pays his acceptances, & B., being indebted to him to that amount, becomes bkpt. D. gets possession of the goods, & sells them:—*Held:* A. might maintain an action for money had & received against D., to recover the proceeds.—FAVENC *v.* HULLET (1808), 1 Camp. 554; 170 E. R. 1055, N. P.

**2429.** ——.]—Deft. shipped at Liverpool on board pltfs.' vessel certain goods, & the master signed a bill of lading which stated that the goods were shipped by deft. "as agent," & were to be delivered at the port of Colombo "unto order or assigns, he or they paying freight for the goods." Before the shipment, pltfs. advanced to E., on whose account the goods were shipped, £400, upon an undertaking by E. that he would indorse to them as a security a bill of lading of the goods, wherein the freight should be payable by E. in this country. Deft. indorsed the bill of lading to E. who indorsed it to pltfs. as a security for the said advance & a further advance made upon an estimate between pltfs. & E. of the value of the goods freight free. E. not having paid the freight:—*Held:* (1) deft. was liable under the bill of lading to pay the freight to pltfs.; (2) Bills of Lading Act, 1855 (c. 111), did not vest the property in the goods in pltfs., as indorsees of the bill of lading, so as to deprive them of their right to sue deft. for the freight.—FOX *v.* NOTT (1861), 6 H. & N. 630; 30 L. J. Ex. 259; 7 Jur. N. S. 663; 158 E. R. 260.

*Annotations:—As to* (2) **Expld.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106; The Freedom (1871), 8 Moo. P. C. C. N. S. 29. **Reld.** Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**2430. Indorsee without consideration.**]—COXE *v.* HARDEN, No. 2311, *ante.*

**2431.** ——.]—WARING *v.* COX, No. 2312, *ante.*

**2432. Agent.**]—MORISON *v.* GRAY, No. 2313, *ante.*

**2433.** ——.]—BURGOS *v.* NASCIMENTO, McKEAND, CLAIMANT, No. 2358, *ante.*

**2434. Pledgee.**]—VAN CASTEEL *v.* BOOKER, No. ]—In an action for wrongfully depriving pltfs. of goods, it appeared that the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, & sold the bills of exchange, with the bills of lading annexed, which he had indorsed in blank to a colonial bank, who sent them to a bank in London, with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at maturity. The goods arrived in England, & were delivered to defts., who were a railway co., to be delivered to the order of the shipowners. The consignee paid the freight & other shipping charges & accepted the bills of exchange, but before the bills became due, he induced defts. wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested pltfs. to advance the money & take up the bills. They did so, & received the bills of exchange & the bills of lading from the London bank, & ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to defts. they found that the goods had been already given up to the consignee, & they thereupon commenced the present action:—*Held:* (1) pltfs. must be taken to be pledgees of the goods, & had therefore a property sufficient to entitle them to maintain the action independently of the Bills of Lading Act, 1855 (c. 111); (2) pltfs.' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods.—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., [1891] 2 Q. B. 653; 61 L. J. Q. B. 115; 65 L. T. 234; 40 W. R. 148; 7 T. L. R. 627; 7 Asp. M. L. C. 69, C. A.

*Annotation:—As to* (2) **Distd.** London Joint Stock Bank *v.* British Amstordam Maritime Agency (1910), 104 L. T. 143.

**2436.** ——.]—BRANDT *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD., No. 2257, *ante.*

**2437. Shipper to whom bill re-indorsed.**]—SHORT *v.* SIMPSON, No. 2439, *post.*

**2438. Indorsees suing as trustees for consignees.**]—THE WILHELM SCHMIDT, No. 3199, *post.*

iii. *When Right Must Accrue.*

**2439. After indorsement.**]—Goods were shipped for Bombay under a bill of lading making them deliverable "to order or assigns." The consignor indorsed the bill of lading in blank, & deposited it with a banker as security for an advance of money, &, on his repaying the sum advanced, the bill of lading was re-indorsed & delivered back to him:—*Held:* such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the shipowners under the original contract: & consequently he was entitled to sue them for a breach, whether occurring before or after such re-indorsement.

*Qu.:* whether one who takes a bill of lading by indorsement after a breach by a wrongful delivery of the goods to a stranger, can maintain an action by virtue of Bills of Lading Act, 1855 (c. 111).—SHORT *v.* SIMPSON (1866), L. R. 1 C. P. 248; Har. & Ruth. 181; 35 L. J. C. P. 147; 13 L. T. 674; 12 Jur. N. S. 258; 14 W. R. 307; 2 Mar. L. C. 307.

*Annotations:—***Apld.** The Nepotor (1869), L. R. 2 A. & E. 375. **Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74; Bristol & West of England Bank *v.* Mid. Ry., [1891] 2 Q. B. 653. **Reld.** Meyerstein *v.* Barber (1866), 36 L. J. C. P. 48. **Mentd.** Kitson *v.* Hardwick (1872), L. R. 7 C. P. 473.

**2440. Before indorsement.**]—SHORT *v.* SIMPSON, No. 2439, *ante.*

**2441.** ——.]—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., No. 2435, *ante.*

*D. Transfer of Liabilities.*

(a) *In General.*

*See* Bills of Lading Act, 1855 (c. 111).

**2442. Demurrage.**]—If a consignee accept goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in sixteen days, & £8 per day, demurrage to be paid after that time, the master, upon delivery of the goods, may recover demurrage against the con-

**PART VII. SECT. 3, SUB-SECT. 9.—D. (a).**

*1. Transfer by indorsement & delivery to bank—& transfer from bank to common carrier.*]—Where goods were shipped at Liverpool for Montreal, to be delivered to deft. or his assignees on payment of freight, & deft., before delivery of the goods to him, transferred the bill of lading by indorsement & delivery to the Bank of Montreal, & the latter

signee.—JESSON *v.* SOLLY (1811), 4 Taunt. 52; 128 E. R. 247.

*Annotations:*—**Distd.** Evans *v.* Forster (1830), 1 B. & Ad. 118. **Consd.** Scaife *v.* Tobin (1832), 3 B. & Ad. 523; Smith *v.* Sieviking (1855), 4 E. & B. 945. **Distd.** Chappel *v.* Comfort (1861), 10 C. B. N. S. 802. **Refd.** Moeller *v.* Young (1855), 5 E. & B. 7; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**2443.** ——.]—If a bill of lading be assigned, the assignee is liable to pay not only the freight of the goods, but also demurrage, according to the terms of the bill of lading.—STINDT *v.* ROBERTS (1848), 5 Dow. & L. 460; 2 Saund. & C. 212; 17 L. J. Q. B. 166; 12 Jur. 518.

*Annotations:*—**Expld.** Young *v.* Moeller (1855), 5 E. & B. 755. **Distd.** Chappel *v.* Comfort (1861), 10 C. B. N. S. 802; Cawthron *v.* Trickett (1864), 15 C. B. N. S. 754. **Apprvd.** Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. **Refd.** Allen *v.* Coltart (1883), 11 Q. B. D. 782; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**2444.** ——.]—ALLEN *v.* COLTART, No. 3542, *post.*

**2445.** —— **Necessity for express stipulation.**]—OLIVER *v.* MUGGERIDGE, No. 2521, *post.*

**2446.** —— —— **Whether stipulation implied.**]—WEGENER *v.* SMITH, No. 3843, *post.*

**2447.** —— **Agreement of freighter to pay demurrage—Bill of lading assigned before arrival of ship.**]—The freighter of goods who has entered into a contract with the shipowner to pay demurrage, the goods being deliverable by the bill of lading to him or his assignees on paying freight, is not relieved from his liability to pay demurrage, although the bill of lading has been assigned before the arrival of the ship, & the goods are parted with by the shipowner to the assignee without satisfaction of the shipowner's lien.—HARRISON *v.* SPAITH (1854), 23 L. T. O. S. 155.

**2448. Whether liability divested by indorsement—Liability to prior holder.**]—Merchants in London receive from a mere stranger residing abroad a bill of lading of certain goods in a letter requesting them to effect insurance. They declining to do business for the consignor, but acting *bonâ fide* with a view to his interest, indorse the bill of lading to a friend of his, who receives the goods, & afterwards sails with the proceeds in his hands:—*Held:* the merchants by indorsing the bill of lading were liable to the consignor for the amount.—CORLETT *v.* GORDON (1813), 3 Camp. 472; 170 E. R. 1450, N. P.

**2449.** —— **Liability for freight.**]—The consignee named in a bill of lading being sued for freight, pleaded that he indorsed the bill before arrival of the ship in the words "Deliver to W. & K. or order, looking to them for all freight, dead freight, & demurrage, without recourse to us;" & that pltfs. accepted the indorsement, & in pursuance of it delivered the goods to W. & K., & not to deft. It was admitted that deft. would have been liable to W. & K. for any freight paid by them. There was a conflict of evidence as to whether the indorsement was or was not on the bill when it was shown to the captain, but the captain swore he did not see it. The judge directed the jury that it was immaterial whether the indorsement was or was not on the bill unless the captain saw it, & that the *onus* lay on deft. of proving that the captain saw & assented to it. The jury found a verdict for pltfs.; & deft. obtained a rule for a new trial on the ground of misdirection, which was discharged:—*Held:* deft. having been at the time of the alleged indorsement liable for the freight, & admitting that he still remained substantially liable, he was bound to prove an assent on the part of pltfs. discharging him from that liability, & that assent would not be proved by showing that the indorsement was on the bill when it was presented to the captain, without proving that the captain in fact assented to it.—LEWIS *v.* M'KEE (1868), L. R. 4 Exch. 58; 38 L. J. Ex. 62; 19 L. T. 522; 17 W. R. 325; 3 Mar. L. C. 174, Ex. Ch.

*Annotations:*—**Refd.** Fowler *v.* Knoop (1878), 47 L. J. Q. B. 473; Armour *v.* Leopold Walford (London), [1921] 3 K. B. 473. **Mentd.** Parker *v.* S. E. Ry., Gabell *v.* The Same (1877), 2 C. P. D. 416; Watkins *v.* Rymill (1883), 10 Q. B. D. 178.

**2450. Lien—For freight.**]—By a charterparty the cargo was made deliverable "on being paid freight as follows: The ship to have a lien on cargo for freight; £3 10*s.* per ton of 50 cubic feet to be paid to captain or his agents on right & true delivery at port of discharge." The charterer shipped a portion of the cargo under a bill of lading which stated freight to be payable as per charterparty:—*Held:* the rate of freight only, & not the terms as to the lien mentioned in the charterparty, was incorporated in the bill of lading, &, therefore, the shipowner had no lien as against a *bonâ fide* indorsee for value of such bill of lading for the whole chartered freight, but only for the freight due on the goods mentioned in the bill of lading.—FRY *v.* CHARTERED MERCANTILE BANK OF INDIA (1866), L. R. 1 C. P. 689; Har. & Ruth. 858; 35 L. J. C. P. 306; 14 L. T. 709; 14 W. R. 920; 2 Mar. L. C. 346.

*Annotations:*—**Consd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522; Porteus *v.* Watney (1878), 3 Q. B. D. 534; Gardner *v.* Trechmann (1884), 15 Q. B. D. 154; Manchester Trust *v.* Furness, [1895] 2 Q. B. 539. **Expld.** Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826. **Refd.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; The Northumbria (1906), 95 L. T. 618; Hogarth Shipping Co. *v.* Blyth Greene, Jourdain, [1917] 2 K. B. 534; United States Shipping Board *v.* Durrell, [1923] 2 K. B. 739.

**2451.** —— **For demurrage.**]—GRAY *v.* CARR, No. 1958, *ante.*

**2452.** —— **For detention.**]—GRAY *v.* CARR, No. 1958, *ante.*

**2453.** —— **Storage changes.**]—A co. imported into England frozen meat purchased by them in Australia. For the purpose of financing the co. in the business pltfs. paid the price owing by the co. to the persons from whom the co. had bought the meat, & reimbursed themselves out of the proceeds of bills of exchange discounted by a bank, which bills had been drawn to the bank's order by pltfs. & accepted by the co. The bills of lading for the meat were deposited with the bank as security that the bills of exchange would be met. On the arrival of the meat in England the co. with the assent of the bank placed the meat in defts.' cold store to be delivered by defts. to the bank's order or against bills of lading. Defts.' terms of storage, which were the terms usual in the trade, provided that defts. should have a general lien on the meat for all charges accruing against the storer or for any other money due from the owners of the goods. The co. having failed to meet their acceptances pltfs. paid the bank & received the bills of lading from the bank & demanded delivery of the meat from defts. Defts. claimed to exercise a lien on the meat for charges due to them from the co. for the storage of other goods:—*Held:* the meat having been placed in defts.' store with the assent of the bank on the terms of defts. having a general lien, defts. were entitled to enforce the general lien against pltfs., who had succeeded to the rights of the bank as regards the meat.—JOWITT & SONS *v.* UNION COLD STORAGE CO., [1913] 3 K. B. 1; 82 L. J.

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indorsed the bill of lading to H., a common carrier:—*Held:* deft. was not liable for the payment of the freight notwithstanding that H., as such common carrier, carried the goods in question from Montreal to Toronto for deft.—BICKFORD *v.* KERR (1873), 18 L. C. J. 169.—CAN.

*Sect.* 3.—*Bills of lading: Sub-sect.* 9, *D.* (*a*) & (*b*); *sub-sects.* 10 & 11, *A.*, *B.* & *C.* (*a*).]

K. B. 890; 108 L. T. 724; 29 T. L. R. 477; 57 Sol. Jo. 560; 18 Com. Cas. 185.

*Annotations:*—**Refd.** Cassils & Sassoon *v.* Holden Wood Bleaching Co. (1914), 84 L. J. K. B. 834; Pennington *v.* Reliance Motor Works, [1923] 1 K. B. 127.

**2454. —— Necessity for express stipulation.**]—GRAY *v.* CARR, No. 1958, *ante.*

**2455. —— ——.**]—MCLEAN & HOPE *v.* FLEMING, No. 2949, *post.*

**2456. Duty to take delivery—Implied term—Where no express stipulation.**]—(1) Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time, & the person to whom the property in the goods has passed by reason of such consignment is, by Bills of Lading Act, 1855 (c. 111), s. 1, subject to the liability so to take them.

(2) Where the charterers & the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charterparty between the charterers & the shipowner in reference to the same matter.—FOWLER *v.* KNOOP (1878), 4 Q. B. D. 299; 48 L. J. Q. B. 333; 40 L. T. 180; 27 W. R. 299; 4 Asp. M. L. C. 68, C. A.

**Freight.**]—*See* Sect. 11, *post.*

*(b) To Whom Liabilities Transf rred.*

*See* Bills of Lading Act, 1855 (c. 111).

**2457. Consignee.**]—JESSON *v.* SOLLY, No. 2442, *ante.*

**2458. Holder by way of security.**]—ALLEN *v.* COLTART, No. 3542, *post.*

**2459. Indorsee.**]—THE FREEDOM, No. 2600, *post.*

**2460.** ——.]—SEWELL *v.* BURDICK, No. 2186, *ante.*

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SUB-SECT. 10.—NEGOTIABILITY.

**2461. Whether negotiable.**]—LICKBARROW *v.* MASON, No. 2295, *ante.*

**2462.** ——.]—A bill of lading is not negotiable like a bill of exchange, so as to enable the indorsee to maintain an action upon it in his own name; the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself.—THOMPSON *v.* DOMINY (1845), 14 M. & W. 403; 14 L. J. Ex. 320; 5 L. T. O. S. 268.

*Annotations:*—**Consd.** Tindall *v.* Taylor (1854), 4 E. & B. 219. **Refd.** Grant *v.* Norway (1851), 10 C. B. 665; Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374; Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Mentd.** Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658.

**2463. Whether negotiable instrument.**]—GREEN *v.* DIROM (1848), 3 L. T. 448.

**2464.** ——.]—GURNEY *v.* BEHREND, No. 2297, *ante.*

**2465.** ——.]—A bill of lading for the delivery of goods to order & assigns, is a negotiable instrument, which by indorsement & delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them *in transitu.*

The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for; even if bills have been given which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide* & without notice.

A firm, M. & D., in France, sold, through their agent in England, to S. & T. a lot of linseed cake, payable by bill at three months' date & shipped the same. A bill of lading, signed by the master & indorsed by M. & D., was delivered to S. & T. in exchange for their acceptance at three months' date. Afterwards the bill of lading was redelivered to M. & D.'s agent to hold as security against the acceptance. T., a member of the firm of S. & T., subsequently obtained the bill of lading from M. & D.'s agent, by fraudulent misrepresentation, & indorsed & delivered it to P. & co. for value without notice of the fraud. Before the goods arrived in England, S. & T. became insolvent:—*Held:* the firm of S. & T. acquired no new title to the goods by the fraud of T., as it merely invested them with the temporary power of transferring their property in the goods; &, the right of M. & D., the vendors, to stop *in transitu* was gone, as the transfer to P. & co. was *bonâ fide*, & for a valuable consideration, in ignorance of T.'s fraud.—PEASE *v.* GLOAHEC, THE MARIE JOSEPH (1866), L. R. 1 P. C. 219; 3 Moo. P. C. C. N. S. 556; Brown. & Lush. 449; 35 L. J. P. C. 66; 15 L. T. 6; 12 Jur. N. S. 677; 15 W. R. 201; 2 Mar. L. C. 394; 16 E. R. 210, P. C.

*Annotations:*—**Apld.** The Argentina (1867), L. R. 1 A. & E. 370. **Mentd.** *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; Cundy *v.* Lindsay (1878), 26 W. R. 406.

**2466. —— Omission of "or order or assigns."**]—HENDERSON & CO. *v.* COMPTOIR D'ESCOMPTE DE PARIS, No. 2400, *ante.*

**2467. Liability of assignee to equities affecting assignor—What amounts to notice—Of prior agreement—Omission of "or order or assigns."**]—HENDERSON & CO. *v.* COMPTOIR D'ESCOMPTE DE PARIS, No. 2400, *ante.*

**2468. —— —— —— Letter from assignor informing assignee of bankruptcy of shipper.**]—THE EMILIEN MARIE, No. 2294, *ante.*

**2469. Whether assignee may take better right than assignor.**]—THE EMILIEN MARIE, No. 2294, *ante.*

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SUB-SECT. 11.—WHERE SHIP CHARTERED.

*A. In General.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article 5.

**2470. Liability as between shipowner & charterer—Dependent on facts of particular case.**]—Where a ship has been hired on a time charter not amounting to a demise & goods have been placed

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**PART VII. SECT. 3, SUB-SECT. 10.**

*g. Notice of outstanding interest by absence of indorsement.*]—The absence of the indorsement on bills of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bills, & places persons proposing to make advances upon the security of those bills upon inquiry in respect to the circumstances affecting them. On failure to take proper measures in order to ascertain these facts & obtain a clear title to the bills & goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee.—GOSSELIN *v.* ONTARIO BANK (1905), 36 S. C. R. 406.—**CAN.**

*h. Whether holder of bill can give valid discharge.*]—Mere possession of a bill of lading in the hands of a person who has intervened between the original shipper & the consignee & is in no way identified with the transaction except by possession of the document, does not give him any authority to give a valid discharge of the money payable by the consignee.—STEWART *v.* RICHARDSON SONS & CO., LTD., [1920] 3 W. W. R. 134; 53 D. L. R. 625; 30 Man. L. R. 481.—**CAN.**

**PART VII. SECT. 3, SUB-SECT. 11.—A.**

*k. Operation of bill as receipt for cargo.*]—Where goods are shipped by the charterer himself & the bill of

on board the ship for carriage upon the terms of a bill of lading, the question whether the contract made by the bill of lading with the owner of the goods is a contract of the shipowner or of the charterer must in every case be decided upon the facts & documents of the particular case.—WILSTON S.S. CO., LTD. *v.* WEIR (ANDREW) & CO. (1925), 31 Com. Cas. 111.

**2471. —— Shipper having no notice of charterparty.**]—THE FIGLIA MAGGIORE, No. 2990, *post.*

**2472. —— Express contract with charterer.**]—WAGSTAFF *v.* ANDERSON, No. 3452, *post.*

**2473. —— Company owning line of steamers—"Extra ship"—Estoppel.**]—A co. owned a line of steamers called the "Monarch Line," running between New York & London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods in a steamer at New York, & received a bill of lading made out in the ordinary form given by the co. for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "Monarch Line of steamships." At London an overside release for the goods was signed & given by the co.'s agents to A., & the freights received by them from A. In an action by A. against the co. for non-delivery of the goods:—*Held:* the co. were estopped from saying that the contract of shipment was not made with them.—HERMAN *v.* ROYAL EXCHANGE SHIPPING CO. & PATTON, JUNR. & CO. (1884), Cab. & El. 413.

**2474. —— Negligence.**]—THE ST. CLOUD, No. 2490, *post.*

**2475.** ——.]—OHRLOFF *v.* BRISCALL, THE HELENE, No. 2989, *post.*

**2476.** ——.]—SANDEMAN *v.* SCURR, No. 2038, *ante.*

**2477.** ——.]—HAYN *v.* CULLIFORD, No. 2699, *post.*

**2478. —— Effect of charterer taking bill of lading—On charterparty contract—Position of holder of bill not in charterer distinguished.**]—The distinction between the position of a charterer who ships & takes a bill of lading & an ordinary holder of a bill of lading is that in the former case the underlying contract of the charterparty remains until it is cancelled, & taking a bill of lading does not cancel it in whole or in part, unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so; while, in the case of a holder of a bill of lading who is not the charterer, there is no presumption that he contracts in any terms but those of the bill of lading, &, if the bill of lading purports to import the charterparty, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods.—TEMPERLEY STEAM SHIPPING CO. *v.* SMYTH & CO., [1905] 2 K. B. 791; 74 L. J. K. B. 876; 93 L. T. 471; 54 W. R. 150; 21 T. L. R. 739; 10 Asp. M. L. C. 123; 10 Com. Cas. 301, C. A.

*Annotation:*—**Refd.** The Portsmouth, [1911] P. 54.

**2479. Reference to charterparty in bill of lading—Constructive notice to holders of bills—Of contents of charterparty.**]—A charterparty contained a proviso that the captain & crew, although appointed & paid by the owners, should be the servants of the charterers, & that in signing bills of lading the captain should only do so as the agent of the charterers, & that the charterers would indemnify the owners against all liabilities arising from the captain signing the bills of lading. The captain signed bills of lading in the ordinary form for goods to be delivered to the holders of the bills of lading, they paying freight & other conditions as per charterparty. The goods were misdelivered, & an action was brought by the holders of the bills of lading against the shipowners for the loss:—*Held:* (1) the special clause in the charterparty was binding only between the owners & the charterers, & did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the captain as the agent of the owners; (2) the reference to the charterparty in the bills of lading did not give the holders constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions.—MANCHESTER TRUST *v.* FURNESS, [1895] 2 Q. B. 539; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. L. C. 57; 1 Com. Cas. 39; 14 R. 739; *sub nom.* MANCHESTER TRUST, LTD. *v.* TURNER, WITHY & CO., LTD., 64 L. J. Q. B. 766; 11 T. L. R. 530, C. A.

*Annotations:*—*As to* (1) **Refd.** Howden *v.* Nutfield S.S. Co. (1898), 14 T. L. R. 172; The Northumbria (1906), 95 L. T. 618; Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton, [1915] 2 K. B. 1. *As to* (2) **Consd.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534. **Apld.** Greer *v.* Downs Supply Co., [1927] 2 K. B. 28. **Refd.** East Yorkshire S.S. Co. *v.* Hancock (1900), 5 Com. Cas. 266; Molyneux *v.* Hawtrey, [1903] 2 K. B. 487; The Draupner, [1909] P. 219; Lloyds Bank *v.* Swiss Bankverein, Union of London & Smiths Bank *v.* Swiss Bankverein (1913), 108 L. T. 143. *Generally,* **Refd.** Roderiakt. Superior *v.* Dewar & Webb (1909), 101 L. T. 371.

*B. Charterparty amounting to a Demise.*

**2480. Liability of charterer.**]—COLVIN *v.* NEWBERRY, No. 2036, *ante.*

**2481.** ——.]—SAMUEL, SAMUEL & CO. *v.* WEST HARTLEPOOL STEAM NAVIGATION CO., No. 4629, *post.*

**What amounts to charterparty by demise.**]—*See* Sect. 2, sub-sect. 21, *ante.*

**Authority of master.**]—*See* Nos. 2498, 2499, *post.*

*C. Authority of Master.*

*(a) In General.*

**2482. Authority to sign bills.**]—GABARRON *v.* KREEFT, KREEFT *v.* THOMPSON, No. 3572, *post.*

**2483. —— Refusal to sign—Sum payable on refusal—Whether penalty or liquidated damages.**]—It was stipulated by a charterparty made between pltfs. & defts. that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, & sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so & warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty. In an action by the charterers against the shipowners for conversion & for penalties:—*Held:* (1) pltfs. could recover nominal damages for the breach of contract in not signing bills of lading as presented; (2) there had been no conversion by defts. of the cargo, as they had carried it for pltfs., had intended to deliver the whole of it to the consignees of the pltfs., & had been prevented by the acts of pltfs. from completing the delivery.—JONES *v.* HOUGH (1879), 5 Ex. D. 115; 49 L. J.

lading is taken by him in his own name, the bill of lading, in the absence of anything to show a contrary intention, is an acknowledgment only of the receipt of the goods & the contract of carriage is to be found in the charterparty alone.—OYLER *v.* MERRIAM, [1923] 1 D. L. R. 602; 56 N. S. R. 61.—CAN.

*Sect.* 3.—*Bills of lading: Sub-sect.* 11, *C.* (*a*) *&* (*b*), *& D.*]

Q. B. 211; 42 L. T. 108; 4 Asp. M. L. C. 248, C. A.

*Annotations:—As to* (1) **Folld.** The Princess (1894), 70 L. T. 388. **Expld.** Rayner *v.* Rederiakt. Condor, [1895] 2 Q. B. 289. *As to* (2) **Refd.** Armstrong *v.* Allan (1892), 67 L. T. 417.

**2484.** —— —— —— ——.]—A charterparty entered into between pltfs. & defts. contained a clause in the following terms: "Captain to sign bills of lading (at pltfs.' office) without responsibility as to weight, & as presented to him, without prejudice to the tenor of this charterparty, within twenty-four hours after the cargo is on board, or pay 4*d.* per register ton per day (the first day's payment being due on the expiration of the said twenty-four hours) for each day's delay." The captain refused to sign for seventeen days, but the owners offered to sign on his behalf within twenty-four hours. In an action by the charterers against the owners:—*Held:* (1) the signature of the owners was not sufficient to satisfy the provision in the charterparty; (2) the clause was one for a penalty, & not for liquidated damages. —THE PRINCESS (1894), 70 L. T. 388; 7 Asp. M. L. C. 432; 6 R. 723.

*Annotation:*—**Refd.** Rayner *v.* S.S. Ornen (1895), 64 L. J. Q. B. 540.

**2485.** —— —— —— ——.]—RAYNER *v.* REDERIAKT. CONDOR, No. 3912, *post*.

**2486.** —— —— **Whether amounting to conversion of cargo.**]—JONES *v.* HOUGH, No 2483, *ante*.

**2487.** —— —— **Signature by owners.**]—THE PRINCESS, No. 2484, *ante*.

**2488.** —— **Bills manifestly inconsistent with charterparty.**] — KRÜGER & CO., LTD. *v.* MOEL TRYVAN SHIP CO., LTD., No. 2503, *post*.

——.]—*See, generally*, Sect. 3, sub-sect. 4, *ante*.

**2489. Form of bill in charterparty—As to order & condition of goods—Master not bound to make untrue statement.**]—COMPANIA NAVIERA VASCONZADA *v.* CHURCHILL & SIM, COMPANIA NAVIERA VASCONZADA *v.* BURTON & CO., No. 2254, *ante*.

**Authority to vary stipulations in charterparty—Stipulations as to freight.**]—*See* Part VIII., Sect. 2, *post*.

*(b) For Whom Master Agent.*

**2490. Shipowner—Charterparty not amounting to demise.**]—(1) Whenever, through the neglect or misconduct of those on board the vessel, goods shipped have received damage, *primâ facie* the shipowner is responsible.

(2) In the absence of notice to the contrary, & when the charterparty does not amount to a demise of the ship, a shipper of goods is justified in supposing that the master is the agent of the shipowner alone, for the purpose of agreement as to the carriage of goods.

A shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading, signed by the master, such as injury to the goods by improper stowage, if it is not proved that at the time of shipment the shipper had notice of the charter.

(3) In case of injury to goods by improper stowage, loss upon a contract of resale entered into before delivery, & of which deft. had no notice at the time of making the original contract, is not to be allowed.—THE ST. CLOUD (1863), Brown. & Lush. 4; 1 New Rep. 244; 8 L. T. 54; 1 Mar. L. C. 307; 167 E. R. 269.

*Annotations:—As to* (2) **Folld.** Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86. **Consd.** Baumvoll Manufactur von Scheibler *v.* Furness, [1891] 2 Q. B. 310. **Refd.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106; Hayn, Roman *v.* Culliford (1879), 27 W. R. 541; Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1893] A. C. 8. *Generally*, **Refd.** The Ella A. Clark (1863), Brown. & Lush. 32; The Norway (1864), Brown. & Lush. 226; The Felix (1868), L. R. 2 A. & E. 273; The Nepotar (1869), L. R. 2 A. & E. 375; Simpson *v.* Blues (1872), L. R. 7 C. P. 290; Argos (Cargo Ex), Gaudet *v.* Brown, The Hewsons (1873), L. R. 5 P. C. 134; Sewell *v.* Burdick (1884), 10 App. Cas. 74; The Mecca, [1895] P. 95; The Cap Blanco, [1913] P. 130.

**2491.** —— ——.]—SANDEMAN *v.* SCURR, No. 2038, *ante*.

**2492.** —— ——.]—THE JOSEPH (1888), 4 T. L. R. 693, D. C.

**2493.** —— **As well as of charterer.**]—(1) The master signed bills of lading to deliver at Hamburg, "dangers of the seas only excepted":—*Held:* though the charterparty contained other exceptions, the master was the agent of the owner, as well as the charterer, &, therefore, the terms of the bill of lading were binding.

(2) The ship arrived at Falmouth on Aug. 23, during the war between France & Germany. Hamburg was blockaded till Sept. 18. The consignees offered to take their cargo at Falmouth & pay full freight, but were refused. The suit was commenced on Nov. 1:—*Held:* the master was bound to have delivered the cargo at Hamburg or at Falmouth.—THE PATRIA (1871), L. R. 3 A. & E. 436; 41 L. J. Adm. 23; 24 L. T. 849; 1 Asp. M. L. C. 71.

*Annotations:—As to* (1) **Refd.** Baumvoll Manufactur von C. Scheibler *v.* Gilchrest & Furness (1891), 60 L. J. Q. B. 605. *Generally*, **Refd.** The San Roman (1872), L. R. 3 A. & E. 583; Giovanni Dapueto *v.* Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482.

**2494.** —— **Ship sub-chartered.**]—THE EMILIEN MARIE, No. 2294, *ante*.

**2495.** —— ——.]—Under a time charter with power to sub-let the shipowners retained legal possession of the ship through the captain appointed & paid by themselves, who was to be the agent in several respects for the charterers, & in particular to sign bills of lading at any rates of freight that they might direct "without prejudice to this charter," & they also were entitled to a lien upon all cargoes for freight or charter money due under the charter:—*Held:* (1) bills of lading granted by the captain to resp., a sub-charterer from the charterers with notice of the time charter, were not mere receipts for goods, but contracts which bound the shipowners, & resp., having paid his bill of lading freight, was entitled to his goods free of lien for the time charterer's dues; (2) the words "without prejudice to this charter" mean that the time charter remains unaltered as between the owners & the charterers, notwithstanding the bills of lading, they do not limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods comprised therein for freight payable under the time charter.—TURNER *v.* HAJI GOOLAM MAHOMED AZAM, [1904] A. C. 826; 74 L. J. P. C. 17; 91 L. T. 216; 20 T. L. R. 599; 9 Asp. M. L. C. 588, P. C.

**2496.** —— ——.]—(1) When a ship is chartered, the charterparty being in the ordinary form & not amounting to a demise of the ship, & subsequently the ship is sub-chartered for a single voyage & bills of lading are signed by the captain in respect of cargo carried on that voyage, the contract contained in the bills of lading is a contract with the owner of the ship. The owner, or the captain as his agent, is entitled to collect the bills of lading freight, & to deduct from it any charterparty hire then owing, accounting for the balance, if any, to the sub-charterers. The rights of the parties are the same if the freight is collected by the ship's

agent, appointed by the sub-charterers, he being for this purpose either the agent of the owner or the agent of all parties.

(2) A shipowner is not entitled to exercise a lien on freight in the hands of the ship's agent for charterparty hire not due but accruing due at the time the lien purported to have been exercised.

(3) Where a charterparty provides that hire is to be paid half-monthly in advance, & that in default of payment the owner may withdraw the ship from the service of the charterer without prejudice to any claim the owner may otherwise have against the charterer, if the owner withdraws the ship in the middle of a half-month, he is only entitled to be paid hire in respect of that portion of the half-month during which the ship was in the service of the charterer.—WEHNER *v.* DENE STEAM SHIPPING CO., [1905] 2 K. B. 92; 74 L. J. K. B. 550; 21 T. L. R. 339; 10 Com. Cas. 139.

*Annotations:—As to* (1) **Consd.** Limerick S.S. Co. *v.* Coker (1916), 33 T. L. R. 103; Wilston S.S. Co. *v.* Weir (1925), 31 Com. Cas. 111; Molthes Rederi Akt. *v.* Ellerman's Wilson Line, [1927] 1 K. B. 710. **Refd.** The Okehampton, [1913] P. 173. *As to* (2) **Refd.** Green *v.* All Motors, [1917] 1 K. B. 625. *As to* (3) **Refd.** Italian State Rys. *v.* Mavrogordatos, [1919] 2 K. B. 305.

**2497. —— Master not entitled to sue charterer.**]—By a charterparty, containing the usual exceptions, freight was made payable on the unloading & right delivery of the cargo, which was to be provided by the charterers; the master was to sign bills of lading at the port of loading, & upon the completion of the loading the charterers' liability under the charterparty was to cease. The charterers having placed the cargo on board at the port of loading, bills of lading were signed by the master, whereby the cargo was made deliverable to the shippers or their assigns at the port of discharge, "they paying freight for the same as per charterparty." In an action by the master against the charterers for freight:—*Held:* the master, in signing the bills of lading, had done so merely as agent for the shipowner, & was therefore not entitled to maintain the action.—REPETTO *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD., [1901] 2 K. B. 306; 70 L. J. K. B. 561; 84 L. T. 836; 49 W. R. 526; 17 T. L. R. 421; 9 Asp. M. L. C. 215; 6 Com. Cas. 129.

——.]—*See, generally*, Sub-sect. 4, B., *ante*.

**2498. Charterer—Charterparty amounting to demise.**]—JAMES *v.* JONES (1799), 3 Esp. 27; 170 E. R. 526, N. P.

*Annotations:*—**Refd.** Hutton *v.* Bragg (1816), 7 Taunt. 14; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86.

**2499.** —— ——.]—BAUMWOLL MANUFACTUR VON CARL SCHEIBLER *v.* FURNESS, No. 2042, *ante*.

**2500. —— As well as of shipowner.**]—THE PATRIA, No. 2493, *ante*.

**2501. —— Agency for shipowner excluded by charterparty—Right of transferee of bill of lading to sue shipowner.**]—MANCHESTER TRUST *v.* FURNESS, No. 2479, *ante*.

**2502. —— —— —— Master signing "as agent for time charterers."**]—HARRISON *v.* HUDDERSFIELD S.S. CO., LTD. (1903), 19 T. L. R. 386.

*D. Inconsistency between Bill of Lading and Charterparty.*

**2503. Duty of charterer to prepare bill consistent with charterparty.**]—(1) A charterparty contained a clause exempting the shipowner from liability for stranding & other accidents of navigation, even when occasioned by the negligence of the master; the master to sign clean bills of lading without prejudice to the charter. In mistake, & *bonâ fide*, the master signed bills of lading presented by the charterers which did not give the shipowner the exemption given by the charterparty. Owing to the negligent navigation of the master there was a total loss of the cargo, & the holders of the bills of lading recovered damages against the shipowner:—*Held:* since the contract between the shipowner & the charterers was that the shipowner was not to be liable for the master's negligence, the charterers were bound to indemnify the shipowner against the claims of the holders of the bills of lading.

(2) It is the charterer's duty both to prepare & to present for signature the bill of lading, but then he must present such a bill of lading to the master as is not inconsistent with & not to the prejudice of the charterparty (LORD HALSBURY).

(3) When it is said that the master must sign any bill of lading submitted to him, I cannot agree. If the bill of lading tendered is manifestly inconsistent with the charterparty, I think it would be his duty to refuse (LORD HALSBURY).—KRÜGER & CO., LTD. *v.* MOEL TRYVAN SHIP CO., LTD., [1907] A. C. 272; 76 L. J. K. B. 985; 97 L. T. 143; 23 T. L. R. 677; 10 Asp. M. L. C. 465; 13 Com. Cas. 1; *sub nom.* MOEL TRYVAN SHIP CO., LTD. *v.* KRUGER & CO., LTD., 51 Sol. Jo. 623, H. L.; *affg.* S. C. *sub nom.* MOEL TRYVAN SHIP CO. *v.* KRUGER & CO., [1907] 1 K. B. 809, C. A.

*Annotations:—As to* (1) **Consd.** Groves *v.* Webb & Kenward (1916), 114 L. T. 1082. **Refd.** The Devonshire & St. Winifred, [1913] P. 13; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Pyman S.S. Co. *v.* Admiralty Lords Comrs. (1918), 119 L. T. 735. *As to* (2) **Consd.** Nolisement (Owners) *v.* Bunge & Born, [1917] 1 K. B. 160. *Generally*, **Mentd.** *Re* Auchmuty (1908), 99 L. T. 462.

**2504. Effect as between shipper & shipowner.**]—SEWELL *v.* BURDICK, No. 2186, *ante*.

**2505. Effect as between charterer & shipowner—Exception in bill of lading—No exception in charterparty.**]—RODOCANACHI *v.* MILBURN, No. 3816, *post*.

**2506.** —— —— ——.]—Where an agreement in special terms & for a special purpose has been entered into between a shipper of goods & shipowner, such special terms cannot be modified by reading into them the general words of a bill of lading under which the goods have been shipped.

By an agreement of the nature of a charterparty it was provided that shipowners should fix, in a suitable place on board their ship, proper refrigerating machinery & insulated chambers, & should, during the voyage, keep the chambers below a certain fixed temperature, any accident to the machinery or cause beyond the owner's control not preventing; & it was further provided that the performance of the agreement was to be subject to the exceptions mentioned in the bill of lading, & the agreement was to be read as if such clauses & conditions were repeated therein, & all cargo was to be "received & carried subject to the terms & conditions in the said bill of lading except as altered by these presents." By the terms of the bill of lading any loss or damage was excepted which might result from "the consequence of any damage, breakdown, or injury to, or defect in hull, tackle, boilers, or machinery, or their appurtenances, refrigerating engines or

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PART VII. SECT. 3, SUB-SECT. 11.—D.

**2504 i.** *Effect as between shipper & shipowner.*]—THE MARGA *v.* SEARLE (1903), 20 S. C. 485; 13 C. T. R. 713. —**S. AF.**

l. *Effect as between charterer & shipowner—Admissibility of parol evidence—To show variation of terms of bill from charterparty.*]—DAVIDSON *v.* BISSET & SON (1878), 5 R. (Ct. of Sess.) 706; 15 Sc. L. R. 397.—**SCOT.**

m. *Effect as between shipper & charterer—Onus of proof of notice to shipper of terms of charterparty.*]—COLONIAL UNION CO., LTD. *v.* COMMON (1890), 8 N. Z. L. R. 528.—**N.Z.**

*Sect.* 3.—*Bills of lading: Sub-sect.* 11, *D. & E.* (*a*), (*b*) & (*c*), *i., ii., iii. & iv.*]

chambers, or any part thereof, however such damage, etc., might have been caused, & notwithstanding that the same might have existed at, or at any time before, the loading or sailing of the vessel, or by unseaworthiness of the ship at the beginning or any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness." The refrigerating engines proved to be unfit & insufficient, & the insulated chambers were not kept at the agreed temperature, whereby the cargo was damaged:—*Held:* the exceptions in the bill of lading were not incorporated with the agreement so as to lessen or qualify the obligation of the owners to provide proper machinery, & to keep the chambers at the agreed temperature, & they were liable for the loss so caused.—HOUSTON & Co. *v.* SANSINENA & Co. (1893), 68 L. T. 567; 7 Asp. M. L. C. 311; 1 R. 203, H. L.; *affg.* S. C. *sub nom.* SANSINENA & Co. *v.* HOUSTON (R. P.) & Co. (1892), 66 L. T. 246, C. A.

**2507.** —— —— ——.]—A clause in a charterparty provided: "The captain to sign bills at any rate of freight without prejudice to this charterparty, but not below charterparty rate." The charterparty also contained an exceptions clause which did not protect the shipowners under the circumstances. A cargo of dates was shipped by a third party for delivery in London under a bill of lading which contained an exceptions clause which it was admitted protected the shipowners from liability if the contract of carriage was governed by the bill of lading. Subsequently to the shipping of the dates the charterers made an advance to the shipper & took the bill of lading duly indorsed, & thus became pledgees of the dates. When the ship arrived in London the charterers presented the bill of lading & took delivery of the dates, a portion of which was found to be seriously damaged. The charterers claimed to recover damages for this loss from the shipowners, they alleging that the dates were shipped under the charterparty:—*Held:* the charterers had no rights in respect of the dates except under the bill of lading, & therefore the shipowners were protected from liability by the exceptions clause in the bill of lading.

*Semble:* a ship does not become unfit to carry a particular cargo merely because it is stowed in a portion of a compartment which is less suitable for the carriage of that cargo than another portion of the same compartment. Such impropriety would only amount to improper stowage.—CALCUTTA S.S. Co., LTD. *v.* WEIR (ANDREW) & Co., [1910] 1 K. B. 759; 79 L. J. K. B. 401; 102 L. T. 428; 26 T. L. R. 237; 11 Asp. M. L. C. 395; 15 Com. Cas. 172.

*Annotations:*—**Refd.** Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534; Paterson, Zochonis *v.* Elder, Dempster, [1923] 1 K. B. 420.

**2508.** —— **Exception in charterparty—No exception in bill of lading—Indemnity of shipowner.**]—Where a contract for carriage of goods by sea contains an exception of negligence of the master & crew, the shipowner is entitled to a contribution from the owner of the goods to general average expenses, though the necessity for the same has been occasioned by the negligence of the master.

A charterparty, which contained an exception of the negligence of the master & crew, provided that the captain should sign bills of lading at any rate of freight the charterers or their agents might choose without prejudice to the stipulations of the charterparty, & that the charterers should indemnify the shipowners from any consequences which might arise from the captain following the charterers' instructions & signing bills of lading.

The captain, upon the instructions of the charterers, signed bills of lading for goods shipped by a third person, which did not contain a negligence clause. The ship coming into collision with another ship through the negligence of the captain, general average expenses were incurred in putting back for repairs:—*Held:* the charterers were liable to indemnify the shipowners against the loss sustained by them through their not being able to obtain a general average contribution from the owner of the goods by reason of the bills of lading not containing a negligence clause.—MILBURN & Co. *v.* JAMAICA FRUIT IMPORTING & TRADING Co. OF LONDON, [1900] 2 Q. B. 540; 69 L. J. Q. B. 860; 83 L. T. 321; 16 T. L. R. 515; 9 Asp. M. L. C. 122; 5 Com. Cas. 346, C. A.

*Annotations:*—**Distd.** Moel Tryvan Ship Co. *v.* Kruger [1906] 2 K. B. 792. **Refd.** The Duc D'Aumale (No. 2), [1904] P. 60; Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51.

**2509.** —— —— —— ——.]—By a charterparty the shipowners were not to be liable for perils of the sea or other accidents of navigation even when occasioned by the negligence, default, or error in judgment of the master, mariners, or other servants of the shipowners. By another clause in the charterparty the captain, although appointed by the owners, was to be under the orders & direction of the charterers as regards employment, agency, or other similar arrangements; bills of lading to be signed at any rate of freight the charterers or their agents might direct without prejudice to the charter, the charterers indemnifying the owners from all consequences or liabilities that might arise from the captain doing so. Corn was shipped under a bill of lading by which the shipowners were not exempted from the same liabilities as under the charterparty. The corn was damaged on the voyage, & the endorsees of the bill of lading sued the shipowners, alleging that the damage was caused by negligent loading. The shipowners served a third party notice on the charterers claiming indemnity from them under the above clause in the charterparty:—*Held:* the shipowners were entitled to serve the third party notice.—THE ARROYO (1900), 16 T. L. R. 255.

**2510.** —— —— —— ——.]—KRÜGER & Co., LTD. *v.* MOEL TRYVAN SHIP Co., LTD., No. 2503, *ante*.

*E. Incorporation of Charterparty in Bill of Lading.*

*(a) In General.*

**2511. When terms incorporated—"All other conditions as per charterparty."**]—PORTEUS *v.* WATNEY, No. 3880, *post*.

**2512.** —— ——.]—By a charterparty a vessel was to load a full cargo of timber, including a deck cargo at merchant's risk. Timber was loaded under a bill of lading which contained no reference to deck cargo, but in which there was a clause "freight & all other conditions as per charterparty." In an action for freight by the shipowner against the consignees of a part of the cargo which had been carried on deck, defts. counterclaimed for damage to their cargo:—*Held:* the conditions of the charterparty incorporated into the bill of



n. *When terms incorporated—Allusion in bill of lading to terms of charterparty.*]—HOWITT *v.* PAUL, SWORD & Co. (1877), 5 R. (Ct. of Sess.) 321.—**SCOT.**

lading were limited to such as were to be performed by the consignee, & did not include the exemption of the shipowner from liability in respect of deck cargo. — DIEDERICHSEN *v.* FARQUHARSON BROTHERS, [1898] 1 Q. B. 150; 67 L. J. Q. B. 103; 77 L. T. 543; 46 W. R. 162; 14 T. L. R. 59; 42 Sol. Jo. 65; 8 Asp. M. L. C. 333; 3 Com. Cas. 87, C. A.

*Annotations:*—**Consd.** Hogarth Shipping Co. *v.* Blyth Greene, Jourdain, [1917] 2 K. B. 534. **Refd.** East Yorkshire S.S. Co. *v.* Hancock (1900), 5 Com. Cas. 266; Moel Tryvan Ship Co. *v.* Kruger, [1906] 2 K. B. 792; The Northumbria (1906), 95 L. T. 618.

**2513. What terms incorporated—All conditions not inapplicable.**]—PORTEUS *v.* WATNEY, No. 3880, *post*.

**2514.** —— ——.]—Goods, forming part of a cargo loaded under a charterparty of pltfs.' ship, were shipped under a bill of lading to be delivered to the order of M. or assigns, "he or they paying freight for the goods . . . all other terms, conditions, & clauses as per charterparty." The charterparty contained the following clause: "The ship to discharge in such berth or dock as ordered by charterers or their agents." On the arrival of the ship at the port of discharge deft., the indorsee of the bill of lading, he being also the charterers' agent, ordered her to discharge in a certain dock, but she discharged in a different dock from that ordered, whereby deft. suffered damage:—*Held:* the clause in the charterparty was incorporated into the bill of lading, & pltfs. were liable to deft. for the damage suffered by him.

The place where the ship is to discharge is a matter relevant to the delivery of the cargo, & the consignee is therefore entitled to the benefit of the clause in the charterparty dealing with that matter. Where a bill of lading contains words such as these the only provisions of the charterparty, which are not incorporated into the bill of lading are those which are not clearly relevant to conditions which have to be performed by the consignee on the arrival of the ship (MATHEW, J.). —EAST YORKSHIRE S.S. CO., LTD. *v.* HANCOCK (1900), 5 Com. Cas. 266.

*Annotations:*—**Refd.** The Portsmouth, [1911] P. 54; Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534.

**2515.** —— —— **Not conditions altering express stipulations in bill of lading.**]—A charterparty contained a stipulation in the usual form for payment of freight at the rate of £1 11*s.* 3*d.* per ton; it also contained a clause that the shipowner should have "an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, & average"; & a further clause that the captain was to sign bills of lading at any rate of freight; "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." Certain goods were put on board the chartered ship, & were made deliverable to pltfs., who were not the charterers, by a bill of lading, whereby freight was made payable at 22*s.* 6*d.* per ton; the bill of lading contained also a clause whereby it was provided that extra expenses should be borne by the receivers & "other conditions as per charterparty." Upon the arrival of the ship at the port of discharge deft., who was the shipowner, claimed & compelled payment of freight at the rate mentioned in the charterparty. Pltfs. having sued to recover back the difference between the freight as specified in the charterparty & the freight as specified in the bill of lading:—*Held:* the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, no right of lien existed for the freight mentioned in the charterparty, & pltfs. were entitled to delivery of the goods upon payment of the freight specified in the bill of lading.

There are many cases as to what is brought into the bill of lading by this general reference to the charterparty. It brings in only those clauses of the charterparty which are applicable to the contract contained in the bill of lading; & those clauses of the charterparty cannot be brought in which would alter the express stipulations in the bill of lading (BRETT, M.R.).—GARDNER *v.* TRECHMANN (1884), 15 Q. B. D. 154; 54 L. J. Q. B. 515; 53 L. T. 518; 5 Asp. M. L. C. 558, C. A.

*Annotations:*—**Consd.** Serraino *v.* Campbell, [1891] 1 Q. B. 283; Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150. **Distd.** Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998; Kish *v.* Taylor, [1912] A. C. 604. **Refd.** Margetson *v.* Glynn (1892), 61 L. J. Q. B. 186; Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826; Red R. S.S. Co. *v.* Allatini (1909), 101 L. T. 510.

**2516.** —— **Conditions to be performed by party taking delivery.**]—TAYLOR *v.* PERRIN (1883), cited in Halsbury's Laws of England, Vol. XXVI., at p. 176.

*Annotations:*—**Refd.** Serraino *v.* Campbell, [1891] 1 Q. B. 283; Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; The Northumbria (1906), 95 L. T. 618; The Portsmouth, [1911] P. 54.

**2517.** —— ——.]—SERRAINO & SONS *v.* CAMPBELL, No. 2526, *post*.

**2518.** —— ——.]—DIEDERICHSEN *v.* FARQUHARSON BROTHERS, No. 2512, *ante*.

**2519.** —— ——.]—TEMPERLEY STEAM SHIPPING CO. *v.* SMYTH & CO., No. 2178, *ante*.

**2520.** —— **Ship sub-chartered—Terms of original charter not incorporated.**]—A shipper who has loaded on the terms of a sub-charter is not affected by notice of a stipulation in the original charterparty, that the owner is to have "a lien on the cargo for arrears of hire." He has a right to have bills of lading signed on the terms of the sub-charter.—THARSIS SULPHUR & COPPER MINING CO. *v.* CULLIFORD (1873), 22 W. R. 46.

—— **Particular terms.**]—*See* Sub-sect. 11, E. (*c*), *post*.

(*b*) *As against Assignees.*

**2521. Transferee only bound by terms expressly incorporated.**]—The indorsee of a bill of lading is only liable to be sued on so much of the contract in the charterparty as is expressly incorporated in the bill of lading.—OLIVER *v.* MUGGERIDGE (1859), 32 L. T. O. S. 254; 7 W. R. 161.

**2522.** —— **Right to delivery on terms of bill of lading.**]—CHAPPEL *v.* COMFORT, No. 2101, *ante*.

**Transfer of bills of lading.**]—*See* Sub-sect. 8, *ante*.

(*c*) *What Terms Incorporated.*

i. *Acknowledgment of Receipt of Cargo.*

*See* Sect. 3, sub-sect. 7, C. (*a*), *ante*.

ii. *Arbitration Clauses.*

*See* ARBITRATION, Vol. II., pp. 331, 332, Nos. 138–141.

iii. *Cesser Clauses.*

**Future liabilities.**]—*See* Nos. 1944, 1946, *ante*.

**Antecedent liabilities.**]—*See* No. 1955, *ante*.

**Effect of arbitration clause.**]—*See* ARBITRATION, Vol. II., p. 331, No. 140.

iv. *Demurrage Clauses.*

*See* Nos. 3841, 3842, 3880, *post*.

*Sect.* 3.—*Bills of lading: Sub-sect.* 11, *E.* (*c*) *v. & vi. Sect.* 4: *Sub-sect.* 1.]

v. *Exceptions from Liability.*

**2523. Whether incorporated.**] — (1) The excepted perils mentioned in the charterparty were more numerous than those in the bill of lading: —*Held:* under the circumstances, both instruments together contained the contract.

(2) *The S. R.*, a German ship with an English cargo, being in need of repairs, put into V. in the month of Aug., & then ascertained the existence of the war between France & Germany. The repairs were completed on Sept. 21, but the master, under the advice of his consul, did not set sail till Dec. 23:—*Held:* under the circumstances, the risk of capture was such that the delay was justifiable.

According to both English & German law, an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment, & experience, would justify delay.—THE SAN ROMAN (1872), L. R. 3 A. & E. 583; 41 L. J. Adm. 72; 26 L. T. 948; 1 Asp. M. L. C. 347; *affd. sub nom.* ANDERSON *v.* SAN ROMAN (OWNERS) (1873), L. R. 5 P. C. 301, P. C.

*Annotation:*—*Generally*, **Refd.** Brunner *v.* Webster (1900), 5 Com. Cas. 167.

**2524.** ——.]—TAYLOR *v.* PERRIN (1883), cited in Halsbury's Laws of England, Vol. XXVI., at p. 176.

*Annotations:*—**Refd.** Serraino *v.* Campbell, [1891] 1 Q. B. 283; Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; The Northumbria (1906), 95 L. T. 618; The Portsmouth, [1911] P. 54.

**2525.** —— **Restraint of princes.**]—RUSSELL *v.* NIEMANN, No. 2544, *post.*

**2526.** —— **Negligence.**]—Goods were shipped under a charterparty & bill of lading, the bill of lading providing that the goods were to be delivered at the port of discharge, "the act of God, the Queen's enemies, fire, & all & every other dangers & accidents of the seas, rivers, & navigation, of what nature & kind soever, excepted, unto order or to assigns, they paying freight for the said goods, & all other conditions as per charter, with average accustomed." In the charterparty were the same exceptions, followed by these words: "Negligence clause, as per Baltic Bill of Lading, 1885." Amongst the perils excepted by the Baltic Bill of Lading, 1885, were "strandings & collisions, & all losses & damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Owing to the negligence of the master, the ship was stranded & the goods were lost. Pltfs., who were indorsees of the bill of lading, but strangers to the charterparty, sued the shipowners for the loss of the goods:—*Held:* the words "all other conditions as per charter" did not incorporate into the bill of lading the exception of "stranding occasioned by the negligence of the master," & the shipowners were liable to pltfs.—SERRAINO & SONS *v.* CAMPBELL, [1891] 1 Q. B. 283; 60 L. J. Q. B. 303; 64 L. T. 615; 39 W. R. 356; 7 T. L. R. 174; 7 Asp. M. L. C. 48, C. A.

*Annotations:*—**Apld.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150. **Consd.** Moel Tryvan Ship Co. *v.* Kruger, [1906] 2 K. B. 792; Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534. **Distd.** Van Liewen *v.* Hollis, [1920] A. C. 239. **Refd.** Manchester Trust *v.* Furness, Withy, [1895] 2 Q. B. 539; East Yorkshire S.S. Co. *v.* Hancock (1900), 5 Com. Cas. 266; The Northumbria (1906), 95 L. T. 618; The Portsmouth, [1911] P. 54.

**2527.** —— ——.]—THE PATRIA, No. 2493, *ante.*

**2528.** —— —— **Express reference in bill of lading.**]—THE NORTHUMBRIA, No. 2606, *post.*

**2529.** —— ——.]—By the terms of a charterparty the shipowners were exempted from liability in respect of loss occasioned by (*inter alia*) "accidents of navigation even when occasioned by negligence, default, or error in judgment of the master, mariners, or other servants of the shipowners." The bill of lading signed by the master, so far as it referred to the charterparty, contained only the words "all other conditions as per charterparty." Pltfs. were the receivers of the cargo shipped under the bill of lading. In their contract of purchase they had stipulated with the sellers, "tonnage to be engaged on conditions of charterparty attached," which form contained the negligence clause. When the cargo arrived there was a shortage due to the negligence of those on board the vessel, in respect of which pltfs. sued the shipowners for damages:—*Held:* the proper inference from the facts was that pltfs. knew that the charterparty contained the negligence clause, & therefore the shipowners were not liable.—DRAUPNER (OWNERS) *v.* DRAUPNER (OWNERS OF CARGO), [1910] A. C. 450; 79 L. J. P. 88; 103 L. T. 87; 26 T. L. R. 571; 11 Asp. M. L. C. 436, H. L.

**2530.** —— **Indemnity clause.**]—MANCHESTER TRUST *v.* FURNESS, No. 2479, *ante.*

—— ——.]—*Compare* Nos. 2508–2510, *ante.*

**2531.** —— **"At charterer's risk."**]—Under a bill of lading which contained the words ". . . all other conditions & exceptions as per charterparty . . ." 900 barrels of tar were shipped on board defts.' steamship *M.* The charterparty was a chamber of shipping wood charter, Scandinavia & Finland, under which the *M.* was to load a cargo of deals, battens, or boards & the barrels of tar were shipped by arrangement in part substitution of the wood. At the request of the master of the *M.*, a clause was inserted in the bill of lading that the ship was "not liable for leakage & breakage," & on the margin of the charterparty itself the master made the following endorsement: "The master of the *M.* agrees to load 900 barrels of tar on deck for London at a freight of 2*s.* 2*d.* per barrel intaken." The charterparty contained the following clause: "The steamer to be provided with a deck load, at full freight, at charterers' risk." The barrels arrived in a damaged condition owing to a quantity of heavy timber being stowed on top of them, with the result that a large number were crushed & broken & their contents wholly or partially lost. In an action by the indorsees of the bill of lading against the shipowners:—*Held:* on the proper construction of the agreement between the parties, the words "at charterers' risk" were not incorporated into the contract under the bill of lading, & defts. were liable for the damage caused by the negligence of their servants.—THE MODENA, CHIESMAN & CO. *v.* MODENA (OWNERS) (1911), 27 T. L. R. 529; 16 Com. Cas. 292, D. C.

vi. *Stipulations as to Freight.*

**Right to payment.**]—*See* Part VIII., Sect. 3, sub-sect. 3, B., *post.*

**Rate of payment.**]—*See* Part VIII., Sect. 3, sub-sect. 3, F. (*b*), *post.*



2526*i*. *Whether incorporated—Negligence.*]—DELAURIER & CO. *v.* WYLLIE (1889), 17 R. (Ct. of Sess.) 167.—SCOT.

## SECT. 4.—EXCEPTED PERILS.

### SUB-SECT. 1.—IN GENERAL.

*See, generally,* CARRIERS, Vol. VIII., pp. 21–25, 38–68, Nos. 107–140, 210–462.

**2532. When exceptions apply—"Save risk of boats."**]—By bill of lading, a shipowner undertook, that goods should be delivered safe, "the act of God, the King's enemies, fire, & all & every other dangers & accidents of the seas, rivers, & navigation of whatever nature & kind soever, save risk of boats, so far as ships are liable thereto, excepted." The goods having been dispatched from the ship, in her boat, according to the usual course of trade in the West Indies, were, together with the boat, lost in a hurricane:—*Held:* the shipowner was not liable, under the terms of the bill of lading, to make good the loss.—JOHNSTON *v.* BENSON (1819), 1 Brod. & Bing. 454; 4 Moore, C. P. 90; 129 E. R. 798.

**2533. —— "At ship's risk."**]—By a charterparty a vessel was to proceed to a port, & there to load a cargo from the shore by the ship's boats & crew at ship's risk & expense. A part of the cargo was lost, after delivery from the shore & before it was loaded on board through one of the perils enumerated in the exceptions in the charterparty. In an action by the charterer for the non-delivery of this part of the cargo:—*Held:* the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, & the exceptions applied, & the shipowner was not liable for the non-delivery.

If this charterparty had been in the ordinary form it would have been the duty of the charterer to bring his goods alongside so as to deliver them into the ship. The provisions of the charterparty would not be applicable to these goods during the transit from the shore to the ship, because they are not at that time brought within the purview of the charterparty. If it were not for this exceptional clause the shipowner would have nothing to do with the goods during transit from the shore to the ship (LORD ESHER, M.R.).—NOTTEBOHM *v.* RICHTER (1886), 18 Q. B. D. 63; 56 L. J. Q. B. 33; 35 W. R. 300; 3 T. L. R. 30, C. A.

**2534. —— ——.**]—A clause in a charterparty provided as follows: "The cargo to be ordered by the captain as required, & when signed for to be at ship's risk until shipped on board . . . but in all other respects, the act of God, perils of the sea . . . are always mutually excepted." The cargo, which consisted of sleepers, was brought alongside the vessel in rafts. A number of the sleepers were lost after being signed for on behalf of the shipowner, & before they were shipped on board, through perils enumerated in the exceptions:—*Held:* the expression "at ship's risk" meant that the sleepers were at the absolute risk of the shipowner during the period between their being signed for & their being shipped on board, the excepted perils not applying to that period owing to their being prefaced by the words "but in all other respects."—DAMPSKEBSSELSKABET SKJOLDBORG & HANSEN *v.* CALDER (CHARLES) & CO. (1911), 106 L. T. 263; 12 Asp. M. L. C. 156; 17 Com. Cas. 97.

**2535. Onus of proof.**]—In 1920, applts., the General Steam Navigation co., Limited, who were shipowners, received from resps., 1,775 cases of dried eggs for carriage to Havre under a bill of lading dated Aug. 28, 1920. Out of these 1,775 cases so received by applts., only 1,767 cases were delivered at Havre. Resps. claimed damages for the loss of the balance of 8 cases. The bill of lading contained a large number of clauses printed in small print, & applts. relied on (*inter alia*), clause (*a*) which provided (*inter alia*), that it was agreed the ship, her owners, charterers, or master, are not liable in any event "for any loss, breakage, damage or injury in respect of animals, coin, jewellery pictures, statutory, china, earthenware, glass, looking glass, or glass ware of any description, plate, baggage, private effects & furniture, liquids, or any other goods packed in glass exceeding in value £2 per dozen bottles & similar articles of value, nor for any other article, package or parcel exceeding £10 in value, unless previous arrangements in writing have been made in which latter event the shipowners' &/or charterers' liability if any, is not to exceed the proved market value of such goods, or £10 per package or parcel at the shipowners' &/or charterers' option. All glass, looking glass & other heavy articles . . . are only to be carried at shipper's risk." Applts.' case was that the parcels of eggs exceeded £10 in value, & that no previous arrangements in writing had been made in regard to them, & that therefore they, applts., were not liable. Resps.' case was that the words "any other article, baggage, or parcel exceeding £10 in value must be construed according to the *ejusdem generis rule*, & that these words only referred to the sort of articles which were mentioned before, namely, "animals, coin, jewellery," & so forth. It was contended that the eggs did not come within the clause at all, & that they were not in the class of goods to which the clause applied. Applts. also relied on clause (*b*) of the bill of lading which excepted "The act of God, the King's enemies, pirates, robbers, restraint of princes, rulers & people . . . defects in hull, fittings, equipment, tackle, apparatus, machinery, boilers, or from perils of the sea . . . or from any act, neglect or default whatsoever, of the pilot, master, officers, engineers":—*Held:* (1) the *onus* was on applts., the shipowners, to show clearly that the words of clause (*a*) of the bill of lading applied to the circumstances of this case, & having regard to the ambiguity of the language of clause (*a*) applts. had failed to discharge that *onus;* (2) applts. had also failed to prove that the loss of the 8 cases of eggs was caused by one of the perils excepted by clause (*b*) of the bill of lading. They were liable for the loss.—LAYTON (J.) & CO., LTD. *v.* GENERAL STEAM NAVIGATION CO., LTD. (1923), 130 L. T. 662; 16 Asp. M. L. C. 335, D. C.

**2536. How far exceptions mutual—Each case dependent on particular facts.**]—In deciding whether a particular provision in an exceptions clause in a charterparty applies in favour of both shipowner & charterer, or applies only in favour of one or other party to the exclusion of the other, regard must be had to the exact wording of the clause in question & to the construction of the charterparty as a whole; & no assistance can be obtained from the decisions of other cases unless the circumstances in those other cases were substantially identical.—AKT. GENERAL GORDON *v.* CAPE COPPER CO. (1921), 91 L. J. K. B. 112; 26 Com. Cas. 289, C. A.

*Annotations:*—**Consd.** Williams *v.* Manissalian (1923), 29 Com. Cas. 42. **Apld.** Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

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**PART VII. SECT. 4, SUB-SECT. 1.**

o. *Owner not liable—Where peril of sea proved.*]—THE VILLE DE L'ORIENT (1860), 2 L. T. 62.—IR.

p. *Ship lost by peril excepted in charterparty—Duty of shipowners to supply substitute vessel.*]—By a charterparty defts. described therein as the owners of *The Kilcoan* (or substitute at owner's option), chartered *The Kilcoan* to pltfs. for a period of twelve months to carry 25,000 tons of

*Sect. 4.—Excepted perils: Sub-sects. 1, 2, 3, 4, & 5.]*

**2537. —— "Act of God."**]—A charterparty contained clauses relating to the obligations of shipowner & charterers respectively, & the usual exceptions, " act of God, perils of the sea," etc. :—*Held:* the exceptions were intended for the protection of the charterers as well as the shipowner.—BARRIE *v.* PERUVIAN CORPN., LTD. (1896), 13 T. L. R. 101 ; 2 Com. Cas. 50.

*Annotations:*—**Apld.** *Re* Newman & Dale S.S. Co. & British & South American S.S. Co., [1903] 1 K. B. 262. **Distd.** Braemount S.S. Co. *v.* Weir (1910), 102 L. T. 73. **Consd.** Embiricos *v.* Reid, [1914] 3 K. B. 45 ; Ralli *v.* Compania Naviera Sota y Aznar (1920), 123 L. T. 375 ; Akt. General Gordon *v.* Cape Copper Co. (1921), 91 L. J. K. B. 112. **Refd.** Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

**2538. —— "Fire."**]—The exception of fire in a charterparty enures for the protection of the charterer as well as the shipowner.—*Re* NEWMAN & DALE S.S. CO. & BRITISH & SOUTH AMERICAN S.S. CO., [1903] 1 K. B. 262 ; 72 L. J. K. B. 110 ; 87 L. T. 614 ; 9 Asp. M. L. C. 351 ; 8 Com. Cas. 87.

*Annotations:*—**Consd.** Embiricos *v.* Reid, [1914] 3 K. B. 45. **Apld.** Ralli *v.* Compania Naviera Sota y Aznar (1920), 123 L. T. 375. **Refd.** Braemount S.S. Co. *v.* Weir (1910), 102 L. T. 73 ; Akt. General Gordon *v.* Cape Copper Co. (1921), 91 L. J. K. B. 112 ; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

**2539. —— "Strikes."**]—By a charterparty, headed " Time Charterparty," the owners agreed to let & the charterers agreed to hire a steamship for the term of one trip from Newcastle, New South Wales, to the west coast of South America, the charterers to pay hire at & after the rate of £1,000 per calendar month, the hire to commence 24 hours after the vessel was placed at the charterers' disposal & to continue until the hour of her redelivery to the owners. There were provisions for the cessation of hire & for the cancellation of the charter on the happening of various enumerated events, but in that enumeration strikes were not included. Clause 26 provided as follows : " The act of God, perils of the seas, fire, barratry of the master & crew, enemies, pirates, robbers, arrests, & restraints of princes, rulers & people, strikes, collisions, strandings, & accidents of navigation, & all losses & damages caused thereby are always excepted, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other persons employed by the owners, or for whose acts they are responsible, but nothing herein contained shall exempt the owners from liability to pay for damage to cargo occasioned by bad stowage . . . & all the above exceptions are conditional on the vessel being seaworthy when she enters on the charter, but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners. . . . This clause is not to be construed as in any way affecting or cancelling the provisions for cessation of hire as provided in this charterparty. Charterers are not answerable for any negligence, default, or error in judgment of trimmers or stevedores employed in loading or discharging the cargo." When the vessel, on Dec. 18, 1909, was placed at the disposal of the charterers, who intended to load her with coal, there was a strike in operation at Newcastle, which prevented the loading of coal. The strike was still in operation on Jan. 12, 1910, when a dispute between the owners & charterers as to the right of the former to the payment of hire was referred to the decision of an umpire :—*Held:* (1) the exception of " strikes " in clause 26 of the charterparty was not mutual, but was for the owners' benefit only ; (2) the commercial object of the charterparty had not been frustrated ; consequently, the vessel was on hire to the charterers as from the date when she was placed at their disposal on Dec. 18, 1909.—BRAEMOUNT S.S. CO., LTD. *v.* WEIR (ANDREW) & CO. (1910), 102 L. T. 73 ; 26 T. L. R. 248 ; 11 Asp. M. L. C. 345 ; 15 Com. Cas. 101.

*Annotations:*—*As to* (1) **Consd.** Ralli *v.* Compañia Naviera [illegible] Bank Line *v.* Capel, [1919] A. C. 435. *Generc.* Akt. General Gordon *v.* Cape Copper Co. (1921), 91 L. J. K. B. 112.

**2540. Construction of exception clause—Exceptions in own favour—Strict construction.**]—BURTON *v.* ENGLISH, No. 4218, *post.*

**2541. —— Insertion of words by Court.**]—In Nov. 1914, after the outbreak of war, defts., a Spanish co. controlled by a Spanish firm, contracted to sell to pltfs., Bolckow, Vaughan & co., a quantity of iron ore to be delivered at Middlesbrough during 1915. The contract contained the following proviso : " In case of strikes, combinations of workmen, accidents, war, or any unavoidable total or partial stoppage of works or mines, the supply of minerals now contracted for may be wholly or partially suspended during the continuation thereof, & the time for delivery extended proportionately. In case of partial stoppage of works or mines, delivery to be *pro rata* with other then existing engagements." The Spanish firm then entered into a freight contract with defts. to carry iron ore from Spain to Middlesbrough during 1915 at 5*s.* 9*d.* a ton, the contract containing an exceptions clause of " restraint of princes." After this contract freights rose rapidly, & on Dec. 1, 1914, the British Admlty. issued regulations which caused delays to shipping. Defts. delivered cargoes under their contract in Dec. 1914, & Feb. 1915. On Feb. 4, 1915, the German Govt. threatened to sink all British & Allied ships in the waters round Great Britain & Ireland after Feb. 18, intimating that neutral ships might unavoidably suffer ; & the Spanish firm relied on this threat as a reason for claiming relief from their contract with defts. The threat caused a rise in war insurance premiums, but did not affect freights ; & no more neutral vessels were sunk in the first three months of 1915 than in the last three months of 1914. In Mar. 1915, defts. refused to make further deliveries until after the war ; & pltfs. treated this as a repudiation of their contract, & sued defts. for breach thereof :—*Held:* the words of the proviso should be read as if they were " In case of strikes, combinations of workmen, accidents, war, or any other unavoidable cause, occasioning total or partial stoppage of works or mines," & there was no exception on which defts. could rely as excusing them from the performance of the contract.

The clause is one in which . . . some words must be inserted in order to make it intelligible (BANKES, L.J.).—BOLCKOW, VAUGHAN & CO., LTD. *v.* COMPANIA MINERA DE SIERRA MENERA (1916), 86 L. J. K. B. 439 ; 115 L. T. 745 ; 33 T. L. R. 111 ; 13 Asp. M. L. C. 533, C. A.

*Annotation:*—**Refd.** Tennants (Lancashire) *v.* Wilson (1917), 23 Com. Cas. 41.

**2542. Operation of exceptions clause—How far shipowner expected to prevent operation.**]—PHOSPHATE MINING CO. *v.* RANKIN, GILMOUR & CO., No. 2782, *post.*

coal in weekly voyages. While engaged in carrying out the contract *The Kilcoan* was lost by a peril excepted in the charterparty :—*Held:* the owners were not obliged to supply a substitute vessel to carry the remaining cargoes specified in the charterparty.—KING (ALEXANDER), LTD. *v.* HOWDEN BROTHERS (1915), 50 I. L. T. 27.—IR.

**Implied warranty of seaworthiness.**]—*See* Sect. 6, sub-sect. 1, B., *post*.

**Incorporation of exceptions in charterparty in bill of lading.**]—*See* Sect. 3, sub-sect. 11, E. (*c*) v., *ante*.

**Inconsistency between charterparty & bill of lading.**]—*See* Nos. 2505–2510, *ante*.

SUB-SECT. 2.—APPLICATION OF EJUSDEM GENERIS RULE.

*See* Sect. 1, sub-sect. 3, C. (*b*), *ante*.

SUB-SECT. 3.—ACT OF GOD.

*See, now*, Carriage of Goods by Sea Acticle 1924 (c. 22), Article IV., r. 2 (*d*).

**What amounts to.**]—*See* CARRIERS, Vol. VIII., p. 21, Nos. 107–113; NEGLIGENCE, Vol. XXXVI., pp. 100–106, Nos. 670–706.

**2543. Exception as mutual protection.**]—BARRIE *v.* PERUVIAN CORPN., LTD., No. 2537, *ante*.

SUB-SECT. 4.—KING'S ENEMIES.

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*f*).

**2544. Who are—Goods shipped on foreign ship—Enemies of country to which ship belongs.**]—(1) A bill of lading for goods shipped in a Russian port on board a Mecklenburgh ship for a port in this country, contained an exception of "the King's enemies":—*Held:* "the King's enemies" meant, or at all events included, the enemies of the sovereign of the person who made the bill of lading, viz. the Duke of Mecklenburgh, & consequently the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburgh. (2) By a bill of lading the goods were made deliverable to order or assigns, "paying freight for the said goods, & all other conditions as per charterparty":—*Held:* this did not incorporate an exception in the charterparty as to "acts of enemies" & "restraints of princes."

The words "restraints of princes & rulers" . . . include all cases of restraint or interruption by lawful authority; leaving the case of pirates to be ranked with other dangers of the sea (BYLES, J.). —RUSSELL *v.* NIEMANN (1864), 17 C. B. N. S. 163; 5 New Rep. 190; 34 L. J. C. P. 10; 10 L. T. 786; 13 W. R. 93; 2 Mar. L. C. 72; 144 E. R. 66.

*Annotations:—As to* (1) **Refd.** The Wilhelm Schmidt (1871), 25 L. T. 34; The Industrie, [1894] P. 58. *As to* (2) **Apld.** Taylor *v.* Perrin (1883), cited in [1891] 1 Q. B. p. 294; Serraino *v.* Campbell, [1891] 1 Q. B. 283; Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150. **Consd.** The Northumbria (1906), 95 L. T. 618. **Refd.** The Felix (1868), L. R. 2 A. & E. 273; The Heinrich (1871), L. R. 3 A. & E. 424; Temperley S.S. Co. *v.* Smyth, [1905] 2 K. B. 791; The Portsmouth, [1911] P. 54. *Generally.* **Refd.** Krüger *v.* Moel Tryvan Ship Co., [1907] A. C. 272.

SUB-SECT. 5.—RESTRAINT OF PRINCES.

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*g*), & *compare* INSURANCE, Vol. XXIX., pp. 218, 219, Nos. 1740–1758.

**2545. Restraint or interruption by lawful authority.**]—RUSSELL *v.* NIEMANN, No. 2544, *ante*.

**2546. —— Whether specific act of interference necessary.**]—NOBEL'S EXPLOSIVES CO. *v.* JENKINS & Co., No. 3501, *post*.

**2547. —— —— Reasonable probability of capture.**]—THE SAN ROMAN, No. 2523, *ante*.

**2548. —— —— ——.**]—By a charterparty made between pltfs., the owners of a Greek ship, & defts. as charterers, pltfs.' ship was to proceed to the Sea of Azoff, there load a cargo of grain, & carry it to a port in the United Kingdom. The charterparty contained an exception of restraints of princes. The ship arrived at the loading port on Oct. 1, 1912, just before the war between Greece & Turkey broke out. She commenced to load, & on the following day, after she had loaded a small portion of the cargo, defts. stopped further loading owing to the fact that the Turkish authorities were then seizing & detaining Greek ships arriving at the Dardanelles. War was declared on Oct. 18. The lay days under the charterparty expired on Oct. 22. On Oct. 21 defts. purported to cancel the charterparty upon the ground that the war had brought the adventure to an end, but pltfs. refused to accept such cancellation. The ship was unable to leave the Black Sea until Sept. 1913, when the war ended. In an action to recover damages for breach of the charterparty:—*Held:* the probability of the capture of the ship, if she attempted to pass through the Dardanelles, & the consequent inability of pltfs. to perform their duty under the contract of carrying the cargo to its destination, justified defts. in treating the adventure as frustrated & throwing up the charterparty; & defts. were none the less so justified because at the time of the alleged breach the contract was in part executed by reason of a portion of the cargo having been already loaded.—RICOS *v.* REID (SYDNEY) & Co., [1914] 3 K. B. 1348; 111 L. T. 291; 30 T. L. R. 451; 12 Asp. M. L. C. 513; 19 Com. Cas. 263.

*Annotations:*—**Refd.** Scottish Navigation Co. *v.* Souter, [1916] 1 K. B. 675; Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1917] 2 K. B. 78; Heilgers Cambrian Steam Navigation Co. (1917), 33 T. L. R. 34 Watts, Watts *v.* Mitsui, [1917] A. C. 227; Bank Line *v.* Capel, [1919] A. C. 435; Snia Soc. di Navigazione Industria e Commercio *v.* Suzuki (1924), 29 Com. Cas. 284; Cantiere Navale Triestina *v.* Handelsvertretung der Russe Soz. Fod. Naphtha Export (1925), 94 L. J. K. B. 579.

**2549. —— —— ——.**]—Pltfs. chartered a vessel for defts., who were shipowners, to proceed to M. & to load & carry to Japan a cargo of sulphate of ammonia which pltf. had bought. The charterparty excepted "arrests & restraints of princes." Defts. refused to provide a ship which by the charterparty they agreed to provide, on the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies. In these circumstances pltfs. were compelled to repudiate their contract with their sellers, & paid them, as the result of arbn. proceedings, £4,500 for so doing.

In an action by pltfs. against defts., for damages for breach of charter, the judge held that the shipowners were guilty of a breach of the charterparty, & that pltfs. could not recover from them £4,500, such damage being too remote, but that they were entitled to recover £3,800, the amount of profit they would have insured. This amount was the difference between the price at which they had

**PART VII. SECT. 4, SUB-SECT. 3.**

**q.** *Heavy rain.*]—A bill of lading stated goods to have been received by a steamer on the River Murray in good order & condition, to be delivered in like good order & condition, acts of God excepted. It was the custom to protect cargo in such steamers by tarpaulins, as pltf. knew, & the usual tarpaulins were on this occasion used, but an extraordinary rain injured a portion of the cargo. On action brought for not delivering in good condition:—*Held:* the damage was within the exception, being the act of God.—ACRAMAN *v.* JOHNSTON (1871), 5 S. A. L. R. 65.—AUS.

*Sect. 4.—Excepted perils: Sub-sect. 5.]*

purchased the goods & the market price of the goods in Japan on the date at which the goods might have been expected to arrive. The Ct. of Appeal were agreed that defts. were guilty of a breach of charterparty in not sending a vessel to load, but that as regards the amount of damage the proper amount to fix was the difference between the price which would have been realised by the sale of the goods in Japan at or about the time the vessel should, under the ordinary circumstances, have arrived, & the cost price of the goods at the port of loading at the time of the shipment, together with the cost of freight & insurance:—*Held:* (1) the mere apprehension of seizure was insufficient to justify deft.'s failure to supply a steamer, as to make the exception operative there must be such a declaration of war as to cause an actual restraint of princes; (2) on the main point, the measure of damages, their lordships were of opinion that the judge had proceeded on a right basis & his order would be restored, subject to correcting the omission to deduct the amount of insurance premium, which, taking the premium to be 6 per cent., would reduce the amount of damages to £800.—WATTS, WATTS & CO., LTD. *v.* MITSUI & CO., LTD., [1917] A. C. 227; 86 L. J. K. B. 873; 116 L. T. 353; 33 T. L. R. 262; 61 Sol. Jo. 382; 13 Asp. M. L. C. 580; 22 Com. Cas. 242, H. L.; *varying* S. C. *sub nom.* MITSUI & CO., LTD. *v.* WATTS, WATTS & CO., LTD., [1916] 2 K. B. 826, C. A.

*Annotations:—As to* (1) **Consd.** The Svorono (1917), 33 T. L. R. 415. *As to* (2) **Refd.** Russian Bank for Foreign Trade *v.* Excess Insce., [1918] 2 K. B. 123; Montevideo Gas & Drydock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 544. *Generally*, **Mentd.** Hackney B. C. *v.* Doré, [1922] 1 K. B. 431.

**2550.** —— —— ——.] — Pltfs. were the indorsees of the bills of lading of a cargo of rice loaded in June, 1914, at Saigon for Dunkirk.

The bills of lading incorporated the conditions & exceptions contained in the charterparty, namely (*inter alia*), that the vessel was to discharge at good & safe ports as specified or as near thereto as she could safely get, & the acts of the King's enemies & restraints of princes were excepted. About the end of Aug. 1914, the vessel, instead of going to Dunkirk, went to London, & discharged the cargo there in spite of pltfs.' protests, the reason given by the shipowners' representatives being that the French & British Admlty. would not allow steamers into Dunkirk, but this was not the fact, & the port was quite free & accessible although the German land forces were not very far off & were endeavouring to reach Paris.

In an action against the shipowners for damages defts. contended that the exception of restraint of princes applied on the ground that the position of the enemies forces was a menace to the port on its land side:—*Held:* the port was not unsafe & there was no restraint of princes, & defts. did not act under any apprehension thereof, & even if they did the apprehension was not reasonable in the circumstances, & therefore pltfs. were entitled to recover.—THE SVORONO (1917), 33 T. L. R. 415; 61 Sol. Jo. 594.

**2551.** —— —— **Risk of being sunk by submarine.**]—A Norwegian vessel was hired for a term of five years by a charterparty, made in 1912, which provided that "no voyage be undertaken & no documents, goods, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or govts." An arbitrator found as a fact that a particular voyage would involve the risk of the vessel "being attacked & sunk by German submarines":—*Held:* a voyage which involved the risk of the vessel being attacked & sunk by German submarines was one which would involve risk of "seizure" or "capture" within the meaning of the charterparty.—*Re* TONNEVOLD & FINN FRIIS, [1916] 2 K. B. 551; 85 L. J. K. B. 1758; 115 L. T. 311; 13 Asp. M. L. C. 439; *sub nom.* TONNEVOLD *v.* FINN FRIIS, 21 Com. Cas. 354.

**2552.** —— **Negligence of shipowner causing restraint — Carriage of enemy goods.**]—Pltfs. during a time of war shipped goods on defts.' vessel under a bill of lading containing an exception of liability for loss or damage occasioned by restraint of princes. Defts. took on board other goods which, as they knew, were intended for the Queen's enemies. The vessel was arrested by the British authorities before the goods were landed, & a suit was instituted in the Prize Ct. In the result, the goods intended for the enemy were confiscated, but the ship was released. In an action brought by pltfs. for consequent delay in the delivery of their goods:—*Held:* (1) even supposing that defts. had not intended to land the goods without the consent of the proper authorities, they were not entitled to rely on the exception to excuse themselves, from the consequences of a peril which their own negligence had contributed to bring about; (2) the measure of damages to which pltfs. were entitled was the difference between the market value of their goods at the time when they ought to have been delivered & the market value at the time when they were in fact delivered.

There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages & the consequent uncertainty as to the time of arrival, may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that as a general rule damages for loss of market by late delivery are not recoverable from the carrier by sea (COLLINS, M.R.).—DUNN *v.* BUCKNALL BROTHERS, DUNN *v.* CURRIE (DONALD) & CO., [1902] 2 K. B. 614; 71 L. J. K. B. 963; 87 L. T. 497; 51 W. R. 100; 18 T. L. R. 807; 9 Asp. M. L. C. 336; 8 Com. Cas. 33, C. A.

*Annotation:—As to* (2) **Refd.** Monte Video Gas & Dry Dock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 866.

**2553.** —— **Not act or decision of foreign tribunal.**]—(1) Declaration stated that M. caused to be shipped & loaded, at New York, upon a vessel of which defts. were owners, certain goods, & thereupon defts. through their agents in New York, executed & delivered to M. a bill of lading, by the terms whereof defts. promised M. that the said goods of M. so shipped as aforesaid should be carried to & delivered at Liverpool, certain perils, etc., only excepted, to the order of M. on payment of freight, etc.; & M. indorsed the said bill of lading to pltfs., to whom the property in the goods thereby passed; & the goods were carried to L., according to the terms of the bill of lading; & pltfs. then & still being the holders of the bill of lading, & entitled to the delivery of the said goods to themselves, were ready, etc., to pay freight, etc., & demanded the delivery of the goods. Averment of performance of all conditions, yet the goods were not delivered to pltfs., whereby the same were wholly lost to them.

Plea 12, equitable, that the goods were shipped as in the declaration mentioned, & the bill of lading provided (*inter alia*) that defts. should not be answerable for non-delivery provided delivery

were prevented by the acts or restraints of princes & rulers; & after the execution & delivery of the bill of lading, & the shipment on board at New York, certain persons claimed the property in & right to the possession of the goods & alleged that they had been fraudulently deprived of the possession thereof, & thereupon such persons proceeded in due course of law, in the recognised & established judicial tribunals of the place, such tribunals having authority & jurisdiction in the premises, to enforce their claim to, & to the possession of, the said goods; & thereupon all due & regular steps being taken, & all due & regular notices having been given, the said judicial tribunals adjudged & determined that such alleged true owners were, in fact, the owners of the said goods, & entitled to the same & to the possession thereof as against all persons; & thereupon it was, by the judicial tribunals, adjudged & determined that defts.' agents being then in possession of the goods, should hold possession thereof for, & deliver them to, the order of the true owners. Averment, that the judgment, order, & determination were duly & regularly made, & were legally enforceable upon & against the goods & against the defts. & their said agents & the said ship; & thereupon defts. & their agents, in obedience thereto, & for no other cause or reason delivered the goods to the order of the person so adjudged to be the true owners thereof; & that the non-delivery to pltfs. in the declaration complained of is the non-delivery of the goods, & not otherwise, & such non-delivery was caused & occasioned as in this plea mentioned, & not otherwise:—*Held:* the plea was bad. The "acts or restraints of princes & rulers" provided against in the bill of lading refer to the forcible interference of a state, or the govt. of a country taking possession of the goods *manu firti*, & do not extend to legal proceedings in the cts. at New York; nor, in an action founded on contract, can the act of any ct. of law, or judicial tribunal, deciding that defts. should hold possession of the goods to the order of the true owner, relieve defts. from performing their contract, such act or decision not having been expressly excepted against in the bill of lading.

(2) Plea 13, equitable, that the goods, before & at the alleged shipping & lading thereof on board the said ship, were not the goods of M. nor had he any right, authority, or title so to ship or load them, & that he had obtained them by fraud from the real owner thereof, & that the shipping or lading was with the consent of P., & against his will, & was made by M. by fraud & with intent to defraud & deprive P. of the goods, & defts. were all along ignorant of the fraud & of the premises, & that the bill of lading & the promise by defts. were obtained by M. by fraud & not otherwise, & that the bill was fraudulently indorsed by M. to pltfs.; & further, that after the goods were so shipped & loaded on defts.' ship, & before the ship left New York, P. demanded the goods from defts.' agent in New York, that is to say, the master of the ship, & sued the master in the New York Supreme Ct., such ct. having jurisdiction, etc., for the return & delivery of the said goods to P., & thereupon the master was adjudged & compelled by law by the Supreme Ct., having jurisdiction, etc., to deliver the goods to the order of P., & the master then did accordingly, deliver the goods to the order of P., & duly ordered defts. to deliver the goods to certain other persons not being pltfs., & defts. duly delivered the said goods accordingly to the order of P., whereby they were prevented delivering to pltfs.:—*Held:* to be a good plea.

The plea, which is good to a common intent, is an argumentative traverse of the averment in the declaration of property having passed, if the words of the declaration amount to an allegation that the goods were never, in fact, his property, & never ceased to be the property of P.

(3) Unless the indorser of a bill of lading really & *bonâ fide* has property in the goods at the time of indorsing it, 18 & 19 Vict. c. 111, passes no property to the indorsee, & upon the intervention of the true owner the latter is entitled to receive the goods from the shipowner, who is thereupon relieved from the liability of delivering them according to the bill of lading.—FINLAY *v.* LIVERPOOL & GREAT WESTERN S.S. CO., LTD. (1870), 23 L. T. 251; 3 Mar. L. C. 487.

*Annotations:—As to* (1) **Refd.** Miller *v.* Law Accident Insce., [1903] 1 K. B. 712; British & Foreign Marine Insce. *v.* Sanday, [1916] 1 A. C. 650.

**2554.** —— ——.]—CREW, WIDGERY & CO. *v.* GREAT WESTERN S.S. CO. (1887), 4 T. L. R. 148, C. A.

*Annotation:*—**Refd.** Robinson Gold Mining Co. *v.* Alliance Insce., [1901] 2 K. B. 919.

**2555.** —— **Restraint by army commander.**]—BRUCE *v.* NICOLOPULO, No. 2556, *post.*

**2556.** —— **Embargo.**]—Pltf. & deft. agreed by charterparty that pltf.'s ship should, after discharging her outward cargo, proceed to Galatz or Ibraila, as ordered at Constantinople by charterer's agents, & there receive a full cargo of wheat; & being so loaded should therewith proceed to Cork for orders to discharge at a safe port in the United Kingdom, & deliver the same agreeable bills of lading, & so end the voyage, restraints of princes & rulers, the dangers of the seas, etc., during the said voyage, always mutually excepted. The vessel, after discharging her outward cargo, proceeded to Constantinople; & in consequence of orders there given by deft.'s agent, the master took the vessel to Ibraila. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat:—*Held:* (1) the exception of the restraint of princes & rulers, etc., applied whilst the vessel was at Ibraila; (2) a copy of a printed placard, with the name of the Russian commander attached to it, & posted on the walls of Ibraila, was admissible as evidence of the prohibition.—BRUCE *v.* NICOLOPULO (1855), 11 Exch. 129; 3 C. L. R. 775; 24 L. J. Ex. 321; 7 L. T. 803; 3 W. R. 483; 156 E. R. 773.

*Annotations:—As to* (1) **Apld.** Barker *v.* M'Andrew (1865), 18 C. B. N. S. 759; The Carron Park (1890), 15 P. D. 203. **Refd.** Valente *v.* Gibbs (1859), 6 C. B. N. S. 270; Cohn *v.* Davidson (1877), 2 Q. B. D. 455.

**2557.** —— —— **No embargo in fact existing.**]—BRUNNER *v.* WEBSTER & BARRACLOUGH (1900), 16 T. L. R. 217; 5 Com. Cas. 167.

**2558.** —— **Blockade.**]—Declaration: that by a charterparty it was agreed that defts.' vessel should with all convenient speed sail to a spot as directed by pltfs., & there load a full cargo of coals; & then, as soon as wind & weather should permit, should proceed to Hamburg, & there deliver the same, the restraint of princes & rulers (*inter alia*) excepted. That pltfs. did, & were ready to do, all that was necessary on their parts; but defts., before any breach by pltfs. of the charterparty, refused to carry out the charterparty, & to let their ship take or carry any goods of pltfs. to the port of Hamburg, & gave notice to pltfs. that they renounced the charterparty. Pleas: 5. that before any breach of the charterparty, war broke out between France & Germany, wherein the port of Hamburg was situate; that the said port was blockaded by the

*Sect. 4.—Excepted perils: Sub-sect. 5.*]

French fleet; that the Queen, by proclamation, enjoined her subjects to a strict neutrality, & not to commit any violation of the law of nations; that defts. were British subjects, & their ship was a British ship, & the cargo being a cargo to be carried to Hamburg, the further performance of the charterparty became illegal, & defts., as they lawfully might, refused to carry out the same. 6. Repeating the above allegations, defts. having notice of the premises, refused to allow the ship to receive a cargo for the purpose of running the blockade & delivering the cargo, which was the breach complained of. 7. Repeating the same allegations, that defts. were ready to perform the charterparty so far as they were not prevented by any of the excepted causes, but that the charterparty could not have been carried out within a reasonable time, except by running the blockade, wherefore defts. refused to carry out the charterparty. On demurrer:—*Held:* the pleas disclosed substantially a good defence; for the charterparty being for one single adventure to commence at once, & the contract being still executory, defts. were justified in throwing up the contract & refusing to load the ship, when the further performance of the contract within a reasonable time was prevented by an excepted cause, viz. the blockade, which was a "restraint of princes."

A state of war must be presumed to be likely to continue so long & so to disturb the commerce of merchants as to defeat & destroy the object of a commercial adventure like this (LUSH, J.).—GEIPEL *v.* SMITH (1872), L. R. 7 Q. B. 404; 41 L. J. Q. B. 153; 26 L. T. 361; 20 W. R. 332; 1 Asp. M. L. C. 268.

*Annotations:*—**Consd.** Rodocanachi *v.* Elliott (1873), L. R. 8 C. P. 649; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38. **Apld.** Embiricos *v.* Reid, [1914] 3 K. B. 45. **Consd.** Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781; Millar *v.* Taylor, [1916] 1 K. B. 402. **Refd.** Duncan *v.* Koster, The Teutonia (1872), 8 Moo. P. C. C. N. S. 411; Nobel's Explosives Co. *v.* Jenkins, [1896] 2 Q. B. 326; Carlton S.S. Co. *v.* Castle Mail Packets Co. (1898), 78 L. T. 661; Horlock *v.* Beal, [1916] 1 A. C. 486; Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Scottish Navigation Co. *v.* Souter, Admiral Shipping Co. *v.* Weidner, Hopkins, [1917] 1 K. B. 222; Watts, Watts *v.* Mitsui, [1917] A. C. 227; Countess of Warwick S.S. Co. *v.* Le Nickel Soc. Anon., Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1918] 1 K. B. 372; Russian Bank for Foreign Trade *v.* Excess Insce., [1918] 2 K. B. 123; Bank Line *v.* Capel, [1919] A. C. 435; Fried Krupp Akt. *v.* Orconera Iron Ore Co. (1919), 88 L. J. Ch. 304; Cantiere Navale Triestina *v.* Handelsvertretung der Russe Soz. Fod. Naphtha Export (1925), 94 L. J. K. B. 579; Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497. **Mentd.** Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 1 K. B. 912; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1.

**2559.** —— ——.] — Defts. chartered pltfs.' vessel to load a cargo of nitrate at Iquique in Chili at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her despatch, "restraints of princes & rulers, political disturbances or impediments during the said voyage always mutually excepted." The charterparty gave the ship liberty to call at any ports in any order. There was at Iquique only storage for a small quantity of nitrate, & the customary mode of loading there was to send the nitrate down direct by rail from the mines to the port, & there put it on board ship as required.

When pltfs.' vessel arrived at Iquique, a civil, war had broken out in Chili, & delay occurred in loading the vessel, in consequence of the railway from the mines to Iquique being in the hands of the troops, so that nitrate could not be sent down from the mines to the port. That state of things subsequently ceasing, the cargo was loaded & the vessel sailed upon her voyage. Being short of coal, which was very dear at Iquique, she put into another Chilian port for it. The Chilian govt. in power there demanded payment of export duties, such duties having already been paid to the *de facto* govt. in power at Iquique, & the ship was detained there for ten days in default of payment of such duties. An action having been brought by pltfs. for demurrage:—*Held:* both the above-mentioned delays fell within the exception clause in the charterparty.—SMITH & SERVICE *v.* ROSARIO NITRATE CO., [1894] 1 Q. B. 174; 70 L. T. 68; 7 Asp. M. L. C. 417; 9 R. 776, C. A.

*Annotation:*—**Apld.** Furness *v.* Forwood (1897), 77 L. T. 95.

**2560.** —— ——.]—NOBEL'S EXPLOSIVES CO. *v.* JENKINS & CO., No. 3501, *post.*

**2561.** —— **Civil War.**]—SMITH & SERVICE *v.* ROSARIO NITRATE CO., No. 2559, *ante.*

**2562.** —— **Detention for non-payment of port dues.**]—SMITH & SERVICE *v.* ROSARIO NITRATE CO., No. 2559, *ante.*

**2563.** —— **Ships requisitioned.**]—By an agreement made in 1910, which was to be in force till 1916, defts. agreed to carry cement for pltfs. by sea from the Thames to the Forth at a certain rate per ton, subject to an exception in the case of "perils of the seas, enemies, pirates, arrests & restraints of princes, rulers & peoples." The freight was fixed at a low rate in view of the fact that defts. did a large trade in carrying coal by sea from the Forth to the Thames. After the outbreak of war many of defts.' ships were requisitioned by the Govt., the ports from which they usually carried coal were closed, restrictions causing delay were placed on ships going from the Thames to the Forth, & the voyage was dangerous. Defts. therefore contended that the contract was suspended, & they declined to carry the cement at the agreed rate. They also contended that they were absolved from liability under the above exception & by Defence of the Realm (Amendment), No. 2 Act, 1915 (c. 37), s. 1 (2):—*Held:* as the Govt. had not prevented the voyage from being made at all the exception as to restraints of princes did not apply, the exception as to perils of the seas only applied when a ship had been declared under the contract, the return coal trade did not lie at the root of the contract, the parties had not impliedly stipulated for the continuance of peace, & the above enactment did not relieve defts. from their obligation to carry out the contract as a whole, & therefore the contract was not suspended.—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) LTD. *v.* CORY (WILLIAM) & SON, LTD. (1915), 31 T. L. R. 442.

*Annotation:*—**Refd.** Larrinaga *v.* Soc. Franco-Américaine des Phosphates de Medulla (1922), 27 Com. Cas. 160.

**2564.** —— ——.]—DINHAM, FAWCUS & CO. *v.* WITHERINGTON & EVERETT, [1916] W. N. 154.

*Annotation:*—**Folld.** Cork Gas Consumers' Co. *v.* Witherington & Everett (1920), 36 T. L. R. 599.

**2565.** —— ——.]—CORK GAS CONSUMERS' CO. *v.* WITHERINGTON & EVERETT, No. 1770, *ante.*

**2566.** —— **Restrictions on shipping.**]—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LTD. *v.* CORY (WILLIAM) & SON, LTD., No. 2563, *ante.*

**2567.** —— ——.]—NORTH-EASTERN STEEL CO., LTD. *v.* COMPANIA MINERA DE SIERRA MENERA (1916), 86 L. J. K. B. 439; 115 L. T. 745; 13 Asp. M. L. C. 533, C. A.

**2568.** —— **Danger from minefields.**] — Pltfs. were the holders of a bill of lading, dated before

the war, & containing the exception "restraint of princes," & relating to a parcel of soya beans which formed part of the cargo of a steamship belonging to defts. By the terms of the bill of lading the vessel was to call at Port Said for orders & to deliver the beans at the port there ordered or so near thereto as she might safely get. Orders were duly given for Amsterdam in Oct. 1914. The vessel had other cargo for Hull, & on her arrival there defts., owing to danger from minefields, declined to let her go on to Amsterdam, claiming that they had performed their bill of lading obligations, & on non-payment of the freight they lightered & warehoused the beans. Meantime the authorities ordered the beans to be detained pending inquiry & ultimately they prohibited their export. In an action by pltfs. for failure to carry the beans to Amsterdam, defts. counterclaimed for freight & lighterage & warehouse charges:—*Held:* though the passage from Hull to Amsterdam was not so attended with danger from minefields as to make Amsterdam not a safe port, & defts. broke their contract by not sending the vessel there, yet as the exception "restraint of princes" excused their failure to carry to Amsterdam, they were immune from resultant damages, but they could not recover the freight & lighterage & warehouse charges.—EAST ASIATIC CO., LTD. *v.* TRONTO S.S. CO., LTD. (1915), 31 T. L. R. 543.

*Annotation:*—**Refd.** Gans S.S. Line *v.* Celtic Shipping Co. (1918), 34 T. L. R. 282.

**2569. —— Delay due to decree of foreign government—Compulsory disinfecting of ship.**]—Lemons belonging to pltf. were loaded on defts.' steamship at Naples for carriage to London under a bill of lading which contained the exceptions "restraints of princes" & "any circumstances beyond the shipowner's control" & gave the ship liberty to call at any ports in the course of the voyage. The ship had come to Naples from Mombassa. After leaving Naples the ship proceeded to Marseilles, at which port, by reason of the fact that Mombassa was a plague contaminated port, & that the ship had a foul bill of health, the ship, in accordance with a decree of the French Govt. in force since 1906, was subjected by the port authorities to a process called *dératisation* which involved the pumping of sulphurous fumes into the ship's holds, in consequence of which the lemons arrived at their destination in a damaged condition:—*Held:* (1) defts. were not protected from liability for the damage by the above exceptions in the bill of lading; (2) the fact that the ship would inevitably have to undergo at Marseilles the process of *dératisation*, which would damage the lemons, caused her to be not reasonably fit at Naples for the carriage of the lemons, & she was, therefore, unseaworthy.—CIAMPA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD., [1915] 2 K. B. 774; 84 L. J. K. B. 1053; 20 Com. Cas. 247.

*Annotation:*—*As to* (2) **Refd.** Paterson, Zochonis *v.* Elder, Dempster, [1923] 1 K. B. 420.

**2570. —— Ship commandeered.**]—The owner of a Greek ship chartered her to pltfs. under a charterparty which provided that if she should be "commandeered" by the Greek Govt. the charterparty should be cancelled. While the ship was lying at Marseilles discharging coal for the charterers, the Greek Govt. on Sept. 25, 1915, sent an order to the captain requiring him to proceed at once to Piraeus for the purpose of placing the ship at their disposal if they should desire to use it. On Oct. 11, while the ship was still at Marseilles, the Greek Govt. withdrew their order & released the ship:—*Held:* the ship had been "commandeered" & the charterparty was cancelled.—CAPEL *v.* SOULIDI, [1916] 2 K. B. 365; 85 L. J. K. B. 1169; 114 L. T. 921; 32 T. L. R. 508; 13 Asp. M. L. C. 361, C. A.

**2571. —— Proposed voyage prohibited by country to which ship belongs—Although ship not within jurisdiction of own country.**]—By a charterparty made in the United Kingdom in 1916 defts., as owners of a Swedish ship, chartered her to pltfs. for a period of six months for trading between certain ports, all of which were outside Sweden. Losses by restraints of princes were excepted. The owners & the master were Swedish subjects ordinarily resident in Sweden. The ship being at Cardiff pltfs. proposed to send her with a cargo of coals to Genoa, one of the charterparty ports. Defts. refused to allow her to go there on the grounds that under the Swedish emergency legislation the ship was prohibited from carrying goods for freight between ports outside the Swedish kingdom, the owners & master being rendered liable to imprisonment for any breach of that prohibition. In an action to restrain defts. from using the ship otherwise than in accordance with the charterparty defts. relied on the exception of restraints of princes:—*Held:* the fact of the ship being outside Swedish territorial limits, & of the Swedish Govt. consequently not being in a position to enforce the restraint directly upon the ship, did not prevent the prohibition from operating as a restraint of princes; it was enough for that purpose that the Swedish Govt. was capable of enforcing the restraint upon the persons having the custody of the ship.—FURNESS, WITHY & CO. *v.* REDERIAKT. BANCO, [1917] 2 K. B. 873; 87 L. J. K. B. 11; 117 L. T. 313; 62 Sol. Jo. 25; 14 Asp. M. L. C. 137.

*Annotation:*—**Refd.** Manbre Saccharine Co. *v.* Corn Products Co., [1919] 1 K. B. 198.

**2572. —— Foreign ship detained in United Kingdom—Failure to obtain licence required by country to which ship belongs.**]—In chartering a Swedish vessel to convey resin through Sweden to Russia, the regulations issued by the Swedish Govt. forbidding, to the knowledge of the parties, the export of resin from Sweden, & also its transit within that kingdom without a licence, arrests & restraints of princes, rulers, & people were excepted. The vessel was detained by the British Customs authorities in the United Kingdom for ten weeks, having failed to procure a licence from the Swedish authorities to take the cargo through Sweden. The owners brought a claim against the charterers in respect of such detention. The Prize Ct. decided in the owner's favour & awarded

**PART VII. SECT. 4, SUB-SECT. 5.**

**2570 i.** *Restraint or interruption by lawful authority—Ship commandeered.*]—Where a bill of lading provided that the shipowner should not be liable for loss or damage occasioned, *inter alia*, by "arrest & restraint of princes, rulers or people":—*Held:* the requisition of the ship by the Govt. of India fell within the exception.—KRISHNA NAIK & SONS *v.* CAYZER, IRWINE & CO., LTD. (1920), I. L. R. 44 Mad. 145.—**IND.**

**r.** *Confiscation—Omission of master to enter goods in ship's manifest.*]—Goods shipped under a bill of lading containing an exception of loss from any default of the master in navigating the ship, "or under any other circumstances," were confiscated at a foreign port by reason of the omission of the master to insert an entry of them in the ship's manifest, as required by the law of the port. In an action on the bill of lading by the shipper against the shipowner:—*Held:* this exception was not a defence; & such confiscation could not be considered a restraint of princes.—AH KANG *v.* AUSTRALASIAN STEAM NAVIGATION CO. (1883), 9 V. L. R. (L.) 171.—**AUS.**

**t.** —— *Shortage of delivery waggons on wharf—Waggons commandeered.*]—CAZALET *v.* MORRIS & CO., S.S. CRONSTADT, [1916] S. C. 952-3.—**SCOT.**

**a.** —— *Refusal of permit to land goods.*]—TAYLOR *v.* JOHN LEWIS, LTD., [1927] S. C. 891.—**SCOT.**

*Sect. 4.—Excepted perils: Sub-sects. 5 & 6, A. & B. (a), (b) & (c).]*

them damages for ten weeks' detention.—THE LISA (1924), 40 T. L. R. 252, P. C.

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SUB-SECT. 6.—PERILS OF THE SEA.

*A. In General.*

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*c*), *& compare* INSURANCE, Vol. XXIX., pp. 197–204, Nos. 1566–1641.

**2573. Same meaning as in insurance policy.**]—(1) Foundering caused by collision with another vessel is within the exception "dangers & accidents of the sea" in a bill of lading: & excuses the shipowner for non-delivery of the goods if it occurs without fault in the carrying ship.

(2) The term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter. . . . It must be a peril "of" the sea . . . [the words] do not protect, for example, against that natural & inevitable action of the winds & waves which results in what may be described as wear & tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure (LORD HERSCHELL).

(3) I certainly must not be understood as deciding that the mere proof of loss by collision, under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause, would exonerate defts. (LORD HERSCHELL).

(4) Whatever the expression "perils of the sea" means in a policy of insurance, it means neither more nor less in a bill of lading (LORD MACNAGHTEN).—WILSON, SONS & CO. *v.* XANTHO (CARGO OWNERS), THE XANTHO (1887), 12 App. Cas. 503; 56 L. J. P. 116; 57 L. T. 701; 36 W. R. 353; 3 T. L. R. 766; 6 Asp. M. L. C. 207, H. L.

*Annotations:—As to* (1) **Expld.** Stott Baltic Steamers *v.* Marten, [1914] 3 K. B. 1262. **Refd.** Hamilton, Fraser *v.* Pandorf (1887), 12 App. Cas. 518. *As to* (2) **Apld.** Sasson *v.* Western Assce., [1912] A. C. 561. **Consd.** Grant, Smith & McDonnell *v.* Seattle Construction & Dry Dock Co., [1920] A. C. 162; Samuel *v.* Dumas, [1924] A. C. 431. **Refd.** Blackburn *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1902] 1 K. B. 290. *As to* (3) **Expld.** The Glendarroch, [1894] P. 226. *As to* (4) **Refd.** Trinder, Anderson *v.* Thames & Mersey Marine Insce., Trinder, Anderson *v.* North Queensland Insce., Trinder, Anderson *v.* Weston, Crocker, [1898] 2 Q. B. 114; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1918] A. C. 350. *Generally,* **Refd.** Dunn *v.* Bucknall, Dunn *v.* Donald Currie, [1902] 2 K. B. 614; Jackson *v.* Mumford (1902), 8 Com. Cas. 61; The Torbryan, [1903] P. 35; Baxter's Leather Co. *v.* Royal Mail Steam Packet Co., [1908] 1 K. B. 796; Travers *v.* Cooper (1914), 20 Com. Cas. 44; British & Foreign S.S. Co. *v.* R., [1918] 2 K. B. 879. **Mentd.** Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667.

**2574.** ——.]—(1) Rice was shipped under a charterparty & bills of lading which excepted "dangers & accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea water escaped & damaged the rice, without neglect or default on the part of the shipowners or their servants:—*Held:* the damage was within the exception, & the shipowners were not liable.

I think the idea of something fortuitous & unexpected is involved in both words, "peril" or "accident" (LORD HALSBURY, C.).

(2) I am of opinion that "perils of the seas" is a phrase having the same meaning in bills of lading & charterparties as in policies of insurance (LORD BRAMWELL).—HAMILTON, FRASER & CO. *v.* PANDORF & CO. (1887), 12 App. Cas. 518; 57 L. J. Q. B. 24; 57 L. T. 726; 52 J. P. 196; 36 W. R. 369; 3 T. L. R. 768; 6 Asp. M. L. C. 212, H. L.; *revsg.* S. C. *sub nom.* PANDORF *v.* HAMILTON (1886), 17 Q. B. D. 670.

*Annotations:—As to* (1) **Expld.** Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455. **Apld.** Hensey *v.* White, [1900] 1 Q. B. 481; Blackburn *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1902] 1 K. B. 290. **Consd.** Fenton *v.* Thorley, [1903] A. C. 443; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1918] A. C. 350; Samuel *v.* Dumas, [1924] A. C. 431. **Refd.** Trinder, Anderson *v.* Thames & Mersey Marine Insce., Trinder, Anderson *v.* North Queensland Insce., Trinder, Anderson *v.* Western, Crocker, [1898] 2 Q. B. 114; Walker *v.* Lilleshall Co. (1899), 69 L. J. Q. B. 192; The Torbryan, [1903] P. 35; Steel *v.* Cammell, Laird, [1905] 2 K. B. 232; Ingram & Royle *v.* Services Maritimes du Treport, [1913] 1 K. B. 538; Stott Baltic Steamers *v.* Martin, [1914] 3 K. B. 1262; Denholm *v.* Shipping Controller (1920), 124 L. T. 378. *Generally,* **Refd.** Thames & Mersey Marine Insce. *v.* Hamilton, Fraser (1887), 12 App. Cas. 484; The Bedouin, [1894] P. 1; The Northumbria (1906), 95 L. T. 618; Morrison *v.* Shaw, Savill & Albion Co., [1916] 1 K. B. 747; Becker, Gray *v.* London Assce. Corpn., [1918] A. C. 101; British & Foreign S.S. Co. *v.* R., [1918] 2 K. B. 879.

**2575. Fortuitous accidents—Occurring in course of voyage.**]—HAMILTON, FRASER & CO. *v.* PANDORF & CO., No. 2574, *ante.*

**2576.** —— —— **Not mere wear & tear.**]—WILSON, SONS & CO. *v.* XANTHO (CARGO OWNERS), THE XANTHO, No. 2573, *ante.*

**2577. Applicable only to voyage.**]—SMITH *v.* DART & SON, No. 1875, *ante.*

**2578. Burden of proof.**]—BECKFORD *v.* CLERKE (1665), 1 Keb. 830; 1 Sid. 236; 82 E. R. 1079.

**2579.** —— **Of shipowner's negligence.**] — WILSON, SONS & CO. *v.* XANTHO (CARGO OWNERS), THE XANTHO, No. 2573, *ante.*

**2580.** —— ——.]—Plts. brought an action against defts. for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water through the stranding of the vessel, & defts. claimed exemption from liability on the ground that the loss was occasioned by perils of the sea; but the judge ruled that in order to excuse themselves for the damage to the goods it lay on defts. to show not only a peril of the sea, but a peril of the sea not occasioned by their negligence:—*Held:* as the loss apparently fell within the exception, the burden of showing that defts. were not entitled

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**PART VII. SECT. 4, SUB-SECT. 6.—A.**

**2578 i.** *Burden of proof.*]—In an action on a bill of lading for damages in respect of goods lost or damaged while on the sea, it is for deft. who relies on the exception of perils of the sea to make out a *primâ facie* case of loss by perils of the sea, & for plff. to prove that that loss could have been avoided by the exercise of reasonable care on the part of deft.—VACUUM OIL CO. PTY., LTD. *v.* COMMONWEALTH & DOMINION LINE, LTD., [1922] V. L. R. 693; 44 A. L. T. 46.—**AUS.**

**2578 ii.** ——.]—The *onus* is on deft. to bring himself within the exception in the bill of lading.—HARRINGTON *v.* BOUDROT (1888), 21 N. S. R. (9 R. & G.) 97.—**CAN.**

**2578 iii.** ——.]—In a suit for damage caused to the plff.'s goods entrusted for carriage by the defts.' ship, it is for the deft. to plead & prove "perils of the sea." If he makes out a *primâ facie* case, the plff. can rebut it by proving defts.' negligence. The mere fact that the accident might have been avoided by greater foresight does not prove negligence.—ESUFATI MAHAMMEDBHAY ALLIBHOY *v.* THAHA UMMAL (1924), I. L. R. 47 Mad. 610.—**IND.**

**2578 iv.** ——.] — Where produce shipped at New York, U.S., to be delivered to St. John's, Newfoundland, in good order & condition, dangers of the sea excepted, was on arrival found to be unmerchantable, the ct. was of opinion that the *onus* of proof was on the shipowner to show that the injury arose from the dangers of the seas & from them alone.—HARVEY *v.* ELLIE (1877), 6 Nfld. L. R. 128.—**NFLD.**

**2579 i.** —— *Of shipowner's negligence.*]—THE COMMONWEALTH, ETC., [1928] N. Z. L. R. 141.—**N.Z.**

**b.** *Ice.*]—In a charterparty *les avaries de la mer et de la saison* were excepted from a general covenant of responsibility for the chartered vessel:—*Held:* the charterer was not to be answerable for her loss by ice.—

to the benefit of the exception, by reason of negligence, lay upon pltfs.—THE GLENDARROCH, [1894] P. 226; 63 L. J. P. 89; 70 L. T. 344; 10 T. L. R. 269; 38 Sol. Jo. 362; 7 Asp. M. L. C. 420; 6 R. 686, C. A.

*Annotations:*—**Consd.** Ashton *v.* L. & N. W. Ry., [1918] 2 K. B. 488. **Apld.** Rowett, Leakey *v.* Scottish Provident Institution, [1927] 1 Ch. 55. **Refd.** Asiatic Petroleum Co. *v.* Leonard's Carrying Co., [1914] 1 K. B. 419; Munro, Brice *v.* War Risks Assocn., [1918] 2 K. B. 78; S.S. Matheos *v.* Dreyfus, [1925] A. C. 654; Stoney *v.* Eastbourne R. D. C., [1927] 1 Ch. 367. **Mentd.** Hurst *v.* Evans, [1917] 1 K. B. 352.

**2581. Loss attributable as well to negligence as to perils of sea—Right of plaintiff to recover.**]—In an action against the proprietors of a steam vessel, to recover compensation for damage done to goods sent by them as carriers, if on the whole it be left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the seas as to negligence, pltf. cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable.—MUDDLE *v.* STRIDE (1840), 9 C. & P. 380, N. P.

**2582. Exception as mutual protection.**]—BARRIE *v.* PERUVIAN CORPN., LTD., No. 2537, *ante*.

### *B. Particular Instances.*

#### (*a*) *Collision.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*c*) & *compare* INSURANCE, Vol. XXIX., pp. 203, 204, Nos. 1626–1641.

**2583. Whether within exception.**]—Where there is an exception in a charterparty of "perils of the sea," a loss from the ship's running foul of another by misfortune is within the exception, & is a loss by perils of the sea.—BULLER *v.* FISHER (1799), 3 Esp. 67; Peake, Add. Cas. 183; 170 E. R. 540, N. P.

*Annotations:*—**Refd.** Lloyd *v.* General Iron Screw Collier Co. (1861), 3 H. & C. 284; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Pandorf *v.* Hamilton (1885), 16 Q. B. D. 629.

**2584. —— Effect of negligence.**]—A collision between two vessels brought about by the negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident, is not "a peril of the sea" within the terms of that exception in a bill of lading.—WOODLEY *v.* MICHELL (1883), 11 Q. B. D. 47; 52 L. J. Q. B. 325; 48 L. T. 599; 31 W. R. 651; 5 Asp. M. L. C. 71, C. A.

*Annotations:*—**Consd.** Pandorf *v.* Hamilton (1885), 16 Q. B. D. 629. **Distd.** Garston Sailing Ship Co. *v.* Hickie Borman (1886), 18 Q. B. D. 17. **Overd.** Wilson *v.* The Xantho (1887), 12 App. Cas. 503. **Refd.** Pyman *v.* Burt (1883), Cab. & El. 207; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873.

**2585. —— ——.**]—WILSON, SONS & CO. *v.* XANTHO (CARGO OWNERS), THE XANTHO, No. 2573, *ante*.

#### (*b*) *Damage by Rats.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*c*); & *compare* INSURANCE, Vol. XXIX., p. 203, No. 1623.

**2586. Whether within exception—Rats proximate cause of damage.**]—(1) Where goods put on board a ship to be carried by sea, for hire, under a bill of lading which contains only the usual exception, viz. "the act of God, the Queen's enemies, fire, & all other dangers & accidents of the seas, rivers, & navigation, etc., excepted," are damaged by rats during the voyage, it is no defence to an action by the owner of the goods that the master had kept cats on board.

(2) *Semble:* it would be a defence that rats had made a hole in the ship through which water came in & injured the goods.—LAVERONI *v.* DRURY (1852), 8 Exch. 166; 22 L. J. Ex. 2; 16 Jur. 1024; 1 W. R. 55; 155 E. R. 1301; *sub nom.* LEVERONI *v.* DRURY, 20 L. T. O. S. 178.

*Annotations:*—*As to* (1) **Distd.** Kay *v.* Wheeler (1867), L. R. 2 C. P. 302; Hamilton, Fraser *v.* Pandorf (1887), 12 App. Cas. 518. *As to* (2) **Apprvd.** Hamilton, Fraser *v.* Pandorf (1887), 12 App. Cas. 518. **Refd.** The Chasca (1875), 32 L. T. 838. *Generally.* **Mentd.** Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217; Nugent *v.* Smith (1875), 1 C. P. D. 19.

**2587. —— ——.**]—Goods were shipped under a bill of lading containing the usual exceptions of "the act of God, the Queen's enemies, fire, & all & every other dangers & accidents of the sea, rivers, & navigation, of what kind & nature soever." The goods were injured during the voyage by rats, though the shipowner had taken all possible precaution to prevent it:—*Held:* the cause of injury did not come within the exception, & that the shipowner was liable.—KAY *v.* WHEELER (1867), L. R. 2 C. P. 302; 36 L. J. C. P. 180; 16 L. T. 66; 15 W. R. 495; 2 Mar. L. C. 466, Ex. Ch.

*Annotations:*—**Refd.** The Duero (1869), 38 L. J. Adm. 69; The Freedom (1869), L. R. 2 A. & E. 346; The Chasca (1875), 32 L. T. 878; Pandorf *v.* Hamilton (1886), 17 Q. B. D. 670. **Mentd.** The Patria (1871), L. R. 3 A. & E. 436.

**2588. —— Rats not proximate cause of damage—Sea water entering through hole gnawed in ship.**]—LAVERONI *v.* DRURY, No. 2586, *ante*.

**2589. —— —— ——.**]—HAMILTON, FRASER & CO. *v.* PANDORF & CO., No. 2574, *ante*.

#### (*c*) *Pirates.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*c*).

**2590. General rule.**]—Pirates are perils of the sea (ROLL, J.).—PICKERING *v.* BARKLEY (1648), Sty. 132; 82 E. R. 587.

*Annotations:*—**Distd.** Cullen *v.* Butler (1815), 1 Stark. 138. **Consd.** Russell *v.* Niemann (1864), 17 C. B. N. S. 163. **Refd.** Pandorf *v.* Hamilton (1886), 17 Q. B. D. 670.

**2591. ——.**]—Piracy is one of the dangers of the sea (*per* CUR.).—BARTON *v.* WOLLIFORD (1686), Comb. 56; 90 E. R. 341.

*Annotations:*—**Refd.** Russell *v.* Niemann (1864), 17 C. B. N. S. 163; Pandorf *v.* Hamilton (1886), 17 Q. B. D. 670.

**2592. ——.**]—RUSSELL *v.* NIEMANN, No. 2544, *ante*.

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FOUGÈRE *v.* BOUCHER, 2 R. de L. 78.—**CAN.**

**PART VII. SECT. 4, SUB-SECT. 6.—B. (b).**

**2586 i. *Whether within exception—Rats proximate cause of damage.***]—According to English law damage by rats is not damage by "Act of God or dangers & accidents of the seas," & a shipowner is liable for such damage, where there is no special exception in the bill of lading, even though he prove that he took every precaution for the extermination of rats.

*Semble:* Roman-Dutch law does not differ from English law in this respect.—MUTER'S EXECUTORS *v.* JONES (1860), 3 S. 356.—**S. AF.**

**c.** —— *Rats not proximate cause of damage.*]—P. Bros. shipped some galvanised iron by the German barque *Stephanie* at Liverpool for the Cape. On the voyage, two of the scupper pipes were gnawed through by rats, with the result that the iron was much damaged by the action of the sea water which had flowed from the scupper pipes into the hold. It was proved that, by an inexpensive contrivance, the scupper pipes could have been protected against rats, and that rats have a propensity to gnaw through leaden pipes conveying water, but some of the defendant's witnesses stated that it was unusual so to protect leaden pipes. In an action for the damage by P. Bros. against the shipowner:—*Held:* the exception of damage by vermin did not apply, as the gnawing of the rats was not the proximate cause of the damage; & there was sufficient evidence of negligence on the part of the shipowner to deprive him of the benefit of the exception.—PHILIP BROTHERS *v.* KOOP (1885), 4 S. C. 53.—**S. AF.**

*Sect.* 4.—*Excepted perils: Sub-sect.* 6, *B.* (*d*); *sub-sect.* 7.]

(*d*) *Other Perils.*

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*c*).

**2593. Damage to cargo by escape of water from boiler—Negligence of captain.**]—Where damage was done to a cargo by water escaping through the pipe of a steamboiler, in consequence of the pipe having been cracked by frost:—*Held:* this was not an act of God, but negligence in the captain, in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning. The owners are liable for damage occasioned thereby to the cargo. —SIORDET *v.* HALL (1828), 4 Bing. 607; 1 Moo. & P. 561; 6 L. J. O. S. C. P. 137; 130 E. R. 902.

*Annotations:*—**Refd.** The Norway (1864), Brown. & Lush. 377. **Mentd.** Fenton *v.* Thorley, [1903] A. C. 443.

**2594. Unauthorised seizure by government officials.**]—In *assumpsit* upon an undertaking to carry goods in defts.' ship to Canton, & to deliver them to pltfs.' agents at Canton, dangers & accidents of the seas & navigation excepted; defts. pleaded that the ship arrived with the goods on board, near to the port of Canton; that certain persons exercising the powers of Her Majesty's govt., to wit, E. & S., did for lawful causes forcibly prevent, & still did prevent defts. from delivering the goods at Canton:—*Held:* the plea was bad, for not sufficiently disclosing that E. & S. had authority to act in the manner alleged.—EVANS *v.* HUTTON (1842), 4 Man. & G. 954; 2 Dowl. N. S. 600; 5 Scott, N. R. 670; 12 L. J. C. P. 17; 6 Jur. 1042; 134 E. R. 391.

**2595. Damage by wind while in dock.**]—LAURIE *v.* DOUGLAS, No. 2642, *post.*

**2596. Confiscation by order of court.**]—*Assumpsit* by shipper on a contract of affreightment. Declaration stated that pltf. had shipped on board deft.'s ship then in the bay of Gibraltar, bound for London, calling at Cadiz, certain goods to be safely conveyed to London, & there delivered in good order, the act of God, the Queen's enemies, fire, all & every other dangers & accidents of the seas, rivers, & navigation, of whatever nature or kind soever, save risk of boats, etc., excepted, pltf., paying freight: promise by deft. so to convey & deliver the cargo, saving the above exceptions: breach, that he failed to do so. Plea, that the ship in the course of her voyage called at Cadiz, & was then within the jurisdiction of the officer of Customs there & of a certain ct. of Spain: that, while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the officers, against the will & without the default of deft., on a charge of suspicion of their being contraband according to the law of Spain, & were confiscated by a decree of the said ct.:—*Held:* the plea alleged no excuse within the express exceptions in the contract; the decree of confiscation was in itself no answer; & it did not appear by the plea to have been incurred through any fault of pltf.—SPENCE *v.* CHODWICK (1847), 10 Q. B. 517; 16 L. J. Q. B. 313; 9 L. T. O. S. 101; 11 Jur. 872; 116 E. R. 197.

*Annotations:*—**Refd.** The Newport (1858), Sw. 335; Geipel *v.* Smith (1872), 41 L. J. Q. B. 153. **Mentd.** Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589; Blackburn Bobbin Co. *v.* Allen, [1918] 1 K. B. 540; Matthey *v.* Curling, [1922] 2 A. C. 180.

**2597. Hypothecation—Consequent on perils of the sea.**]—Where the master of a ship, damaged by perils of the seas, hypothecated at a foreign port, by one bottomry bond, for necessary repairs, the ship, freight, & cargo amongst which were pltf.'s goods, & the ship & freight having realised less than the sum borrowed, pltf. was obliged to contribute towards the difference, & also to pay his proportion of the costs of a suit instituted in the Ct. of Admlty. by the obligee of the bond:—*Held:* (1) pltf. might maintain an action against the owner of the ship on an implied promise to indemnify him; (2) the non-delivery of the goods was not, under the above circumstances, occasioned by "perils of the seas," so as to be within the exception of the bills of lading.

(3) In ordering the repairs of the ship, the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship, or his agent, can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absorbed from his contract to carry, if prevented by the perils of the seas, & he is bound by it if prevented by inherent defects in the ship; in either case, if he does repair, he does so for the sake of earning freight, which the master is bound to enable him to do if he can (PATTERSON, J.).—BENSON *v.* DUNCAN (1849), 3 Exch. 644; 18 L. J. Ex. 169; 12 L. T. O. S. 516; 14 Jur. 218; 154 E. R. 1003, Ex. Ch.; *affg.* S. C. *sub nom.* DUNCAN *v.* BENSON (1847), 1 Exch. 537.

*Annotations:*—*As to* (1) **Consd.** Hallett *v.* Wigram (1850), 9 C. B. 580. **Refd.** The Olivier (1862), Lush. 484; Lloyd *v.* Guibert (1865), 6 B. & S. 100; The Lizzie (1868), 19 L. T. 71; The Eugénie (1873), L. R. 4 A. & E. 123; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. *As to* (3) **Consd.** Atwood *v.* Sellar (1879), 4 Q. B. D. 342. **Refd.** Gibbs *v.* Grey, Grey *v.* Gibbs (1857), 2 H. & N. 26. *Generally,* **Refd.** Atkinson *v.* Stephens (1852), 7 Exch. 567; Stainbank *v.* Shepard (1853), 13 C. B. 418; The Staffordshire (1871), 25 L. T. 137. **Mentd.** The Union (1860), 30 L. J. P. M. & A. 17; The Onward (1873), L. R. 4 A. & E. 38.

**2598. "Dangers of the roads"—Dangers of roads where ships anchor.**]—DE ROTHSCHILD *v.* ROYAL MAIL STEAM PACKET CO., No. 2636, *post.*

**2599. Worms attacking ship.**]—THE JESSIE MILLER, HEYDORN *v.* BIBBY (1855), 7 L. T. 102; *subsequent proceedings,* 25 L. T. O. S. 199.

**2600. Damage due to stowage.**]—(1) The right of suing upon a contract under a bill of lading follows the property in the goods therein specified, that is, the legal title to the goods as against the indorsee.

(2) A cause of damage to cargo, instituted under Admiralty Court Act, 1861 (c. 10), s. 6, by the consignees, who were also assignees of the bills of lading, to recover damages on account of breaches of contract & duty with respect to certain parcels of oil cake, which in the bills of lading were agreed to be delivered in the like good order & condition as when shipped, the dangers of the seas only excepted; but the oil cake, when delivered, was in a greatly damaged & deteriorated condition, occasioned by the packing & stowage:—*Held:* as the proximate cause of damage arose from the nature & collocation of the cargo, consisting of animal, vegetable, & to some extent putrescible matter, & the want of due ventilation,

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**PART VII. SECT. 4, SUB-SECT. 6.—B. (d).**

d. *Accident to rudder.*] — Pltf. shipped cattle on a steamship of defts., the latter agreeing to supply them with water. On the 9th day of the voyage from Portland to Liverpool, the ship's rudder broke, & the vessel only reached Liverpool after 49 days' voyage. The captain to economise coal stopped condensing water for use of cattle, & a large part of pltf.'s cattle died in consequence, the remainder were rendered of little value:—*Held:* the accident to the rudder was caused by perils of the seas, & in the circumstances, the stoppage of water & pltf.'s consequent loss were the result of inevitable accident, *force majeure,* & defts. were not liable therefor.—KELLY *v.* MISSISSIPPI & DOMINION S.S. CO. (1886), 39 L. C. J. 42.—**CAN.**

e. "*Loss of carrying ship.*"]—DADABHAI HORMUNJI DUBASH *v.* KHAMBATTA (1896), I. L. R. 22 Bom. 89.—**IND.**

f. *Cattle injured in heavy weather.*]

it was not brought within the legal exception of "dangers of the seas."—THE FREEDOM (1871), L. R. 3 P. C. 594; 8 Moo. P. C. C. N. S. 29; 24 L. T. 452; 1 Asp. M. L. C. 28; 17 E. R. 224, P. C.

*Annotations:—As to* (1) **Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. *As to* (2) **Consd.** The Chasca (1875), L. R. 4 A. & E. 446. *Generally,* **Refd.** Lebeau *v.* General Steam Navigation Co. (1872), 21 W. R. 146.

**2601.** ——.]—Damage to cargo occasioned by salt water does not come within the excepted perils when by reason of the place in which it is stowed it is exceptionally liable to such damage in severe weather.—THE OQUENDO (1877), 38 L. T. 151; 3 Asp. M. L. C. 558.

**2602. Oozing from casks strained by bad weather.**]—Damage to cargo caused by the oozing of wine from casks through straining in bad weather is damage occasioned by perils of the seas, & the shipowners are, under the usual exceptions, exempt from liability therefor, where the cargo is, properly stowed, or is stowed in such a manner that the master is not responsible for bad stowage.

Where a charterparty, stipulates that a vessel is "to be stowed by charterers' stevedore, at risk & expense of vessel," & a cargo is supplied by the charterers & is stowed by their stevedore, the shipowner is not responsible for damage occasioned by bad stowage.—THE CATHARINE CHALMERS (1874), 32 L. T. 847; 2 Asp. M. L. C. 598.

**2603. Holes feloniously bored by crew.**]—A shipowner signed bills of lading for the due delivery of cargo at the port of discharge, the dangers of the seas & fire only excepted:—*Held:* the exceptions in the bills of lading did not operate to protect him from liability for damage done to the cargo by sea water, let into the hold in consequence of the barratrous act of the crew in boring holes in the ship during her voyage, for the purpose of scuttling her.—THE CHASCA (1875), L. R. 4 A. & E. 446; 44 L. J. Adm. 17; 32 L. T. 838; 2 Asp. M. L. C. 600.

*Annotations:*—**Refd.** Scaramanga *v.* Stamp (1879), 4 C. P. D. 316; Chartered Mercantile Bank of India, *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Pandorf *v.* Hamilton (1885), 16 Q. B. D. 629; Samuel *v.* Dumas, [1924] A. C. 431.

**2604. Damage through closing of ventilators during storm.**]—A cargo of maize & oats shipped on defts.' steamship was damaged by heat proceeding from the bulkheads inclosing the engine & boiler space, which was unable to escape owing to the necessary closing of the ventilators for a period of seven days during a storm of exceptional severity & duration:—*Held:* the loss was occasioned by "accidents of the seas."—THE THRUNSCOE, [1897] P. 301; 66 L. J. P. 172; 77 L. T. 407; 46 W. R. 175; 13 T. L. R. 566; 8 Asp. M. L. C. 313, D. C.

**2605. Seacock imperfectly closed.**]—MCFADDEN *v.* BLUE STAR LINE, No. 2796, *post.*

**2606. Deck plate strained through bad weather.**]—Pltfs.' goods were carried under a bill of lading containing the words "all other conditions as per charterparty including negligence clause." A clause in the charterparty stated that "the steamer is in no way liable for the consequences of . . . perils of the seas. . . . Neither is the steamer answerable for losses occasioned by . . . unseaworthiness, or latent defect in hull, machinery or appurtenances whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owner of the steamer, or by the ship's husband or manager . . . & by a further clause in the charterparty, the above clause was to be embodied in the bill of lading.

During the voyage damage was done to pltfs.' goods owing to a small crack in a deck plate which let the water through, & pltfs. alleged, & established in the ct. below, unseaworthiness not covered by the exceptions incorporated in the bill of lading:—*Held:* (1) the evidence showed that bad weather was met with involving straining of the vessel sufficient to account for the crack in question, &, therefore, a *primâ facie* case of perils of the seas had been made out, which pltfs. upon whom the burden of proof rested, had failed to rebut; (2) the bill of lading incorporated by reference the whole of the clause in the charterparty, including the exemption as to unseaworthiness, unless resulting from want of due diligence, of which there was no evidence.—THE NORTHUMBRIA, [1906] P. 292; 75 L. J. P. 101; 95 L. T. 618; 10 Asp. M. L. C. 314, D. C.

*Annotations:—As to* (1) **Refd.** S.S. Matheos *v.* Dreyfus, [1925] A. C. 654. *As to* (2) **Refd.** Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534.

SUB-SECT. 7.—FIRE.

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*b*), &, *compare,* INSURANCE, Vol. XXIX., pp. 215, 216, Nos. 1717-1719.

**2607. Meaning of damage by fire—Damage by smoke.**]—Owing to the negligence of the crew in overheating a stove, a fire broke out on board deft.'s ship, & pltfs.' cargo was damaged. Pltfs. alleged that the ship was unseaworthy in that the stove was placed too near to a bulkhead without any means of insulation, &, as deft. must be taken to be "privy" to the position of the stove, he could not rely upon 1894 Act, s. 502 (1), by which the owner of a British seagoing ship is not liable to make good any loss or damage happening "without his actual fault or privity" to goods damaged "by reason of fire on board the ship." Pltfs. contended that a great part of the damage was due to smoke & to water used to extinguish the fire, which was not damage included in the statute:—*Held:* (1) deft. could claim the statutory exemption from liability, for the stove was perfectly safe if properly used, &, therefore, the vessel was seaworthy, & deft. not in fault or "privy" to the negligence of the crew; (2) damage by smoke & by water used in putting out a fire is damage "by reason of" fire within the statute.—THE DIAMOND, [1906] P. 282; 75 L. J. P. 96; 95 L. T. 550; 10 Asp. M. L. C. 286.

*Annotation:—As to* (1) **Consd.** Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419.

**2608.** —— **Damage by water.**]—THE DIAMOND, No. 2607, *ante.*

**2609.** —— **Explosion of goods due to rough weather.**]—By 1894 Act, s. 502, the owner of a British sea going ship is not liable to make good any loss or damage happening without his actual default or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship. Pltfs. shipped on defts.' vessel certain goods for carriage from Le Tréport to London on the terms of a bill of lading which contained the following exemptions from liability: (*a*) "Fire on board . . . & all accidents, loss, & damage whatsoever from . . . perils of the seas . . . or from any act,

—If cattle are shipped in a small ship & are injured through being knocked about in heavy weather more than they would have been in a larger ship, they are injured by a peril of the sea, for which the shipowner is not responsible, provided he has used reasonable precautions to prevent them being knocked about.—FLEMING *v.* RAMSAY (1906), 25 N. Z. L. R. 596.—N.Z.

**PART VII. SECT. 4, SUB-SECT. 7.**

*g. General rule.*]—If a fire takes place in a ship from a notorious defect in the mode of fitting her up or from any other gross & culpable neglect on

*Sect. 4.—Excepted perils: Sub-sects. 7 & 8.*]

neglect, or default whatsoever of the master, officers, crew, stevedores, servants, or agents of the owners . . . in the management, loading, stowing . . . or otherwise . . ."; (*b*) "It is agreed that the maintenance by the shipowners of the vessel's class . . . shall be considered a fulfilment of every duty, warranty, or obligation whether before or after the commencement of the said voyage." Defts. also took on board at Le Tréport certain cases of metallic sodium saturated with petrol. The sodium was insufficiently packed & stowed with insufficient care. The vessel started in rough weather; the cases broke loose, & coming into contact with water caused a series of explosions & fire on board, as the result of which the ship went down & pltfs.' goods were lost.

In an action to recover damages for the loss of the goods the judge at the trial found that the ship was not seaworthy at the commencement of the voyage; that the goods were lost by fire caused by the unseaworthiness without the actual fault or privity of defts. within 1894 Act, s. 502; but he held that the protection afforded by that sect. was excluded by the exceptions in the bill of lading, & therefore defts. were liable:—*Held:* neither of the above exceptions in the bill of lading excluded the operation of 1894 Act, s. 502, & therefore defts. were entitled to rely upon the protection of that sect., & were not liable for the loss.—INGRAM & ROYLE, LTD. *v.* SERVICES MARITIMES DU TRÉPORT, [1914] 1 K. B. 541; 83 L. J. K. B. 382; 109 L. T. 733; 12 Asp. M. L. C. 387; 19 Com. Cas. 105, C. A.

*Annotations:*—**Consd.** Royal Exchange Assce. *v.* Kingsley Navigation Co., [1923] A. C. 235. **Reld.** Travers *v.* Cooper, [1915] 1 K. B. 73; The Thorsa, [1916] P. 257; Paterson, Zochonis *v.* Elder Dempster, [1923] 1 K. B. 420.

**2610. Application of statutory exception—Fire on lighter.**]—A "gabbert" (a lighter) is not "a ship or vessel" with 26 Geo. 3, c. 86, s. 2. If goods on freight are shipped on board such a vessel & destroyed by fire accidentally, or through the negligence of the master, etc., the owners, etc., are not protected by that statute, but are responsible as at common law.—HUNTER *v.* M'GOWN (1819), 1 Bli. 573; 4 E. R. 210, H. L.

*Annotation:*—**Reld.** Morewood *v.* Pollok (1853), 1 C. L. R. 78.

**2611.** ——.]—MOREWOOD *v.* POLLOK (1853), 1 E. & B. 743; 1 C. L. R. 78; 22 L. J. Q. B. 250; 21 L. T. O. S. 87; 17 Jur. 881; 1 W. R. 304; 118 E. R. 614.

**2612.** —— **Negligence of crew.**]—THE DIAMOND, No. 2607, *ante*.

**2613.** —— **Ship unseaworthy.**]—1894 Act, s. 502, provides that "the owner of a British sea going ship" shall not be liable for "any loss or damage happening without his actual fault or privity" where goods on board his ship are lost or damaged by reason of fire on board the ship.

A bill of lading contained a clause providing that the shipowner was not responsible for any loss of or damage to the goods received thereunder for carriage occasioned by (*inter alia*), fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness:—*Held:* a shipowner was not deprived of the protection of 1894 Act, s. 502, merely by reason of the fact that the fire was caused by the unseaworthiness of the ship, but the effect of a bill of lading containing the above clause was to preclude the shipowner from setting up the section as an answer to a claim for the loss of goods, shipped under the bill of lading, by reason of fire on board the ship caused by the unseaworthiness of the ship.—VIRGINIA CAROLINA CHEMICAL CO. *v.* NORFOLK & NORTH AMERICAN STEAM SHIPPING CO., [1912] 1 K. B. 229; 81 L. J. K. B. 129; 105 L. T. 810; 28 T. L. R. 85; 12 Asp. M. L. C. 82; 17 Com. Cas. 6, C. A.; *on appeal, sub nom.* NORFOLK & NORTH AMERICAN STEAM SHIPPING CO., LTD. *v.* VIRGINIA CAROLINA CHEMICAL CO., [1913] A. C. 52, H. L.; *subsequent proceedings, sub nom.* VIRGINIA CAROLINA CHEMICAL CO. *v.* NORFOLK & NORTH AMERICAN SHIPPING CO. (1912), 107 L. T. 320.

*Annotations:*—**Expld.** Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419. **Distd.** Ingram & Royle *v.* Services Martimes du Tréport, [1914] 1 K. B. 541.

**2614.** —— ——.]—The Ct. of Appeal having decided as a preliminary question of law that 1894 Act, s. 502, which exempts the owner of a sea-going ship from liability for loss or damage to goods by fire where the loss or damage happens without his actual fault or privity, applies to protect the shipowner, even although there has been a breach by him of the warranty of seaworthiness; but that the parties to a contract for carriage of goods by sea may, by the terms of their contract, exclude the operation of this sect., & that on the construction of a bill of lading the parties had excluded the operation of the sect., the House of Lords, on appeal thereto from the Ct. of Appeal decision, directed that the facts should be ascertained before the preliminary question of law could be decided. On the rehearing:—*Held:* the vessel in question was not unseaworthy when she started on her voyage, & the fire which caused the damage to pltfs.' goods was occasioned by an act of negligence on the part of one of the ship's engineers, for which act of negligence the shipowners were exempt from liability by the terms of the bill of lading.—VIRGINIA CAROLINA CHEMICAL CO. *v.* NORFOLK & NORTH AMERICAN SHIPPING CO. (1912), 107 L. T. 320; 28 T. L. R. 513; 56 Sol. Jo. 722; 12 Asp. M. L. C. 233; 17 Com. Cas. 277.

**2615.** —— ——.]—INGRAM & ROYLE, LTD. *v.* SERVICES MARITIMES DU TRÉPORT, No. 2609, *ante*.

**2616.** —— ——.]—By 1894 Act, s. 502, the owner of a British sea-going ship shall not be liable to make good to any extent whatever "any loss or damage happening without his actual fault or privity" where any goods or merchandise taken in or put on board his ship are lost or damaged by reason of fire on board the ship. A cargo of benzine on board ship was lost by fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited co. & the managing owners were another limited co. The managing director of the latter co. was the registered managing owner & took the active part in the management of the ship on behalf of the owners. He knew or had the means of knowing of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision & took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition:—*Held:* the owners had failed to discharge the *onus* which lay upon them of proving that the loss happened without their actual fault or privity.—LENNARD'S CARRYING CO., LTD. *v.* ASIATIC PETROLEUM CO., LTD., [1915] A. C. 705; 84 L. J. K. B. 1281; 113 L. T. 195; 31 T. L. R. 294; 59 Sol. Jo. 411; 13 Asp. M. L. C. 81; 20 Com. Cas. 283, H. L.; *affg.* S. C. *sub nom.* ASIATIC

the part of the owners to adopt the ordinary & necessary means of preventing it, the exception to "fire" in the bill of lading will not protect them from a liability to answer for the damage occasioned by such fire to goods on board the vessel.—HUNTER & CO. *v.* THE MORNING STAR (OWNERS) (1821), 1 Nfld. L. R. 239.—**NFLD.**

PETROLEUM CO., LTD. *v.* LENNARD'S CARRYING CO., LTD., [1914] 1 K. B. 419, C. A.

*Annotations :*—**Consd.** Ingram & Royle *v.* Services Maritimes du Tréport, [1914] 1 K. B. 541. **Apld.** Royal Exchange Assce. Corpn. of London *v.* Kingsley Navigation Co., [1923] A. C. 235. **Refd.** Ashton *v.* L. & N. W. Ry., [1918] 2 K. B. 488; The Bristol City, [1921] P. 444; La Compañia Martiartu *v.* Royal Exchange Assce. Corpn., [1923] 1 K. B. 650. **Mentd.** Baker *v.* James, [1921] 2 K. B. 674.

**2617. Application of exception in contract—Statutory exception excluded.**]—VIRGINIA CAROLINA CHEMICAL CO. *v.* NORFOLK & NORTH AMERICAN SHIPPING CO., No. 2613, *ante*.

**2618.** —— ——.]—INGRAM & ROYLE, LTD. *v.* SERVICES MARITIMES DU TRÉPORT, No. 2609, *ante*.

**2619.** —— **Negligence of crew.**] — VIRGINIA CAROLINA CHEMICAL CO. *v.* NORFOLK & NORTH AMERICAN SHIPPING CO., No. 2614, *ante*.

**2620.** —— ——.]—By a clause in a time charter of a ship "fire" (*inter alia*) was "always mutually excepted." Besides other cargo the charterers loaded in the hold a quantity of benzine &/or petrol in tins in cases. During the voyage the tins leaked, & in consequence there was a considerable quantity of petrol vapour in the hold. At one of the ports of call it became necessary for the stevedores, who were employed by & were the servants of the charterers, to shift some of the cases of benzine, & for that purpose the stevedores placed a number of heavy planks at the forward end of the hatchway, which they used as a platform for transferring the cases from the lower hold to the 'tween deck. When the sling containing the cases of benzine was being hoisted up, owing to the negligence of the stevedores the rope by which the sling was hoisted or the sling itself came in contact with the boards, causing one of the boards to fall into the hold, & the fall was immediately followed by a rush of flames, the result being the total destruction of the ship. The shipowners claimed from the charterers as damages the value of the ship. The charterers disputed liability, & the dispute was referred to arbn. under a clause in the charterparty. The arbitrators found that the ship was lost by fire; that the fire arose from a spark igniting the petrol vapour in the hold; that the spark was caused by the falling board coming into contact with some substance in the hold; & that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. The charterers contended: (*a*) that they were protected from liability by the exception of "fire" in the charterparty; (*b*) that the damages were too remote, as it could not reasonably have been anticipated that the falling of the board would have caused a spark:—*Held* (1) the exception clause did not protect the charterers against loss by fire caused by the negligence of their servants, there being no express stipulation to that effect; & (2) as the fall of the board was due to the negligence of the charterers' servants, the charterers were liable for all the direct consequences of the negligent act, even though those consequences could not reasonably have been anticipated; & they were therefore liable for the loss of the ship by fire.—*Re* POLEMIS & FURNESS, WITHY & CO., LTD. [1921] 3 K. B. 560; *sub nom.* POLEMIS *v.* FURNESS, WITHY & CO., LTD., 90 L. J. K. B. 1353; 126 L. T. 154; 37 T. L. R. 940; 15 Asp. M. L. C. 398; 27 Com. Cas. 25, C. A.

*Annotations :*—**Consd.** Fagan *v.* Green & Edwards, [1926] 1 K. B. 102. **Refd.** Adelaide S.S. Co. *v.* R., [1923] 1 K. B. 59; Britannia Hygienic Laundry Co. *v.* Thornycroft (1925), 94 L. J. K. B. 858; Hambrook *v.* Stokes, [1925] 1 K. B. 141. **Mentd.** Harnett *v.* Bond, [1924] 2 K. B. 517.

**Liability to general average contribution.**]—*See* Sect. 14, sub-sect. 2, C., *post*.

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SUB-SECT. 8.—BARRATRY.

*Compare* INSURANCE, Vol. XXIX., pp. 221–224, Nos. 1767–1814.

**2621. What amounts to—Act of wrong by master against ship & goods.**]—LEWEN *v.* SWASSO (1742), 1 Postlethwayt's Dictionary of Trade & Commerce, 147, L. C.

*Annotation :*—**Refd.** Earle *v.* Rowcroft (1806), 8 East, 126.

**2622.** —— ——.]—Barratry is every species of fraud or knavery in the master or mariners of a ship, by which the owners or freighters are injured; & a deviation, if such, is barratry; whether the loss happen during such fraudulent voyage, or after. Otherwise, if the deviation be with their privity or consent.—VALLEJO *v.* WHEELER (1774), 1 Cowp. 143; Lofft, 631; 98 E. R. 1012.

*Annotations :*—**Apld.** Nutt *v.* Bourdieu (1786), 1 Term Rep. 323. **Consd.** Phyn *v.* Royal Exchange Assce. (1798), 7 Term Rep. 505; Earle *v.* Rowcroft (1806), 8 East, 126. **Apld.** Soares *v.* Thornton (1817), 7 Taunt. 627. **Consd.** Cory *v.* Burr (1882), 9 Q. B. D. 463. **Refd.** Lockyer *v.* Offley (1786), 1 Term Rep. 252; Trinity House Master, etc. *v.* Clark (1815), 4 M. & S. 288; Hutton *v.* Bragg (1816), 7 Taunt. 14; Christie *v.* Lewis (1821), 2 Brod. & Bing. 410. **Mentd.** Frazer *v.* Marsh (1810), 13 East, 238; Tate *v.* Meek (1818), 8 Taunt. 280; Saville *v.* Campion (1819), 2 B. & Ald. 503.

**2623.** —— ——.]—GRILL *v.* GENERAL IRON SCREW COLLIER CO., No. 2617, *post*.

**2624.** —— —— **Without consent of owner.**]—Barratry can only be committed against the owner of the ship, & without his consent.—NUTT *v.* BOURDIEU (1786), 1 Term Rep. 323; 99 E. R. 1119.

*Annotations :*—**Consd.** Earle *v.* Rowcroft (1806), 8 East, 126; Samuel *v.* Dumas, [1924] A. C. 431.

**2625.** —— —— **Motive immaterial.**]—Barratry is any fraudulent or criminal conduct against the owners of ship or goods by the master or mariners in breach of the trust reposed in them, & to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expense the master or mariners; & therefore, where a master had general instructions to make the best purchases with dispatch, this would

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**2619 i.** *Application of exception in contract—Negligence of crew.*]—HAMILTON *v.* HUDSON'S BAY CO. & IRVING & BRIGGS (1884), 1 B. C. R., pt. 2, 176.—**CAN.**

h. *Meaning of damage by fire—Accidental fire—Not occasioned by lightning.*]—Where deft. had agreed to return a steamer chartered by him on a certain day in good repair, "dangers of the lake excepted":—*Held:* damage to the steamer by an accidental fire, not occasioned by lightning, did not come under the exception.—LARNED *v.* MCRAE (1843), 1 U. C. R. 99.—**CAN.**

k. —— ——.] — HONG-KONG & SHANGHAI BANKING CORPN. *v.* BAKER (1870), 7 Bom. O. C. 186.—**IND.**

l. —— *Unseaworthiness.*] — Applts. sued resps. to recover for the loss of lime in barrels shipped in resps.' barge for carriage, & destroyed by fire in the course thereof. The carriage was subject to Water Carriage of Goods Act, 1909, of Canada. The barge was unseaworthy to the knowledge of resps.' manager, & leaked badly in consequence. A possible cause of the fire was heat generated by the action on the lime of the water which thus entered the barge:—*Held:* the loss was directly, though not proximately, attributable to the unseaworthiness, & therefore was not a "loss arising from fire" within sect. 7 of the Act.—ROYAL EXCHANGE ASSURANCE *v.* KINGSLEY NAVIGATION CO., [1923] A. C. 235, P. C.—**CAN.**

m. *Whether wharfingers exempted by exception.*]—CHIN HONG & CO. *v.* SENG MOH & CO. (1879), I. L. R. 4 Calc. 736; 3 C. L. R. 585.—**IND.**

**PART VII. SECT. 4, SUB-SECT. 8.**

n. *What amounts to—Deviation.*]—SPINNEY *v.* OCEAN MUTUAL MARINE INSURANCE CO. (1890), 21 N. S. R. 244; 17 S. C. R. 326.—**CAN.**

o. —— *Two seawater valves allowed*

*Sect. 4.—Excepted perils: Sub-sects. 8, 9 & 10.]*

not warrant him in going into an enemy's settlement to trade, which was permitted by the enemy, though his cargo could be more speedily & cheaply completed there; but such act, in consequence of which the ship was seized & confiscated, is barratrous.

I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any: & where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage (LORD ELLENBOROUGH, C.J.).—EARLE *v.* ROWCROFT (1806), 8 East, 126; 103 E. R. 292.

*Annotations:*—**Consd.** Wilson *v.* Rankin (1865), 6 B. & S. 208. **Distd.** Grill *v.* General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600. **Consd.** Australasian Insce. *v.* Jackson (1875), 33 L. T. 286. **Apprvd.** Cory *v.* Burr (1883), 8 App. Cas. 393. **Refd.** Westport Coal Co. *v.* McPhail, [1898] 2 Q. B. 130.

**2626. —— Deviation—Whenever loss occurs.**]—VALLEJO *v.* WHEELER, No. 2622, *ante*.

**2627. —— —— Unless with consent of owners or freighters.**]—VALLEJO *v.* WHEELER, No. 2622, *ante*.

**2628. —— Trading with alien enemy.**]—EARLE *v.* ROWCROFT, No. 2625, *ante*.

**2629. —— Improper treatment of vessel—Master acting against own judgment.**]—Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shown that he acted against his own judgment.—TODD *v.* RITCHIE (1816), 1 Stark. 240; 171 E. R. 459, N. P.

**2630. —— Vessel run on shore—Collusion between owner & master.**]—If the owner of a vessel, fully laden by the freighters, collude with the captain to run her on shore:—*Held:* this amounted to barratry, although by the terms of a charterparty entered into between such owner & the freighters, the former was entitled to put goods on board during a previous part of the voyage.—SOARES *v.* THORNTON (1817), 7 Taunt. 627; 1 Moore, C. P. 373; 129 E. R. 250.

*Annotations:*—**Consd.** Samuel *v.* Dumas, Graham Joint Stock Shipping Co. *v.* Merchants Marine Insce. Co. (No. 2), [1923] 1 K. B. 592. **Refd.** Christie *v.* Lewis (1821), 2 Brod. & Bing. 410.

**2631. —— Production of forged papers.**]—The captain of a vessel, in the due course of his voyage, put into port for the purpose of repairing damage, & while the repairs were proceeding, was absent, & continued absent for a much longer time than was necessary to finish the repairs; & during his absence, procured forged papers. He afterwards returned to the vessel, & instead of proceeding on the voyage, carried the vessel to a foreign port. On the trial of the cause the jury found that the act of barratry was committed during the absence of the captain, while the vessel was repairing:—*Held:* the verdict was right.—ROSCOW *v.* CORSON (1819), 8 Taunt. 684; 129 E. R. 550.

**2632. —— Secret & fraudulent act—Against which shipowner cannot guard.**]—LLOYD *v.* GENERAL IRON SCREW COLLIER CO., No. 2646, *post*.

**2633. —— Theft by crew.**]—TAYLOR *v.* LIVERPOOL & GREAT WESTERN STEAM CO., No. 2638, *post*.

**2634. —— Reckless conduct.**]—BRISCOE & CO. *v.* POWELL & CO., No. 2686, *post*.

**2635. —— Holes bored in ship by crew.**]—THE CHASCA, No. 2603, *ante*.

SUB-SECT. 9.—PIRATES, ROBBERS AND THIEVES.

*Compare* INSURANCE, Vol. XXIX., pp. 219–221, Nos. 1759–1766.

**2636. Definitions — "Robbers" — Robbers by violence.**]—Defts. received from pltf. at Panama certain goods to be delivered in London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, & steam, the dangers of the seas, roads, & rivers, of what or kind soever, excepted." The goods were carried by defts. across the Isthmus of Panama to Chagres, where they were shipped to Southampton, & there placed in a railway truck, from whence they were secretly stolen in the course of their transit to London:—*Held:* this was not within the exception, a loss by "robbers" or by "dangers of the roads"; since the word "robbers" meant, not "thieves" but robbers by violence; & "dangers of the roads" meant dangers of marine roads; or, if of land roads, such dangers as are immediately caused by roads, as the overturning of carriages in rough & precipitous places.—DE ROTHSCHILD *v.* ROYAL MAIL STEAM PACKET CO. (1852), 7 Exch. 734: 21 L. J. Ex. 273; 19 L. T. O. S. 229.

*Annotations:*—**Refd.** Phillips *v.* Clark (1857), 2 C. B. N. S. 156; Wilton *v.* Atlantic Royal Mail Steam Navigation Co. (1861), 10 C. B. N. S. 453.

**2637. —— —— ——.**]—STEINMAN & CO. *v.* ANGIER LINE, No. 2639, *post*.

**2638. —— "Thieves"—Persons external to ship.**]—Pltfs. shipped at Liverpool, on board defts.' ship for New York, a box of diamonds under a bill of lading by which were excepted (*inter alia*) "pirates, robbers, thieves, vermin, barratry of master & mariners. . . ." The box was stolen during the voyage or on the ship's arrival in port, before the time for delivery; but there was no evidence to show whether it was stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore:—*Held:* (1) "thieves" must be interpreted as in a policy of insurance, & only applied to thieves external to the ship; (2) assuming theft by one of the crew to be "barratry," it lay on defts., the shipowners, to bring the loss within one of the exceptions, by showing by whom the theft had been committed, & pltfs. were therefore entitled to recover for the loss.

(3) The bill of lading also contained a clause "the shipowner is not to be liable for any damage done to any goods which is capable of being covered by insurance":—*Held:* "damage" would include damage to the goods amounting to a total loss or destruction of them, but did not apply to the case of the abstraction of the goods.

(4) The word is ambiguous &, being of doubtful meaning, it must receive such a construction as is most in favour of the shipper, & not such as is most in favour of the shipowner, for whose benefit the exceptions are framed (LUSH, J.).—TAYLOR *v.* LIVERPOOL & GREAT WESTERN STEAM CO.

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*to flow into ballast tank.*]—WOODHEAD, PLANT & CO. *v.* GULLY (1897), 14 S. C. 102; 7 C. T. R. 75.—**S. AF.**

**PART VII. SECT. 4, SUB-SECT. 9.**

**p.** *Onus of proof.*]—Pltf. shipped forty cases of oranges from A. to P. as deck cargo under a bill of lading which contained the following exemptions: "That the co. would not be responsible for any loss occasioned by robbers or thieves on board or on shore, & whether the servants of the co. or not: & that the goods shipped as deck cargo were to be carried at the owners' risk." Upon arrival at F., three of the cases were found to be empty. Pltf. sued for the value of the goods lost, & obtained judgment:—*Held:* the *onus* of proving that the cause of damage was not covered by the exemptions in the bill of lading was upon pltf.—SEMPER *v.* AUSTRALIAN UNITED STEAM

(1874), L. R. 9 Q. B. 546; 43 L. J. Q. B. 205; 30 L. T. 714; 22 W. R. 752; 2 Asp. M. L. C. 275.

*Annotations:—As to* (1) **Consd.** Steinman *v.* Angier Line, [1891] 1 Q. B. 619. *As to* (2) **Refd.** The Xantho (1886), 11 P. D. 170; The Glendarroch, [1894] P. 226. *As to* (4) **Apld.** Hayn *v.* Culliford & Clark (1879), 27 W. R. 541. **Consd.** Norman *v.* Binnington (1890), 25 Q. B. D. 475. *Generally,* **Refd.** Chartered Mercantile Bank of India *v.* Netherlands Steam Navigation Co. (1882), 52 L. J. Q. B. 220; The Prinz Heinrich (1897), 14 T. L. R. 48; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412; Ashton *v.* L. & N. W. Ry., [1918] 2 K. B. 488.

**2639.** —— —— ——.]—Goods were shipped under a bill of lading which provided that the shipowner should not be liable for any loss or damage caused by (*inter alia*) "thieves of whatever kind, whether on board or not, or by land or sea." The goods were stolen during the stowage by some of the stevedore's men, who were paid by & in the service of the shipowner:—*Held:* the words "thieves of whatever kind" did not relieve the shipowner from liability for thefts committed by persons in his service.

Robbery imports violence, but "theft" . . . properly speaking, does not (BOWEN, L.J.).—STEINMAN & CO. *v.* ANGIER LINE, [1891] 1 Q. B. 619; 60 L. J. Q. B. 425; 64 L. T. 613; 39 W. R. 392; 7 T. L. R. 398; 7 Asp. M. L. C. 46, C. A.

*Annotations:*—**Refd.** The Prinz Heinrich (1897), 14 T. L. R. 48; Dunn *v.* Bucknall, Dunn *v.* Donald Currie, [1902] 2 K. B. 614; Price *v.* Union Lighterage Co., [1903] 1 K. B. 750; Baxter's Leather Co. *v.* Royal Mail Steam Packet Co., [1908] 2 K. B. 626. **Mentd.** *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560; Fagan *v.* Green & Edwards, [1926] 1 K. B. 102.

**Whether piracy a peril of the sea.**]—*See* Nos. 2590, 2591, *ante.*

**Meaning of piracy.**]—*See* CRIMINAL LAW, Vol. XV., pp. 724, 725, Nos. 7838–7854.

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SUB-SECT. 10.—COLLISIONS, STRANDINGS AND ACCIDENTS OF NAVIGATION.

*Compare* INSURANCE, Vol. XXIX., pp. 241–243, Nos. 1939–1969.

**2640. Collision—Through negligence of shipowners' servants—Both ships property of same owner.**]—CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO., No. 2648, *post.*

**2641.** —— **Necessity for seaworthiness.**]—THE GLENFRUIN, No. 2655, *post.*

—— **Whether an accident of navigation.**]—*See* Nos. 2646–2649, *post.*

—— **Whether a peril of the sea.**]—*See* Subsect. 6, B. (*a*), *ante.*

—— **Effect of exception of war risks.**]—*See* Nos. 2763–2765, *post.*

**2642. "Accidents of navigation"—Accident while in dock—Shipping water to damage of cargo.**]—A vessel laden with goods arrived in the port of London, & was taken into the C. Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, & on the other to a barge lying between her & the wharf. The crew were discharged, except the mate, & lumpers were being employed in unloading her, when the tackle broke [by force of the wind] whereby she was fastened to the lighter, & in consequence she canted over, water got in through her ports, & the goods still on board were damaged:—*Held:* this was a loss within the exception in the bill of lading, of "all & every the dangers & accidents of the seas & navigation."—LAURIE *v.* DOUGLAS (1846), 15 M. & W. 746; 4 L. T. 588.

*Annotations:*—**Dbtd.** The Accomac (1890), 15 P. D. 208 **Refd.** Notara *v.* Henderson (1872), 26 L. T. 412; The Warkworth (1884), 53 L. J. P. 65.

**2643.** —— —— ——.]—THE SOUTHGATE, No. 2709, *post.*

**2644.** —— —— ——.]—THE GLENOCHIL, No. 2683, *post.*

—— ——.]—*Compare* No. 2700, *post.*

**2645.** —— **Failure to enter port owing to insufficient depth of water.**]—SCHILIZZI *v.* DERRY, No. 2788, *post.*

**2646.** —— **Collision—Through negligence of owners.**]—(1) Pltf. shipped goods on board defts.' vessel to be safely & securely carried from Genoa to London & there delivered, "barratry of master or mariner," "accidents," "damage of the sea," etc., excepted. Defts.' vessel when at sea by the gross carelessness, negligence, mismanagement & improper conduct of defts.' servants & mariners, ran foul of & struck against another vessel, whereby pltf.'s goods on board were sunk & lost:—*Held:* defts. were liable to pltf. for such loss.

I do not think the fair meaning of the word "accident" extends to a loss caused by the negligence of the crew (BRAMWELL, B.).

(2) Barratry is a wrong done to the owners themselves, & a secret & fraudulent act, so that it is not so easy to guard against it in the selection of the crew as against negligence (BRAMWELL, B.).—LLOYD *v.* GENERAL IRON SCREW COLLIER CO. (1864), 3 H. & C. 284; 4 New Rep. 298; 33 L. J. Ex. 269; 10 L. T. 586; 10 Jur. N. S. 661; 12 W. R. 882; 2 Mar. L. C. 32.

*Annotations:—As to* (1) **Apld.** The Norway (1864), Brown. & Lush. 377; Grill *v.* General Iron Screw Collier Co. (1868), 37 L. J. C. P. 205. **Refd.** Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Woodley *v.* Michell (1883), 48 L. T. 599. *Generally,* **Refd.** The Freedom (1869), L. R. 2 A. & E. 316; The Chasca (1875), L. R. 4 A. & E. 446.

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NAVIGATION CO. (1904), 6 W. A. L. R. 63.—**AUS.**

q. *Right to except thefts by master or crew.*]—MATHYS *v.* MANCHESTER LINERS (1904), Q. R. 25 S. C. 426.—**CAN.**

**PART VII. SECT. 4, SUB-SECT. 10.**

r. *Necessity for evidence of negligence to be very clear.*]—Where exception against loss by dangers of navigation is in a bill of lading, & the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the shipowner liable; & although it lies upon defft. in the first place to bring himself within the exception, yet this is sufficiently done by showing a shipwreck from stress of weather; & pltf. is then called upon to establish that the loss would not have happened but from negligence or want of skill.—HARNDEN *v.* PROCTOR (1852), 9 U. C. R. 592.—**CAN.**

t. *Goods carried at plaintiff's risk.*]—STEVENSON *v.* GILDERSLEEVE (1853), 2 C. P. 495.—**CAN.**

s. *Vessel striking sunken rock.*]—Under a contract to that effect, pltf., during Jan. 1875, loaded defts.' vessel, which was frozen in the ice in Port Hope harbour, with a cargo of peas, to be carried in the vessel on the opening of navigation to Kingston or Oswego. While the goods were so on board, the vessel struck a sunken rock, unknown to all parties at the bottom of the harbour, which broke a hole in the vessel's bottom, causing her to sink & damaging the cargo:—*Held:* assuming defts.' liability to be that of carriers, this was a loss caused by the "dangers of navigation," within 37 Vict. c. 25, s. 1, so as to exempt defts. from liability.—CLUXTON *v.* DICKSON (1876), 27 C. P. 170.—**CAN.**

b. ——.]—DHAUNSEE *v.* INDIA GENERAL STEAM NAVIGATION CO. (1862), 1 Ind. Jur. O. S. 125; 1 Hyde, 283.—**IND.**

c. "*Accidents of navigation*"—*Onus of proof that carrier blameworthy.*]—RICHELIEU & ONTARIO NAVIGATION CO. *v.* FORTIER (1889), 18 R. L. O. S. 83.—**CAN.**

d. *Inclement weather—Hatches closed—Damage to cargo by heat.*]—A cargo of maize was shipped on deft.'s steamship under a bill of lading excepting "accidents of the seas." Owing to inclement weather & for the safety of the ship, ventilators were closed on a number of occasions during the voyage, with the result that the air in the holds became heated & a portion of the cargo was damaged:—*Held:* the case came within the exception "accident of the seas," & the shipowners were not liable, as the heating of the maize was caused by the stoppage of ventilation which, as a matter of good seamanship, was necessitated by the state of the weather.—DONKIN,

*Sect.* 4.—*Excepted perils: Sub-sects.* 10 & 11.]

**2647.** —— —— ——.]—Merchant Shipping Act, 1854 (c. 104), s. 296, requires that when ships are meeting each other, each shall port its helm, & by s. 299 it is enacted that loss arising from the non-observance of the regulations laid down by the Act shall be deemed to have been occasioned by the "wilful default" of the person in charge of the deck:—*Held:* (1) the effect of the statute was only to make the act wilful as between the shipowners, & not as between the master & shipowner, so as to make it an act of barratry; (2) loss by a collision brought about by the negligence of the crew was not a loss by "dangers or accidents of the seas or navigation" within the exceptions of the bill of lading.

(3) In an action on a bill of lading by the shipper of goods against the shipowners to recover the value of goods lost in a collision, the jury found that the collision was caused by the negligence of the crew of deft.'s ship, & there was no want of care on the part of the crew of the other ship which contributed to the collision. It appeared that if the other ship had backed, the collision would have been less violent, & deft.'s ship might not have sunk, but there was no evidence as to whether this would have been the most prudent course under all the circumstances:—*Held:* the judge was not bound to leave the question to the jury whether the loss of the goods, & not the collision might not have been avoided by care on the part of the crew of the other ship.—GRILL *v.* GENERAL IRON SCREW COLLIER CO. (1868), L. R. 3 C. P. 476; 37 L. J. C. P. 205; 18 L. T. 485; 16 W. R. 796; 3 Mar. L. C. 77, Ex. Ch.

*Annotations:—As to* (2) **Reld.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225; The Chasca (1875), L. R. 4 A. & E. 446; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1882), 10 Q. B. D. 521; Wilson *v.* The Xantho (1887), 12 App. Cas. 503; Steinman *v.* Angier Line, [1891] 1 Q. B. 619; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412. *Generally,* **Reld.** Leuw *v.* Dudgeon (1867), 17 L. T. 145; Gibbin *v.* M'Mullen (1869), 38 L. J. P. C. 25; Scaramanga *v.* Stamp (1880), 28 W. R. 691; The Glendarroch, [1894] P. 226; Johnson *v.* Wainwright (1894), 38 Sol. Jo. 362; Trinder, Anderson *v.* Thames & Mersey Marine Insce., Trinder, Anderson *v.* North Queensland Insce., Trinder, Anderson *v.* Weston, Crocker, [1898] 2 Q. B. 114; Fenton *v.* Thorley, [1903] A. C. 443; *Re* Etherington & Lancashire & Yorkshire Accident Insce., [1909] 1 K. B. 591; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873; Becker, Gray *v.* London Assce. Corpn., [1918] A. C. 101; *Re* City Equitable Fire Insce., [1925] Ch. 407. **Mentd.** Oppenheim *v.* White Lion Hotel Co. (1871), L. R. 6 C. P. 515; Newman *v.* Bourne & Hollingsworth (1915), 31 T. L. R. 209.

**2648.** —— —— **Purely accidental.**]—Pltfs. shipped goods on board defts.' vessel, the *Crown Prince*, under a bill of lading, which contained exceptions of, among other things, "collision," & "accidents, loss, or damage, from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the co., in navigating the ship." In the course of the voyage the *Crown Prince* came into collision with another vessel of defts., the *Atjeh*. Pltfs.' goods were in consequence lost. The collision was due to negligence, for which the *Atjeh* was mainly in fault; but the *Crown Prince* also was in some degree to blame:—*Held:* (1) defts. had not committed a breach of the contract created by the bill of lading, & no action could be maintained against them on the ground of failure to perform the undertaking therein contained to carry the goods safely upon the voyage. No stipulation on the part of defts. could be implied as to the conduct of those on board the *Atjeh*, & although the negligence of the *Atjeh* was not within the exceptions, nevertheless it was not within the contract created by the bill of lading. The exception "collision," although it did not cover the negligence of the *Crown Prince*, covered the negligence of the *Atjeh*, & defts. were expressly relieved from liability for the negligence of the *Crown Prince* by the other exceptions in the bill of lading.

A collision at sea may arise from mere accident, that is, without any default on the part of those who are navigating either ship, & if a collision of that kind occurs it is within the exception of accidents of the sea (BRETT, L.J.).

(2) By the first part of the bill of lading an absolute contract is entered into to carry the goods safely & deliver them safely (BRETT, L.J.).—CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO. (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; 48 L. T. 546; 47 J. P. 260; 31 W. R. 445; 5 Asp. M. L. C. 65, C. A.

*Annotations:—As to* (1) **Reld.** Woodley *v.* Michell (1883), 11 Q. B. D. 47; Wilson *v.* The Xantho (1887), 12 App. Cas. 503; Leduc *v.* Ward (1888), 20 Q. B. D. 475. *Generally,* **Reld.** Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589; The August, [1891] P. 328; The Englishman & The Australia, [1894] P. 239; The Industrie, [1894] P. 58; The Drumlanrig (1910), 80 L. J. P. 9. **Mentd.** Davidson *v.* Hill, [1901] 2 K. B. 606; British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354.

**2649.** —— —— **Attributable to negligence of other ship.**]—SAILING SHIP GARSTON CO. *v.* HICKIE, BORMAN & CO., No. 4833, *post.*

**2650. Stranding.**]—BROKEN HILL PROPRIETARY CO., LTD. *v.* P. & O. STEAM NAVIGATION CO., No. 3281, *post.*

——.]—*See, also,* INSURANCE, Vol. XXIX., pp. 241–243, Nos. 1939–1964.

**Effect of negligence clause.**]—*See* Sub-sect. 14, D., *post.*

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SUB-SECT. 11.—LATENT DEFECTS IN, AND ACCIDENTS TO HULL OR MACHINERY.

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), Art. IV., r. 2 (*p*); & *compare* INSURANCE, Vol. XXIX., p. 225, Nos. 1827–1830.

**2651. Accident to machinery—Salvage services**

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CREEDEN & AVERY, LTD. *v.* THE CHICAGO MARU (1917), 23 B. C. R. 551; 33 D. L. R. 38.—**CAN.**

e. ——.]—DONALDSON BROTHERS *v.* LITTLE & CO., LITTLE & CO. *v.* HAY & SONS (1882), 10 R. (Ct. of Sess.) 413; 20 Sc. L. R. 275.—**SCOT.**

f. *Stranding of ship.*]—HAWTHORNE *v.* HATRICK & CO. (1903), 23 N. Z. L. R. 208.—**N.Z.**

g. *Failure of steam power.*]—The charterparty of a steamship freed the owners from liability for "the act of God, the Queen's enemies, fire, & all & every other dangers & accidents of the seas, rivers, & errors or negligence of navigation of whatsoever nature & kind, during the said voyage." The vessel was lost through failure of steam power, in consequence of which she drifted on a lee shore. In an action at the instance of the charterers against the owners for damages for the loss of the cargo:—*Held:* (1) the failure of steam power was attributable to the water having been allowed to run too low in the boiler, so that the metal surfaces of the crowns of the wing furnaces & some of the boiler tubes were denuded of water, with the result that they contracted unevenly & consequently leaked when cold water was admitted into the boiler; & (2) the loss fell under the exception of "errors or negligence of navigation" in the charterparty & therefore the owners were not liable in damages.—CUNNINGHAM *v.* COLVILS, LOWDEN & CO. (1888), 16 R. (Ct. of Sess.) 295; 26 Sc. L. R. 249.—**SCOT.**

h. *Omission to shut seacock—Negligence of engineer.*]—ADAM *v.* MORRIS (1890), 18 R. (Ct. of Sess.) 153; 26 Sc. L. R. 149.—**SCOT.**

**PART VII. SECT. 4, SUB-SECT. 11.**

k. *Latent defect—Defective tackle.*]—VINTINER *v.* HUDDART, PARKER & CO. (1897), 18 N. S. W. L. R. (L.) 20; 13 N. S. W. W. N. 150.—**AUS.**

l. ——.]—CHARLTON & BAGSHAW *v.* LAW & CO., [1913] S. C. 317; 50 Sc. L. R. 214; [1912] 2 S. L. T. 459.—**SCOT.**

**consequent on breaking of engine shaft.**]—" Accidents from machinery," among the accepted perils in a bill of lading, include salvage services rendered necessary by the sudden breaking of the crank shaft of an engine.—THE MIRANDA (1872), L. R. 3 A. & E. 561 ; 41 L. J. Adm. 82 ; 27 L. T. 389 ; 21 W. R. 84 ; 1 Asp. M. L. C. 440.

**2652. Latent defect—Accumulation of rust.**]—Applts. sued for damage to a cargo of cotton seed shipped under a bill of lading by the terms of which the shipowner's warranty of seaworthiness was not to extend to damage caused by " latent defect in hull provided such latent defect did not result from want of due diligence of the owners or by the ship's husband or managers. . . ." The damage was caused by sea water entering the hold through the fracture of certain rivets by which the plates were attached to the ship's frames. Rust had been allowed to accumulate between the plates & the frames, thus subjecting the rivets to undue stress, which ultimately caused them to break. The damage occurred during a voyage in Aug. 1921. In 1920 the vessel had passed Lloyd's special survey, & in July, 1921, she had been surveyed for fire damage, when the condition of the rivets was satisfactorily reported upon ; but certain cleaning & recoating of steel work in the holds which was then recommended had not been carried out at the time when the cargo was damaged. The damage was augmented by the failure of the master, who was a part owner, to have the bilges properly pumped. The judge gave judgment for resps. on the ground that although a careful examination would have disclosed the existence of the rust which caused the defect, the surveyors' reports indicated no lack of diligence in the owner or his advisors. The damage was therefore caused by a latent defect in respect of which the owner was protected by the bill of lading :—*Held :* the defect was such that it could have been discerned by a reasonably careful & diligent examination, & extraordinary care was not necessary to make it apparent. The judge had treated the question whether a defect was or was not latent as being the same as whether the person charged with the care of the vessel was or was not negligent.

By the exercise of ordinary care by a competent person the rust on the plates would have been found, & it was common ground that something should have been done to remedy it ; if the ship sailed without anything being done there was a breach of the warranty of seaworthiness.—THE DIMITRIOS RALLIAS (1922), 128 L. T. 491 ; 16 Asp. M. L. C. 62 ; 13 Lloyd, L. R. 363, C. A.

*Annotations :*—**Reid.** The Christel Vinnen, [1924] P. 61 ; Angliss (Australia) Proprietary *v.* Peninsular & Oriental Steam Navigation Co., [1927] 2 K. B. 456.

**2653. —— Corroded valve.**]—Pltfs. chartered from defts. a steamer to carry sugar from Java to the United Kingdom, a clause in the charter-party providing that defts. should not be answerable for any loss or damage arising from any latent defects in machinery or hull not resulting from want of due diligence by the owners of the ship. Before the voyage defts. sent the ship to repairers for overhaul, & a representative of defts. watched the repairs, but on the voyage water got into the hold through a corroded valve & damaged the sugar. In an action for damages owing to unseaworthiness :—*Held :* in fact the ship was unseaworthy, the defect was not latent within the meaning of the above clause, & even if it was latent, it could have been discovered by due diligence, & the clause was no protection, but defts. were entitled to have their liability limited under 1894 Act, s. 503.—LONDON RANGOON TRADING CO., LTD. *v.* ELLERMAN LINES, LTD. (1923), 39 T. L. R. 284 ; 14 Lloyd, L. R 497.

*Annotation :*—**Reid.** Angliss (Australia) Proprietary *v.* Peninsular & Oriental Steam Navigation Co., [1927] 2 K. B. 456.

**2654. —— Defective rivet.**]—Pltfs.' cargo of maize was carried in defts.' vessel under a bill of lading containing the following clause : " The steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . or any latent defects in hull . . . or by other accidents arising in the navigation of the steamer, even when occasioned by the negligence . . . of the servants of the shipowner."

A defective rivet allowed water to flow into the vessel. Had the pumps been duly sounded the leakage would have been discovered & the inflow of water kept under. The cargo was damaged by the sea water :—*Held :* the vessel was unseaworthy ; the exception of " latent defects in hull " did not qualify the implied warranty of seaworthiness ; &, although the damage to the cargo was increased by the negligent failure to pump, the dominant cause of the damage was the unseaworthiness. It followed, therefore, that the shipowner was responsible for the whole of the damage & not only for the proportion of the damage done before the time when but for the negligence the inflow of water would have been checked.—THE CHRISTEL VINNEN, [1921] P. 208 ; 93 L. J. P. 138 ; 132 L. T. 337 ; 40 T. L. R. 845 ; 69 Sol. Jo. 89 ; 30 Com. Cas. 32 ; 16 Asp. M. L. C. 413, C. A.

**2655. Whether implied warranty of seaworthiness excluded.**]—(1) The warranty of seaworthiness implied in a bill of lading is an absolute warranty that the ship shall be in fact fit for the voyage, & not merely that the shipowner shall take all reasonable care to make her so fit ; & hence a latent defect in the screw shaft existing prior to the commencement of the voyage, & resulting in the breaking of the shaft, is a breach of the shipowner's warranty of seaworthiness, although the shipowner may have taken all reasonable precaution in the selection of the shaft

(2) The excepted perils in a bill of lading have no application to the case of a ship sailing in an unseaworthy condition ; & hence they are no defence to an action brought for loss or damage to the charterer's goods occasioned by such unseaworthiness.

(3) Where a screw steamship carrying cargo under a bill of lading containing the exception " accidents of the seas & of navigation," becomes disabled through her main shaft breaking in consequence of a latent defect in existence prior to the sailing of the vessel, & another vessel belonging to the same owners renders salvage services, such owners are precluded from recovering salvage against the cargo by reason of the services becoming necessary through the breach of their warranty of seaworthiness. In these circumstances the right of the crew of the salving ship to recover for the services is not affected by such unseaworthiness ; but the owners of the cargo, having to pay such salvage, are entitled to recover by way of counterclaim, from such of pltfs. as are owners of the salved ship, the full amount which they, the owners of cargo, have to pay to the crew for salvage.—THE GLENFRUIN (1885), 10 P. D. 103 ; 54 L. J. P. 49 ; 52 L. T. 769 ; 33 W. R. 826 ; 5 Asp. M. L. C. 413.

*Annotations :*—*As to* (1) **Reid.** The Northumbria (1906), 95 L. T. 618 ; The Europa, [1908] P. 84 ; The Christel Vinnen, [1924] P. 61. *As to* (2) **Reid.** The Maori King *v.* Hughes (1895), 73 L. T. 141 ; Nelson *v.* Nelson Line

*Sect. 4.—Excepted perils: Sub-sects.* 11, 12, 13 & 14, *A.*]

(Liverpool) (1907), 96 L. T. 402; Ingram & Royle *v.* Services Maritime Du Tréport (1913), 82 L. J. K. B. 374. *As to* (3) **Refd.** The Duc D'Aumale (No. 2), [1904] P. 60; The Leon Blum, [1915] P. 90.

**2656.** ——.]—The *L.*, having been disabled in her machinery owing to a latent defect in the welding of her flywheel shaft, existing at the commencement of the voyage, but not discoverable by the exercise of reasonable care, was towed by the *A.*, a vessel belonging to the same owners, into a port of safety. The cargo on board the *L.* was shipped under three different bills of lading. The first of these contained the clause, "Warranted seaworthy only so far as ordinary care can provide"; the second, "Warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, & crew can ensure it"; & the third, "Owners not to be liable for loss, detention, or damage, if arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at the time of shipment, provided all reasonable means have been taken to secure efficiency." In a salvage action brought by the owners, master, & crew of the *A.* against the owners of cargo on board the *L.*: —*Held:* the exceptions in the bills of lading limited the implied warranty of seaworthiness, & such limited warranty having been satisfied, there had been no breach by the owners of the *L.* of their contract of carriage.—THE LAERTES (CARGO EX) (1887), 12 P. D. 187; 56 L. J. P. 108; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. L. C. 174.

*Annotations:*—**Consd.** The Maori King *v.* Hughes (1895), 73 L. T. 141. **Refd.** McFadden *v.* Blue Star Line (1905), 74 L. J. K. B. 423; The West Cock, [1911] P. 23; The Christel Vinnen, [1924] P. 208.

**2657.** ——.]—MAORI KING (OWNERS OF CARGO) *v.* HUGHES, No. 2797, *post.*

**2658.** ——.]—A bill of lading contained among other exceptions, one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise" in hull, tackle, boilers, or machinery, or their appurtenances:—*Held:* the exception did not cover a defect which was obvious at the commencement of the voyage.—WAIKATO (CARGO OWNERS) *v.* NEW ZEALAND SHIPPING CO., [1899] 1 Q. B. 56; 68 L. J. Q. B. 1; 79 L. T. 326; 15 T. L. R. 33; 43 Sol. Jo. 41; 8 Asp. M. L. C. 442; 4 Com. Cas. 10, C. A.

*Annotations:*—**Apld.** Borthwick *v.* Elderslie S.S. Co., [1904] 1 K. B. 319. **Refd.** Cordey *v.* Cardiff Pure Ice & Cold Storage Co. (1903), 19 T. L. R. 256; Rathbone *v.* MacIver, [1903] 2 K. B. 378; The Torbryan, [1903] P. 35; The West Cock, [1911] P. 208; Infram & Royle *v.* Services Maritimes du Tréport, [1913] 1 K. B. 538; The Christel Vinnen, [1924] P. 208.

**2659.** ——.]—THE DIMITRIOS RALLIAS, No. 2652, *ante.*

**2660.** ——.]—LONDON RANGOON TRADING CO., LTD. *v.* ELLERMAN LINES, LTD., No. 2653, *ante.*

**2661.** ——.]—Pltfs. consigned goods from Liverpool to Australia by defts.' steamship under a bill of lading containing the following exceptions clause: "The act of God, . . . & loss or damage resulting from any of the following causes or perils are excepted, viz. . . . loss or damage from rust, accidents to, or defects in hull, tackle, or machinery or their appurtenances, . . . perils of the sea . . . or navigation . . . of whatsoever nature or kind & howsoever caused."

When the goods arrived they were found to have been damaged by sea water. In an action to recover the amount of the damage defts. contended that the damage was due to the fracture of a water pipe, which fracture was caused by stormy weather or by a latent defect covered by the exception with regard to defects:—*Held:* (1) the word "defects" in the exceptions clause referred only to defects which might develop during the voyage in a ship which at the beginning of the voyage was seaworthy; (2) on the evidence the ship was unseaworthy from the start, & therefore pltfs. were entitled to recover.—TUDOR ACCUMULATOR CO., LTD. *v.* OCEANIC STEAM NAVIGATION CO., LTD. (1924), 41 T. L. R. 81.

**2662.** ——.]—THE CHRISTEL VINNEN, No. 2654, *ante.*

**2663. Liability for patent defects.**]—WAIKATO (CARGO OWNERS) *v.* NEW ZEALAND SHIPPING CO., No. 2658, *ante.*

**Effect of negligence clause.**]—*See* Sub-sect. 14, D., *post.*

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SUB-SECT. 12.—RUST, LEAKAGE AND BREAKAGE.

**2664. Scope of exception—Liability of shipowner for negligence.**]—A stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from gross negligence.—PHILLIPS *v.* CLARK (1857), 2 C. B. N. S. 156; 26 L. J. C. P. 168; 29 L. T. O. S. 181; 3 Jur. N. S. 467; 5 W. R. 582; 140 E. R. 372.

*Annotations:*—**Apld.** Leuw *v.* Dudgeon (1867), 17 L. T. 145; Grill *v.* General Iron Screw Collier Co. (1868), L. R. 3 C. P. 476; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412. **Refd.** Wilton *v.* Atlantic Royal Mail Steam Navigation Co. (1861), 10 C. B. N. S. 453; Ohrloff *v.* Briscall, The Helene (1866), L. R. 1 P. C. 231; Czech *v.* General Steam Navigation Co. (1867), L. R. 3 C. P. 14; The Duero (1869), L. R. 2 A. & E. 393; Kopitoff *v.* Wilson (1876), 24 W. R. 706; Steel *v.* State Line S.S. Co. (1877), 3 App. Cas. 72; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Steinman *v.* Angier Line, [1891] 1 Q. B. 619; The Glendarrach, [1894] P. 226; The Modena (1911), 27 T. L. R. 529. **Mentd.** Gill *v.* Manchester Ry. (1873), L. R. 8 Q. B. 186; M. S. & L. Ry. *v.* Brown (1883), 8 App. Cas. 703.

**2665.** —— ——.]—OHRLOFF *v.* BRISCALL, THE HELENE, No. 2989, *post.*

**2666.** —— —— **Negligence question for jury.**]—Where wines were shipped on board a vessel, &

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**PART VII. SECT. 4, SUB-SECT. 12.**

**2664 i.** *Scope of exception—Liability of shipowner for negligence.*]—In an action by pltfs., merchants, to recover from the owners of a vessel, damage suffered in consequence of the breakage of an iron boiler, lined with enamel, & deft. set up the bill of lading by the which they were not to be liable for breakage, leakage or rust:—*Held:* notwithstanding, they were liable for damage arising from any of these causes by reason of their neglect.—HARRIS *v.* EDMONSTONE (1859), 4 L. C. J. 40.—**CAN.**

**2664 ii.** —— ——.]—Piece-goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the master from "leakage, breakage, rust, decay, loss, or damage from machinery, boilers . . . misfeasance, error in judgment, negligence or default of . . . persons in the service of the ship . . . & the ship not being liable for any consequences of causes therein excepted, however originating." The piece-goods, on their arrival in Bombay, were found to be damaged by oil & by chafing—*i.e.* by rubbing against other goods in the hold; but there was no evidence to show how such damage was occasioned:—*Held:* the term "leakage" did not include leakage from other goods on to the piece-goods, nor did "breakage" include damage caused by chafing, & as no negligence was proved, the master was not protected by the exception "damage from negligence."—GRAHAM *v.* HILLE (1873), 10 Bom. 60.—**IND.**

**2664 iii.** ——.]—CRAIG & ROSE *v.* DELARGY (1879), 6 R. (Ct. of Sess.) 1269; 16 Sc. L. R. 750.—**SCOT.**

**2668 i.** —— —— *Negligence of servants.*] — FRAZER & CO. *v.* PORT ELIZABETH HARBOUR BOARD (1900), 17 S. C. 231; 10 C. T. R. 292.—**S. AF.**

**m.** *Damage to iron by salt.*]—STEVENS *v.* HUGHES (1873), 1 N. Z. Jur. 45.—**N.Z.**

**n.** *Collision causing damage to plates—Cargo damaged by leakage.*]—PARRATT & CO. & HIND, ROLFE & CO. *v.* THE NOTRE DAME D'AVOR (1911), 16 B. C. R. 381; 13 Exch. C. R. 456.—**CAN.**

sustained damage by leakage, the bill of lading containing, besides the usual clauses, these words, "contents unknown & free of leakage"; in an action against the owner for the damage, it was left to the jury to say, whether or not the leakage had been occasioned by the negligence of deft., & they gave a verdict for pltf. The ct. refused to set it aside, or grant a new trial.—STRAHAN *v.* M'QUEEN (1827), 6 L. J. O. S. C. P. 4.

**2667.** —— —— **Negligence of servants—Onus of proof.**]—Goods were shipped in a steamer under a bill of lading which contained an exception from liability for "breakage, leakage, or damage." The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo, but that there were two donkey engines on deck, near the place where the goods were stowed, in lubricating which oil was used; there was no direct evidence of how the injury to the goods occurred. In an action against the shipowners:—*Held:* (1) the exception did not protect the shipowners from liability for damage accruing through the negligence of their servants, but it did shift the *onus* of proof, & it was incumbent upon pltfs. to prove affirmatively the negligence of defts.' servants; (2) the above facts were evidence upon which a jury were justified in finding the existence of negligence.—CZECH *v.* GENERAL STEAM NAVIGATION CO. (1867), L. R. 3 C. P. 14; 37 L. J. C. P. 3; 17 L. T. 246; 16 W. R. 130; 3 Mar. L. C. 5.

*Annotations:—As to* (1) **Consd.** The Glendarroch, [1894] P. 226. **Refd.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106; The Freedom (1869), L. R. 2 A. & E. 346; Taylor *v.* Liverpool & Great Western Steam Co. (1874), L. R. 9 Q. B. 546; Hayn, Roman *v.* Culliford (1879), 27 W. R. 541; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; The Xantho (1886), 55 L. J. P. 65; Steinman *v.* Angier Line, [1891] 1 Q. B. 619; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412.

**2668.** —— —— ——.]—THE MODENA, CHIESMAN & CO. *v.* MODENA (OWNERS), No. 2531, *ante*.

**2669.** —— **Quantity of leakage immaterial.**]—OHRLOFF *v.* BRISCALL, THE HELENE, No. 2989, *post*.

**2670.** —— **Damage to cargo—From other portions of cargo.**]—C. & M. had been in the habit of receiving consignments of goods from N. & accepting his bills, & there was an account current between them. A cargo of sugar so consigned at a time N. was debtor in the account between them having suffered damage C. & M. brought a suit in this ct.:—*Held:* sugar injured by drainage from other sugar improperly stowed was not damaged by "leakage" as named in the excepted perils.—THE NEPOTER (1869), L. R. 2 A. & E. 375; 38 L. J. Adm. 63; 22 L. T. 177; 18 W. R. 49; 3 Mar. L. C. 355.

*Annotations:*—**Refd.** The Freedom (1870), 22 L. T. 175; Simpson *v.* Blues (1872), L. R. 7 C. P. 290; Thrift *v.* Youle (1877), 2 C. P. D. 432; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**2671.** —— —— ——.]—The clause in a bill of lading by which the shipowner is "not accountable for rust, leakage or breakage," is limited to the rust, leakage or breakage of the goods themselves, & does not protect the shipowner from liability for damage done to other goods in consequence of such rust, leakage or breakage.—THRIFT *v.* YOULE & CO. (1877), 2 C. P. D. 432; 46 L. J. Q. B. 402; 36 L. T. 114; 3 Asp. M. L. C. 357, D. C.

**2672.** —— —— ——.]—BARROW *v.* WILLIAMS & CO. (1890), 7 T. L. R. 37.

**2673.** —— **Breakage during re-stowing—General ship.**]—Pltfs. shipped in London certain mining machinery on board deft.'s steamer *Denby Grange*, for carriage to Buenos Aires via Newport under a bill of lading which gave the steamer liberty to proceed to & stay at other ports for loading or discharging cargo. The bill of lading excepted liability for loss or damage arising from (*inter alia*) breakage. The *Denby Grange* was a general ship carrying cargo for various ports in the River Plate. She loaded cargo at Antwerp & proceeded to London where she took on board pltfs.' machinery & other cargo. She then proceeded to Newport where she was to load a large quantity of cargo. It was found necessary at Newport for the safe stowage of the cargo & for the proper trim of the ship that two large cylinders, part of pltfs.' mining machinery, should be taken out of the hold in which they were stowed & re-stowed in another hold, & for this purpose they were placed temporarily on the quay. The evidence showed that such a dealing with a portion of the cargo in the case of a general ship like the *Denby Grange*, which was intended to load & discharge cargo at various ports was quite usual. One of the cylinders while on the quay was damaged:—*Held:* in removing the cylinders from the hold in which they had been stowed with a view to stowing them in another hold, & in the meanwhile temporarily placing them on the quay, defts. did not commit any breach of their contract of carriage, & were therefore protected by the exceptions in the bill of lading.—BRUCE, MARRIOTT & CO. *v.* HOULDER LINE, LTD., [1917] 1 K. B. 72; 86 L. J. K. B. 509; 115 L. T. 846; 61 Sol. Jo. 98; 22 Com. Cas. 116; 13 Asp. M. L. C. 550, C. A.

*Annotation:*—**Refd.** Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 616.

**Effect of negligence clause.**]—*See* Sub-sect. 14, *post*.

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SUB-SECT. 13.—"DAMAGE CAPABLE OF BEING INSURED AGAINST."

**2674. What amounts to—Theft—Bill of lading containing warranty against theft.**]—TAYLOR *v.* LIVERPOOL & GREAT WESTERN STEAM CO., No. 2638, *ante*.

**2675.** —— **Latent damage.**]—MOORE *v.* HARRIS, No. 1708, *ante*.

—— **Loss through negligence.**]—*See* CARRIERS, Vol. VIII., p. 44, Nos. 265–267.

**Effect of negligence clause.**]—*See* Sub-sect. 14, *post*.

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SUB-SECT. 14.—NEGLIGENCE.

*A. In General.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*a*), &, *generally*, NEGLIGENCE, Vol. XXXVI., pp. 6 *et seq.*

**2676. Necessity for express exception of negligence.**]—Cattle were shipped in deft.'s vessel under a bill of lading, which contained, amongst others, the following exceptions: "Ship free in case of mortality, & from all damage arising from dangers of the seas. . . . The owner will not be liable for any loss arising from suffocation or other causes. . . . The ship not liable for accident, injury, mortality or jettison, whether shipped on deck or in the hold":—*Held:* these exceptions did not exempt deft. from liability in respect of

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**PART VII. SECT. 4, SUB-SECT. 14.—A.**

**2676 i.** ***Necessity for express exception of negligence.***]—Exemption of shipowners from liability for negligence must be provided for in clear & unambiguous terms & must not be left to inference from general words.—RAVUTHER (SHEIK MAHAMAD) *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. (1908), I. L. R. 32 Mad. 95. —IND.

*Sect. 4.—Excepted perils: Sub-sect. 14, A. & B.*]

cattle lost by his culpable negligence.—LEUW *v.* DUDGEON (1867), 37 L. J. C. P. 5, n.; 17 L. T. 145; 16 W. R. 80; 3 Mar. L. C. 3.

*Annotation:*—**Refd.** Czech *v.* General Steam Navigation Co. (1867), L. R. 3 C. P. 14.

**2677.** ——.]—Goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, & the goods were lost. In an action to recover damages for the loss of the goods:—*Held:* the exemption being in general terms not expressly relating to negligence, the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants.—PRICE & CO. *v.* UNION LIGHTERAGE CO., [1904] 1 K. B. 412; 73 L. J. K. B. 222; 89 L. T. 731; 52 W. R. 325; 20 T. L. R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C. A.

*Annotations:*—**Folld.** The Pearlmoor, [1904] P. 286. **Apld.** Nelson *v.* Nelson Line (Liverpool) (No. 2), [1907] 1 K. B. 769. **Consd.** Rosin & Turpentine Import Co. *v.* Jacob (1909), 101 L. T. 56; The Modena (1911), 27 T. L. R. 529; Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; Travers *v.* Cooper, [1915] 1 K. B. 73; Forbes, Abbott & Lennard *v.* G. W. Ry. (1927), 44 T. L. R. 97. **Refd.** Denholm *v.* Shipping Controller (1920), 124 L. T. 378; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714; Fagan *v.* Green & Edwards, [1926] 1 K. B. 102; Turner *v.* Civil Service Supply Assocn., [1926] 1 K. B. 50. **Mentd.** Rutter *v.* Palmer, [1922] 2 K. B. 87.

**2678.** ——.]—In an action by indorsees of bills of lading, for damage, through negligent stowage, to a cargo of grain, part of which had become heated during the voyage, & the remainder otherwise deteriorated, deft. shipowners relied on a series of exceptions, set out in numbered paragraphs, by which they were not to be responsible for (paragraph (*a*)) "loss, damage, or injury arising from sweating . . . decay . . . explosion, heat, fire at sea or on shore . . ."; nor for (paragraph (*b*)) "any loss or injury to the said goods, occurring from any of the causes above mentioned or for any loss or injury arising from the perils or accidents of the seas . . . whether any of the perils, causes, or things above mentioned or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of . . . stevedores . . . or other persons in the service of the shipowners." They further relied on a marginal note, stamped on the bill of lading under which a large quantity of maize was carried, stating that "In no case is the steamship to be held liable for heating or any other damage accruing to the within-mentioned goods . . .":—*Held:* defts. were liable for, a shipowner must indicate by express words his intention to relieve himself from liability for the negligence of his servants, & the exemption of negligence in paragraph (*b*) could not be incorporated so as to refer to the matters excepted in paragraph (*a*) or in the marginal note; &, further, the words "sweating" & "decay" were inapplicable to cover the damage to the maize through improper stowage, whilst the collocation of the words showed that "heat" referred to heat arising from some extraneous cause, such as heat from the engine room.—THE PEARLMOOR, [1904] P. 286; 73 L. J. P. 50; 90 L. T. 319; 20 T. L. R. 199; 9 Asp. M. L. C. 540.

*Annotation:*—**Refd.** Travers *v.* Cooper, [1915] 1 K. B. 73.

**2679.** ——.]—Defts., who were lightermen, lightered certain goods for pltfs. upon the terms of the following clause: "The rates charged by B. are for conveyance only, & every reasonable precaution is taken for the safety of goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance, & the shipper in taking out the policy should effect same "without recourse to lighterman, as B. do not accept responsibility for insurable risks." The goods were damaged by the negligence of defts.:—*Held:* the clause was clear & unambiguous & protected defts. from liability for negligence.—ROSIN & TURPENTINE IMPORT CO. *v.* JACOB & SONS (1910), 102 L. T. 81; 26 T. L. R. 259; 54 Sol. Jo. 268; 11 Asp. M. L. C. 363; 15 Com. Cas. 111, H. L.

*Annotations:*—**Consd.** Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185. **Refd.** Rutter *v.* Palmer, [1922] 2 K. B. 87.

**2680. Duration of exception,**.]—By a charter-party it was agreed that defts.' steam vessel should go to New Fairwater, & there load from the agents of pltfs. a cargo of sugar & proceed therewith to Greenock, defts. not to be responsible "for any act, neglect, or default whatsoever of their servants during the said voyage." The agents commenced loading the vessel with sugar belonging to pltfs., & during the loading the cargo was damaged by water through a valve in the engine room having been negligently left open by one of the engineers of the vessel:—*Held:* (1) the term "voyage" included the period of time during which the vessel was being loaded, & consequently the damage was within the exception & defts. were not liable.

Defts. counterclaimed for a general average contribution from pltfs.:—*Held:* (2) their right to contribution was not affected by the negligence of their servants, for which by the terms of the exception they were not responsible, & they were entitled to recover.—THE CARRON PARK (1890), 15 P. D. 203; 59 L. J. P. 74; 63 L. T. 356; 39 W. R. 191; 6 T. L. R. 474; 6 Asp. M. L. C. 543.

*Annotations:*—*As to* (1) **Consd.** Rathbone *v.* MacIver, [1903] 2 K. B. 378. **Refd.** De Clermont & Donner *v.* General Steam Navigation Co. (1891), 7 T. L. R. 187; The Glenochil, [1896] P. 10. *As to* (2) **Apprvd.** Milburn *v.* Jamaica Fruit & Trading Co. of London, [1900] 2 Q. B. 540. **Consd.** Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51. **Refd.** The Mary Thomas, [1894] P. 108.

**2681.** ——.]—THE ACCOMAC, No. 2700, *post.*

**2682.** ——.]—The mate's receipt for pltfs.' goods shipped on defts.' steamship was endorsed "Received subject to the conditions contained in bill of lading to be issued for the same." Before the bill of lading had been exchanged for the mate's receipt pltfs.' goods were lost from causes against which the shipowners were protected by exceptions in the bill of lading. Pltfs. sought to recover for the loss of their goods on the ground that they were led to believe by defts.' conduct that the bills of lading referred to in the mate's receipt were in a different form without the exceptions which exempted the shipowners from liability for the loss:—*Held:* this case was not made out & pltfs. could, with ordinary & reasonable care, have informed themselves of the terms of the bills of lading.

The exception is intended to protect defts. as from the commencement of the time at which but for the exception they would have become liable, viz. from the time of receipt of the goods on board & not merely from the time of sailing (WRIGHT, J.).—DE CLERMONT & DONNER *v.* GENERAL STEAM NAVIGATION CO. (1891), 7 T. L. R. 187.

**2683.** ——.]—Goods were shipped under a bill of lading incorporating the Act of Congress known as "the Harter Act," by which the owner of the vessel is not to be "held responsible for damage or loss resulting from faults or errors in navigation or in the management of" the vessel. After

the arrival of the vessel at her port of destination, & during the discharge of the cargo, it became necessary to stiffen the ship. For this purpose the engineer ran water into a ballast tank, but negligently omitted first to ascertain the condition of the sounding pipe & casing, which had, owing to heavy weather during the voyage, become broken. The owner of the goods damaged by the water getting to the cargo, sought to render the shipowner liable:—*Held:* the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, & the operation of the exception as to "management" was not limited to the period during which the vessel was at sea, but extended to the period during which the cargo was being discharged.—THE GLENOCHIL, [1896] P. 10; 65 L. J. P. 1; 73 L. T. 416; 8 Asp. M. L. C. 218.

*Annotations:*—**Apld.** The Rodney, [1900] P. 112; Rowson v. Atlantic Transport Co., [1903] 2 K. B. 666. **Consd.** Brown v. Harrison (1927), 96 L. J. K. B. 1025.

**2684.** ——.]—Pltfs. delivered three hundred & twelve baskets of plums to be carried by defts. from Hamburg to London under a bill of lading by which they were "to be delivered subject to the exceptions & conditions hereinafter mentioned . . . at the port of London unto the order of defts. to be forwarded . . . for delivery to M. . . . subject to all clauses & conditions in the bill of lading." By clause 1 of the exceptions defts. were exempted from liability for "all . . . loss . . . from any act, neglect, or default whatsoever of the . . . crew, stevedores, servants, or agents of the owners in the . . . discharging or navigation of the ship . . . or otherwise." When the ship arrived at the wharf at London only ninety-nine baskets were delivered to the carman of M., who had come to the wharf for them. The jury found that all the three hundred & twelve baskets were discharged out of the ship on to the wharf, but that two hundred & thirteen of these baskets were delivered to the wrong people by the fault of those who had the control of the goods at the wharf:—*Held:* the baskets were lost through an "act, neglect, or default of the agents" of defts., & the latter were therefore protected by the exception in the bill of lading.—SMACKMAN v. GENERAL STEAM NAVIGATION CO. (1908), 98 L. T. 396; 11 Asp. M. L. C. 14; 13 Com. Cas. 196, D. C.

*Annotation:*—**Distd.** Buerger v. Cunard S.S. Co., [1925] 2 K. B. 646.

**2685. Parties within exception—Damage partly caused by negligence of stranger.**]—THE ACCOMAC, No. 2700, *post.*

**2686. Scope of exception—Damage caused by recklessness.**]—Goods were shipped under a contract which contained exceptions of liability for damage or loss, whether on shore, or ship, lighter, or hulk, arising from negligence, barratry, or error of judgment of the master, mariners, engineers, or any other persons in the employment of the shipowner. In the margin of the contract the words, "Carried entirely at merchant's risk," were written. The goods were damaged through the reckless conduct of the stevedores, who were employed by the shipowner, in discharging the goods into lighters:—*Held:* the words "at merchant's risk" did not cut down the special exceptions; damage caused by recklessness, which was an error of judgment or negligence of a bad kind, came within the exceptions; & therefore the shipowner was not liable.

There was substantial damage done in the mode in which the packages were delivered into the lighters. They were delivered in a careless manner. [But] the exception as to barratry did not apply (CHANNELL, J.).—BRISCOE & Co. v. POWELL & Co. (1905), 22 T. L. R. 128.

**2687.** —— **Effect of words "at merchant's risk."**]—BRISCOE & Co. v. POWELL & Co., No. 2686, *ante.*

**2688. Goods carried by railway company—Application of Railway Clauses Act, 1863 (c. 92), & Railway & Canal Traffic Act, 1854 (c. 31)—Clause void for unreasonableness.**]—By Railways Clauses Act, 1863 (c. 92), s. 31, the provisions of Railway & Canal Traffic Act, 1854 (c. 31), are extended to the steam vessels of the railway co., & to the traffic carried on thereby. Therefore a railway co., whose private Act incorporates Railways Clauses Act, 1863 (c. 92), is not protected by a condition in a bill of lading in respect of goods carried by them by sea only that they shall not be liable for the negligence of the master or mariners navigating their steam vessels, as such a condition is not reasonable.—JENKINS v. GREAT CENTRAL RY. Co., [1912] 1 K. B. 1; 81 L. J. K. B. 24; 106 L. T. 565; 28 T. L. R. 61; 12 Asp. M. L. C. 154; 17 Com. Cas. 32; *subsequent proceedings*, cited in Halsbury's Laws of England, Vol. XXVI., p. 614, C. A.

*Annotation:*—**Consd.** Western Electric Co. v. G. E. Ry., [1913] 3 K. B. 15.

**Effect of personal negligence of shipowner.**]—*See* Sub-sect. 14, B., *post.*

**Effect of unseaworthiness of ship.**]—*See* Sub-sect. 14, C., *post.*

**Construction of negligence clauses.**] — *See* Sub-sect. 14, D., *post.*

### *B. Personal Negligence of Shipowner.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article IV. (*q*).

**2689. Exception does not apply.**] — ANGLO-ARGENTINE LIVE STOCK & PRODUCE AGENCY,

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**2686 i.** *Scope of exception—Damage caused by recklessness.*]—TOUGH v. AUSTRALASIAN STEAM NAVIGATION CO. (1870), 2 Q. S. C. R. 75.—**AUS.**

**2686 ii.** —— ——.]—JELLICOE v. BRITISH INDIA STEAM NAVIGATION CO. (1884), I. L. R. 10 Calc. 489.—**IND.**

**2686 iii.** —— ——.]—WOOD & Co. v. BURNS (1893), 20 R. (Ct. of Sess.) 602; 30 Sc. L. R. 561.—**SCOT.**

**o.** *Shipper bound — Where negligence excepted.*]—Whether provision in bills of lading as to excluding the liability of shipowners for damage done to articles of special value or for any negligence of their servants are reasonable or not, a consignee accepting such a bill of lading is bound by them, & cannot recover for damage caused by the negligence of the shipowners' servants.—BROOKS, ROBINSON & Co. v. HOWARD SMITH & SONS (1890), 16 V. L. R. 245.—**AUS.**

**p.** *Validity of exception—Contrary to statute.*] — INDIA GENERAL STEAM NAVIGATION CO. v. JOYKRISTO SHAHA (1889), I. L. R. 17 Calc. 39.—**IND.**

**q.** —— ——.]—A railway co. contracted to carry goods "through" partly by railway, & partly by sea, & to an action for loss & injury to the goods, pleaded a special condition exempting the defts. from liability in respect of the negligence of the captain & crew of a steamer (the property of & worked by a steam-packet co. who had made arrangements with defts. for through booking) which was lost through the negligence of either the captain or crew:—*Held:* through the operation of 31 & 32 Vict. c. 119, s. 16, & 34 & 35 Vict. c. 78, s. 12, the Railway & Canal Traffic Act, 1854, applied, & the condition, being unreasonable, was null & void.—MOORE v. MIDLAND RY. (1875), I. R. 9 C. L. 20.—**IR.**

**r.** —— ——.]—The effect of Mercantile Law Act, 1880, ss. 25-27, is to make common carriers by sea in New Zealand subject to the same rules which govern carriers by land in England. Therefore a condition in the contract of affreightment purporting to except the carrier from responsibility for the negligence of his servant is, *primâ facie*, unjust & unreasonable; & it is not enough to show that it is usual to insert such a condition, & that it has been acquiesced in by the shipper.—STAPLES v. JOSEPH (1888), 6 N. Z. L. R. 236.—**N.Z.**

*Sect. 4.—Excepted perils: Sub-sect. 14, B. & C.*]

LTD. *v.* WESTALL (*circa* 1890), cited [1904] A. C. at p. 255, H. L.

*Annotation:*—**Refd.** The City of Lincoln *v.* Smith, [1904] A. C. 250.

**2690.** ——.]—Unless the conditions of a charter-party relieve the owner as distinct from his servants & agents from the consequences of personal negligence, he is liable if his ship. in other respects seaworthy, is rendered unseaworthy in being so laden under his orders as to become topheavy at starting, with the result that her deck cargo was partly jettisoned & partly swept overboard in a gale which otherwise could have been weathered in safety.—THE CITY OF LINCOLN (MASTER & OWNERS) *v.* SMITH, [1904] A. C. 250; 73 L. J. P. C. 45; 91 L. T. 206; 9 Asp. M. L. C. 586, P. C.

**2691.** —— **Failure to order special precautions.**]—A ship of the "turret" type was chartered for a voyage from New York to China under a charter-party which incorporated the Harter Act of the United States. That Act provided that if the owners exercised due diligence to make the vessel in all respects seaworthy & properly manned they should not be held responsible for loss resulting from faults or errors in navigation or in the management of the ship. The charterers shipped a cargo under bills of lading which incorporated the Harter Act & also contained a clause exempting the owners from loss occasioned by "accidents of navigation of whatsoever kind even when occasioned by the negligence, default, or error in judgment of the . . . master . . . not resulting, however, in any case from want of due diligence by the owners of the ship."

Shortly after leaving New York the master ordered two water tanks to be emptied, with the result that the ship capsized & sank. Nine years previously, after the loss of a sister ship by capsizing, the builders had sent to the owners a series of instructions for loading the ship, including an instruction that when she was loaded with a homogeneous cargo, as on the voyage in question, the water ballast tanks were to be filled. The owners had never communicated these instructions to the master, who was a competent seaman with long experience of turret ships:—*Held:* (1) the ship was inherently unseaworthy in certain not improbable conditions unless special precautions were taken, which it was the duty of the owners to enjoin as being required by the structure of their ship, & the owners were therefore liable for the loss of the cargo; (2) the owners were not entitled to the limitation of liability prescribed by 1844 Act, s. 503, as they had failed to prove that the loss occurred without their actual fault or privity.—STANDARD OIL CO. OF NEW YORK *v.* CLAN LINE STEAMERS, LTD., [1924] A. C. 100; 93 L. J. P. C. 49; 130 L. T. 481; 40 T. L. R. 148; 68 Sol. Jo. 234; 16 Asp. M. L. C. 273; 29 Com. Cas. 75, H. L.

*Annotation:*—*Generally*, **Refd.** Rio Tinto Co. *v.* Seed Shipping Co. (1926), 134 L. T. 764.

**2692.** —— **Master also part owner—Negligence as master only.**]—A bill of lading was signed by deft., who was master & part owner of the ship, on behalf of himself & his co-owners. It contained an exception in respect of "the neglect & default of master in navigating the ship." The cargo was lost by the stranding of the ship through the negligence, but not the wilful negligence, of deft. ' In an action by the owners & shippers of the cargo:—*Held:* the negligence which caused the loss was that of deft. exclusively as master & not as part owner, & was within the exception.—WESTPORT COAL CO. *v.* MCPHAIL, [1898] 2 Q. B. 130; 67 L. J. Q. B. 674; 78 L. T. 490; 46 W. R. 566; 14 T. L. R. 388; 8 Asp. M. L. C. 378; 3 Com. Cas. 140, C. A.

*Annotations:*—**Refd.** The Dimitrios Rallias (1922), 128 L. T. 491; Samuel *v.* Dumas, Graham Joint Stock Shipping Co. *v.* Merchants Marine Insce. (No. 2), [1923] 1 K. B. 592.

### *C. Seaworthiness of Ship.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 1.

Seaworthiness, *generally*, *see* Sect. 6, sub-sect. 1, *post.*

**2693. Effect of unseaworthiness—Exception does not apply.**]—Where special clauses in a bill of lading exonerate the shipowner from the liability of even the perils induced by the negligence of his servants, it is necessary that the jury should find whether the vessel was or was not seaworthy when starting on the voyage.

A cargo of wheat was shipped at the port of New York for conveyance to Glasgow, & a specially worded bill of lading contained clauses excepting "peril of the seas of whatever nature or kind soever & howsoever caused," including negligence of the crew. On the voyage the sea burst through an insufficiently fastened port hole, damaging the cargo. A jury found by special verdict that this port hole had been insufficiently fastened, but did not find whether this happened before starting on the voyage:—*Held:* there was an implied engagement to supply a seaworthy ship.

Whether the ship was seaworthy was a question of fact which lay at the very root of this case; but no answer to this question was found in the special verdict; therefore there is no finding on which the judgment can be entered either way.

A shipowner who accepts goods, which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy.

All the perils which are excepted are perils subsequent to the loading of the wheat on board.

This is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation & an engagement, a contract, by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. . . . By "seaworthy" I do not desire to point to any technical meaning

**PART VII. SECT. 4, SUB-SECT. 14.—C.**

**2693 i.** *Effect of unseaworthiness—Exception does not apply.*]—The following condition in a bill of lading, viz.: "The steamer not to be responsible for loss of or damage to any parcel or package exceeding the sum of two pounds (£2) sterling in value unless booked as of more than that value & paid for 'accordingly,'" does not protect the carriers from liability occasioned (1) by their gross & wilful default; (2) by the negligence of their servants in transhipment; (3) or by the unseaworthiness of the barge into which the goods were transhipped.—LEA *v.* HOWARD SMITH & SONS (1883), 1 Q. L. J. 157.—**AUS.**

**2693 ii.** —— ——.]—Whatever risks may be excepted in a bill of lading are always subject to an implied engagement that the vessel shall be seaworthy.—PEYTON, DOWLING & CO. *v.* HOULDER BROTHERS (1890), 16 V. L. R. 812.—**AUS.**

**2693 iii.** —— ——.]—CONNOLLY *v.* GRENIER, CONNOLLY *v.* MARTEL (1909), 42 S. C. R. 242.—**CAN.**

**2693 iv.** —— ——.]—VITHULDAS GOBER *v.* BOMBAY & PERSIA STEAM NAVIGATION CO. (1895), I. L. R. 19 Bom. 639.—**IND.**

**2693 v.** —— ——.]—A charterparty of a steamship freed the owners from liability through "the act of God, the Queen's enemies, fire, & all & every other dangers & accidents of the seas, rivers, & for errors or negligence of navigation, of whatsoever nature & kind, during said voyage." The vessel was lost in consequence of the breakdown of her boiler through the presence of muddy water in it. In an action by the charterers against the shipowners for damages on account

of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, & laden in that way, may be fairly expected to encounter (LORD CAIRNS, C.).

Where there is a contract to carry goods in a ship whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it that the ship shall be fit for its purpose (LORD BLACKBURN).—STEEL *v.* STATE LINE S.S. Co. (1877), 3 App. Cas. 72; 37 L. T. 333; 3 Asp. M. L. C. 516, H. L.

*Annotations:*—**Apld.** The Marathon (1879), 40 L. T. 163; The United Service (1883), 8 P. D. 56; Tattersall *v.* National S.S. Co. (1884), 12 Q. B. D. 297; The Glenfruin (1885), 10 P. D. 103. **Distd.** The Laertes (1887), 12 P. D. 187. **Apld.** Gilroy *v.* Price, [1893] A. C. 56. **Consd.** Hedley *v.* Pinkney S.S. Co., [1894] A. C. 222; Dobell *v.* S.S. Rossmore Co., [1895] 2 Q. B. 408. **Apld.** The Maori King *v.* Hughes, [1895] 2 Q. B. 550; Queensland & National Bank *v.* Peninsular & Oriental Steam Navigation Co. (1898), 67 L. J. Q. B. 402. **Consd.** Rathbone *v.* MacIver, [1903] 2 K. B. 378; The Schwan, [1909] A. C. 450; Kish *v.* Taylor, [1912] A. C. 604; The Christel Vinnen, [1924] P. 61; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522. **Refd.** Hyman *v.* Nve (1881), 6 Q. B. D. 685; The Undaunted (1886), 55 L. J. P. 24; Hamilton, Fraser *v.* Pandorf (1887), 12 App. Cas. 518; The Carron Park (1890), 15 P. D. 203; The Vortigern, [1899] P. 140; Morris & Morris *v.* Oceanic Steam Navigation Co. (1900), 16 T. L. R. 533; Ajum Goolam Hossen *v.* Union Marine Insce., Hajee Cassim Joosub *v.* Ajum Goolam Hossen, [1901] A. C. 362; Rowson *v.* Atlantic Transport Co. (1902), 72 L. J. K. B. 87; Upperton *v.* Union-Castle Mail S.S. Co. (1903), 89 L. T. 289; The Northumbria (1906), 95 L. T. 618; Nelson *v.* Nelson Line (Liverpool) (1907), 96 L. T. 402; The Europa, [1908] P. 84; The West Cock, [1911] P. 208; Virginia Carolina Chemical Co. *v.* Norfolk & North Americans S.S. Co., [1912] 1 K. B. 229; Ingram & Royle *v.* Services Maritimes du Treport (1913), 109 L. T. 733; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381.

**2694.** —— ——.]—GILROY SONS & CO. *v.* PRICE & Co., No. 3121, *post.*

**2695.** —— ——.]—RATHBONE BROTHERS & CO. *v.* MACIVER (D.) SONS & CO., No. 2794, *post.*

**2696.** —— ——.]—VIRGINIA CAROLINA CHEMICAL CO. *v.* NORFOLK & NORTH AMERICAN STEAM SHIPPING CO., No. 2614, *ante.*

**2697.** —— —— **Express provision for due diligence—Necessity for due diligence by servants of shipowner.**]—Goods were shipped under a bill of lading which incorporated by reference an Act of Congress by which, if the owner of a ship shall exercise due diligence to make the vessel in all respects seaworthy, & properly manned, equipped, & supplied, neither the vessel, her owner, agent nor charterers shall become liable or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel. The owner of a vessel supplied proper equipment & appointed a competent ship's carpenter, but by the negligence of the carpenter the ship was allowed to go to sea in an unseaworthy condition, by reason whereof a part of the cargo was damaged during the voyage. In an action by the owner of the damaged goods against the shipowner:—*Held:* to exempt the shipowner from liability it was not sufficient merely to show that he had personally exercised due diligence to make the vessel seaworthy, but it must be shown that those persons whom he employed to act for him in this respect had exercised due diligence; & therefore the negligence of the ship's carpenter prevented the exemption from applying, & the shipowner was liable.—DOBELL & Co. *v.* S.S. ROSSMORE Co., [1895] 2 Q. B. 408; 64 L. J. Q. B. 777; 73 L. T. 74; 44 W. R. 37; 11 T. L. R. 501; 8 Asp. M. L. C. 33; 14 R. 558, C. A.

*Annotations:*—**Refd.** The Glenochil, [1896] P. 10; Rowson *v.* Atlantic Transport Co., [1903] 2 K. B. 666; McFadden *v.* Blue Star Line, [1905] 1 K. B. 697; Hordern *v.* Commonwealth & Dominion Line, [1917] 2 K. B. 420; The Dimitrios Rallias (1922), 128 L. T. 491; Angliss (Australia) Proprietary *v.* Peninsular & Oriental Steam Navigation Co., [1927] 2 K. B. 456.

**2698.** —— —— ——.]—By the terms of a bill of lading the owners of a vessel undertook to obtain the certificate of Lloyd's surveyor at United Kingdom, Montevideo, that the machinery, insulated spaces, etc., had been properly inspected by him, & were in a fit & proper condition for the carriage of a cargo of frozen meat. Such certificate to be accepted by the shippers as conclusive evidence that the machinery, insulated spaces, & appurtenances were at the time of shipment in fit & proper condition, & seaworthy for the voyage, & as full & complete fulfilment by the owners or charterers of any duty, warranty or obligation they might be under in relation to or in respect of the machinery, insulated spaces or appurtenances. The bill of lading also provided that "the owners or charterers are not to be responsible for any breakdown if machinery during the voyage even when occasioned by any act, neglect, default or error in judgment of any of the servants of shipowners," & were also exempted from liability for any damage occasioned by "the act of God . . . sweating, evaporation or decay, resulting from bad stowage or otherwise . . . insufficient ventilation; or heat of holds, . . . perils of the seas, rivers, or navigation of whatsoever nature or kind, & however caused; whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise from any act of omission, negligence, default or error in judgment of the master, pilot, . . . engineers refrigerating or otherwise . . . or other persons whomsoever . . . whether such act, omission, negligence, default or error in judgment shall have occurred before or after the commencement of or during the voyage; or any other cause beyond the control of the owners or charterers &/or by or from any accidents or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigerating or otherwise, or from unseaworthiness . . . provided reasonable means have been taken to provide against such defects & unseaworthiness." The ship loaded two parcels of frozen meat, one at Rio Seco & the other at Montevideo. In an action against the shipowners for damage done to the cargo, the jury found that the ship was unseaworthy in respect of its refrigerating apparatus at the commencement of the voyage; that the damage was caused by this unseaworthiness; & that the unseaworthiness was due to the neglect by the ship's agents at Durban & the chief refrigerating engineer:—*Held:* the owners could not avail themselves of the exceptions in the bill of lading as they had not taken reasonable means to provide against unseaworthiness.—SOUTH AMERICAN EXPORT SYNDICATE, LTD. *v.* FEDERAL STEAM NAVIGATION CO., LTD. (1909), 100 L. T. 270; 25 T. L. R. 272; 53 Sol. Jo. 270; 11 Asp. M. L. C. 195; 14 Com. Cas. 228.

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of the loss of the cargo:—*Held:* (1) it was proved that the muddy water had been put in the boiler before the commencement of the voyage; (2) the presence of muddy water in the boiler when the ship started rendered her unseaworthy; & consequently (3) the clause of exemption in the charter-party did not apply.—SEVILLE SULPHUR & COPPER CO. *v.* COLVILS, LOWDEN & Co. (1888), 15 R. (Ct. of Sess.) 616; 25 Sc. L. R. 437.—**SCOT.**

*Sect. 4.—Excepted perils: Sub-sect. 14, D.]*

*D. Construction of Negligence Clauses.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*a*).

**2699. Negligence in navigation — Improper stowage.**]—Bags of sugar shipped by pltfs. were carried in defts.' steamship from H. to L. at an agreed freight. The vessel was chartered for the voyage by P. & K., who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master, or mariners in navigating the ship, & a further clause that the captain, officers, & crew in the transmission of the goods should be considered the servants of the shipper, owner or consignee. The sugar was negligently stowed under oxide of zinc, & was consequently damaged. It did not appear how the sugar came to be shipped nor with whom pltfs. made the contract of carriage:—*Held:* defts. were liable to compensate pltfs. for the damage done to the sugar; for either defts. had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with pltfs., they were liable for misfeasance, that is, for stowing the goods in such a manner as to come into contact with a mischievous substance.

If there was a contract between them, it is the one contained in or evidences by the bill of lading (BRAMWELL, L.J.).—HAYN *v.* CULLIFORD (1879), 4 C. P. D. 182; 48 L. J. Q. B. 372; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. L. C. 128, C. A.

*Annotations:*—**Distd.** Norman *v.* Binnington (1890), 25 Q. B. D. 475. **Apld.** The Ferro, [1893] P. 38. **Distd.** Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522. **Refd.** Baumvoll Manufactur Von Carl Scheibler *v.* Furness, [1893] A. C. 8; Dunn *v.* Bucknall, Dunn *v.* Donald Currie, [1902] 2 K. B. 614; Standard Oil Co. of New York *v.* Clan Line Steamers, [1924] A. C. 100. **Mentd.** Foulkes *v.* Met. Dist. Ry. (1880), 49 L. J. Q. B. 361; Meux *v.* G. E. Ry., [1895] 2 Q. B. 387.

**2700. —— Removal of bilge pump while in dock.**]—By charterparty it was agreed that defts.' vessel should carry a cargo of rice for pltfs. to London. The charterparty excepted defts. from liability "for any act, negligence, or default of master or crew in the navigation of the ship in the ordinary course of the voyage." The vessel, on her arrival in London, went into the Victoria Dock to discharge her cargo. While this was being done, the cargo was damaged by water which got into the vessel through negligence in the removal of a bilge-pump:—*Held:* assuming that the negligence which caused the damage was negligence on the part of the crew, it was not "negligence in the navigation of the ship in the ordinary course of the voyage" within the exception, & defts. were liable.—THE ACCOMAC (1890), 15 P. D. 208; 59 L. J. P. 91; 63 L. T. 737; 39 W. R. 133; 6 T. L. R. 482; 6 Asp. M. L. C. 579, C. A.

*Annotations:*—**Distd.** The Glenochil, [1896] P. 10. **Refd.** De Clermont & Donner *v.* General Steam Navigation Co. (1891), 7 T. L. R. 187.

——.]—*Compare* INSURANCE, Vol. XXIX., p. 439, Nos. 3396–3398.

**2701. —— "Or otherwise"—Not construed ejusdem generis.**]—BAERSELMAN *v.* BAILEY, No. 2703, *post*.

**2702. —— —— Improper stowage.**]—NORMAN *v.* BINNINGTON, No. 1678, *ante*.

**2703. —— —— ——.**]—A bill of lading contained, among other exemptions, one by which the shipowner was not to be liable for "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship or otherwise." A part of the cargo was damaged by being negligently stowed by a stevedore employed by the shipowner. In an action by the owner of the cargo so damaged:—*Held:* the shipowner was not liable for the words "or otherwise" in the bill of lading were general, & did not limit the exemption to loss or damage arising from negligence in matters akin to navigation or to loss or damage arising from negligence in relation to the other excepted perils of the bill of lading.—BAERSELMAN *v.* BAILEY, [1895] 2 Q. B. 301; 64 L. J. Q. B. 707; 72 L. T. 677; 43 W. R. 593; 8 Asp. M. L. C. 4; 14 R. 481, C. A.

*Annotations:*—**Refd.** The Torbryan (1903), 9 Com. Cas. 1; S.S. Knutsford *v.* Tillmanns (1908), 99 L. T. 399.

**2704. —— —— Loss of animal on board.**]—A dog was shipped under a bill of lading which excepted the shipowner from liability for loss or damage arising from any act, neglect, or default of the master, officers, crew, or any servant of the shipowner "in providing, dispatching, & navigating the vessel or otherwise." The dog was lost on the voyage owing to the negligence of the shipowner's servants in letting it loose:—*Held:* the words "or otherwise" protected the shipowner from liability.—PACKWOOD *v.* UNION-CASTLE MAIL S.S. Co., LTD. (1903), 20 T. L. R. 59.

**2705. —— —— Damage to cargo by stevedores.**]—Sugar in bags was shipped under a charterparty excepting the shipowner from liability for loss or damage arising from the usual perils "& all other accidents even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owner in the management or navigation of vessel or otherwise."

In the process of discharge stevedore's men, employed by the ship, recklessly used hooks which tore the bags, & carelessly allowed the bags to be cut by the slings & to burst through striking against the hatch-coamings whilst being lifted out of the hold. In an action by the charterer for damage to & short delivery of the sugar:—*Held:* the shipowner was not liable, as the loss was covered by the exception "accidents . . . caused by negligence . . . of the servants of the owner" "otherwise" than "in the management or navigation of the vessel."—THE TORBRYAN, [1903] P. 194; 72 L. J. P. 76; 89 L. T. 265; 52 W. R. 40; 19 T. L. R. 625; 9 Asp. M. L. C. 450; 9 Com. Cas. 1, C. A.

*Annotations:*—**Apld.** Briscoe *v.* Powell (1905), 22 T. L. R. 128. **Consd.** Denholme *v.* Shipping Controller (1920), 124 L. T. 378. **Refd.** Mudie *v.* Strick (1909), 100 L. T. 701; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873; Samuel *v.* Dumas, Graham Joint Stock Shipping Co. *v.* Merchants Marine Insce. (No. 2), [1923] 1 K. B. 592.

**2706. Negligence causing damage by "perils of the sea & other accidents of navigation"—Failure to stop leak.**]—A cargo of wheat was shipped by charterers on board defts.' vessel, under a charterparty & bill of lading both of which excepted ". . . perils of the sea . . . & other accidents of navigation, even when occasioned by the negligence . . . of the . . . master."

The charterparty, referred to in the bill of lading under the words, "all other conditions as per charterparty," contained the condition, "Vessel to be properly stowed & dunnaged, & certificate thereof, & of good general condition, draft of water & ventilation, to be furnished to charterers

**PART VII. SECT. 4, SUB-SECT. 14.—D.**

t. *Construction of negligence & gross negligence.*]—SOUTHCOTT *v.* MONTREAL S.S. Co. (1881), 6 Nfld. L. R. 273.—**NFLD.**

from W., surveyor." Under this condition a certificate was furnished by the surveyor which did not specially mention dunnage, but stated that the vessel " is entitled to full confidence, can carry a dry & perishable cargo, & is a good risk for underwriters."

During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, &, through the leak thereby occasioned, the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, & the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged by sea water. In an action for damage to cargo, brought by the pltf., who had purchased the cargo in transit, against the shipowner:—*Held:* (1) the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuance of the leakage not being prevented; for, the inflow of water being a peril of the sea & an accident of navigation, the negligence of the master in respect of it was covered by the exception in the bill of lading; (2) the shipowner was liable for the additional damage caused by the dunnage being insufficient, as the certificate of the surveyors was not conclusive.—THE CRESSINGTON, [1891] P. 152; 60 L. J. P. 25; 64 L. T. 329; 7 T. L. R. 208; 7 Asp. M. L. C. 27, D. C.

*Annotations:—As to* (1) **Refd.** The Torbryan (1903), 9 Com. Cas. 1; The Dimitrios Kallias (1922), 128 L. T. 491.

**2707. —— Opening valve.**]—Goods were shipped under a bill of lading which excepted loss or damage arising from perils of the seas or navigation, whether arising from the negligence, default, or error in judgment of the engineers or otherwise howsoever. When the ship was off the port of discharge the engineer, intending to fill the ballast tank with water for boiler use whilst discharging, opened the sea cock, & then by mistake opened the valve of the tank in which the goods were being carried instead of the valve of the ballast tank, & the goods were damaged by sea water:—*Held:* the damage was caused by a peril of the seas arising from negligence of the engineer, within the exception, & the shipowner was not liable.—BLACKBURN *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., [1902] 1 K. B. 290; 71 L. J. K. B. 177; 85 L. T. 783; 50 W. R. 272; 18 T. L. R. 121; 9 Asp. M. L. C. 263; 7 Com. Cas. 10.

*Annotation:*—**Refd.** The Torbryan (1903), 9 Com. Cas. 1.

**2708. —— —— Improper opening of valves expressly excluded from exception.**]—Under a charterparty pltfs. became the charterers of a steamship of which defts. were owners. By the charterparty the steamship was to proceed to Sulina & there load a cargo of grain &, being so loaded, was to proceed to a port in the United Kingdom or Continent, which in the event was Belfast, with a cargo of grain. The charterparty & bill of lading, of which pltfs. were indorsees, for the cargo contained the following exceptions: " The act of God, perils, dangers, & accidents of the sea or other waters of what nature & kind soever; . . . & all other accidents of navigation, & all losses & damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk or burnt nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by . . . improper opening of valves . . ." The vessel accordingly went to Sulina & proceeded to load a cargo of maize. When the loading of the vessel had proceeded so far that the circulating pump discharge valve became submerged, the engineers negligently omitted to close the discharge valve. They also negligently omitted to close the condenser doors, which had been opened for the purpose of draining the pipes. The consequence was that there was an incursion of water through the open valve & condenser doors into the engine room & thence into the holds, whereby the cargo was damaged:—*Held:* defts. were not protected by the exceptions from liability for the damage so caused, inasmuch as the words " improper opening of valves " must be construed as including the case of improperly leaving the valves open.—MENDL & CO. *v.* ROPNER & CO., [1913] 1 K. B. 27; 82 L. J. K. B. 75; 29 T. L. R. 37; 57 Sol. Jo. 130; 18 Com. Cas. 29; *sub nom.* MERAL & CO. *v.* ROPNER & CO., 107 L. T. 699; 12 Asp. M. L. C. 268.

**2709. —— —— —— " Unless stranded, sunk or burnt."**]—By charterparty & bill of lading defts. were exempted from liability for damage to pltf.'s cargo arising from " . . . perils, dangers, & accidents of the sea or other waters of what nature & kind soever; . . . strandings . . . & all other accidents of navigation, & all losses & damages caused thereby . . . even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk or burnt nothing herein contained shall exempt the shipowner from liability to pay for damage, to cargo occasioned by . . . improper opening of valves, sluices, & ports, or by causes other than those above excepted. . . ." Whilst defts.' steamship was lying at her moorings, loading pltfs.' cargo of grain, under the above charterparty & bill of lading, the circulating pump delivery valve in the side of the ship was reasonably & properly opened by defts.' engineer, but was negligently & improperly left open, whereby a quantity of sea water entered the ship & damaged pltfs.' cargo. To prevent the vessel foundering at her moorings, where the water was deep, the master had her towed into shallower water, where she settled on the ground, & the water was subsequently pumped out. For the loss so sustained pltfs. sued defts.:—*Held:* (1) defts. were not liable as the negligence clause applied to " dangers & accidents of the sea or other waters, ' as well as to " accidents of navigation," & the words " unless stranded, sunk or burnt," constituted a condition preventing liability attaching to the shipowner for the damage occasioned by the valve being improperly open.

(2) *Semble:* defts. were also protected because the damage resulting from the incursion of water into the ship—caused by the use of the valve, whilst she had cargo in her, though she was still at her moorings & not in motion was an " accident of navigation " within the exception in the first part of the clause in question.—THE SOUTHGATE, [1893] P. 329.

*Annotations:—As to* (2) **Refd.** McFadden *v.* Blue Star Line (1905), 74 L. J. K. B. 423; The Glenochil, [1896] P. 10.

**2710. Error in management—Incorporation of Harter Act—Failure to ascertain condition of sounding pipe.**]—THE GLENOCHIL, No. 2683, *ante.*

**2711. —— —— Injury to drainage pipe leading through cargo.**]—Cargo was shipped at a port in the United States under a bill of lading incorporating the Act of Congress known as " the Harter Act," by which the owner of the vessel is not to be " held responsible for damage or loss resulting

*Sect.* 4.—*Excepted perils: Sub-sect.* 14, *D.*]

from faults or errors in navigation or in the management of the vessel."

During the voyage the vessel met with heavy weather, &, the forecastle becoming flooded, the boatswain, whilst endeavouring, with the aid of a poker, to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold, & damaging a portion of the cargo. The owner of the cargo sought to render the shipowner liable:—*Held:* the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, the act having been done for the purpose of rendering the forecastle habitable, that is, with the object of rendering the ship proper for the purpose for which she was intended.—THE RODNEY, [1900] P. 112; 69 L. J. P. 29; 82 L. T. 27; 48 W. R. 527; 16 T. L. R. 183; 9 Asp. M. L. C. 39, D. C.

*Annotations:*—**Consd.** Rowson *v.* Atlantic Transport Co., [1903] 2 K. B. 666. **Apld.** Brown *v.* Harrison (1927), 96 L. J. K. B. 1025.

**2712. —— —— Defective refrigerating apparatus.**]—Butter was shipped on board defts.' steamship at New York for carriage to London under bills of lading which incorporated the Act of Congress known as the "Harter Act" by s. 3 of which it is provided that, subject to the conditions therein named, the owner of the ship shall not be "held responsible for damage or loss resulting from faults or errors . . . in the management of said vessel." The butter was carried in four out of six insulated chambers forming part of refrigerating apparatus bolted to the ship & connected with her engines, the other two chambers being used for the ship's provisions during the voyage. The butter was delivered in London in a damaged condition, resulting from the negligence of one of the ship's engineers in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high:—*Held:* upon the facts, & especially as the refrigerating apparatus was used for the ship's provisions & not exclusively for the butter, the apparatus must be regarded as being part of the ship & therefore the mismanagement of the apparatus was mismanagement of the ship, so that the neglect to keep the chambers sufficiently cooled during the voyage was a fault or error "in the mangement of vessel" within the meaning of the bills of lading, & defts. were consequently excused.—ROWSON *v.* ATLANTIC TRANSPORT CO., [1903] 2 K. B. 666; 72 L. J. K. B. 811; 89 L. T. 204; 52 W. R. 85; 19 T. L. R. 668; 47 Sol. Jo. 738; 9 Asp. M. L. C. 458; 9 Com. Cas. 33, C. A.

*Annotations:*—**Apld.** Brown *v.* Harrison (1927), 96 L. J. K. B. 1025. **Consd.** Gosse Millard *v.* Canadian Government Merchant Marine, American Can Co. *v.* Same, [1927] 2 K. B. 432.

**2713. —— —— Failure to check marks on cargo.**]—Pltfs., who were the owners of the steamship *Foxton Hall*, chartered her to defts. to proceed to Galveston to load a full & complete cargo for a European port as ordered. By the charterparty, which provided that the shipment was to be subject to the provisions of the Harter Act, & that bills of lading were to be issued in conformity with that Act, the charterers were to load, stow & trim the cargo at their own expense, under the direction of the master, & the captain was to sign bills of lading as presented, without prejudice to the charterparty, any difference between the amount of freight by the bills of lading & the charterparty to be paid at port of loading before sailing. The cargo to be loaded on the *Foxton Hall* consisted mainly of 7,797 bales of cotton, which were all supposed to be marked, although not all with the same marks. During the loading, which was at defts.' wharf, the mate kept a tally of the number of bales, & by the captain's instructions he kept a look out for bales which were unmarked. A considerable number being found to be unmarked, marks supplied by defts.' servants were then placed upon them. The mate did not keep or attempt to keep any tally of the marks upon the various bales, & the captain in his evidence stated that it would have been utterly impossible to do so. At the conclusion of the loading, defts. produced to the mate & asked him to sign, & he did sign, a number of sheets containing particulars of the bales said to have been shipped on the *Foxton Hall*, with particulars of the marks upon them, the total number of bales shown thereon agreeing with the number taken by his own tally. On the same day defts. presented to the captain for signature, & he signed bills of lading for the 7,797 bales, after having checked the numbers & marks in these with those shown in the sheets signed by the mate. By each of those bills of lading, which stated that the cargo was to be delivered at the port of Havre, it was provided that the shipment was subject to the provisions of the Harter Act, & further, that "in the absence of fraud, clerical, or obvious error, this bill of lading signed by the master or agent shall be conclusive evidence that the abovementioned cargo has been received if the number of bales agrees with the mate's &/or tally clerk's receipts." All the bales put on board the *Foxton Hall* were delivered at Havre, but it was there found that 124 bales had either no marks or marks other than those specified in the bills of lading, & in consequence the consignees refused to accept those bales, & claimed for their value. As by French law a bill of lading is conclusive evidence against the shipowners of the receipt of the goods mentioned in it, even although it contains no conclusive evidence clause, pltfs., without prejudice to their rights against defts., paid the consignees' claims, sold the 124 rejected bales, & sued defts. to recover the amount of the net loss:—*Held:* (1) the Harter Act did not impose upon the shipowners any obligation as between them & the charterers to check the marks on the bales; (2) as the obligation of loading the ship lay upon the charterers, it was their duty to check the marks on the bales; & (3) as the loss occurred by reason of the charterers' failure to perform this duty, the pltfs. were entitled to recover.—ELDER, DEMPSTER & Co. *v.* DUNN & Co. (1909), 101 L. T. 579; 11 Asp. M. L. C. 337; 15 Com. Cas. 49, H. L.

**2714. —— Improper stowage—Stevedore not included in exception.**]—Pltf. shipped a quantity of oranges on board defts.' vessel, under a bill of lading, excepting (*inter alia*), "damage from any act, neglect, or default of the pilot master, or mariners in the navigation or management of the ship." The oranges were damaged by the negligent stowage of the stevedore:—*Held:* defts. were not protected by the exception in the bill of lading, as the stevedore was not included in the list of persons whose acts, etc., were excepted & the words "management of the ship" did not include improper stowage.—THE FERRO, [1893] P. 38; 62 L. J. P. 48; 68 L. T. 418; 7 Asp. M. L. C. 309; 1 R. 562.

*Annotations:*—**Consd.** The Glenochil, [1896] P. 10; Brown *v.* Harrison (1927), 96 L. J. K. B. 1025.

**2715. Negligence or error in navigation or management—Delay for reasons of safety.**]—THE RENÉE HYAFFIL, No. 3197, *post.*

**2716. —— Error as to route while in port.**]—

A clause in a charterparty exempted the owners from liability for loss or damage caused by the negligence, default, or error of judgment of the pilot, master or crew "in the management or navigation of the steamer":—*Held:* an error of judgment by the master while in harbour as to the route he should pursue to his port of destination was not an error of judgment "in the management or navigation of the ship."

The word "navigation" as used in the clause refers to a ship which is in motion or is being cast off.—LORD (OWNERS) *v.* NEWSUM, SONS & CO., [1920] 1 K. B. 846; 89 L. J. K. B. 449; 123 L. T. 63; 36 T. L. R. 291; 15 Asp. M. L. C. 19; 25 Com. Cas. 200.

2717. —— **Failure to keep steam up while awaiting a berth.**]—Defts., the charterers, hired a steamer from pltfs., the owners, by a charterparty, which provided (*inter alia*), that the master should prosecute his voyages with the utmost dispatch & that the owners should not be liable for loss occasioned by negligence, default or error of judgment of the master in the management or navigation of the steamer. Defts. sent the steamer to Galatz to load a cargo of grain. She arrived at the port in due course but was unable to obtain a berth & had to lie at anchor in the outer harbour to wait until a berth should be available. Defts. instructed the master to keep steam up so that he might be able to move to a berth whenever one should become available. A death occurred aboard the steamer & the master had to go ashore to make certain arrangements relating to it & he omitted to order steam to be kept up in his absence. The result was that the steamer was unable to move to a berth when one became available & defts. suffered loss owing to the delay in her finally reaching a berth. Arbn. took place upon a number of matters in dispute arising out of the charter & the umpire stated a case for the opinion of the ct. under Arbitration Act, 1889 (c. 49), s. 19. Upon this head of dispute defts. claimed damages on the ground that the master had failed to prosecute the voyage with the utmost dispatch & pltfs. contended they were not liable because they were protected from liability for loss occasioned by the negligence, default or error of judgment of the master in the management of the steamer:—*Held:* the failure of the master to have steam kept up while the steamer was waiting for a berth was not an act of negligence, default or error of judgment in the management of the steamer & pltf. were therefore liable to defts. for the delay.—TOYOSAKI KISSEN KAISHA *v.* SOCIÉTÉ LES AFFRÉTEURS REUNIS (1922), 27 Com. Cas. 157; 10 Lloyd, L. R. 147, D. C.

*Annotation:*—**Dbtd.** Suzuki *v.* Benyon (1926), 95 L. J. K. B. 397.

2718. —— **Failure to prosecute voyage with dispatch.**]—SUZUKI *v.* BENYON, No. 2059, *ante*.

2719. —— **Incorporation of Hague Rules—Theft during voyage—Failure of shipowner to discharge onus of proof.**]—Pltfs. were the holders & indorsees of a bill of lading issued by defts. in respect of 66 cases of bristles shipped on defts.' steamer for carriage from Tsing-tao to London. The bill of lading contained a provision that the carrier should not be liable for robberies or thefts on sea or on land, & it was subject to the Hague Rules, 1921, which provided by Article III., r. 2, that the carrier should be bound to provide for the proper & careful handling, loading, stowage, carriage, custody, care, & unloading of the goods, & by Article IV., r. 2, that neither the carrier nor the ship should be responsible for loss arising from any neglect or default of the master mariner or the servants of the carrier in the management of the ship, from act or omission of the shipper or owner of the goods . . . from insufficiency of packing, or from any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents, servants, or employees of the carrier.

The steamer called at several ports, & when the cases were unloaded in London it was found that 21 of them had been broken open & were empty.

In an action for breach of contract &/or duty in relation to the carriage of goods by sea, defts. contended that the loss was occasioned by thieves without the actual fault or privity of defts. & without the fault or neglect of their agents or servants:—*Held:* the *onus* was on defts. to show that the theft was not due to the fault of their servants, &, as they had not discharged this *onus*, & as there was a duty on defts., not only to provide watchmen, but also to see that the watching was vigilantly carried out, pltfs. were entitled to recover.—CITY OF BARODA (CARGO OWNERS) *v.* HALL LINE, LTD. (1926), 42 T. L. R. 717; 70 Sol. Jo. 877; 17 Asp. M. L. C. 27.

2720. —— **Carriage of Goods by Sea Act, 1924 (c. 22), sched. Article IV., r. 2 (a), (q)—Theft by stevedores.**]—Pltfs. shipped a case of cotton goods on defts.' steamer at Liverpool for carriage to Tampico, under a bill of lading issued by defts., acknowledging the receipt of the goods in good order & condition, & agreeing to carry the goods to Tampico & there deliver them. When delivered the case was found to have been broken into & the goods had disappeared. It transpired that in spite of the vigilance of the ship's officers & without the fault or the privity of defts., the goods were stolen by the stevedore's men who were employed by the ship's agents to discharge cargo at another Mexican port where the ship had called before going to Tampico.

In an action claiming damages for non-delivery the defts. relied on Article IV., rule 2 (*a*) & (*q*) of the Schedule to above Act, which exempted them from responsibility for loss or damage arising or resulting from (*a*) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . . (*q*) & any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage:—*Held:* (1) defts. were not protected by rule 2 (*a*) of the Schedule to above Act, because the theft of the goods was not an act in the management of the ship within the meaning of sub-rule (*a*); (2) they were not protected by rule 2 (*q*), because they had failed to discharge the burden of proving that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier had contributed to the loss of the goods within the meaning of the exception contained in that sub-rule, & therefore defts. were liable; (3) the word "or" in rule 2 (*q*) must be read in a conjunctive sense.—BROWN & CO. *v.* HARRISON (1927), 96 L. J. K. B. 1025; 43 T. L. R. 633; *sub nom.* BROWN & CO., LTD. *v.* HARRISON, HOURANI *v.* HARRISON, 137 L. T. 549; 32 Com. Cas. 305, C. A.

*Annotations:*—*As to* (3) **Follds.** Gosse Millard *v.* Canadian Government Merchant Marine, American Can Co. *v.* Same, [1927] 2 K. B. 432. **Reld.** Green *v.* Premier Glynrhonwy Slate Co. (1927), 20 B. W. C. C. 563.

*Sect.* 4.—*Excepted perils: Sub-sect.* 14, *D.; sub-sect.* 15.]

**2721. —— —— Negligence in repairing ship during voyage.**]—A steamship, with a cargo of tinplates on board carried under a bill of lading under above Act, sustained damage during the voyage which necessitated her being kept for some weeks in dock for repairs. While the repairs were being executed, workmen had frequently to be in & out of the hold where the tinplates were stored, & the hatches in consequence were often left open. Owing to the negligence of the shipowners' servants the hatches were not protected when rain was falling, & the rain having penetrated the hold damaged the tinplates. In an action by the owners of the tinplates in respect of the damage so caused :—*Held :* the negligence in the management of the hatches was " negligence in the management of the ship " within Article IV., r. 2 (*a*), of the Schedule to above Act, & therefore by virtue of that Article the shipowners were not liable for the damage.—GOSSE MILLARD *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LTD., [1928] 1 K. B. 717 ; 44 T. L. R. 143 ; *sub nom.* GOSSE MILLARD *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LTD., AMERICAN CANNING CO. *v.* SAME, 97 L. J. K. B. 193 ; 138 L. T. 421, C. A.

**2722. —— —— Injury to drainage pipe leading through cargo.**]—Pltfs.' bales of opossum skins were shipped on board defts.' steamship under bills of lading incorporating the Sea-Carriage of Goods Act, 1924, of the Commonwealth of Australia, by which the carrier is not responsible for damage arising from " act, neglect or default of the . . . servants of the carrier in the navigation or in the management of the ship " ; but the Act also provides that the carrier is at liberty to surrender in whole or in part any of his rights & immunities thereunder, provided such surrender is embodied in the bill of lading. The bills of lading contained a clause providing that " the carriers are not to be responsible for faults or errors of navigation."

The skins were damaged by water which entered the compartment where they were stowed through a fractured waste-pipe leading from the seamen's washhouse. The fracture was caused after the voyage commenced by a seamen negligently using an iron rod to clear the pipe from obstruction in order to put the washhouse floor in a proper state : —*Held :* (1) the act of clearing the pipe was " neglect in the management of the ship " ; (2) by retaining the exception of " faults or errors of navigation " defts. had not impliedly surrendered the immunity in respect of neglects in management, & accordingly they were relieved from liability.—THE TOURAINE, [1928] P. 58 ; 97 L. J. P. 60 ; 138 L. T. 492.

**2723. —— —— Exception clause in bill of lading against " errors of navigation."**]—THE TOURAINE, No. 2722, *ante*.

**2724. —— —— Failure of shipowner to discharge onus of proof.**]—The contents of a case shipped for carriage between London & Piraeus were lost in transit. In an action by the shippers for damages for their value :—*Held :* (1) the carriers had failed to discharge the *onus* laid upon them by Carriage of Goods by Sea Act, 1924 (c. 22), sched. Article IV., r. 2 (*q*), to show that the loss did not result from their fault or privity, or from the fault or neglect of their agents or servants ; (2) by reason of the failure of the shippers to insert the value of the contents of the case in the bill of lading, the carrier's liability was limited to £100 as provided by Article IV., r. 5, of the Act.—PENDLE & RIVETT, LTD. *v.* ELLERMAN LINES, LTD. (1928), 72 Sol. Jo. 15.

**2725. —— —— Failure of refrigerating machinery.**]—A parcel of frozen beef from Australia was found to be damaged on arrival. The ship in which it was carried had visited several Queensland ports in the height of the Australian summer & the master decided to proceed to England by the south of Australia instead of the north. The voyage was considerably protracted owing chiefly to the effects of a recent strike & the " ca' canny " attitude adopted by the stokers. The ship had two refrigerating plants but only one was used throughout the voyage :—*Held :* (1) on the facts there had been no unreasonable deviation. Above Act permitted " reasonable " deviation. Deviation would not be reasonable merely if it was convenient to the shipowner ; it must be reasonable having regard to all the circumstances of the case ; (2) on the facts the damage was due to an insufficiently low temperature being kept in the holds, especially at time of shipment, an error of judgment on the part of the engineers. The word " default in the navigation or in the management of the ship " in Article IV., 2 (*a*), did not cover default in the management of the refrigerating machinery. The words in the exception referred to matters relating to a ship as a ship, & not to matters relating to refrigerating machinery which could not come under the head " navigation or management of a ship."—FOREMAN & ELLAMS, LTD. *v.* FEDERAL STEAM NAVIGATION CO., LTD. (1928), 97 L. J. K. B. 525 ; 138 L. T. 582 ; 44 T. L. R. 250.

**2726. Clause limiting liability—Unless value of goods declared—Inconsistency with Harter Act.**]—Goods were shipped under a bill of lading expressed to be subject to all the terms & exceptions of the Harter Act, an Act of Congress of the United States which makes it unlawful for the owner of any vessel to insert in any bill of lading any clause whereby he is relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise, & makes null & void & of no effect all clauses of such import inserted in bills of lading. The bill of lading contained a clause to the effect that the shipowner would not be accountable for any one package which was of a value of more that £100, unless the value thereof was declared & extra freight agreed upon & paid. The shipowner failed to deliver one package worth more than £100. The value thereof had not been declared, nor had extra freight been agreed upon or paid. In an action by the owner of the package to recover its value from the shipowner, who relied upon the clause :—*Held :* the clause was inconsistent with the Harter Act & must be treated as null & void.—HORDERN (A.) & SONS, LTD. *v.* COMMONWEALTH & DOMINION LINE, LTD., [1917] 2 K. B. 420 ; 86 L. J. K. B. 1048 ; 116 L. T. 501 ; 33 T. L. R. 344 ; 14 Asp. M. L. C. 51 ; 22 Com. Cas. 315.

*Annotations :*—**Reid.** Australasian United Navigation Co. *v.* Hunt, [1921] 2 A. C. 351 ; Gosse Millard *v.* Canadian Government Merchant Marine (1927), 43 T. L. R. 544.

**2727. Negligence of master & crew.**]—A cargo, through the careless stowage of the master & crew, was damaged in the course of the voyage. The bill of lading, which was not signed until after the cargo was stowed, but before the voyage commenced, contained a clause exempting the ship from liability to make good loss from (*inter alia*), " negligence, or default of master or mariners, or others performing their duties " :—*Held :* assuming the shipowner to be, which, *semble*, he is not, in the category of a common carrier, the clause was not unreasonable ; the damage came within it, & the shipowner was, therefore, not liable.—THE DUERO

(1869), L. R. 2 A. & E. 393; 38 L. J. Adm. 69; 22 L. T. 37; 3 Mar. L. C. 323.

**2728.** ——.]—THE CARRON PARK, No. 2680, *ante*.

**2729.** ——.]—RAYNES *v.* BALLANTYNE (1898), 14 T. L. R. 399, H. L.

**2730. Accidents to hull—Damage by stevedores.**]—(1) A charterparty provided that the steamer was "to be provided with a deck load at full freight at charterers' risk . . . accidents to hull . . . always excepted, even when occasioned by the negligence . . . of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible." While the vessel was lying at anchor taking in the cargo, through want of proper care on the part of the stevedores, a quantity of cargo on the bridge deck pressed so severely on the uprights which were placed against the stanchions to keep the cargo in position that the stanchions gave way & a part of cargo was lost:—*Held:* the loss was not due to the unseaworthiness of the ship, but to an accident to the hull occasioned by the negligence of persons for whose acts but for the exceptions clause the owners would be responsible, & the owners were, therefore, protected by that clause. *Semble:* the owners were also protected by the words "at charterers' risk."

(2) In construing ordinary contracts, it is impossible to apply the "*expressio unius*" rule to cases where the "*expressio unius*" is to be found in one clause only, & where in another clause in the same contract there is no "*expressio unius*" that is to operate as an "*exclusio alterius*" (VAUGHAN WILLIAMS, L.J.).

(3) There is always a presumption of a warranty of seaworthiness by the shipowner in favour of those who use the ship for carriage (VAUGHAN WILLIAMS, L.J.).—WADE & SONS CO., LTD. *v.* COCKERLINE & CO. (1905), 53 W. R. 420; 21 T. L. R. 296; 49 Sol. Jo. 313; 10 Com. Cas. 115, C. A.

*Annotations:—As to* (1) **Consd.** Reed *v.* Page & East, [1927] 1 K. B. 743. **Reid.** Calcutta S.S. Co. *v.* Weir (1910), 79 L. J. K. B. 401; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**2731. Negligent stowage.**]—Fruit was shipped under a bill of lading which excepted (*inter alia*), loss or damage from decay resulting from bad stowage, insufficiency of ventilation or temperature of holds, whether occasioned by any act or omission, negligence, or error in judgment of the master, officers, engineers, crew, stevedores, or other persons in the service of the shipowners, & whether before or after the commencement of or during the voyage, or from defects, latent or otherwise, in hull, tackle, machinery, refrigerating or otherwise, whether or not existing at the time of the goods being loaded or at the commencement of the voyage, or from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, refrigerating engineers, crew, or other persons in the service of the owners, nor from any other cause whatsoever. On the voyage the fruit was damaged owing to the cases having been stowed by persons, for whose acts the shipowners were responsible, too close to the top of the hold, which made it impossible for the refrigerating machinery to ventilate the hold & to keep it at the proper temperature:—*Held:* the damage was caused by bad stowage within the exceptions, & therefore the shipowners were not liable.—BOND, CONNOLLY & CO. & WOODALL & CO. *v.* FEDERAL STEAM NAVIGATION CO., LTD. (1906), 22 T. L. R. 685, C. A.

*Annotation:*—**Reid.** Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**2732.** ——.]—Chocolate was put on board a steamship for carriage from Genoa to London. The chocolate was shipped in good condition, but was delivered in a damaged state owing to the chocolate having been stowed in a hold in which cheeses were stowed. The consignees of the chocolate brought an action to recover the damage they had sustained. The shipowners pleaded as a defence an exception in the bill of lading relieving them from liability for negligent stowage. The consignees by their reply alleged that the shipowners could not rely on the exception, as the ship was unfit to carry the chocolate when the ship was loaded or when the voyage began:—*Held:* the ship was not unseaworthy; the damage was caused by improper stowage; & resps. were protected by the exception in the bill of lading & were entitled to rely on the exception.—THE THORSA, [1916] P. 257; 85 L. J. P. 226; 116 L. T. 300; 13 Asp. M. L. C. 592; 22 Com. Cas. 218, C. A.

*Annotations:*—**Consd.** Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522. **Reid.** Werner *v.* Det Bergenske Dampskibsselskaft (1926), 134 L. T. 573; Reed *v.* Page & East, [1927] 1 K. B. 743.

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SUB-SECT. 15.—FROST AND ICE.

**2733. Port open—Lighters delayed by frost.**]—HUDSON *v.* EDE, No. 2880, *post*.

**2734.** —— ——.]—By the terms of a charterparty the ship was to proceed to Cardiff, East Bute Dock, & there load in the customary manner from the agents of the freighters a cargo of rail iron, the cargo to be loaded as fast as ship could take on board & stow within the customary working hours of the port, commencing when ship was in berth & ready to load, "detention by frost, floods, etc., not to be reckoned as lay days." At Cardiff there are two docks, the East Bute Dock & the West Bute Dock, connected by a canal, & the West Bute Dock is connected by a junction canal with the Glamorganshire Canal. The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six manufacturers of rail iron there, & all of them, with the exception of the freighters' agents, had wharves in the East or West Bute Dock. The agent's wharf was on the Glamorganshire Canal, nearly opposite the junction canal, & their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down the junction canal, through the West Bute Dock, & from thence through the connecting canal to the East Bute Dock. The other manufacturers loaded ships in the East Bute Dock, either from the quay or by lighters coming from their wharves. The ship on arrival was berthed in the East Bute Dock, & the loading was commenced, but it was delayed

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PART VII. SECT. 4, SUB-SECT. 15.

a. *Hatch opened to unload other cargo—Consignment of fruit frozen.*]—VIPOND *v.* FURNESS, WITHY & CO. (1916), 54 S. C. R. 521; 35 D. L. R. 278.—CAN.

*Sect. 4.—Excepted perils: Sub-sect. 16, B.*]

received at the dock during the continuance of the strike, & after its termination none was ready for shipment until Apr. 11, a period of more than six days after the vessel was ready to load. On Apr. 10, the charterers gave notice to the shipowners that, a stoppage having continued for six running days within the meaning of the charterparty, such charterparty was null & void. In an arbitration between the shipowners & the charterers the learned arbitrator held that the charterparty was void by reason of a stoppage arising from the specified causes or some of them, viz., a colliers' strike & causes beyond the control of the charterers within the meaning of clause 3 of the charter:—*Held:* the decision of the umpire was right; although the actual strike was over before the six running days had expired, the effects of the strike continued beyond that time, & consequently the stoppage was a stoppage due to the strike, although the actual stoppage continued for a few days beyond the time at which the strike itself, as a matter of dispute between masters & men, had come to an end.—GORDON S.S. Co., LTD. *v.* MOXEY SAVON & Co., LTD. (1913), 108 L. T. 808; 12 Asp. M. L. C. 339; 18 Com. Cas. 170.

**2749. Strike at port.**]—THE ALNE HOLME, No. 3766, *post.*

**2750.** ——.]—By a charterparty a ship was to discharge as fast as she could deliver during ordinary working hours according to the custom of the port. There was an exception in the case of a strike. At the port it was customary to discharge cargo into lighters or on to the quay. When the ship arrived, owing to a strike & other causes, there was a scarcity of lighters, & the cargo was discharged on to the quay, the ship being thereby delayed. In an action by the shipowners claiming demurrage:—*Held:* as it was not practicable in the existing circumstances for the consignee to obtain lighters, he was not liable for the delay caused by discharging on to the quay.—REID *v.* LEE & SONS (1901), 17 T. L. R. 771.

*Annotation:*—**Apld.** Hulthen *v.* Stewart (1902), 71 L. J. K. B. 624.

**2751.** ——.]—AKT. SHAKESPEARE *v.* EKMAN & Co., No. 2755, *post.*

**2752. Strike at coal mine.**]—CLAY *v.* WORMS (1857), 29 L. T. O. S. 196.

**2753.** ——.]—Defts. chartered pltf.'s ship to proceed to Ardrossan, the charterparty providing that the ship should there load "in the customary manner, say in twelve colliery working days" a cargo of coals, "to be loaded according to the custom of the port"; "strikes & lock outs of pitmen & others" being excepted perils. The following written clause was added: "It is understood that vessel is to be loaded at once, & lay days to count when vessel ready & notice given." The ship arrived at Ardrossan, & gave notice that she was ready to load; but before twelve working days had elapsed a strike broke out at the pit, in consequence of which the ship did not load the cargo of coal till twenty-three ordinary working days had gone by. By the charterparty demurrage was to be paid at the rate of 4*d.* per registered ton per day. Pltf. claimed for fifteen days' demurrage:—*Held:* the written clause only fixed the time when the lay days began, & the delay was caused by an excepted peril.—PETERSEN *v.* DUNN & Co. (1895), 43 W. R. 349; 1 Com. Cas. 8.

**2754.** ——.]—By a charterparty dated Feb. 29, 1912, the *Adalands* was to proceed to Hull & there load a complete cargo of coal. No particular colliery was specified. Clause 5 provided that the cargo was to be loaded in seventy-two running hours, "time to count when notice of readiness to receive the entire cargo is given to the staithman or colliery agent or handed in to his office between the hours of 6 a.m. & noon. The loading date to be not before 6 a.m. on Apr. 7, but seven clear days' written notice of definite loading date to be given by owners. . . ." Clause 6 provided that "the parties hereto mutually exempt each other from all liability, except under the strike rules, arising from or for time lost through riots, strikes, lock outs of workmen, or disputes between masters & men, or by reason of accidents to mines or machinery, obstructions on railways or in harbours, not including congestion of ships or traffic, or by reason of frosts, floods, fogs, storms, & any unavoidable accidents & hindrances, beyond their control, either preventing or delaying the working, leading, or shipping of the said cargo, occurring on or after the date of this charter until the expiration of the loading time. . . . In the event of any stoppage or stoppages arising from any of these causes, other than a 'strike' as defined in the strike rules, continuing for the period of five days from the time of the steamer being ready to load at the colliery or collieries for which she is stemmed, this charter shall become null & void, provided, however, that no cargo shall have been shipped on board the vessel previous to such stoppage or stoppages." The shipowners notified the charterers that the vessel would be ready to load on Apr. 22, 1912. On Apr. 16, 1912, the charterers refused to load as they said they could not get coal from a particular colliery owing to a stoppage at the colliery such as was contemplated by clause 6. On Apr. 19, 1912, the shipowners notified the charterers that the vessel was in Hull roads on that date ready for loading & at their disposal. The charterers not having loaded any cargo on the *Adalands* the shipowners claimed damages:—*Held:* (1) the five days mentioned in clause 6 must be counted from Apr. 22, although the vessel was in fact ready to load on Apr. 19; & (2) the word "stoppage" in clause 6 meant an entire stoppage of work, &, that as the charterers had failed on the evidence to show that there was an entire stoppage which prevented any loading for five days from Apr. 22, they were liable in damages for refusing to load.—AKT. ADALANDS *v.* WHITAKER (1913), 18 Com. Cas. 229.

**2755. Strike of specified class of workmen.**]—An exception in a charterparty of "general strikes of lightermen" preventing the discharge of the cargo means a general strike of lightermen of the class & kind who would in the ordinary course of

**PART VII. SECT. 4, SUB-SECT. 16.—B.**

2755 i. *Strike of specified class of workmen.*]—A charterparty contained a "strike" clause: "If the cargo cannot be discharged by reason of a strike or lock out of any class of workmen essential to the discharge of the cargo, the days of discharging shall not count during the continuance of such strike or lock out." On the arrival of the ship at the port of discharge, a strike of carters was in existence, in consequence of which the docks had become congested; this condition of affairs rendered it impossible for deft., who was consignee, to accept delivery of the cargo, there being neither space for the cargo in the docks nor means of taking it away when tendered over the ship's rail:—*Held:* (1) the carters were not a "class of workmen essential to the discharge" within the clause, & deft. was not protected by the clause, as discharge was not made impossible by the strike; (2) "discharge" is a joint act, necessitating co-operation on the part of the ship & the receiver of the cargo, & the obligation of the ship under this term is fulfilled when its crew or its stevedore's men are in a position to offer, & do offer, delivery to the consignee over the ship's side.—LANGHAM S.S. Co., LTD. *v.* GALLAGHER (1911), 12 Asp. M. L. C. 109.—IR.

2755 ii. ——.]—SCHELE *v.* LUMSDEN & Co., [1916] S. C. 709.—SCOT.

business be employed in discharging a cargo such as that carried by the ship.—AKT. SHAKESPEARE *v.* EKMAN & Co. (1901), 17 T. L. R. 330; *affd.* (1902), 18 T. L. R. 605, C. A.

**2756. Stoppage contemplated at beginning of loading—Stoppage in fact occurring later.**]—By a charterparty it was agreed that a ship of applts. should load a cargo of coal for the charterers "to be loaded in one hundred & forty running hours, commencing when written notice is given of steamer being completely discharged of inward cargo & ballast in all her holds, & ready to load." The charterparty also provided that in the event of a stoppage caused by a strike "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null & void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage." Due notice was given that the ship was ready to load, &, after the expiration of the time allowed for loading, a stoppage caused by a strike commenced, & continued for six days. No cargo had been shipped, & the charterers gave notice that the charterparty was cancelled:—*Held:* the charterparty contemplated a stoppage in existence at the beginning of the loading time, & the charterers were not entitled to cancel the charter on the occurrence of a stoppage at a later period.—STEEL, YOUNG & Co. *v.* GRAND CANARY COALING CO. (1904), 90 L. T. 729; 20 T. L. R. 542; 9 Asp. M. L. C. 584; 9 Com. Cas. 275, H. L.

**2757. Ship sent to strike area.**]—A charterparty, which contained an exception of any delay occasioned by strikes, provided that the vessel, when loaded with coal, should proceed to one of certain named places on the Thames, as ordered, & there unload. The charterers ordered her to proceed to R., one of such places. After the voyage commenced, & before the arrival of the vessel at the mouth of the Thames, the charterers became aware of a strike among the coal porters at R., which did not extend to the other places named in the charterparty. In consequence of the strike it was impossible for the vessel to unload at R. within the time allowed by the charterparty. In an action by the shipowners for demurrage:—*Held:* there was no obligation upon the charterers to change the order for the vessel to proceed to R. on the strike coming to their knowledge; &, the delay being covered by the exception, no demurrage was payable.—BULMAN & DICKSON *v.* FENWICK & Co., [1894] 1 Q. B. 179; 63 L. J. Q. B. 123; 69 L. T. 651; 42 W. R. 326; 10 T. L. R. 45; 7 Asp. M. L. C. 388; 9 R. 227, C. A.

*Annotations:*—**Distd.** The Fox (1914), 83 L. J. P. 89. **Apld.** Michalinos *v.* Dreyfus (1924), 131 L. T. 177. **Apprvd.** S.S. Matheos *v.* Dreyfus, [1925] A. C. 654. **Apld.** Lewis *v.* Dreyfus (1926), 31 Com. Cas. 239. **Refd.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499.

**2758.** ——.]—By a time charterparty a steamship was let at a monthly hire for a certain period to be employed in such lawful trades as the charterers should direct within certain geographical limits, & the charterparty contained an exemption clause, which provided that "the owners & charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented" by, among other things, strikes. During the currency of the charter the charterers ordered the ship to a port where, to their knowledge, a strike of colliers was in operation, for the purpose of loading a cargo of coal. On the arrival of the ship, she was prevented by the strike from loading for several weeks. A dispute arose between the owners & the charterers as to whether under the charterparty the hire was payable during this period:—*Held:* (1) upon the construction of the exempton clause the words "carrying out this contract" meant merely performing the obligations imposed upon the respective parties by the contract & did not include exercising the rights bestowed upon them by the contract; (2) upon any construction of the clause the charterers were not prevented by the strike from carrying out the contract, inasmuch as they could have withdrawn the ship from the strike area; consequently the hire was payable.—BROWN *v.* TURNER, BRIGHTMAN & Co., [1912] A. C. 12; 81 L. J. K. B. 387; 105 L. T. 562; 12 Asp. M. L. C. 79; 17 Com. Cas. 171, H. L.

*Annotations:*—*Generally,* **Refd.** Admiral Shipping Co. *v.* Weidner, Hopkins, [1916] 1 K. B. 429; Modern Transport Co. *v.* Duneric S.S. Co., [1916] 1 K. B. 726; Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1917] 2 K. B. 78; Countess of Warwick S.S. Co. *v.* Le Nickel Soc. Anon. (1917), 34 T. L. R. 27; Denholm *v.* Shipping Controller (1920), 124 L. T. 378; Diamond Alkali Export Corpn. *v.* Bourgeois, [1921] 3 K. B. 443.

**2759. Where loading not prevented.**] — The principle which entitles a charterer to refuse to load a vessel if he has reasonable ground for believing that she will not be able to proceed to her destination with the cargo on board within a commercially reasonable time owing to the existence of a war cannot be applied to a case where a vessel may be delayed in starting on her voyage through a strike in this country, which, however, does not prevent the loading of the cargo.—ROPNER & Co. *v.* RONNEBECK (1914), 84 L. J. K. B. 392; 112 L. T. 723; 13 Asp. M. L. C. 47; 20 Com. Cas. 95.

*Annotations:*—**Refd.** Countess Warwick S.S. Co. *v.* Le Nickel Soc. (1917), 87 L. J. K. B. 309; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1.

**2760. Strike of crew—Refusal to risk voyage—Belligerent threat to sink neutrals.**]—WILLIAMS, BROTHERS (HULL), LTD. *v.* NAAMLOOZE VENNOOTSCHAP W. H. BERGHUYS KOLENHANDEL, No. 2744, *ante.*

**2761. Computation of time — Time during which work actually prevented or delayed.**]—A charterparty contained the following clause: "Time to commence when steamer is ready to unload & written notice given, whether in berth or not. In case of strikes, lock outs, civil commotions, or any other causes or accidents, beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage":—*Held:* the clause did not mean that time was not to count at all if a strike delayed the discharging, but that time should not count to the extent of any delay caused by a strike.—LONDON & NORTHERN S.S. Co., LTD. *v.* CENTRAL ARGENTINE RY., LTD. (1913), 108 L. T. 527; 12 Asp. M. L. C. 303.

*Annotation:*—**Folld.** Central Argentine Ry. *v.* Marwood, [1915] A. C. 981.

**2762.** —— ——.]—A steamer was chartered to carry a cargo of coal by charterers who were also consignees of the cargo to a specified port under a charterparty which provided that the cargo should be taken from alongside by consignees at port of discharge, free of expense & risk to the steamer, at the average rate of 200 tons per day, weather permitting, Sundays & holidays excepted, provided steamer could deliver at that rate; if longer detained consignees to pay demurrage at the rate of fourpence per ton per running day. "Time to commence when steamer is ready to unload & written notice given, whether in berth or not. In case of strikes, lock outs, civil commotions or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already in demurrage." On the arrival

*Sect.* 4.—*Excepted perils: Sub-sect.* 16, *B.; sub-sects.* 17 & 18.]

of the steamer at the port of discharge she gave notice of readiness to discharge, but all the berths at the port were occupied & there was at the time a strike of stokers at the port. For the first fortnight after her arrival no work of discharging was done at all, but for the next ensuing nineteen days, after which period the strike came to an end, there was a partial resumption of work, & there were discharged from the other ships in the port 6,000 tons of coal, which was equal to six days' normal work. The steamer was unable to get into berth until after the termination of the strike owing to the delay in discharging the other ships by reason of the strike. Upon a claim for demurrage by the shipowner:—*Held:* "such time" meant the time for which the discharging was actually prevented or delayed by the strike & the shipowner was entitled to count the six days as lay days.—CENTRAL ARGENTINE RY., LTD. *v.* MARWOOD, [1915] A. C. 981; 84 L. J. K. B. 1593; 113 L. T. 786; 13 Asp. M. L. C. 153, H. L.

SUB-SECT. 17.—WAR RISKS.

**2763. Port of loading becoming hostile port.**]—(1) A charterparty stipulated for pltf.'s, a British, ship proceeding to Constantinople & thence to Odessa, & there loading a cargo from def., a British subject; & that in case of war having commenced previous to & continuing on the ship's arrival at Constantinople, deft. was to load the ship at the latter port:—*Held:* the war contemplated was such a war as would render the voyage of a British ship from Constantinople to Odessa unlawful, that is, a war between England & Russia; &, therefore, a war between Russia & Turkey existing at the time of the ship's arrival at Constantinople, no war having been then declared between Great Britain & Russia, was not within the provision.

(2) In a second count upon another charterparty between pltf. & deft., both British subjects, the declaration stated that it was agreed that pltf.'s, a British, ship should proceed to & load a cargo from deft. at Odessa, forty-five running days being allowed for loading & unloading; that the ship proceeded to Odessa, & remained there a great part of the forty-five running days, & was ready to remain for the residue thereof, but that deft. dispensed with her doing so, & requested her to depart from Odessa without remaining for the rest of the running days, & without a cargo; & alleged as a breach, that deft. had not provided a cargo. Deft. pleaded that before deft. dispensed, etc., & before breach by deft., war was declared between Great Britain & Russia, & that it thereby became impossible for deft. to load a cargo without trading with the enemy. Issue thereon. The evidence was that the ship arrived at Odessa on Mar. 11, that the declaration of war between England & Russia was known there on Apr. 1, that on several occasions previous & subsequent to Apr. 1, pltf.'s captain repeatedly asked deft.'s agent for a cargo, whose answer was, that he had none for him, & on Apr. 16 he added, that the ship had better go away. The ship sailed from Odessa without a cargo on Apr. 17, before the expiration of the running days. A verdict was found for pltf., but leave was reserved to deft. to move to enter a verdict for him, if the ct. should be of opinion that there was no evidence to go to the jury of any dispensation by him before the declaration of war was known at Odessa:—*Held:* on such a motion the verdict could not stand, unless there was reasonable evidence on which the jury were justified in finding it, & a mere *scintilla* of evidence, or evidence leading only to a conjecture, was insufficient; there was no reasonable evidence of any dispensation by deft. of the ship's remaining the running days at Odessa.—AVERY *v.* BOWDEN (1856), 6 E. & B. 953, 962; 26 L. J. Q. B. 3; 28 L. T. O. S. 145; 3 Jur. N. S. 238; 5 W. R. 45; 119 E. R. 1119, 1122, Ex. Ch.

*Annotations:—As to* (2) **Consd.** Croockewit *v.* Fletcher (1857), 1 H. & N. 893. **Apld.** Barrick *v.* Buba (1857), 2 C. B. N. S. 563; Pole *v.* Cetcovich (1860), 30 L. J. C. P. 102. **Consd.** Danube & Black Sea Ry. & Kustendjie Harbour Co. *v.* Xenos, Xenos *v.* Danube & Black Sea Ry. & Kustendjie Harbour Co. (1862), 31 L. J. C. P. 284; Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352. **Refd.** Esposito *v.* Bowden (1857), 7 E. & B. 763; Frost *v.* Knight (1872), L. R. 7 Exch. 111; Roper *v.* Johnson (1873), L. R. 8 C. P. 167; Hudson *v.* Hill (1874), 43 L. J. C. P. 273; Gueret *v.* Audouy (1893), 62 L. J. Q. B. 633; Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331. *Generally,* **Refd.** Hall *v.* Wright (1859), 29 L. J. Q. B. 43; Roberts *v.* Brett (1859), 6 C. B. N. S. 611; Byrne *v.* Van Tienhoven (1880), 5 C. P. D. 344; Johnstone *v.* Milling (1886), 16 Q. B. D. 460. **Mentd.** McMahon *v.* Lennard (1858), 6 H. L. Cas. 970; Dawes *v.* Hawkins (1860), 8 C. B. N. S. 848; Bartholomew *v.* Markwick (1864), 15 C. B. N. S. 711; Unwin *v.* Clark (1866), 7 B. & S. 400; Webber *v.* G. W. Ry. (1866), 4 H. & C. 582; Phillipson *v.* Hayter (1870), L. R. 6 C. P. 38; Wilkinson *v.* Verity (1871), L. R. 6 C. P. 206; Curtis *v.* B. U. R. T. (1912), 28 T. L. R. 353; Veithardt & Hall *v.* Rylands (1917), 86 L. J. Ch. 604.

**2764.** ——.]—Declaration charged that, by a memorandum for charter, it was agreed between pltf., owner of a ship then in a British port, & deft., that the ship should proceed to Odessa, & there load from the freighter's factors a complete cargo of specified goods, & proceed therewith to a port of discharge, the act of the Queen's enemies & all accidents of the seas, navigation, etc., excepted; thirty-five running days to be allowed for loading & unloading, to commence at the port of loading, & £4 per day for demurrage above the running days. Breach (*a*) that, although a reasonable time for loading the cargo had elapsed, deft. made default in loading the agreed cargo; (*b*) deft. detained the ship on demurrage ten days above the laying days, & did not pay for such demurrage. Plea, that deft. was always a subject of the Queen, & Odessa was a port within the dominions of the Emperor of Russia; & that, after the making of the charter party, & before the ship arrived at Odessa, & before deft. provided a cargo, the Queen declared war against the Emperor; since which time war had existed between them, & Odessa had been a hostile port in the possession of the Queen's enemies. That, from the time war was so declared, it became impossible for deft. to perform his agreement without dealing & trading with the Queen's enemies, of which pltf. had notice before the expiration of the laying days, & the charterparty, by reason of the premises, was wholly rescinded. Replication that the Queen, by order of council, waived, except in the case of contraband of war, the seizure or confiscation of enemies' property on board neutral ships & of neutral property on board enemies' ship; &, by a second order in council, allowed a certain time for Russian ships to load their ships in British ports, & allowed Russian merchant vessels, which should have sailed before the date of the order for any British port, to discharge at such port; &, by a third order, made before the expiration of the running days, & while there was time to load the cargo, ordered that neutral or friendly vessels might import into any British port all goods, not being contraband of war or requiring a special permission, to whomsoever belonging, & that the subjects of the Queen or of any neutral or friendly state

might trade with all ports not blockaded, except that British vessels might not enter enemies' ports. That the ship was a neutral vessel, & pltf. the subject of a neutral state that Odessa was not blockaded during any part of the time during which the cargo ought to have been loaded; & no part of the agreed cargo was contraband of war or requiring special permission for importation; & the cargo might have been loaded notwithstanding the hostilities. On demurrer:—*Held:* the plea was good, as showing a dissolution of the contract before the time for performance had expired, & an impossibility of legally performing the contract, as the shipment of a cargo from an enemy's port, even in a neutral vessel, was an act, *primâ facie* at least, involving a trading & dealing with the enemy, & therefore forbidden by law to a British subject; & if such a shipment could under peculiar facts be legal, it lay on pltf. to show the facts, which on this record he had not done.—ESPOSITO *v.* BOWDEN (1857), 7 E. & B. 763; 8 State Tr. N. S. 807; 27 L. J. Q. B. 17; 29 L. T. O. S. 295; 3 Jur. N. S. 1209; 5 W. R. 732; 119 E. R. 1430, Ex. Ch.; *revsg.* (1855), 4 E. & B. 963.

*Annotations:*—**Apld.** Barrick *v.* Buba (1857), 2 C. B. N. S. 563. **Consd.** Danube & Black Sea Ry. & Kustendjie Harbour Co. *v.* Xenos, Xenos *v.* Danube & Black Sea Ry. & Kustendjie Harbour Co. (1862), 31 L. J. C. P. 284; The Teutonia (1871), L. R. 3 A. & E. 394; Arnhold Karberg *v.* Blythe, Green, Jourdain, Theodor Schneider *v.* Burgett & Newsam, [1916] 1 K. B. 495. **Distd.** Clapham S.S. Co. *v.* Handels-en-Transport-Maatschappij Vulcann of Rotterdam, [1917] 2 K. B. 639. **Consd.** Ertel Bieber *v.* Rio Tinto, [1918] A. C. 260; Naylor, Benzon *v.* Krainische Industrie Gesellschaft, [1918] 1 K. B. 331. **Distd.** Sargant *v.* Paterson (1923), 129 L. T. 471. **Consd.** Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352. **Refd.** Reid *v.* Hoskins (1855), 4 E. & B. 979; Tamvaco *v.* Lucas (1861), 1 B. & S. 185; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484; Jager *v.* Tolme & Runge (1915), 31 T. L. R. 381; British & Foreign Marine Insce. *v.* Sanday, [1916] 1 A. C. 650; Halsey *v.* Lowenfeld, [1916] 2 K. B. 707; Horlock *v.* Beal, [1916] 1 A. C. 486; Millar *v.* Taylor, [1916] 1 K. B. 402; Zinc Corpn. *v.* Hirsch, [1916] 1 K. B. 541; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1; Orconera Iron Ore Co. *v.* Fried Krupp Akt. (1917), 86 L. J. Ch. 613; Stevenson *v.* Akt. Für Cartonnagen Industrie, [1917] 1 K. B. 842; Tingley *v.* Müller, [1917] 2 Ch. 144; Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085; Dynamit Act. *v.* Rio Tinto Co., [1918] A. C. 292; Jebara *v.* Ottoman Bank, [1927] 2 K. B. 254. **Mentd.** Santos *v.* Illidge (1859), 6 C. B. N. S. 841; Porter *v.* Freudenberg, [1915] 1 K. B. 857; Daimler Co. *v.* Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C. (1916), 85 L. J. K. B. 1759; *Re* Badische Co., Bayer Co., etc., [1921] 2 Ch. 331.

**2765. Ship sunk while under convoy.**]—MAZARAKIS BROTHERS *v.* FURNESS, WITHY & CO. (1923), 156 L. T. Jo. 362.

**Ship requisitioned by government.**] — *See* Part XXV., Sect. 3, *post*.

*Compare* INSURANCE, Vol. XXIX., pp. 226–230, Nos. 1836–1861.

### SUB-SECT. 18.—OTHER EXCEPTIONS.

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 2 (*q*).

**2766. "Ship damage."**]—In a charterparty between the co. & the owners of a ship taken into their service, was the following clause: "But nevertheless the said part owners shall not be charged with any sum of money in respect of goods damaged on board the said ship, either in her outward or homeward-bound voyage, but such as shall, by the condition & appearance of the package thereof, or by some other reasonable proof, appear to be ship damage." Part of the homeward-bound cargo was damaged in a storm:—*Held:* this was not ship damage, within the meaning of the clause, which is imputable only to such damage as happens by insufficiency of the ship, or the neglect of those who have the charge of her.—EAST INDIA CO. *v.* TOD (1788), 1 Bro. Parl. Cas. 405; 1 E. R. 652, H. L.

**2767. "Accident."**]—FENWICK *v.* SCHMALZ, No. 2884, *post*.

**2768. Stoppage of navigation.**]—Where it was agreed by charterparty that the charterer should not be liable for delay in loading caused by neaps & stoppage of navigation & the lay days were exceeded in consequence of the lighters which were bringing the cargo (one of salt) down the rivers Weaver & Mersey to Birkenhead, the place of loading, being delayed by neaps of exceptional lowness at the junction of the Mersey & Weaver, & it was proved that it is the invariable practice for all salt intended for foreign exportation to be brought to Birkenhead from the Weaver by water; that there are no storehouses for salt at Birkenhead & that it is never kept there to await the arrival of vessels:—*Held:* the charterer was relieved from liability under the above exceptions, upon the ground that they must be taken to apply to bringing the cargo to Birkenhead for loading purposes.—ALLERTON SAILING SHIP CO., LTD. *v.* FALK (1888), 6 Asp. M. L. C. 287.

*Annotation:*—**Refd.** Smith & Service *v.* Rosario Nitrate Co., [1893] 2 Q. B. 323.

**2769. "Hindrance."**]—Defts. chartered pltf.'s ship to proceed to R. with a cargo "& there, in any anchorage ground as ordered by charterers, to deliver the same . . . where she can safely lie afloat, as may be directed by the said charterers"; all unavoidable accidents or hindrances, in procuring, loading &/or discharging the cargo . . . excepted." When the ship arrived at R. a rebellion was in progress, by which defts.' arrangements for unloading ships were & continued to be seriously disorganised. In an action for demurrage:—*Held:* rebellion constituted an "unavoidable hindrance in discharging the cargo," defts. were not liable.—CRAWFORD & ROWAT *v.* WILSON, SONS & CO. (1896), 12 T. L. R. 170; 1 Com. Cas. 154, 277, C. A.

*Annotations:*—**Consd.** Blythe *v.* Richards, Turpin (1916), 85 L. J. K. B. 1425. **Refd.** Phosphate Mining Co. *v.* Rankin, Gilmour (1916), 86 L. J. K. B. 358; Scheepvaart Maatschappy Gylsen *v.* North African Coaling Co. (1916), 85 L. J. K. B. 1386; Tennants (Lancashire) *v.* Wilson (1917), 23 Com. Cas. 41; Produce Brokers Co. *v.* Weis (1918), 87 L. J. K. B. 472; Stewart *v.* Rank (1920), 36 T. L. R. 728.

**2770.** ——.]—A charterparty provided that a ship should proceed to a port, "or so near thereunto as she may safely get," & deliver her cargo "according to the custom of the A. dock, alongside any craft, steamer, floating depot, wharf or pier." The charterers were not to be liable for demurrage due to "hindrance beyond charterers' control." When the ship arrived at the port the A. dock was full of vessels, & the authorities would not allow her to go to a berth for a considerable time. There was no wharf or pier except in the A. dock, & only a small supply of lighters:—*Held:* the charterers were not liable for demurrage, because it was clear that the discharge could not have been expedited by the use of lighters, & because the delay was due to a "hindrance beyond charterers' control."

The fact that the authorities would not allow the ship to enter the dock was clearly a "hindrance beyond the charterers' control" (MATHEW, J.).—MILVERTON SAILING SHIP CO., LTD. *v.* CAPE TOWN & DISTRICT GAS LIGHT & COKE CO., LTD. (1897), 13 T. L. R. 548; 2 Com. Cas. 281.

*Annotation:*—**Consd.** Larsen *v.* Sylvester (1908), 99 L. T. 94.

**2771. "Heating."**]—THE PEARLMOOR, No. 2678, *ante*.

*Sect.* 4.—*Excepted perils: Sub-sect.* 18. *Sect.* 5: *Sub-sect.* 1, *A., B. & C.* (*a*).]

**2772. Sweating.**]—THE PEARLMOOR, No. 2678, *ante.*

**2773. Decay.**]—THE PEARLMOOR, No. 2678, *ante.*

**2774. Surf.**]—BENNETTS & CO. *v.* BROWN, No. 3976, *post.*

**2775. "Intervention of constituted authority"—Delay caused by railway company.**] —WATSON BROTHERS *v.* MYSORE MANGANESE CO., LTD., No. 3966, *post.*

**2776. Obstruction on railways.**]—In charter-parties the charterer's obligation to have a cargo ready for loading at the place of loading is *primâ facie* an absolute one, & is not affected by clauses of exception as to lay days unless by express language or necessary implication.

A ship was chartered to proceed to one or two safe ports in the River Parana & there load a full cargo. The charterparty provided for a daily loading rate, & it contained the following clause: "If the cargo cannot be loaded by reason of . . . a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstruction or stoppages beyond the control of the charterers on the railways, or in the docks, or other loading places . . . the time for loading . . . shall not count during the continuance of such causes." The ship was ordered to Rosario, & on her arrival the charterers had not provided any cargo ready at the port, but, having decided to load wheat only, had bought a supply of wheat up-country, & this was conveyed to the port by the C. railway, the most important of several up-country railways by which grain was carried to the port. The employees of the C. railway co. carried out a ca' canny strike, which produced a general retardation of the regular traffic, & as a result the charterers had not sufficient wheat forthcoming by railway to load the ship within the lay days apart from the exceptions clause. The port was divided into two sections. In the old section the grain was loaded direct out of the railway wagons of the up-country cos. In the new section a port railway co. owned a railway within the limits of the port, & at the boundary of the port took over with its own locomotives the loaded wagons from the up-country railways for distribution to the various consignees. Shortly after the charterers began to load wheat the Government prohibited the export of wheat: —*Held:* an obstruction, to come within the exceptions clause, must be an obstruction preventing the loading, & not one preventing the bringing of the cargo to the port, & in the context the word "railways" was referable to the railways in the port; there was therefore no obstruction on the railways within the meaning of the clause.—BUNGE Y BORN CO. *v.* BRIGHTMAN (H. A.) & CO., [1925] A. C. 799; 94 L. J. K. B. 840; 133 L. T. 738; 41 T. L. R. 652; 69 Sol. Jo. 795; 16 Asp. M. L. C. 545; 31 Com. Cas. 27, H. L.; *affg.* S. C. *sub nom.* BRIGHTMAN & CO. *v.* BUNGE Y BORN, [1924] 2 K. B. 619, C. A.

*Annotations:*—**Folld.** Bassa (Owners) *v.* Royal Commission on Wheat Supplies (1924), 132 L. T. 634. **Refd.** Lewis *v.* Dreyfus (1926), 31 Com. Cas. 239.

**2777. Inherent vice of goods.**]—(1) Apples were shipped from Hobart to the United Kingdom on board defts.' steamship *N.* under bills of lading, each of which contained the following overriding provision: "This bill of lading is to be read & construed as if every clause therein contained which is rendered illegal or null & void by the Sea-Carriage of Goods Act, 1904, had never been inserted therein or had been cancelled & eliminated therefrom prior to the execution thereof & is issued subject to all the terms & provisions of & to all the exceptions from liability contained in such Act." When the apples, after their arrival in the United Kingdom, were distributed to the trade, extensive damage was found by reason of the fact that a large proportion of the apples were proved to be affected with a species of internal browning. An action was accordingly brought by the indorsees of the bills of lading against the shipowners claiming damages for breach of contract: for negligence & unseaworthiness; & pltfs. alleged that although the apples were good shipping apples, suitable for the voyage in kind, in ripeness & in packing, they were damaged on account of the faulty ventilation of the ship. Defts.' case was that the *N.* was a seaworthy ship & they relied on Sea-Carriage of Goods, 1904, s. 8 (2) (D), as exonerating them:—*Held:* the damage was caused to the apples not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way; this was not the kind of risk

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**PART VII. SECT. 4, SUB-SECT. 18.**

2772 i. *Sweating.*]—HORSLEY *v.* BAXTER BROTHERS & CO. (1893), 20 R. (Ct. of Sess.) 333; 30 Sc. L. R. 387.—**SCOT.**

b. "*Goods at owner's risk.*"]—Pltf. shipped certain cases of fruit by defts.' steamship, under a bill of lading in which, amongst others, was the following clause:—"Fruit, & all kinds of perishable property, to be carried on deck or below, at owner's risk." The goods were lost in a collision occasioned entirely by the negligent navigation of deft.'s servants:—*Held:* deft. was protected from liability by the terms of the bill of lading.—JOYCE *v.* ELLIS (1890), 11 N. S. W. L. R. (L.) 68; 6 N. S. W. W. N. 134.—**AUS.**

c. ——.]—A charterparty contained the usual exceptions of the act of God, the Queen's enemies, fire, & all other dangers & accidents of the seas & navigation of all kinds during the voyage, & also a clause "cargo carried on deck, & live-stock, whether on deck or below, to be at charterer's risk for all loss, including mortality": —*Held:* this clause would not cover the risk of loss or damage arising from the negligence or improper acts or omissions of the master & crew.—FLEMING *v.* RAMSAY (1906), 25 N. Z. L. R 596.—**N.Z.**

d. *Improper & negligent stowage.*]—TRAINOR *v.* BLACK DIAMOND S.S. CO. (1888), 16 S. C. R. 156.—**CAN.**

e. ——.]—Under the law of England, a stipulation in a charterparty, that the owner or charterer of the vessel shall not be liable for damages to the goods carried caused by improper & even negligent stowage, is valid & binding.—CANADA SUGAR REFINING CO., LTD. *v.* FURNESS WITHY CO., LTD. (1905), Q. R. 27 S. C. 502.—**CAN.**

f. *No liability for "insufficiency of address or package."*]—PENINSULAR & ORIENTAL STEAM NAVIGATION CO. *v.* SOMAJI VISHRAM (1868), 5 Bom. O. C. 113.—**IND.**

g. "*Reshipped or re-exported goods.*"]—A clause in a bill of lading exempted the shipowner from liability for any loss in respect of "reshipped or re-exported goods":—*Held:* the reshipment or re-exportation need not be in the course of the voyage covered by the bill of lading.—HAJI SHAKOOR GANI SAIT *v.* B. I. S. N. CO., LTD. (1927), I. L. R. 50 Mad. 804.—**IND.**

h. "*Accidents in landing stock.*"]—UNION S.S. CO. *v.* HOBBS (1894), 12 N. Z. L. R. 98.—**N.Z.**

k. *Clause exempting from "injurious effects of other goods"—Reasonableness of.*]—NEW ZEALAND SHIPPING CO., LTD. *v.* TYREE (1912), 31 N. Z. L. R. 825.—**N.Z.**

l. *Damage to sugar.*]—MOES, MOLIERE & TROMP *v.* LEITH & AMSTERDAM SHIPPING CO. (1867), 5 Macph. (Ct. of Sess.) 988; 39 Sc. Jur. 546.—**SCOT.**

m. "*Detention by railways.*"]—LETRICHEUX & DAIRD *v.* DUNLOP (JAMES) & CO. (1891), 19 R. (Ct. of Sess.) 209; 29 Sc. L. R. 182.—**SCOT.**

n. ——.]—MEIN *v.* OTTMANN (1904), 6 F. (Ct. of Sess.) 276; 41 Sc. L. R. 144.—**SCOT.**

o. ——.]—I. O. co., Ltd., chartered the *Maroon* from G. co. to carry iron ore to Ayr, & there to discharge it as customary, the charterparty exempting the charterers from liability for delay in discharging due to "stoppage on railway," or time lost by any cause "beyond the personal control of the charterers or their agents." The cargo was sold & consigned by the I. O. co. to D. I. co. On arrival at Ayr discharging was delayed by the railway co. refusing, although an ample supply of wagons was available, to allow them to be loaded, owing to it being impossible to get them into D. I. co.'s works, which were blocked with wagons filled with ore from cargoes

which the Act called on the shipowners to bear, & it was well within the words " resulting from . . . inherent quality or vice."

(2) In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative among other things to the state of knowledge & the standards prevailing at the material time (LORD SUMNER).—BRADLEY (F. O.) & SONS, LTD. *v.* FEDERAL STEAM NAVIGATION CO., LTD. (1927), 137 L. T. 266; 27 Lloyd, L. R. 395, H. L.

*Annotations :—As to* (2) **Apld.** Angliss (Australia) Proprietary *v.* P. & O. Steam Navigation Co. (1927), 96 L. J. K. B. 1084. *Generally,* **Refd.** Gosse Millard *v.* Canadian Government Merchant Marine, American Canadian Co. *v.* Same, [1927] 2 K. B. 432.

## SECT. 5.—THE LOADING.

### SUB-SECT. 1.—THE READINESS OF THE SHIP.

#### *A. In General.*

**2778. Duty of shipowner—To bring ship to port of loading.**]—ATKINSON *v.* BUCKLE (1615), 3 Bulst. 152; 1 Roll. Rep. 312; Jenk. 324; 81 E. R. 130.

**2779.** —— ——.]—MOEL TRYVAN SHIP CO., LTD. *v.* WEIR (ANDREW) & CO., No. 1865, *ante.*

**2780.** —— ——.]—Defts. contracted with pltfs. that a specified ship should be at Northfleet on May 25, 1916, to receive a consignment of cement from barges belonging to pltfs. for conveyance to Buenos Aires. Pltfs. sent their barges with the cement to Northfleet on the named date; but defts.' ship was not there then, & on the following day the ship was sunk at sea through no default of defts. The cement was subsequently taken on board another ship, but before it could be loaded pltfs.' barges had been detained at Northfleet for several days. Pltfs. claimed damages for the detention of the barges :—*Held :* defts. had broken their contract by not having the ship at Northfleet on the date fixed, but the contract came to an end on the following day when the ship was sunk, & pltfs. were therefore only entitled to damages for detention of the barges from the time of the breach of contract to the time of the sinking of the ship.—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LTD. *v.* HOULDER BROTHERS & CO., LTD. (1917), 86 L. J. K. B. 1495; 118 L. T. 94; 14 Asp. M. L. C. 170; 22 Com. Cas. 279.

**2781. Promise of shipowner to provide ship—Interdependent on shipper's promise to provide cargo.**]—VERGOTTIS *v.* CORY (WILLIAM) & SON, LTD., No. 3899, *post.*

**2782.** —— **Ship to be nominated—Whether nomination confined to ships of owner.**]—(1) In 1913 defts., steamship owners, contracted to provide a steamship, to be nominated in Aug.-Sept. 1915, to carry phosphate from Florida to Delfzyl, in Holland, up the river Ems. The exceptions clause included " public enemies & restraint of princes." In Aug.-Sept. 1915, during the continuance of a state of war between Great Britain & Germany, the Germans had assumed full control of the fairways of the Ems. All vessels bound for Delfzyl were boarded by them & compelled to take a German pilot. The ship's papers were overhauled or liable to be overhauled, & the channel was mined. Freights had risen since 1913 from about 13*s.* 6*d.* to three or four times as much. Defts. in these circumstances refused to tender a vessel, maintaining that they need only nominate one of their own vessels &, having done so, to rely upon the exceptions clause in the contract as they were prevented from performing the contract by " public enemies & restraint of princes." Pltfs., in an action for breach of the contract, argued that the exceptions clause did not come into operation until a steamer was nominated :—*Held :* as the deft. contracted not as owners, but as contractors, it was not sufficient for them merely to nominate one of their own vessels & not to try to procure another steamer in the market; but on the other hand, it was not necessary that a steamer should have been nominated for the exceptions clause to come into operation, since such a conclusion would leave defts. without excuse if the operation of the exception were such that it was impossible to procure any steamer which could, or would, undertake the voyage.

(2) The German control of the Ems shut out from the market not only defts.' own steamers, but also the ships of Great Britain & her allies, amounting probably to more than three-quarters of the tonnage available but for the excepted peril. Neutral shipowners would have been very reluctant of getting their ships under German control when proceeding under an English charterparty, & the cargo would probably have been seized by the Germans with the result that no freight would have been earned. The rate of insurance, if insurance had been possible, would have been extremely high. Defts. would have had to prepay the freight, or pay the premium, or run the risk themselves, or to have paid the shipowner such a freight as would have enabled him to cover the risk or induce him to run it :—*Held :* even leaving out of consideration the general & enormous rise in freights, it would be wholly unreasonable to expect defts. to pay large sums of money, or to run big risks, or both, in order to deprive themselves of the protection of an exception inserted in the contract on their behalf.—PHOSPHATE MINING CO. *v.* RANKIN, GILMOUR & CO. (1916), 86 L. J. K. B. 358; 115 L. T. 211; 13 Asp. M. L. C. 418; 21 Com. Cas. 248.

*Annotation :—***Refd.** Stewart *v.* Bank (1920), 36 T. L. R. 728.

#### *B. Proceeding to Port of Loading.*

*See* Sect. 2, sub-sect. 7, B., *ante.*

#### *C. Arrival at Port of Loading.*

##### *(a) In General.*

**2783. What constitutes arrival—Arrival at specified loading place.**]—(1) By a charterparty it was provided that a ship should proceed to Santander, excluding San Salvador old tip " to a loading

previously arrived. In an action for demurrage by the shipowners against the charterers :—*Held :* the delay was due not to a " stoppage on railway " but to the fault of D. I. co., & that was a cause " beyond the personal control of the charterers & their agents," & the charterers were accordingly exempted from liability.—GLASGOW NAVIGATION CO., LTD. *v.* IRON ORE CO., LTD., [1909] S. C. 1414; 46 Sc. L. R. 908; [1909] 2 S. L. T. 133.—**SCOT.**

p. " *Stoppage at collieries.*"]—ARDEN S.S. CO., LTD. *v.* MATHWIN & SON, [1912] S. C. 211; 49 Sc. L. R. 143.—**SCOT.**

q. " *Hindrance beyond charterer's control.*"]—An exception in the case of " hindrance beyond the charterer's control " will not avail as a defence to a claim for demurrage where the charterers have been unable to obtain facilities for landing cargo in the manner customary at the port owing to circumstances & difficulties of the existence of which they effect discharge within a definite period.—HALVORSEN *v.* SOUTH AFRICAN LIGHTING ASSOCN., LTD., [1909] 16 E. D. C. 58.—**S. AF.**

r. " *Defective packing.*"]—KOCH *v.* UNION-CASTLE S.S. CO., LTD., [1913] E. D. L. 286.—**S. AF.**

**PART VII. SECT. 5, SUB-SECT. 1.—C. (a).**

t. *What constitutes arrival — Ship placed at disposal of charterer.*]—The loss to a ship through an unexpected detention by quarantine on arriving at the port of loading falls upon the shipowner, even when the charterparty binds the charterer to load within a

*Sect. 5.—The loading: Sub-sect. 1, C. (a) & (b), D. (a).]*

place as ordered " & there take on board a cargo :—*Held :* the ship could not be taken as an arrived ship for the purpose of the commencement of the lay days until she had arrived at the loading place as ordered, & arrival at Santander was not sufficient.

(2) A shipowner who has a lien on the cargo for freight or demurrage, when he has the opportunity of unloading the cargo, cannot keep the cargo on the ship & then claim for the detention of the ship. —(MODESTO) PINEIRO & CO. *v.* DUPRE & CO. (1902), 86 L. T. 560 ; 9 Asp. M. L. C. 297 ; 7 Com. Cas. 105 ; 18 T. L. R. 351.

*Annotation :—As to* (1) **Refd.** Larsen *v.* Sylvester (1908), 99 L. T. 94.

**2784. Notice of arrival.**]—In an action by a shipowner against the charterers for not loading a cargo of coals pursuant to a charterparty by the terms of which the owner engaged that the vessel, then in the port of Sunderland, being tight, etc., should with all possible dispatch proceed direct to the South Dock, Sunderland, & there load, in the usual & customary manner, at any one of the collieries the freighters might name, a full cargo of coals, etc., which the freighters bound themselves to ship by a given day, for Calcutta, defts. pleaded that they had not any notice of the ship having proceeded to & having arrived at the South Dock, & of her being ready to receive cargo, wherefore they did not nor could ! ad :—*Held :* the allegation in the plea must be treated as an allegation of fact, meaning that by reason of want of notice of the ship's arrival at the dock & being ready to load, defts. were prevented loading her ; & so read, the plea was an answer to the action.—STANTON *v.* AUSTIN (1872), L. R. 7 C. P. 651 ; 41 L. J. C. P. 218.

*Annotation :*—**Refd.** Davies *v.* McLean (1873), 21 W. R. 264.

**2785.** ——.]—GORDON *v.* POWIS (1892), 8 T. L. R. 397.

**What is an " arrived ship "—Calculation of demurrage.**]—*See* Sect. 8, sub-sect. 2, B., *post.*

*(b) " So Near thereto as She may Safely Get."*

**2786. Meaning of provision.**]—The stipulation in a charterparty that a vessel shall proceed to a certain place, or as near thereto as she can safely get, & there load a full cargo, means a place to which she can safely get, & from which, when loaded, she can safely get away.

Under the terms of a charterparty, pltf.'s ship was to proceed to B., or as near thereto as she could safely get, & to load from deft.'s agent a full cargo of timber. The vessel proceeded within the harbour at B., & there received a portion of the cargo, but owing to want of water she was then taken without the bar, but as near as she could safely get, where it was requested that the rest of the cargo should be delivered, which was refused : —*Held :* pltf. had complied with the charterparty, & deft. was liable for such refusal.—SHIELD *v.* WILKINS (1850), 5 Exch. 304 ; 19 L. J. Ex. 238 ; 155 E. R. 130.

*Annotations :*—**Consd.** General Steam Navigation Co. *v.* Slipper (1862), 11 C. B. N. S. 493. **Distd.** Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38. **Apld.** The Alhambra (1881), 6 P. D. 68. **Consd.** Nielsen *v.* Wait (1885), 14 Q. B. D. 516. **Refd.** Reynolds *v.* Tomlinson (1896), 65 L. J. Q. B. 496.

**2787. Application of provision—Obstacles affecting arrival or departure—At & from port of loading.**]—SHIELD *v.* WILKINS, No. 2786, *ante.*

**2788.** —— —— ——.]—Defts. agreed by a charterparty that the ship should proceed to Galatz, or as near thereto as she could safely get, & there load a cargo, the act of God, etc., & every other dangers & accidents of the seas, rivers, & navigation during the voyage excepted. The ship arrived on Nov. 5, off the mouth of the Danube. At that time, & until Jan. 7, following, the water was unusually low on the bar & the ship was unable to cross. On Dec. 11 she was obliged by stress of weather to go to Odessa as the nearest safe port, where she afterwards took in a cargo & sailed for England. On & after Jan. 7 there was sufficient water in the port for the ship to have crossed & to have gone up to Galatz & there shipped a cargo :—*Held :* under these circumstances, there was a breach of the charterparty, & defts. were not justified in putting an end to the contract by any of the excepted causes.—SCHILIZZI *v.* DERRY (1855), 4 E. & B. 873 ; 3 C. L. R. 1160 ; 24 L. J. Q. B. 193 ; 25 L. T. O. S. 66 ; 1 Jur. N. S. 795 ; 3 W. R. 374 ; 119 E. R. 324.

*Annotations :*—**Apld.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613. **Consd.** The Alhambra (1880), 5 P. D. 256 ; Dahl *v.* Nelson, Donkin (1881), 6 App. Cas. 38. **Distd.** Horsley *v.* Price (1883), 11 Q. B. D. 244. **Refd.** General Steam Navigation Co. *v.* Slipper (1862), 5 L. T. 641 ; Gibson *v.* Hillstrom (1869), 21 L. T. 302 ; Nielsen *v.* Wait (1885), 14 Q. B. D. 516.

**2789.** —— —— ——.]—By the terms of a charterparty, pltf.'s ship, a steam vessel, was to proceed to H., to be there ready to load by a given day, or so near thereunto as she might safely get, & there load from the factors of the merchant such quantity of oxen, sheep, &/or other lawful produce which the merchant might find it convenient to ship, not exceeding what she could reasonably stow & carry over & above her tackle, etc., &, being so loaded, was to proceed therewith to London, & deliver the same on being paid freight a lump sum of £450. Two working days were allowed for loading & discharging, & three days on demurrage. The cargo to be taken to & from alongside at the merchant's risk & expense. Arrived at H., the vessel went alongside the jetty, & received on board a number of barrels of hams & 300 head of live stock, for which the captain signed bills of lading. Being thus laden, the vessel was found to draw too much water to get over the bar, & the captain was consequently obliged to take out all the stock. He then proposed to the charterer's agent to stow on board so many of the cattle as would enable him to pass over the bar, & to remain outside & there take in the remainder at the charterer's expense & risk. The agent declined to accede to this, & refused to put any of the cattle again on board, unless the captain would take all. Being unable to come to terms, the captain proceeded on his voyage with only the hams on board :—*Held :* under these circumstances, the owners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo ; for although the captain was not obliged to go within the bar at all, yet, having chosen to do so, & having received the cargo on board, & signed bills of lading, he was bound to find his way to his destination.—GENERAL STEAM NAVIGATION CO. *v.* SLIPPER (1862), 11 C. B. N. S.

fixed period after the ship's arrival, in respect that the ship cannot be regarded as having arrived at the port of loading until it is placed by the shipowner at the disposal of the charterer. —WHITES, ETC. *v.* THE WINCHESTER (1886), 13 R. (Ct. of Sess.) 524 ; 23 Sc. L. R. 342.—**SCOT.**

**PART VII. SECT. 5, SUB-SECT. 1.—C. (b).**

**2787 1.** *Application of provision—Obstacles affecting arrival or departure—At & from port of loading.*]—GIFFORD & CO. *v.* DISHINGTON & CO. (1871), 9 Macph. (Ct. of Sess.) 1045 ; 43 Sc. Jur. 554.—**SCOT.**

*a. Ship unable to enter port or lie there without previous lightening—" Safe port or as near thereunto as she may safely get always afloat."*]—GRAHAM & CO. *v.* MERVANJI NUSSERVANJI (1881), I. L. R. 5 Bom. 539.—**IND.**

493; 31 L. J. C. P. 185; 5 L. T. 641; 8 Jur. N. S. 821; 10 W. R. 316; 1 Mar. L. C. 180; 142 E. R. 888.

*Annotation:*—**Reld.** Carlton S.S. Co. *v.* Castle Mail Packets Co. (1897), 66 L. J. Q. B. 819.

**2790.** —— —— ——.] — DAHL *v.* NELSON, DONKIN & Co., No. 3471, *post.*

**2791.** —— —— ——.]—If a ship is prevented from going to the loading place which the charterer has a right to name by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load & would but for such obstacles or engagements begin to load at such place.

By a charterparty a ship was to proceed to B., or so near thereto as she could safely get, & there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent might direct, a certain cargo. Owing to her draught the ship could not have loaded fully at the berth at the jetty, but according to the custom of the port she would be moved when partly loaded from the jetty to an anchorage to complete loading:—*Held:* the lay days did not begin to run until the ship was at the jetty or anchorage the charterers' agent directed, & the fact that she could not fully load there made no difference & did not prevent the charterers requiring her to come to the jetty & claiming that the lay days did not commence until she was at the jetty.—AKT. INGLEWOOD *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD. (1903), 88 L. T. 559; 19 T. L. R. 405; 9 Asp. M. L. C. 411; 8 Com. Cas. 196.

**Arrival for purposes of unloading.**]—*See* Sect. 7, sub-sect. 1, B. (*b*), *post.*

*D. Fitness to Receive Cargo.*

*(a) In General.*

**2792. Seaworthiness—Duty of shipowner.**]—TOWSE *v.* HENDERSON, No. 1911, *ante.*

**2793.** —— ——.]—STEEL *v.* STATE LINE S.S. Co., No. 2693, *ante.*

**2794.** —— ——.]—A bill of lading of skeepskins exempted the shipowners from liability (*inter alia*) "for loss or damage resulting from the consequence of any injury to or defect in hull, tackle, or machinery . . . however such defect or injury may be caused & notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel . . . & whether . . . the loss or injury arising therefrom be occasioned by the . . . negligence of the . . . owners, masters, officers . . . crew, & whether before, or after, or during the voyage or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Some of the sheepskins were damaged by fresh water which escaped from a pipe which was broken at the time when the cargo was loaded.

In an action by the indorsees of the bill of lading against the shipowners for the damage to the sheepskins, defts. admitted that the vessel was not fit to receive cargo at the time when the sheepskins were loaded, & that reasonable means had not been taken to provide against that unfitness, but defts. claimed exemption from liability under the terms on the bill of lading:—*Held:* the clause relating to unseaworthiness did not create an additional exception, but was a qualification of the prior exceptions; it included unfitness of the ship to receive the cargo; & as the shipowners had not taken reasonable means to provide against that unfitness, they were liable for the loss.

*Primâ facie* the term "unseaworthiness" in a bill of lading includes unfitness of the ship to carry the cargo as well as unfitness to encounter the perils of navigation.

With reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations which will always bind him, unless there are in the contract clear & express words which without ambiguity relieve him from that which I may call his common law obligations (VAUGHAN WILLIAMS, L.J.).

Shipowners have been for a long time endeavouring to limit the general liability cast upon them by law as carriers by sea by inserting special exceptions without going the length of excepting their liability in respect of the warranty of seaworthiness & they have been, as I understand, from time to time extending the special exceptions. I think, however, I am right in saying that as a principle of construction the warranty of seaworthiness will be held not to have been excepted unless it plainly appears that it was intended to except it (ROMER, L.J.).—RATHBONE BROTHERS & Co. *v.* MACIVER (D.) SONS & Co., [1903] 2 K. B. 378; 72 L. J. K. B. 703; 89 L. T. 378; 52 W. R. 68; 19 T. L. R. 590; 47 Sol. Jo. 653; 9 Asp. M. L. C. 467; 8 Com. Cas. 303, C. A.

*Annotations:*—**Apld.** Borthwick *v.* Elderslie S.S. Co., [1904] 1 K. B. 319. **Consd.** The West Cock, [1911] P. 208.

**2795.** —— **Vessel in leaky state.**]—BREED *v.* YATES (1839), 8 L. T. 802.

**2796.** —— **Defective valve chest.**] — (1) The warranty, which is *primâ facie* implied in a contract for the carriage of goods by sea, that the ship is fit for the reception of the cargo, is an absolute warranty; & the incorporation in the bill of lading of the provisions of the Act of Congress known as the Harter Act does not cut down the obligation of the shipowner in that respect to an obligation to exercise due diligence to make the ship fit for that purpose.

The above warranty is a warranty only as to the condition of the ship at the time of loading; it does not continue in force after the goods are once on board.

(2) Defts. received on board their ship for carriage certain goods of pltf. After the goods were on board the ship's engineer had occasion to open a sluice-door in a watertight bulkhead in the lower part of the ship. He shortly afterwards shut the sluice-door, but failed to screw it down so closely as to make it water-tight. He subsequently proceeded to fill one of the ballast tanks, for which purpose he opened a sea-cock in the ship's side to allow the water to flow in. The water, on its way from the sea-cock to the ballast tank, passed through a valve-chest, the joint between the lid & body of which had been packed in the ordinary way with cotton to make it watertight.

**PART VII. SECT. 5, SUB-SECT. 1.—D. (a).**

**2795.** *Seaworthiness—Vessel in leaky state.*]—ROBERT & CHARRIOL *v.* ISAAC (1870), 6 B. L. R. App. 20.—**IND.**

*b. Vessel not ready in reasonable time.*]—BROWN *v.* LAMONT (1871), 32 U. C. R. 167.—**CAN.**

*c. Construction of words.*] — The words "ready to receive cargo" inserted in a shipping order mean that the ship, on the day named in the shipping order, shall be ready to receive a full cargo by whomsoever offered, & not merely ready to receive the *quantum* of cargo mentioned in the shipping order.—TAYLOR *v.* BROOKE (1864), 1 Bom. A. C. App. XLVIII.—**IND.**

*d. Receipt of excessive quantity of freight—Precluding reshipment of goods within reasonable time.*]—Where the following clause in a bill of lading

*Sect. 5.—The loading: Sub-sect. 1, D. (a) & (b), & E. (a).]*

This joint had been remade shortly before the pltf.'s goods were put on board, & it had been imperfectly done. When the tank was full the engineer screwed down the sea-cock, but, owing to the accidental presence of some hard substance, the screw-valve was prevented from bedding down closely on to its seating & the sea-cock was left partially open, with the result that the continued pressure of the water forced out the defective packing of the valve-chest, & the water flowed through the joint down into the lower part of the ship where it passed through the sluice-door into the cargo hold & damaged the pltf.'s goods:—*Held:* the defective fitting of the sea-cock & of the sluice-door, being defects which came into existence after pltf.'s goods were loaded, were not breaches of the implied warranty of the fitness of the ship to receive the cargo; but the defective packing of the valve-chest, being an existing defect at the time of the loading of the goods, was a breach of the warranty.

Whether a particular defect is sufficiently substantial to amount to a breach of the warranty must in all cases be a question of fact; but it is a question of fact which must be determined by certain rules. The rule applicable to the present case is that a vessel must have that degree of fitness which an ordinary careful & prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, & ignorance is no excuse. If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking (CHANNELL, J.).—MCFADDEN *v.* BLUE STAR LINE, [1905] 1 K. B. 697; 74 L. J. K. B. 423; 93 L. T. 52; 53 W. R. 576; 21 T. L. R. 345; 10 Asp. M. L. C. 55; 10 Com. Cas. 123.

*Annotations:—As to* (1) **Apld.** Hordern *v.* Commonwealth & Dominion Line, [1917] 2 K. B. 420. **Consd.** Royal Exchange Assce. *v.* Kingsley Navigation Co., [1923] A. C. 235. *As to* (2) **Consd.** New York & Cuba Mail S.S. Co. *v.* Eriksen & Christensen (1922), 27 Com. Cas. 330; The Christel Vinnen, [1924] P. 61; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522; Reed *v.* Page & East, [1927] 1 K. B. 743. **Refd.** The Northumbria (1906), 95 L. T. 618.

—.]—*See, generally,* Sect. 6, sub-sect. 1, *post.*

**2797. Defective refrigerating machinery.**]—A cargo of frozen meat was shipped on board a steamship at Melbourne, in Australia, for carriage to London. The ship was fitted with refrigerating machinery. The bill of lading was headed "Refrigerator bill." It described the cargo as consisting of 4,553 carcases of hard frozen mutton, & stated that they were shipped in apparent good order & condition, & were to be delivered in London in the like good order & condition, subject to the exceptions thereinafter mentioned. The bill of lading contained the following clause: "Steamer shall not be accountable (*inter alia*) for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances. . . . ." In an action by the shippers against the shipowners for damages for injury to the cargo, by reason of the breaking down of the refrigerating machinery during the voyage:—*Held:* the bill of lading contained an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in good condition to Europe, & the exceptions applied only to what might happen during the voyage, & not to the original fitness of the machinery.—THE MAORI KING (CARGO OWNERS) *v.* HUGHES, [1895] 2 Q. B. 550; 65 L. J. Q. B. 168; 73 L. T. 141; 44 W. R. 2; 11 T. L. R. 550; 39 Sol. Jo. 688; 8 Asp. M. L. C. 65; 14 R. 646, C. A.

*Annotations:* — **Apld.** Queensland National Bank *v.* Peninsular & Oriental Steam Navigation Co., [1898] 1 Q. B. 567; Rathbone *v.* MacIver, [1903] 2 K. B. 378; Rowson *v.* Atlantic Transport Co., [1903] 1 K. B. 114. **Consd.** The West Cock, [1911] P. 208. **Refd.** Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**2798.** ——.]—NELSON LINE (LIVERPOOL), LTD. *v.* NELSON (JAMES) & SONS, LTD., No. 3056, *post.*

**2799.** —— **Defective boilers—Repudiation of contract by charterers.**]—Defts. chartered a steamer from pltfs. upon the terms of a charterparty which provided (*inter alia*) that the steamer "being tight, staunch & strong & in every way fitted for the intended voyage . . . shall load . . . in Buenos Aires. . . . Should the steamer not be ready to load by 6 p.m. on Nov. 25, 1920, charterers shall have the option of cancelling this charterparty. The steamer reached her loading place at Buenos Aires on Nov. 25, 1920, & at 7 p.m. on that day the master gave notice of readiness to load. At the time when notice of readiness to load was given the steamer's boilers required repair, & there was no prospect of the repairs being completed for at least ten days, until the repairs had been completed & the boilers tested, a certificate of seaworthiness could not have been obtained. The charterers refused to load the ship under the charterparty, & cancelled the charterparty under the cancelling clause. The question whether the charterers were entitled to do so was referred to arbitration & the umpire decided in their favour, subject to the opinion of the court upon a case stated. On argument of the case:—*Held:* upholding the award, the charterers were entitled to refuse to load on the ground that the steamer was unseaworthy, & not, as provided by the charterparty, "tight, staunch & strong & in every way fitted for the intended voyage" at the time when the chartered service began, & there was no reasonable certainty when she would be ready for the intended voyage by the time the loading was finished.—NEW YORK & CUBA MAIL S.S. CO. *v.* ERIKSEN & CHRISTENSEN (1922), 27 Com. Cas. 330.

**2800. Failure to clean.**]—Frozen meat shipped for carriage from Melbourne to London arrived tainted with carbolic acid, with which the ship had been disinfected before shipment. The bill of lading contained two exception clauses. The first exempted the shipowner from liability for damage to goods whether arising from a defect existing at the time of the shipment or not, or from the neglect of the master or crew, or from any other cause whatsoever. The second clause also exempted the shipowner from liability for damage from defects, etc., "if reasonable means have been taken to provide against such defects & unseaworthiness":—*Held:* upon the true construction of the bill of lading the generality

occurred:—"In case the whole or any part of the goods specified herein be prevented from any cause from going in said steamer, the shipowners are only bound to forward them by the succeeding steamer of this line, & incur no further penalty":—*Held:* under such a clause the carriers would not be justified in receiving for carriage by their ship such an excessive of freight as to preclude themselves from the ability to re-ship the shippers' goods within a reasonable time.—GIBB *v.* ALLAN (1883), 6 Nfld. L. R. 499.—NFLD.

of the first clause was qualified by the second clause, & reasonable care not having been taken in cleansing the ship before shipment, the shipowner was liable for the damage in an action brought by an indorsee of the bill.—ELDERSLIE S.S. Co. *v.* BORTHWICK, [1905] A. C. 93; 74 L. J. K. B. 338; 92 L. T. 274; 53 W. R. 401; 21 T. L. R. 277; 10 Asp. M. L. C. 24; 10 Com. Cas. 109, H. L.; *affg.* S. C. *sub nom.* BORTHWICK *v.* ELDERSLIE S.S. Co., [1904] 1 K. B. 319, C. A.

*Annotations:*—**Apld.** Nelson Line (Liverpool) *v.* Nelson, [1908] A. C. 16. **Consd.** South American Export Syndicate *v.* Federation Steam Navigation Co. (1909), 100 L. T. 270; Wiener *v.* Wilsons & Furness-Leyland Line (1910), 102 L. T. 716; Ingram & Royle *v.* Services Maritimes du Tréport, [1913] 1 K. B. 538; Mitsui *v.* Watts, Watts, [1916] 2 K. B. 826. **Refd.** Chartered Bank of India, Australia & China *v.* British India Steam Navigation Co., [1909] A. C. 369; Rosin & Turpentine Import Co. *v.* Jacobs (1909), 101 L. T. 56; The West Cock, [1911] P. 23; Morrison *v.* Shaw, Savill & Albion Co., [1916] 1 K. B. 747; Denholm *v.* Shipping Controller (1920), 124 L. T. 378; Atlantic Shipping & Trading Co. *v.* Dreyfus, [1922] 2 A. C. 250; Ambatielos *v.* Anton Jurgens Margarine Works, [1923] A. C. 175; Layton *v.* General Steam Navigation Co. (1923), 130 L. T. 662; Brightman *v.* Bunge y Born, [1924] 2 K. B. 619; Alison *v.* Wallsend Slipway & Engineering Co. (1926), 43 T. L. R. 104; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Mentd.** The Forfarshire, [1908] P. 339; Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714; Aron *v.* Comptoir Wegimont, [1921] 3 K. B. 435; Szymonowski *v.* Beck, [1923] 1 K. B. 457; Lancaster *v.* Turner, [1924] 2 K. B. 222; Lake *v.* Simmons, [1926] 1 K. B. 366.

**Fitness for carriage of animals.**]—*See* ANIMALS, Vol. II., p. 300, Nos. 689, 692.

*See, also,* Sect. 2, sub-sect. 6, F., *ante.*

### (*b*) "*Always Afloat.*"

**2801. Application of provision.**]—THE CURFEW, No. 1702, *ante.*

**2802.** ——.]—A charterparty provided that a ship should proceed to a named dock & "there load in the customary manner, Sundays & holidays excepted, always afloat as & where ordered by the charterers, a cargo of rails." The depth of water in the dock varied with the tides & was sufficient at spring tides, but not at neap tides, for a ship of the size of the chartered vessel to load there always afloat, & this was within the knowledge of the owners & of the charterers. The ship having arrived in the dock the charterers ordered her to a berth where the loading began & continued for several days; then the water began to fall, & to avoid taking the ground the ship was compelled to leave the dock. After several days she returned with the spring tides & completed her loading. The shipowners having sued the charterers for demurrage or damages:—*Held:* the charterers were not bound to do that which, as was known to the shipowners, might be physically impossible, namely, order the ship when she arrived to a berth where she could then load continuously always afloat, & they were not responsible for delay occasioned by natural & physical causes beyond their control.

The charterparty does not contain any provision to the effect that the ship shall "lie afloat." . . . It merely provides that she is to "load in the customary manner, always afloat." These words, according to their natural meaning, go no further than to impose a qualification of the charterer's right to load, by negativing his right to put cargo on board except at times when the ship is afloat (LORD WATSON).

There is no such thing as reasonable time in the abstract. The question is whether, having regard to all the obligations of the contract . . . more than a reasonable time has been taken in the performance of any one of these obligations in respect of which the parties have not, by their contract, expressed any limit of time for its performance (LORD HERSCHELL).—CARLTON S.S. Co. *v.* CASTLE MAIL PACKETS Co., [1898] A. C. 486; 67 L. J. Q. B. 795; 78 L. T. 661; 47 W. R. 65; 14 T. L. R. 469; 8 Asp. M. L. C. 402; 3 Com. Cas. 207, H. L.

*Annotations:*—**Consd.** Akt. Inglewood *v.* Millar's Karri & Jarrah Forests (1903), 88 L. T. 559. **Refd.** Barque Quilpué *v.* Brown, [1904] 2 K. B. 264; Darling *v.* Raeburn, [1907] 1 K. B. 846; Jardine, Matheson *v.* Clyde Shipping Co., [1910] 1 K. B. 627.

**2803.** ——.]—AKT. INGLEWOOD *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD., No. 2791, *ante.*

### *E. Readiness to Load.*

### (*a*) *In General.*

**2804. Whether readiness condition precedent.**]—By a memorandum of charter between pltf., the captain & part owner, & defts., merchants, it was agreed that the ship should load in the London Dock, & there receive & take on board all such lawful goods as might be required by the charterers, & should therewith proceed to Geelong, & there deliver the cargo agreeably to the bills of lading; that the captain should attend daily at the broker's office to sign bills of lading as customary; that the whole of the ship should be at the disposal of the charterers for the conveyance of goods & specie, excepting cabin & room for officers, crew, & stores; that, if gunpowder were shipped, the same was to be taken on board where ordered below Blackwall, as customary, etc.: in consideration whereof the charterers agreed to pay freight for use & hire of the ship £1,400 with a gratuity of 25 guineas to the master, payable before leaving London: the freight to be paid as follows: so much as might be payable in the colony by bills of lading, to the extent of £800, to be taken & received in part payment, & balance £600 in cash, less seventy days' discount from the date of clearing from London: forty running days were to be allowed the charterers, Sundays & holidays excepted, if the ship were not sooner dispatched, for loading the said ship, to commence from date of her being ready at her loading berth to receive cargo: the owner further engaged that the ship should be ready to sail for her destined port at the expiration of the said laying days, or sooner if required by the charterers: if the ship were not ready either on the owner's or charterers' part at above-named dates, then demurrage to be paid by the party in default, at the rate of £7 *per diem:* the ship to be ready on or before Nov. 10, or charterers to have the option of cancelling that agreement: penalty for non-performance of the agreement £1,400: should bills of lading not represent £800 payable in Geelong to cover the balance due, then the difference to be paid in cash before sailing from London. By a memorandum in the margin of the charterparty, the charterers were to have the option of shipping acids on deck to the extent of 5 tons measurement at shippers' risk, to which effect a clause was to be inserted in bills of lading:—*Held:* (1) the £600 & the 25 guineas being by the terms of the contract payable on the sailing of the ship, when that event happened those sums were payable

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**PART VII. SECT. 5, SUB-SECT. 1.—E. (a).**

**2805.** *Meaning of readiness—Ship in ballast.*]—A charterparty provided that the vessel was to receive cargo at Quebec, "on or before Aug. 10 next, or this charter is cancelled." The vessel arrived in port in ballast only on the morning of the 10th, & no ballast was discharged on that day. On the same afternoon the ship's agent notified the ship's charterer by protest that the ship was ready for loading, & demanded a cargo, which the latter refused to give,

*Sect. 5.—The loading: Sub-sect. 1, E. (a) & (b).*]

on request, & were recoverable upon common *indebitatus* count; & that the captain, who was a part owner, & with whom & in whose name the contract was made, might sue upon it alone; (2) the stipulation for the payment of the £600 was an independent stipulation, & the things to be done by pltf. before the clearing out of the ship were not conditions precedent to his right to sue for that sum; (3) the stipulation that the captain should attend daily at the broker's office to sign bills of lading, was not a condition precedent to pltf.'s right to sue for the stipulated freight; (4) the stipulation that the ship should be ready (for loading) on or before Nov. 10, was a condition precedent; (5) the demurrage clause was not applicable to the case of a delay caused by the captain's refusal to receive on board goods which he *bonâ fide* but erroneously supposed that he was not bound to receive; (6) the charterers were not entitled to set off or deduct from pltf.'s claim in respect of the £600 freight, the expenses incurred by them in consequence of such refusal of the captain.—SEEGER *v.* DUTHIE (1860), 8 C. B. N. S. 45; 30 L. J. C. P. 65; 3 L. T. 478; 7 Jur. N. S. 239; 9 W. R. 166; 1 Mar. L. C. 3; 141 E. R. 1081, Ex. Ch.

*Annotations:—As to* (2) **Refd.** MacAndrew *v.* Chapple (1866), L. R. 1 C. P. 643. *As to* (4) **Refd.** Behn *v.* Burness (1863), 2 New Rep. 184. *Generally,* **Refd.** Corkling *v.* Massey (1873), L. R. 8 C. P. 395.

**2805. Meaning of readiness—Whether fitness included.**]—VAUGHAN *v.* CAMPBELL, HEATLEY & Co. (1885), 2 T. L. R. 33, C. A.

*Annotations:*—**Consd.** Sailing Ship Lyderhorn Co. *v.* Duncan Fox, [1909] 2 K. B. 929. **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**2806. —— Whether ship to be moored at quay.**]—In an action for damages for loss of freight & for demurrage, it was proved that defts., who carried on business at O., made a contract with the agent of pltf. in L., in the form of a letter signed by defts. & containing these clauses: "Steamer to load end of Nov. or early Dec.

Charterers having the option of cancelling if she is not ready to receive cargo by Dec. 12 next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us."

Defts. had made contracts with merchants at O. for loading the vessel, the merchants having the power of cancelling if the vessel was not ready to load on Dec. 12, & the vessel was not to be considered ready to load until moored alongside the quay. Pltf. had no notice of these contracts.

The vessel arrived at O. on Dec. 10, & her stern having been fastened to the breakwater, the captain gave defts. notice that he was ready to receive cargo, but the merchants refused to take notice that the vessel was "ready to receive cargo," until she was moored alongside the quay, which could not be done before Dec. 18. Meantime the merchants cancelled their contracts with defts., & the vessel was loaded at a lower rate of freight than that specified in the contract:—*Held:* (1) defts. were liable as principals, as they had contracted in their own names without any qualifications; (2) pltf. was entitled to recover damages for the loss of freight, as the vessel was "ready to receive cargo" within the meaning of the contract, although not moored alongside the quay, & the matter was not affected by an alleged custom at the port of O., that a vessel was not to be considered "ready to receive cargo" until moored alongside the quay; (3) pltf. was not entitled to damages for demurrage of detention of the vessel after Dec. 12 as the contract came to an end on that date.—HICK *v.* TWEEDY & Co. (1890), 63 L. T. 765; 7 T. L. R. 144; 6 Asp. M. L. C. 599.

*Annotations:—As to* (2) **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545. *Generally,* **Refd.** Akt. Nordiska Lloyd *v.* Brownlie (Hull) (1925), 41 T. L. R. 294.

**2807. —— Vessel in quarantine.**]—GRAMPIAN S.S. Co., LTD. *v.* CARVER & Co. (1893), 9 T. L. R. 210.

*Annotation:*—**Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**2808. —— Steamer in dock—Though not at loading berth.**]—RAYNER *v.* REDERIAKT. CONDOR, No. 3912, *post.*

**2809. —— All holds empty.**]—A ship to be "ready to load" must be completely ready & discharged in all her holds, so as to give the charterer complete control of every portion of the ship available for cargo.—GROVES, MACLEAN & Co. *v.* VOLKART BROTHERS (1885), 1 T. L. R. 454, C. A.

*Annotation:*—**Refd.** Sailing Ship Lyderhorn Co. *v.* Duncan Fox, [1909] 2 K. B. 929.

**2810. —— Previous cargo partly undischarged—Master's request for stiffening refused.**]—By a charterparty of Nov. 15, 1907, it was agreed between pltfs. & defts. that the ship *Lyderhorn* should proceed to load at Iquique & Caleta Buena & there receive from the agents of defts. a full cargo of nitrate of soda. Twenty-five lay days were to be allowed to the merchants for loading the ship & for waiting orders abroad; lay days to be reckoned from the day after the master should give notice to charterers' agents of being ready to receive cargo & not to commence before Jan. 1, 1908, at the respective ports, & to cease when they should give him notice that he was at liberty to proceed to sea. Stiffening of nitrate to be supplied as required at Iquique, but not before Dec. 10, on receipt of forty-eight hours' notice from captain of his readiness to receive the same. Time occupied in discharging ballast or in shifting ports not to count as lay days. Demurrage was provided for. Freight was payable at 16*s.* a ton. "Should the vessel not have arrived at her loading port & be ready for loading, in accordance with this charter, on or before noon of Jan. 31, 1908, charterers to have the option of cancelling this charter." At the date of the charterparty the *Lyderhorn* was at Caleta Buena discharging a cargo of coal & intended to complete her discharge at Iquique. She arrived at Iquique on Dec. 13, & by Jan. 27, 1908, had discharged as much of her cargo of coal as could safely be unladen without some stiffening. The captain therefore gave notice to defts.' agents that he required 700 tons of nitrate for stiffening, but they refused to supply it unless he would agree to redeliver it if the charterparty was cancelled. It was admitted that the whole of the coal could not have been discharged by noon of Jan. 31, 1908. Defts. on that day cancelled the charterparty, & the shipowners brought this action to decide whether they were entitled to do so, & for damages:—*Held:* the vessel was not ready for loading within the meaning of the charterparty, & defts. were entitled to cancel it.—LYDERHORN SAILING SHIP Co., LTD. *v.* DUNCAN FOX & Co., [1909] 2 K. B. 929; 79

alleging that the said ship was not ready to receive cargo according to agreement:—*Held:* the charterparty had become cancelled according to its terms, the ship not being ready to receive cargo or fulfil its obligations either literally, substantially or according to the usage of trade at Quebec.—PATTERSON *v.* KNIGHT (1878), 4 Q. L. R. 187.—CAN.

*f.* —— *Time limit for loading.*]—A ship, by the terms of the charter, was to load grain at Fort William before noon of Dec. 5:—*Held:* to load at Fort William meant to load at the

L. J. K. B. 105; 101 L. T. 295; 25 T. L. R. 739; 11 Asp. M. L. C. 291; 14 Com. Cas. 293, C. A.

*Annotation:*—**Reid.** Armement Adolf Deppe *v.* Robinson, [1917] 2 K. B. 204.

**2811. —— —— Bunker coal.**]—*Held:* on the evidence a steamship was ready to load a cargo of maize, notwithstanding that she had, when tendered to the charterers, a large quantity of coal stored on deck between the bulwarks & the raised coamings, which coal had formed part of the outward cargo & was bought by the shipowner as bunker coal for the homeward voyage.—LONDON TRADERS SHIPPING CO., LTD. *v.* GENERAL MERCANTILE SHIPPING CO., LTD. (1914), 30 T. L. R. 493, C. A.

**2812. —— All shifting boards in position.**]—A steamer was chartered to bring a grain cargo from the Danube to Western Europe. The charterparty provided: "Cargo shall be loaded at the average rate of 450 units per running day. . . . Time for loading to count from the morning after steamer's arrival . . . she being then . . . ready to load in all her holds & notice of readiness given. . . . Captain to declare in writing upon arrival at first loading port the quantity required for a full cargo. . . . Should lighterage be required, captain to declare in writing on steamer's arrival at first loading port the quantity of cargo he requires to be loaded from lighters." If the steamer was detained longer than the time so stipulated, demurrage was to be paid at the rate of £40 per running day.

The steamer arrived at Braila on June 4, 1923, & on that day notice of readiness to load was given, but on June 5, 6 & 7, work was still in progress in connection with the erection of shifting boards. Part of the cargo having been loaded at Braila, further cargo was taken in at Galatz, & this left a balance to be taken in from lighters in Sulina roads.

In an arbn. on the question for how many days demurrage was due from the charterers to the shipowners, the arbitrator found that it was a custom for the lighterage portion of cargo to be supplied in lighers in the river & the time occupied in loading same into the steamer at Sulina did not count against the charterers, & that it was a custom for charterers to count the lay days in respect of the cargo loaded in the river in accordance with the rate of loading provided by contract as applied to the whole cargo including the lighterage portion, but that the custom was not reasonable & did not bind the owners:—*Held:* (1) the number of days which the charterers were entitled to take in loading was to be ascertained by dividing 450 into a number of units shipped up-river & not into the total number of units including the portion of the cargo loaded from lighters at Sulina, & the custom to the contrary was unreasonable & directly contradicted by the contract; (2) as a general rule the whole of the shifting boards must be in position before the ship could be said to be ready, & there was nothing in this case to estop the charterers from contending that this general rule applied.—SUN SHIPPING CO., LTD. *v.* WATSON & YOUELL SHIPPING AGENCY, LTD. (1926), 42 T. L. R. 240.

**2813. Notice of readiness — Necessity for.**]—Where, by the terms of a charterparty, a ship is to proceed to a certain port, & there to load a full cargo for the agents of the freighter, but the freighter has no interest in the outward cargo, his agents are entitled to notice from the captain, that the vessel is ready to receive her homeward cargo; & if no such notice be given, the freighter is not liable for not providing such cargo.—FAIRBRIDGE *v.* PACE (1844), 1 Car. & Kir. 317, N. P.

**2814. —— Effect of failure to give.**]—The owners of a steamship chartered her to defts. to go to the Humber & load a cargo as ordered. The charterparty provided: (3B) The cargo to be loaded in eighty-four running hours. . . . Time to count when written notice of readiness to receive cargo is handed in to the office of the charterers' agents on weekdays between the hours of 9 a.m. & 6 p.m. & noon on Saturdays. (7) If steamer be prevented from entering harbour or docks or from arriving at or off loading place by reason of congestion of shipping or shore traffic (not due to strikes . . .), she is to be treated as a ready steamer from first high water on or after arrival at or off harbour or docks or so near thereunto as she may be permitted to approach & entitled thereupon to give written notice of readiness. . . . (8) If steamer be not loaded in the time allowed she is to lie on demurrage at the rate of . . . (11) Time for loading unless used not to count before 6 a.m. on March 21; & charterers to have option of cancelling this charter . . . if steamer is not ready from any cause on or before 6 a.m. on April 3. The vessel was ordered to load at Hull & arrived off the docks about 2 p.m. on Saturday, Mar. 31, 1923, & pltfs. alleged that from that time she was ready to load. The first high water after her arrival was at 5.21 p.m. on the same day. The following Monday being Easter Monday notice of readiness to load could not be given before 9 a.m. on Tuesday, Apr. 3, & the master then gave notice of readiness, but defts. claimed to cancel the charterparty under clause 11 on the ground that the vessel was not ready before 6 a.m. on that day. In an action for damages for breach of the charterparty:—*Held:* on the construction of the particular words of the charterparty, that as the vessel was under clause 7 to be treated as a ready steamer on the Saturday & as failure to give notice of readiness by a certain time did not give defts. an option of cancellation under clause 11, the pltfs. were entitled to recover.—AKT. NORDISKA LLOYD *v.* BROWNLIE (C.) & CO. (HULL), LTD. (1925), 41 T. L. R. 503; 69 Sol. Jo. 661; 30 Com. Cas. 307, C. A.

**2815. —— Ship damaged after notice given.**]—REEDEREI KIRCHNER & CO. *v.* HUGO STINNES G. M. B. H. (1924), 157 L. T. Jo. 284.

**2816. —— Making binding obligation to load in time—Obligation not operating till time arrives.**]—UNITED STATES SHIPPING BOARD *v.* STRICK, No. 4423, *post*.

**2816a. Readiness prevented by vis major—Action of foreign government.**]—By a charterparty it was agreed that deft.'s ship, the *R.*, should, after loading "dead weight" at M., proceed to V., a Spanish port, & there load a cargo of fruit for pltf. At the time of entering into the charterparty pltf. knew that the "dead weight" intended to be put on board the *R.* at M. would consist of military stores, & he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish Govt. to relax the prohibition, permission to load

elevator there; & the obligation of the shipowner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; & where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed, & left to save insurance, the obligation was not fulfilled, & the owner could not recover damages.—MIDLAND NAVIGATION CO. *v.* DOMINION ELEVATOR CO. (1904), 34 S. C. R. 578; 24 C. L. T. 202; 2 O. W. R. 754.—CAN.

*Sect. 5.—The loading: Sub-sect. 1, E. (a) & (b), F. (a) & (b).]*

was refused. The *R.* arrived at V. with the warlike stores on board, but otherwise ready & fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:—*Held:* pltf. could not sue defts. for not having the *R.* ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, pltf. being unable to load the cargo, & defts. to receive it.—CUNNINGHAM *v.* DUNN (1878), 3 C. P. D. 443; 48 L. J. Q. B. 62; 38 L. T. 631; 3 Asp. M. L. C. 595, C. A.

*Annotations:*—**Consd.** The Austin Friars (1894), 71 L. T. 27. **Apld.** Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287. **Expld.** Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

**2817. "Expected ready to load"—At given date.**]—SANDAY & Co. *v.* KEIGHLEY, MAXTED & Co., SANDAY (S.) & Co. *v.* HILLERNS & FOWLER, No. 1845, *ante.*

*(b) Obtaining Pratique.*

**2818. Necessity for.**]—SMITH *v.* DART & SON, No. 1875, *ante.*

**2819.** ——.]—A ship that has not obtained pratique & is prohibited by regulations of the port from communicating with the shore is not "ready to load" within the meaning of those words in a charterparty.—THE AUSTIN FRIARS (1894), 71 L. T. 27; 10 T. L. R. 633; 7 Asp. M. L. C. 503; 6 R. 739.

*Annotations:*—**Refd.** New York & Cuba Mail S.S. Co. *v.* Eriksen & Christensen (1922), 27 Com. Cas. 330; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

*F. Failure to have Ship in Readiness—Damages.*

*(a) In General.*

**2820. Penalty for failure to provide—Recovery of damages in excess of penalty.**]—HARRISON *v.* WRIGHT, No. 1968, *ante.*

**2821. Natural & necessary consequences of failure to provide ship—Damages in former action against charterers for failure to supply homeward cargo—Charterer prevented from obtaining cargo—In consequence of failure to provide ship.**]—A ship's husband covenanted that his ship should at one port take in a quantity of brandy & convey it to another port, & there receive a cargo of fruit, etc., which the freighters of the ship covenanted to supply. He did not take the brandy, & the freighters did not furnish a full homeward cargo; for which he recovered damages against them. They afterwards brought an action against his widow & representative to recover damages for the breach of his covenant:—*Held:* they could not recover in any shape, in that action, either the damages they had paid him or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband in not taking in the brandy.

On the question of damages, they must be the necessary & immediate consequence, & not so remote as those sought to be recovered (TINDAL, C.J.).—WALTON *v.* FOTHERGILL (1835), 7 C. & P. 392, N. P.

**2822.** —— **Expenses of detention paid to railway company—No expenses incurred if ordinary course of business followed.**]—Defts., shipowners, contracted to load on board their ship, then lying at a berth in the London Docks, goods of pltfs. to arrive from a distance by the Great Western Ry., the goods to be alongside by a day named. Pltfs. thereupon agreed with the dock co. that the latter should haul the railway trucks containing the goods into the docks alongside the ship at a rate of 3*s.* per ton. In consequence of defts.' delay in loading the goods, the railway trucks were detained, & pltfs. became liable to pay demurrage to the railway co. If pltfs. had agreed with the dock co. for haulage of the trucks at the rate stated in the dock co.'s table of rates, namely, 3*s.* 9*d.* per ton, pltfs. would have been entitled to have the goods warehoused free of charge for three weeks, within which time the goods were in fact loaded by defts. In an action to recover from defts. the demurrage for detention of the railway trucks, defts. contended that, inasmuch as pltfs., if they had paid the usual rate for haulage, might have warehoused the goods free of charge, & would not, therefore, have incurred liability for demurrage, they could not recover it from defts., no notice having been given to defts. that the trucks were to be hauled, not upon the usual terms, but under a special bargain:—*Held:* the demurrage was the natural result of defts.' breach of contract, pltfs. were not bound to protect defts. against the natural result of a breach of contract by hauling the goods upon any particular terms, & pltfs., therefore, were entitled to recover.—WELCH, PERRIN & Co. *v.* ANDERSON & Co. (1891), 61 L. J. Q. B. 167; 66 L. T. 442; 8 T. L. R. 119; 36 Sol. Jo. 107; 7 Asp. M. L. C. 177, C. A.

**2823.** —— **Delay in providing ship.**]—Defts. both could & ought to have provided a ship fit in proper time to sail with the cargo on the stipulated voyage; they did not do so, & they failed to make out any excuse, in fact, which could avail them in answer to pltf.'s complaint. This breach caused a delay of fourteen days in the departure of the vessel, & really the only question is, what damages ought defts. to be called upon to pay. Defts., while denying liability, paid £300 into ct., saying that it was enough. Now, in dealing with a question of this kind, the ct. has to consider what the parties may reasonably be said to have had in contemplation at the time the contract was made; & for this purpose it is necessary to ascertain what circumstances were known to them. In the present case defts. knew that the object of the contract of charterparty was the carriage of a cargo of coal to Torre, & I think they must be taken also to have known that J. & co., or the persons for whom J. & co. were acting, wanted the coal for some purpose of trade, either to sell again before the vessel sailed or to sell or to use on or soon after arrival at Torre. This being so, I think that if they by their breach did delay or defeat any one of these possible objects of the charterparty contract, they must be held responsible for the "natural consequence" of such defeat or delay. What are the natural consequences of a delay of fourteen days in the transport of a cargo in these circumstances? The natural consequences are such as the parties as reasonable men may be supposed to have had in contemplation at the time they made the contract. These consequences may be very different indeed from the actual consequences of the breach, but these so-called natural consequences constitute the limit of legal liability (BIGHAM, J.).—GIACHETTI *v.* SPEEDING, & Co. (1899), 15 T. L. R. 401.

**PART VII. SECT. 5, SUB-SECT. 1.—F. (a).**

*g. Allegation that master of vessel did not receive necessary orders.*]—MCKENZIE *v.* DANCEY (1885), 12 A. R. 317.—**CAN.**

*h. Condition to load & proceed with despatch—Plea that weather favourable.*]—SPINDLER *v.* FARQUHAR (1905), 38 N. S. R. 183.—**CAN.**

*k. Contract for freight—June shipment—Naming probable date of arrival of steamer—Later arrival no breach of contract.*]—BEYTS, CRAIG & Co. *v.* MARTIN (1892), I. L. R. 16 Bom. 389.—**IND.**

*l. Failure to provide ships according to agreement.*]—DUNFORD & ELLIOT

**2824. No damage in fact sustained.**]—CLIPSHAM *v.* VERTUE, No. 3184, *post.*

**2825. Action for breach—Averment of performance of conditions precedent—Tendering cargo, giving orders & naming port.**]—In an action on a charterparty the declaration stated, that by a charterparty made between deft., the shipowner, & pltfs., it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on & after the delivery of her outward cargo, & there load from pltfs.' factors a full cargo & thence proceed to Bristol, & that the vessel should have her orders before leaving Messina. Averment, that the ship arrived at Messina. Breach, that deft. within a reasonable time after the delivery of her outward cargo, & before pltfs. could have given orders for the ship to proceed to the said port, made a contract with other persons for the conveyance of goods from Messina, & therewith, & within such reasonable time as aforesaid, & before such reasonable time had elapsed, loaded his ship, & afterwards proceeded to London without taking on board the cargo agreed to be taken from pltfs., & thereby wholly incapacitated & deprived himself of the power of fulfilling the charterparty, although pltfs. within such reasonable time as aforesaid provided merchandise, & were ready & willing to load on board the said ship the said merchandise, & although pltfs. would have been ready & willing to have named & appointed, & given orders to defts. to proceed to two ports, & to have there loaded a full cargo :—*Held :* the declaration was bad for not showing performance by pltfs. of the conditions precedent of tendering a cargo giving orders, & naming a port, or not showing a sufficient excuse for non-performance thereof.—MATTHEWS *v.* LOWTHER (1850), 5 Exch. 574 ; 19 L. J. Ex. 364 ; 155 E. R. 251.

**2826. Charterer prevented from fulfilling contract—Slight difference in dates of delivery in charterparty & contract immaterial.**] — Pltfs., manufacturers of wood pulp at Stocka, Sweden, entered into a charterparty dated Jan. 20, 1900, with defts., shipowners of Glasgow, by which the latter agreed to carry 900–1,000 tons of wood pulp from Stocka to Cardiff, the cargo to be lifted in two shipments : " One in May (f.o.w.). The second in Aug.–Sept. (owner's option)." The ship was to have liberty to call at any port or ports in order to tow & assist vessels in distress, & to deviate for the purpose of saving life or property ; the owners to wire shippers of the cargo, Ströms Bruks, Stocka, six days' notice of readiness ; also ship's departure from last port. The contract was made by pltfs. with the view of enabling them to fulfil a contract, dated Dec. 4, 1899, for the sale & delivery of 900–1,000 tons of wood pulp to T. & co., Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note " Mode & place of delivery " were the words " C.i.f., Penarth Dock, Cardiff," & against the note " Time of delivery " the words " In two cargoes, first open water & Aug.–Sept. 1900." The first cargo, consisting of 500 tons, was duly forwarded & accepted by T. & co. ; but defts. wholly failed to fulfil their contract with regard to the second shipment, whereby pltfs. were unable to complete their contract with T. & co., who bought in against them 367 tons in several parcels in Manchester, Liverpool, & London. Pltfs. having paid T. & co. the amount of their claim in respect of the goods so bought in, brought their action to recover from defts. the amount paid by them :—*Held :* applts. were entitled to recover ; the proper measure of damages was the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden & the amount of the freight & insurance ; & pltfs.' right to damages would not be effected even if it were assumed that the dates of delivery in their contract with defts. did not exactly coincide with those in their contract with T. & co. —STRÖMS BRUKS AKTIE BOLAG *v.* HUTCHISON, [1905] A. C. 515 ; 74 L. J. P. C. 130 ; 93 L. T. 562 ; 21 T. L. R. 718 ; 10 Asp. M. L. C. 138 ; 11 Com. Cas. 13, H. L.

*Annotations :*—**Apld.** Wertheim *v.* Chicoutimi Pulp Co., [1911] A. C. 301 ; Phosphate Mining Co. & Coronet Phosphate Co. *v.* Rankin, Gilmour (1916), 115 L. T. 211. **Distd.** Watts, Watts *v.* Mitsui, [1917] A. C. 227. **Reld.** Montevideo Gas & Drydock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 544.

(*b*) *Measure of Damages.*

**2827. Charterer taking other ship at advanced freight—Difference in rate of freight.**]—Pltf. told deft. that Admlty. contracts were out for coals & inquired if he had any tonnage to offer. In consequence, pltf. chartered a ship of deft., which was not ready in time to enable pltf. to fulfil his Admlty. contract. Pltf. thereupon arranged with another vessel to take his coals, in pursuance of the contract ; & the jury found that this was best for the interests of all concerned :—*Held :* pltf. was entitled to recover as damages for the breach of the charter, the extra expense incurred by so forwarding the coals.—PRIOR *v.* WILSON (1860), 1 L. T. 549 ; 8 W. R. 260.

**2828.** —— ——.]— Defts., by charterparty, agreed with pltf. that their ship should, at a specified time, load 1,300 tons of coal in the river Tyne, to be carried to Havre for pltf. They broke their contract, & pltf. had, in consequence, first to hire other vessels at an advanced freight, & secondly, to buy 1,300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. Pltf. having sued defts. in respect of both these heads of damage, defts. admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed ; but it was not directly proved that there had been an equivalent rise at Havre :—*Held :* the fact of pltf. having paid the additional price was *primâ facie* evidence of damage to that extent, & entitled him, in the absence of evidence to the contrary, to recover.—FEATHERSTON *v.* WILKINSON (1873), L. R. 8 Exch. 122 ; 42 L. J. Ex. 78 ; 28 L. T. 448 ; 21 W. R. 442 ; 2 Asp. M. L. C. 31.

*Annotation :*—**Consd.** Whiteman *v.* Hawkins (1878), 4 C. P. D. 13.

**2829. Charterer purchasing goods at increased**

*v.* MACLEOD & CO. (1902), 4 F. (Ct. of Sess.) 912 ; 39 Sc. L. R. 719 ; 10 S. L. T. 151.—**SCOT.**

m. *Shipowners rendering loading impossible—By undertaking other engagements.*]—NELSON (THOMAS) & SONS *v.* DUNDEE EAST COAST SHIPPING CO., LTD., [1907] S. C. 927 ; 44 Sc. L. R. 661 ; 15 S. L. T. 38.—**SCOT.**

**PART VII. SECT. 5, SUB-SECT. 1.—F. (*b*).**

**2827 i.** *Charterer taking other ship at advanced freight—Difference in rate of freight.*]—A., a shipowner, broke a contract with B. to carry goods across the Atlantic for him, & B. had to secure carriage for his goods by another route & at an increased rate of freight :—*Held :* A. was bound to pay to B. the full amount of the difference of freight, unless he could prove that B. had neglected a cheaper mode of conveyance which was open to him.—CONNAL, COTTON & CO. *v.* FISHER, RENWICK & CO. (1883), 10 R. (Ct. of Sess.) 824 ; 19 Sc. L. R. 698.—**SCOT.**

n. *Damage to ship—Refusal of*

*Sect.* 5.—*The loading: Sub-sect.* 1, *F.* (*b*); *sub-sects.* 2 *&* 3, *A. & B.* (*a*).]

**price—Difference in price of goods—Evidence in reduction of damages.**]—FEATHERSTON *v.* WILKINSON, No. 2828, *ante.*

**2830. Charterer unable to fulfil contract—Owner's knowledge of contract—Failure of ship to arrive at port of loading.**]—COUPER & Co. *v.* RICHARDS (1887), 3 T. L. R. 739.

**2831. —— —— Ship not of guaranteed capacity—Loss of profit on deficiency.**]—Pltfs. chartered a ship from defts. By the charterparty the ship was to load a grain cargo of "not less than 13,000 quarters." Pltfs., before entering into the charter, had sold 13,000 quarters to third parties at a profit. The ship was not of the guaranteed capacity, & loaded 422 quarters less than 13,000:—*Held:* knowledge of pltfs.' contract not having been fully brought home to defts., they were not liable for pltfs.' loss of profit on the 422 quarters.—SCARAMANGA MANOUSSIN & Co. *v.* ENGLISH & Co. (1895), 1 Com. Cas. 99.

**2832. —— Cost of replacing goods at destination at contemplated time of arrival—Less value at place of shipment & amount of freight & insurance.**]—STRÖMS BRUKS AKTIE BOLAG *v.* HUTCHISON, No. 2826, *ante.*

**2833. —— —— —— Market price at place of shipment immaterial.**]—WATTS, WATTS & Co., LTD. *v.* MITSUI & Co., LTD., No. 2549, *ante.*

**2834. Agreement to provide particular ship—Ship subsequently sunk—Expenses of detention between date of breach & sinking.**]—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LTD. *v.* HOULDER BROTHERS & Co., LTD., No. 2780, *ante.*

SUB-SECT. 2.—MODE OF AND TIME FOR LOADING.

**2835. Mode of loading—Right of charterers to select—Adoption of other mode—Reasonable time to change plans.**]—A ship was chartered to load cargo at a port at which three different methods of loading were in use, & the charterers had the option of selecting the particular method of loading to be employed; & the charterparty provided that detention by frost or ice was not to count as lay days. The charterers selected a method of loading in which a temporary delay was caused by ice, & they made no attempt to load by any other method; & the shipowners claimed demurrage. The claim was referred to arbn., & a special case was stated; & upon argument of the special case, held the charterers were liable because the provision that detention by ice should not count as lay days only applied if all possible methods of loading had been prevented, & the charterers had not shown that any method but that which they had in fact adopted had been prevented by ice. From that decision the charterers now appealed:—*Held:* (1) as the charterers had the option of selecting the method of loading to be employed & the obstruction to the method which they adopted was only temporary they were not under any obligation to adopt another method of loading, but were entitled to wait until the method selected had become possible; & (2) in any event if the charterers had been bound to adopt another method of loading they would have been entitled to a reasonable time in which to change their plans, & would not have become liable for demurrage until that reasonable time had elapsed, & such reasonable time had not elapsed in this case. *Qu.:* what would have been the legal position of the charterers if the method of loading selected by them had become permanently impossible.—LEWIS *v.* DREYFUS (LOUIS) & Co. (1926), 31 Com. Cas. 239, C. A.

**2836. Time for loading—When time commences—Arrival at loading berth.**]—A printed clause in a charterparty provided as follows: "The steamer to be loaded in usual turn, with customary dispatch, at Goole, & discharged in thirty-six running hours, commencing first high water on or after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between 6 p.m. & 6 a.m. . . ." On the margin the following clause was written: "When steamer loads at Hull seventy-two running hours will be allowed for loading & discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock owing to congestion, time to commence from first high water after arrival off the dock":—*Held:* when the steamer loaded at Hull the words in the printed clause "time . . . not to commence between 6 p.m. & 6 a.m." did not apply & the time commenced to count from the time the steamer got to the loading berth.

The charterparty also contained the following exception clause: "Strikes of workmen, lock-outs, pay days, idle days or cavilling days, or riots, or frost, rain or floods, or any accident or any cause whatsoever beyond the control of the charterer which may prevent or delay her loading or unloading excepted." At the port of discharge there was a delay of seventeen hours owing to a deficiency of railway waggons, this being due to the abnormal demands upon the railway co. at the material time. On a claim for demurrage in respect of the seventeen hours:—*Held:* the words in the exception clause, "or any cause whatsoever," were sufficiently wide to exclude the *ejusdem generis* rule of construction; in the circumstances the charterers came within the exceptions clause & were therefore not liable for demurrage.

If a person contracts to discharge in thirty-six hours unless prevented by some cause beyond his control, & if the cause beyond his control always would prevent the discharge within that time then, it is not an exception at all, & if in such a case he fails to discharge within the thirty-six hours he is not within the exceptions clause (BAILHACHE, J.).—FRANCE, FENWICK & Co., LTD. *v.* SPACKMAN (PHILIP) & SONS (1912), 108 L. T. 371; 12 Asp. M. L. C. 289; 18 Com. Cas. 52.

**2837. —— —— Arrival in dock.**]—THORMAN *v.* DOWGATE S.S. Co., LTD., No. 1685, *ante.*

**2838. —— Reasonable time—Both parties with knowledge of cause of delay.**]—HARRIS & TAYLOR *v.* DREESMAN, No. 2870, *post.*

**2839. —— "Usual dispatch."**] — Defts., by charterparty, engaged to load on board pltf.'s ship a cargo of coals. "To be loaded with usual dispatch." Defts. commenced loading by bringing the coal in boats along a canal to the dock where pltf.'s ship was, but before the cargo was

*charterers to furnish cargo when ship ready.*]—SCHOFIELD *v.* CARVILL (1882), 21 N. B. R. (5 P. & B.) 558.—**CAN.**

*o. Difference between value of steamer to plaintiffs as freight-earning instrument—& what ship was worth to plaintiffs at time of her delivery.*]—SCHILLER *v.* FINLAY (1872), 8 B. L. R. 544.—**IND.**

**PART VII. SECT. 5, SUB-SECT. 2.**

*p. Agreement to give notice to charterer—Whether charterer bound to ship before notice.*]—When a shipowner has contracted to give a certain notice to a charterer, or to do any other act, with a view to inform the charterer when the ship will be ready, the charterer is not bound to ship his goods until the shipowner has given him that notice or has done that act.—FLEMING *v.* KOEGLER (1878), I. L. R. 4 Calc. 237; 3 C. L. R. 297.—**IND.**

*q. Meaning of "reasonable efforts."*] — Where a charterparty stipulates that the shippers are to use "reasonable efforts" in loading the vessel chartered, these words mean reasonable with

completed a severe frost rendered the canal unnavigable, & the ship was detained thirty-four days:—*Held:* the expression "usual dispatch" meant "usual dispatch of persons who have a cargo ready for loading," & defts. were responsible for the delay.—KEARON *v.* PEARSON (1861), 7 H. & N. 386; 31 L. J. Ex. 1; 10 W. R. 12; 158 E. R. 523.

*Annotations:*—**Consd.** Ashcroft *v.* Crow Orchard Colliery Co. (1874), L. R. 9 Q. B. 540; Grant *v.* Coverdale, Todd (1884), 9 App. Cas. 470. **Distd.** Nickoll & Knight *v.* Ashton, Edridge, [1901] 2 K. B. 126. **Refd.** Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127; Jackson *v.* Union Marine Insce. (1873), L. R. 8 C. P. 572; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Kay *v.* Field (1882), 8 Q. B. D. 594; Harrowing *v.* Dupré (1902), 18 T. L. R. 594; Jones *v.* Green, [1904] 2 K. B. 275. **Mentd.** Cave *v.* Mills (1862), 10 W. R. 471.

**2840. Coal cargo—According to turn of arrival of ship at port—With turn of ship at colliery.**]—EINAR BUGGE A. S. *v.* BOWATER (W. H.), LTD., No. 2908, *post.*

Sect. 4, *ante*

SUB-SECT. 3.—PROVISION OF CARGO.

*A. In General.*

**2841. Implied warranty by shipper of fitness for voyage—Shipowner having opportunity to examine goods on board.**]—(1) A master of a vessel cannot at an intermediate port sell goods, which are damaged & cannot be carried to the port of discharge, without communicating with their owner.

(2) Where goods damaged on the voyage are landed at an intermediate port & sold without the assent of their owner, the shipowners are not entitled to freight *pro ratâ itineris.*

(3) Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage.

(4) It has been fully established by authority, that the master cannot hypothecate the cargo or freight if he has the means of communicating with the owner, & that is a question of fact for the jury (BRETT, L.J.).

(5) The measure of damages is not what the maize realised at the sale, but what it would be worth to the owner if it had not been sold (BRAMWELL, L.J.).

(6) The first point made was that the authority of the master to sell goods is to be measured differently when the goods become perishable owing to their own inherent vice at the time of shipment, & when they become so from being damaged by perils of the sea. There is no ground for any such distinction (BRETT, L.J.).

(7) The law of England looks with jealousy on the master selling any part of the cargo without the consent of its owner, & it gives the master no authority, unless there is an urgent necessity for the sale. . . . There may be an urgent necessity to sell goods, arising from the fact that if the goods are not sold they will perish, or that they will have to be kept in warehouses at great expense, so that as a matter of business it would be wrong to warehouse them; & it must be shown that the master has no means of communicating with the owner, & taking his directions whether he shall sell them or not. But I think, whether the goods are of a perishable nature or not, if the master has an opportunity of communicating with the owner before they actually perish, he cannot sell without communicating with the owner & obtaining his directions (BRETT, L.J.).—ACATOS *v.* BURNS (1878), 3 Ex. D. 282; 47 L. J. Q. B. 566; 26 W. R. 624, C. A.

*Annotations:*—*As to* (3) **Consd.** Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94. **Apld.** Transoceanica Soc. Italiana di Navigazione *v.* Shipton, [1923] 1 K. B. 31. **Refd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742. *As to* (7) **Refd.** Atlantic Mutual Insce. *v.* Huth (1880), 16 Ch. D. 474; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

**2842. Promise of charterer to provide cargo—Interdependent with shipowner's promise to provide ship.**]—VERGOTTIS *v.* CORY (WILLIAM) & SON, LTD., No. 3899,

*B. Duty to Provide.*

*(a) In General.*

**2843. Duty of charterer.**]—ATKINSON *v.* BUCKLE (1615), 3 Bulst. 152; 1 Roll. Rep. 312; Jenk. 324; 81 E. R. 130.

**2844.** ——.]—Declaration on charterparty, that deft. had agreed to put a cargo on board at Marseilles, & pay freight by a bill on London at three months. Breach, that deft. did not put any cargo on board, by which pltf. was put to expenses in procuring one, & that deft. did not pay pltf. those expenses, or give the bill in the charterparty mentioned, contrary to his promise:—*Held:* an unobjectionable breach, on motion in arrest of judgment.—HOGGETT *v.* EXLEY (1840), 6 Bing. N. C. 207; 8 Scott, 480; 4 Jur. 293; 133 E. R. 82; *previous proceedings* (1839), 9 C. & P. 324, N. P.

**2845.** ——.]—KAY *v.* FIELD, No. 2734, *ante.*

**2846.** ——.]—GRANT & CO. *v.* COVERDALE, TODD & CO., No. 2877, *post.*

**2847.** ——.]—STEPHENS *v.* HARRIS & CO. (1887), 57 L. J. Q. B. 203; 4 T. L. R. 11, C. A.

*Annotations:*—**Consd.** Furness *v.* Forwood (1897), 77 L. T. 95. **Refd.** Bunge y Born Co. *v.* Brightman, [1925] A. C 799.

**2848.** ——.]—By a charterparty dated May 30, 1900, which did not fix the time within which the vessel was to be loaded, the steamship *Ardandearg*, of which pltfs. were owners, was chartered by defts. to proceed to such loading berth as the freighters might name at Newcastle, New South Wales, & after being in loading berth as ordered to load "in the usual & customary manner" a full & complete cargo of Australian coal "as ordered by the charterers, which they bind themselves to ship, except in case of riot, strikes, etc., or any other accidents or causes beyond the control of the charterers, which may delay her loading." By the custom of the port of Newcastle a vessel was not allowed to occupy a loading berth until she had received a loading order from a colliery. These orders were issued in turn & there were no facilities for storing coal at the port. The *Ardandearg* arrived at her destination on July 14, 1900, & was

reference to the circumstances known to the parties, & to the contingencies which might naturally be expected to arise out of these circumstances.—WATERSON *v.* CARSWELL (1899), 7 N. Z. L. R. 739.—**N.Z.**

**PART VII. SECT. 5, SUB-SECT. 3.—A.**

*r. Meaning of "Cargo to be furnished vessel at port of loading as customary."*]—The words, "Cargo to be furnished vessel at port of loading as customary," do not mean the ordinary mode in which the charterer loads vessels chartered by him, but the general custom of the port of shipment.—LOVITT *v.* SNOWBALL (1895), 33 N. B. R. 263.—**CAN.**

**PART VII. SECT. 5, SUB-SECT. 3.—B. (a).**

**2843i.** *Duty of charterer.*]—SCHOFIELD *v.* GIBSON (1878), 17 N. B. R. (1 P. & B.) 619.—**CAN.**

**2843ii.** ——.]—HAJI ABDUL RAHMAN ALLARAKHIA *v.* HASANBHOY VISRAM (1892), I. L. R. 16 Bom. 501.—**IND.**

*t. Lies on ship.*]—By universal usage, the duty & expense of putting goods on board a ship lies on the ship, & that a contract to deliver goods "free on board" cannot be construed as relieving a charterer of that burden when he happens to be the buyer of the goods.—GLENGARNOCK IRON & STEEL CO., LTD. *v.* COOPER & CO. (1895), 22 R. (Ct. of Sess.) 672; 32 Sc. L. R. 546; 3 S. L. T. 36.—**SCOT.**

*Sect. 5.—The loading: Sub-sect. 3, B. (a).]*

ready to load; but there was no cargo ready for her until Aug. 13, & then not enough. She had twice to be removed from her berth under a regulation of the port that a vessel must not occupy a berth when not loading, & her loading was not completed until Aug. 23. Pltfs. claimed damages for the detention of the vessel owing to the delay in providing the cargo:—*Held:* defts. were liable in damages on the ground that it was their primary duty as charterers to furnish the stipulated cargo; & there was nothing to be found in the charterparty or the evidence which qualified this absolute obligation.—ARDAN S.S. Co. *v.* WEIR (ANDREW) & Co., [1905] A. C. 501; 74 L. J. P. C. 143; 93 L. T. 559; 21 T. L. R. 723; 10 Asp. M. L. C. 135; 11 Com. Cas. 26, H. L.

*Annotations:*—**Distd.** Jones *v.* Green, [1904] 2 K. B. 275; Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193; Eina Bugge A. S. *v.* Bowater (1925), 31 Com. Cas. 1; Vergottis *v.* Cory, [1926] 2 K. B. 344. **Refd.** The Sheila (1907), [1909] P. 31, n.; Brightman *v.* Bunge y Born, [1924] 2 K. B. 619.

**2849.** —— **Whether absolute—Frustration.**]—BLIGHT *v.* PAGE (1801), 3 Bos. & P. 295, n.; 127 E. R. 163, N. P.

*Annotations:*—**Consd.** Beale *v.* Thompson (1803), 3 Bos. & P. 405; Sjoerds *v.* Luscombe (1812), 16 East, 201. **Apld.** Barret *v.* Dutton (1815), 4 Camp. 333. **Distd.** Barrie *v.* Peruvian Corpn. (1896), 13 T. L. R. 101. **Consd.** Ralli *v.* Compania Naviera Sota y Aznar, [1920] 2 K. B. 287. **Refd.** Touting *v.* Hubbard (1802), 3 Bos. & P. 291; The Teutonia (1871), L. R. 3 A. & E. 394; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

**2850.** —— —— ——.]—Where the master of a ship covenanted in a charterparty to go to a certain port of America & receive a loading from the freighter, alongside the ship, & bring home the same; with an exception of the restraints of rulers, etc.; but the freighter covenanted absolutely to provide the loading without any such exception; it seems that an embargo in the American port, which prevented the freighter from loading the ship, did not discharge him from his covenant; but the plea alleging that deft. did provide a cargo, & was ready & willing, & offered to send it alongside the ship, but that pltf. refused to receive it there, & discharged deft. from sending alongside, on which issue was taken by the replication, was held not to be sustained by evidence of the master's written acknowledgment of deft. having offered to load the cargo on board, on his, the master's, being ready to take it, for the purpose of raising the question of law on the embargo.—SJOERDS *v.* LUSCOMBE (1812), 16 East, 201; 104 E. R. 1065.

*Annotations:*—**Consd.** Ralli *v.* Compania Naviera Sota y Aznar, [1920] 2 K. B. 287. **Refd.** Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085. **Mentd.** Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589.

**2851.** —— —— ——.]—The charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port all public intercourse is prohibited by the law at the port, & though he could not have communication without danger of contracting & communicating the disorder; therefore where to covenant for not sending a cargo alongside at Gibraltar deft. pleaded that a pestilent & infectious disorder prevailed there, & thereupon all intercourse was prohibited by the law of the place, & became impracticable, without imminent danger to the persons concerned, of contracting & communicating the same, & deft. was prevented from sending alongside during all that time, of which pltf. had notice, & thereupon departed with his ship on her return: replication, that deft. might have sent the cargo alongside before all intercourse became unlawful or impracticable, but refused, & thereupon pltf. departed with his ship by the consent of deft.'s agent:—*Held:* deft. was liable.

Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable for it upon his covenant? (LORD ELLENBOROUGH, C.J.).—BARKER *v.* HODGSON (1814), 3 M. & S. 267; 105 E. R. 612.

*Annotations:*—**Distd.** Pringle *v.* Mollett (1840), 6 M. & W. 80. **Consd.** Esposito *v.* Bowden (1857), 7 E. & B. 763; Ralli *v.* Compania Naviera Sota y Aznar, [1920] 2 K. B. 287. **Refd.** Evans *v.* Hutton (1842), 12 L. J. C. P. 17; Hall *v.* Wright (1859), E. B. & E. 765; Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127; Hudson *v.* Ede (1868), 8 B. & S. 631; Clifford *v.* Watts (1870), L. R. 5 C. P. 577; The Teutonia (1871), L. R. 3 A. & E. 394; Jackson *v.* Union Marine Insce. (1873), L. R. 8 C. P. 572; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589; Budgett *v.* Binnington, [1891] 1 Q. B. 35; Hick *v.* Rodocanachi, [1891] 2 Q. B. 626; Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70; Millar *v.* Taylor, [1916] 1 K. B. 402; Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172. **Mentd.** Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1.

**2852.** —— —— ——.]—Declaration stated that pltf. & deft. agreed, by charterparty, that pltf.'s ship should proceed to Odessa, & there load from deft.'s agent a cargo of specified goods, & therewith proceed home, a specified number of running days to be allowed for loading & unloading, & ten days for demurrage after the laying days: that the ship proceeded to Odessa; that the time for loading had elapsed; but deft. made default in loading. Plea: that, after the vessel proceeded to Odessa, & before the alleged breach of contract, war was declared by the Queen against the Emperor of Russia, & war had ever since existed between this kingdom & Russia, of which pltf. & deft. had notice before the alleged breach: that Odessa was part of the empire of Russia; & pltf. & deft. were subjects of this kingdom, & not of Russia: that the ship was a registered British ship; & no licence from the Queen could be obtained for loading the ship at Odessa; that deft. could not have procured a cargo or loaded the ship as agreed, nor could pltf. have received such cargo, without trading or corresponding with the enemy. Issue on this plea.

It was proved that the master was directed, by deft., to apply to deft.'s agent M. at Odessa. War between England & Russia was first known at Odessa on Apr. 1, 1854, which was before the expiration of the running days. M., before Apr. 1, repeatedly told the master that he should be unable to procure a cargo, owing to a Russian prohibition; & he also endeavoured to persuade the master to quit Odessa without a cargo, upon certain terms inconsistent with the charterparty. The master continued to demand a cargo till after Apr. 1, & on a later day, but before the expiration of the running & demurrage days, left Odessa in ballast:—*Held:* the plea was proved.—REID *v.* HOSKINS (1856), 6 E. & B. 953; 26 L. J. Q. B. 5; 28 L. T. O. S. 145; 3 Jur. N. S. 238; 5 W. R. 45; 119 E. R. 1119, Ex. Ch.

*Annotations:*—**Folld.** Barrick *v.* Buba (1857), 2 C. B. N. S. 563. **Consd.** Esposito *v.* Bowden (1857), 7 E. & B. 763. **Distd.** Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352. **Refd.** Croockewit *v.* Fletcher (1857), 1 H. & N. 893; Ericksen *v.* Barkworth (1858), 3 H. & N. 601; Hudson *v.* Hill (1874), 43 L. J. C. P. 273. **Mentd.** Bartholomew *v.* Markwick (1864), 15 C. B. N. S. 711; Frost *v.* Knight (1872), L. R. 7 Exch. 111; Roper *v.* Johnson (1873), L. R. 8 C. P. 167; Johnstone *v.* Milling (1886), 16 Q. B. D. 460; Veithardt & Hall *v.* Rylands (1917), 86 L. J. Ch. 604.

**2853.** —— —— ——.]—AVERY *v.* BOWDEN, No. 2763, *ante*.

**2854.** —— —— ——.]—ESPOSITO *v.* BOWDEN, No. 2764, *ante*.

**2855.** —— —— ——.]—(1) A declaration of war by this country against a foreign power, imports a prohibition of commercial intercourse with the subjects of that power; therefore a plea to an action upon a charterparty made between a subject of this country & a Russian subject for loading a cargo at Odessa, a Russian port, that, at the time of making the contract, pltf. was a subject of Great Britain & the vessel a British vessel, & deft. a subject of Russia residing & carrying on trade there, & that, before the expiration of the time for deft. to load the vessel according to the charterparty, & before any breach thereof, a state of war existed, & had ever since continued, between the two countries:—*Held:* a good answer.

(2) A mere intimation by the agent of the charterer at Odessa to the master, before the time for loading had expired, that "he had ceded the charterparty, with all its rights & obligations," to a third person, & that he must address himself to such third person for a cargo, did not amount to a renunciation of the charterparty, so as to entitle the owner to sue as for a breach at that time.—BARRICK *v.* BUBA (1857), 2 C. B. N. S. 563; 29 L. T. O. S. 199; 5 W. R. 665; 140 E. R. 536; *sub nom.* BARWICK *v.* BUBA, 26 L. J. C. P. 280.

*Annotations:—As to* (2) **Refd.** Frost *v.* Knight (1872), L. R. 7 Exch. 111; Roper *v.* Johnson (1873), L. R. 8 C. P. 167; Johnstone *v.* Milling (1886), 16 Q. B. D. 460; Veithardt & Hall *v.* Rylands (1917), 86 L. J. Ch. 604.

**2856.** —— —— ——.]—By a charterparty dated Mar. 24, 1926, pltfs. chartered defts.' steamship to run consecutive voyages with cargoes of coal from one of the South Wales ports to one or other of specified Italian or Sicilian ports for a period of "twelve months as & from date of notice of readiness to load for first voyage." The charter was on the printed form of the Chamber of Shipping Welsh Coal Charter, 1896, & contained the ordinary clauses as to strikes & lock outs, with the addition of the following written clause: "Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter, free of strike." In May, 1926, deft. shipowners, through their agents, & in accordance with the provisions of the charterparty, gave notice to pltf. charterers that the ship would be ready to load about the first week in June, & they asked for orders as to the port of loading. Meanwhile the coal strike had begun, resulting in a total prohibition of coal exports by the British Government, & on June 12 the charterers replied that they could not order the vessel to a port to load, & must leave the owners to make their own arrangements. Thereupon the owners, under the written clause in the charterparty, arranged to interpose two "similar" voyages after which as the strike was still proceeding, & as the charterers were still unable to order the ship to a loading port, the owners took independent action & chartered the vessel for voyages to America & back to Naples, Huelva, & Rouen. At the end of Nov., when the strike had become restricted in its operation, although the Govt. embargo upon the export of coal remained in force until Dec. 17, the charterers notified the shipowners that the ship must be ready to carry out the charter within a reasonable time after the settlement of the strike. The shipowners replied that by reason of the prolonged strike & the Governmental embargo on coal exports the commercial venture had been frustrated, & the contract therefore became null & void. In these circumstances the charterers claimed damages for breach of contract:—*Held:* the total impossibility of any export of coal from the South Wales ports for a period of upwards of six months was a circumstance not contemplated by the parties which had prevented the performance of the charter according to its true intent, &, the charterers not having been "ready & willing" to perform their obligations under the charterparty at the material times, the shipowners were justified in treating the contract as at an end.—THE PENELOPE (1928), 44 T. L. R. 597.

**2857.** —— —— **Circumstances beyond freighters control.**]—By a charterparty, the owner of the ship agreed that she should proceed direct to Ichaboe, & there load a full & complete cargo of guano, by the ship's boats & tackle, & by the labour of the crew, & being so loaded, should proceed therewith to Cork or Falmouth, etc., & deliver the same, on being paid freight, at £4 15*s.* per ton, restraint of princes & rulers, the acts of God & the Queen's enemies, fire, & perils of navigation, always excepted. Twenty-one working days to be allowed to the charterers, if the ship were not sooner discharged, at the port of unloading. The charterers to ship bags & other materials requisite for loading the ship, & to supply the stores for the vessel, at cash prices, for the voyage, & to deduct the amount from the balance of freight; but in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charterparty, the owner agreed to pay the charterers the amount of their disbursements for such stores. To a declaration on this charterparty, alleging as a breach of it, that deft., the shipowner, did not load a full & complete cargo of guano on board the ship at Ichaboe, he pleaded a plea, which stated, in substance, that he was prevented from doing so by an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, & within a reasonable time afterwards, no guano was to be found there; & that he had paid to pltfs. the amount of their disbursements for stores for the vessel:—*Held:* this plea was bad in substance, for that the fact of no guano being to be found was not such an "unforseen cause preventing the completion of the charterparty," as entitled deft. to pay the amount of the disbursements, & treat the charterparty as at an end, but he was nevertheless bound by this positive contract to load a full cargo.—HILLS *v.* SUGHRUE (1846), 15 M. & W. 253; 153 E. R. 844; *sub nom.* MILLS *v.* SEYBOURNE, 6 L. T. O. S. 414.

*Annotations:*—**Refd.** Geipel *v.* Smith (1872), L. R. 7 Q. B. 404. **Mentd.** Clifford *v.* Watts (1870), L. R. 5 C. P. 577; Howell *v.* Coupland (1874), L. R. 9 Q. B. 462.

**2858.** —— ——.]—POSTLETHWAITE *v.* FREELAND, No. 3666, *post.*

**2859.** —— ——.]—BUNGE Y BORN CO. *v.* BRIGHTMAN (H. A.) & CO., No. 2776, *ante.*

**2860.** —— **Provision within reasonable time—Extraordinary circumstances causing delay—Not contemplated by parties.**]—ADAMS *v.* ROYAL MAIL STEAM-PACKET CO., No. 2903, *post.*

**2861.** —— —— **Circumstances within knowledge of parties.**]—JONES, LTD. *v.* GREEN & CO., No. 2872, *post.*

**2862.** —— **Steamer unexpectedly ready.**]—LITTLE *v.* STEVENSON & CO., No. 2874, *post.*

**2863.** —— **Reasonable portion of cargo to be ready.**]—HOGARTH *v.* CORY BROTHERS & CO., No. 4030, *post.*

**2864.** —— **Procuring licence or pass for ship.**]—Those ports of St. Domingo which are under the dominion of Christophe & the negroes engaged in hostility with France, are neutral ports; & no licence is necessary to legalise a trade with them. If a vessel be chartered to any ports of an island,

*Sect. 5.—The loading: Sub-sect. 3, B. (a), (b) & (c), & C. (a) & (b).]*

part of which is hostile, & part neutral, & the freighter covenants to procure a licence, if the ship trades to a neutral port of the island, it is no breach of the covenant that the freighter has procured a licence which would not authorise the like trade to an hostile port. The master of a ship detained as prize, & libelled in the Prize Ct. at Jamaica, gave bills of lading of the cargo to one who became bail for the ship & cargo there :—*Held :* the master had no authority to contract that the cargo should be sold in London, & the proceeds remitted back to Jamaica, the owners being ready to give sufficient security to indemnify the bail in London.—JOHNSON *v.* GREAVES (1810), 2 Taunt. 344 ; 127 E. R. 1111.

**2865.** —— ——.]—Declaration on a charterparty, whereby it was agreed between pltfs., owners of a vessel called the *Brevet*, & defts. that the vessel should sail to Melbourne & thence proceed to the port of Callao, Peru, where the captain should report his arrival to G. & co. : that the vessel being then tight, staunch, strong, & well conditioned for the voyage, G. & co. should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which should be given to the captain by the charterers' agents free of expense within twenty-four hours of his application. Breach : that defts. made default in providing the agreed guano, & only provided an insufficient & less quantity. Plea : that the port of Callao & the Chincha Islands are a part of the Republic of Peru, & that by the laws of that Republic every vessel proceeding from Callao to the Chincha Islands, for the purpose of taking on board a cargo of guano, is obliged to procure from the said Govt. a written pass so to do, & the said vessel could not lawfully have proceeded from Callao to the Chincha Islands without such pass : that the vessel was, after her arrival at Callao, surveyed by officers of the said Govt., & the said Govt. did, upon the report of the said surveyors refuse to give such pass, or to allow the vessel to proceed to the Chincha Islands ; & thereupon certain reparations were done to the vessel by pltfs. at Callao, & the said Govt. did afterwards give a written pass for the vessel to proceed to the said Island, to take in a cargo of guano, but upon the condition expressed in the pass that more guano should not be placed on board than would make the vessel draw eighteen & a half feet of water, that the vessel did by virtue of such pass proceed to the Chincha Islands & defts. caused to be loaded on board her sufficient guano to make her draw eighteen & a half feet of water & they could not without violating the laws of the said Republic have loaded a greater quantity, & if they had done so the vessel & cargo would have been liable to seizure by the said Govt. On demurrer :—*Held :* the plea was bad, since the obligation was on defts. to procure the proper pass, & it was not alleged that they were prevented from so doing by reason of the vessel not being well conditioned.—KIRK *v.* GIBBS (1857), 1 H. & N. 810 ; 26 L. J. Ex. 209 ; 4 L. T. 682 ; 156 E. R. 1427.

*Annotation :*—**Refd.** Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 1 K. B. 614.

**2866.** —— **Ship must become an arrived ship—What amounts to arrival.**]—VERGOTTIS *v.* CORY (WILLIAM) & SON, LTD., No. 3899, *post.*

**2867.** —— —— **Duty of shipper to help arrival.**]—VERGOTTIS *v.* CORY (WILLIAM) & SON, LTD., No. 3899, *post.*

*(b) Amount of Cargo.*

*See* Sect. 2, sub-sect. 6, E., & Sub-sect. 8, C., *ante.*

*(c) Option to Select Cargo.*

*See* Sect. 2, sub-sect. 8, B., *ante.*

*C. Conveyance to and Readiness at Place of Loading.*

*(a) In General.*

**2868. Duty of charterer.**]—ATKINSON *v.* BUCKLE (1615), 3 Bulst. 152 ; 1 Roll. Rep. 312 ; Jenk. 324 ; 81 E. R. 130.

**2869.** ——.]—BUNGE Y BORN CO. *v.* BRIGHTMAN (H. A.) & Co., No. 2776, *ante.*

**2870. Shipment of coals—Colliery not at work when charterparty signed—Loading within reasonable time.**]—By a charterparty the master of a vessel engaged to proceed with his vessel to a particular colliery & there take on board for the freighters a cargo of coal. Before the charterparty was signed both parties knew that the colliery was not at work, an accident having happened to the steam engine, & both were told it would be repaired in a short time, & that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was, that ships were loaded in their regular turns as they were entered on the colliery books. The freighter had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect :—*Held :* if the steam engine was repaired & the colliery got to work in a reasonable time after the execution of the charterparty, & if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading.—HARRIS & TAYLOR *v.* DREESMAN (1854), as reported in 23 L. J. Ex. 210 ; 18 J. P. 458.

*Annotations :*—**Distd.** Adams *v.* Royal Mail Steam Packet Co. (1858), 5 C. B. N. S. 492. **Folld.** Jones *v.* Green, [1904] 2 K. B. 275. **Refd.** Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127 ; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599 ; Hick *v.* Rodocanachi, [1891] 2 Q. B. 626 ; Ardan S.S. Co. *v.* Weir, [1905] A. C. 501 ; The Sheila (1907), [1909] P. 31, n. **Mentd.** Krell *v.* Henry, [1903] 2 K. B. 740.

**2871.** —— **Shipment subject to colliery guarantee—Colliery on strike.**]—It was agreed by a charterparty that the ship should sail to Cardiff, & proceed to such loading berth as the freighters might name, & should there load " a cargo of steam coal as ordered by the charterers," which they bound themselves to ship, except in the event of (*inter alia*) strike of shippers' pitmen ; the vessel to be loaded as customary, " but subject in all respects to the colliery guarantee, in —— colliery working days as may be arranged, any claim for demurrage in loading to be settled with colliery direct." The charterers, for the purpose of fulfilling their obligation under the charterparty, contracted with a colliery for a cargo of steam coal, subject to the usual exception as to strikes. Subsequently a strike of pitmen took place, which extended to 85 per cent. of the South Wales collieries, including the before-mentioned colliery. The charterers, in performance of their obligation under the charterparty, tendered to the shipowners the guarantee of that colliery, by which the colliery proprietors undertook to load the ship in twenty days after she should be ready to receive



a. *Shipment of coals—Delay at colliery.*]—KROG & Co. *v.* BURNS & LINDEMANN, THE AVIS (1903), 5 F. (Ct. of Sess.) 1189 ; 40 Sc. L. R. 874.—SCOT.

cargo, subject to the usual exceptions as to strikes. The shipowners objected to the colliery guarantee, as not being in accordance with the charter on the ground that the colliery was then on strike. The strike still continuing for three months after the arrival of the ship at Cardiff, her loading was in consequence delayed for that period. Steam coal might have been obtained from other collieries in the district which remained working during the strike, although at a very high price.

In an action by the shipowners against the charterers for damages for the detention of the ship:—*Held:* the shipowners were not entitled to object to the colliery guarantee as not being in accordance with the charterparty, & the action was not maintainable.—DOBELL & Co. *v.* GREEN & Co., [1900] 1 Q. B. 526; 69 L. J. Q. B. 454; 82 L. T. 314; 16 T. L. R. 204; 9 Asp. M. L. C. 53; 5 Com. Cas. 161, C. A.

*Annotation:*—**Refd.** Barque Quilpué *v.* Brown, [1904] 2 K. B. 264.

**2872. —— No berth for ship until coaling order lodged—Loading berth allotted in proper rotation at colliery.**]—On Feb. 14, 1900, a charterparty was entered into between pltfs., shipowners, & defts., charterers, which provided that the ship "shall with all possible dispatch proceed to such loading berth as freighters may name at Newcastle, New South Wales, & . . . shall there load in the usual & customary manner a full & complete cargo of coals as ordered by charterers," the name of the coal being left blank. The coal was to be carried to South America, & defts. sold the cargo as "Wallsend" to purchasers there. No time for loading was fixed.

On May 25, 1900, defts. notified pltfs. that the coal was to be "Wallsend," a coal coming from the Wallsend Colliery at Newcastle, which was in greater demand than the coal from other collieries in the neighbourhood. The output from the collieries was limited.

By the custom of the port, which was known to both parties at the time of the contract, a ship could not obtain a loading berth until a coaling order from the particular colliery was lodged with the port authority.

The ship arrived at Newcastle on Sept. 1, 1900. She did not obtain a loading berth till Dec. 15, 1900, the coaling order having been lodged on the previous day:—*Held:* (1) the charterers had fulfilled their obligation when the ship obtained a loading berth in accordance with her proper turn at the colliery, & they were not liable for the delay; (2) defts. had not acted unreasonably in not substituting another coal for Wallsend, their purchasers having declined to accept other coal.

(3) When the source from which a cargo is to come is expressly defined, no time being fixed for loading, there is no absolute rule that the charterer is bound to have the cargo ready whenever it may be reasonably expected that there will be a berth for the ship if the cargo is ready.—JONES, LTD. *v.* GREEN & Co., [1904] 2 K. B. 275; 73 L. J. K. B. 601; 90 L. T. 768; 9 Asp. M. L. C. 600; 9 Com. Cas. 20, C. A.

*Annotations:*—*As to* (1) **Refd.** Einar Bugge A. S. *v.* Bowater (1925), 31 Com. Cas. 1. *As to* (3) **Refd.** Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193. *Generally*, **Refd.** Ardan S.S. Co. *v.* Weir (1905), 93 L. T. 559.

**2873. Ship "to receive prompt dispatch"—Want of facilities to bring cargo to port.**]—A charterparty provided that the ship should proceed to a port, & there load from the factors of the charterers a cargo of "coal, taking her turn with other steamers," & receive "prompt dispatch in loading." The charterers employed the persons at the port of loading who were employed to load other ships, & the ship was loaded in her turn, but, by reason of an insufficient supply of coal, the ship was delayed:—*Held:* the charterers were responsible for the delay.—ELLIOTT *v.* LORD (1883), 52 L. J. P. C. 23; 48 L. T. 542; 5 Asp. M. L. C. 63, P. C.

**2874. Ship unexpectedly berthed.**]—A charterer is not bound to have a cargo ready at all times & under all circumstances in order to take advantage of the possibility of the ship getting an early loading berth out of her regular turn.

A charterparty provided that a ship belonging to applt. should proceed to B. & receive a cargo of coal to be supplied by resps. "lay days to count from the time the master has got ship reported berthed & ready to receive cargo." The ship reached B. on Oct. 19, & the charterers were informed of the fact. In consequence of the crowded state of the dock she was not allowed to enter in her ordinary turn till Oct. 26. She was loaded within the time allowed by the charterparty, & sailed on Oct. 28. A berth in the dock became vacant accidentally on Oct. 21, & if the cargo had been ready the ship could have been berthed on that day out of her turn:—*Held:* the charterers were not liable for demurrage for the detention of the ship from Oct. 21 to Oct. 26.—LITTLE *v.* STEVENSON & Co., [1896] A. C. 108; 65 L. J. P. C. 69; 74 L. T. 529; 8 Asp. M. L. C. 162, H. L.

*Annotations:*—**Consd.** Jones *v.* Green, [1904] 2 K. B. 275. **Refd.** Ardan S.S. Co. *v.* Weir, [1905] A. C. 501; Vergottis *v.* Cory, [1926] 2 K. B. 344.

**2875. Source of cargo expressly defined—Readiness of cargo in expectation of ship berthing—No time for loading fixed.**]—JONES, LTD. *v.* GREEN & Co., No. 2872, *ante*.

*(b) Construction of Exception Clauses.*

**2876. Whether exceptions inoperative until goods alongside.**]—KAY *v.* FIELD, No. 2734, *ante*.

**2877. ——.**]—By a charterparty it was agreed that a ship should proceed to Cardiff East Bute Dock & there load from the agents of the freighters a cargo of iron; the cargo was to be supplied as fast as steamer could receive at all hatchways; "time to commence from the vessel being ready to load, . . . & ten days on demurrage over & above the said lay days at £40 per day except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading, . . . in which case the owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship." The ship arrived in dock & commenced loading; but subsequently canals through which part of the cargo had to pass became blocked with ice, & in consequence a stoppage occurred of five days in the loading. The frost would not have prevented the loading had the cargo been ready at the dock, but the cargo could not have been brought to the dock otherwise than by the canals without unreasonable expense:—*Held:* there was no frost "preventing the loading" within the exception, & the charterers were liable for demurrage.

It is important to observe, with respect to any argument founded on the particular accidents enumerated, frosts, floods or hands striking work, to which large general words are superadded, that those are in a printed form, & are meant therefore to suit each particular case as far as they can, but they are not introduced in contemplation of any particular case, this or any other (LORD SELBORNE, C.).

When the charterer has tendered the cargo, & when the operation has proceeded to the point at which the shipowner is to take charge of it,

*Sect. 5.—The loading: Sub-sect. 3, C. (b) & (c),*

everything after that is the shipowner's business, & everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation, everything before that is the charterer's part only. It would appear to me to be unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading, which are no part whatever of it, but which belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading & have it ready there to be put on board; & it is only when he has done those things that the duty & the obligation of the shipowner in respect of the loading arises (LORD SELBORNE, C.).—GRANT & Co. *v.* COVERDALE, TODD & Co. (1884), 9 App. Cas. 470; 53 L. J. Q. B. 462; 51 L. T. 472; 32 W. R. 881; 5 Asp. M. L. C. 353, H. L.; *affg.* S. C. *sub nom.* COVERDALE *v.* GRANT (1883), 11 Q. B. D. 543, C. A.

*Annotations:*—**Apld.** Stephens *v.* Harris (1887), 57 L. J. Q. B. 203. **Distd.** Allerton Sailing Ship Co. *v.* Falk (1888), 6 Asp. M. L. C. 287. **Consd.** The Alne Holme, [1893] P. 173. **Distd.** Jones *v.* Green, [1904] 2 K. B. 275. **Consd.** Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109. **Refd.** Smith & Service *v.* Rosario Nitrate Co., [1894] 1 Q. B. 174; Furness *v.* Forwood (1897), 77 L. T. 95; Bunge y Born Co. *v.* Brightman, [1925] A. C. 799; Vergottis *v.* Cory, [1926] 2 K. B. 344.

**2878.** ——.]—By the terms of a charterparty it was provided that: "If the cargo cannot be loaded by reason of riots, civil commotions, or of a strike or lock out of any class of workmen essential to the loading of the cargo or by reason of obstructions or stoppages beyond the control of the charterers on the railways, or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes. . . . In case of any delay by reason of the before-mentioned causes no claim for damages or demurrage shall be made by the charterers, receivers of the cargo, or owners of the steamer:—*Held:* (1) the charterers were not thereby excused for delay in loading caused by obstructions on the railways leading to the port or loading place, but not occurring actually at the port or loading-place; (2) the charterers were not protected by the exceptions clause quoted above, from liability for delay in loading caused by congestion in the port due to a strike which had come to an end before the lay days began to run.—BASSA (OWNERS) *v.* ROYAL COMMISSION ON WHEAT SUPPLIES (1924), 132 L. T. 634; 16 Asp. M. L. C. 461.

**2879.** ——.]—BUNGE Y BORN CO. *v.* BRIGHTMAN (H. A.) & Co., No. 2776, *ante*.

**2880.** —— **Circumstances of port well known in trade—Unknown to shipowner.**]—A charterparty provided that the ship should proceed to Sulina, or outside, in sufficient depth of water to load the ship, & there load from the agents of the merchants a complete cargo of grain. The cargo to be brought & taken from alongside the ship at the ports of loading & discharge at charterer's expense & risk. Thirty running days to be allowed, if the ship be not sooner dispatched, for loading & unloading, & ten days on demurrage over & above the laying days, at £6 a day; detention by ice & quarantine not to be reckoned as laying days. There are no storehouses at the port of Sulina itself; but the grain shipped at Sulina is kept at places higher up the Danube, & is brought by steam lighters down the river & unloaded direct into ships waiting their lading at Sulina. The ship being ready to load, notice was given to the charterer; but after six days, before any cargo had been supplied, the river immediately above Sulina became frozen up, & so remained for two months, the port of Sulina itself remaining open. The ship having been thus delayed waiting for cargo:—*Held:* this was a "detention by ice," within the meaning of the charterparty; though the circumstances of the port were unknown to the shipowner, yet, being well known in the grain trade, they must be taken to have been the basis of the contract; & whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply.—HUDSON *v.* EDE (1868), L. R. 3 Q. B. 412; 8 B. & S. 631; 37 L. J. Q. B. 166; 18 L. T. 764; 16 W. R. 940; 3 Mar. L. C. 114, Ex. Ch.

*Annotations:*—**Distd.** Stephens *v.* Harris (1887), 57 L. J. Q. B. 203. **Folld.** Allerton Sailing Ship Co. *v.* Falk (1888), 6 Asp. M. L. C. 287. **Apld.** Smith & Service *v.* Rosario Nitrate Co., [1894] 1 Q. B. 174; Michalinos *v.* Dreyfus (1924), 131 L. T. 177. **Consd.** Bunge y Born Co. *v.* Brightman, [1925] A. C. 799. **Refd.** Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Kay *v.* Field (1882), 10 Q. B. D. 241; Grant *v.* Coverdale, Todd (1884), 9 App. Cas. 470; The Alne Holme, [1893] P. 173; The Austin Friars (1894), 71 L. T. 27; Furness *v.* Forwood (1897), 77 L. T. 95; Temple, Thomson & Clarke *v.* Runnalls (1902), 18 T. L. R. 822; Einar Bugge A. S. *v.* Bowater (1925), 31 Com. Cas. 1; S.S. Matheos *v.* Dreyfus, [1925] A. C. 654.

**2881.** —— ——.]—ALLERTON SAILING SHIP CO., LTD. *v.* FALK, No. 2768, *ante*.

**2882.** —— **Customary mode of loading.**]—SMITH & SERVICE *v.* ROSARIO NITRATE CO., No. 2559, *ante*.

**2883.** ——.]—BRUCE *v.* NICOLOPULO, No. 2556, *ante*.

**2884.** ——.]—Deft. agreed by charterparty to load pltf.'s ship with coal in regular & customary turn, "except in cases of riots, strikes, or any other accidents beyond his control" which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, deft. pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—*Held:* a snowstorm was not an "accident" within the exception.

The only question then is, does this snowstorm come within a reasonable interpretation of the exception? What is a reasonable time must be taken in connection with the possibility & the difficulty of loading, but it has no reference to getting the coals down (WILLES, J.).—FENWICK *v.* SCHMALZ (1868), L. R. 3 C. P. 313; 37 L. J. C. P. 78; 18 L. T. 27; 16 W. R. 481; 3 Mar. L. C. 64.

*Annotations:*—**Consd.** S.S. Knutsford *v.* Tillmanns (1908), 99 L. T. 399. **Refd.** Furness *v.* Forwood (1897), 77 L. T. 95; Mudie *v.* Strick (1909), 100 L. T. 701; S.S. Magnhild *v.* McIntyre, [1920] 3 K. B. 321. **Mentd.** Matsoukis *v.* Priestman, [1915] 1 K. B. 681.

**2885.** ——.]—*Re* RICHARDSONS & SAMUEL (M.) & Co., No. 1680, *ante*.

**2886.** ——.]—A charterparty provided that a ship should proceed to P. & there load a cargo of ore. It was known to the shipowners & charterers that the ore was to be brought down from the mines to the place of shipment by rail. When the ship arrived at P. it was impossible to bring a cargo to the place of shipment as portions of the railway had been rendered impassable by storms, floods & consequent subsidence. The charterparty excepted "stoppages of trains, mines & workmen, accidents to railways & to mines or piers from which the ore is to be shipped":—*Held:* the exceptions applied not only to causes preventing

the shipment, but also to causes preventing the ore from being brought to the place of shipment.—FURNESS *v.* FORWOOD BROTHERS & CO. (1897), 77 L. T. 95; 13 T. L. R. 500; 41 Sol. Jo. 662; 8 Asp. M. L. C. 298; 2 Com. Cas. 223.

*Annotation:*—**Refd.** Bunge y Born Co. *v.* Brightman, [1925] A. C. 799.

**2887. —— Through bill of lading.**]—WIENER & CO. *v.* WILSONS & FURNESS-LEYLAND LINE, LTD., No. 2218, *ante*.

*(c) Particular Causes of Detention.*

**Excepted perils.**]—*See, generally*, Sect. 4, *ante*.

**2888. Frost.**]—KEARON *v.* PEARSON, No. 2839, *ante*.

**2889.** ——.]—HUDSON *v.* EDE, No. 2880, *ante*.

**2890.** ——.]—KAY *v.* FIELD, No. 2734, *ante*.

**2891.** ——.]—GRANT & CO. *v.* COVERDALE, TODD & CO., No. 2735, *ante*.

**2892.** ——.] — THE ROOKWOOD (1894), 10 T. L. R. 314, C. A.

*Annotation:*—**Refd.** Bunge y Born Co. *v.* Brightman, [1925] A. C. 799.

**2893.** ——.] — S.S. MATHEOS *v.* DREYFUS (LOUIS) & CO., No. 2736, *ante*.

**2894. Snowstorm.**]—FENWICK *v.* SCHMALZ, No. 2884, *ante*.

**2895. Exceptional tides.**] — ALLERTON SAILING SHIP CO., LTD. *v.* FALK, No. 2768, *ante*.

**2896. Civil war.**]—SMITH & SERVICE *v.* ROSARIO NITRATE CO., No. 2559, *ante*.

**2897. Floods.**]—FURNESS *v.* FORWOOD BROTHERS & CO., No. 2886, *ante*.

**2898. Outbreak of war.**]—REID *v.* HOSKINS, No. 2852, *ante*.

**2899.** ——.]—ESPOSITO *v.* BOWDEN, No. 2764, *ante*.

**2900.** ——.]—CLAPHAM S.S. CO., LTD. *v.* HANDELS-EN TRANSPORT-MAATSCHAPPIJ VULCAAN OF ROTTERDAM, No. 2117, *ante*.

**2901. Embargo.**]—SJOERDS *v.* LUSCOMBE, No. 2850, *ante*.

**2902. Lock out.**]—*Re* RICHARDSONS & SAMUEL (M.) & CO., No. 1680, *ante*.

**2903. Strike.**]—By a charterparty, the vessel was to proceed with all convenient speed to Cardiff, & there load from the factors of the freighters a full cargo of coals, in the customary manner, no time being mentioned:—*Held:* this meant a loading according to the usage of the port, & within a reasonable time, without reference to unforeseen casualties; &, consequently, the loading having been delayed for an unreasonable time, the freighters were not excused by reason of the delay having arisen from difficulties connected with the railway & the collieries, which were beyond their control.—ADAMS *v.* ROYAL MAIL STEAM-PACKET CO. (1858), 5 C. B. N. S. 492; 28 L. J. C. P. 33; 32 L. T. O. S. 92; 7 W. R. 9; 141 E. R. 200.

*Annotations:*—**Expld.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626. **Refd.** Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127; Wright *v.* New Zealand Shipping Co. (1879), 4 Ex. D. 165, n.; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Ardan S.S. Co. *v.* Weir, [1905] A. C. 501.

**2904.** ——.]—STEPHENS *v.* HARRIS & CO., No. 2743, *ante*.

**2905.** ——.]—DOBELL & CO. *v.* GREEN & CO., No. 2871, *ante*.

**2906.** ——.]—BASSA (OWNERS) *v.* ROYAL COMMISSION ON WHEAT SUPPLIES, No. 2878, *ante*.

**2907.** ——.]—BUNGE Y BORN CO. *v.* BRIGHTMAN (H. A.) & CO., No. 2776, *ante*.

**2908.** ——.]—Applts., defts. in the action, sold to resps. a quantity of South African coal. The coal was to be supplied from M. Colliery & to be delivered f.o.b. Delagoa Bay. Resps. chartered a steamer to go to Delagoa Bay to load the coal, & in the events which happened they became liable to pay demurrage to the owners of the steamer. They then brought an action in which they claimed to recover from applts. as damages the amount which they had been compelled to pay to the shipowners for demurrage.

The contract of sale provided that the coal was to be supplied at Delagoa Bay in accordance with the custom of the port, & also (*inter alia*) that the sellers were not to be liable to the buyers for damages resulting from delay due to strikes . . . railway derangements . . . or any other causes beyond the seller's control.

When the steamer arrived at Delagoa Bay the port was already congested with shipping, & owing to a strike & to shortage of trucks on the railway & other causes she was not able to load for several weeks:—*Held:* if applts.' obligation was to have cargo ready to load when the steamer came on turn in the order of arrival they were excused, in the particular circumstances, by the operation of the exceptions clause; & if the provision in the contract that the coal was to be supplied according to the custom of the port implied that the turn of arrival was to be combined with the turn of ships at the colliery, the steamer had been loaded within the time allowed by the contract.—EINAR BUGGE A. S. *v.* BOWATER (W. H.), LTD. (1925), 31 Com. Cas. 1, C. A.

**2909. Prohibition of export.**]—BLIGHT *v.* PAGE (1801), 3 Bos. & P. 295, n.: 127 E. R. 163, N. P.

*Annotations:*—**Consd.** Beale *v.* Thompson (1803), 3 Bos. & P. 405. **Apld.** Barret *v.* Dutton (1815), 4 Camp. 333. **Refd.** Touteng *v.* Hubbard (1802), 3 Bos. & P. 291; Sjoerds *v.* Luscombe (1812), 16 East, 201; The Teutonia (1871), L. R. 3 A. & E. 394; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; Barrie *v.* Peruvian Corpn. (1896), 13 T. L. R. 101; Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

**2910.** ——.]—BRUCE *v.* NICOLOPULO, No. 2556, *ante*.

**2911. Failure to procure pass.**]—KIRK *v.* GIBBS, No. 2865, *ante*.

**2912. Infection at port of loading.**]—BARKER *v.* HODGSON, No. 2851, *ante*.

**2913. Failure to obtain colliery loading order.**]—ARDAN S.S. CO. *v.* WEIR (ANDREW) & CO., No. 2848, *ante*.

**2914. Shortage of trucks.**] — EINAR BUGGE A. S. *v.* BOWATER (W. H.), LTD., No. 2908, *ante*.

*D. Failure to Provide Cargo.*

*(a) In General.*

**2915. Condition precedent to action for breach—Readiness of ship to receive cargo—Necessity for**

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**PART VII. SECT. 5, SUB-SECT. 3.—C. (c).**

b. *Want of diligence.*]—A charterparty was entered into by which a steamer was to take on board a cargo of coal, at the port of Sydney, Cape Breton. In the charterparty was this stipulation: "Taking her turn with other steamers, & taking precedence of sailing vessels, & receiving prompt despatch, in loading & unloading." Sydney is a coaling port, & the coal is brought straight from the pit to the vessels loading. There were a number of vessels waiting to load, & the steamer did not get her cargo until seventeen days after the captain protested the freighters:—*Held:* want of diligence on the part of the lessees, defts., was established, the delay which occurred in loading the vessel being caused by the deficiency of coals at the port, & not by the necessity of taking turn according to the custom of the port.—LORD *v.* ELLIOTT (1883), 27 L. C. J. 30; 6 L. N. 146.—**CAN.**

**PART VII. SECT. 5, SUB-SECT. 3.—D. (a).**

c. *Defences to action for breach—Satisfaction of defendant's agents condition precedent—To performance of promise to load.*]—DIBBS *v.* COLONIAL SUGAR REFINING CO. (1872), 10

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averment.]—*Assumpsit* on the following charter-party: "It is mutually agreed between E. O., agent for the owners of *The Lydia*, new ship, now on the stocks, of the measurement of 1,100 tons or thereabouts, now at Quebec, to be launched & ready to receive cargo in all May, guaranteed to sail in all June, & F. & co., merchants, that the ship shall proceed to, etc., & there load a cargo of timber, etc.:—*Held:* the readiness to receive a cargo in all May was a condition precedent to pltf.'s right to recover for not loading a full cargo; & a plea stating that the ship was not ready to receive a cargo in all May was good on general demurrer.—OLIVER *v.* FIELDEN (1849), 4 Exch. 135; 18 L. J. Ex. 353; 13 L. T. O. S. 214; 154 E. R. 1155.

*Annotations:*—**Refd.** Croockewit *v.* Fletcher (1857), 1 H. & N. 893; Behn *v.* Burness (1863), 2 New Rep. 184; Corkling *v.* Massey (1873), L. R. 8 C. P. 395.

**2916. Defences to action for breach—Non-performance of condition precedent—Failure of shipowner to deliver outward cargo.**] — STORER *v.* GORDON, No. 4717, *post.*

**2917. —— —— Covenant by shipowner to take in particular cargo.**]—By charterparty between the shipowner & freighters, the shipowner covenanted to take on board 6 pipes of brandy at Havre, & therewith proceed to Terciera, & there take on board a complete cargo of fruit or other goods, as the freighters might think fit, & proceed to London or Bristol, as might be ordered by the freighters, & there make a right & true delivery of the fruit, etc.; & the freighters covenanted to pay certain freight for the fruit & the brandy, the freight of brandy, etc., to be taken out in fruit at Terciera, & guaranteed the ship a full cargo home:—*Held:* the covenant to take the brandy to Terciera was not a condition precedent, but a distinct & independent covenant; & the owner, in an action of covenant on the charterparty against the freighters for not putting a full cargo of fruit on board at Terciera, having averred general performance, the declaration was held good on demurrer.—FOTHERGILL *v.* WALTON (1818), 8 Taunt. 576; 2 Moore, C. P. 630; 129 E. R. 508.

*Annotation:*—**Refd.** Carpenter *v.* Cresswell (1827), 4 Bing. 409.

**2918. —— Ship in leaky condition.**]—BREED *v.* YATES (1839), 8 L. T. 802.

**2919. —— Ship going aground after part of loading completed—Unloading necessary.**]—A ship was chartered on Sept. 12, 1861, for the conveyance of a cargo of wheat from Harwich to St. Malo; ten days to be allowed for loading. The usual course was to load a portion of the cargo at a quay in the river Orwell, & to proceed lower down the river to take in the residue. The vessel having arrived on Sept. 14, & taken in 900 quarters, which was about three-fourths of the whole cargo, was proceeding down the river in charge of a pilot, when she got aground. The master, finding it necessary to take out the cargo in order to examine & repair the ship, gave notice to the charterers' agent, who accordingly, at the request of the master, & at the expense of the charterers, unloaded the 900 quarters, & dispatched the whole quantity to its destination by other vessels. On Oct. 4, the master gave notice that he was ready to receive the cargo & demanded it. The agent had none to ship:—*Held:* the owner could not, under the circumstances, maintain an action against the charterers for not supplying a cargo.—STRUGNELL *v.* FRIEDRICHSEN (1862), 12 C. B. N. S. 452; 9 Jur. N. S. 77; 142 E. R. 1219.

*Annotation:*—**Refd.** Blasco *v.* Fletcher (1863), 14 C. B. N. S. 147.

**2920. —— Owners unable to perform contract—Sale of ship.**]—By a berth contract made between shipowners & charterers the former agreed that their ship, *The Rosalia*, should proceed as ordered to Odessa & there load a complete cargo to be delivered at another port. Before *The Rosalia* proceeded to Odessa the shipowners sold her to a co. with the benefit of the berth contract, & the purchasers declared that they accepted the execution of that contract. Notice of the sale was given to the charterers. *The Rosalia* was tendered at Odessa to the charterers, but they refused to load her, contending that by the sale of the ship the shipowners had put it out of their power to perform the contract. The original owners claimed damages for breach of contract to load, & the dispute was referred to arbitration under a clause in the contract. The arbitrator found as facts that *The Rosalia* was duly tendered under the berth contract, & that both the original owners & the purchasers were always ready & willing to do all things necessary on their part towards the fulfilment of the contract, & that the vessel was not loaded solely by reason of the charterers' refusal to load her:—*Held:* upon these findings of fact, which meant that the original owners were always ready & willing to perform the contract personally & not merely through the purchasers, the original owners had not put it out of their power to perform the contract & the charterers were liable in damages for refusing to load the vessel.—SORRENTINO FRATELLI *v.* BUERGER, [1915] 3 K. B. 367; 84 L. J. K. B. 1937; 113 L. T. 840; 13 Asp. M. L. C. 164; 21 Com. Cas. 33, C. A.

*Annotation:*—**Apld.** Omnium D'Enterprises *v.* Sutherland, [1919] 1 K. B. 618.

**2921. —— Provision in contract for payment of demurrage.**]—AKT. REIDAR *v.* ARCOS, LTD., No. 1922, *ante.*

**2922. —— Freight payable at final destination—Ship lost on homeward voyage.**]—In an action on a charterparty, by which defts. covenanted to unload & receive the cargo at Charlestown, & then & there put on board 100 tons of goods, etc., pltfs. assigned as a breach that no goods were put on board. Defts. after oyer of the charterparty, in which there was a proviso, that the freight of the homeward cargo should be paid on delivery at London, pleaded that the vessel never arrived in London on the homeward voyage, but was lost. On demurrer the plea was held bad.—STEPHENSON *v.* PRICE (1784), 3 Doug. K. B. 353; 99 E. R. 692.

**2923. —— Loss of ship.**]—By a contract made in Oct. 1899, defts. sold to pltfs. a cargo of cotton seed, to be shipped per steamship *Oriando* at an Egyptian port during the month of Jan. 1900, & to be delivered to pltfs. in the United Kingdom. The contract provided that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof should be cancelled. In Dec. 1899, the *Orlando* was stranded through perils of the sea without default on defts.' part, & was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during Jan. In an action by pltfs. against defts. for

N. S. W. S. C. R. 81, 323; 11 N. S. W. S. C. R. 198.—AUS.

**d.** —— *Unseaworthiness of ship.*]—In an action for breach of contract in not shipping certain goods, defts. pleaded the unseaworthiness of the vessel. It was found that the ship was unseaworthy at the time of sailing, & that defts. had placed part of the goods on board:—*Held:* it was a condition precedent that a vessel shall be in a proper state to take the goods on board for the purpose of the particular voyage; or in such a state that she may be made fit for the voyage with the

failure to ship a cargo under the contract:—*Held:* the contract must be construed as subject to an implied condition that, if at the time for its performance the *Orlando* should, without default on defts.' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end; & the action was therefore not maintainable.—NICKOLL & KNIGHT *v.* ASHTON, EDRIDGE & CO., [1901] 2 K. B. 126; 70 L. J. K. B. 600; 84 L. T. 804; 49 W. R. 513; 17 T. L. R. 467; 9 Asp. M. L. C. 209; 6 Com. Cas. 150, C. A.

*Annotations:*—**Apld.** Dunford *v.* Cia Anonima Maritima Union (1911), 104 L. T. 811. **Distd.** Seville & United Kingdom Carrying Co. *v.* Mann (1915), 32 T. L. R. 192; F. A. Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 1 K. B. 485. **Refd.** Tredegar Iron & Coal Co. *v.* Hawthorn (1902), 18 T. L. R. 716; Blakeley *v.* Muller, Hobson *v.* Pattenden (1903), 88 L. T. 90; Kroll *v.* Henry, [1903] 2 K. B. 740; Chandler *v.* Webster (1904), 73 L. J. K. B. 401; *Re* Shipton, Anderson & Harrison, [1915] 3 K. B. 676; Horlock *v.* Beal, [1916] 1 A. C. 486; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; Metropolitan Water Board *v.* Dick Kerr, [1917] 2 K. B. 1; Blackburn Bobbin Co. *v.* Allen, [1918] 1 K. B. 540.

—— **Frustration.**]—*See* Nos. 2849-2856, *ante*.

**2924. Shipowner not bound to wait after day fixed—Agreement to load in time to join convoy.**]—Where the charterer of a ship, for a voyage to Tobago & back, covenanted to load & dispatch her in time to join the convoy that should be appointed to sail from the West Indies on Aug. 1:—*Held:* he was liable for not having loaded & dispatched her by July 22, the day the West India convoy passed the Island of Tobago, although he offered to load her with a complete cargo if she would stop a few days longer.—THOMPSON *v.* INGLIS (1813), 3 Camp. 428; 170 E. R. 1434, N. P.

**2925. Right of shipowner to minimise damage—Completion of deficient cargo.**]—Where a charterer undertakes to load a full & complete cargo & fails to perform that duty, the shipowner, acting reasonably & in order to minimise damage, has implied liberty to load other cargo in order to fill up the space in the ship left vacant by the charterer, & to delay the charter voyage for the period of time reasonably & necessarily occupied in taking in that substituted cargo.

Charterers agreed by the charterparty to load a full & complete cargo at her ports of loading in Java, but failed to do so. At Alexandria, an intermediate port at which the ship called in order to discharge a portion of her cargo, the shipowners, without asking for or receiving the assent of the charterers, loaded additional cargo, & thereby minimised the damages for which the charterers would otherwise be liable. The ship was necessarily detained for a period of five days, during which time the further cargo was being loaded. At the close of the voyage the shipowners sued the charterers to recover dead freight. The charterers by their defence alleged that the ship by loading the additional cargo at Alexandria without their consent & by the consequent delay in her chartered voyage had deviated, & that as a result the shipowner's right to dead freight had been destroyed:—*Held:* inasmuch as the shipowners had an implied right to minimise the damages caused by the charterers' default & to load additional cargo to fill up the space in the ship left vacant by the charterers, the delay occasioned to the voyage by loading that cargo was impliedly authorised by the charterparty, & there had been no deviation.—WALLEMS REDERIJ A./S. *v.* MULLER (W. H.) & CO., BATAVIA, [1927] 2 K. B. 99; 96 L. J. K. B. 819; 137 L. T. 154; 43 T. L. R. 330; 71 Sol. Jo. 431; 17 Asp. M. L. C. 226; 32 Com. Cas. 219.

### (*b*) *Measure of Damages.*

#### i. *In General.*

**2926. Provision for penalty—Whether damages in excess of penalty recoverable.**]—WINTER *v.* TRIMMER, No. 1967, *ante*.

**2927.** —— ——.]—Where a written contract had been made in the following terms: "We undertake to ship for you by the *Warrior Queen*, guaranteeing that she sails not later than the first week in July, or forfeit 2*s.* 6*d.* per ton, 300 or 400 packages, one-third yarn, at a through rate of 42*s.* 6*d.*, free of commission, provided they are forwarded *per* Thompson, M'Kay & Co., on or before 29th inst."; & deft. in answer to a declaration for breach of the said contract by reason of the non-shipment of a portion of the packages so sent, pleaded the payment of 2*s.* 6*d.* per ton on the said packages as & for the forfeit according to the agreement:—*Held:* on demurrer the plea was good.—HEUGH *v.* ESCOMBE (1861), 4 L. T. 517; 1 Mar. L. C. 79.

**2928. Different articles payable at different rates—Average value of freight.**]—THOMAS *v.* CLARK & TODD, No. 1908, *ante*.

**2929. Agreement to charter particular ship—Owner earning profit by sending other ship on same venture.**]—When a breach of contract has been committed with the owner of a ship whereby he is prevented from employing her upon an adventure, the damages payable to him cannot be reduced on the ground that he has earned a profit by sending another ship upon the same adventure in place of the first-mentioned ship.

Pltfs. were twelve in number, & were owners of a ship called the *J.*; by defts.' default she became unable to fulfil a contract to carry 240 emigrants from B. to A. Defts. were aware of this contract; five of pltfs. were part-owners of a ship called the *H.*, & five of them were part-owners of a ship called the *O.* 202 out of the 240 emigrants were carried to A. in the *H.*, & 25 more in the *O.* Pltfs. having sued to recover damages in respect of the loss happening to them through being prevented from carrying the 240 emigrants in the *J.*, defts. contended that the gain to individual pltfs. from carrying the 202 emigrants in the *H.* & the 25 emigrants in the *O.* must be taken into account in mitigation of damages:—*Held:* the damages could not be so reduced; because even if there had been but one owner of the *J.*, & the same person had been sole owner of the *H.* & the *O.*, the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former; & the contention of defts. was in substance an attempt to set off against joint damage a several benefit.—JEBSEN *v.* EAST & WEST INDIA DOCK CO. (1875), L. R. 10 C. P. 300; 44 L. J. C. P. 181; 32 L. T. 321; 23 W. R. 624; 2 Asp. M. L. C. 505.

*Annotations:*—**Refd.** The Marpessa, [1891] P. 403; British Westinghouse Electric & Manufacturing Co. *v.* Underground Electric Ry. of London, [1912] A. C. 673; Jamal *v.* Moolla Dawood, [1916] 1 A. C. 175; Hill *v.* Showell (1918), 87 L. J. K. B. 1106; City Tailors *v.* Evans (1921), 91 L. J. K. B. 379.

**2930. Full freight.**]—If a shipper by his default prevents the shipowner from earning the freight the rule of damages in ordinary cases does not apply, & the shipowner is entitled to the full

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goods on board, without such a delay as to frustrate the object of the merchant in shipping his goods.—TURNER, MORRISON *v.* RALLI & MAVROJANI (1869), 2 B. L. R. 127.—IND.

*e.* —— *Contravention of law.*]—KARL ERRLINGER *v.* CHAGANDAS & CO. (1915), 1 L. R. 40 Bom. 301.—IND.

*Sect.* 5.—*The loading: Sub-sect.* 3, *D.* (*b*) *i., ii. & iii.*]

freight.—CASEBOURNE *v.* AVERY & HOUSTON (1887), 3 T. L. R. 795, C. A.

**2931. Agreement between charterer & sub-charterers—Difference between freight for which charterers liable & freight agreed upon by sub-charterers—Fall in market rate of freight.**]—The owners of a ship chartered her to pltfs. for a particular voyage under a charterparty which stipulated for freights at the rate of 21*s.* per ton, & provided that in a certain event, which happened, pltfs. should be at liberty to cancel the charterparty. Pltfs. sub-chartered the ship to defts. for the same voyage at a freight of 28*s.* 6*d.* per ton. Defts., in breach of their contract, refused to load. The rate of freight obtainable in the market for a similar ship at the date of the breach had fallen to 17*s.* per ton :—*Held :* as the contract related to the hire of a specific ship which pltfs. were entitled to get rid of at a saving to themselves of 21*s.* per ton, the measure of damages was the difference between 28*s.* 6*d.* & 21*s.*, & not the difference between 28*s.* 6*d.* & 17*s.* the market rate.—WEIR (ANDREW) & Co. *v.* DOBELL & Co., [1916] 1 K. B. 722 ; 85 L. J. K. B. 873 ; 115 L. T. 387 ; 13 Asp. M. L. C. 496 ; 21 Com. Cas. 206.

ii. *No Cargo Provided.*

**2932. Freight ship might have earned.**]—WESTLAND *v.* ROBINSON (prior to 1690), 1 Eq. Cas. Abr. 375 ; cited 2 Vern. 212.

*Annotation :*—**Apld.** Edwin *v.* East India Co. (1690), 2 Vern. 210.

**2933. —— Less expenses of carriage.**] — A charterparty, on its face, purported to be accepted by M., by procuration of T., deft. To show the authority of M., evidence was adduced that deft., although resident in London, carried on the business of a corn factor at Limerick, where the charterparty was executed, & that M. was his brother, & had the general management of deft.'s business & warehouse there, & was in the habit of sending great quantities of corn to London, by vessels hired, & the charterparties signed, by him, by procuration of deft. :—*Held :* (1) the jury were at liberty to find that M. had a general authority so as to bind deft., although in fact no authority had been given by him to execute this charterparty, & it was one in which he had no interest. (2) *Semble :* the damages recoverable in an action for not loading pursuant to a charterparty are the amount of freight which the ship would have earned if she had been loaded, minus the expenses in carrying the freight, & also deducting any sum the ship has actually earned elsewhere.

I am not prepared to say that a shipowner, who has lost his freight by reason of a breach of contract by the charterer, is bound to go & look for employment for his ship so as to relieve the charterer from the consequence (MARTON, B.).—SMITH *v.* M'GUIRE (1858), 3 H. & N. 554 ; 27 L. J. Ex. 465 ; 31 L. T. O. S. 248 ; 6 W. R. 726 ; 157 E. R. 589.

*Annotations :*—*As to* (1) **Refd.** Cornish *v.* Abington (1859), 28 L. J. Ex. 262 ; Stagg *v.* Elliott (1862), 12 C. B. N. S. 373 ; The Fanny, The Maltilda (1883), 48 L. T. 771. *As to* (2) **Consd.** Aitken, Lilburn *v.* Ernsthausen, [1894] 1 Q. B. 773.

**2934. Other employment found for ship—Whether owner must bring sum earned into account.**]—LIDGETT *v.* WILLIAMS, No. 1792, *ante.*

**2935. —— ——.**]—SMITH *v.* M'GUIRE, No. 2933, *ante.*

**2936. —— —— Where stipulation for payment of liquidated sum—Dead freight.**]—Freighters chartered a foreign ship to take a cargo from London to St. Petersburg, & to load a cargo there & immediately return to London, paying so much freight per ton ; & it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at St. Petersburg for forty running days ; & if that time elapsed without the outward cargo being delivered, & consequently without the return cargo being put on board, the master should be at liberty to return to London, & the freighters should pay him £2,500 immediately upon the arrival of the ship at London. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss in case the ship was not allowed by the Russian Govt. to load a cargo at St. Petersburg on the chartered voyage. In fact the Russian Govt., when the ship arrived at St. Petersburg, presuming that the outward cargo was British, refused permission to unload her, & consequently she could not take in a Russian cargo ; on which the master, judging for the best, proceeded immediately to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to London, & earned freight thereon :—*Held :* as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from Stockholm to London, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened ; every contract of insurance being in its nature a contract of indemnity.—PULLER *v.* STANIFORTH (1809), 11 East, 232 ; 103 E. R. 993.

*Annotations :*—**Expld.** Puller *v.* Halliday (1810), 12 East, 494. **Distd.** Bell *v.* Puller (1810), 12 East, 496, n. ; Lidgett *v.* Williams (1845), 5 L. T. O. S. 169.

**2937. —— —— —— ——.**]—Where a ship was chartered to take a cargo of lead from London to St. Petersburg, & there immediately receive a return cargo from the freighters' agent & bring it to London, with a proviso that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at St. Petersburg forty running days, without the outward cargo being unloaded, & consequently without the return cargo being loaded, should be at liberty to return to London or any port in England :—*Held :* such political circumstances having occurred as hindered the unloading of the outward cargo at St. Petersburg, & the ship having waited forty running days there, the master was entitled to receive the freight of a homeward cargo, which he loaded on his own account upon the outward cargo, & brought home, in addition to the dead freight payable by the freighters according to the stipulations of the charterparty. —BELL *v.* PULLER (1810), 12 East, 497, n. ; 2 Taunt. 285 ; 104 E. R. 194.

*Annotations :*—**Distd.** Staniforth *v.* Lyall (1830), 7 Bing. 169. **Refd.** Puller *v.* Halliday (1810), 12 East, 494.

**2938. —— —— —— Profit greater than under charterparty.**]—Defts. chartered a ship to New Zealand, where they were to load her, or by an

agent there to give pltf., the owner, notice that they abandoned the adventure; in which case they were to pay him £500. The ship went to New Zealand, but found neither agent nor cargo there, & the captain made a circuitous voyage home, by way of Batavia. This voyage, after making every allowance for increased expense & loss of time, was more profitable than the original adventure to New Zealand would have been. Pltf. having sued deft. on the charterparty for breach of covenant:—*Held:* he could not recover the £500 penalty in addition to the profit of the homeward voyage.—STANIFORTH *v.* LYALL (1830), 7 Bing. 169; 4 Moo. & P. 829; 9 L. J. O. S. C. P. 23; 131 E. R. 65.

*Annotations:*—**Apld.** British Westinghouse Electric & Manufacturing Co. *v.* Underground Electric Ry. of London, [1912] A. C. 673. **Reld.** Jamal *v.* Moolla Dawood, [1916] 1 A. C. 175; Hill *v.* Showell (1918), 87 L. J. K. B. 1106.

**2939. —— —— No loss sustained by owner—Nominal damages.**]—BOOTH *v.* SIMPSON (1837), 4 L. T. 179.

**2940. —— Mitigation of damages—By endeavours to find other employment.**]—By a charterparty it was stipulated that a ship should proceed to Limerick with her then present cargo, & there take a cargo of oats for London, at a freight of 2*s.* 8*d.* a quarter; six days being allowed for loading at Limerick. Before the expiration of the six days the freighter's agent offered the captain a cargo at 2*s.* 6*d.*, & said that the freighter's broker would pay the difference. The captain refused to take anything not according to the terms of the charterparty:—*Held:* as the contract had not been broken by deft., the captain was not bound to accept this offer; but, if the contract had been broken by the freighter not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible.—HARRIES *v.* EDMONDS (1845), 1 Car. & Kir. 686; 4 L. T. 180.

**2941.** —— —— ——.]—In actions of contract, where, supposing the data to be admitted or established, & to be unaffected by any evidence introducing other legitimate elements of consideration, the damages may be more or less matter of calculation, although, *primâ facie*, pltf. may be entitled to the full measure of damages, yet, where the actual amount of damage has been in any degree affected by the conduct of pltf. or his agents, that is a legitimate element of consideration, & the jury are at liberty to diminish the damages on that account. But if they do so unreasonably & arbitrarily the ct. can grant a new trial, as for a verdict against evidence.

In an action on a charterparty for not loading a cargo, the loading ports being Rangoon or Bassein, & the captain having been to Rangoon, & there received orders to go to Bassein, three days' sail, where no cargo could be obtained, & he was requested to go back to Rangoon or elsewhere, in hopes of obtaining a cargo, which he declined to do, & remained inactive at Rangoon until the time for loading had elapsed, the judge having told the jury that they were not bound to give the plaintiff the full amount of freight, £2,750, but that if they deemed the master's conduct unreasonable they might diminish the damages on that account, & left it to them to say whether pltf. should recover the full amount, or any other amount they might deem reasonable, & they having found for pltf. damages £500:—*Held:* there had been no misdirection, but granted a new trial on the ground that the verdict was against the evidence, & the amount of damages considerably too low, making it, however, a condition that pltf. should relinquish the costs of the first trial.—WILSON *v.* HICKS (1857), 26 L. J. Ex. 242; 4 L. T. 683.

*Annotations:*—**Reld.** Nichol *v.* Bostwick (1858), 28 L. J. Ex. 4; Roth *v.* Taysen, Townsend & Grant (1895), 73 L. T. 628; Payzu *v.* Saunders (1919), 35 T. L. R. 657.

**2942.** —— —— ——.]—SMITH *v.* M'GUIRE, No. 2933, *ante*.

**2943.** —— —— ——.]—Pltfs., by charterparty, dated May 26, 1871, agreed with deft. that deft.'s ship should sail to B., & there load from pltfs. factors a cargo of coals & proceed therewith to H. or D. & deliver same on being paid freight at the rate of 2*s.* 9*d.* per ton in cash on unloading & right delivery. The ship was to be loaded & discharged with all possible dispatch, & to load with G. or H. till end of Sept., at captain's option, but after Sept. with H; & was to continue at the above rate until Mar. 1872. In Sept. the captain exercised his option in favour of loading with G., but pltfs. refused to load him from G.; whereupon deft. declined further to perform the charterparty:—*Held:* the breach of the charterparty which pltf. had committed went to the root of the contract between the parties, & justified deft. in his refusal.

Suppose pltfs. had said they would not load till some distant date . . . but that afterwards they would again proceed with loading, what ought deft. to do in such a case? He would clearly be bound to find some occupations for his ship; otherwise, when he brought his action for damages, pltfs. would have good cause to complain (BRAMWELL, B.).—BRADFORD *v.* WILLIAMS (1872), L. R. 7 Exch. 259; 41 L. J. Ex. 164; 26 L. T. 641; 20 W. R. 782; 1 Asp. M. L. C. 313.

*Annotations:*—**Reld.** Hudson *v.* Hill (1874), 43 L. J. C. P. 273; Honck *v.* Muller (1881), 7 Q. B. D. 92; Rhymney Ry. *v.* Brecon & Merthyr Tydfil Ry. (1900), 83 L. T. 111. **Mentd.** Corcoran *v.* Proser (1873), 22 W. R. 222.

**2944. —— Performance of contract refused on ground of excessive freight—Lower rate of freight offered—Whether measure taken on higher or lower rate.**]—TAUBATE (OWNERS) *v.* BARNETT (1924), 157 L. T. Jo. 451.

**2945. Half cargo shipped—Subsequent destruction by fire—Shipowner accountable for space left unfilled.**]—A shipper contracted with a shipowner to load a full cargo at a given average rate of freight, fire excepted. When half the cargo had been shipped it was destroyed by fire, & the shipper declined to proceed with the loading. The shipowner obtained a full cargo from other sources. In an action for breach of charterparty:—*Held:* for the purpose of mitigating the damages, the shipowner was only bound to account for the freight earned by the cargo in that half of the ship which the shipper had neglected to fill up, & he was at liberty to fill up the half made vacant by the fire for his own benefit.—AITKEN, LILBURN & Co. *v.* ERNSTHAUSEN & Co., [1894] 1 Q. B. 773; 63 L. J. Q. B. 559; 70 L. T. 822; 10 T. L. R. 256; 7 Asp. M. L. C. 462; 9 R. 758, C. A.

*Annotation:*—**Apld.** Weir *v.* Girvan, [1900] 1 Q. B. 45.

### iii. *Short Cargo or Cargo Not in Accordance with Charterparty.*

**2946. Difference between sum actually earned & sum ship might have earned.**]—THE THOMAS BELL, RICHARDSON *v.* SADLER (1852), 6 L. T. 165.

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PART VII. SECT. 5, SUB-SECT. 3.—D. (b) iii.

1. *Agreed freight.*]—LORD *v.* DAVIDSON (1886), 13 S. C. R. 166.—CAN.

2. *Dead freight.*]—A shipper who had chartered a ship, agreeing to furnish a full cargo, & pay for it at a certain rate per ton, failed to furnish a full cargo:—*Held:* the dead freight

*Sect.* 5.—*The loading: Sub-sect.* 3, *D.* (*b*) *iii.; sub-sect.* 4, *A., B. & C.*]

**2947.** ——.]—A charterparty provided that a vessel should load a full cargo of Jarrah wood for the United Kingdom, freight being payable at the rate of 35*s.* per load of 50 cubic feet delivered. "Cargo to consist of 9 inch by 3 inch planks, of reasonable lengths such as could go down ship's present hatchways." The cargo consisted of planks exceeding 9 inch by 3 inch by an average of about ⅛ inch. By a custom of the hardwood timber trade, in measuring cross dimensions, fractions of quarter of an inch are disregarded: —*Held:* freight was payable upon the number of loads ascertained by measuring the cargo in the customary manner, & assuming that there had been a breach of the obligation to load planks 9 inch by 3 inch the damages were measured by the difference, if any, in freight, which must be ascertained by measuring in the customary manner. *Semble:* the expression "planks 9 inch by 3 inch," meant planks of those measurements, when measured in the customary manner.—YOUNG *v.* CANNING JARRAH TIMBER CO., LTD. (1899), 4 Com. Cas. 96.

**2948.** —— **Claim for dead freight.**]—PEARSON *v.* GOSCHEN, No. 4528, *post.*

**2949.** —— ——.]—(1) "Dead freight" means compensation, liquidated or unliquidated, for the loss suffered by the shipowner by the failure on the part of the charterer to supply a full cargo, & the amount payable in respect thereof, where it is unliquidated, is such reasonable amount as the shipowner would have earned, after deducting such expenses as he would have incurred if a full cargo had been shipped.

(2) A lien on the cargo actually shipped for dead freight may be created by express stipulation in the charterparty.

(3) Where a charterparty is entered into on behalf of the indorsees of the bills of lading, given under the charter, so that they are the actual charterers, they are bound by a stipulation as to lien in the charterparty.

(4) Bills of lading signed by the master are *primâ facie* evidence that the quantities named therein were received on board by him; the *onus* of rebutting this presumption, & of showing that a less quantity than that specified was received lies on a shipowner.

The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship. Though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them (LORD CHELMSFORD).—MCLEAN & HOPE *v.* FLEMING (1871), L. R. 2 Sc. & Div. 128; L. R. 6 Q. B. 558, n.; 25 L. T. 317; 1 Asp. M. L. C. 160, H. L.

*Annotations:*—*As to* (1) **Distd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Consd.** Red "R" S.S. Co. *v.* Allatini (1909), 100 L. T. 268. **Foll.** Kish *v.* Taylor, [1912] A. C. 604. *As to* (4) **Consd.** Brown *v.* Powell Coal Co. (1875), L. R. 10 C. P. 562. **Refd.** Pyman *v.* Burt (1883), Cab. & El. 207; Smith *v.* Bedouin Steam Navigation Co., [1896] A. C. 70; The Hollinside (1898), 3 Com. Cas. 100; New Chinese Antimony Co. *v.* Ocean S.S. Co., [1917] 2 K. B. 664. *Generally*, **Mentd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117.

**2950.** —— ——.]—GRAY *v.* CARR, No. 1958, *ante.*

**2951.** —— ——.]—KISH *v.* TAYLOR, No. 3170, *post.*

**2952. Goods not in accordance with charterparty — Actual earnings more profitable — Nominal damages.**]—THE OLANDA, STOOMVAART MAATSCHAPPIJ NEDERLANDSCHE LLOYD *v.* GENERAL MERCANTILE CO., LTD. (1917), [1919] 2 K. B. 728, n., H. L.

*Annotation:*—**Distd.** Steven *v.* Bromley, [1919] 2 K. B. 722.

**2953.** —— **Recovery on quantum meruit.**]—STEVEN *v.* BROMLEY & SON, No. 4870, *post.*

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SUB-SECT. 4.—DELIVERY OF CARGO.

*A. In General.*

**2954. Dividing line of liability of shipper & shipowner.**]—GRANT & CO. *v.* COVERDALE, TODD & CO., No. 2877, *ante.*

**2955. Cargo partly delivered—Departure of ship from port—Under apprehension of embargo.**]—The master & the freighter of a vessel of 400 tons having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to St. P., & there load from the freighter's factor a complete cargo of hemp, & iron, & proceed therewith to London, & deliver the same, on being paid freight, etc.:—*Held:* the master, after taking in at St. P. about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian Govt., was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted *bonâ fide*, & under a reasonable & well-grounded apprehension at the time; & a hostile embargo & seizure was in fact laid on six weeks afterwards.—ATKINSON *v.* RITCHIE (1809), 10 East, 530; 103 E. R. 877.

*Annotations:*—**Apld.** Splidt *v.* Heath (1809), 2 Camp. 57, n. **Refd.** Spence *v.* Chodwick (1847), 10 Q. B. 517; Esposito *v.* Bowden (1857), 7 E. & B. 763; The Teutonia (1871), L. R. 3 A. & E. 394; Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589; Watts, Watts *v.* Mitsui, [1917] A. C. 227; Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287. **Mentd.** Hall *v.* Wright (1858), E. B. & E. 765; Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085; Matthey *v.* Curling, [1922] 2 A. C. 180.

**2956. Preparation of cargo for delivery—Pressing wool—Liability for expenses—Evidence of custom at port of loading.**]—COCKBURN *v.* ALEXANDER, No. 1902, *ante.*

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due for the deficiency was the actual damage occasioned to the shipowner by the failure, & consequently that any expense (such as drogherage) thereby saved to him, must be deducted from the amount of freight which would have appertained to the deficient cargo.—M'GAVIN *v.* CUDDY (1843), 6 Dunl. (Ct. of Sess.) 297; 16 Sc. Jur. 164.—**SCOT.**

**PART VII. SECT. 5, SUB-SECT. 4.—A.**

h. *Expense of wood-boats—Whether implied contract that stevedore should pay.*]—There is no implied contract between the shipper of deals & the stevedore (who is employed by the owner of the vessel & undertakes to bring the deals from the wharf), that the stevedore shall pay the expense of wood-boats employed by the shipper to bring part of the deals to the vessel.—WARD *v.* MCNICHOL (1857), 8 N. B. R. (3 All.) 499.—**CAN.**

k. *Constructive delivery.*] — Where pltf. gave evidence, uncontradicted, that deft., the captain of a vessel, told her to send her goods to a certain wharf, & that she sent them there:—*Held:* there was evidence of a constructive delivery to deft., which imposed on him the duty of looking after pltf.'s goods & taking them on board.—MORRISON *v.* THOMPSON (1877), 11 N. S. R. (2 R. & C.) 411.—**CAN.**

l. ——.]—FORSYTH *v.* BELL (1885), 18 N. S. R. (6 R. & G.) 374; 6 C. L. T. 489.—**CAN.**

m. *Duty of shipper.*]—It is the duty of the shipper to comply strictly with the terms of the shipping order.—GENTLE *v.* THOMSON (1862), 1 Ind. Jur. O. S. 69.—**IND.**

n. *Carriage of stone-crusher.*] — The Public Works Department wrote to resp. co.'s agents asking them to quote freight on a stone-crusher from Wanganui to Dunedin taken from & landed into railway trucks. The agents wrote in reply offering a price to carry the crusher from Wanganui

**2957. Risk during delivery—Transit from shore to ship—When risk falls on shipowner—Absence of exceptional clause in charterparty.**]—NOTTEBOHN *v.* RICHTER, No. 2533, *ante*.

**2958. Delivery at "merchant's risk & expense"—Cargo to be loaded "as customary"—Exclusion of merchant's risk & expense—Expenses of lighterage.**]—Pltfs. agreed with deft. by charterparty that deft.'s ship should load at Barbadoes, St. Kitts, or Trinidad, a full cargo of West India produce, "to be brought to & taken from alongside at merchant's risk & expense." These words, with others, were in print. The charterparty also contained the words "cargo at Trinidad as customary." These words, with others, were in writing.

The custom at Trinidad is, that the ship pays for the lighterage, & the shipowner allows the charterer the reasonable expense thereof. Deft.'s ship loaded at Trinidad in the customary manner, but the captain refused to pay the lighterage, whereupon pltfs. had to bear the expense of it:—*Held:* the stipulation, "cargo at Trinidad as customary," worked an exception to the stipulation as to loading at merchant's risk, & pltfs. were entitled to recover the lighterage from deft.—SCRUTTON *v.* CHILDS (1877), 36 L. T. 212; 3 Asp. M. L. C. 373, D. C.

*Annotation:*—**N.F.** The Nifa, [1892] P. 411.

—— **Unloading cargo.**]—*Compare* Part VII., Sect. 7, sub-sect. 5, F., *post*.

**Delivery of dangerous goods.**]—*See* Sect. 1, sub-sect. 8, *ante*.

*B. Place of Delivery to Ship.*

**2959. Agreement to load on board ship—Goods brought to warehouse or quay—& offered to person in charge—Refusal of master to take goods on board.**]—An agreement to load on ship board seven casks of brandy, is well performed when the master refuses to take them on board by bringing them to the warehouse or the quay from which the vessel takes in her cargo, & offering them to the party there to send them on board; for being cumbersome goods the tender is sufficient if they be brought to a place from whence they may be well received, & need not be carried to the ship's side.—STONE *v.* GILLIAM (1690), 1 Show. 149; 89 E. R. 505.

**2960.** —— —— —— **Cumbersome goods.**]—STONE *v.* GILLIAM, No. 2959, *ante*.

**2961. Custom to deliver at wharf to mate—Delivery by wharfinger—Liability for goods lost from wharf.**]—COBBAN *v.* DOWNE, No. 2967, *post*.

**2962. Provision requiring cargo to be brought alongside—Expenses of removal to ship—Goods deposited at distance on wharf—Clause requiring usual & customary assistance from master.**]—Defts. had executed a charterparty, under which the cargo was to be sent alongside the ship at the merchant's expense, the captain rendering the usual & customary assistance with his boats & crew, some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to deft.'s factor for labourers to remove it into the boats, the factor having refused, saying he would abide by the charterparty, the captain hired labourers for the purpose:—*Held:* the expense so incurred might, notwithstanding the charterparty, be recovered on counts for money paid, & work & labour.—FLETCHER *v.* GILLESPIE (1826), 3 Bing. 635; 11 Moore, C. P. 547; 4 L. J. O. S. C. P. 202; 130 E. R. 659.

*Annotation:*—**Refd.** Holman *v.* Dasnieres (1886), 2 T. L. R. 480.

**2963.** —— —— **Safe loading impossible inside bar.**]—On a charter to receive a cargo alongside the ship, at a port where the ship cannot safely load inside a bar, if she is loaded outside the freighter cannot throw extra expense of lighterage on the shipowner.—TRINDADE *v.* LEVY (1861), 2 F. & F. 441, N. P.

**2964.** —— —— **Master accepting cargo before brought alongside.**]—HOLMAN & SONS *v.* DASNIÈRES, No. 2965, *post*.

**2965.** —— **Duty of charterer to bring cargo as near as practicable—Meaning of "as near as practicable"—Question for jury.**]—Where a charterparty provided that the cargo should be "brought alongside" for shipment:—*Held:* "brought alongside" meant that the charterer was to bring the cargo as near to the ship as practicable, & it was for the jury to say whether the charterer had done so.

He [the master] had no right to receive it & load it & then seek to throw upon the shipper the extra expense of loading it (LORD ESHER, M.R.).—HOLMAN & SONS *v.* DASNIÈRES (1886), 2 T. L. R. 607, C. A.

*Annotation:*—**Consd.** Akt. Helios *v.* Ekman (1897), 76 L. T. 537.

*C. Effect of Delivery.*

**2966. Shipowner's responsibility attaches.**]—GRANT & CO. *v.* COVERDALE, TODD & CO., No. 2877, *ante*.

**2967.** —— **Delivery to officer or person accredited.**]—Where goods are to be carried coastwise & the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried; if they are delivered to the mate, the wharfinger's responsibility is at an end, & he is not liable, though the goods are lost from the wharf before they are shipped.—COBBAN *v.* DOWNE (1803), 5 Esp. 41; 170 E. R. 731, N. P.

*Annotations:*—**Refd.** Leigh *v.* Smith (1825), 1 C. & P. 638; Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894.

**2968.** —— ——.]—If a ship is chartered for a particular voyage & put up as a general ship by the charterer, it is not enough to make the owners liable for the non-delivery of goods, to show that they were put on board the ship to be carried in this voyage, unless it be proved that they were received on board by some person appointed or authorised by the owners.—MACKENZIE *v.* ROWE (1810), 2 Camp. 482; 170 E. R. 1225, N. P.

*Annotations:*—**Refd.** Hutton *v.* Bragg (1816), 2 Marsh. 339; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86.

**2969.** —— ——.]—Goods were sent by canal carriers, directed to a person in the Isle of Man,

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to Dunedin, "to be delivered to & taken from alongside ship at port of loading & discharge." This offer was accepted by the Minister of Public Works without reference to the terms of the first letter:—*Held:* the stipulation made in the first letter that the crusher should be taken from & landed into railway trucks was not a term of the contract of affreightment, the offer which was accepted being to carry the crusher if delivered at the ship's side, & the duty of deft. co. to take delivery of the crusher did not therefore arise until it had been so delivered.—R. *v.* CANTERBURY S.S. CO., LTD. (1909), 28 N. Z. L. R. 361.—**N.Z.**

**PART VII. SECT. 5, SUB-SECT. 4.—B.**

o. *False representations as to depth of water.*]—Pltf. declared that deft. by falsely pretending & representing to pltf., that if pltf. would go with his vessel to Willie's Bay, for the purpose of carrying a load of deft.'s wood thence to Cobourg, he would be able, by reason of the depth of water in said bay, to approach within a convenient distance from the shore, & load the wood on his vessel with scows, induced pltf. to go with his vessel to the said bay for that purpose, & to incur great expense, etc., whereas the depth of the water was not sufficient, etc.:—*Held:* it sufficiently appeared that deft. induced pltf. to go for the wood by his false representation, though no contract to carry was stated.—HARVEY *v.* WALLACE (1858), 16 U. C. R. 508.—**CAN.**

*Sect. 5.—The loading: Sub-sect. 4, C.; sub-sect. 5, A., B. & C. (a) i. & ii.]*

to the care of deft., at Liverpool. On the arrival of the goods at Liverpool, they were landed on a public wharf, & notice sent to deft., who was the agent to a steam vessel co. He signed the carrier's book, & afterwards entered them in the manifest & clearance of the steam vessel going to the Isle of Man. There was also evidence, that, on former occasions, deft. had desired that goods sent to him should remain on the wharf:—*Held:* there was evidence to go to the jury of a delivery to, & acceptance by deft. of the goods, so as to make him be liable for a subsequent loss by negligence.—QUIGGIN *v.* DUFF (1836), 1 M. & W. 174; 1 Gale, 420; 3 Tyr. & Gr. 553; 5 L. J. Ex. 149; 150 E. R. 394.

**2970.** —— ——.]—BRITISH COLUMBIA SAW-MILL CO. *v.* NETTLESHIP, No. 3820, *post.*

**2971. Right to demand redelivery—Right of charterer — Redelivery before freight due.]** — THOMPSON *v.* SMALL, No. 1912, *ante.*

**2972. —— Right of shipper—Necessity for payment of freight—& indemnity to master against bills of lading.]**—TINDALL *v.* TAYLOR, No. 2179, *ante.*

**2973. Unloading necessary to enable ship to pass bar—Charterer not bound to reship.]**—GENERAL STEAM NAVIGATION CO. *v.* SLIPPER, No. 2789, *ante.*

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SUB-SECT. 5.—STOWAGE.

*A. In General.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 2.

**2974. Definition.]**—(1) A custom that, in discharging long lengths of timber from a ship, the shipowner is bound to put the timber into lighters brought alongside by the consignees is not inconsistent with a charterparty which provides that the timber shall be taken from alongside at merchants' expense.

If the written terms of the charterparty stood alone, upon the true construction of a charterparty in those terms, the delivery of the cargo from the ship into barges or on to a quay is a joint operation, that is to say, neither party is bound to do it alone. It is to be a joint act, &, therefore, if one party is not there to perform his part in it, that prevents the other party from performing his part. Therefore, upon the written terms of the charterparty standing alone, the captain of the ship would not be bound to begin to deliver the cargo into the barges, unless the charterers had men there to assist in the joint operation; &, if they were not ready & willing to take part in it, the captain being ready & willing to do so, he would be prevented by the default of the charterers from discharging the ship, & demurrage would be payable for the consequent delay. That being the state of things with regard to a charterparty in these terms if they stood alone, a custom appears to have been evolved among the persons engaged in importing timber cargoes into the Thames by way of addition to the terms of the written contract.

What is the effect of the evidence as to the custom? The judge finds in plain terms, as to so much of the transaction as consists of delivery of the timber out of the ship into the barge, that it is to be wholly performed by the shipowner alone; but he does not find that the arranging of the timber when on the barge, so as to make the barge properly navigable, & to make the cargo of the barge as large as it can be, is to be done by the shipowner either alone or jointly with the charterer.

Then the question is whether the custom so limited is contrary to the terms of the charterparty. I think not. It simply explains what delivery of the cargo to the consignee alongside is & how it is to be effected—namely, by the act of the shipowner alone instead of the joint act of both parties. I therefore think that the view taken by the learned judge was correct (LORD ESHER, M.R.).

(2) Stowage means something over & above the loading of the barge from the ship (A. L. SMITH, L.J.).—AKT. HELIOS *v.* EKMAN & CO., [1897] 2 Q. B. 83; 66 L. J. Q. B. 538; 76 L. T. 537; 8 Asp. M. L. C. 244; 2 Com. Cas. 163, C. A.

*Annotations:—As to* (1) **Distd.** Brenda S.S. Co. *v.* Green (1900), 82 L. T. 66. **Consd.** Glasgow Navigation Co. *v.* Howard (1910), 102 L. T. 172. **Distd.** Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397. **Reid.** Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Rederi Akt. Acolus *v.* Hillas (1925), 134 L. T. 184.

**2975. By whom cargo to be stowed—Master or stevedore—What shipper entitled to assume.]**—*Semble:* a merchant sending goods to be loaded on board a general ship is not entitled to assume, without inquiry that they are to be shipped & stowed by the master, rather than by a stevedore, & so, without any contract with the master, or wrong done by him or the crew, to insist upon holding the master liable for damage done to the goods in the loading thereof.

In the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner of a ship, to receive & properly stow on board the goods to be carried; &, for any damage to the goods occasioned by negligence in the performance of this duty, the owner, & probably also the master, if the damage result from the neglect or misconduct of himself or of those for whose acts he is responsible, is liable to the shipper.

A ship was chartered by the owner to one A. for a voyage with cargo to Port Louis & back, for a stipulated rate of freight per ton on the homeward cargo, the cargo to be taken to & tendered alongside at the charterer's risk & expense, the ship to be consigned to charterer's agents at ports of loading & discharge, & a stevedore for the outward cargo to be appointed by the charterer, but to be paid by & to act under the captain's orders. The charterer put up the ship as a general ship for Port Louis, & appointed a stevedore, who with his men went on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the stevedore, only looking into the hold occasionally to see how the cargo was being stowed, for the safety of the ship. Pltfs.' agent arranged with the broker of the charterer for the freight & carriage to Port Louis of certain sugar pans, & sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter by the stevedore & his men, two of them were by their negligence damaged:—*Held:* under these circumstances, the stevedore was not the servant or agent of the master, so as to render him responsible.—BLAIKIE *v.* STEMBRIDGE (1860), 6 C. B. N. S. 894; 6

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**PART VII. SECT. 5, SUB-SECT. 5.—A.**

**p.** *Duty of carrier—To use all reasonable & proper means to secure safe stowage.]*—A carrier is only bound to use all reasonable & proper means, but not every possible means, to secure the safe stowage of his cargo. It is not incumbent on him to take special & exceptional precautions for its safe carriage.—AVERY *v.* INMAN S.S. CO. (1870), 5 Nfld. L. R. 357.—**NFLD.**

**q.** *Stevedore's charges—Liability of owner]*—CANADIAN STEVEDORING CO., LTD. *v.* ROBIN LINE S.S. CO., CANADIAN STEVEDORING CO., LTD. *v.* SEAS SHIPPING CO. (B. C.), [1927] 4 D. L. R. 614; [1927] 2 W. W. R. 737.—**CAN.**

Jur. N. S. 825; 8 W. R. 239; 141 E. R. 703; *sub nom.* BLAKIE *v.* STEMBRIDGE, 29 L. J. C. P. 212; 2 L. T. 570, Ex. Ch.

*Annotations:*—**Distd.** Sack *v.* Ford (1862), 13 C. B. N. S. 90. **Consd.** British Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. *v.* Nettleship (1868), 37 L. J. C. P. 235. **Apld.** The Catharine Chalmers (1874), 32 L. T. 847. **Refd.** Roberts *v.* Shaw (1863), 4 B. & S. 44; Ohrloff *v.* Briscall, The Helene (1866), L. R. 1 P. C. 231; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86.

**2976. Duty of master—To stow goods properly—As agent of owner—In absence of contrary custom or agreement.**]—BLAIKIE *v.* STEMBRIDGE, No. 2975, *ante*.

**2977. —— To inquire as to proper protection of goods.**]—A charterparty provided that the stowage of the cargo should be under the control of the master, & that the shipowners should be responsible for proper stowage. The cargo loaded included a consignment of chloride of lime in iron drums, all of which were apparently in good condition. The charterers' agents who saw to the loading stowed the drums of chloride of lime below deck. During the voyage the chloride of lime corroded the drums, & fumes leaked out, causing damage to other cargo in the hold. The leakage of the fumes was due to a latent defect in the drums:—*Held:* the clause providing that the shipowners should be responsible for proper stowage of the cargo did not amount to an absolute warranty. It only meant that the shipowners would not be negligent in the stowage of the cargo, & in the absence of negligence on the part of the master in allowing the chloride of lime to be stowed below deck, the shipowners, as between themselves & the charterers, were not liable for the damage.—UNION CASTLE MAIL S.S. CO. *v.* BORDERDALE SHIPPING CO., [1919] 1 K. B. 612; 88 L. J. K. B. 979; 120 L. T. 669; 14 Asp. M. L. C. 435; 24 Com. Cas. 164.

**2978. Duty of owner—To stow as skilfully as competent stevedore.**]—ANGLO-AFRICAN CO. *v.* LAMZED, No. 3017, *post*.

**2979. Stevedore's charges—Liability of owner—Ship sub-chartered—Bankruptcy of sub-charterer.**]—The owner of a ship had chartered her to A. for the purpose of being loaded; the charterparty provided that the stevedore was to be nominated by the charterer, & be under the control of the captain, & was to be paid by the owner. A. sub-chartered the ship to B., entering into a charterparty with a similar clause. B. employed pltf., who was a stevedore, to load the ship, & introduced him to deft. as the person who was to load the ship. Deft. frequently came on board while the ship was being loaded, & superintended & gave certain instructions relative to the stowage of the cargo. On completion of the loading pltf. sent in his account to B. headed "To captain & owners," & pressed B. for payment. B. had sent in his account to A. & A. had sent in his account to deft., with the item "Stevedore's account" charged. Deft. had paid A.'s account, & A. had paid B.'s account, B. became bkpt., & did not pay pltf.:—*Held:* deft. was liable to pay pltf.'s account.—EASTMAN *v.* HARRY (1876), 33 L. T. 800; 3 Asp. M. L. C. 117, C. A.

**Stowage resulting in unseaworthiness.**]—*See* Sect. 6, sub-sect. 1, D. (*b*) iii., *post*.

*B. Mode of Stowage.*

*See* Sect. 2, sub-sect. 8, C. (*c*), *ante*.

*C. Improper Stowage.*

*(a) What amounts to Improper Stowage.*

*i. In General.*

**2980. Less care bestowed than required by perils of sea.**]—MUDDLE *v.* STRIDE, No. 2581, *ante*.

**2981. Absence or insufficiency of dunnage.**]—MORRISON *v.* SMITH (1840), 10 L. T. 275.

**2982. ——.**]—MORA ONA & CO. *v.* WATTS, WARD & CO. (1891), 8 T. L. R. 73.

**2983. Goods stowed in portion of compartment—Less suitable than another portion.**]—CALCUTTA S.S. CO., LTD. *v.* WEIR (ANDREW) & CO., No. 2507, *ante*.

**2984. Heavy cargo over light.**]—THE TRAFALGAR, RITSON *v.* TYRE (1855), 10 L. T. 242.

*ii. Proximity of Different Kinds of Goods.*

**2985. Currants, oilcake & turpentine.**]—THE SIR THOMAS GRESHAM, MCANDREW *v.* LIDGETT (1854), 10 L. T. 791.

**2986. Cambric goods & sulphuric acid.**]—Pltfs. chartered deft.'s vessel for a voyage from Glasgow to Colombo. Pltfs. sent on board the vessel some cambric goods, & they agreed with M. & co. for freight to carry goods for them. M. & co. shipped a quantity of sulphuric acid, which was stowed by deft. near pltf.'s goods. The master signed & delivered to pltfs. bills of lading for the goods & acid. It was alleged to be the duty & custom of merchants, who shipped sulphuric acid, to give notice of the same to the shipowner. No notice was given to deft. In the course of the voyage the sulphuric acid leaked & damaged pltf.'s goods. In an action by pltfs. on the bill of lading, for not delivering the goods in good condition:—*Held:* the neglect of pltfs. to give notice of the shipment of the sulphuric acid was no excuse for deft.'s breach of contract, since it was only a remote cause of the damage, the proximate cause being the act of deft. in placing the acid where it was; & even if the declaration had been on the charterparty, & it had contained an agreement to inform deft. when sulphuric acid was shipped, & pltfs. had actually shipped it, deft. would nevertheless have been liable.—ALSTON *v.* HERRING (1856), 11 Exch. 822; 25 L. J. Ex. 177; 27 L. T. O. S. 70; 156 E. R. 1005.

*Annotations:*—**Refd.** Blower *v.* G. W. Ry. (1872), L. R. 7 C. P. 655; Budgett *v.* Binnington (1890), 60 L. J. Q. B. 1. **Mentd.** Minshull *v.* Oakes (1858), 2 H. & N. 793; Speeding *v.* Young (1864), 33 L. J. C. P. 286.

**2987. Coffee & cocoanut oil.**]—THE SEPOY, PALMER *v.* LEMON (1866), 3 Mar. L. C. Digest of Shipping Law Cases, p. 70.

**2988. Tobacco & plassava.**]—CHAVES *v.* BROOKS (1866), 3 Mar. L. C. Digest of Shipping Law Cases, p. 70.

**2989. Casks of oil with wool & rags—Shippers superintending stowage—Ignorance of owner as to latent effect of heat.**]—Under a charterparty the shippers put a cargo, consisting of casks of oil, wool, & rags, on board the chartered vessel, & personally superintended the stowage of the cargo in the hold of the vessel. In the margin of the bill of lading of the casks of oil there was this memorandum, "weight, measurement, & contents unknown, & not accountable for leakage." The bill of lading was indorsed in blank by the shippers, & assigned to B. & co. In the course of the voyage the oil casks became heated by the action & contiguity of the wool & rags, & a very large portion

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of the oil was lost. In a suit against the ship under the provisions of Admiralty Court Act, 1861 (c. 10), for damages occasioned by the shipowner's negligence:—*Held:* (1) ignorance of the shipowners as to the latent effect of heat, in storing the casks of oil with wool & rags, did not, in the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable to the holders of the bill of lading for the loss occasioned by the leakage of the oil; (2) the limitation of liability by the memorandum in the bill of lading, that the shipowners were not to be accountable for leakage, was not restricted as to the quantity of leakage, & protected the shipowners, in the absence of proof that the leakage was occasioned by their negligence.—OHRLOFF *v.* BRISCALL, THE HELENE (1866), L. R. 1 P. C. 231; 4 Moo. P. C. C. N. S. 70; Brown. & Lush. 429; 35 L. J. P. C. 63; 14 L. T. 873; 12 Jur. N. S. 675; 15 W. R. 202; 2 Mar. L. C. 390; 16 E. R. 242, P. C.

*Annotations:—As to* (2) **Expld.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106. **Distd.** The Nepoter (1869), L. R. 2 A. & E. 375. **Consd.** Thrift *v.* Youle (1877), 46 L. J. Q. B. 402. **Refd.** Czech *v.* General Steam Navigation Co. (1867), L. R. 3 C. P. 14. *Generally*, **Refd.** The Xantho (1886), 11 P. D. 170. **Mentd.** Giblin *v.* McMullen (1868), L. R. 2 P. C. 317.

**2990. Oilcake & tobacco.**]—Pltfs. were assignees for valuable consideration of bills of lading for 1,000 barrels of oilcake shipped on board *The Figlia Maggiore*, at New York, & which the master had agreed "to deliver in like good order & condition at the port of London." The vessel was at the time under a charterparty, of which the shippers were ignorant, the master having put up the ship as a general ship. The oilcake was stowed with hogsheads of tobacco, oaken staves being placed between them. A suit having been brought by pltfs. against the shipowner for damage suffered by the oilcake on the voyage:—*Held:* (1) the *onus* of proving negligence lay on pltfs.; (2) the mode of stowage of the oilcake & tobacco was unknown to pltfs., & the damage, however caused, was occasioned by the negligence or misconduct, as well as by the breach of contract, on the part of deft. & his servants.—THE FIGLIA MAGGIORE (1868), L. R. 2 A. & E. 106; 37 L. J. Adm. 52; 18 L. T. 532, 3 Mar. L. C. 97.

*Annotations:—As to* (2) **Consd.** The Nepoter (1869), L. R. 2 A. & E. 375. *Generally*, **Refd.** The Freedom (1869), L. R. 2 A. & E. 346; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**2991. Coal & machinery.**]—MACKILL *v.* WRIGHT BROTHERS & Co., No. 1823, *ante*.

**2992. Cheese & chocolate.**]—THE THORSA, No. 2732, *ante*.

**2993. Eggs & rotting potatoes.**]—Pltfs. were the owners of a quantity of eggs which were shipped in May, 1924, from Dantzig to London on a motor ship belonging to defts. Before the eggs were put on board at Dantzig the ship had already loaded a large consignment of potatoes, which in fact were in a rotting condition. The eggs were placed in the hold with the potatoes, & in consequence of their proximity became tainted & suffered in value. Pltfs. claimed damages from defts. accordingly. The bill of lading under which the eggs were carried contained exceptions relieving defts. from (*inter alia*) liability for loss due to bad stowage, & defts. contended that the damage in question was a result of bad stowage. Pltfs. contended that the damage was due to unseaworthiness, because the fact that the potatoes were on board before the eggs were loaded rendered the vessel unseaworthy for the carriage of eggs:—*Held:* (1) the loss was the result of bad stowage & not of unseaworthiness, & therefore defts. were protected by the exception; (2) *obiter*, where an exception protects shipowners against liability for loss due to unseaworthiness if they have taken reasonable means by appointing "experienced or qualified" officers to provide against unseaworthiness they must, to escape liability, appoint officers who are qualified by experience or qualified in some other way for the particular work, & it is not enough that the officers should be qualified in the sense of holding certificates.—WERNER *v.* DET BERGENSKE DAMPSKIBSSELSCHAFT (1926), 134 L. T. 573; 42 T. L. R. 265; 17 Asp. M. L. C. 18.

*iii. Stowage on Deck.*

**2994. Whether improper stowage.**]—(1) *Semble:* a plea of a custom of trade in London may be supported by proof of a custom prevailing in London & other English ports.

(2) Where issue is joined on the question whether a party had notice that goods would be stowed according to such alleged custom, proof of the usage of trade, though strong evidence of knowledge, is not sufficient to induce the ct. to assume the fact of notice, contrary to a finding of the jury negativing such notice.

(3) There may be other & valid reasons for stowing goods on deck; indeed, some goods could be stowed in no other place, such as timber, &, on some voyages, live animals (LORD DENMAN, C.J.). —MILWARD *v.* HIBBERT (1842), 3 Q. B. 120; 2 Gal. & Dav. 142; 11 L. J. Q. B. 137; 6 Jur. 706; 114 E. R. 452.

*Annotations:—As to* (3) **Consd.** Apollinaris Co. *v.* Nord Deutsche Insce., [1904] 1 K. B. 252. *Generally*, **Consd.** [illegible] *v.* Marwood (1881), 7 Q. B. D. 62. **Refd.** Royal Exchange Shipping Co. *v.* Dixon (1886), 12 App. Cas. 11. **Mentd.** Hall *v.* Janson (1855), 24 L. T. O. S. 289; Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449; Miller *v.* Tetherington (1863), 9 L. T. 231.

**2995.** ——.]—On a ship carrying a general cargo from New Orleans to Liverpool cotton was shipped on deck under a practice by which owners of vessels trading between those ports were in the habit of stowing goods on deck in violation of their contract with the shipper, the shipowners accepting full responsibility for the consequences. The bills of lading for part of the cotton contained the words "under deck." All the bills of lading contained exceptions (*inter alia*) in favour of "jettison." On the voyage the ship took ground, & in order to get her off the master properly jettisoned the cotton. The indorsees of the bills of lading having brought an action against the shipowners to recover the value of the cotton:—*Held:* whether the bills of lading did or did not contain the words "under deck," the cotton was carried in breach of the contract, & was not within the exceptions specified in the bills of lading, which had exclusive reference to goods safely stowed under hatches; the shipowners had therefore no legal excuse for their failure to deliver; the cause of damage was not too remote, & the shipowners were liable to the indorsees for the value of the cotton.—ROYAL EXCHANGE SHIPPING CO. *v.* DIXON (1886), 12 App. Cas. 11; 56 L. J. Q. B. 266; 56 L. T. 206; 35 W. R. 461; 3 T. L. R. 172; 6 Asp. M. L. C. 92, H. L.; *affg.* S. C. *sub nom.* NEWALL *v.* ROYAL EXCHANGE SHIPPING CO. (1885), 33 W. R. 868; *sub nom.* DIXON *v.* ROYAL EXCHANGE SHIPPING CO., LTD. (1885), 1 T. L. R. 490, C. A.

*Annotations:*—**Refd.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348. **Mentd.** Tancred, Arrol *v.* Steel Co. of Scotland (1890), 15 App. Cas. 125; Shaw *v.* Symmons, [1917] 1 K. B. 799.

**2996. —— Evidence of usage.**]—Where in a memorandum of charter, it is agreed that the ship shall proceed to Quebec, & there load from the factors of the freighter a full cargo, *not exceeding what the ship can reasonably stow*, the words in italics are merely a qualification upon the shipowner's engagement to carry a full cargo, & not a substantive engagement on his part to stow the cargo in a reasonable manner. Upon an issue whether a cargo, loaded on deck, is improperly loaded, A., a witness called on the part of pltf., to prove that the practice of stowing part of the cargo upon deck is dangerous, states, in answer to a question put to him on cross-examination, that it is usual for ships in the particular trade to carry deck cargoes. A. may be asked, upon re-examination, whether it is not usual for the shipowner to pay for deck cargo washed or thrown overboard. Upon an issue whether a deck cargo was loaded at the request & by the order & direction of the freighter, proof that the superintendent of the freighter's warehouse, who delivered out the goods for shipping, was aware of & approved of the stowage of the cargo, does not support the affirmative of the issue. A direction to a jury that *primâ facie* the deck was not the proper place for stowing any part of the cargo, & that if it increased the danger of the ship or of that part of the cargo, it is an improper stowage, was held to be correct, though it appeared that it had been usual to load deck cargoes in the particular trade, but it also appeared to be usual for the shipowner to bear the loss of deck cargo washed or thrown overboard.—GOULD *v.* OLIVER (1840), 2 Man. & G. 208; 2 Scott, N. R. 241; 133 E. R. 723; *previous proceedings* (1837), 4 Bing. N. C. 134.

*Annotations:*—**Refd.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150. **Mentd.** Lewin *v.* Edwards (1842), 9 M. & W. 720; Carr *v.* Royal Exchange Assce. Corpn. (1864), 5 B. & S. 941; R. *v.* Murphy (1869), L. R. 2 P. C. 535; R. *v.* Paul (1890), 25 Q. B. D. 202.

**2997. —— ——.**]—MILWARD *v.* HIBBERT, No. 2994, *ante*.

**2998. —— Stowage increasing danger to ship or cargo.**]—GOULD *v.* OLIVER, No. 2996, *ante*.

**2999. —— Goods stowed in cabin.**]—MITCHESON *v.* NICOL, No. 1932, *ante*.

**3000. —— Clause in bill of lading.**]—ARMOUR & CO. *v.* LEOPOLD WALFORD (LONDON), LTD., No. 2188, *ante*.

### (*b*) *Liability.*

#### i. *In General.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article III. (2).

**3001. Liability of master—Accidental damage by servants.**]—GOFF *v.* CLINKARD (1750), 1 Wils. 282, n.; 95 E. R. 620, N. P.

*Annotation:*—**Refd.** Nugent *v.* Smith (1875), 1 C. P. D. 19.

**3002. —— Charterer appointing stevedore—Verbal agreement not incorporated in charterparty.**]—SWAINSTON *v.* GARRICK, No. 3012, *post*.

**3003. —— —— To act under master's orders.**]—BLAIKIE *v.* STEMBRIDGE, No. 2975, *ante*.

**3004. Liability of charterer.**]—SWAINSTON *v.* GARRICK, No. 3012, *post*.

**3005. ——.**]—SANDEMAN *v.* SCURR, No. 2038, *ante*.

**3006. Action for damages—When maintainable by consignor—Consignee having no property in goods—At time of shipment.**]—By a bill of lading the captain was to deliver the goods for the consignor, &, in his name, to the consignee. At the time of shipment the consignee had no property in the goods:—*Held:* an action against the shipowners for damage done to the goods must be brought in the name of the consignor; & that, although the consignee had insured the goods & advanced the premiums of insurance before the arrival of the ship.—SARGENT *v.* MORRIS (1820), 3 B. & Ald. 277; 106 E. R. 665.

*Annotations:*—**Consd.** Dunlop *v.* Lambert (1839), Macl. & Rob. 663. **Mentd.** Coombs *v.* Bristol & Exeter Ry. (1858), 27 L. J. Ex. 269.

**3007. —— —— Special contract by consignor with carrier.**]—DUNLOP *v.* LAMBERT (1839), 6 Cl. & Fin. 600; Macl. & Rob. 663; 7 E. R. 824, H. L.

*Annotations:*—**Refd.** Coombs *v.* Bristol & Exeter Ry. (1858), 3 H. & N. 1; Calcutta & Burmah Steam Navigation Co. *v.* De Mattos, De Mattos *v.* Calcutta & Burmah Steam Navigation Co. (1863), 2 New Rep. 575; Colonial Insce. Co. of New Zealand *v.* Adelaide Marine Insce. (1886), 12 App. Cas. 128.

**3008. Measure of damage—Loss on contract of resale before delivery—Owner's ignorance of contract.**]—THE ST. CLOUD, No. 2490, *ante*.

**3009. Onus of proof of damage.**]—On an allegation that damage to cargo originated from defective stowage, & heat & fermentation arising from the cargo being stowed in too close conjunction with other cargo:—*Held:* pltfs. must establish affirmatively that the cargo on its arrival at its port of destination was in a damaged condition: & the *onus* then falls on the ship to prove that the original stowage was good, & the perils of the sea, subsequently occurring, created the damage.—THE ALEXANDRA (1866), 14 L. T. 742; 14 W. R. 466; 2 Mar. L. C. 372.

**3010. ——.**]—THE FIGLIA MAGGIORE, No. 2990, *ante*.

**3011. Determination whether damage due to bad stowage or unseaworthiness—Order of shipment & stowage not ground of decision.**]—WERNER *v.* DET BERGENSKE DAMPSKIBSSELSCHAFT, No. 2993, *ante*.

**Excepted perils.**]—*See* Sect. 4, sub-sect. 14, *ante*.

#### ii. *Liability of Owner.*

**3012. Liability for negligent stowage.**]—The owner of a ship, & not the charterer, is *primâ facie* liable to the consignees for damage done to goods on the voyage, by reason of improper stowage.

The master is *primâ facie* liable for the safe stowage of the cargo, but he is exonerated by the special appointment of his own stower by the freighter; & if the freighter by a verbal agreement with the owner, undertakes to appoint his own,

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**PART VII. SECT. 5, SUB-SECT. 5.—C. (a) iii.**

**2996 i.** *Whether improper stowage—Evidence of usage.*]—RAND INDENT, LTD. *v.* THE MOTHERLAND (MASTER & OWNERS) (1919), 40 N. L. R. 210.—**S. AF.**

**3000 i.** —— *Clause in bill of lading.*]—BURNS, PHILP & CO., LTD. *v.* WESTERN AUSTRALIAN STEAM NAVIGATION CO., LTD. & OCEAN S.S. CO., LTD. (1922), 24 W. A. L. R. 115.—**AUS.**

**3000 ii.** —— ——.]—FORD MOTOR CO., LTD. *v.* UNION S.S. CO. OF NEW ZEALAND (B. C.), [1925] 3 D. L. R. 1169; [1925] W. W. R. 708.—**CAN.**

**PART VII. SECT. 5, SUB-SECT. 5.—C. (b) i.**

**t.** *Determination whether damage due to bad stowage or unseaworthiness.*]—MCEWAN & CO. *v.* BRABENDER (1895), 16 N. S. W. L. R. 200.—**AUS.**

**PART VII. SECT. 5, SUB-SECT. 5.—C. (b) ii.**

**3012 i.** *Liability for negligent stowage.*]—The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damages caused through improper or insufficient stowage.—GLENGOIL S.S. CO. *v.* PILKINGTON, GLENGOIL S.S. CO. *v.* FERGUSON (1897), 28 S. C. R. 146.—**CAN.**

**3012 ii.** ——.]—BOMBAY & AFRICA STEAM NAVIGATION CO. *v.* HAJI AZUM (1917), I. L. R. 41 Bom. 119.—**IND.**

**3012 iii.** ——.]—The master & owners of a vessel are responsible for a deterioration in the quality of an article shipped on board such vessel, arising from the article in question having been placed too near another article, in its nature calculated to injure the former; & it seems that a knowledge on the part of the shipper of the damaged article of the other parts

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& he acts as such, the mere silence of a charterparty, subsequently entered into, does not subject the master to his original liability.—SWAINSTON *v.* GARRICK (1833), 2 L. J. Ex. 255.

*Annotations :*—**Consd.** Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894. **Distd.** Roberts *v.* Shaw (1863), 4 B. & S. 44.

**3013.** ——.]—BLAIKIE *v.* STEMBRIDGE, No. 2975, *ante*.

**3014.** ——.]—HAYN *v.* CULLIFORD, No. 2699, *ante*.

**3015. Charterer appointing stevedore—"Master & owner remaining responsible."**]—By a charterparty the owner agreed to let & the charterer to hire the ship for a certain period, the ship, being in good & working order, & her master, officers, & crew being duly shipped, to be placed at the disposal of the charterer in the port of London on a given day, & the hire to commence from & after the time that she should have been placed at the disposal of the charterer with a clean & clear hold & ready to load. It was further stipulated, that the owner was to appoint, victual, & pay the master, officers, & crew, & to provide & pay for the necessary equipment for the working of the ship, & to pay all other charges whatsoever, save & except for coals, pilotages, port charges, & labour, which were to be paid by the charterers; & that the cargoes were to be taken on board & discharged by the charterers, the crew of the vessel rendering customary assistance so far as they might be under the orders of the master; & the charterers were to have liberty to employ stevedores & labourers to assist in the loading, stowage, & discharge thereof; but such stevedores & labourers, being under the control & direction of the master, the charterers were not in any case to be responsible to the owners for damage or improper stowage; & further, that "the master & owner of the ship should devote the same attention to the cargo, should use the same endeavours to promote dispatch, & should in every respect be & remain responsible to all whom it might concern, as if the ship was loading & discharging her cargoes & performing her voyages for account of the owner, & independently of that charterparty" :—*Held :* there was nothing in this charterparty to exonerate the owner from responsibility for negligent & improper stowage by the stevedores employed by the charterer under the above stipulation.—SACK *v.* FORD (1862), 13 C. B. N. S. 90; 1 New Rep. 96; 32 L. J. C. P. 12; 9 Jur. N. S. 750; 143 E. R. 36.

*Annotations :*—**Distd.** Roberts *v.* Shaw (1863), 4 B. & S. 44. **Apld.** Hayn *v.* Culliford (1878), 3 C. P. D. 410. **Reld.** Anglo-African Co. *v.* Lamzed (1866), Har. & Ruth. 216; Omoa & Cleland Coal & Iron Co. *v.* Huntley (1877), 37 L. T. 184.

**3016. —— —— Theft by stevedore—Fines & damages paid by charterers.**]—By a charterparty shipowners were made responsible for full & complete delivery of the cargo & also for its proper stowage by the stevedores, but the stevedores were to be employed by the charterers. When loading the ship for a voyage to Brazil the stevedores stole part of the cargo, & owing to their theft the charterers were unable to make full delivery at the Brazilian port. As the cargo actually delivered did not correspond with that shown on the ship's manifest, the Brazilian Govt. imposed fines on the local agent of the charterers. The charterers reimbursed their agent, & also paid damages to the owners of the goods which were stolen; & they now sought to recover the amounts of the fines & damages so paid by them from the shipowners :—*Held :* the clause in the charterparty which made the shipowners responsible for full & complete delivery of the cargo did not apply where the loss of cargo had been occasioned by the felonious acts of the charterers' own servants, & therefore the shipowners were not liable for either the fines or the damages.

*Qu. :* whether if the charterers had been protected by their bill of lading from any obligation in consequence of the theft to pay damages to the owners of the goods they could nevertheless under the charterparty have compelled the shipowners to make good the loss.—ROYAL MAIL S.S. Co. *v.* MACINTYRE BROTHERS & Co. (1911), 16 Com. Cas. 231.

**3017. —— Failure to appoint—Cargo stowed to best of master's skill.**]—It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do. Therefore, in an action by charterers against shipowners, for not loading as much as the vessel could reasonably carry, the charterparty containing the words "Charterer's stevedore to be employed by ship" : —*Held :* to be no answer that pltfs. had not appointed a stevedore, & the cargo was stowed to the best of the master's skill & ability.—ANGLO-AFRICAN Co. *v.* LAMZED (1866), L. R. 1 C. P. 226; Har. & Ruth. 216; 35 L. J. C. P. 145; 13 L. T. 796; 12 Jur. N. S. 294; 14 W. R. 477; 2 Mar. L. C. 309.

*Annotation :*—**Reld.** Standard Oil Co. of New York *v.* Clan Line Steamers, [1924] A. C. 100.

**3018. —— Charterparty not amounting to demise.**]—SANDEMAN *v.* SCURR, No. 2038, *ante*.

**3019. —— At risk & expense of ship.**]—THE CATHARINE CHALMERS, No. 2602, *ante*.

**3020. —— Cargo at ship's risk—Stevedore paid by charterer.**]—The ship had to take the cargo on board & stow it, & although by the terms of the charterparty the shipper was deputed to appoint & pay the stevedore, the work which the stevedore had to do was still the ship's work & the ship remained liable for its proper performance, the cargo being at the ship's risk (*per* CUR.).—ANDERSEN *v.* CRUNDALL & Co. (1898), 14 T. L. R. 256.

**3021. Shipper's knowledge of mode of stowage.**] —(1) If a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad stowage

(2) If the shipper of goods was warned as to the way in which goods would be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage were bad.—MAJOR *v.* WHITE (1835), 7 C. & P. 41, N. P.

*Annotations :*—*As to* (1) **Reld.** Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894; Wagstaff *v.* Anderson (1879), 4 C. P. D. 283.

**3022. Shipper's knowledge that ship chartered.**] —MAJOR *v.* WHITE, No. 3021, *ante*.

**3023.** ——.]—THE ST. CLOUD, No. 2490, *ante*.

**3024.** ——.]—SANDEMAN *v.* SCURR, No. 2038, *ante*.

**3025.** ——.]—THE FIGLIA MAGGIORE, No. 2990, *ante*.

**3026. Liability apart from negligence.**]—GILLESPIE *v.* THOMPSON (1856), 6 E. & B. 477, n.;

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of the vessel's cargo, & of the manner of stowage used on board of her will not relieve the master & owners from this liability.— BECK *v.* THE KENYON (OWNERS) (1824), 1 Nfld. L. R. 407.—NFLD.

u. *Onus of proof.*]—In an action by a consignee against a shipowner for negligence in the loading & stowage of eggs :—*Held :* the *onus* of proving negligence was on pltf.—MAKINS PRODUCE Co. *v.* UNION S.S. Co. OF NEW ZEALAND, [1927] 1 D. L. R. 97 [1927] 1 W. W. R. 206.—CAN.

2 Jur. N. S. 713, n.; 119 E. R. 943; *sub nom.* THE STAR OF THE WEST, GILLESPIE *v.* THOMPSON, 10 L. T. 242.

*Annotation:*—**Apld.** Brass *v.* Maitland (1856), 6 E. & B. 470.

**3027. —— Stowage under control of master.**]—UNION CASTLE MAIL S.S. CO. *v.* BORDERDALE SHIPPING CO., No. 2977, *ante*.

**3028. Stowage in course of voyage.**]—In an action by a shipper against shipowner there being a general count for a breach of the bailment, not arising from the excepted causes, & also for a breach in bad stowage; the evidence being that the goods had been in the course of the voyage, & in bad weather, stowed in the tank upon coals; & that they arrived damaged by sea water & coal dust. The judge told the jury that they must find for defts. on the first count, & that they should find for them upon the second, if they thought that, under the circumstances, what had been done was the best that could be done.—ZIPSY *v.* HILL (1858), 1 F. & F. 570, N. P.; *subsequent proceedings*, 1 F. & F. 573, n.

**3029. Ignorance of owner as to effect of stowage—Induced by wilful misrepresentation of shipper.**]—Declaration against defts., shipowners, for negligently & carelessly stowing salt cake, whereby it sustained damage. Fifth plea, that salt cake was a corrosive & destructive substance, rotting casks & other substances being in contact with it, which pltfs. knew, but which defts., without any default on their part, did not know, & could not reasonably be expected to know, until after the happening of the damage complained of; that it was the duty of pltfs., before or at the time of the shipment or stowage, to have informed defts., & to have used due & reasonable care in ascertaining that defts. were informed of the corrosive & destructive nature of salt cake, in order to its proper & safe stowage by them; that pltfs. did not so inform defts., or ascertain that they were so informed, but, on the contrary, improperly & negligently delivered the salt cake to defts. in bulk, & pltfs. thereby & otherwise represented to defts. & induced them to believe, & they did reasonably believe, that the salt cake might be placed in contact with casks, etc.; that, under this reasonable belief, & induced as aforesaid, defts. stowed the salt cake in contact with & between & amongst casks of salt provisions, being, as they reasonably believed, a safe & proper mode of stowing the same; & that afterwards, & without default of defts., the salt cake corroded, rotted, & destroyed the casks, & the hoops thereof, & the brine therefrom damaged the salt cake, & caused the default in the delivery thereof complained of in the declaration. Replication that salt cake is an article of merchandise well known in trade & commerce, & the nature & properties of which are well known in trade & commerce, & is an article of merchandise commonly carried in ships, & the nature & properties of which are commonly & well known to persons carrying on the trade & business of carriers by water, & that, at the time of the shipment, defts. well knew that the goods were salt cake:—*Held:* the fifth plea was good, & the replication no answer to it: for, if defts.' ignorance arose from the wilful misrepresentation of pltfs., such ignorance was justifiable.—HUTCHINSON *v.* GUION (1858), 5 C. B. N. S. 149; 28 L. J. C. P. 63; 32 L. T. O. S. 276; 4 Jur. N. S. 1149; 6 W. R. 757; 141 E. R. 59.

*Annotations:*—**Refd.** Ohrloff *v.* Briscall, The Helene (1866), L. R. 1 P. C. 231; Blower *v.* G. W. Ry. (1872), L. R. 7 C. P. 655.

**3030. Acceptance of certificate of stowage by shipper—Certificate inconsistent with Harter Act.**]—A bill of lading, incorporating the Harter Act, contained the following clause: "It is also mutually agreed that the carrier shall ship & stow the cargo in accordance with the requirements of the surveyors of the New Orleans Board of Underwriters, & that the shipper, owner, & consignee of the goods shall accept the certificate of any such surveyor or surveyors as conclusive evidence that the vessel has been properly prepared in every way for cargo, & that . . . the cargo has been properly dunnaged & stowed. . . ." *Semble:* the above clause, which purported to make the certificate of an outside body conclusive that the cargo had been properly stowed, was inconsistent with the Harter Act, which makes the shipowner liable for negligent stowage & prevents him from limiting his liability.—WALTERS *v.* RANK (JOSEPH), LTD. (1923), 39 T. L. R. 255.

*D. Employment of Stevedores.*

**Improper stowage—Charter appointing stevedore—Liability of master.**]—*See* Nos. 3002, 3003, *ante*.

—— —— **Liability of owner.**]—*See* Nos. 3015–3020, *ante*.

**Whether liability excepted.**]—*See* Nos. 2703, 2705, 2714, 2720, *ante*.

**Stevedore's charges—Liability of owner.**]—*See* No. 2979, *ante*.

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## SECT. 6.—THE VOYAGE.

### SUB-SECT. 1.—SEAWORTHINESS.

*A. In General.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), s. 2, Article III., r. 1, Article IV., r. 1; & *compare* INSURANCE, Vol. XXIX., pp. 186–195.

**3031. Presumption of seaworthiness—Rebuttal of presumption.**]—When a ship, soon after her sailing on a voyage insured, is found to be unfit for sea, the question whether or not she was seaworthy at the commencement of the risk, or the voyage, when not otherwise ascertained, must be decided by rational inference from the circumstances.

A ship is *primâ facie* to be deemed seaworthy. But if it is found soon after her sailing that she is not so sound, without adequate cause by stress of weather, or otherwise, to account for it, the rational inference is that, notwithstanding appearances, she was not seaworthy

If a ship is seaworthy at the time of her sailing, however soon after she may become otherwise, the warranty is complied with.—PARKER *v.* POTTS (1815), 3 Dow. 23; 3 E. R. 977.

*Annotation:*—**Consd.** Franco *v.* Natusch (1836), Tyr. & Gr. 401.

**3032. No absolute standard.**]—BRADLEY (F. O.) & SONS, LTD. *v.* FEDERAL STEAM NAVIGATION CO., LTD., No. 2777, *ante*.

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**PART VII. SECT. 5, SUB-SECT. 5.—D.**

**a.** *Death of horse — Tackle not sufficient & proper.*]—MCWHINNIE *v.* UNION S.S. CO. OF NEW ZEALAND (1887), 9 N. S. W. L. R. (L.) 1.—**AUS.**

**b.** *Liability of master or captain.*]—Persons engaging a vessel under a charterparty in which they reserve themselves the right to employ a stevedore for the loading of the vessel have no recourse against the master or captain for damages incurred during the voyage & caused by bad loading or absence of ballast.—BOZZO *v.* MOFFATT (1881), 11 R. L. O. S. 41.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 1.—A.**

**3032 i.** *No absolute standard.*]—Seaworthiness means that a vessel must be reasonably fit for the service she is employed to render. It is a relative term, & is to be construed with reference to the situation of the ship, the particular service she is engaged to

*Sect.* 6.—*The voyage: Sub-sect.* 1, *A. & B.*]

**3033. —— Knowledge of parties as to character of ship.**]—The charterparty of a cylindrical tank steamer provided that it should remain in force for eight consecutive voyages. On the first & second voyages a large quantity of oil was lost by leakage, the steamer being in fact unseaworthy on those voyages. The charterers then repudiated the charter, & after the repudiation the steamer was made as seaworthy for the carriage of oil as a vessel of her description ever could be. On a claim by the owners for the hire which would have become payable if the remaining six voyages had been performed, the arbitrator found that the carriage of oil in a cylindrical tank steamer was always exceedingly dangerous & he made an award in favour of the owners:—*Held:* as the owners, in providing a cylindrical tank steamer, had performed their duty under the contract, & as the repairs were completed within a reasonable time, the charterers were not justified in repudiating the charter & the award in favour of the owners must be upheld.—COMPANIA CANTABRICA DI NAVIGACION *v.* ANGLO-AMERICAN OIL CO., LTD. (1923), 39 T. L. R. 614.

**3034. Necessity for.**]—THE SOPHY, MAGNUS *v.* FAIRBRASS (1856), 8 L. T. 802.

**3035. —— Seaworthiness of lighter — Transhipment under through bill of lading.**]—WILSON (THOMAS), SONS & CO., LTD. *v.* S.S. GALILEO (CARGO EX), THE GALILEO, No. 2213, *ante*.

**3036. Claim for damage through unseaworthiness—Time for making claim.**]—In an action by indorsees of bills of lading against shipowners for breach of contract & for damages for injury to the goods carried, it appeared that the goods were shipped at Wellington, New Zealand, upon *The Clan Maclaren*. At Port Pirie it was discovered that a portion of the goods, wool, was damaged by sea water, & the damaged portion was there transhipped into *The Geelong*. *The Clan Maclaren* arrived in London on Apr. 13 & *The Geelong* on Apr. 23, & on arrival the wool in both ships was found to be damaged by sea water owing to the unseaworthiness of *The Clan Maclaren*. Clause (*a*) of the bill of lading made provision for transhipment of the goods. Clause (*b*) provided that "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Clause (*c*) provided that "The shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage." No claim was made by pltfs. upon defts. till June 10, more than seven days after the arrival of either vessel:—*Held:* (1) in view of the fact that the bill of lading was subject to an express condition making the shipowners liable for damage resulting from unseaworthiness, the provisions of clause (*b*) applied; (2) the clause, not being clear & unambiguous, afforded no protection to the shipowners in respect of the goods transhipped to *The Geelong*.—BANK OF AUSTRALASIA *v.* CLAN LINE STEAMERS, LTD., [1916] 1 K. B. 39; 84 L. J. K. B. 1250; 113 L. T. 261; 13 Asp. M. L. C. 99; 21 Com. Cas. 13, C. A.

*Annotations:—As to* (1) **Distd.** Atlantic Shipping & Trading Co. *v.* Dreyfus, [1922] 2 A. C. 250. **Reld.** Ford *v.* Compagnie Furness (France), [1922] 2 K. B. 797; Paterson Zochonis *v.* Elder Dempster, [1923] 1 K. B. 420.

**Duty to keep ship seaworthy during voyage.**]—*See* No. 3222, *post*.

**3037. Damage to cargo through unseaworthiness—Liability of shipowner—Position as common carrier.**]—It is a good working rule to assume that when a ship is unseaworthy & the unseaworthiness is the cause of damage to the cargo, then *qua* that particular damage the shipowner's position is analogous to that of a common carrier of goods without any special contract, & that the conditions of the contract are gone subject to this that . . . the freight which is stipulated for by the charterparty is payable & that payment is not on a *quantum meruit* (BAILHACHE, J.).—FORD (H.) & CO., LTD. *v.* COMPAGNIE FURNESS (FRANCE), [1922] 2 K. B. 797; 92 L. J. K. B. 88; 128 L. T. 286; 16 Asp. M. L. C. 102, D. C.

**3038. —— ——.**]—THE SOPHY, MAGNUS *v.* FAIRBRASS (1856), 4 L. T. 742.

### *B. Warranty of.*

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), s. 2, Article III., r. 1, Article IV., r. 1; & *compare* INSURANCE, Vol. XXIX., pp. 186–195, Nos. 1437–1556.

**3039. Implied warranty—That ship fit for voyage.**]—A carrier by water contracting to carry goods for hire impliedly promises that the vessel shall be tight & fit for the purpose, & is answerable for damage arising from leakage; & this, though he had given notice "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. upon such damage, so as the whole did not exceed the value of the vessel & freight." For a loss happening by the personal default of the carrier himself, such as the not providing a sufficient vessel, is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, etc.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the King's enemies.—LYON *v.* MELLS

render, & also to the character & capacity of the vessel itself.—JONES *v.* AUSTRALIAN STEAM NAVIGATION CO. (1888), 9 N. S. W. L. R. (L.) 208.—**AUS.**

**3033 i.** —— *Knowledge of parties as to character of ship.*]—As "seaworthiness" is merely a relative term, the character of the particular ship as known to the parties must be taken into consideration.—NORTHERN S.S. CO., LTD. *v.* DOMINION PORTLAND CEMENT CO., LTD., [1921] N. Z. L. R. 372.—**N.Z.**

**3036 i.** *Claim for damage through unseaworthiness—Time for making claim.*]—On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date, after which the same should be completely barred:—*Held:* this limitation applied to a claim for damages caused by unseaworthiness of the steamer.—UNION S.S. CO. OF BRITISH COLUMBIA *v.* DRYSDALE (1902), 22 C. L. T. 278; 32 S. C. R. 379.—**CAN.**

c. *Meaning of seaworthiness.*]—"Seaworthiness" includes not only staunchness in the sense of being built to withstand the elements without injury to the hull, but also comprehends a condition which will include the safety of the cargo, both from perils of the sea as commonly understood, & from causes not accompanied by violence of the elements, such as leakage.—GRAIN GROWERS EXPORT CO. *v.* CANADA STEAMSHIP LINES, LTD. (1919), 43 O. L. R. 330.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 1.—B.**

**3039 i.** *Implied warranty—That ship fit for voyage.*]—In a special contract guaranteeing to carry goods by ship, a warranty of seaworthiness is implied by law.—CONNOR *v.* SPENCE, SPENCE *v.* CONNOR (1878), 4 V. L. R. (L.) 243.—**AUS.**

**3039 ii.** ——.]—GRENIER *v.* CONNOLLY (1908), Q. R. 34 S. C. 405.—**CAN.**

**3039 iii.** —— ——.]—Where a contract with a carrier requires carriage by sea this entails on the part of the carrier, in the absence of effectual exempting provisions, a warranty of seaworthiness. Such warranty is absolute & is broken though the unseaworthiness be due to a hidden defect which the most careful inspection would not have revealed. Such warranty includes the unfitness of the ship to receive as well as carry the cargo.—AUTOMATIC ELECTRIC TELEPHONE CO. *v.* UNION S.S. CO., [1921] 1 W. W. R. 741.—**CAN.**

(1804), 5 East, 428; 1 Smith, K. B. 478; 102 E. R. 1134.

*Annotations:*—**Consd.** Chippendale *v.* L. & Y. Ry. (1851), 21 L. J. Q. B. 22. **Expld.** Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338. **Consd.** Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Nugent *v.* Smith (1876), 1 C. P. D. 423; The Glenfruin (1885), 10 P. D. 103. **Refd.** Phillips *v.* Clark (1857), 26 L. J. C. P. 168; Peek *v.* North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Lloyd *v.* General Iron Screw Collier Co. (1864), 3 H. & C. 284; Redhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379; Stanton *v.* Richardson, Richardson *v.* Stanton (1872), L. R. 7 C. P. 421; Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; Steel *v.* Steel Line S.S. Co. (1877), 3 App. Cas. 72; The Northumbria (1906), 95 L. T. 618; L. & N. W. Ry. *v.* Hudson, [1920] A. C. 324; The Christel Vinnen, [1924] P. 61; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**3040.** —— ——.]—EDWARDS *v.* INGRAM (1853), 21 L. T. O. S. 60.

**3041.** —— ——.]—LLOYD *v.* GENERAL IRON SCREW COLLIER CO., No. 2646, *ante*.

**3042.** —— ——.]—STEEL *v.* STATE LINE S.S. Co., No. 2693, *ante*.

**3043.** —— ——.]—Where a chartered voyage is necessarily divided into stages for coaling purposes, the ship is bound to have on board at the commencement of each stage sufficient coal for that stage, & if the ship starts with less she is unseaworthy.

There is no difference between the implied warranty of seaworthiness which attaches under a marine policy at the commencement of a voyage in the case of an insured shipowner & in the case of a shipowner under a contract of affreightment.

Pltf.'s vessel shipped, in the Philippine Islands, a cargo, including a quantity of copra belonging to defts., under a charterparty by which the cargo was to be carried to Liverpool for a lump sum freight. The charterparty & bill of lading relieved the shipowner from liability for the negligence of the master & crew from dangers of navigation & machinery.

The voyage, in order that the vessel might be able to recoal, was necessarily divided into three stages: from Cebu, in the Philippines, to Colombo, from Colombo to Suez, & from Suez to Liverpool. Owing to the negligence of the engineer, the vessel left Colombo for Suez, the second stage of her voyage, with an insufficient supply of coal for the transit. Another coaling port, Perim, lies between Colombo & Suez, & the vessel was supplied with sufficient coal to reach that place, where she might have obtained a further supply; but this she neglected to do. In consequence of the insufficiency of her coal some of the copra was used & consumed as fuel with the remaining coal:—*Held:* the shipowner was liable to the cargo owner for the loss of cargo because the vessel was unseaworthy.—THE VORTIGERN, [1899] P. 140; 68 L. J. P. 49; 80 L. T. 382; 47 W. R. 437; 15 T. L. R. 259; 43 Sol. Jo. 330; 8 Asp. M. L. C. 523; 4 Com. Cas. 152, C. A.

*Annotations:*—**Apld.** Greenock S.S. Co. *v.* Maritime Insce., [1903] 2 K. B. 657. **Refd.** MacIver *v.* Tate Steamers (1903), 8 Com. Cas. 124; Darling *v.* Raeburn, [1907] 1 K. B. 846.

**3044.** —— ——.]—WADE SONS & CO., LTD. *v.* COCKERLINE & CO., No. 2730, *ante*.

**3045.** —— —— **Not that shipowner will take reasonable care to make her fit.**]—In every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy.

In an action to recover damages for the loss of iron-armour plates, which were lost on board defts'. ship, it appeared that defts., by their servants, stowed the ship, & that during rough weather one of the plates broke loose & went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, & not merely that he will honestly & *bonâ fide* endeavour to make her fit, & left to them the questions, was the vessel at the time of the sailing in a state, as regards the stowing & receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season; secondly, if she was not in a fit state, was the loss that happened caused by that unfitness:—*Held:* the direction was right, & correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier.

In whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly & necessarily held to warrant that the ship is good, & is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy (FIELD, J.).—KOPITOFF *v.* WILSON (1876), 1 Q. B. D. 377; 45 L. J. Q. B. 436; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. L. C. 163.

*Annotations:*—**Consd.** Cohn *v.* Davidson (1877), 2 Q. B. D. 455; Steel *v.* State Line S.S. Co. (1877), 3 App. Cas. 72; The Glenfruin (1885), 10 P. D. 103; The Europa, [1908] P. 84; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522. **Refd.** The Northumbria (1906), 95 L. T. 618; Ingram & Royle *v.* Services Maritimes du Treport (1913), 109 L. T. 733; The Thorsa, [1916] P. 257; The Christel Vinnen, [1924] P. 61; Reed *v.* Page & East, [1927] 1 K. B. 743. **Mentd.** Hyman *v.* Nye (1881), 6 Q. B. D. 685.

**3046.** —— —— ——.]—THE GLENFRUIN, No. 2655, *ante*.

—— —— ——.]—*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Sched., Article III., r. 1.

**3047.** —— —— **As to perils probable at season of voyage.**]—KOPITOFF *v.* WILSON, No. 3045, *ante*.

**3048.** —— —— **& likely to continue seaworthy during voyage.**]—The ordinary warranty as to seaworthiness in a bill of lading is a warranty that the ship is seaworthy at the time, & reasonably likely to continue seaworthy on the voyage specified. If from special circumstances in her construction she requires special appliances to preserve the cargo from sea damage, the owner is bound to provide those appliances, & will be liable for damage to cargo arising from the want of them.—THE MARATHON (1879), 40 L. T. 163; 4 Asp. M. L. C. 75.

**3049.** —— **Similarity to warranty in contract for marine insurance.**]—THE VORTIGERN, No. 3043, *ante*.

**3050.** —— **Absolute warranty.**]—THE GLENFRUIN, No. 2655, *ante*.

**3051.** —— ——.]—JOSEPH THORLEY, LTD. *v.* ORCHIS S.S. Co., LTD., No. 3185, *post*.

**3052.** —— ——.]—RIO TINTO CO., LTD. *v.* SEED SHIPPING CO., No. 3161, *post*.

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**3039 iv.** —— ——.]—In a contract to carry specific cargo there is an implied warranty that the ship is fit to carry such cargo.—RAMSAY *v.* HOKITIKA DREDGING CO. (1902), 22 N. Z. L. R. 138.—**N.Z.**

**d.** —— —— *Whether clause in bill of lading limiting liability violation of statute.*]—Bananas were shipped from Fiji under a bill of lading, which provided that no claim for loss or damage should be enforceable unless made within seven days from the date at which the cargo was or should have been landed. The bananas were damaged owing to the ship being unseaworthy in that, both at the commencement & during the continuance of the voyage, the refrigerating chambers were defective. The shippers sued to recover damages, but had failed to claim within seven days:—*Held:* the clause in the bill of lading above referred to weakened or lessened

*Sect.* 6.—*The voyage: Sub-sect.* 1, *B., C. & D.* (*a*).]

**3053. —— Reasonably fit.**]—RIO TINTO CO., LTD. *v.* SEED SHIPPING CO., No. 3161, *post.*

**3054. —— That shipowner will exercise due diligence to make ship seaworthy—Extension of warranty to acts of servants or agents.**]—By Art. III., r. 1, of the Schedule to the Australian Sea Carriage of Goods Act, 1924, which is in the same terms as the Carriage of Goods by Sea Act, 1924 (c. 22), Sched., Art. III., r. 1, "The carrier shall be bound, before & at the beginning of the voyage, to exercise due diligence to (*a*) make the ship seaworthy, (*b*) properly man, equip, & supply the ship, (*c*) make the holds, refrigerating & cool chambers, & all other parts of the ship in which goods are carried, fit & safe for their reception, carriage & preservation."

By Art. IV., r. 1, of the Schedule to the Australian Act, in the same terms as Art. IV., r. 1, of the English Act, "neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to" comply with the requirements of Art. III., r. 1, (*a*), (*b*) & (*c*).

The obligation under these Rules of a carrier under a bill of lading to exercise due diligence to make the ship seaworthy & fit for the carriage of goods is not limited to his personal diligence; his responsibility extends to the acts or default of his agents or servants. Where, however, the carrier has contracted for the building of the ship he is not liable for lack of due diligence on the part of the shipbuilders or their workmen, unless he fails to engage builders of repute & to adopt all reasonable precautions, for example, requiring the builders to satisfy one of the recognised classification societies & engaging skilled naval architects, who advise him, & skilled inspectors, who supervise the work, with due diligence.

*Semble:* if he buys a ship he must take all appropriate steps to satisfy himself by surveys & inspections that she is fit for the service in which he puts her. The need to repair a ship may cast on the carrier a special duty to see, so far as is reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.

The Carriage of Goods by Sea Acts have introduced a new & obligatory code of responsibilities & immunities as affecting carriers under bills of lading in place of the former rule that carriers by sea, while generally under the liability of common carriers, were free by contract to vary & limit their liabilities. In particular the Acts have expressly abolished the previous absolute obligation to provide a seaworthy ship & have substituted an obligation to use due diligence to that effect (WRIGHT, J.).—ANGLISS (W.) & CO. (AUSTRALIA) PROPRIETARY *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., [1927] 2 K. B. 456; 96 L. J. K. B. 1084; 137 L. T. 727; 43 T. L. R. 675; 32 Com. Cas. 388.

**3055. —— Exclusion—Contract relating to specified vessel.**]—Pltf., a master mariner, contracted with defts., for a lump sum to be paid him by defts., to take a certain specified steam tug of defts., towing six sailing barges, from Hull to the Brazils, pltf. paying the crew & providing provisions for all on board for seventy days. The engines of the steam tug were damaged & out of repair at the time of the contract, but neither pltf. nor defts. were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, & pltf.'s gain in performing his contract was much less than it would otherwise have been:—*Held:* as the contract related to a specified vessel, there was no implied undertaking by defts. that it should be reasonably efficient for the purposes of the voyage, & therefore the defective state of the engines gave pltf. no cause of action, it not appearing that the engines were in a worse state when pltf. took possession of the vessel than they were at the time of the contract.—ROBERTSON *v.* AMAZON TUG & LIGHTERAGE CO., LTD. (1881), 7 Q. B. D. 598; 51 L. J. Q. B. 68; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. L. C. 496, C. A.

*Annotations:*—**Apld.** The West Cock, [1911] P. 208; Point Anne Quarries *v.* The M. F. Whalen (1922), 39 T. L. R. 37. **Refd.** The Glenmorven, [1913] P. 141.

**3056. —— —— Terms must be unambiguous.**]—A shipowner agreed to carry frozen meat by an agreement which was so ill thought out & ill expressed in self contradictory sentences that it was impossible to feel sure what the parties intended to stipulate. Frozen meat shipped under this agreement arrived damaged owing to the unseaworthiness of the ship & the negligence of the shipowner's agents:—*Held:* there being no clear & express exemption, the shipowner was not relieved from his duty to provide a seaworthy ship & to take reasonable care.—NELSON LINE (LIVERPOOL), LTD. *v.* NELSON & SONS, LTD., [1908] A. C. 16; 77 L. J. K. B. 82; 97 L. T. 812; 24 T. L. R. 114; 52 Sol. Jo. 170; 10 Asp. M. L. C. 581; 13 Com. Cas. 104, H. L.

*Annotations:*—**Distd.** Chartered Bank of India, Australia & China *v.* British India Steam Navigation Co., [1909] A. C. 369. **Apld.** Rosin & Turpentine Import Co. *v.* Jacobs (1909), 25 T. L. R. 345; South American Export Syndicate *v.* Federal Steam Navigation Co. (1909), 100 L. T. 270. **Folld.** Ingram & Royle *v.* Services Maritimes du Trepont, [1913] 1 K. B. 538. **Apld.** Bank of Australasia *v.* Clan Line Steamers, [1916] 1 K. B. 39; Lepeaupin *v.* Crispin, [1920] 2 K. B. 714; Layton *v.* General Steam Navigation Co. (1923), 130 L. T. 662. **Refd.** The West Cock, [1911] P. 208; Pyman S.S. Co. *v.* Hull & Barnsley Ry. (1914), 83 L. J. K. B. 1321; Travers *v.* Cooper, [1915] 1 K. B. 73; Denholm *v.* Shipping Controller (1920), 124 L. T. 378; Paterson, Zochonis *v.* Elder Dempster, [1923] 1 K. B. 420; Lake *v.* Simmons (1926), 95 L. J. K. B. 586.

**3057. —— ——.**]—WIENER & CO. *v.* WILSONS & FURNESS-LEYLAND LINE, LTD., No. 2218, *ante.*

**3058. —— ——.**]—THE MARIONGA MARI (1922), 153 L. T. Jo. 450.

**3059. —— —— Appointment of qualified officer—Meaning of "qualified."**]—WERNER *v.* DET BERGENSKE DAMPSKIBSSELSCHAFT, No. 2993, *ante.*

**3060. Express warranty—Condition precedent to payment of freight.**]—THOMPSON *v.* GILLESPY, No. 1835, *ante.*

**3061. —— Duty to use due diligence.**]—MORRIS & MORRIS *v.* OCEANIC STEAM NAVIGATION CO., LTD. (1900), 16 T. L. R. 533.

*Annotations:*—**Consd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; Bank of Australasia *v.* Clan Line Steamers, [1916] 1 K. B. 39. **Refd.** Baxter's Leather Co. *v.* Royal Mail Steam Packet Co. (1908), 99 L. T. 280; Wiener *v.* Wilsons & Furness Leyland Line (1910), 11 Asp. M. L. C. 413; Hordern *v.* Commonwealth & Dominion Line, [1917] 2 K. B. 420.

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the shipowners' obligation, & therefore was void under Fiji Ordinance 14, s. 4; & the shipper was entitled to damages.—AUSTRALASIAN UNITED STEAM NAVIGATION CO., LTD. *v.* HUNT, [1921] 2 A. C. 351, P. C.—**FIJI.**

e. —— —— ——.]—A clause in a bill of lading which limits the shipowners' liability to specified rates unless the value of the goods has been declared on shipment & extra freight paid thereon is not a violation of an Act which prohibits any agreement whereby the obligations of a shipowner to make his vessel seaworthy, & of the master, officers, or servants carefully to handle, stow, & deliver the cargo, are lessened, weakened, or avoided.—BEATH & CO., LTD. *v.* UNION S.S. CO. OF NEW ZEALAND, LTD., [1919] N. Z. L. R. 282.—**N.Z.**

**3062. —— Whether implied warranty excluded.**]—RATHBONE BROTHERS & Co. *v.* MACIVER (D.), SONS & Co., No. 2794, *ante*.

**3063. —— Meaning of "unseaworthiness"—Fitness to meet perils of the sea—& fitness to carry cargo.**]—RATHBONE BROTHERS & Co. *v.* MACIVER (D.), SONS & Co., No. 2794, *ante*.

**When warranty commences.**]—*See* Sub-sect. 1, C., *post*.

*C. Time for.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 1, Article IV., r. 1; &, *compare*, INSURANCE, Vol. XXIX., pp. 191–193, Nos. 1501–1520.

**3064. Commencement of voyage.**]—KOPITOFF *v.* WILSON, No. 3045, *ante*.

**3065.** ——.]—STEEL *v.* STATE LINE S.S. Co., No. 2693, *ante*.

**3066.** ——.]—THE MARATHON, No. 3048, *ante*.

**3067. —— Evidence of seaworthiness—Inference from circumstances.**]—PARKER *v.* POTTS, No. 3031, *ante*.

**3068. —— Subsequent repair insufficient—Although carried out before loss.**]—Pltf. shipped goods on board deft.'s vessel, deft. undertaking that the vessel should be seaworthy at the commencement of the voyage. In an action on the contract the declaration alleged "that the vessel was not seaworthy at the commencement of the voyage, whereby pltf. was prevented from insuring"; to which a plea "that before any damage, loss, or prejudice accrued to pltf. the vessel was made seaworthy," was held no answer to the action, & bad on demurrer.—DUNBAR *v.* SMUTHWAITE (1854), 24 L. T. O. S. 92; 3 W. R. 68.

**3069.** —— ——.]—GILROY, SONS & Co. *v.* PRICE & Co., No. 3121, *post*.

**3070. —— When voyage commences.**]—By a charterparty, deft.'s ship was to proceed to a good & safe place in the river or dock as ordered, & there take on board a cargo of cement for pltf., & proceed therewith to port of discharge. She loaded according to pltf.'s orders at the usual wharf for such cargo, where, however, she of necessity grounded at low water. From the time of sailing she took in water, & although she proceeded on her voyage, the wind being fair, she foundered just before reaching her destination. The ship was seaworthy when she commenced taking in cargo, but not when she set sail, & she must therefore have received damage in the course of loading. The jury found the master innocent of negligence:—*Held:* the implied warranty of seaworthiness was not exhausted on the ships proceeding to the wharf under the agreement, but attached at the time of sailing, when the underwriters' risk commenced.—COHN *v.* DAVIDSON (1877), 2 Q. B. D. 455; 46 L. J. Q. B. 305; 36 L. T. 244; 25 W. R. 369; 3 Asp. M. L. C. 374.

*Annotations:*—**Reld.** The Rona (1884), 51 L. T. 28; The Thorsa, [1916] P. 257; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522; Reed *v.* Page & East, [1927] 1 K. B. 743.

**3071. Voyage in stages—Commencement of each stage.**]—There may be different stages of seaworthiness in cases where the different stages of navigation involve the necessity of a different equipment or state of seaworthiness; but the vessel must be properly equipped, & in all respects seaworthy, for each of the stages respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with.—QUEBEC MARINE INSURANCE Co. *v.* COMMERCIAL BANK OF CANADA (1870), L. R. 3 P. C. 234; 7 Moo. P. C. C. N. S. 1; 39 L. J. P. C. 53; 22 L. T. 559; 18 W. R. 769; 3 Mar. L. C. 414; 17 E. R. 1, P. C.

*Annotations:*—**Folld.** The Vortigern, [1899] P. 140. **Reld.** Daniels *v.* Harris (1874), 23 W. R. 86; Sleigh *v.* Tyser, [1900] 2 Q. B. 333.

**3072.** —— ——.]—By a charterparty a ship was to proceed to Oran, & there load a part cargo of esparto, for delivery at Garston, with liberty to fill up with ore, or other dead weight cargo, for owner's benefit, & to call at any ports in any order. She loaded at Oran, & left with a supply of coal insufficient for a voyage thence to Garston. She called at Huelva, & was filled up with ore, but no further supply of coal was taken on board. After leaving Huelva, the ship went ashore, by reason of the insufficient supply of coal, & the cargo was lost. In an action for non-delivery of the esparto:—*Held:* even if the voyage could be treated as one divided into stages, the warranty of seaworthiness, which attaches at the commencement of each stage, had been broken at Huelva, & pltfs. were entitled to recover.—THIN *v.* RICHARDS & Co., [1892] 2 Q. B. 141; 62 L. J. Q. B. 39; 66 L. T. 584; 40 W. R. 617; 8 T. L. R. 571; 36 Sol. Jo. 501; 7 Asp. M. L. C. 165, C. A.

*Annotations:*—**Folld.** The Vortigern, [1899] P. 140. **Apld.** MacIver *v.* Tate Steamers (1903), 8 Com. Cas. 124. **Reld.** Greenock S.S. Co. *v.* Maritime Insce. (1903), 72 L. J. K. B. 868.

**3073.** —— —— **Determination of stages.**]—THE VORTIGERN, No. 3043, *ante*.

**3074.** —— ——.]—MCIVER & Co., LTD. *v.* TATE STEAMERS, LTD., No. 3098, *post*.

*D. What amounts to.*

*(a) In General.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 1, Article IV., r. 1, &, *compare*, INSURANCE, Vol. XXIX., pp. 187–191.

**3075. Question of fact.**]—STEEL *v.* STATE LINE S.S. Co., No. 2693, *ante*.

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**PART VII. SECT. 6, SUB-SECT. 1.—C.**

**3064 i.** *Commencement of voyage.*]—A steamship became unseaworthy by reason of an injury sustained after she had been moved from her wharf in intended prosecution of a voyage, which she continued to prosecute, until an inrush of water disclosed the injury, whereupon she was beached. The cargo was damaged by the inrush. When the injury was sustained some at least of the mooring lines had been released, but it did not appear whether or not the ship had been completely unmoored:—*Held:* applt., a shipper, on whom the *onus* lay, had not shown that the voyage began after the injury had been sustained, so as to constitute a breach of warranty of seaworthiness under Sea Carriage of Goods Act, 1904, s. 8.—WHYBROW & Co. PROPRIETARY *v.* HOWARD SMITH Co. (1913), 17 C. L. R. 1.—**AUS.**

**3064 ii.** ——.]—MCGREGOR *v.* HUDDART, PARKER, LTD. (1919), 26 C. L. R. 336.—**AUS.**

**3064 iii.** ——.]—The implied warranty of seaworthiness in a vessel applies to the state of the vessel at the commencement of the voyage.—QUEBEC MARINE INSURANCE Co. *v.* COMMERCIAL BANK OF CANADA (1869), 13 L. C. J. 267; *revsd.* (1870), L. R. 3 P. C. 234.—**CAN.**

**3064 iv.** —— ]—CANADIAN S.S. LINES *v.* GRAIN GROWERS EXPORT Co. (1919), 59 S. C. R. 643; 52 D. L. R. 680.—**CAN.**

**3064 v.** ——.]—HILL (C. ERNEST), INCORPORATED *v.* MCHENRY, [1925] 3 D. L. R. 1036.—**CAN.**

**3064 vi.** ——.]—PREMIER GOLD MINING Co., LTD. *v.* COASTWISE STEAMSHIP & BARGE Co., LTD. (1925), 35 B. C. R. 147; [1925] 1 W. W. R. 630.—**CAN.**

**3064 vii.** ——.]—CUNNINGHAM *v.* COLVILS, LOWDEN & Co. (1888), 16 R. (Ct. of Sess.) 295; 26 Sc. L. R. 249.—**SCOT.**

**3064 viii.** ——.]—PARK *v.* DUNCAN & SON (1898), 25 R. (Ct. of Sess.) 528; 35 Sc. L. R. 378.—**SCOT.**

**PART VII. SECT. 6, SUB-SECT. 1.—D. (a).**

**1.** *Muddy water in boiler.*]—SEVILLE SULPHUR & COPPER Co. *v.* COLVILS, LOWDEN & Co. (1888), 15 R. (Ct. of Sess.) 616; 25 Sc. L. R. 437.—**SCOT.**

*Sect. 6.—The voyage: Sub-sect. 1, D. (a) & (b) i.*

**3076.** ——.]—MCFADDEN *v.* BLUE STAR LINE, No. 2796, *ante*.

**3077. Fitness to meet perils of the sea.**]—Pltf. shipped a cargo of haricot beans on board deft.'s vessel, which was then lying in dock, for carriage & delivery at another port. Before sailing, it came on to blow a gale at night, the vessel started a plank, the water entered, & the beans were damaged. There was no direct evidence how the strain on the vessel was occasioned, whether by pressure of the adjoining vessels in dock, or by coming into contact with a mooring chain, as, in the opinion of one witness, she might have done. The only damage sustained by the vessel was the starting of a plank, which was sound, & the repairs cost but 5*s*. The jury found that the vessel was unseaworthy, & gave damages for the delay in the transport of the beans, & the loss sustained by pltf. from a falling market:—*Held:* (1) the vessel must be presumed unseaworthy as she ought to be equal to all the strain to which, in common with other ships, she might be exposed; & the ct., therefore, would not disturb the verdict; (2) pltf. was entitled to recover damages for the delay in carrying the beans to their port of destination, by reason whereof he had lost a market, & been obliged to sell at a less price than he would otherwise have obtained; although he had, after the accident, insisted on the beans being carried by defts.' ship instead of sending them by some other & earlier conveyance.—CHRISTIE *v.* TROTT (1853), 22 L. T. O. S. 101; 2 W. R. 15.

**3078.** ——.]—STEEL *v.* STATE LINE S.S. Co., 2693, *ante*.

**3079.** ——.]—RATHBONE BROTHERS & Co. *v.* MACIVER (D.), SONS & Co., No. 2794, *ante*.

**3080.** ——.]—The words "seaworthy for the voyage" in Merchant Shipping Act, 1876 (c. 80), s. 5, mean that the ship must be "in a fit state as to repairs, equipment & crew, & in all other respects, to encounter ordinary perils of the voyage." They do not include "a neglect properly to use the appliances on board a vessel well equipped & furnished."—HEDLEY *v.* PINKNEY & SONS S.S. Co., [1894] A. C. 222; 63 L. J. Q. B. 419; 70 L. T. 630; 42 W. R. 497; 10 T. L. R. 347; 7 Asp. M. L. C. 483; 6 R. 106, H. L.

*Annotations:*—**Reid.** Dobell Co. *v.* S.S. Rossmore Co., [1895] 2 Q. B. 408; Morris & Morris *v.* Oceanic Steam Navigation Co. (1900), 16 T. L. R. 533; Leonard *v.* Leyland (1902), 18 T. L. R. 727; Ingram & Royle *v.* Services Maritimes du Tréport (1913), 109 L. T. 733. **Mentd.** Tozland *v.* West Ham Grdns. (1905), 69 J. P. 240; Burr *v.* Theatre Royal Drury Lane, [1907] 1 K. B. 544.

**3081. Ship in condition to satisfy ordinary prudent owner.**]—MCFADDEN *v.* BLUE STAR LINE, No. 2796, *ante*.

**3082. Dependent on trade in which vessel employed.**]—JOHNSON *v.* CHAPMAN (1844), 8 L. T. 767.

**3083. Latent defects.**]—COHN *v.* DAVIDSON, No. 3070, *ante*.

**3084.** ——.]—THE GLENFRUIN, No. 2655, *ante*.

**3085. Unseaworthiness distinguished from neglect or default in prosecution of voyage.**]—GILROY, SONS & Co. *v.* PRICE & Co., No. 3121, *post*.

**3086. Proper use of appliances with which ship furnished.**]—HEDLEY *v.* PINKNEY & SONS S.S. Co., No. 3080, *ante*.

*(b) Particular Requirements.*

*i. Adequate Crew and Equipment.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 1, Article IV., r. 1, &, *compare*, INSURANCE, Vol. XXIX., p. 189, Nos. 1479–1490.

**3087. Necessity for.**]—WYNNE *v.* FELLOWES (1691), Holt, K. B. 466; 1 Show. 334; 90 E. R. 1157.

**3088.** ——.]—HEDLEY *v.* PINKNEY & SONS S.S. Co., No. 3080, *ante*.

**3089.** —— **Provision of special appliances.**]—THE MARATHON, No. 3048, *ante*.

**3090. Meaning of equipment — Medicines.**]—When sickness of the master or crew is set up as an excuse for deviation, it is incumbent on pltf. to show that proper medicines & necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board.—WOOLF *v.* CLAGGETT (1800), 3 Esp. 257; 170 E. R. 607, N. P.

**3091.** —— **Documents—Required by English law.**]—Where by a charterparty of affreightment the owner of the ship covenants that she shall be furnished with everything needful & necessary for the voyage, he is bound to furnish her not only with all documents required by the law of this country, but such as are required for her immediate admission into the foreign port mentioned in the charterparty; therefore, where by such a charterparty a ship was let to freight for a voyage to Sardinia & back:—*Held:* the owner was liable for not furnishing her with a bill of health, without which by the law of Sardinia she could not be admitted into port before performing quarantine.—LEVY *v.* COSTERTON (1816), 4 Camp. 389; Holt, N. P. 167; 1 Stark. 212; 171 E. R. 124, N. P.

**3092.** —— —— **Necessary for admission to port named in charterparty.**]—LEVY *v.* COSTERTON, No. 3091, *ante*.

**3093.** —— —— **Sufficient bills of lading to obtain consular manifest.**]—Deft., a merchant at L., chartered a ship from pltfs. at a lump sum & put it up as a general ship. The shippers of goods in the vessel, according to the custom of L., made out & delivered to deft., for the captain, copies of the respective bills of lading, which were eight in number. It was necessary, as deft. knew, that a document called a consular manifest should be made at L. before the ship sailed, containing an accurate account of the goods on board the ship, & that for that purpose the person employed to make it out should have all the bills of lading or copies of them before him. On application for the copies by pltfs., deft. delivered over only six out of the eight copies as the whole number. An imperfect consular manifest was drawn up from these, & pltfs. were in consequence subjected to fines & expense at the end of the voyage:—*Held:* in the absence of express contract or mercantile usage, there was no legal duty making it incumbent on deft. to deliver over the copies to pltf.'s, & therefore no action could be maintained against him for the omission.—DUTTON *v.* POWLES (1862), 2 B. & S. 191; 31 L. J. Q. B. 191; 6 L. T. 224;

PART VII. SECT. 6, SUB-SECT. 1.—D. (b) i.

*g. Hatches partially battened down.*]—Where it is well known that heavy seas & gales may be expected on a projected voyage, & that total or partial battening-down might become necessary, any evil consequences likely to result from the battening-down ought to be foreseen & as far as possible guarded against by the shipowner. If cattle die when the hatches are partially battened-down & notwithstanding that everything has been done by the master that could reasonably be done, it shows that the cattle died because the vessel, so far as the cargo was concerned, was not seaworthy.—FLEMING *v.* RAMSAY (1906), 25 N. Z. L. R. 596.—N.Z.

*h. Defect in cargo hook.*]—Goods were shipped to be carried by sea, & after the ship had arrived at her

8 Jur. N. S. 970 ; 10 W. R. 408 ; 1 Mar. L. C. 209 ; 121 E. R. 1043, Ex. Ch.

**3094. —— Provisions.**]—THE PUSEY HALL (1848), 7 L. T. 866.

**3095. —— Coal.**]—THIN *v.* RICHARDS & Co., No. 3072, *ante*.

**3096.** —— ——.]—Defts. shipped goods on a steamer chartered by pltfs. to be carried to S. The ship, on arriving off S., was ordered to a quarantine station 120 miles away. The master, not being able to obtain bunker coals, used certain wood & cannel coal, which formed part of his cargo, to get to the quarantine station, & the ship was damaged in consequence :—*Held :* that the use of the cannel coal was a general average act, & pltfs. were entitled to a general average contribution from defts.—WALFORD DE BAEDEMAECKER & Co. *v.* GALINDEZ BROTHERS (1897), 13 T. L. R. 293 ; 2 Com. Cas. 137.

**3097.** —— ——.]—THE VORTIGERN, No. 3043, *ante*.

**3098.** —— ——.]—Where it was provided by the terms of a charterparty, by which a steamer was chartered for a round voyage from Liverpool to the River Plate & back to the United Kingdom, that the charterers should provide & pay for all the coal :—*Held :* this provision did not relieve the shipowners from the obligation of seeing that the ship was in a seaworthy condition in respect of her supply of coal at the commencement of each of the stages of the voyage.—MCIVER & Co., LTD. *v.* TATE STEAMERS, LTD., [1903] 1 K. B. 362 ; 72 L. J. K. B. 253 ; 88 L. T. 182 ; 51 W. R. 393 ; 19 T. L. R. 217 ; 9 Asp. M. L. C. 362 ; 8 Com. Cas. 124, C. A.

**3099.** —— ——.]—Cattle were shipped on board a steamship at Buenos Ayres for Deptford under a live stock contract which excepted the usual perils, & also excepted loss arising from *force majeure*, or from any negligence of the master, engineers, or other persons in the service of the shipowner, whether arising previously or subsequently to the vessel's sailing, or by unseaworthiness or unfitness of the ship or any part of her equipment at or after the commencement of the voyage. By a subsequent clause the vessel was to have liberty to deviate " for the purpose of saving life or property, but not to call at any port or ports before landing her live-stock except in case of *force majeure*." The vessel sailed from Buenos Ayres intending to call at St. Vincent to take in coal for the voyage from there to Deptford. After leaving Buenos Ayres it was found that she has not sufficient coal to take her to St. Vincent & she accordingly called at Pernambuco & took in coal there. On arriving at Deptford the vessel was detained in quarantine, Pernambuco being a prohibited port, & the cattle suffered deterioration in consequence :—*Held :* by the contract the vessel was not to call at any port before landing her live stock except in the case of *force majeure ;* the deficiency of coal owing to the miscalculation as to the quantity necessary to take the vessel to St. Vincent was not a case of *force majeure*, the vessel & cargo being in no danger ; & therefore the shipowner was liable for the deterioration of the cattle.—YRAZU *v.* ASTRAL SHIPPING Co. (1904), 20 T. L. R. 153 ; 9 Com. Cas. 100.

*Annotation :*—**Refd.** Lebeaupin *v.* Crispin, [1920] 2 K. B. 714.

ii. *Fitness to Carry Cargo.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 1, Article IV., r. 1, &, *compare*, Vol. XXIX., p. 191, Nos. 1498–1500.

**3100. Particular cargo specified in contract.**]—The word " seaworthy " means fit to carry the particular cargo safely in respect of the dangers which but for proper fittings & equipment might damage it during the carriage.—ROWSON *v.* ATLANTIC TRANSPORT Co., [1903] 1 K. B. 114 ; 72 L. J. K. B. 87 ; 87 L. T. 717 ; 52 W. R. 85 ; 19 T. L. R. 67 ; 9 Asp. M. L. C. 347 ; 8 Com. Cas. 74 ; *affd.*, [1903] 2 K. B. 666, C. A.

*Annotations :*—**Refd.** Brown *v.* Harrison (1927), 96 L. J. K. B. 1025 ; Gosse Millard *v.* Canadian Government Merchant Marine, American Can Co. *v.* Same, [1927] 2 K. B. 432.

**3101.** ——.]—RATHBONE BROTHERS & Co. *v.* MACIVER (D.), SONS & Co., No. 2794, *ante*.

**3102.** ——.]—MOUNTPARK S.S. Co. *v.* GREY (1910), cited Halsbury's Laws of England, Vol. XXVI., at p. 216, H. L.

**3103. —— Wet sugar—Insufficient pumps.**]—STANTON *v.* RICHARDSON, No. 1899, *ante*.

**3104. —— Meat—Refrigerating apparatus.**]—Pltfs. shipped a cargo of frozen meat on defts.' steamship. The bill of lading contained the following clauses : " Steamer shall not be accountable for . . . any loss or damage . . . arising from failure or breakdown of machinery, insulation, or other appliances . . . nor for the consequences of any act, neglect, or default . . . of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever." " Loss or damage resulting from any of the following causes or perils all excepted, viz. : . . . explosion, accidents to, or defects in hull, tackle, boilers, or machinery . . . barratry, jettison, neglect, default, or error in judgment of the master, mariners, engineers, or others in the service of the owners." The cargo was damaged by the breakdown of the refrigerating machinery : —*Held :* the above clauses did not limit the warranty that the ship was fit to carry the cargo.

Under an ordinary Bill of Lading there can be no question that the owner enters into an absolute undertaking that the ship on sailing shall be fit to carry the particular cargo to its destination. The ordinary exceptions refer to the incidents of the voyage after the ship has sailed, & do not qualify this obligation (MATHEW, J.).—MAORI KING (CARGO OWNERS) *v.* ALLEN (1895), 1 Com. Cas. 104, C. A.

**3105.** —— —— ——.]—WAIKATO (CARGO OWNERS) *v.* NEW ZEALAND SHIPPING Co., No. 2658, *ante*.

**3106.** —— —— ——.]—SOUTH AMERICAN EXPORT SYNDICATE, LTD. *v.* FEDERAL STEAM NAVIGATION Co., LTD., No. 2698, *ante*.

**3107.** —— —— **Contaminated by disinfectant used in ship.**]—Frozen meat shipped for carriage from Melbourne to London arrived tainted with carbolic acid, with which the ship had been disinfected before shipment. The bill of lading contained two exception clauses. The first exempted the shipowner from liability for damage to goods whether arising from a defect existing at the time of the shipment or not, or from the neglect of the master or crew, or from any other cause whatsoever. The second clause also exempted the shipowner from liability for damage

destination, & while landing goods, a portion of the ship's discharging-tackle, viz. a cargo hook, which was weak & defective, broke, with the result that the goods were damaged :— *Held :* the defect in the cargo hook did not constitute a breach of the warranty of seaworthiness, but constituted a breach of the duty which the shipowner owed as a carrier, liability for which was limited by the special provisions of the bill of lading. —S.S. PORT STEPHENS *v.* INGLIS BROTHERS & Co., LTD., [1926] N. Z. L. R. 357.—**N.Z.**

*Sect. 6.—The voyage: Sub-sect. 1, D. (b) ii., iii. iv., E. & F.*]

from defects, etc., " if reasonable means have been taken to provide against such defects & unseaworthiness " :—*Held :* upon the true construction of the bill of lading the generality of the first clause was qualified by the second clause, &, reasonable care not having been taken in cleansing the ship before the shipment, the shipowner was liable for the damage in an action brought by an indorsee of the bill.—ELDERSLIE S.S. Co. *v.* BORTHWICK, [1905] A. C. 93 ; 74 L. J. K. B. 338 ; 92 L. T. 274 ; 53 W. R. 401 ; 21 T. L. R. 277 ; 10 Asp. M. L. C. 24 ; 10 Com. Cas. 109, H. L. ; *affg.* S. C. *sub nom.* BORTHWICK *v.* ELDERSLIE S.S. Co., [1904] 1 K. B. 319, C. A.

*Annotations :*—**Apld.** Atlantic Shipping & Trading Co. *v.* Dreyfus, [1922] 2 A. C. 250. **Reld.** The Forfarshire, [1908] P. 339 ; Nelson Line (Liverpool) *v.* Nelson, [1908] A. C. 16 ; Chartered Bank of India, Australia & China *v.* British India Steam Navigation Co., [1909] A. C. 369 ; Rosin & Turpentine Import Co. *v.* Jacob (1909), 101 L. T. 56 ; South American Export Syndicate *v.* Federal Steam Navigation Co. (1909), 100 L. T. 270 ; Wiener *v.* Wilsons & Furness-Leyland Line (1910), 102 L. T. 716 ; The West Cock, [1911] P. 23 ; Ingram & Royle *v.* Services Maritimes du Tréport, [1913] 1 K. B. 538 ; Mitsui *v.* Watts, Watts, [1916] 2 K. B. 826 ; Morrison *v.* Shaw, Savill & Albion Co., [1916] 1 K. B. 747 ; Denholm *v.* Shipping Controller (1920), 124 L. T. 378 ; Aron *v.* Comptoir Wegimont, [1921] 3 K. B. 435 ; Ambatielos *v.* Anton Jurgens Margarine Works, [1923] A. C. 175 ; Layton *v.* General Steam Navigation Co. (1923), 130 L. T. 662 ; Brightman *v.* Bunge y Born, [1924] 2 K. B. 619 ; Alison *v.* Wallsend Slipway & Engineering Co. (1926), 43 T. L. R. 104 ; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Mentd.** Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612 ; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714 ; Szymonowski *v.* Beck, [1923] 1 K. B. 457 ; Lancaster *v* Turner, [1924] 2 K. B. 222 ; Lake *v.* Simmons, [1926] 1 K. B. 366.

**3108. —— Bullion—Bullion room fit to resist thieves.**]—Boxes of gold, shipped abroad, under a bill of lading, for delivery in London, were placed in the bullion room of the ship, from which one of the boxes was stolen during the voyage. The bill of lading did not contain any mention of a bullion room, but it was known to pltfs. that defts.' vessels were provided with such rooms, & it was in the contemplation of both parties to the contract that the gold was to be carried in a bullion room :—*Held :* there was an implied warranty that the bullion room in which the gold was stowed was so constructed as to be reasonably fit to resist thieves.—QUEENSLAND NATIONAL BANK *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION Co., [1898] 1 Q. B. 567 ; 67 L. J. Q. B. 402 ; 78 L. T. 67 ; 46 W. R. 324 ; 14 T. L. R. 166 ; 42 Sol. Jo. 212 ; 8 Asp. M. L. C. 338 ; 3 Com. Cas. 51, C. A.

*Annotations :*—**Reld.** Rawson *v.* Atlantic Transport Co. (1902), 87 L. T. 717 ; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**3109. —— Lemons—Damage by sulphur fumigation.**]—CIAMPA *v.* BRITISH INDIA STEAM NAVIGATION Co., LTD., No. 2569, *ante.*

**3110. —— Palm oil—Absence of 'tween decks.**]—ELDER, DEMPSTER & Co. *v.* PATERSON, ZOCHONIS & Co., GRIFFITHS LEWIS STEAM NAVIGATION Co. *v.* PATERSON, ZOCHONIS & Co., No. 3118, *post.*

*iii. Stowage of Cargo.*

*See, now,* Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 1, Article IV., r. 1.

**3111. Improper stowage—Whether amounting to unseaworthiness.**]—KOPITOFF *v.* WILSON, No. 3045, *ante.*

**3112. —— ——.**]—TATE *v.* CROSBY, MAGEE & Co. (1898), cited in Halsbury's Laws of England, Vol. XXVI., at p. 77.

**3113. —— ——.**]—THE CITY OF LINCOLN *v.* SMITH, No. 2690, *ante.*

**3114. —— ——.**]—Pltfs., who were the consignees of 500 tons of wood pulp which arrived at Erith by steamer, employed lightermen to provide barges for the collection of that consignment from the steamer & to lighter it to Nine Elms. The lightermen sent to Erith three barges for this purpose, one of which, the *Jellicoe*, had a carrying capacity of 170 tons & no more. When the loading commenced the *Jellicoe* was seaworthy, but 190 tons were put on board, & after the loading was finished & while she was lying with that cargo on board alongside the steamer waiting for a tug to tow her to Nine Elms she sank, & her cargo was lost :—*Held :* when the loading of the *Jellicoe* was finished a new stage of the employment or adventure commenced, & as at that stage the *Jellicoe* was, by reason of being overloaded, unseaworthy either to lie in the river or to be towed, the lightermen were liable, as the London Lighterage Clause did not cover a loss due to unseaworthiness. —REED (A. E.) & Co. *v.* PAGE, SON & EAST, LTD., [1927] 1 K. B. 743 ; 96 L. J. K. B. 390 ; 137 L. T. 77 ; 43 T. L. R. 272 ; 17 Asp. M. L. C. 231 ; 32 Com. Cas. 243, C. A.

**3115. What amounts to improper stowage—Heavy cargo breaking loose.**]—KOPITOFF *v.* WILSON, No. 3045, *ante.*

**3116. —— Lack of dunnage.**]—THE CRESSINGTON, No. 2706, *ante.*

**3117. —— Damage to part cargo by another part—Contamination.**]—THE THORSA, No. 2732, *ante.*

**3118. —— —— Goods crushed by heavier goods.**]—A shipping co. ran a line of cargo steamers to West African ports for the carriage of West African produce. These vessels had their holds fitted 'tween decks, so as to relieve the cargo stored in the lower part of the holds from the weight of the cargo stored in the upper part. This co., hereinafter called " the charterers," requiring an additional vessel for their West African trade, chartered from another co., hereinafter called " the shipowners," on a time charter, a ship of the Isherwood type with deep holds & no 'tween decks. This ship loaded at a West African port a large number of casks of palm oil, which were properly stored in tiers at the bottom of the holds, & also loaded a large number of bags of palm kernels, which for the most part were stowed over the casks of palm oil. The palm kernels being very heavy crushed the casks of palm oil, so that before the ship left port the bilge well of the holds had 3 feet of oil in them, & on the arrival of the ship at her destination in England the greater part of the oil was lost or damaged.

**PART VII. SECT. 6, SUB-SECT. 1.—D. (b) iii.**

**3111 i.** *Improper stowage—Whether amounting to unseaworthiness.*]—The fact that a cargo is improperly stowed in that it is not supplied with sufficient ventilation may be " unseaworthiness " as far as such cargo is concerned.—BALFOUR, GUTHRIE & Co. *v.* CANADIAN PACIFIC RY. Co. (B. C.), [1917] 3 W. W. R. 310.—CAN.

**3111 ii.** —— ——.]—CUNNINGHAM *v.* FRONTIER S.S. Co., [1906] 2 I. R. 12. —IR.

**3111 iii.** —— ——.]—Unless the conditions of a charterparty relieve the owner, as distinct from his servants & agents, from the consequences of personal negligence, he is liable for damages accruing during the voyage to cargo laden under his orders, owing to such cargo having been so laden as to render the ship, in other respects seaworthy, top heavy at starting.—THE CITY OF LINCOLN (MASTER & OWNERS) *v.* SMITH (1904), 25 N. L. R. 7.—S. AF.

The bills of lading under which the palm oil was shipped protected the charterers from damage due to bad stowage.

In an action by the shippers of the palm oil against the charterers & the shipowners for damages for breach of the contract of carriage evidenced by the bills of lading, or, alternatively, for negligence or breach of duty:—*Held:* (1) the ship being structurally fit to carry the palm oil at the time when it was loaded, the damage was due not to the unseaworthiness of the ship for the cargo by reason of the absence of 'tween decks, or the non-provision of a temporary 'tween deck, but to bad stowage, &, consequently, the charterers were protected by the exceptions in the bills of lading; in the circumstances the shipowners were entitled to the same protection.

Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage & nothing more, & still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo (LORD SUMNER).—ELDER, DEMPSTER & CO. *v.* PATERSON, ZOCHONIS & CO., GRIFFITHS LEWIS STEAM NAVIGATION CO. *v.* PATERSON, ZOCHONIS & CO., [1924] A. C. 522; 93 L. J. K. B. 625; 131 L. T. 449; 40 T. L. R. 464; 68 Sol. Jo. 497; 16 Asp. M. L. C. 351; 29 Com. Cas. 340, H. L.; *revsg.* S. C. *sub nom.* PATERSON ZOCHONIS & CO. *v.* ELDER DEMPSTER & CO., [1923] 1 K. B. 420, C. A.

*Annotations:*—**Consd.** Werner *v.* Det Bergensk Dampskibsselselschaft (1926), 134 L. T. 573; Reed *v.* Page & East, [1927] 1 K. B. 743.

**3119. —— Cargo in excess of capacity.**]—REED (A. E.) & CO. *v.* PAGE, SON & EAST, LTD., No. 3114, *ante*.

—.]—*See, generally*, Sect. 5, sub-sect. 5, C. (*a*), *ante*.

### iv. *Other Requirements.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 1, Article IV., r. 1, & *compare* INSURANCE, Vol. XXIX., pp. 189, 190, Nos. 1477, 1478, 1491–1497.

**3120. Vessel without knees.**]—*Qu.:* whether a vessel can be deemed seaworthy for a foreign voyage without knees.—WATT *v.* MORRIS (1813), 1 Dow, 32; 3 E. R. 612, H. L.

**3121. Uncased pipe.**]—A cargo of jute was shipped under a bill of lading, which contained an exception from liability for any act, neglect, or default whatsoever of the master & crew in the navigation of the ship in the ordinary course of the voyage. The ship during her voyage encountered stormy weather, & the pipe of the port water closet was broken by the pressure of the cargo, whereby water entered the vessel, & the jute was damaged.

In an action at the instance of the indorsees of the bill of lading, it was found as a fact "that the pipe was uncased at the sailing of the vessel," & "that the default came within the exemption." It was found also that it was the usual practice to case such a pipe before loading a cargo of jute; that when the cargo was loaded, the pipe was not visible; & that to case the pipe it would have been necessary to remove part of the cargo, but the evidence did not show how much:—*Held:* the findings of fact amounted to a verdict that the ship was not seaworthy on sailing, &, therefore, the exception in the bill of lading did not relieve the shipowners from liability.

It is said that it is found that this was a "neglect or default" in the course of the voyage, & it is found that it might be remedied in the course of the voyage. In my judgment if it is found that the vessel was unseaworthy when she started, that is absolutely immaterial. . . . I can conceive cases in which a defect which constitutes unseaworthiness at the time of the disaster may have existed at the time when the vessel started, & yet it may have been a case not, properly speaking, of initial unseaworthiness but of neglect or default in the prosecution of the voyage. If, for example, some port hole be left open, or there be some means of access for the water, which in the ordinary course of the prosecution of the voyage, if the master & crew were not negligent, would be closed, & which it is usual to leave open when starting, there is no doubt that although it existed at the time when the voyage commenced, it would properly be said not to be a case of unseaworthiness, but of "neglect or default" on the part of the master & crew (LORD HERSCHELL, C.).—GILROY, SONS & CO. *v.* PRICE & CO., [1893] A. C. 56; 68 L. T. 302; 7 Asp. M. L. C. 314; 1 R. 76, H. L.

*Annotations:*—**Consd.** The Europa, [1908] P. 84. **Refd.** Kish *v.* Taylor, [1912] A. C. 604; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522. **Mentd.** Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406; Nimmo *v.* Connell, [1924] A. C. 595.

**3122. Open porthole.**]—GILROY, SONS & CO. *v.* PRICE & CO., No. 3121, *ante*.

**3123. Vessel with one boiler.**]—A vessel held not to be unseaworthy by reason of her proceeding to sea under one boiler only.—THE PENTLAND (1897), 13 T. L. R. 430.

**3124. Provision of unusual fitting requiring special care.**]—A ship is not seaworthy which has to rely upon an unusual & dangerous fitting permitting water to pass from the sea into the holds unless special care is used, & in which those who use the fitting in the ordinary course of navigation have no intimation of its unusual & dangerous character.

*The Schwan* was built under the superintendence of an engineer acting on behalf of the owners & under the rules of the Germanischer Lloyd, which contain stringent provisions that the arrangement shall be such as shall not permit sea water to run into the vessel by an act of carelessness or negligence. The ship was provided with a cock which in fact did allow sea water to enter the holds, & the water damaged applts.' cargo:—*Held:* the shipowners were liable for the damage sustained.—THE SCHWAN, [1909] A. C. 450; 78 L. J. P. 112; 101 L. T. 289; 25 T. L. R. 742; 53 Sol. Jo. 696; 11 Asp. M. L. C. 286, H. L.

*Annotations:*—**Consd.** Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson Zochonis, [1924] A. C. 522. **Apld.** Standard Oil Co. of New York *v.* Clan Line Steamers, [1924] A. C. 100. **Mentd.** Nimmo *v.* Connell, [1924] A. C. 595.

**3125. Overloading.**]—KISH *v.* TAYLOR, No. 3170, *post*.

### *E. Seaworthiness in relation to Excepted Perils.*

**Fire.**]—*See* Nos. 2613–2616, *ante*.

**Collision.**]—*See* No. 2641, *ante*.

**Latent defects in, & accidents to hull or machinery.**]—*See* Nos. 2655–2662, *ante*.

**Negligence.**]—*See* Sect. 4, sub-sect. 14, C., *ante*.

### *F. Evidence and Proof.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV. (1); *compare* INSURANCE, Vol. XXIX., pp. 193–195, Nos. 1531–1547.

*Sect. 6.—The voyage: Sub-sect. 1, F.; sub-sect.*

**3126. Onus of proof—Of unseaworthiness—When onus shifted.**]—Though it is a principle of law that the *onus* of proving unseaworthiness lies upon those who allege it, effect must be given to such presumptions of fact, arising from the age of the vessel, the low classing or non-classing, the non-survey of the ship, the refusal to insure, admitted defects, & bad record of the vessel, as tend to shift the burden of proof.

A steamship started on a voyage from Libau to Leith with a general cargo. A few hours after she put to sea her feed pumps broke down with the result that the boilers had to be fed with sea water by means of the donkey engine. She met with bad weather & put into Elsinore for repairs after sustaining damage to ship & cargo. Particular average charges were incurred at Elsinore in connection with the discharge, reconditioning, & reloading of the cargo. In an action by the shipowners to recover from the owners of the cargo a contribution to general average & also a proportion of the charges incidental to the discharging & reloading of the cargo :—*Held :* defts. were not liable, for in the circumstances the *onus* was on pltfs. of showing that the ship was seaworthy at the commencement of the voyage, & they had failed to discharge that *onus*.—LINDSAY *v.* KLEIN, THE TATJANA, [1911] A. C. 194 ; 80 L. J. P. C. 161 ; 104 L. T. 261 ; 11 Asp. M. L. C. 502, H. L.

*Annotation :*—**Refd.** Munro, Brice *v.* Marten, Same *v.* R., [1920] 3 K. B. 94.

**3127. —— —— Statutory liability for fire.**]—LENNARD'S CARRYING CO., LTD. *v.* ASIATIC PETROLEUM CO., LTD., No. 2616, *ante*.

**3128. —— —— Incorporation of Harter Act.**]—Pltfs., parties interested in cargo carried by a steamer which was lost at sea while on a voyage from the United States to Hamburg, sued defts. as owners of the steamer, for breach of the contract of carriage, or, alternatively, for negligence in the custody of their goods. The bills of lading incorporated the Harter Act, which provided (*inter alia*), that if the owners of any vessel transporting merchandise from any port in the United States shall exercise due diligence to make the vessel in all respects seaworthy, neither the vessel nor her owners shall be held responsible for damage or loss :—*Held :* where the Harter Act was incorporated in the contract the burden of proof was not the same as it was under English law, but it was for the shipowner to prove that his ship was seaworthy or that he had exercised due care to make her so, & the cargo owner need not prove, as he must do in the case of an ordinary English contract, that the ship was unseaworthy.—MOORE *v.* LUNN (1923), 39 T. L. R. 526, C. A.

**3129. —— That damage caused by unseaworthiness.**]—A shipowner, whose ship is unseaworthy at the commencement of the chartered voyage, though liable in damages to the charterer, the owner of the cargo on board, for injury to the cargo caused directly by that unseaworthiness, is not liable for injury caused to other portions of the cargo, not as the result of that unseaworthiness, but by a peril of the sea excepted in the contract of affreightment ; that is to say, if unseaworthiness in the carrying ship is relied on by the cargo owner, he must prove that it was the cause of the damage.—THE EUROPA, [1908] P. 84 ; 77 L. J. P. 26 ; 98 L. T. 246 ; 24 T. L. R. 151 ; 11 Asp. M. L. C. 19, D. C.

*Annotations :*—**Consd.** Internationale Guano en Superphosphaatwerken *v.* Macandrew, [1909] 2 K. B. 360. **Apprvd.** Kish *v.* Taylor, [1912] A. C. 604. **Apld.** The Christel Vinnen, [1924] P. 61. **Refd.** Bank of Australasia *v.* Clan Line Steamers (1915), 21 Com. Cas. 13 ; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**3130. Evidence of expert witness—Shipbuilder.**]—A shipbuilder may be called as a witness to give his opinion as to the seaworthiness of a ship, on the facts stated by others.—THORNTON *v.* ROYAL EXCHANGE ASSURANCE CO. (1790), Peake, 37 ; 170 E. R. 70, N. P.

### SUB-SECT. 2.—PROSECUTION OF THE VOYAGE.

#### *A. In General.*

**3131. Duty of owner or master to convey cargo to destination.**]—(1) All authorities are in unison to this extent, that " the master is at liberty to procure another ship to transport the cargo to the place of destination " : & in these words LORD TENTERDEN [in his book on Shipping] cautiously lays down the rule of our law. . . . It may therefore be safely taken to be either the duty or the right of the shipowner to tranship ; . . . if it be the former, it must be so on virtue of his original contract ; & it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into without respect to the particular circumstances attending its fulfilment ; on the other hand, if it be the latter, a right to the full freight seems to be implied ; the master is at liberty to tranship ; but for what purpose, except for that of earning his full freight, at the rate agreed on ? . . . We may introduce another circumstance ; let the owner of the goods arrive, & insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port ; there is then no question that the whole freight at the original rate must be paid ; & that because the freighter prevents the master, who is able & willing, & has the right to insist on it, from fulfilling the contract on his part, & because the sending the goods to their destination in another vessel as deemed a fulfilment of the contract (LORD DENMAN, C.J.).

(2) It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter ; & that, where the freight cannot

**PART VII. SECT. 6, SUB-SECT. 1.—F.**

**3126 i.** *Onus of proof—Of unseaworthiness—When onus shifted.*]—A vessel became unseaworthy during a voyage for which she was chartered, & put into port for repairs. These were executed, but surveyors who were employed by the owner to examine her reported unfavourably, & advised that she should be further strengthened. This was not done, & she proceeded to sea. In a question between the shippers of cargo, which was damaged, & the owners :—*Held :* the report by the surveyors, though not conclusive, operated to shift the *onus* of proving unseaworthiness from the shippers, & laid upon the owners the burden of proving the contrary.—SCOTT *v.* KALNING (1877), 14 Sc. L. R. 260.—**SCOT.**

**k.** —— ——.]—Although the *onus* is on the pltf. of showing unseaworthiness, yet if a vessel a few minutes after leaving the wharf begins to leak seriously from no ascertainable cause it is a reasonable inference that she was not fit to undertake the voyage at the time she started.—ROSS & GLENDINING, LTD. *v.* SHAW, SAVILL & ALBION CO., LTD. (1907), 26 N. L. R. 845.—**N.Z.**

*That loss arose without actual fault or privity of shipowners—Lies on shipowners.*]—ROYAL EXCHANGE ASSURANCE *v.* KINGSLEY NAVIGATION CO., [1923] A. C. 235 ; [1923] 1 W. W. R. 737 ; [1923] 1 D. L. R. 1048, P. C.—**CAN.**

**m.** *Presumption of seaworthiness.*]—It will not be presumed that a vessel was not seaworthy, merely because the cause of her foundering is unknown.—SMITH *v.* BISSET (1810), 15 Fac. Coll. 617.—**SCOT.**

be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. . . . The case now put supposes an inability to complete the contract on its original terms on another bottom, &, therefore, the owner's right to tranship will be at end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; & if so, it will be the duty of the master as his agent to do so (LORD DENMAN, C.J.). —SHIPTON *v.* THORNTON (1838), 9 Ad. & El. 314; 1 Per. & Dav. 216; 1 Will. Woll. & H. 710; 8 L. J. Q. B. 73; 112 E. R. 1231.

*Annotations:—As to* (1) **Consd.** Gibbs *v.* Grey, Grey *v.* Gibbs (1857), 2 H. & N. 22. Matthews *v.* Gibbs (1860), 3 E. & E. 282; Svendsen *v.* Wallace (1885), 10 App. Cas. 404; Bradley *v.* Newson, [1919] A. C. 16. **Refd.** Rosetto *v.* Gurney (1851), 11 C. B. 176; The Newport (1858), Sw. 335; The Bahia (1864), 11 Jur. N. S. 90; Kidston *v.* Empire Marine Insce. (1866), Har. & Ruth. 433; Atwood *v.* Sellar (1879), 4 Q. B. D. 342; Hill *v.* Wilson (1879), 4 C. P. D. 329. Assicurazioni Generali *v.* S.S. Bessie Morris Co., [1892] 1 Q. B. 571. *Generally*, **Refd.** Great Indian Peninsula Ry. *v.* Saunders (1862), 6 L. T. 297. **Mentd.** *Re* Clarke, *Ex p.* Buckley (1845), 14 M. & W. 469.

**3132.** ——.]—The ship *Lord Cochrane*, with a cargo on board, left Pernambuco, on a voyage to Liverpool on June 29, 1839; in proceeding out of the harbour at Pernambuco, she struck on a rock, & was obliged to put back to be repaired; the master, after several surveys, & with the concurrence of the persons to whom he had been addressed by the owner to procure a cargo, proceeded to repair the ship, the repairs continuing from June 29, 1839, till Jan. 4, following; the expenses of the repairs amounted to £7,132 3*s.* 8*d.*, a sum much exceeding the value of the ship & freight, & which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, & accordingly executed a bottomry bond, charging the ship, freight, & cargo; the cargo, which had been necessarily taken out during the repairs, was reshipped, & the ship sailed on Jan. 6, 1840, & arrived with the cargo at Liverpool; the obligees of the bottomry bond received the freight under a decree of the Ct. of Admlty. It did not appear when the owner was first informed of the accident to the ship; but it appeared that a letter from Pernambuco, dated Nov. 14, 1839, & received on Dec 30, containing an intimation that the *Lord Cochrane's* expenses were likely to exceed £5,000, with commission, discharging & reloading cargo, etc., was shown to him, & that, on the same day, he gave notice of abandonment of the ship & freight to the respective underwriters on each, & did not interfere in any way afterwards in respect of either ship or freight. In an action against the underwriters on freight, claiming for a total loss, by a special verdict, setting out the above facts, the jury found that pltf. had acted *bonâ fide*, without laches & as a prudent owner of the ship & freight, if uninsured, would have acted:—*Held:* (1) pltf. was not entitled to recover in respect either of a total or of a partial loss of freight, the freight having actually been earned, & its receipt by the obligee of the bottomry bond being, in law, a receipt by pltf.; (2) it is the duty of the master, in case of damage to the ship, to do all that can be done towards bringing the adventure to a successful termination, to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, & to bring home the cargo, & earn the freight, if possible; that, in the absence of any finding to the contrary, it must be assumed that this duty has been properly performed; (3) where the master elects to repair, the mere fact of the expenses of repair ultimately proving to be greater than the value of the ship, would not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner to treat him as ceasing to be his agent, as soon as he commenced the repairs; & as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the ct. could not infer that he would not have done so.—BENSON *v.* CHAPMAN (1849), 8 C. B. 950; 2 H. L. Cas. 696; 13 Jur. 969; 137 E. R. 781, H. L.; *affg.* S. C. *sub nom.* CHAPMAN *v.* BENSON (1847), 5 C. B. 330, Ex. Ch.

*Annotations:—As to* (1) **Refd.** Stewart *v.* Greenock Marine Insce. (1848), 2 H. L. Cas. 159; Scottish Marine Insce. *v.* Turner (1853), 21 L. T. O. S. 10; Barber *v.* Fleming (1869), L. R. 5 Q. B. 59. *As to* (2) **Consd.** Atwood *v.* Sellar (1879), 4 Q. B. D. 342; Assicurazioni Generali *v.* S.S. Bessie Morris Co., [1892] 1 Q. B. 571. **Refd.** Knight *v.* Faith (1850), 15 Q. B. 649; Blasco *v.* Fletcher (1863), 14 C. B. N. S. 147; The Bahia (1864), Brown. & Lush. 292; Kemp *v.* Halliday (1866), 6 B. & S. 723; Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Mavro *v.* Ocean Marine Insce. (1874), L. R. 9 C. P. 595; Macbeth *v.* Maritime Insce., [1908] A. C. 144. *Generally*, **Refd.** Great Indian Peninsula Ry. *v.* Saunders (1861), 1 B. & S. 41. **Mentd.** Bowers *v.* Nixon (1848), 13 Jur. 334.

**3133.** ——.]—TRONSON *v.* DENT, No. 3447, *post*.

**3134.** ——.]—THE WILHELM, No. 3196, *post*.

**3135.** ——.]—HILL *v.* WILSON, No. 4848, *post*.

**3136.** ——.]—In the contract of affreightment there is an implied undertaking on the part of the shipowner, in consideration of his being entrusted with the custody of the goods, that if the further prosecution of the voyage should be interrupted by disaster to the ship, if he cannot, or does not choose to, tranship the cargo & send it on in another vessel in order to earn the freight, he will do his best to protect the interest of the goods owner; &, therefore, if the circumstances will admit of it, must find another vessel & forward the goods to their destination. Upon which assumption it may be contended that as the ship, having been repaired & rendered fit to resume the voyage, is available for the purpose, the master will be bound, as the best course to promote the interest of the goods owner, to reship the goods on board his owner's ship (COCKBURN, C.J.).—ATWOOD *v.* SELLAR & Co. (1879), 4 Q. B. D. 342; 27 W. R. 726; *sub nom.* ATTWOOD *v.* SELLAR, 48 L. J. Q. B. 465; 41 L. T. 83; 4 Asp. M. L. C. 153; *on appeal* (1880), 5 Q. B. D. 286, C. A.

*Annotations:*—**Consd.** Assicurazioni Generale *v.* S.S. Bessie Morris (1892), 61 L. J. Q. B. 754. **Refd.** Piric *v.* Middle Dock Co. (1881), 44 L. T. 426; Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653; Svensden *v.* Wallace (1885), 10 App. Cas. 404; Anglo-Argentine Live Stock & Produce Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403; Balmoral S.S. Co. *v.* Marten, [1901] 2 K. B. 396; Carlsbrook S.S. Co. *v.* London & Provincial Marine & General Insce. (1901), 50 W. R. 42; Hudson *v.* British & Foreign Marine Insce., The Leitrim (1902), 8 Com. Cas. 6; The Leitrim, [1902] P. 256; Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298; Chellew *v.* Royal Commission on Sugar Supply, [1922] 1 K. B. 12.

**3137.** ——.]—CREW, WIDGERY & Co. *v.* GREAT WESTERN S.S. Co. (1887), 4 T. L. R. 148, C. A.

*Annotation:*—**Refd.** Robinson Gold Mining Co. *v.* Alliance Insce., [1901] 2 K. B. 919.

**3138.** ——.] — ASSICURAZIONI GENERALI *v.* BESSIE MORRIS S.S. Co., No. 3219, *post*.

**3139.** - - -.]—HANSEN *v.* DUNN, No. 3220, *post*.

**3140.** —— **Damage to cargo—Master not bound to wait indefinite period to reload cargo.**]—Owing to stress of weather a vessel, after sailing under charter from Cardiff for Cape Town with coals, put into a port of refuge. The coal was discharged partly to effect the necessary repairs to the ship, & partly for the benefit of the cargo, portions of which had become heated from wetting by excepted perils of the sea. After the repairs to the ship were completed, the charterer required

*Sect.* 6.—*The voyage: Sub-sect.* 2, *A. & B.* (*a*) *&* (*b*), *& C.* (*a*) *i.*]

the shipowner to reload the coal; the shipowner refused on the ground that in the opinion of the surveyors on both sides the coal was not then in a fit state for reshipment, though, subsequent to the commencement of an action by the charterer against the shipowner for breach of contract, the coal had dried sufficiently to be carried on if the small coal were eliminated from the bulk:—*Held:* the charterer was not entitled to recover, as, at the date of the issue of the writ, there was no breach of contract by the shipowner; up to that time, on the evidence before him, the master, acting on behalf of the shipowner, was justified in refusing to carry on the cargo, & was not bound to wait an indefinite period until experts should be agreed that, the coal being dry, there would be no further risk of spontaneous combustion on a voyage through the tropics, provided the excessive amount of small coal, due to repeated handlings, were removed, for which no facilities existed at the port of refuge, except at an expense out of proportion to the value of the cargo.—THE SAVONA, [1900] P. 252; 69 L. J. P. 95; 49 W. R. 303.

*Annotations:*—**Consd.** Embiricos *v.* Reid, [1914] 3 K. B. 45. **Reid.** The Fox (1914), 83 L. J. P. 89; Anglo-Northern Trading Co. *v.* Emlyn, Jones & Williams, [1917] 2 K. B. 78.

**3141. —— In same ship.**]—DUNCAN *v.* BENSON, No. 3327, *post.*

**3142. —— ——.**]—(1) Where a bottomry bond is made payable upon arrival at the ship's port of destination in England, the validity of the bond is triable by the general maritime law as administered in England, & not by the law of the ship's flag, or the law of the place where the bond was executed.

(2) If there are means of repairing the ship at the port of distress, the master has no obligation to tranship the cargo.

(3) The character of agent for the owners of the cargo is imposed upon the master solely by the necessity of the case. The master of a ship, therefore, has not authority to hypothecate the cargo, if in the circumstances of the case it is reasonably practicable for him to communicate with the owners before doing so; & if he hypothecates the cargo in such circumstances without so communicating, the bond, though given & taken *bonâ fide*, is not binding upon the cargo.

(4) Where a question is raised as to the duty of the master in a port of distress to have transhipped the cargo, it must be considered that his first duty is to carry his cargo to its port of destination in the same bottom.—DURANTY *v.* HART, THE HAMBURG (CARGO EX) (1864), 2 Moo. P. C. C. N. S. 289; Brown. & Lush. 253; 33 L. J. P. M. & A. 116; 10 L. T. 206; 10 Jur. N. S. 600; 12 W. R. 628; 2 Mar. L. C. 1; 167 E. R. 362, P. C.

*Annotations:*—*As to* (1) **Distd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; The Gaetano & Maria (1882), 7 P. D. 137. **Reid.** The San Roman (1872), L. R. 3 A. & E. 583. *As to* (2) **Reid.** The Bahia (1864), Brown. & Lush. 292. *As to* (3) **Distd.** The Lizzie (1868), L. R. 2 A. & E. 254. **Consd.** Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156. **Apld.** Acatos *v.* Burns (1878), 3 Ex. D. 282. **Reid.** The Empire of Peace (1869), 39 L. J. Adm. 12; The Staffordshire (1871), 25 L. T. 137; Australasian Steam Navigation Co. *v.* Morse (1872), L. R. 4 P. C. 222.

—— **Transhipment.**]—*See* Sub-sect. 4, *post.*

*B. Sailing from Port.*

*(a) In General.*

**3143. Duty to commence voyage without delay—Omission to take in stores—Ship detained by ice.**]—THE WILHELM, No. 3196, *post.*

**3144. Alteration of destination—Duty to give notice to shippers.**]—PEEL *v.* PRICE, No. 1638, *ante.*

**3145. No obligation to dispatch ship second time—Compulsory return against will of owner.**]—In covenant upon a charterparty of affreightment, by which the owner covenanted to take on board at London the freighter's goods, & to proceed therewith to Monte Video, & there deliver them, & receive another cargo, & proceed therewith to the port of discharge in Great Britain, & there deliver the same & end the voyage, in consideration of which the freighter covenanted to pay so much per month for freight during the voyage to M. V. & back to her port of discharge, it is not enough to allege in the declaration that the ship, after taking in a cargo in G. B. & proceeding in part on her outward voyage was, against the will & without the default of the owner, & through the act of the super-cargo, the servant of the freighter, seized & brought back to London, & detained until restored to the owner, in consequence of which she required repair, & which pltf. caused to be done with proper dispatch, & was ready & willing to cause the ship to prosecute & complete her voyage, & offered her to deft. for that purpose, & requested him to dispatch her, & upon this to assign a breach that deft. refused to dispatch her, & renounced the charterparty & further prosecution of the voyage, & discharged pltf. from the same, *per quod* pltf. was hindered from endeavouring to complete the voyage, & to earn the money stipulated by the charterparty to be paid at her port of discharge; for deft. having once dispatched the ship, there was no obligation upon him to dispatch her a second time.—SMITH *v.* WILSON (1817), 6 M. & S. 78; 105 E. R. 1172.

**3146. Advertisement of time of sailing—Whether amounting to warranty.**]—Shipping brokers having represented that a ship, described as on their "line," would sail on or about a certain day; *qu.:* whether there is evidence on which a jury can find them liable as on a warranty that she should so sail. But, *semble*, if they without authority in fact reship the goods in another ship, insuring them in their own names, & refusing delivery except on handing over the bills of lading sent by the first ship, there being no authority in law so to act, there is evidence of a conversion on which they may be liable.—SIMPSON *v.* YOUNG (1859), 1 F. & F. 708, N. P.; *subsequent proceedings* (1861), 2 F. & F. 426, N. P.

*(b) What amounts to.*

**3147. Departure from limits of artificial port.**]—By the terms of a charterparty, a ship was to proceed to Cardiff, & there to load a full & complete cargo of coals, & therewith to proceed to the port of San Francisco or any of the landing places within the waters of San Francisco, & there to discharge the cargo, the cargo to be taken from alongside the vessel according to the custom of the port, & at the expense & risk of the freighters. The freight to be paid three-fourths in cash on the final sailing of the vessel from the port of loading, less 2½ per cent. discount & costs of insurance on the amount, & remainder in cash at the current rate of exchange on right & true delivery of the cargo. The docks at Cardiff communicate with the sea at high water by means of dock gates, & from these gates down to low watermark there is a ship canal, which was made under an Act of Parliament, no vessel being able to enter or leave the docks except by passing along this canal. Vessels using the canal have to pay certain tolls, & cannot hoist sail there,

& are also subject to the directions of the dock-master, who is at liberty to stop them. The vessel loaded a complete cargo, & being fully equipped for sea, with a pilot on board, got out of the docks; but in proceeding down the canal in tow of a steam tug she grounded. She afterwards got off & returned towards the docks, but was refused admittance by the dockmaster, & subsequently became a wreck outside the dock gates: —*Held:* by the terms "the final sailing of the vessel from the port of loading" must be understood the final departure of the vessel from the port of Cardiff, so as to be out of the limits of the artificial port & at sea; &, therefore, as that time had never arrived, the three-fourths of the freight was not payable.

The term "final sailing of the vessel from the port of loading" stated in a charterparty as the period for payment of the freight or part of it, means the final departure from the port & being at sea ready to proceed on her voyage, & not merely having the clearances on board, & being ready to sail.—ROELANDTS *v.* HARRISON (1854), 9 Exch. 444; 2 C. L. R. 995; 23 L. J. Ex. 169; 22 L. T. O. S. 289.

*Annotations:*—**Apld.** Thompson *v.* Gillespy (1855), 5 E. & B. 209. **Consd.** Garston Sailing-ship Co. *v.* Hickie (1885), 15 Q. B. D. 580. **Refd.** Van Baggen *v.* Baines (1854), 9 Exch. 523; Hudson *v.* Bilton (1856), 2 Jur. N. S. 784; Sharp *v.* Gibbs (1857), 1 H. & N. 801; Price *v.* Livingstone (1882), 9 Q. B. D. 679; Hunter *v.* Northern Marine Insce. (1888), 13 App. Cas. 717.

**3148. —— To save spring tide—Crew & equipment incomplete.**]—THOMPSON *v.* GILLESPY, No. 1835, *ante*.

**3149. At sea ready to proceed on voyage.**]—ROELANDTS *v.* HARRISON, No. 3147, *ante*.

**3150. —— Ship driven back to port by weather.**]—PRICE *v.* LIVINGSTONE, No. 1732, *ante*.

**3151. Not mere readiness to sail.**]—ROELANDTS *v.* HARRISON, No. 3147, *ante*.

**3152. Not sufficient to have clearances on board.**]—ROELANDTS *v.* HARRISON, No. 3147, *ante*.

**3153. Master absent on shore—For purposes of obtaining ship's papers.**]—Deft. chartered a ship of T. from Sunderland to Barcelona; by the charterparty, half the freight was to be advanced to the master on his signing the bills of lading T. being indebted to pltf., gave him an order on deft., requiring deft. to pay to pltf., on the ship "being load & sailed, out of the advance," £73. Deft. wrote, at the foot of the order, that he agreed to the above. The vessel, being loaded & in a fit state for sailing, but the clearances not being completed nor the bills of lading signed, left Sunderland harbour, with the captain on board. She crossed the bar; & the captain returned to land, in order to get the papers completed, & sign the bills of lading; he signed them, & got the advance of freight from deft., who deducted a sum to meet the £73. The vessel stood off & on, waiting for the captain; but, it being found that she had been injured, she returned into Sunderland harbour to repair, the captain not having rejoined her, & did not afterwards sail:—*Held:* (1) the sailing of the vessel was a condition precedent to the liability of deft. to pay the £73; (2) the vessel had not sailed, & deft. therefore was not liable.—HUDSON *v.* BILTON (1856), 6 E. & B. 565; 26 L. J. Q. B. 27; 27 L. T. O. S. 154; 2 Jur. N. S. 784; 119 E. R. 975.

*Annotations:*—*As to* (2) **Distd.** Price *v.* Livingstone (1882), 9 Q. B. D. 679. **Refd.** Valente *v.* Gibbs, Gibbs *v.* Valente (1859), 5 Jur. N. S. 1213; Garston Sailing-ship Co. *v.* Hickie (1885), 15 Q. B. D. 580.

**3154. —— ——.**]—THOMPSON *v.* GILLESPY, No. 1835, *ante*.

**Meaning of port.**]—*See* Nos. 1732, 1733, *ante*.

### *C. Deviation and Delay.*

#### *(a) Deviation.*

##### i. *In General.*

**3155. Duty of owner not to deviate unnecessarily.**]—DAVIS *v.* GARRETT, No. 3188, *post*.

**3156. —— Although charter time table not interfered with—Deviation on voyage to port of loading.**]—Deft., by charterparty of Oct. 20, 1832, agreed to go in ballast from Portsmouth to St. Michael's, & bring back a cargo of fruit direct to London. The charterer was to be allowed thirty-five running days for loading & unloading, to commence on Dec. 1, then next; & if the vessel did not arrive at St. Michael's by Jan. 31, 1833, the charterer was to be at liberty to rescind the charterparty:—*Held:* deft. was bound to proceed at once to St. Michael's, & was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. Michael's before Jan. 31, 1833.—M'ANDREW *v.* ADAMS (1834), 1 Bing. N. C. 29; 4 Moo. & S. 517; 3 L. J. C. P. 236; 131 E. R. 1028.

**3157. Ship driven out of loading port—Into other port—Necessity for return to loading port—Before proceeding to destination.**]—If a ship be driven out of her loading port into another port, & being there, she does the best she can to get to her port of destination, she is not obliged to return to the port from whence she was driven. Neither is it a deviation if she complete her loading at the port into which she is driven. In the principal case, however, there was a custom to warrant this. —DELANY *v.* STODDART (1785), 1 Term Rep. 22; 99 E. R. 950.

*Annotation:*—**Refd.** Hibbert *v.* Carter (1787), 1 Term 745.

**3158. —— —— Completion of loading at that port.**]—DELANY *v.* STODDART, No. 3157, *ante*.

**3159. Breach going to root of contract.**]—JOSEPH THORLEY, LTD. *v.* ORCHIS S.S. CO., LTD., No. 3185, *post*.

**3160. Deviation on Government order—Compensation for consequential expense.**] — THE TREDEGAR HALL, No. 3195, *post*.

**3161. Intention to deviate — Necessity for.**]—Pltfs. chartered a steamer from defts. to carry a cargo of coke & coal from Glasgow to Heulva, the charterparty & bills of lading containing exceptions relieving the shipowners from liability for perils of the seas, strandings, & accidents of navigation, even when occasioned by the negligence, default, or error of judgment of the master. The master was competent & fit to command the ship, & he was apparently a man of ordinary health except that he suffered from indigestion, & on the day before starting he had had two attacks of giddiness. There was no suggestion of insobriety, but near Troon the master set a most unusual course & the vessel stranded & was totally lost. The charterparty contained no express exception relieving against liability for unseaworthiness.

In an action for damages for loss of the cargo pltfs. alleged that the master must have been in such a condition of health as not to be in possession of all his faculties, & that this constituted unseaworthiness of the ship, & that, as there was

*Sect. 6.—The voyage: Sub-sect. 2, C. (a) i. & ii.*]

a deviation from the contemplated voyage, the exceptions in the charterparty did not apply:—*Held:* (1) the implied waranty of seaworthiness did not warrant that the master was in absolutely perfect health, but only that the shipowners should adopt the ordinary standard of care, & pltfs. had failed to discharge the *onus* of proving unseaworthiness, & (2) as the master never intended to leave the contract route there was no deviation, & the action failed.—RIO TINTO CO., LTD. *v.* SEED SHIPPING CO. (1926), 134 L. T. 764; 42 T. L. R. 381; 17 Asp. M. L. C. 21.

**3162. Reasonable deviation—Reasonableness dependent on all circumstances.**] — FOREMAN & ELLAMS, LTD. *v.* FEDERAL STEAM NAVIGATION CO., LTD., No. 2725, *ante*.

**Deviation as barratry.**]—*See* No. 2622, *ante*.

**In insurance policies.**]—*See* INSURANCE, Vol. XXIX., pp. 145–155, Nos. 975–1111.

ii. *When Deviation Permissible.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 4.

**3163. To save life.**]—A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

Defts.' ship was chartered by pltfs. to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted & went to the assistance of a vessel in distress, called *The Arion*, & the master, in consideration of £1,000, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing defts.' vessel was stranded, & ultimately, with her cargo, was totally lost. The jury found that it was not reasonably necessary to take *The Arion* to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her & her cargo:—*Held:* the deviation was unjustifiable, & pltfs. were entitled to recover the value of the cargo against defts. as owners of the ship.—SCARAMANGA *v.* STAMP (1880), 5 C. P. D. 295; 49 L. J. Q. B. 674; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. L. C. 295, C. A.

*Annotations:*—**Refd.** Kish *v.* Taylor (1910), 80 L. J. K. B. 601; A.-G. *v.* Smith (1918), 87 L. J. K. B. 1045. **Mentd.** Brandon *v.* Osborne, Garrett, [1924] 1 K. B. 548.

**3164. To save property.**] — SCARAMANGA *v.* STAMP, No. 3163, *ante*.

**3165. To avoid danger—On receipt of credible information.**]—The master of a Prussian vessel, a subject of the King of Prussia, having on board a cargo of nitrate of soda, contraband of war, under a charterparty & bill of lading from Pisagua, bound to Cork, Cowes, or Falmouth, for orders to proceed to any safe port in Great Britain, or on the Continent between Havre & Hamburg, both included, & there deliver the cargo, "the act of God, the Queen's enemies, fire, & all & every other risk, dangers & accidents of the seas, rivers, & navigation of whatever nature & kind soever excepted," arrived at Falmouth on July 10, 1870, & received orders on July 11 of that month to proceed to the French port Dunkirk, & there deliver her cargo. On the ship's arrival off Dunkirk on July 16, the master was informed by a French pilot that war had broken out between France & Prussia, whereupon the master put back to the Downs to make inquiries, & anchored there on July 17, which was Sunday. On July 18, having telegraphed to the owner of the vessel for instructions, he was ordered not to go to Dunkirk, & on July 19 he put into Dover, where he was informed, as the fact was, that war, which had been imminent from July 10, had been declared between France & the North German Confederation, formal declaration thereof having been given as upon July 19:—*Held:* (1) the master was justified in putting back to the Downs for the purpose of ascertaining whether war had been declared, & was guilty of no improper deviation or delay in not returning to Dunkirk before July 19, when war was actually declared; (2) the master committed no breach of contract in refusing to deliver the cargo at Dunkirk, & as the charterparty provided what freight was to be paid if the cargo was delivered, the delivery at Dover was within the terms of the charterparty, & the master was entitled to freight for the cargo from the owners before delivery thereof. *Semble:* where a master receives credible information that if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as from pirates, or icebergs, or other dangers of navigation, he is justified in pausing & deviating from the direct course, & taking any step that a prudent man would take for the purpose of avoiding the danger.—DUNCAN *v.* KÖSTER, THE TEUTONIA (1872), L. R. 4 P. C. 171; 8 Moo. P. C. C. N. S. 411; 41 L. J. Adm. 57; 26 L. T. 48; 20 W. R. 421; 1 Asp. M. L. C. 214; 17 E. R. 366, P. C.

*Annotations:*—*As to* (2) **Consd.** Giovanni Dapueto *v.* Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482. **Distd.** St. Enoch Shipping Co. *v.* Phosphate Mining Co., [1916] 2 K. B. 624. **Refd.** The Argos, Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134; Akt. Olivebank *v.* Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162. *Generally*, **Refd.** The Patria (1871), L. R. 3 A. & E. 436; Anderson *v.* The San Roman, The San Roman (1873), L. R. 5 P. C. 301; Waugh *v.* Morris (1873), L. R. 8 Q. B. 202; Metcalfe *v.* Brittania Ironworks Co. (1876), 1 Q. B. D. 613; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412; Horlock *v.* Beal (1916), 114 L. T. 193. **Mentd.** Wade *v.* L. & N. W. Ry., [1921] 1 K. B. 582; Ruffy-Arnell, etc. Co. *v.* R., [1922] 1 K. B. 599.

**3166. —— Express orders to master.**]—Where a master receives express orders from his owners as to the voyages which he is to make & the ports to which he is to take the ship, & those orders are given under & with a view to a state of circumstances out of which danger might arise to the ship, & which are known to & discussed by the master & owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other

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**PART VII. SECT. 6, SUB-SECT. 2.—C. (a) ii.**

**3163 i.** *To save life.*]—Deviation of a ship from her course to ascertain if the state of a vessel in distress was such as to involve danger to the lives of those on board of her risking being infected with an infectious disease involves no hazard with regard to insurances or engagements with cargo owners.—NORTH COAST S. N. CO. *v.* THE EUGENE (1909), 9 S. R. N. S. W. 246.—**AUS.**

**3163 ii.** ——.]—In an action against the master or owner of a schooner for damages for deviation, pltf. having a large quantity of fish on board, of which he alleged he had lost the sale in consequence of such deviation:—*Held:* it was the duty of shipmasters to aid & assist ships in distress at sea, & for that purpose a vessel may go out of her regular course, & it is not considered a deviation; but having secured those on board, the shipmaster has no right to risk his own freight to render salvage services to another.—TARR *v.* DESJARDINS (1863), 13 L. C. R. 394.—**CAN.**

**3163 iii.** ——.]—SYLVAIN *v.* CANADIAN FORWARDING & EXPORT CO. (1895), Q. R. 7 S. C. 256; *revsd.* (1897), Q. R. 10 S. C. 195.—**CAN.**

**3163 iv.** ——.]—DRAIN *v.* HENDERSON (1860), 11 I. C. L. R. 497; 3 Mar. L. C. 24.—**IR.**

**3164 i.** *To save property.*]—UNION S.S. CO. OF NEW ZEALAND, LTD. *v.* JAKINS & BOWER (1901), 19 N. Z. L. R. 780.—**N.Z.**

**p.** *Force majeure — Shortage of coal.*]—The charterparty described the voyage in writing as being from Havana, Cuba, "to Montreal direct *via* the river St. Lawrence." A printed clause declared that the steamship should "have liberty to tow & be towed, & to assist vessels in all situations," also to call at any port or ports for coals or other supplies":—*Held:* the fact that the steamship called at

voyages & to other ports ; & if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyages are for the owners' benefit.—THE ROEBUCK (1874), 31 L. T. 274 ; 2 Asp. M. L. C. 387.

*Annotation :*—**Refd.** The Macleod (1880), 5 P. D. 254.

**3167. Force majeure — Shortage of coal — Through miscalculation.**]—YRAZU *v.* ASTRAL SHIPPING CO., No. 3099, *ante*.

**3168.** —— —— **Through accident.**]—YRAZU *v.* ASTRAL SHIPPING CO., No. 3099, *ante*.

**3169. Perils of the sea—Repair of damage by weather.**]—A ship belonging to defts., who were shipowners & shipbuilders at Bristol, shipped, in addition to other cargo, some tin plates belonging to pltfs. at Cardiff, for New York. The bill of lading contained the usual exemptions from liability in respect of damage by collision, etc. In the course of the voyage the ship experienced very heavy weather, & repairs became necessary. The master put into Queenstown at first, & afterwards, having communicated with defts., determined to return to Bristol for repairs. In the Avon the ship came into collision with another vessel & sank. She was subsequently raised & taken to Bristol. Pltfs. sued for damages for the failure of defts. to deliver the tin plates in New York according to the bill of lading. The case was tried before a judge & special jury, & the verdict & judgment were for defts. Pltfs. applied for a new trial, & contended that the master was not justified without the consent of the cargo owners in returning to Bristol, but should have had the ship repaired at Queenstown or Swansea, that the jury had been misdirected, & that the verdict was against the weight of evidence :—*Held :* the return to Bristol was not such a deviation from the course as could not be held to be reasonably necessary ; the ship being a "general ship," it was not necessary to communicate with the cargo owners before returning to Bristol ; the question of reasonable necessity was one for the jury, & the verdict should not be disturbed.—PHELPS (JAMES) & CO. *v.* HILL, [1891] 1 Q. B. 605 ; 60 L. J. Q. B. 382 ; 64 L. T. 610 ; 7 T. L. R. 319 ; 7 Asp. M. L. C. 42, C. A.

*Annotation :*—**Mentd.** Prager *v.* Blatspeil, Stamp & Heacock, [1924] 1 K. B. 566.

**3170.** —— **Seeking shelter.**]—(1) A contract of affreightment is not put an end to either by a breach of the warranty of seaworthiness or by a deviation which is in fact necessary for the safety of the ship & crew but the necessity for which is caused by unseaworthiness.

(2) The charterers of a ship having failed to load a full cargo as required by the charterparty, the master, to minimise the loss, procured a cargo from other sources & overloaded the deck to such an extent as to render the ship unseaworthy. In consequence of her unseaworthiness the ship was obliged to deviate from her course in order to put into a port of refuge for repairs, &, after repairing, she completed the voyage in safety. The shipowner was entitled under the charterparty, the conditions of which was incorporated in the bills of lading, to a lien on the cargo for dead freight :—*Held :* he was not debarred from asserting the lien against the cargo owners.

(3) Dead freight is not freight at all properly so called but is in reality damages for breach of contract (LORD ATKINSON).—KISH *v.* TAYLOR, [1912] A. C. 604 ; 81 L. J. K. B. 1027 ; 106 L. T. 900 ; 28 T. L. R. 425 ; 56 Sol. Jo. 518 ; 12 Asp. M. L. C. 217 ; 17 Com. Cas. 355, H. L.

*Annotations :*—*As to* (1) **Consd.** Reed *v.* Page & East (1927), 137 L. T. 77. **Refd.** Bank of Australasia *v.* Clan Line Steamers (1915), 21 Com. Cas. 13 ; The Christel Vinnen, [1924] P. 61 ; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522.

**3171. Express stipulations—Liberty to call—Taking in cargo at port of call.**]—If a ship has liberty to touch at a port, it is no deviation to take in merchandise during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there.—URQUHART *v.* BARNARD (1809), 1 Taunt. 450 ; 127 E. R. 909.

**3172.** —— —— **Ports within course of voyage.**]—Pltfs. having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume & bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, & was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by pltfs. against the shipowners for non-delivery of the goods, evidence was given to show that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed via Glasgow :—*Held :* such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage ; Glasgow, being altogether out of the course of such voyage, was not such a port ; & the vessel was therefore lost while deviating from the voyage contracted for, & the excepted perils clause did not exonerate defts. from liability in respect of non-delivery of the goods.

The bill of lading is no doubt a receipt for the goods, & as such, like any other receipt, is not conclusive, for it may be controverted by evidence showing that the goods were not received (LORD ESHER, M.R.).—LEDUC *v.* WARD (1888), 20 Q. B. D. 475 ; 57 L. J. Q. B. 379 ; 58 L. T. 908 ; 36 W. R. 537 ; 4 T. L. R. 313, C. A.

*Annotations :*—**Apld.** Margetson *v.* Glynn, [1892] 1 Q. B. 337. **Consd.** Lecky *v.* Ogilvy Gillanders (1897), 3 Com. Cas. 29 ; Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783. **Apld.** United States Shipping Board *v.* Bunge y Born Soc. (1924), 132 L. T. 323.

**3173.** —— —— ——.]—GLYNN *v.* MARGETSON & CO., No. 1715, *ante*.

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the port of Sydney, C.B., for coal in the course of the voyage, was not a deviation therefrom other than permitted by the charterparty. — PETERS *v.* CANADA SUGAR REFINING CO. (1886), M. L. R. 2 Q. B. 420 ; 31 L. C. J. 72.—**CAN.**

**3169 i.** *Perils of the sea—Repair of damage by weather.*]—BURNS *v.* CASSELLS (1886), 26 N. B. R. 20.—**CAN.**

**3170 i.** —— *Seeking shelter.*]—It is not a deviation for a coasting vessel on a voyage from Mahone Bay, N.S., to Fortune Bay in Newfoundland, & thence, etc., to put into an intermediate port over night to escape threatened bad weather.—NOVA SCOTIA MARINE INSURANCE CO. *v.* EISENHAUER (1894), 1 Cout. Dig. 811.—**CAN.**

*q. Want of water.*]—The want of water is no legitimate excuse for a deviation from a lawful voyage, where it might have been prevented by ordinary prudence, or the master might have obtained a supply without such deviation. — THE PILGRIM (1813), Stewart, 533.—**CAN.**

*r.* ——.]—THE BELLE (1815), S. V. A. R. 537.—**CAN.**

*t. Deviation agreed to by charterer's agent.*]—LINDSAY & SONS *v.* SCHOLEFIELD (1897), 24 R. (Ct. of Sess.) 530. —**SCOT.**

*Sect. 6.—The voyage: Sub-sect. 2, C. (a) ii. & iii.]*

**3174.** —— —— ——.]—WHITE *v.* GRANADA S.S. CO., LTD. (1896), 13 T. L. R. 1, C. A.

*Annotation:*—**Apld.** United States Shipping Board *v.* Bunge y Born Soc. (1924), 132 L. T. 323.

**3175.** —— —— ——.]—EVANS, SONS & CO. *v.* CUNARD S.S. CO., LTD. (1902), 18 T. L. R. 374.

*Annotations:*—**Reld.** Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783; *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348.

**3176.** —— —— ——.]—Pltfs. were indorsees & holders of two bills of lading under which wool was shipped at Napier, New Zealand, in defts.' steamship for carriage to London. Each bill of lading had in the margin the words "Direct service between New Zealand & London." It stated that the steamship was "now lying in the port of Napier, New Zealand, & bound for London," &, after giving the fullest liberty to proceed to & stay at any ports or places in New Zealand for any purpose without any liability on defts. on the ground of deviation, it continued: "& bound, subject to the before-mentioned liberties, on finally leaving New Zealand for London, & with liberty on the way to London to call & stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro &/or Monte Video &/or La Plata for the purpose of taking on board coal, supplies, &/or cargo &/or live stock," the goods to be delivered subject to all the above liberties to deviate & to the exceptions & conditions therein contained at the Port of London. The bills of lading contained an exception of the King's enemies. After pltfs.' goods were loaded on board & the bills of lading handed over a parcel of frozen meat was loaded on board for France, & the master received orders on the voyage to deliver the meat at Havre before going to London. When the steamship was about 8 miles from Havre she was torpedoed by a German submarine, & she sank with her cargo. The usual & well known course of the voyage of defts.' line of steamships from New Zealand to London was by Cape Horn, calling at one of the three named South American ports, thence to Teneriffe or Madeira, & thence direct to London. The distance via Havre to London was 54 miles longer than the direct route to London, & the distance from Havre to the nearest point on the direct route to London was 68 miles. No steamship of defts.' line had ever before called at Havre. There was, however, at the time in question no greater likelihood of danger from submarine attack in going to Havre than in going to London direct. In an action by pltfs. to recover the value of the wool:—*Held:* (1) Havre was not an "intermediate port" within the meaning of the bills of lading at which the steamship had liberty to call, that in proceeding thereto there had been a wrongful deviation from the named voyage, & defts. could not rely upon the exception of the King's enemies in the bills of lading; (2) as defts. in deviating were breaking their contract as carriers, they could not rely upon the implied common law exception of the King's enemies, & they were liable, not having shown that the loss must have occurred even if they had not deviated.—MORRISON (JAMES) & CO., LTD. *v.* SHAW, SAVILL & ALBION CO., LTD., [1916] 2 K. B. 783; 86 L. J. K. B. 97; 115 L. T. 508; 32 T. L. R. 712; 61 Sol. Jo. 9; 13 Asp. M. L. C. 504; 22 Com. Cas. 81, C. A.

*Annotations:*—*As to* (1) **Reld.** Smith *v.* R. (1917), 86 L. J. K. B. 1147; United States Shipping Board *v.* Bunge y Born Soc. (1924), 132 L. T. 323. *As to* (2) **Reld.** The Oscar II., The Bernisse, The Elve, [1921] P. 173; Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646. *Generally*, **Reld.** The Cap Palos, [1921] P. 458. **Mentd.** Shaw *v.* Symmons, [1917] 1 K. B. 799; Gibaud *v.* G. E. Ry., [1921] 2 K. B. 426.

**3177.** —— —— ——.]—Pltf. claimed to recover from defts., the shipowners, damages for loss of a parcel of oil shipped at M. under a bill of lading which described the shipment as a shipment in defts.' ship to L. with liberty to touch at any ports whatsoever, though it might be outside the route, without being considered a deviation. The shipowners relied on the deviation clause & the exceptions clause in the bill of lading as protecting them from liability, but pltf. said that they were not so protected because when the loss occurred defts. were not carrying the goods on the bill of lading voyage but were carrying them by means of an unauthorised deviation. For a considerable time deft. had been pursuing from M. to L., or other ports of this country, two distinct routes for the ships of their line, one "via Levante," which meant going North-East up the coast of Spain calling at various ports & then coming back from the furthermost port down the Mediterranean & through the Straits of Gibraltar to this country, & the other one, called "Directo," coming direct from M. to L. or other ports in this country. Both routes were well known to the representatives of pltf. at M. They knew that sometimes the route of the ship would be "via Levante," & sometimes it would be "Directo," & in this particular case, when they delivered their goods to the ship to be carried under this bill of lading, they knew that the route of that ship would be "via Levante":—*Held:* as between the parties in this case the bill of lading could be read as meaning that the goods were destined for L. by one of the usual routes, & even if pltf. had not known which way the ship was going on this occasion, still, as the ship was taking one of the known & usual routes to L., it was not deviating at the time of the loss. The shipowners were therefore protected by the exceptions clause in the bill of lading.—FRENKEL *v.* MACANDREWS & CO., LTD. (1928), 139 L. T. 327; 44 T. L. R. 580; 33 Com. Cas. 363, C. A.

**3178.** —— —— ——.]—CAFFIN *v.* ALDRIDGE, No. 1930, *ante*.

**3179.** —— —— —— **Necessity to call at port outside course.**]—A steamship constructed to use oil fuel was chartered to carry a cargo from the river Plate to a safe port in the United Kingdom, or on the Continent between Marseilles & Hamburg inclusive. By clause (*a*) of the charterparty it was provided that "the steamer shall have liberty to call at any port or ports, in any order for the purposes of taking bunkercoal or other supplies." The vessel was loaded with a cargo part of which was to be discharged at Malaga & part at Seville, & it was agreed that Malaga should be the first port of discharge. After discharging at Malaga the vessel had enough oil fuel left sufficient to take her to Seville, & to discharge her cargo there, but it would not have carried her to any further point. No oil fuel being obtainable either at Malaga or at Seville, she called at Gibraltar to obtain oil fuel from a tank steamer which was expected to arrive, but owing to the non-arrival of the latter, the vessel proceeded to Lisbon to procure oil supplies. Lisbon was out of the direct course from Malaga or Gibraltar to Seville. On a claim by the charterers claiming damages for the deviation:—*Held:* the call of the vessel at Lisbon for the purpose of obtaining oil supplies constituted a deviation which was not within the terms of the charterparty given either expressly or by implication. In order to justify such a deviation it was

for the owners to show that it was reasonably necessary in a business sense, & for this purpose it was essential to show that all necessary steps had been taken to supply the vessel with adequate oil supplies at the commencement of the voyage. The owners, having failed to prove this, were therefore liable to the charterers in damages in respect of such deviation.

*Qu.:* whether the shipowners had any right to deviate for the purpose of obtaining the fuel that might be necessary to take their vessel out of the port of final discharge after the discharge had been completed.—UNITED STATES SHIPPING BOARD *v.* BUNGE Y BORN LIMITADA SOCIEDAD (1925), 134 L. T. 303; 42 T. L. R. 174; 16 Asp. M. L. C. 577; 31 Com. Cas. 118, H. L.

**3180. —— Liberty to tow.**]—Pltfs. shipped goods at Liverpool on board *The Liberia*, a steam vessel belonging to deft. co., to be carried, for freight, payable by pltfs. to defts., to Benin, on the coast of Africa, which goods, on the arrival of *The Liberia* at Bonny, were, in the usual course of defts.' business, & according to the terms of the bill of lading transhipped on board *The Kwara*, a small branch steamer belonging to defts., to be forwarded thereby to their destination at Benin. *The Kwara*, with pltf.'s goods on board, left Bonny, & proceeded on her voyage to Benin, calling on her way at Brass, where she had both to discharge & to take in cargo. Whilst lying in the harbour at Brass, & after having discharged & taken in cargo, & within two or three hours of being ready to proceed on her onward voyage to Benin, *The Kwara* was taken by her captain, at the request of the captain & owners of another vessel, to the mouth of the Brass river, some 3 miles from the harbour, for the purpose of towing off such other vessel which had got stranded on the breakers in attempting to cross the bar at the entrance of the river, & in her efforts to tow that vessel off, *The Kwara* herself, in consequence of her screw getting fouled with a rope, was wrecked, & pltf.'s goods were lost. It did not appear that human life was in any imminent danger, or that the assistance of *The Kwara* was sought for, except to save property. The bill of lading, given by defts. on receiving the goods at Liverpool, contained a clause giving to their vessels "liberty to tow & assist vessels in all situations"; & also a memorandum in the margin as follows: "The within goods to be transhipped at Bonny, & forwarded to destination by branch steamer at ship's expense but shipper's risk." In an action by pltfs. to recover the value of their goods they obtained a verdict, with leave to defts. to move to enter it for themselves:—*Held:* making absolute the rule to enter the verdict for defts.: (1) under the express words of the clause in the bill of lading giving liberty "to tow & assist vessels," etc., *The Kwara* was justified & protected in going to the assistance of the other vessel in the manner & under the circumstances stated; & (2) the words in the margin of the bill of lading "at shipper's risk" applied, as did also the words "at ship's expense," to the transhipment only of the goods from the one vessel to the other at Bonny, & not to the "forwarding of them from Bonny to Benin."—STUART *v.* BRITISH & AFRICAN STEAM NAVIGATION CO. (1875), 32 L. T. 257; 2 Asp. M. L. C. 497.

*Annotation:—As to* (1) **Refd.** Potter *v.* Burrell, [1897] 1 Q. B. 97.

**3181. —— ——.**]—By a charterparty shipowners agreed with charterers to provide for the successive arrival at a foreign loading port of five steamers between Aug. & Dec. inclusive, "as nearly as possible a steamer a month," at approximate dates afterwards agreed upon; & the charterers agreed to present cargo within twenty-four hours after notice of each ship's readiness to receive it. The charterparty contained a clause excepting perils of the sea, & also a clause giving each steamer liberty to tow & be towed & assist vessels in all situations, & providing that salvages should be for the benefit of owners. Owing to perils of the sea, ship No. 2 arrived about a fortnight late; & while she was loading ship No. 3 arrived punctually. There was not sufficient labour to load the two ships at once, & ship No. 3 had to wait for her cargo till the loading of ship No. 2 was completed:—*Held:* upon the construction of the charterparty, the shipowners were entitled to damages for the detention of ship No. 3.

Ship No. 4 arrived three weeks late at her Australian port owing to her having while on her voyage to that port fallen in with a disabled ship & towed her to Mauritius as a salvage service; such towage was out of the course of the voyage, & took three weeks to effect. The arbitrator having found that the delay caused by this towing was not so great as to frustrate the object of the adventure:—*Held:* the salvage service was an allowable deviation within the contract between the shipowners & the charterers; & notwithstanding the delay in the arrival of the ship, the charterers were bound to present cargo within twenty-four hours after notice, & not having done so were liable to pay demurrage to the shipowners.

A clause in a charterparty that "any profit or loss on the charter shall be equally divided between owners & charterers" does not create a partnership between the owners & charterers so as to deprive the former of their right of action against the latter for demurrage.—POTTER (JOHN) & CO. *v.* BURRELL & SON, [1897] 1 Q. B. 97; 66 L. J. Q. B. 63; 75 L. T. 491; 45 W. R. 145; 13 T. L. R. 26; 41 Sol. Jo. 66; 8 Asp. M. L. C. 200, C. A.

*Annotations:—***Refd.** Nelson *v.* Nelson Line (Liverpool) (No. 3), *Re* Nelson & Nelson Line (Liverpool) (1907), 77 L. J. K. B. 97; United States Shipping Board *v.* Strick, [1926] A. C. 545.

iii. *Effect of Unauthorised Deviation.*

**3182. Whether going to root of contract—Frustrating object of charterer.**]—FREEMAN *v.* TAYLOR, No. 1856, *ante*.

**3183. —— ——.**]—A charterparty contained a clause that the ship should "with all convenient speed, on being ready, having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to E., & there load a full cargo of cotton." This the freighters bound themselves to ship. The ship deviated to C., & arrived at E. a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, & a small loss in freight was the only result of this delay. In an action against the freighter for not loading a cargo:—*Held:* the above clause was a stipulation, & not a condition precedent, & the delay afforded no justification to the freighters for refusing to load a cargo; but their remedy for any damage that had accrued by reason of the delay was by cross action. *Semble*, if the delay had entirely defeated the object of the freighters in taking up the vessel, it would have afforded an answer to the action.

It seems to be now settled that delay by deviation is the same as a delay in starting; & it is also settled . . . that a delay or deviation which . . . goes to the whole root of the matter, deprives

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the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay or deviation short of that gives an action for damages, but does not defeat the charter (WILLES, J.).—MACANDREW *v.* CHAPPLE (1866), L. R. 1 C. P. 643; Har. & Ruth. 745; 35 L. J. C. P. 281; 14 L. T. 556; 12 Jur. N. S. 567; 14 W. R. 891; 2 Mar. L. C. 339.

*Annotations:*—**Refd.** Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125. **Mentd.** Kidston *v.* Monceau Iron-works Co. (1902), 86 L. T. 556.

**3184. —— —— No proof of frustration.**]—By charterparty between pltf., owner of a ship, & defts., it was agreed that the ship should load from defts.' agent at Nantes a full cargo, &, being loaded, forthwith proceed to London, & deliver the cargo on being paid freight upon unloading & delivery, twenty-five running days being allowed for loading & discharging at Nantes & London, with penalty for demurrage beyond. A declaration in *assumpsit* set out the charterparty, & averred that the vessel arrived at Nantes, whereof defts.' agent there had notice; that the ship was ready to load the cargo, & defts.' agent was requested, during the running days to load it, & pltf. was ready to detain the ship on demurrage over those days: but defts. refused to load. Plea that, after the making the charterparty & before proceeding to Nantes, the vessel proceeded to Newcastle, contrary to the intent o the charterparty, &, by reason thereof, arrived at Nantes a long & unreasonable time after the time at which she would have arrived at Nantes had she sailed direct according to the intent of the charterparty:—*Held:* bad, on demurrer, for not showing that the delay frustrated the object of the voyage.—CLIPSHAM *v.* VERTUE (1843), 5 Q. B. 265; Dav. & Mer. 343; 13 L. J. Q. B. 2; 2 L. T. O. S. 120; 8 Jur. 32; 114 E. R. 1249.

*Annotations:*—**Refd.** Barker *v.* Windle (1856), 6 E. & B. 675; Tarrabochia *v.* Hickie (1856), 26 L. J. Ex. 26; Crookewit *v.* Fletcher (1857), 26 L. J. Ex. 153; Dimech *v.* Corlett (1858), 12 Moo. P. C. C. 199; Behn *v.* Burners (1863), 2 New Rep. 184; MacAndrew *v.* Chapple (1866), 14 L. T. 556; Richardson *v.* Stanton, Stanton *v.* Richardson (1872), 41 L. J. C. P. 180; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125.

**3185. —— Displacing contract.**]—(1) Goods were shipped on a vessel described in the bill of lading as "now lying in the port of Limassol & bound for London." By the bill of lading the shipowners were exempted from liability for any act, neglect, or default of (*inter alia*) their stevedores in the loading, stowing, or discharging of the vessel. The vessel deviated during the voyage. In the course of discharging at London the shipowners' stevedores damaged part of the cargo, consisting of locust beans, by allowing the beans to become mixed with a poisonous earth called terra umber:—*Held:* the shipowners were liable for the default of their stevedores, as by deviating they lost the benefit of the stipulations in the bill of lading.

A deviation is a breach of a condition in a contract or a warranty in the sense of that word when it is used in connection with seaworthiness, & the effect of that condition or warranty not being complied with is to displace the contract altogether. It goes to the root of the contract, & its performance is a condition precedent to the right of the shipowners to put in suit the liability of the other party to the contract (COLLINS, M.R.).

(2) Seaworthiness is an absolute condition, & the absence of seaworthiness at the commencement of the voyage displaces the whole contract of insurance (COLLINS, M.R.).—JOSEPH THORLEY, LTD. *v.* ORCHIS S.S. CO., LTD., [1907] 1 K. B. 660; 76 L. J. K. B. 595; 96 L. T. 488; 23 T. L. R. 338; 51 Sol. Jo. 289; 10 Asp. M. L. C. 431; 12 Com. Cas. 51, 251, C. A.

*Annotations:*—*As to* (1) **Distd.** The Europa, [1908] P. 84. **Apld.** Internationale Guano en Superphosphaatwerken *v.* Macandrew, [1909] 2 K. B. 360. **Refd.** Kish *v.* Taylor, [1912] A. C. 604; Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783. *As to* (2) **Refd.** Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646.

**3186. —— —— Deviation necessary for safety of ship & crew—Necessity due to unseaworthiness.**]—KISH *v.* TAYLOR, No. 3170, *ante*.

**3187. Deviation giving rise to action for damages only—Object of freighters not defeated.**]—MACANDREW *v.* CHAPPLE, No. 3183, *ante*.

**3188. Liability of shipowner—Damages to cargo—Deviation proximate cause of loss.**]—Pltf. put on board deft.'s barge, lime, to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, & during the deviation a tempest wetted the lime, & the barge taking fire thereby, the whole was lost:—*Held:* (1) deft. was liable, & the cause of loss sufficiently proximate to entitle pltf. to recover under a declaration alleging deft.'s duty to carry the lime without unnecessary deviation, & averring a loss by unnecessary deviation; (2) the law implies a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course.—DAVIS *v.* GARRETT (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L. J. O. S. C. P. 253; 130 E. R. 1456.

*Annotations:*—*As to* (1) **Apld.** Scaramanga *v.* Stamp (1880), 5 C. P. D. 295; Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783. **Consd.** Elliott Steam Tug Co. *v.* Payne, [1920] 2 K. B. 693. **Refd.** Grill *v.* General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600; Taylor *v.* G. N. Ry. (1866), L. R. 1 C. P. 385; Svensden *v.* Wallace (1885), 54 L. J. Q. B. 497; Royal Exchange Shipping Co. *v.* Dixon (1886), 12 App. Cas. 11; Searle *v.* Lund (1903), 88 L. T. 863; Shaw *v.* Symmons, [1917] 1 K. B. 799; The Cap Palos, [1921] P. 458. *As to* (2) **Refd.** M'Andrew *v.* Adams (1834), 1 Bing. N. C. 29; Thompson *v.* Hopper (1858), E. B. & E. 1038. *Generally*, **Refd.** The Norway (1865), 13 W. R. 296; Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646. **Mentd.** G. N. Ry. *v.* Taylor (1866), Har. & Ruth. 471; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Morritt *v.* N. E. Ry. (1876), 1 Q. B. D. 302; Lilley *v.* Doubleday (1881), 7 Q. B. D. 510; Gibaud *v.* G. E. Ry., [1921] 2 K. B. 426.

**3189. —— —— Stipulation limiting liability.**]—BALIAN & SONS *v.* JOLY, VICTORIA & CO., LTD. (1890), 6 T. L. R. 345, C. A.

*Annotations:*—**Folld.** Thorley *v.* Orchis S.S. Co., [1907] 1 K. B. 660. **Refd.** The Europa, [1908] P. 84; Kish *v.* Taylor, [1911] 1 K. B. 625; Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646.

**PART VII. SECT. 6, SUB-SECT. 2.—C. (a) iii.**

**3188 i.** *Liability of shipowner—Damage to cargo—Deviation proximate cause of loss.*]—D. shipped horses to be carried on deck by the A. S. N. Co.'s steamer *Victoria* from Sydney to Townsville *via* Bowen. The *Victoria* deviated from her course & called at Brisbane, causing a delay of forty hours. After the *Victoria* had regained her course to Townsville, she encountered a violent storm of unusual duration. The stalls of the horses broke away from their fastenings during the storm & sixteen of the horses were killed:—*Held:* the A. S. N. Co. were liable for the loss, as the damage was proximately caused by the deviation.—DUNNE *v.* ASIATIC STEAM NAVIGATION CO. (1876), 14 N. S. W. S. C. R. (Law) 131.—**AUS.**

**a.** —— —— *Deviation beyond established usages of trade.*]—Pltf. shipped 90 barrels of flour at Port Credit, in a vessel of deft.'s, to be carried to Quebec, such vessel being capable of carrying 4,500. She proceeded to Toronto, where she took in 400 barrels more, & thence to Oswego, where 2,450 were shipped for Quebec also. She was wrecked near Oswego. Deft. was held liable therefor, such

**3190.** —— —— ——.]—JOSEPH THORLEY, LTD. *v.* ORCHIS S.S. CO., LTD., No. 3185, *ante*.

**3191.** —— —— **Shipowner as insurer.**]—By charterparty deft.'s vessel was to load a cargo of wheat at Marianople for Gibraltar for orders for a port in the United Kingdom or on the continent between Havre & Hamburg, the master of the vessel, to avoid being frozen in at the port of loading, to be " at liberty to leave . . . with part cargo, & to fill up for steamer's benefit at any open Black Sea, Azoff or Mediterranean port for United Kingdom, Continent or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded . . ."

The master, under this liberty, left Marianople with part of the cargo of wheat, & proceeded to Novorossisk, where he filled up for steamer's benefit with linseed. At Gibraltar he was ordered to deliver the wheat at Cardiff; but he first proceeded to King's Lynn, & there discharged the linseed. On the way between King's Lynn & Cardiff the wheat was damaged by fire. Pltf., who were holders of the bill of lading incorporating the conditions of the charterparty, sued defts. for the damage:—*Held:* defts. were liable as, between King's Lynn & Cardiff, they had become insurers of the consignees of the wheat, for, though the usual exceptions in the bill of lading & charterparty would have covered the loss if it had occurred in the ordinary course of the voyage, defts. were not entitled to deviate by taking the wheat round by King's Lynn, & could only discharge the linseed at a port on the way.—THE DUNBETH, [1897] P. 133; 66 L. J. P. 66; 76 L. T. 658; 8 Asp. M. L. C. 284.

**3192.** —— **Loss of cargo—Stipulation limiting liability.**]—Pltf. shipped eight bales of cloth, each above the value of £20 for carriage by a steamer belonging to deft. co. from London to Odessa under a bill of lading which excepted liability on the part of the co. for goods above the value of £20 per package, unless the value was therein declared & extra freight paid. Pltf. did not declare the value of the goods or pay the extra freight. The bill of lading, clause 2, reserved to the co. liberty for the steamer, before or after proceeding towards her port of discharge, to proceed to any port or ports whatsoever, although in a contrary direction, in any order, for any purpose whatsoever, & such ports were to be deemed included in the intended voyage, & it provided, clause 4, that in case the whole or part of the goods specified therein were not from any cause, including negligence on the part of the co.'s servants, found for delivery, or it was inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination, the co. was only bound to forward them to the port of destination from any subsequent port by any other steamer, either belonging to the co. or to other persons, & proceeding either directly or indirectly to such port, such carriage to be at the co.'s expense but at the merchant's risk. The contemplated voyage was to Constantinople & thence to the Black Sea ports including Odessa. On the arrival of the ship at Constantinople in Apr. 1919, it appeared that Odessa was likely to be captured forthwith by the Soviet forces, & accordingly it was agreed between the respective agents of pltf. & deft. co. that the destination of five of the bales should be changed from Odessa to Batoum & that the remaining three should be discharged at Constantinople, either then or on the ship's return voyage. They were not then discharged & the ship proceeded to Batoum & back by Novorossisk to Constantinople. The five bales consigned to Batoum remained on board after the ship had left that port. The three which were to have been brought back to Constantinople were landed at Norvorossisk for no explained reason & were detained by deft. co.'s agents for two months. Neither the five bales nor the three bales had since been heard of.

In an action by pltf. for non-delivery of the goods:—*Held:* the terms of the original bill of lading applied to the carriage to the substituted destinations, but in the absence of special protective provisions in the bill of lading, the overcarriage of the five bales & the landing & detention of the three bales at Novorossisk constituted a deviation from the contract of carriage so as to deprive deft. co. of the benefit of the exceptions in the bill of lading; & in the circumstances neither clause 2 nor clause 4 afforded any protection to the co.—CUNARD S.S. CO. *v.* BUERGER, [1927] A. C. 1; 96 L. J. K. B. 18; 135 L. T. 494; 42 T. L. R. 653; 17 Asp. M. L. C. 92; 32 Com. Cas. 183, H. L.; *affg.* S. C. *sub nom.* BUERGER *v.* CUNARD S.S. CO., [1925] 2 K. B. 646, C. A.

**3193.** —— —— **Shipowner as common carrier.**]—Pltfs. chartered defts.' ship to carry a cargo of superphosphates in bags for delivery at Algeciras & Alicante, with leave to call at Corunna. The vessel was delayed at Corunna & Algeciras. On leaving Algeciras she deviated from the chartered voyage by going to Seville, whence she went to Alicante. By reason of the various delays the cargo delivered at Alicante was damaged, the damage being due to the action of sulphuric acid in the superphosphates eating away the bags:—*Held:* the deviation to Seville put an end to the charterparty as from the beginning of the voyage, & defts. were therefore, as to the whole voyage, under the obligations of common carriers; as regards damage to the cargo by the delay at Corunna & Algeciras defts. were not liable, the damage being due to the nature of the cargo, & not to any failure on the part of defts. to carry the goods with reasonable despatch; but as regards the increased damage due to the delay occasioned by the deviation itself defts. were liable under the obligations of common carriers. —INTERNATIONALE GUANO EN SUPERPHOSPHAAT-WERKEN *v.* MACANDREW (ROBERT) & CO.,

deviation being beyond the established usages of trade.—WRIGHT *v.* HOLCOMBE (1857), 6 C. P. 531.—**CAN.**

b. ——.]—A ship was chartered to sail to two ports in New Zealand, & was consigned to agents of the charterers at the first of these ports. On arriving there, in consequence of some surmountable difficulties, the master arranged with the agents that the ship should not proceed to the second port, but that the passengers & cargo should be forwarded in other vessels. The agents furnished the money necessary for this purpose, & the master drew bills in their favour on the owner of the vessel at home. In an action by the charterers' agents against the owners:—*Held:* the deviation from the charterparty not having been necessary for the safety of the ship was *ultra vires* of the captain; & the expense incurred in consequence was not recoverable from the owner.—STRICKLAND *v.* NEILSON & M'INTOSH (1869), 7 Macph. (Ct. of Sess.) 400.—**SCOT.**

c. *Goods carried by different route than contract stipulated—Nominal damages recoverable.*]—LANGDON *v.* ROBERTSON (1886), 13 O. R. 497.—**CAN.**

d. *Withholding of subsidy.*]—A deviation which causes delay, but does not in other respects prevent the performance by a steamer of a contract to call at certain ports of call, does not justify the withholding of a subsidy for such service.—*Re* REID NEWFOUNDLAND CO. & GOVERNMENT (1904), 9 Nfld. L. R. 47.—**NFLD.**

e. *Whether freighters liable as insurers.*]—Where a ship master had altered the voyage of a vessel specified in a charterparty, at the request of the freighter, & where the vessel was lost

*Sect.* 6.—*The voyage: Sub-sect.* 2, *C.* (*a*) *iii.*, *&* (*b*) *i. & ii.*]

[1909] 2 K. B. 360; 78 L. J. K. B. 691; 100 L. T. 850; 25 T. L. R. 529; 53 Sol. Jo. 504; 11 Asp. M. L. C. 271; 14 Com. Cas. 194.

*Annotations*:—**Refd.** Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783; Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646.

**3194. —— Fall in market value.**]—DIMSDALE *v.* SMITH (1837), 6 L. T. 479.

**3195. Deviation under Admiralty order—Right of shipowner to compensation.**]—Where a British ship, on a voyage to a German port, has been diverted by the Admlty. on account of the war to a port in the United Kingdom, the owners are not entitled to compensation for outlays incurred by them in consequence of such diversion or for the additional cost of discharging the cargo at such port as compared with the cost of discharging it at the German port.—THE TREDEGAR HALL, [1916] P. 217; 32 T. L. R. 9; 60 Sol. Jo. 45; 1 P. Cas. 492.

### (*b*) *Delay.*

#### i. *In General*

**3196. Through act of master—Causing ship to become ice bound.**]—The master of a ship, whilst waiting for cargo, omitted to take in sufficient stores & provisions for his voyage, & whilst subsequently taking in such provisions & stores the frost set in, & the ship was frozen in port & detained from the beginning of Oct. until the breaking of the ice in the ensuing year:—*Held*. the owners of the ship were responsible to the owners of the cargo for any loss accruing from such detention: it being, by maritime law, the duty of the master to convey the cargo to its port of delivery with all expedition: & if by neglecting to avail himself of all fair opportunity the voyage is delayed & damage accrues to the owners of the cargo, the owners of the ship are liable to make good the sum.—THE WILHELM (1865), 14 L. T. 636; 2 Mar. L. C. 343.

*Annotation*:—**Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41.

**3197. —— Apprehension as to weather—Liability of owners for master's navigation or management of ship.**]—A cargo of fruit was shipped in deft.'s vessel from Gandia to London under bills of lading by which defts. were not liable for the master's neglect, default, or error in judgment in the navigation or management of the vessel. On the voyage, in Dec. 1914, the master put into Corunna & remained there twenty-three days for reasons of safety, though the weather was not such as to oblige the vessel to remain in port so long. The fruit was damaged by the delay in transit, & pltfs., as indorsees of the bills of lading, claimed damages from defts:—*Held:* as the delay at Corunna had nothing to do with the navigation or management of the ship as such, defts. were not relieved by the exception in the bills of lading from liability for damage to the cargo.—THE RENÉE HYAFFIL (1916), 32 T. L. R. 660, C. A.

**3198. War—Master awaiting further instructions.**]—POLE *v.* CETCOVICH, No. 1888, *ante*.

**3199. —— Apprehension of capture.**] — The master of a North German ship, lying at Constantinople, entered into a charterparty with North German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the continent, to be delivered to English consignees. The charterparty & the bill of lading given under it were in the English language, & it was stipulated that the ship should call at one of three ports of the United Kingdom, for orders. The ship duly called at F., & was ordered to proceed to an English port to discharge. War then existed between France & Germany. The master sailed from F., as ordered, but, through a reasonable fear of capture, put into D. The ship remained at D. for two months, waiting for a steamtug, which was considered necessary by the charterers' agents to avoid capture, the master expressing himself ready to sail with the first fair wind. The ship was then sent forward by steam power, at the charterers' agents' expense. The cargo was damaged & pltfs. lost profits by the delay:—*Held:* (1) the master was justified in putting into & remaining in port, & the shipowners were not liable for the damage caused by the delay.

(2) Whilst the ship was yet to arrive, the charterers' agents, the consignees of cargo, appropriated the cargo & endorsed the bill of lading, through other persons, to pltfs. Pltfs. sustained no loss by deterioration, for, under the contract of sale, they paid for the cargo after deductions settled by arbitration, for the damage done to it:—*Held:* pltfs. were entitled to sue under Bills of Lading Act, 1855 (c. 111), & Admiralty Court Act, 1861 (c. 10), & perhaps even as trustees for the consignees.—THE WILHELM SCHMIDT (1871), 25 L. T. 34; 1 Asp. M. L. C. 82.

*Annotations*:—*As to* (1) **Refd.** The San Roman (1872), L. R. 3 A. & E. 583. *As to* (2) **Refd.** The Dannebrog (1874), 31 L. T. 759.

**3200. —— ——.**]—A vessel sailing under the flag of the North German Confederation was, by a charterparty made at Constantinople, in the English language, between her master & a firm of merchants at Constantinople, chartered to take on board a cargo at a port in the Sea of Azov, & to proceed therewith to a safe port in the United Kingdom, or a safe port on the Continent between Havre & Hamburg, calling at Cork, or Falmouth, or Plymouth, for orders, & deliver the cargo on being paid the stipulated freight, the act of God, the Queen's enemies, the restraint of princes & rulers, fire, & all & every the dangers & accidents of the seas, rivers, & navigation of what nature & kind soever excepted. In pursuance of the terms of the charterparty the vessel proceeded to Berdiansk, & took on board, from a Greek merchant there, a cargo of wheat. For the cargo a bill of lading, in the Italian language, was signed by the master. It was stated in the bill of lading that the cargo was consigned according to the tenor of the charterparty, & that the cargo was to be delivered on freight being paid according to the charterparty, with all other conditions expressed therein. The bill of lading was endorsed by the shipper to S. & co., who were the charterers' agents in London. The vessel sailed from Berdiansk; on Aug. 8 she put into Falmouth, & her master applied to S. & co. for orders. The master received no orders till Sept. 3,

in the course of the voyage so altered the freighters were, in the circumstances of the case, not liable as insurers, for the value of the ship; but this without prejudice as to the question of their liability for freight.—RUSSELL & MOFFAT *v.* SHANNON & CO. (1821), 1 Sh. Sc. App. 83.—**SCOT.**

**PART VII. SECT. 6, SUB-SECT. 2.—C. (b) i.**

*f. Excuse for delay.*]—Steam shipping co. held liable in damages for delay in forwarding goods to China. If the delay had been caused by the Govt. taking some of the steamers off the line for national purposes, that might have excused them.—LEMON *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1856), 6 L. T. 478.—**HONG KONG.**

*g. Repairs to ship—Undue delay.*]—DARRELL & CO. *v.* THE AMERICAN, [1925] Exch. C. R. 2.—**CAN.**

when pltfs., to whom S. & co. had indorsed the bill of lading, ordered the vessel by their agent to proceed to Leith. After the making of the charterparty & the signing of the bill of lading a war broke out between the North German Confederation & France. The war continued until after the arrest of the vessel in the suit. From the time the master received orders to proceed to Leith until after the arrest of the vessel armed French national cruisers were cruising in the English Channel & North Sea, & German vessels could not sail in those seas beyond the limits of neutral waters without incurring risk of capture. When the master received orders to proceed to Leith, & on other occasions after that time & before the arrest of the vessel, he expressed his willingness to sail for Leith the first favourable opportunity. From the time the master received orders to proceed to Leith until the arrest of the vessel the prevailing winds at Falmouth were light & variable, or unfavourable for a passage to Leith, & during that time the master kept the vessel at Falmouth waiting for a leading wind, which would enable her to make a good passage, & afford her a fair chance of escaping the French cruisers. On Sept. 15, pltfs. instituted a suit against the vessel, alleging, as the cause of action, the neglect of the master to proceed to Leith. On Sept. 21 the vessel was arrested in the suit at Falmouth :—*Held :* the delay of the master under the circumstances was justifiable. Before the orders to sail for Leith were given, & afterwards, negotiations were continually going on between pltfs. & the master for the delivery of the cargo at Falmouth at a reduced freight, but no terms were agreed upon. —*Semble :* these negotiations modified the order to proceed to Leith, & afforded a reasonable excuse for the master remaining at Falmouth while the negotiations were being carried on.—THE HEINRICH (1871), L. R. 3 A. & E. 424 ; 24 L. T. 914 ; 1 Asp. M. L. C. 79.

*Annotation :*—**Refd.** The Dannebrog (1874), 31 L. T. 759.

**3201.** —— ——.]—A charterparty, in English, entered into at Constantinople between freighters who were subjects of the North German Confederation, resident there, & the master of a North German vessel owned by subjects of the North German Confederation, provided that the vessel should proceed to Taganrog, & there take on board a cargo as therein mentioned, to be carried to Queenstown, Falmouth, or Plymouth for orders, & thence to a safe port in the United Kingdom, or a safe port on the Continent between Havre & Hamburg, both inclusive, or as near thereunto as he could safely get, & deliver the same on being paid freight as therein mentioned, the act of God, the Queen's enemies, etc. excepted. The vessel proceeded to Taganrog, & a cargo, as agreed, having been shipped on board, bills of lading were signed by the master of the vessel, as per charterparty. On June 29, 1870, the vessel sailed on her voyage with the cargo to Falmouth, & on Aug. 16 put into Algeciras in order to obtain a supply of water. She there learnt that since she had sailed from Taganrog a war had broken out between France & the North German Confederation, & was still existing. In order to avoid capture by the French cruisers the vessel proceeded to Gibraltar, where she arrived on Aug. 15, & remained there with her cargo on board till Feb. 2, when, after receiving news that an armistice had been concluded between France & the the North German Confederation, she sailed for Falmouth & delivered her cargo, according to orders, in London. Whilst the vessel was lying at Gibraltar her master was requested by the owners of cargo to proceed on his voyage, & if he would not do so, then to tranship & forward the cargo to its destinaton at the expense of his owners, but no tender of freight & expenses was made, such as according to German law was necessary to entitle the owners of the cargo to demand its transhipment. The war continued until Jan. 1871, & if the vessel had left Gibraltar during the war she would have run great risk of capture from French cruisers :—*Held :* under the circumstances the master was justified in proceeding with his ship to Gibraltar, & keeping her there with her cargo on board during the continuance of the war.

I am of opinion that the only definite proposal made by S. & co. [the owners of the cargo] to the captain was that he should tranship at his own cost & expenses ; & that they were not authorised by the German code to make such a demand (SIR ROBERT PHILLIMORE).—THE EXPRESS (1872), L. R. 3 A. & E. 597 ; 41 L. J. Adm. 79 ; 26 L. T. 956 ; 1 Asp. M. L. C. 355.

*Annotation :*—**Refd.** The Dannebrog (1874), 31 L. T. 759.

**3202.** —— ——.]—THE SAN ROMAN, No. 2523, *ante*.

**3203.** —— **Ship putting in at intermediate port—Negotiations for delivery at such port.**]—THE HEINRICH, No. 3200, *ante*.

**3204. Carriage of contraband—Ship seized & detained.**]—DUNN *v.* BUCKNALL BROTHERS, DUNN *v.* CURRIE (DONALD) & CO., No. 2552, *ante*.

**3205. Congestion at port of delivery—Goods over carried—Subsequent return to port of delivery.**]—Defts. agreed to sell goods to pltf. c.i.f. London. A clause in the bill of lading provided "Ship to be at liberty . . . to carry the goods or part of them beyond their port of destination, & to tranship land & store the goods either on shore or afloat & reship & forward the same at the co.'s expense but at merchant's risk. The co. not to be responsible for any loss arising from late or wrong delivery of goods at port of destination. Goods overcarried to be returned at ship's expense but free of liability for any loss, depreciation or damage arising from overcarriage or return carriage." The ship arrived in London, & delivery of the goods was duly demanded, but was refused, because owing to the congestion of shipping much delay would have been caused by unloading at that time. The ship proceeded to Copenhagen, & eventually returned to London & delivered pltf.'s goods. In an action for breach of contract : —*Held :* the above clauses in the bill of lading did not protect defts. from liability.—SARGANT & SONS *v.* EAST ASIATIC CO., LTD. (1915), 85 L. J. K. B. 277 ; 32 T. L. R. 119 ; 21 Com. Cas. 344.

*Annotations :*—**Consd.** Broken Hill Proprietary Co. *v.* Peninsular & Oriental Steam Navigation Co., [1917] 1 K. B. 688. **Refd.** Monte Video Gas & Dry Dock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 866.

**Deviation.**]—*See* Sub-sect. 2, C. (*a*), *ante*.

ii. *Measure of Damages*

**3206. Delay in delivery of cargo — Whether damages for loss of market recoverable.**]—CHRISTIE *v.* TROTT, No. 3077, *ante*.

**PART VII. SECT. 6, SUB-SECT. 2.—C. (b) ii.**

**3206 i.** *Delay in delivery of cargo—Whether damages for loss of market recoverable.*]—CO-OPERATIVE BOX CO. OF NEW SOUTH WALES *v.* PIKE (E. D.) & CO., LTD. (1919), 19 S. R. N. S. W. 424 ; 36 N. S. W. W. N. 140.—**AUS.**

**3206 ii.** —— ——.]—MARSH *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1855), 71 L. T. 195.—**HONG KONG.**

**3206 iii.** —— ——.]—BAULD *v.* SMITH (1901), 40 N. S. R. 294.—**CAN.**

*Sect. 6.—The voyage: Sub-sect. 2, C. (b) ii., & D.*]

**3207.** ——— ———.]—Where, on account of defects in the ship, the voyage had been protracted, & in the meantime the market price of the goods shipped had fallen:—*Held:* the consignee could not recover damages for the loss of market.

There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time the goods ought to have arrived & the time when they did arrive. If goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, & if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered (MELLISH, L.J.).—THE PARANA (1877), 2 P. D. 118; 36 L. T. 388; 25 W. R. 596; 3 Asp. M. L. C. 399, C. A.; *revsg.* (1876), 1 P. D. 452.

*Annotations:*—**Apld.** The Notting Hill (1884), 9 P. D. 105. **Distd.** Rodoconachi *v.* Milburn (1886), 18 Q. B. D. 67. **Expld. & N.F.** Dunn *v.* Bucknall, Dunn *v.* Currie, [1902] 2 K. B. 614. **Consd.** Monte Video Gas & Dry Dock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 866. **Refd.** The Star of India (1876), 1 P. D. 466; The Thyatira (1883), 8 P. D. 155; Smith Edwards *v.* Tregarthen (1887), 56 L. J. Q. B. 437; The Argentino (1888), 13 P. D. 191; Sargant *v.* East Asiatic Co. (1915), 85 L. J. K. B. 277. **Mentd.** Duckham *v.* G. W. Ry. (1899), 80 L. T. 774.

**3208.** ——— ———.]—A ship having been damaged by a collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The argo owners claimed (*inter alia*) for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—*Held:* loss of market was too remote a consequence to be considered as an element of damage, & there was no difference in the principles which regulate the measure of damages in an action of collision, & an action for a breach of duty under a shipping contract.—THE NOTTING HILL (1884), 9 P. D. 105; 53 L. J. P. 56; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. L. C. 241, C. A.

*Annotations:*—**Consd.** Monte Video Gas & Dry Dock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 866. **Refd.** Smith, Edwards *v.* Tregarthen (1887), 56 L. J. Q. B. 437; The Argentino (1888), 13 P. D. 191; Victorian Rys. Comrs. *v.* Coultas (1888), 13 App. Cas. 222; Anglo-Argentine Live Stock & Produce Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403; H.M.S. London, [1914] P. 72; Sargant *v.* East Asiatic Co. (1915), 85 L. J. K. B. 277. **Mentd.** Addis *v.* Gramophone Co., [1909] A. C. 488.

**3209.** ——— ———.] — DUNN *v.* BUCKNALL BROTHERS, DUNN *v.* CURRIE (DONALD) & CO., No. 2552, *ante.*

**3210.** ——— **Whether limited to interest on value for period of delay.**]—THE PARANA, No. 3207, *ante.*

**3211.** ——— **Reference to registrar & merchants.**]—THE WILHELM (1865), as cited in L. R. 3 A. & E. at p. 45.

*Annotation:*—**Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41.

**3212.** ——— ———.]—THE ELINA (1880), 5 P. D. 237, n.

*D. Repairs.*

**Liability of owner for necessaries generally.**]—*See* Part II., Sect. 4, sub-sect. 1; Part IV., Sect. 2, sub-sect. 1, A.; Sect. 3, sub-sect. 7, B., *ante.*

**3213. Duty of owner or master to repair.**]—COOK *v.* JENNINGS, No. 4765, *post.*

**3214.** ———.]—CANNAN *v.* MEABURN, No. 3402, *post.*

**3215.** ———.]—BENSON *v.* CHAPMAN, No. 3132, *ante.*

**3216.** ———.]—A clipper sailing ship of 2,000 tons, with an auxiliary steam screw of 130 horse-power, & carrying about 550 tons of coal, sailed on a voyage from Australia to England. After eleven days she came in collision with an iceberg, & suffered so much damage in her masts & upper works on one side as practically to have lost all power of sailing. She reached Rio de Janeiro under steam alone, having nearly exhausted her stock of coals. The repairs necessary to restore her sailing powers would have cost at Rio many thousand pounds more than in England, & would have occupied several months, & the cargo would have to be unshipped & warehoused. The captain, therefore, had only temporary repairs done, which took three days, sufficient to enable him to complete his voyage under steam alone; & in order to do this he had to purchase coals at Rio, & again at Fayal. The voyage having been accomplished under steam alone, the shipowner sought to charge the cost of the coals against shipper of cargo as general average; either on the principle that the expenditure was a substitution, beneficial to all parties, for a greater expenditure, which the captain had a right to incur by repairing at Rio, & ought to be apportioned in the same way as the greater expenditure would have been; or as an extraordinary expenditure for the general advantage of all interests concerned:—*Held:* (1) assuming the repairing at Rio would have been justifiable, & any of the incidental expenses chargeable against the shippers as general average, there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted; (2) the shipowners, by the contract of affreightment on such a ship, were bound to give the services of the auxiliary screw, & to make all the necessary disbursements for fuel; & although the circumstances caused these disbursements to be extraordinarily heavy, they did not render them an extraordinary expenditure within the rule as to general average.

The shipowners . . . are bound to give the services of their crew & their ship, & to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, & consequently the disbursements necessary for fuel for the steam engine (BLACKBURN, J.).

(3) Inasmuch as the master could, by the expenditure of a comparatively small sum on temporary

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3210 i. ——— *Whether limited to interest on value for period of delay.*]—Interest at the legal rate may be allowed as damages for delay in delivery of goods.—HAMILTON *v.* HUDSON'S BAY CO. & IRVING & BRIGGS (1884), 1 B. C. R. pt. 2, 1.—**CAN.**

h. *Difference paid to consignee & excess of freight.*]—MCEWAN *v.* MCLEOD (1884), 9 A. R. 239.—**CAN.**

k. ——— *Price increased by import duty.*] — Deft., a steamboat owner, agreed to carry certain wheat of the pltfs. from Oshawa to a port in the United States, by Mar. 17, when, as deft. knew, the reciprocity treaty would expire, & an import duty be payable there. He failed to do so, & pltfs. having sent the flour afterwards, were compelled to pay a large duty:—*Held:* such duty was recoverable as damages for the breach of contract; & it was immaterial that prices rose in the States soon after the day fixed for delivery, so that pltfs. actually made more, after paying the duty, than they could have done by selling it on that day.—GIBBS *v.* GILDERSLEEVE (1867), 26 U. C. R. 471.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 2.—D.**

3213 i. *Duty of owner or master to repair.*]—THE CONQUEROR, ZIZINIA *v.* KNIGHT (1854), 11 L. T. 159.—**IR.**

l. *Liability for repairs.*]—A vessel was sent to a slip for the purpose of undergoing repairs & alterations. Upon completion of these operations disputes arose as to the amount to be

repairs & coals, bring the ship & cargo safely home, it was his duty to do so; & though we do not decide a point which does not arise, we are not to be taken as deciding that his owners would not have been liable to the owners of the cargo if he had not taken this course (BLACKBURN, J.).—WILSON *v.* BANK OF VICTORIA (1867), L. R. 2 Q. B. 203; 8 B. & S. 290; 36 L. J. Q. B. 89; 16 L. T. 9; 15 W. R. 693; 2 Mar. L. C. 449.

*Annotations:—As to* (2) **Consd.** The Bona, [1895] P. 125. **Refd.** Harrison *v.* Bank of Australasia (1872), L. R. 7 Exch. 39. *As to* (3) **Refd.** Assicurazioni Generali *v.* S.S. Bessie Morris, [1892] 1 Q. B. 571. *Generally,* **Refd.** Svendsen *v.* Wallace (1885), 10 App. Cas. 404.

**3217. —— To do all that prudent man would do.**]—If a vessel after she had started on her voyage receive damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interest of all concerned, & to do that which a prudent master would do under the circumstances, whether it be to return to his port of loading & repair, or repair at the nearest possible place before proceeding, or go on without repairing but if it be in his power to effect the repairs without any great delay or expense to the interests entrusted to his charge it is his duty to repair before proceeding.

*The R.* a wooden vessel under a charterparty from the port of New York to London with a cargo of grain & flour, left her moorings & towed down the New York river, & on her way stranded on the Craven Shoal, which is about ten miles below New York.

A tug towed at her for an hour & three-quarters before she was got off, during that time her decks & waterways were much strained, & she was then found to be making five inches of water per hour; but the master did not examine her or cause any repairs or caulking to be done, but proceeded on her voyage & encountered very severe weather.

On her arrival in London the flour of pltf., which was immediately beneath the deck, was found to have been damaged by the sea water making its way through the deck, the grain at the bottom at the bottom of the ship being uninjured:—*Held:* the master was negligent in not repairing; that is, in not caulking the deck before he proceeded on his voyage, the ship was more liable thereby to sustain damage & to injure the cargo, & defts. were liable for the damage occasioned there.—THE RONA (1884), 51 L. T. 28; 5 Asp. M. L. C. 259.

**3218. —— If repair possible without undue delay or expense.**]—THE RONA, No. 3217, *ante.*

**3219.** —— —— ——.]—The exception of perils of the sea contained in a charterparty will not relieve the shipowner from his obligation to complete the voyage by carrying the cargo to the port of destination in the chartered ship if the damage caused by such perils is capable of repair within a reasonable time & at a cost not exceeding the value of the ship when repaired.—ASSICURAZIONI GENERALI *v.* BESSIE MORRIS S.S. Co., [1892] 2 Q. B. 652; 61 L. J. Q. B. 754; 67 L. T. 218; 41 W. R. 83; 8 T. L. R. 715; 36 Sol. Jo. 682; 7 Asp. M. L. C. 217; 4 R. 33, C. A.

**3220.** —— ——.]—Where a ship is damaged & obliged to put into an intermediate port for repairs it is the duty as well as the right of the shipowner, if he can repair his ship without unreasonable sacrifice & within a reasonable time, to repair his ship & carry the goods to their destination. This is the purpose for which he has been entrusted with the cargo, & this purpose he is bound to accomplish by every reasonable & practicable method. If he so determines to fulfil his contract, it is his duty, whilst the repairs are being done, to take all reasonable means to preserve the cargo from deterioration. If, on the other hand, the circumstances are such that the shipowner is justified in not repairing his ship, or are such that, even if the ship is eventually repaired, it is not, with a due regard to his own interest & the interest of the owner of the cargo, reasonably practicable, owing either to the length of the time which the repairs will take, or the perishable nature of the cargo, or to the expense involved, or all or any such reasons, that the carriage of the cargo should be completed in the ship when repaired, then the shipowner is at liberty to tranship & carry the cargo to its destination in another bottom & so earn his freight. He is not bound to employ another vessel to complete the voyage at his own loss. But if he chooses, because he deems it best & for his own advantage, to pursue this course, he must, where he has been entrusted with a perishable cargo, which is daily incurring on shipboard an increase of deterioration, use all reasonable promptitude in procuring the transhipment, & take all reasonable means to prevent, or at least minimise, the deterioration of the cargo until the transhipment is effected. Lastly, if the shipowner decides neither to repair nor to tranship, it is his duty, with the greatest dispatch which the circumstances reasonably considered admit, to inform the owner of the cargo, or his agents on the spot, in order that he or they may not be unreasonably hindered in the protection of his interests, & the perishable cargo may not be unnecessarily damaged by the lapse of time before the owner or his agents have it placed at his or their disposition. If instead of promptly transhipping a perishable cargo which is daily deteriorating on shipboard he prefers to negotiate for a *pro rata* freight to which he is not entitled, he can only do it by incurring the expense involved in discharging the cargo from the ship's hold. The absence of definite instructions from the cargo owners or underwriters on cargo does not relieve the shipowner from the duty of doing one or other of the above things.—HANSEN *v.* DUNN (1906), 22 T. L. R. 458; 11 Com. Cas. 100.

**3221. —— Interests of all concerned in venture to be considered.**]—THE RONA, No. 3217, *ante.*

**3222. —— Continuation of venture with unseaworthy vessel.**]—If a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by the perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in an unseaworthy condition.—WORMS *v.* STOREY (1855), 11 Exch. 427; 25 L. J. Ex. 1; 26 L. T. O. S. 106; 4 W. R. 115; 156 E. R. 898.

*Annotations:*—**Consd.** De Cuadra *v.* Swann (1864), 16 C. B. N. S. 772; Atwood *v.* Sellar (1879), 4 Q. B. D. 342. **Refd.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225; The Chasca (1875), 32 L. T. 838; Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; The Rona (1884), 51 L. T. 28; Assicurazioni Generali *v.* S.S. Bessie Morris, [1892] 1 Q. B. 571.

**3223. —— Extent of Duty—Ship must be fit to carry on cargo.**]—HILL *v.* WILSON, No. 4848, *post.*

**3224.** —— —— ——.]—The ordinary contract between shipowner & merchant is that the goods

charged, & the vessel was detained upon the slip in security of the account:—*Held:* averments were irrelevant to entitle the owners of the ship to an issue claiming (1) ship-dues at a fixed rate during the time of the vessel's detention; (2) damages in respect of the slip being occupied by the vessel, & the trade of pursuers in repairing vessels being thus interfered with.—STEPHEN *v.* SWAYNE (1861), 24 Dunl. (Ct. of Sess.) 158.—**SCOT.**

*Sect. 6.—The voyage: Sub-sect. 2, D.; sub-sect. 3, A.]*

shall be carried to their destination & shall there be delivered, unless prevented by the excepted perils, & this generally should be done in the original ship. Whenever the ship is disabled it must, in order literally to fulfil this contract, be necessary to repair the ship so far as to make her fit to carry on the cargo, & if any part of the cargo has been taken out to reship it (LORD BLACKBURN). —SVENDSEN *v.* WALLACE BROTHERS (1885), 10 App. Cas. 404; 54 L. J. Q. B. 497; 52 L. T. 901; 34 W. R. 369; 1 T. L. R. 476; 5 Asp. M. L. C. 453, H. L.

*Annotations:*—**Consd.** Assicurazioni Generali & Schenker *v.* S.S. Bessie Morris Co. & Browne, [1892] 61 L. J. Q. B. 754. **Mentd.** Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362; The Brigella, [1893] P. 189; McCall *v.* Houlder (1897), 76 L. T. 469; Iredale *v.* China Traders Insce., [1900] 2 Q. B. 515; Balmoral S.S. Co. *v.* Marten, [1901] 2 K. B. 896; Hamel *v.* P. & O. Steam Navigation Co., [1908] 2 K. B. 298; Chellew *v.* Royal Commission on Sugar Supply, [1922] 1 K. B. 12.

**3225. —— Absence of instructions from cargo owners in indemnities on cargo—Not thereby absolved from duty.**]—HANSEN *v.* DUNN, No. 3220, *ante.*

**3226. Who may order repairs—Shipowner & agent—Master.**]—BENSON *v.* DUNCAN, No. 2597, *ante.*

**3227. —— —— —— Without consulting cargo owners.**]—PHELPS (JAMES) & CO. *v.* HILL, No. 3169, *ante.*

**3228. —— Not cargo owner.**]—BENSON *v.* DUNCAN, No. 2597, *ante.*

**3229. Right to reasonable time for repair—Where intending to carry cargo to destination.**]—THE GALAM (CARGO EX), No. 4075, *post.*

**3230. Cost of repairs—Lien of master.**]—Lien of the master of a ship by bills drawn & payments made for necessary repairs abroad in the prosecution of the voyage though an instrument of hypothecation.—HUSSEY *v.* CHRISTIE (1807), 13 Ves. 594; 33 E. R. 417, L. C.

*Annotation:*—**Consd.** *Ex p.* Halkett (1814), 3 Ves. & B. 135.

**3231.** ——.]—The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage.—HUSSEY *v.* CHRISTIE (1808), 9 East, 426; 103 E. R. 636.

*Annotations:*—**Extd.** Smith *v.* Plummer (1818), 1 B. & Ald. 575. **Distd.** Bristow *v.* Whitmore (1861), 9 H. L. Cas. 391. **Refd.** The Gustaf (1862), 7 L. T. 259.

**3232. —— Action for quantum meruit.**]—A ship outward bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of her voyage, & a shipwright was engaged, & undertook, to put her into thorough repair. Before this was completed he required payment for the work already done, without which he refused to proceed; & the vessel remained in an unfit state for sailing:—*Held:* the shipwright might maintain an action for the work already done, though the repair was incomplete, & the vessel thereby kept from continuing her voyage, at the time when the action was brought.—ROBERTS *v.* HAVELOCK (1832), 3 B. & Ad. 404; 110 E. R. 145.

*Annotations:*—**Refd.** The Tergeste, [1903] P. 26. **Mentd.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651.

**3233. —— Repairs improperly executed.**]—THE TAMERLANE, ELMSLIE *v.* PITCHER (1857), 9 L. T. 302.

—— **Hypothecation of ship.**]—*See* Part IV., Sect. 3, sub-sect. 7, B., *ante.*

—— **Hypothecation of cargo.**]—*See* Sect. 6, sub-sect. 5, *post.*

—— **Sale of cargo.**]—*See* Sect. 6, sub-sect. 6, *post.*

—— **General average contribution.**]—*See* Sect. 14, *post.*

**3234. Duty to preserve cargo during repair.**]—HANSEN *v.* DUNN, No. 3220, *ante.*

**3235. Decision not to repair—Duty to inform owner of cargo.**]—HANSEN *v.* DUNN, No. 3220, *ante.*

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SUB-SECT. 3.—PRESERVATION OF CARGO.

*A. In General.*

**3236. Duty of master.**]—Pltf.'s ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading pltf. was to deliver the petroleum at Havre, & it was to be taken out by deft. within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to Havre, he discharged his general cargo, & no bill of lading having been presented to him, & no application having been made to him for the delivery of the petroleum, he brought it back to London. On the shipowner claiming freight, back-freight, demurrage, & expenses:—*Held:* (1) he was entitled to freight, back-freight, & expenses. Freight is earned by the carriage & arrival of the goods ready to be delivered to the merchant. Although the petroleum could not be landed at Havre, it was in the port a reasonable time, during which the owner might have received it; & the freight was accordingly earned.

(2) In a case where no application for delivery is made, the captain may land & warehouse the cargo at the expense of the merchant; & where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices he may take it to such a place as in his judgment is most convenient for the merchant, & may charge to the merchant all expenses properly incurred; consequently, here the shipowner was entitled to back-freight & expenses. The demurrage & the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage.

(3) A duty is cast on the master in many cases of accident & emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; &, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing (SIR MONTAGUE E. SMITH).

(4) No part of the port being expressly mentioned for discharging, there can be no doubt that under usual circumstances the ship ought to have been brought to the place in the port where cargo, such as she carried, is ordinarily discharged (SIR MONTAGUE E. SMITH).

(5) The master, as a rule, is only bound to deliver cargo upon production of the bill of lading; & it is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading (SIR MONTAGUE E. SMITH).

(6) The duty of a shipowner to deliver goods at the usual place of delivery of a port, to which

he has contracted to carry under a bill of lading stipulating only that the goods shall be delivered at the port without any particular part of the port being named, is an implied duty only, & does not amount to an engagement to go to the usual place in all events & under all circumstances.—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH (1873), L. R. 5 P. C. 134; 42 L. J. Adm. 1; 28 L. T. 77; 21 W. R. 420; 1 Asp. M. L. C. 519, P. C.

*Annotations:—As to* (3) **Apld.** G. N. Ry. *v.* Swaffield (1874), L. R. 9 Exch. 132. *Generally,* **Mentd.** Purkis *v.* Flower (1873), 43 L. J. Q. B. 33; Flower *v.* Bradley (1874), 44 L. J. Ex. 1; Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65; The Alina (1880), 5 Ex. D. 227; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; The Iona (1882), 7 P. D. 247; R. *v.* Southend County Court Judge (1884), 13 Q. B. D. 142; The County of Durham, [1891] P. 1; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; The Theodora, [1897] P. 279.

**3237. —— Extent of duty—Preservation from excepted perils.**]—There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check & arrest the loss or deterioration resulting from accidents, for the necessary & immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. For neglect of this duty by the master the shipowner is responsible to the shipper.

Pltfs. shipped beans on board defts.' ship, under a bill of lading, from Alexandria to Glasgow, with leave to call at intermediate ports, deliverable to pltfs.' order on payment of freight by consignees. The ship called at Liverpool, & in going out met with a collision, a peril excepted in the bill of lading, & was obliged to put back for repairs, which detained her a few days. The beans were wetted by sea water in consequence of the collision; & pltfs., being at Liverpool, offered to receive them there, paying freight *pro rata;* but defts.' agent refused to deliver them without being paid full freight; & the beans were carried on to Glasgow; & on their arrival there they were much deteriorated in value, beyond what they would have been by the mere wetting from the collision, if they had been dried instead of being carried on as they were. The beans might have been removed at Liverpool from the ship to warehouses & spread out & dried, & there was warehouse accommodation within half a mile of the dock in which the ship was; & by this means the decomposition would have been materially arrested or mitigated. The cost of unshipping, drying, & reshipping, would have been particular average, payable by the shippers. Pltfs. brought an action against defts., claiming the amount of the extra depreciation:—*Held:* the facts showed that the beans might have been taken out & dried, which was clearly a proper thing to do on behalf of the owners, & then reshipped, without unreasonably delaying the whole adventure; that it was, therefore, the master's duty to have done so, & consequently defts. were liable

*Semble:* the measure of damages was the amount of extra depreciation in value in consequence of the neglect to dry the beans, after allowing the estimated expense of unshipping, drying, & reshipping.

The duty of the master is to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check & arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability. . . . If, therefore, the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, & it turns out that the facts do not warrant its exercise in the particular instance, as, for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts. . . . The question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done & suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner & the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; & there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity & means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, & inconvenience, must be taken into account (WILLES, J.).—NOTARA *v.* HENDERSON (1872), L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; 26 L. T. 442; 20 W. R. 413; 1 Asp. M. L. C. 278, Ex. Ch.

*Annotations:*—**Consd.** The Argos, Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134. **Apld.** G. N. Ry. *v.* Swaffield (1874), L. R. 9 Exch. 132. **Consd.** Metcalfe *v.* Brittania Ironworks Co. (1876), 1 Q. B. D. 613; The Savona, [1900] P. 252. **Apld.** Hansen *v.* Dunn (1906), 22 T. L. R. 158. **Refd.** The Kathleen (1874), L. R. 4 A. & E. 269; Hingston *v.* Wendt (1876), 1 Q. B. D. 367; Prehn *v.* Bailey (1881), 45 L. T. 399; Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362; Rose *v.* Bank of Australasia, [1891] A. C. 687; Nobel's Explosives Co. *v.* Jenkins, [1896] 2 Q. B. 326; The Torbryan, [1903] P. 35; Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1917] 2 K. B. 78; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. **Mentd.** Coldman *v.* Hill, [1919] 1 K. B. 443.

**3238. What measures to be taken—Matters for consideration.**]—NOTARA *v.* HENDERSON, No. 3237, *ante.*

**3239. —— Dependent on circumstances.**]—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante.*

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**PART VII. SECT. 6, SUB-SECT. 3.—A.**

**3239 i.** *What measures to be taken—Dependent on circumstances.*]—A ship laden with a cargo of whale blubber & heads was detained by stress of weather, & in consequence the cargo became partially decomposed, so that the voyage could not be prosecuted in safety either to the cargo or the vessel. The owner of the cargo was resident at the port where the vessel was detained, but refused to give the shipmaster any instructions as to the course which he should pursue in regard to the cargo, or to relieve him of responsibility. The master, therefore, acting upon the best advice he could get, unloaded the cargo, subjected it to certain operations, & finally continued the voyage & delivered the cargo to the owner's consignee:—*Held:* the owner of the cargo was bound to reimburse the owners of the vessel for the expense incurred in the operations upon the cargo, in respect that these operations were necessary, for carriage,

*Sect.* 6.—*The voyage: Sub-sect.* 3, *A. & B.* (*a*), (*b*) & (*c*).]

**3240. —— Damage by sea water—Cargo to be taken out, dried & reshipped.**] — TRONSON *v.* DENT, No. 3447, *post.*

**3241. —— —— ——.**]—NOTARA *v.* HENDERSON, No. 3237, *ante.*

**3242. —— Transhipment.**]—HANSEN *v.* DUNN, No. 3220, *ante.*

**3243. Expenses of preservation — Liability of shipowner to master.**]—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante.*

**3244. —— —— Lien of master.**] — A vessel having gone ashore with a cargo on board, pltf., a ship agent, was put in possession of the ship & cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. Pltf. did work & expended money in discharging the cargo, & brought it to a place of safety, where he took possession of it. The hull broke up, & became a wreck. The expenditure by pltf. was not for the purpose of enabling the shipowner to perform his contract & to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo:—*Held:* (1) pltf. had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage; (2) an agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, is impliedly authorised to bind the owner by an agreement to pay, on conditon of the cargo being given up, charges for which there is a lien on the cargo.

(3) The hardship would be very great if a master was bound to make a disbursement for the benefit of the goods, & had no remedy if the goods owner transferred the property & then became insolent, & as there was no hardship in holding the master bound to make such disbursements, we think it is not too much to infer that there was such a lien (BLACKBURN, J.).—HINGSTON *v.* WENDT (1876), 1 Q. B. D. 367; 45 L. J. Q. B. 440; 34 L. T. 181; 3 Asp. M. L. C. 126; *sub nom.* KINGSTON *v.* WENDT, 24 W. R. 664, D. C.

*Annotations:*—*Generally*, **Refd.** Prehn *v.* Bailey (1881), 45 L. T. 399; The Gas Float Whitton No. 2, [1895] P. 301.

**Preservation of cargo during repair.**]—*See* No. 3220, *ante.*

**Duty to repair.**]—*See* Sub-sect. 2, D., *ante.*

*B. Liability for Damage or Loss.*

*(a) In General.*

**Deficiency on delivery.**]—*See* Sub-sect. 9, C., *post.*

**Exemption from liability—Excepted perils.**]—*See* Sect. 4, *ante.*

**—— Proof of quantity shipped—Terms of bill of lading.**]—*See* Sect. 3, sub-sect. 7, A., *ante.*

**Incorporation of charterparty in bill of lading.**]—*See* Sect. 3, sub-sect. 11, E., *ante.*

**Improper stowage.**]—*See* Sect. 5, sub-sect. 5, C., *ante.*

**Measure of damages.**]—*See* Sect. 7, sub-sect. 9, *post.*

*(b) Express Limitation of Amount of Liability.*

*See, now*, Carriage of Goods by Sea Act, 1924 (c. 22), Article IV., r. 5.

**3245. When limitation clause applies—Ship unseaworthy.**]—Pltf. shipped certain cattle on board defts.' ship for carriage from London to New York under a bill of lading which provided as follows:—"These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer for accidents, disease, or mortality, & that under no circumstances shall they be held liable for more than £5 for each of the animals." The ship had on her previous voyage carried cattle suffering from foot & mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of defts.' servants in not cleansing & disinfecting the ship before receiving pltf.'s cattle on board & signing the bill of lading, & pltf. in consequence suffered damage amounting to more than £5 for each of the said cattle:—*Held:* the provision in the bill of lading limiting liability to £5 for each of the cattle did not apply to damage occasioned by defts. not providing a ship reasonably fit for the purposes of the carriage of the cattle which they had contracted to carry.—TATTERSALL *v.* NATIONAL S.S. CO. (1884), 12 Q. B. D. 297; 53 L. J. Q. B. 332; 50 L. T. 299; 32 W. R. 566; 5 Asp. M. L. C. 206.

*Annotations:*—**Apld.** The Maori King *v.* Hughes, [1895] 2 Q. B. 550. **Consd.** Baxter's Leather Co. *v.* Royal Mail Steam Packet Co. (1908), 99 L. T. 286. **Apld.** Wiener *v.* Wilsons & Furness-Leyland Line (1910), 11 Asp. M. L. C. 413. **Distd.** Bank of Australasia *v.* Clan Line Steamers, [1916] 1 K. B. 39. **Apld.** Atlantic Shipping & Trading Co. *v.* Dreyfus, [1922] 2 A. C. 250. **Consd.** Ford *v.* Compagnie Furness (France), [1922] 2 K. B. 797. **Refd.** Carmichael *v.* Liverpool Sailing Shipowners' Mutual Indemnity Assocn. (1886), 56 L. T. 863; Queensland National Bank *v.* Peninsular & Oriental Steam Navigation Co., [1898] 1 Q. B. 567; Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1915] 2 K. B. 729; The Thorsa, [1916] P. 257; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522; Werner *v.* Det Bergenske Dampskibsselskaft (1926), 134 L. T. 573.

**3246. —— ——.**]—MORRIS & MORRIS *v.* OCEANIC STEAM NAVIGATION CO., LTD. (1900), 16 T. L. R. 533.

*Annotations:*—**Consd.** Baxter's Leather Co. *v.* Royal Mail Steam Packet Co. (1908), 99 L. T. 286. **Expld.** Wiener *v.* Wilsons & Furness-Leyland Line (1910), 11 Asp. M. L. C. 413. **Consd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788. **Expld.** Bank of Australasia *v.* Clan Line Steamers, [1916] 1 K. B. 39. **Distd.** Hordern *v.* Commonwealth & Dominion Line, [1917] 2 K. B. 420.

**3247. —— No special declaration of value.**]—Pltfs. shipped two packages of leather goods on board defts.' ship for carriage from London to

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& had proved beneficial to the owner of the cargo, & the master was entitled to perform them, as the owner of the cargo, although on the spot, refused to give any instructions in the matter.—GARRIOCK *v.* WALKER (1873), 1 R. (Ct. of Sess.) 100; 11 Sc. L. R. 16.—**SCOT.**

m. *Duty of master.*]—There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods entrusted to him, &, in the event of loss or deterioration resulting from accidents covered by the exceptions in the charterparty, to take reasonable measures in order that the loss or deterioration may be minimised.—ADAM *v.* MORRIS (1890), 18 R. (Ct. of Sess.) 153; 28 Sc. L. R. 149.—**SCOT.**

**PART VII. SECT. 6, SUB-SECT. 3.—B. (b).**

n. *General rule.*]—A shipping co. is *primâ facie* bound to deliver goods in good order & condition, but this obligation is subject expressly to the conditions inserted in the bill of lading.—CUTLER PALMER & CO. *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. (1898), I. L. R. 25 Calc. 654; 2 C. W. N. 423.—**IND.**

o. —— *Express agreement that carriers not answerable.*]—CRAFFORD *v.* BROWNE (1853), 11 U. C. R. 96.—**CAN.**

3247 i. *When limitation clause applies—No special declaration of value.*]—Neither the master nor the owner of a vessel is liable for any loss or damage which may happen to any gold, silver, jewels, etc., shipped on board such vessel, unless the owner or shipper shall insert in his bill of lading or declare in writing to the master the true

Buenos Ayres under a bill of lading containing a clause which specified a large number of excepted perils for which defts. were not to be responsible, whether the peril, or the loss or damage arising therefrom, was caused by the negligence of defts.' servants or agents or not, & a further clause by which defts. were not to be accountable at all for bullion or other specified valuable or fragile articles, "nor for any other goods of whatever description beyond the amount of £2 per cubic foot for any one package," unless shipped under a special declaration of value & extra freight paid. Pltfs.' goods were not delivered at Buenos Ayres, & their loss was found as a fact to have been due to the negligence of defts.' servants; they had not been shipped under a special declaration of value, nor had extra freight been paid upon them:—*Held:* notwithstanding that the loss was due to the negligence of defts., they were only liable to the limited extent provided by the bill of lading.—BAXTER'S LEATHER CO. *v.* ROYAL MAIL STEAM PACKET CO., [1908] 2 K. B. 626; 77 L. J. K. B. 988; 99 L. T. 286; 24 T. L. R. 537; 11 Asp. M. L. C. 98; 14 Com. Cas. 46, C. A.

*Annotations:*—**Consd.** Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646. **Refd.** Wall *v.* Rederiakt. Luggude, [1915] 3 K. B. 66; Hordern *v.* Commonwealth & Dominion Line, [1917] 2 K. B. 420; Atlantic Shipping & Trading Co. *v.* Dreyfus, [1922] 2 A. C. 250; Layton *v.* General Steam Navigation Co. (1923), 130 L. T. 662.

**3248. —— —— Carriage of goods by Sea Act, 1924 (c. 22), Article IV., r. 5.**]—PENDLE & RIVETT, LTD. *v.* ELLERMAN LINES, LTD., No. 2724, *ante*.

*(c) Damages.*

**3249. Liability of shipowner.**]—Action may be brought against the master or owners of a ship where goods are taken to freight, & damaged.

The master or owners may maintain an action for freight money, unless some of the owners disagree to the voyage, for by that means they are exempted from the action (HOLT, C.J.).—BOSON *v.* SANDFORD (1690), Carth. 58; Comb. 116; Freem. K. B. 499; 3 Lev. 258; 3 Mod. Rep. 321; 2 Salk. 440; 1 Show. 101; 90 E. R. 638; *sub nom.* BOULSTON *v.* SANDIFORD, Skin. 278.

*Annotations:*—**Consd.** Boucher *v.* Lawson (1735), Lee *temp.* Hard. 194. **Refd.** Mitchell *v.* Tarbutt (1794), 5 Term Rep. 649; Govett *v.* Radnidge (1802), 3 East, 62; Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365; Max *v.* Roberts (1807), 2 Bos. & P. N. R. 454; Corbett *v.* Packington (1827), 6 B. & C. 268; Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894. **Mentd.** Abbot *v.* Smith (1774), 2 Wm. Bl. 947; Laugher *v.* Pointer (1826), 5 B. & C. 547; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Kendall *v.* Hamilton (1879), 4 App. Cas. 504.

**3250.** ——.]—LESLIE *v.* WILSON, No. 1784, *ante*.

**3251.** ——.]—NOTARA *v.* HENDERSON, No. 3237, *ante*.

nature, quality & value of such gold, silver, etc.—BOWRING *v.* HARRISON (1824), 1 Nfld. L. R. 406.—**NFLD.**

p. *Liability of shipowner & master.*]—A *voiturier par eau* is answerable for the consequences of his own neglect. If, therefore, he carelessly quits his ship, & she is lost during his absence, he must be answerable for the cargo.—BORNE *v.* PERRAULT & NAUD, 2 R. de L. 75.—**CAN.**

q. ——.]—Whether the shipowner will be liable for loss of deck cargo depends on the usage which prevails in respect to deck loading in the particular navigation.—PATERSON *v.* BLACK (1849), 5 U. C. R. 481.—**CAN.**

r. ——.]—Under the terms of Art. 1676, C. C., the shipowner cannot validly contract himself out of responsibility for his negligence.—RENDELL *v.* BLACK DIAMOND S.S. CO. (1896), Q. R. 10 S. C. 257.—**CAN.**

t. ——.]—The owners of a ship for whose benefit she is navigated are bound to the owners of goods shipped for the due carriage thereof, & are liable for any negligence whereby the goods may be damaged.—TIFFIN *v.* WEBB (1864), 5 Nfld. L. R. 54.—**NFLD.**

a. ——.]—The master of a steamer trading between port & port in New Zealand is, in the absence of special contract, responsible for damage to cargo, even though caused by a peril of the seas, for he has all the liabilities of a common carrier.—EVANS *v.* HORSFALL (1877), 3 N. Z. Jur. N. S. 64.—**N.Z.**

b. ——.]—A shipmaster will be liable for damages resulting to cargo through negligence unless he specifically excludes liability for such in his bill of lading.—CLAN LINE OF STEAMERS *v.* ALCOCK & CO. (1896), 13 S. C. 104; 6 C. T. R. 130.—**S. AF.**

c. *Defences—False invoices.*]—It is no defence to a common carrier by water for not carrying goods safely from a foreign country, or on a claim for general average, that the owner of the goods had prepared false invoices, to defraud the revenue laws of this Province. — GROUSETTE *v.* F (1842), 3 Ont. Dig. 6448.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 3.—B. (c).**

**3249 i.** *Liability of shipowner.*]—WING WAH *v.* AUSTRALASIAN STEAM NAVIGATION CO. (1868), 2 Q. S. C. R. 36.—**AUS.**

**3249 ii.** ——.]—JONES & CO. *v.* ROSS (1830), 8 Sh. (Ct. of Sess.) 495; 26 Fac. Coll. 396.—**SCOT.**

**3249 iii.** ——.]—Shipowners who received a cargo of corks on board their vessel, & were also the consignees of the cargo at the foreign port:—*Held:* liable for the value of the cargo, which was landed in a damaged state, no survey having been made, nor any steps taken to enable the shipper to recover, under a policy of insurance.—URQUHART *v.* BROWN (1833), 11 Sh. (Ct. of Sess.) 567.—**SCOT.**

**3249 iv.** ——.]—In an action against the owner of a trading steamer on a regular line for loss by negligence in the carriage of goods, he maintained in defence that in a circular issued with regard to the voyage to the port where the goods were taken on board he referred to conditions in his sailing bills which excluded his liability on the common law grounds alleged against him:—*Held:* negligence which would make him liable at common law as a carrier of goods was established, & therefore he was liable in damages.—MACRAE *v.* HUTCHISON (1886), 14 R. (Ct. of Sess.) 4; 24 Sc. L. R. 7.—**SCOT.**

d. —— *Inherent vice.*]—BRADLEY (F. O.) & SONS, LTD. *v.* FEDERAL STEAM NAVIGATION CO., LTD. (1927), 137 L. T. 266, H. L.—**AUS.**

e. —— *For negligence.*]—PIERCE *v.* RICHELIEU & ONTARIO NAVIGATION CO. (1890), Q. R. 5 S. C. 139.—**CAN.**

f. *Liability of master.*]—Pltfs., consignees of cargo, brought this action against the master of the vessel to recover damages for injury to their goods. The bill of lading contained a stipulation that "the shipowners' liability in case of loss or detention or injury to goods, for which they may be responsible, to be calculated on, & in no case to exceed, the net invoice cost." At the trial it was proved that the goods were damaged by train after being landed on the wharf; but, on being sold by auction they realised more than the net invoice cost. Verdict for pltfs.:—*Held:* pltfs. by reason of the stipulation in the bill of lading, were not entitled to any damages at all.—HEYDE *v.* SWAN (No. 2) (1885), 6 N. S. W. Eq. 33; 1 N. S. W. W. N. 106.—**AUS.**

g. ——.]—A shipmaster who receives a mirror on board, & grants a receipt for it, without examining its condition, is liable in damages to the owner, if it shall be found on delivery to be broken.—SPROTT *v.* BROWN (1803), 13 Fac. Coll. 240; Mor. Dict. 10114.—**SCOT.**

h. *Nominal damages recoverable.*]—HANCOCK *v.* BETHUNE (1846), 3 U. C. R. 47.—**CAN.**

k. *Measure of damages—Price of wheat less freight.*]—YOUNG *v.* LAIDLAW (1862), 12 C. P. 612.—**CAN.**

l. —— *Value of goods.*]—WALLACE *v.* SWIFT (1871), 31 U. C. R. 523.—**CAN.**

m. —— *Market value of goods.*]—The damages to be allowed to owners of cargo for the loss thereof by collision is the market value thereof to the owners at the time & place of delivery, if there is one, & if not, the value is to be calculated, taking into account among other things the cost price, the expenses of transit & importer's profit.—WARREN & STARR, LTD. *v.* SHIP PERENE, [1924] Exch. C. R. 229.—**CAN.**

n. —— *Cost price of goods at port of shipment plus freight & insurance.*]—A shipping co. received on board in good order & condition at Port Said goods for carriage to East London which had come by sea from Beirat, under bill of lading, which provided that the co.'s liability in case of damage should not exceed the cost price of the goods at port of shipment, together with freight & insurance. They arrived at East London in a damaged condition:—*Held:* the measure of damage was the cost at Beirat whence the goods had originally come, & not at Port Said, where defts. received them, together with freight & insurance.—JURIDINI *v.* DEUTSCHE OOST-AFRIKA LINIE (1905), 19 E. D. C. 74.—**S. AF.**

o. *Burden of proof—Of condition of goods when shipped.*]—In an action of damages done to a cargo of tea in the voyage from London to Montreal:—*Held:* as to proof of the condition of the goods when shipped there was no general rule of law or evidence, & it must depend on the circumstances of each case how far such proof is necessary, & when the case is to be urged

*Sect.* 6.—*The voyage: Sub-sect.* 3, *B.* (*c*) & (*d*); *sub-sect.* 4, *A.*]

**3252.** ——.]—SIORDET *v.* HALL, No. 2593, *ante.*

**3253.** ——.]—ANDERSON *v.* CHAPMAN (1839), 7 L. T. 102; *subsequent proceedings*, 5 M. & W. 483.

**3254.** ——.]—THE SOPHY, MAGNUS *v.* FAIRBRASS (1856), 4 L. T. 742.

**3255.** ——.]—THE AFRICAN, SICHELL *v.* DIXON (1856), 9 L. T. 301.

**3256.** ——.]—ALSTON *v.* HERRING, No. 2986, *ante.*

**3257.** ——.]—ROWBOTTOM *v.* COOPER (1857), 6 L. T. 228.

**3258.** ——.]—VALLEE *v.* BUCKNALL NEPHEWS (1900), 16 T. L. R. 362.

**3259.** —— **Action for damages—Not action for freight.**]—GARRETT *v.* MELHUISH, No. 4860, *post.*

—— **Improper stowage.**]—*See* Sect. 5, sub-sect. 5, C. (*b*) ii., *ante.*

—— **Excepted perils.**]—*See* Sect. 4, *ante.*

**Admiralty jurisdiction.**]—*See* ADMIRALTY, Vol. I., pp. 146–149, Nos. 524–570.

(*d*) *Loss.*

**3260. Liability of shipowner.**]—The owner & not the freighter is liable for a loss of gold sent by the ship.—PARISH *v.* CRAWFORD (1746), 2 Stra. 1251; 93 E. R. 1163.

*Annotations:*—**Consd.** Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86. **Refd.** Hutton *v.* Bragg (1816), 7 Taunt. 14; Colvin *v.* Newberry (1828), Dan. & Ll. 61; Baumvoll Manufactur von Scheibler *v.* Gilchrest, [1891] 2 Q. B. 310.

**3261.** ——.]—The owners of vessels on the navigation between A. & C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10 per cent. unless extra freight were paid, the master of one of the ships took on board pltf.'s goods, to be carried from A. to B., an intermediate place between A. & C., & delivered at B.; the vessel passed by B. without delivering pltf.'s goods there, & sunk before her arrival at C. without any want of care in the master:—*Held:* the owner of the vessel was responsible to pltf. for the whole loss in an action on the contract.—ELLIS *v.* TURNER (1800), 8 Term Rep. 531; 101 E. R. 1529.

*Annotations:*—**Refd.** Bodenham *v.* Bennett (1817), 4 Price, 31; Batson *v.* Donovan (1820), 4 B. & Ald. 21; Garnett *v.* Willan (1821), 5 B. & Ald. 53; Owen *v.* Burnett (1834), 3 L. J. Ex. 76; Morritt *v* N. E. Ry. (1876), 1 Q. B. D. 302.

**3262.** ——.]—HARVEY *v.* THOMPSON (1837), 4 L. T. 589.

**3263.** ——.]—BLACK *v.* BENNETT (1839), 7 L. T. 397.

**3264.** ——.]—THE ELIZABETH, BARING *v.* TWIZELL (1853), 7 L. T. 102.

**3265.** ——.]—THE PERSEVERANCE, USBORNE *v.* MATTOCKS (1856), 7 L. T. 166.

**3266.** ——.]—Owner of an insufficient barge held liable for loss of cargo of wheat, negligence being also proved.—USBORNE *v.* GLENDINNING (1857), 3 L. T. 419.

**3267.** —— **Theft.**]—REID *v.* REEDER (1844), 7 L. T. 195.

**3268.** —— ——.]—HYDE *v.* GREEN (1845), 9 L. T. 238.

**3269.** —— ——.]—When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind is not entitled to maintain an action in respect of such loss. Deft., a shipowner, undertook to carry pltfs.' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of deft.'s neglect to take a precaution enjoined by an order of Privy Council, which was made under Contagious Diseases (Animals) Act, 1869 (c. 70), s. 75:—*Held:* the object of the statute & the

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as insufficiently proved without it.—MOORE & HARRIS (1876), 2 Q. L. R. 147, P. C.—**CAN.**

p. —— *Of cause of damage on plaintiff.*]—In an action by a consignee against a carrier for damage caused by negligent handling of goods (eggs in cases) shipped by sea, wherein it was shown that the goods were receipted for by the carrier at the point of shipment as being in apparent good order & were delivered in the same apparent good order (with the exception of some cases which, deft. admitted, had been dropped on being loaded in one slingload & which it settled for), & the injury sued for was not discovered until after the goods had been reshipped by railway & delivered at a place several thousand miles away:—*Held:* deft. was not under the *onus* of proving how the goods were injured.—MAKINS PRODUCE CO. *v.* CANADIAN AUSTRALIAN ROYAL MAIL LINE, [1927] 1 D. L. R. 97.—**CAN.**

q. —— *When shifted.*]—Where a cargo shipped in good condition is delivered damaged by sea water, the *onus* lies, in the first instance, on the master of the ship, to show that he met with weather of such severity on the voyage, as would be sufficient, *primâ facie*, to account for the damage to the cargo, but thereafter the *onus* of proof is shifted, & it rests with the owner of the cargo to prove that the damage was caused by the fault of the master & not through stress of weather.—WILLIAMS *v.* DOBBIE (1884), 11 R. (Ct. of Sess.) 982; 21 Sc. L. R. 667.—**SCOT.**

r. *Limitation of time for giving notice of loss.*]—On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date, after which the same should be completely barred: *Held:* this limitation applied to a claim for damage caused by unseaworthiness of the steamer.—UNION S.S. CO. OF BRITISH COLUMBIA *v.* DRYSDALE (1902), 32 S. C. R. 379.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 3.—B. (d).**

**3260 i.** *Liability of shipowner.*]—Several packages of goods were shipped at London to a merchant at Quebec. Upon the arrival of the vessel & delivery of the packages it was ascertained that some of the goods were missing from one of the packages. Notice not having been given until several months afterwards:—*Held:* the master was not responsible for the deficiency.—SWINBURNE *v.* MASSUE (1834), Stuart, K. B. 569.—**CAN.**

**3260 ii.** ——.]—Where the owner of a vessel undertook by his bill of lading to carry goods, without any exception as to the dangers of navigation or otherwise, & the goods were lost in a violent tempest:—*Held:* the owner was liable.—WARREN *v.* WILSON (1842), 6 O. S. 435.—**CAN.**

**3260 iii.** ——.]—Where a person delivers a parcel to carry to a person on board a boat not as to a servant of the owners, but to be carried by such person himself, either for reward or otherwise, the person so engaging to carry it is alone responsible for its loss. If, however, the parcel is delivered to the person on board to be carried, not on any private undertaking, but as an officer of the boat, the owners of the boat would be chargeable with the loss, though they were to have no reward for carrying; but then, to establish the liability of the owners, it would be necessary for the jury to find gross negligence in the owners or their servants, or at least a want of that ordinary care which a prudent man would take of his own goods.—MCLEOD *v.* EBERTS (1850), 7 U. C. R. 244.—**CAN.**

**3260 iv.** ——.]—In an action against a steamship co. to recover the value of a case of plate glass carried from Liverpool to Quebec:—*Held:* the clause in the bill of lading granting the co. option to tranship & forward to Montreal, at the shipper's expense, but owner's risk, did not release the carrier from liability arising from neglect & want of care in the handling & landing of the goods at Montreal.—SAMUEL *v.* EDMONSTONE (1856), 1 L. C. J. 89.—**CAN.**

**3260 v.** ——.]—Where a common carrier receives goods from England on board his lighter, he is not responsible for loss arising from delay in transhipment owing to the ocean vessel being already full, when the bill of lading contains a clause that if, from any cause, the goods do not go forward on board that ship, they should be forwarded by the next steamer of the same line.—TORRANCE *v.* ALLAN (1863), 6 L. C. J. 190; 8 L. C. J. 57.—**CAN.**

**3260 vi.** ——.]—THOMPSON *v.* ALLAN (1887), 32 L. C. J. 69.—**CAN.**

**3260 vii.** ——.]—DHUNJEEBHOY BYRAMJEE METHA *v.* BETHAM (1867), 2 Ind. Jur. N. S. 305.—**IND.**

**3260 viii.** ——.]—A vessel advertised as a coasting vessel between Perth, Newburgh, & Leith, having touched at St. Andrews & having been lost in her course from thence to Leith, the owners of the vessel were found liable for the goods lost.—STEWART *v.* JOHNSTONE (1810), 2 Scots. Dig. 853.—**SCOT.**

order being to prevent the spread of contagious disease among animals, & not to protect them against perils of the sea, pltfs. could not recover.—GORRIS *v.* SCOTT (1874), L. R. 9 Exch. 125; 43 L. J. Ex. 92; 30 L. T. 431; 22 W. R. 575; 20 Asp. M. L. C. 282.

*Annotations:*—**Mentd.** Ross *v.* Rugge-Price (1876), 1 Ex. D. 269; Groves *v.* Wimborne, [1898] 2 Q. B. 402; Hemmings *v.* Stoke Poges Golf Club, [1920] 1 K. B. 720; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832.

**3270.** —— ——.]—THE PRINZ HEINRICH (1897), 14 T. L. R. 48.

**3271.** —— ——.]—CITY OF BARODA (CARGO OWNERS) *v.* HALL LINE, LTD., No. 2719, *ante*.

**3272.** —— **Hague Rules, 1921, Article IV., r. 2—Onus of proof.**]—CITY OF BARODA (CARGO OWNERS) *v.* HALL LINE, LTD., No. 2719, *ante*.

—— **Excepted perils.**]—*See* Sect. 4, *ante*.

—— **Improper stowage.**]—*See* Sect. 5, sub-sect. 5, C. (*b*), *ante*.

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SUB-SECT. 4.—TRANSHIPMENT OF CARGO.

*A. In General.*

**3273. Effect of transhipment—Original contract deemed to be fulfilled.**]—SHIPTON *v.* THORNTON, No. 3131, *ante*.

**3274.** —— ——.]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante*.

**3275.** —— **Original voyage deemed to be continuing.**]—HILL *v.* WILSON, No. 4848, *post*.

**3276. Contract between master & owner of substituted ship—Position of master—Agent of shipowners not cargo owners.**]—Defts., London merchants, by charterparty made between them & C., the master of the ship *Planter*, chartered that ship to bring a cargo of guano from Callao to England. The ship was, by the charterparty, consigned outwards to defts.' agents in South America; & freight at 70*s.* per ton was made payable on her arrival in England, deducting such advances on account of freight as charterers' agents might, as the charterparty empowered them, make to C. in the Pacific. The *Planter* arrived at Callao, loaded her cargo of guano & set sail for England, defts.' agents having, previously to her sailing, made large advances to C. on account of freight. Soon after sailing she sprang a leak, which compelled her to put back to Callao, & she arrived there the second time, consigned to a firm independent of defts. or their agents. It was then found that she could not proceed on her voyage, & C., defts.' agents refusing to interfere, transhipped the cargo into another ship, the *Alarm*, to be forwarded to England. For this purpose a charterparty was entered into between pltf., the master & apparent owner of the *Alarm*, & C. in his own name; under which freight was made payable by the consignees, on ship's arrival in England, at 70*s.* per ton. Pltf. then made out bills of lading, in which C. was named as shippers & defts. as consignees. At the date of this latter charterparty the current rate of freight at Callao was only 40*s.* per ton, & it was agreed between pltf. & C. that pltf. should pay the difference between that & the charterparty freight to C., but whether for C.'s benefit or that of his owners did not appear. The cargo arrived in England, in the *Alarm*; when pltf. claimed from defts. the full freight of 70*s.* per ton; from which defts., on the other hand, insisted on their right to deduct the advances made to C. by their agents at Callao. Defts. having paid the freight less the amount of such advances, pltf. brought this action to recover that amount. A verdict having been taken, by consent, for pltf., for this amount, leave being reserved to defts. to move to enter it for them, the ct. to have power to draw inferences of fact from the above facts, which were proved at the trial:—*Held:* making absolute a rule to enter the verdict for defts., (1) the proper inference from the facts was that C. made the charterparty with the *Alarm* as agent for his owners & not for defts.; the agreement by pltf. to return him part of the charterparty freight being a legitimate transaction in that view, but a gross fraud on defts., to which pltf. was a party, in the other; (2) assuming C. to have made the said charterparty as defts.' ostensible agent, he had no implied authority, from the necessity of the case, on transhipping the cargo, to bind defts. to payment of a higher than the current rate of freight; & pltf. had knowledge of that want of authority; (3) apart from the *Alarm* charterparty, pltf. had no lien on the cargo for a greater amount of freight than the balance due after crediting defts. with the advances to C., for assuming, a point which the ct. did not decide, that upon a transhipment of cargo arising from necessity, in a port of distress, in order to its being forwarded to its destination, the original shipowner can transfer his lien for freight to the substituted shipowner, he can transfer no greater right of lien than he himself possesses.—MATTHEWS *v.* GIBBS (1860), 3 E. & E. 282; 30 L. J. Q. B. 55; 3 L. T. 551; 7 Jur. N. S. 186; 9 W. R. 200; 1 Mar. L. C. 14; 121 E. R. 448.

**3277. Liability of sub-contractor—Loss of cargo by negligence.**]—(1) Gunpowder was shipped for Valparaiso on board a vessel chartered on a voyage to that port, with liberty to touch & stay at the Falkland Islands. On the arrival of the vessel at Port Stanley, where the captain had goods to unload for defts., it was found that by the regulations of the port it would be necessary to land & store the powder before the vessel could enter the harbour. To avoid the inconvenience & expense of this, the captain accepted the offer of the agent of defts. of the use of a vessel belonging to them, called the *Fairy*, in which to place the powder during his stay at Port Stanley. Defts.' agent afterwards requiring the *Fairy* for another purpose, without the consent of the captain transhipped the powder to a half-decked vessel called the *Lily*, which the jury found to be an unsafe & improper vessel for the purpose. Whilst the *Lily* was anchored outside the harbour, a storm arose & she was sunk, & the powder lost:—*Held:* defts. were responsible for the value, for that they were either trespassers in removing the powder without the captain's consent, or bailees who had been guilty of want of reasonable care. (2) On the arrival of the ship at Valparaiso, the consignees of the powder demanded it from the captain, &, not obtaining it, took proceedings against the ship, which the captain unsuccessfully resisted, being ultimately compelled to pay the consignees the

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**PART VII. SECT. 6, SUB-SECT. 4.—A.**

**3275 i.** *Effect of transhipment—Original voyage deemed to be continuing.*]—Fifty barrels of oysters having been shipped at Oswego for Toronto per deft.'s vessel the *Junius*, & the vessel having been obliged by stress of weather to go to Kingston, whence the goods were transhipped for Toronto by the steamer *Oshawa*, where they arrived in a damaged condition:—*Held:* deft. was the carrier throughout, that is, from Oswego to Toronto *via* Kingston.—MCCONKEY *v.* GORRIE (1856), 5 C. P. 430.—**CAN.**

**3275 ii.** —— ——.]—CLAN LINE OF STEAMERS *v.* ALCOCK & CO. (1896), 13 S. C. 104.—**S. AF.**

**t.** —— *By unauthorised ship.*]—VANCOUVER MILLING & GRAIN CO., LTD. *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPN. (1923), 32 B. C. R. 269; [1923] 2 W. W. R. 579.—**CAN.**

*Sect. 6.—The voyage: Sub-sect. 4, A., B. & C. (a).*

value of the powder & the costs:—*Held:* the owners of the ship could not claim these costs from defts., they not being a necessary consequence of their wrongful act.—RONNEBERG *v.* FALKLAND ISLANDS CO. (1864), 17 C. B. N. S. 1; 4 New Rep. 243; 34 L. J. C. P. 34; 10 L. T. 530; 10 Jur. N. S. 940; 12 W. R. 914; 2 Mar. L. C. 30; 144 E. R. 1.

**3278.** —— ——.]—Where the owners of goods contract with a steamship co. under a through bill of lading for their conveyance & delivery, including transhipment by barge at a port en route, a co. which contracts with the steamship co. to supply a barge to tranship the goods commits a tort against the owners of the goods by supplying an unseaworthy barge & is liable to them for damages.—THE TERMAGANT (1914), 30 T. L. R. 377; 19 Com. Cas. 239.

*B. Under Express Term of Contract.*

**3279. Liability of shipowner—Breach of duty to use due diligence.**]—A shipowner, being sued on a clause in a bill of lading, by which he was bound to forward the goods by steamer from London to a foreign port; the breach of duty being in not using due diligence to do so, whereby the season was lost:—*Held:* it was not enough that he had let the discharge & sorting of the cargo take the usual course of business at the docks where the vessel discharged, if he neglected means which might well have been used to hasten the sorting & to procure vessels for the transhipment.

If, for instance, he delayed the transhipment in order to save money he had to pay for freight, that would not be using due diligence, for he had no right to delay the goods for that reason. If, however, the delay was caused by a search for the missing package, & deft. otherwise used due diligence he would be entitled to the verdict (ERLE, C.J.).—CARALI *v.* XENOS (1862), 2 F. & F. 740, N. P.

**3280.** —— **Where provision for transhipment at shipper's risk—Loss by wreck of vessel to which goods transferred.**]—STUART *v.* BRITISH & AFRICAN STEAM NAVIGATION CO., No. 3180, *ante*.

**3281.** —— —— ——.]—Pltfs. shipped at Sydney on board defts.' mail steamer *Mooltan* a quantity of lead for delivery at Colombo under a bill of lading which exempted defts. from liability for loss due to (*inter alia*), perils of the seas, & which also contained the following clause: "The co. are to be at liberty to carry the goods to their port of destination by the above or other steamer or steamers . . . proceeding either directly or indirectly to such port, & in so doing to carry the goods beyond their port of destination & to tranship or land & store the goods either on shore or afloat, & reship & forward the same at the co.'s expense, but at merchant's risk." When the *Mooltan* arrived at Colombo riots had broken out there, which seriously interfered with the employment of coolie labour & the use of lighters into which cargo had to be discharged, & in consequence of these difficulties & the exigencies of the mail service the *Mooltan* left Colombo without having discharged pltfs.' lead, & proceeded to Bombay to get the Indian mail there. The *Mooltan* would have been seriously delayed if she had waited at Colombo to discharge pltfs.' lead. At Bombay the lead was transhipped into another steamer, which, while taking it back to Colombo, stranded, & in consequence a portion of the lead was lost. Pltfs. sued to recover the value of the lead that was lost, & the repayment of certain money paid under protest as a general average deposit, alleging that the loss occurred on a voyage from Bombay to Colombo which was not the voyage contemplated:—*Held:* (1) under the clause in the bill of lading giving defts. liberty to carry goods beyond their port of destination & to reship & forward the same to that port, defts. were entitled to carry the lead on to Bombay & to send it back to Colombo by another steamer, inasmuch as the parties must have contemplated that as the *Mooltan* was a mail steamer she would have to arrive at & leave the various ports at fixed times, & could not therefore be expected to remain at an intermediate port for an unusual time to discharge her cargo; (2) as the lead was lost by an excepted peril in the course of the voyage back from Bombay to Colombo, defts. were protected from liability.—BROKEN HILL PROPRIETARY CO., LTD. *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., [1917] 1 K. B. 688; 86 L. J. K. B. 273; 116 L. T. 635; 14 Asp. M. L. C. 116; 22 Com. Cas. 178.

*Annotation:*—**Reid.** Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 646.

**3282.** —— —— **Negligence in transhipment.**]—ALLAN BROTHERS & CO. *v.* JAMES BROTHERS & CO., No. 2220, *ante*.

**3283.** ——————.]—WILSON (THOMAS), SONS & CO., LTD. *v.* S.S. GALILEO (CARGO EX), THE GALILEO, No. 2219, *ante*.

**3284.** —— —— **Negligent stowage on ship to which goods transferred.**]—ALLAN BROTHERS & CO. *v.* JAMES BROTHERS & CO., No. 2220, *ante*.

**3285.** —— —— **Goods carried beyond destination.**]—A bill of lading provided (*inter alia*), that if the master reasonably anticipated that delivery would be impeded at the port of delivery by strikes, he might at any point of the transit, at the risk & expense of the owners of the goods, tranship or land or otherwise dispose of the cargo, or he might proceed on the voyage with the whole or part of the goods, & discharge the same on the return voyage, or forward them to their destination from another port, & if the discharge of the cargo was or threatened to be impeded by absence from whatever cause of facilities of discharge, he was to have liberty at ship's expense, but shipper's risk, to put the whole of the cargo into hulk, lighter, etc. Transhipment of cargo for ports where the ship did not call, or for shipowners' purposes, was to be at shipowners' expense. The bill of lading also provided that goods over-carried should be returned at ship's expense. Pltfs.' cargo was shipped under the bill of lading for London, but the vessel did not call there in consequence of a strike. She proceeded to Liverpool, where the cargo was transhipped & brought to London. In an action brought to recover the expenses of transhipment & dock dues:—*Held:* on the true construction of the bill of lading, the expenses in question were payable by the shipowners.—WILES & CO., LTD. *v.* OCEAN S.S. CO., LTD. (1912), 107 L. T. 825; 57 Sol. Jo. 213.

**3286. Right of shipowner—To abandon voyage.**]—Under a bill of lading goods were shipped on board a steamship "bound, subject to the liberties

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**PART VII. SECT. 6, SUB-SECT. 4.—B.**

a. *Liability of shipowner.*] — A carrier who undertakes to convey goods from Quebec to Chicago, with power to tranship at Kingston, complies with the usages of that port by transhipping from a steamer into a sailing craft, & is further not responsible for the loss of such goods, occasioned by tempestuous weather, in which such sailing craft is wrecked.—WARREN *v.* HENDERSON (1858), 8 L. C. R. 108.—CAN.

b. —— *Where provision for transhipment—At risk of company carrying goods when lost.*]—MERCHANTS' DESPATCH TRANSPORTATION CO. *v.* HATELY (1887), 14 S. C. R. 572.—CAN.

hereafter mentioned, for London . . . with liberty to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route . . . with liberty either before shipment or at any period of the voyage, & so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship, whether belonging to the co. or not, or transhipment or land & store . . . & thence reship on the steamship or any other steamship, whether belonging to the co. or not, to be carried & delivered (subject to certain exceptions, limitations, & conditions) at the port of London." Among the excepted perils set out in the bill of lading was the following clause numbered 16: "Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by a steamer of any other line shippers & consignees are to be bound by all clauses & conditions of the usual bill of lading of such steamer." During the voyage the destination of the vessel on which the goods were shipped was changed from London to Cardiff, where the goods were transhipped into a small steamer, & by it the goods were carried to London. In an action by the consignees claiming damages on the ground that by abandoning the voyage to London the shipowners lost the protection of all exceptions in their favour in the bill of lading:—*Held:* (1) the exceptions were wide enough to cover the total abandonment of the final destination to London & were reasonable & did not defeat the object of the bill of lading contract to carry the goods to London; (2) the words "other line" in Clause 16 of the bill of lading meant merely another steamer; & did not therefore compel the shipowners to transhipment the goods into a "liner" as distinguished from a small trading steamer.—HADJI ALI AKBAR & SONS, LTD. *v.* ANGLO-ARABIAN & PERSIAN S.S. CO., LTD. (1906), 95 L. T. 610; 22 T. L. R. 600; 10 Asp. M. L. C. 307; 11 Com. Cas. 219.

*Annotation:*—*As to* (1) **Reld.** Morrison *v.* Shaw, Savill & Albion Co., [1916] 1 K. B. 747.

**3287. Construction of terms—"Other line"—Not construed to mean "liner."**]—HADJI ALI AKBAR & SONS, LTD. *v.* ANGLO-ARABIAN & PERSIAN S.S. CO., LTD., No. 3286, *ante*.

**3288. —— "Transhipped"—Whether includes putting into lighters.**]—WILSON (THOMAS), SONS & CO., LTD. *v.* S.S. GALILEO (CARGO EX), THE GALILEO, No. 2219, *ante*.

### *C. In Interest of Shipowner.*

#### *(a) In General.*

**Duty of master to convey cargo in same ship.**]—*See* Sect. 6, sub-sect. 2, A., *ante*.

**3289. Right of owner or master to transhipment.**]—SHIPTON *v.* THORNTON, No. 3131, *ante*.

**3290. —— Duty to protect interests of all persons concerned.**]—THE LORD COCHRANE (1844), 2 Wm. Rob. 320; 3 Notes of Cases, 172; 3 L. T. O. S. 487; 8 Jur. 714; 166 E. R. 775.

*Annotations:*—**Reld.** The Don Francisco (1862), Lush. 468; The Ollivier (1862), 6 L. T. 259; The Onward (1873), L. R. 4 A. & E. 38; The Pontida (1884), 9 P. D. 102.

**3291. —— Duty to communicate with owner.**]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante*.

**3292. —— ——.**]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante*.

**3293. —— Ship damaged by collision.**]—A cargo was shipped by pltf. on defts.' vessel under a charterparty & bill of lading, not excepting the negligence of the master & crew. During the voyage, & through the negligence of the masters & crews of both ships, the vessel came into collision with another, & was so much damaged as to render it necessary to discharge her cargo at a port of refuge, &, after temporary repairs, to complete the voyage in ballast The master transhipped the cargo with the knowledge, but without the assent or dissent of pltf., into three other vessels, under bills of lading excepting the negligence of the masters & crews. Two of these vessels with their cargoes were, through the negligence of their masters & crews, lost before reaching the port of discharge. Defts. obtained a decree limiting their liability arising out of the collision to £8 per ton & the proceeds were distributed to claimants, of whom pltf. was not one. In an action for non-delivery of the portion of the cargo lost:—*Held:* defts. were liable; for the loss did not arise from an excepted peril, & the transhipment, though justifiable, was for the purpose of earning the freight under the charterparty.

I find that the transhipment of the cargo from the *Bernina* to the three other steamers was justifiable & prudent & that the cargo was shipped in the three steamers on account of the defts. & to enable them to earn their freight (HANNEN, P.). —THE BERNINA (1886), 12 P. D. 36; 56 L. J. P. 38; 56 L. T. 450; 35 W. R. 214; 3 T. L. R. 175; 6 Asp. M. L. C. 112.

*Annotation:*—**Reld.** Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171.

**3294. —— Repair of ship inexpedient—Further carriage in repaired ship inexpedient.**]—HANSEN *v.* DUNN, No. 3220, *ante*.

**3295. Whether duty of master to tranship.**]—COOK *v.* JENNINGS, No. 4765, *post*.

**3296. ——.**]—SHIPTON *v.* THORNTON, No. 3131, *ante*.

**3297. ——.**]—THE LORD COCHRANE (1844), 2 Wm. Rob. 320; 3 Notes of Cases, 172; 3 L. T. O. S. 487; 8 Jur. 714; 166 E. R. 775.

*Annotations:*—**Reld.** The Don Francisco (1861), Lush. 468; The Ollivier (1862), 6 L. T. 259; The Onward (1873), L. R. 4 A. & E. 38; The Pontida (1884), 9 P. D. 102.

**3298. ——.**]—THE JESSIE MILLER, HEYDORN *v.* BIBBY (1855), 10 L. T. 791; 25 L. T. O. S. 199.

**3299. —— Application of law of ship's flag.**]—THE BAHIA, No. 4768, *post*.

**3300. —— Right to abandon voyage—Expense of repair exceeding value of ship & freight.**]—A cargo of wheat was insured from O. to L., & the vessel was damaged & repaired, & vessel & cargo were hypothecated for repairs, by a bottomry bond, & afterwards the vessel was wrecked & towed into the port of C. by salvors. The cargo

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**PART VII. SECT. 6, SUB-SECT. 4.—C. (a).**

**3289 i.** *Right of owner or master to tranship.*]—If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination & earn the freight. The option to tranship must be exercised within a reasonable time, & if repairs are decided upon they must be effected with reasonable dispatch or otherwise the owner of the cargo becomes entitled to his goods.—OWEN *v.* OUTERBRIDGE (1896), 26 S. C. R. 272.—CAN.

c. *Liability of shipper for harbour dues.*]—A., having entered into an engagement with B. to carry goods from Liverpool to Hamilton, for a certain sum per ton of forty cubic feet, transhipped them at Montreal, a port on the line of route, where harbour dues were charged, & sent them by rail from there. Upon an action brought for harbour dues thus charged & paid

*Sect. 6.—The voyage: Sub-sect. 4, C. (a) & (b), & D.; sub-sect. 5, A. & B. (a).]*

was damaged, but part of it could have been dried & conveyed in a merchantable condition to L., the port of discharge. Proceedings were taken in the Admlty. ct., & a sum was awarded on the bottomry bond, & another sum for salvage :—*Held :* (1) in determining whether it was "practicable" to send the whole or part of the cargo to its place of destination in a marketable state, the jury ought to have ascertained the costs of unshipping, drying, warehousing & transhipping the cargo into a new bottom, the cost of the difference of transit to the port of discharge if it could be only effected at a higher than the original rate of freight, & the amount of the salvage in proportion to the value of the cargo saved ; the loss would have been total if the aggregate of those items had exceeded the value of the cargo at L., but if the aggregate would not have exceeded the value of the cargo or the part saved, then the loss would have been only partial ; (2) the sum paid to the parties entitled under the bottomry bond, & to the costs in the Admlty. Ct., could not be taken into account. —ROSETTO *v.* GURNEY (1851), 11 C. B. 176 ; 20 L. J. C. P. 257 ; 17 L. T. O. S. 242 ; 15 Jur. 1177 ; 138 E. R. 438.

*Annotations :—As to* (1) **Apprvd.** Farnworth *v.* Hyde (1866), L. R. 2 C. P. 204. **Consd.** Macbeth *v.* Maritime Insce., [1908] A. C. 144. **Refd.** The Newport (1858), Sw. 335 ; Great Indian Peninsula Ry. *v.* Saunders (1861), 1 B. & S. 41 ; Adams *v.* Mackenzie (1863), 13 C. B. N. S. 442 ; The Bahia (1864), 11 Jur. N. S. 90 ; Kemp *v.* Halliday (1866), 6 B. & S 723 ; Kidston *v.* Empire Marine Insce. (1866), L. R. 1 C. P. 535 ; Meyer *v.* Ralli (1876), 1 C. P. D. 358 ; Svendsen *v.* Wallace (1885), 10 App. Cas. 404 ; Assicurazioni Generali *v.* S.S. Bessie Morris Co. (1892), 61 L. J. Q. B. 754 ; British & Foreign Marine Insce. *v.* Sanday, [1916] 1 A. C. 650 ; Wilson Bobbin Co. *v.* Green, [1917] 1 K. B. 860.

**3301.** —— —— ——.]—Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value together with the freight when repaired, the master is justified in abandoning the voyage, & is not bound as agent of his owner to send the goods on in another bottom.

In an action upon a policy on goods from Cadiz to Monte Video & Buenos Ayres, & also "on cash on account of freight, £216," the declaration alleged the shipment of the goods & the prepayment of the £216 on account of freight, & then proceeded to aver that, whilst prosecuting the voyage, the vessel encountered a storm, & sustained so much damage that she became & was disabled from proceeding without being repaired, & could not be repaired so as to proceed on the voyage without incurring an expense greater than her value would have been when repaired, together with the freight which she would have earned on the said voyage ; that, the ship being so disabled from continuing the voyage with the goods on board, the master was obliged to & did abandon the voyage & the earning of the residue of the freight ; that the freighter procured two other vessels to carry the goods on, at a rate of freight exceeding the freight originally payable under the charter-party ; & that the £216 so paid in cash on account of freight as aforesaid, by reason of the premises, became & was wholly lost to pltf. The declaration then went on to aver that one of the substituted vessels sustained so much damage that she was obliged to put back to Gibraltar ; & there unload, & the goods were sent on to Monte Video by the other ; & that, by reason of the premises, pltf. sustained a total loss of the £216 so paid in cash on account of freight as aforesaid, & was put to charges in transhipping the goods, etc. :—*Held :* (1) the declaration disclosed a sufficient justification for the master's abandoning the voyage, & consequently pltf. was entitled to recover as for a total loss of the pre-paid freight. (2) Plea, that the substituted vessel into which the goods were first transhipped, at the time the goods were first at risk on board of her was not seaworthy :—*Held :* a bad plea.—DE CUADRA *v.* SWANN (1864), 16 C. B. N. S. 772 ; 143 E. R. 1329.

*Annotations :—As to* (1) **Refd.** The Bahia (1864), 11 Jur. N. S. 90 ; Notara *v.* Henderson (1872), L. R. 7 Q. B. 225 ; Atwood *v.* Sellars (1879), 4 Q. B. D. 342.

**3302.** —— **Where ship repairable.**]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante.*

**3303. Right to reasonable time—To carry on cargo or tranship.**]—THE GALAM (CARGO EX), No. 4075, *post.*

**3304.** —— ——.]—THE BAHIA, No. 4768, *post.*

**3305.** —— ——.]—THE SOBLOMSTEN, No. 4780, *post.*

**3306. Preservation of cargo until transhipment.**]—HANSEN *v.* DUNN, No. 3220, *ante.*

**3307. Decision not to repair or tranship—Necessity to inform owners.**]—HANSEN *v.* DUNN, No. 3220, *ante.*

*(b) Right to Freight.*

*See* Part VIII., Sect. 3, sub-sects. 3, 4, B. (*d*), *post.*

*D. In Interest of Cargo Owner.*

**3308. Master as agent of cargo owner—When agency arises—Only ex necessitate rei.**]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante.*

**3309.** —— **Whether bound to tranship.**]—THE GRATITUDINE, No. 3333, *post.*

**3310.** —— ——.]—SHIPTON *v.* THORNTON, No. 3131, *ante.*

**3311.** —— —— **At own expense.**]—THE EXPRESS, No. 3201, *ante.*

**3312.** —— **Right to bind cargo owner—Provision of full cargo.**]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante.*

**3313.** —— —— **False representation by master.**]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante.*

**3314.** —— —— **Duty to communicate with owner.**]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante.*

**3315.** —— —— ——.]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante.*

**3316.** —— —— **Fraudulent agreement for freight.**]—MATTHEWS *v.* GIBBS, No. 3276, *ante.*

**3317.** —— **Duty to reship goods on owners' ship after repair.**]—ATWOOD *v.* SELLAR & CO., No. 3136, *ante.*

**3318. Duty of shipowner to tranship.**]—SHIPTON *v.* THORNTON, No. 3131, *ante.*

**3319.** ——.]—CARALI *v.* XENOS, No. 3279, *ante.*

**3320.** ——.]—ATWOOD *v.* SELLAR & CO., No. 3136, *ante.*

**3321.** ——.]—HANSEN *v.* DUNN, No. 3220, *ante.*

**3322. Right of shipowner to freight—Transhipment by instructions of Vice-Consul at foreign port—As agent for cargo owners.**]—Defts. chartered

by A. :—*Held :* the contract being to deliver the goods at so much per ton B. was entitled to have them delivered at the price free of all expense.—EDMONSTONE *v.* YOUNG (1862), 12 C. P. 437.—CAN

**PART VII. SECT. 6, SUB-SECT. 4.—D.**

**3318 1.** *Duty of shipowner to tranship.*] —If the goods are such as would perish before repairs could be made the shipowner should either tranship, deliver them up, or sell, if the cargo owner does not object, & his duty is the same if a portion of the cargo, severable from the rest, is perishable.—OWEN *v.* OUTERBRIDGE (1896), 26 S. C. R. 272. CAN.

pltf.'s ship from London to Buenos Ayres, there to deliver her cargo, reload, & proceed to a port between Gibraltar & Antwerp, freight for voyage out & home £1,300, if delivered at Gibraltar, in Spain, London or Liverpool, £200 to be paid in London, on the vessel's departure; the remainder on final delivery of the homeward cargo. The ship proceeded to Buenos Ayres, delivered her cargo there, & sailed again with a cargo of hides, which defts. consigned to Gibraltar. At Fayal the ship & about one third of the hides were lost. The Vice-Consul of Fayal, acting on behalf of defts., at the request of the captain of the ship, transmitted the residue of the hides, by another vessel, to defts.' consignees at Gibraltar, where they were accepted, & the freight from Fayal to Gibraltar paid by defts.:—*Held:* pltf. was not entitled to the £1,300 freight; he was not entitled *pro rata itineris* for freight to Buenos Ayres, or from Fayal to Gibraltar, but he was entitled to freight *pro rata* from Buenos Ayres to Fayal.—MITCHELL *v.* DARTHEZ (1836), 2 Bing. N. C. 555; 2 Scott, 771; 1 Hodg. 418; 5 L. J. C. P. 154; 132 E. R. 217.

*Annotation:*—**Consd.** Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171.

SUB-SECT. 5.—HYPOTHECATION OF CARGO.

*A. In General.*

**3323. Respondentia & bottomry bonds distinguished.**]—GORE *v.* WYNNE (1829), L. & Welsb. 39; Mood. & M. 393, N. P.

**3324.** ——.]—THE SULTAN (CARGO EX), No. 3379, *post.*

**3325. Bond partly valid partly invalid—Part of property not exposed to maritime risk.**]—THE SULTAN (CARGO EX), No. 3379, *post.*

**Jurisdiction of Admiralty Court.**]—*See* ADMIRALTY, Vol. I., pp. 121–126.

**Hypothecation of ship.**]—*See* Part IV., Sect. 3, *ante.*

*B. Authority of Master to Hypothecate.*

*(a) In General.*

**3326. General rule—In case of necessity.**]—(1) The master of the Copenhagen entered into a written contract with the owners of the three vessels; & I think the master had a right, under such circumstances of necessity, to bind both the owners of the ship & cargo in acting for their service: for a master, under circumstances of necessity, has a general right to hypothecate either of them, or to sell the cargo, or to throw any part of it overboard (SIR WILLIAM SCOTT).

(2) When a ship having sustained damage at sea, comes in for repairs, & becomes unfit to perform the function for which she is engaged, to contain & to convey the cargo: that in such a case the owners of the ship should claim the expenses of repairs from the owners of the cargo, & at the same time refuse to pay any part of the charges of transhipping & conveying the cargo would be very unreasonable. The expenses, severally, may be matter of simple average, or the whole may be matter of general average. General average is for a loss incurred, towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit & preservation of the whole. Simple or particular average is not a very accurate expression; for it means damage incurred by or for one part of the concern, which that part must bear alone; so that in fact it is no average at all, but still the expression is sufficiently understood, & received into familiar use. The loss of an anchor or cable, the starting of a plank, are matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage, it would be a matter of simple average, which the goods alone must bear; & there might be a simple average for which each would be severally liable under a misfortune happening to both ship & cargo at the time same, & from a common cause; as if a water spout should fall on a cargo of sugars, & a plank from the same violence should start at the same time. General average is that loss to which contribution must be made by both ship & cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both. In this case the transhipping, or rather the unloading of the goods, seems to have been for the common benefit of both; for it was necessary to unload the ship, as well for its own repair, which was become indispensable, as for the preservation of the cargo; & therefore the expense of that transhipment, or rather of the unloading, seems to have upon it the character of a general average, though, possibly, it may be hardly worth while to consider the unloading as a charge distinct from the transshipment; & if so, it should seem to belong to the cargo only The expense of conveying the cargo to its ultimate destination belongs to the cargo only, the contract having been in effect determined by the payment of freight *pro rata itineris.* As to the expense of the repairs, I think that there is no ground to charge the cargo with that; for the reason, that the ship & the cargo being completely separated by the determination of the contract, & new vehicles provided at the expense of the cargo, the cargo is not answerable for those repairs which it in no degree occasioned (SIR WILIAM SCOTT).—THE COPENHAGEN, (1799), 1 Ch. Rob. 289; 165 E. R. 180.

*Annotations:*—*As to* (2) **Consd.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Reld.** Hallett *v.* Wigram (1850), 9 C. B. 580; Hall *v.* Janson (1855), 4 E. & B. 500; Atwood *v.* Sellar (1880), 5 Q. B. D. 286; Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298.

**3327.** —— ——.]—Where a master of a ship at a foreign port borrows money on a bottomry bond for the repairs of the ship, secured upon the ship, freight, & cargo, & the bond is afterwards put in force, & the cargo seized, & the owner of the cargo, to release it, pays the money, he may recover from the owner of the vessel the money so paid.

It is the primary duty of the master, acting for the owner, to do his best to convey the cargo to its place of destination in the same ship, & in case of damage to repair it. . . . The owner of the goods is under no obligation to contribute to any expenses except such as constitute a general average. . . . To accomplish the object of repairing the vessel, the master is authorised to bind his owner by causing the repairs to be done on his credit, in which case the tradesman may sue the owner, or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner, or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale, . . . & in this case the shipper may sue the shipowner, or the master may hypothecate part of the whole of the cargo, which gives a right to the proprietor of it to recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the shipowner on his account, & for his use to enable him to do his duty by repairing the vessel, & in all the shipowner must pay the lender. The agency

*Sect.* 6.—*The voyage: Sub-sect.* 5, *B.* (*a*).]

to borrow, by these various modes, & so to bind his employer to the lender, is cast upon the master by the necessity of the case (POLLOCK, C.B.).—DUNCAN *v.* BENSON (1847), 1 Exch. 537; 17 L. J. Ex. 238; 10 L. T. O. S. 228; *on appeal, sub nom.* BENSON *v.* DUNCAN (1849), 3 Exch. 644, Ex. Ch.

*Annotations:*—**Apld.** Hallett *v.* Wigram (1850), 9 C. B. 580. **Consd.** The Olivier (1862), Lush. 484; The Lizzie (1868), 19 L. T. 71; The Eugénie (1873), L. R. 4 A & E. 123; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. **Refd.** Atkinson *v.* Stephens (1852), 7 Exch. 567; Stainbank *v.* Shepard (1853), 13 C. B. 418; Gibbs *v.* Grey, Grey *v.* Gibbs (1857), 2 H. & N. 22; The Union (1860), 30 L. J. P. M. & A. 17; Lloyd *v.* Guibert (1865), 6 B. & S. 100; The Staffordshire (1871), 25 L. T. 137; The Onward (1873), L. R. 4 A. & E. 38; Atwood *v.* Sellar (1879), 4 Q. B. D. 342.

**3328.** —— ——.]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante*.

**3329.** —— ——.]—(1) The extent of the authority conferred on the master of a vessel to bind the owners either of the ship or cargo, is derived from, & governed by, the law of the flag; & the existence of the necessity which the maritime law requires to validate the hypothecation of the ship & cargo by bottomry, is to be ascertained by evidence in the usual manner.

(2) The meaning of the term "necessity," in respect of hypothecation by the master, being analogous to its meaning in other parts of the law.

The master of a vessel, chartered from Galveston, United States, to Liverpool, received before sailing from the charterer various sums in part payment of the freight, & after taking on board a cargo, sailed for the port of destination. The vessel, having in the prosecution of her voyage met with bad weather, & suffered damage, put into Bermuda, where the master incurred heavy expenses for repairs & supplies. The repairs were executed, & the supplies furnished, without any promise of a bottomry bond; but the law of Bermuda giving a right of arrest of the ship to the creditors for the repairs & supplies, the master, to complete the voyage, having written to the agent of the owners of the ship, & of the cargo, & not receiving any answer within the time an answer might have been returned, raised the funds necessary for the payment of such supplies on bottomry of the ship, cargo, & freight. The expenses of remaining at the port were very heavy, the cargo was falling greatly in value, & communication was uncertain. On a suit brought by the assignees of the bond, the owners of the ship not opposing, the ct. below pronounced for the validity of the bond, so far as it regarded the ship, cargo, & freight, & the ship was thereupon sold, but produced a sum far less than sufficient to cover the sum due on the bond. The consignees of the cargo, who were also entitled to the freight, claimed to retain in their hands the amount of freight, with interest & insurance, advanced by them in part payment before the commencement of the voyage, & paid the freight, short of that amount, into ct. The ct. below disallowed this abatement, & ordered the whole freight to be paid into ct. On appeal:—*Held:* (3) in the circumstances, the master was warranted in resorting to a bottomry bond, & the necessity of the case warranted the hypothecation of the cargo as well as the ship & freight, but (4), as the latter was, by the agreement between the charterer & the master, in part paid in advance, the retention of the amount of such prepayment by the consignees of the cargo, upheld, as the master, by hypothecating the chartered freight, could give no right to more freight than the owner had a right to demand from the charterer.

(5) In respect of communication with the owner either of ship or cargo, the possibility of so doing must be construed by estimating the cost & risk incidental to the delay from the attempt to make such communication, & the probability of failure after every execution should have been made (SIR WILLIAM ERLE).—DROEGE *v.* SUART, THE KARNAK (1869), L. R. 2 P. C. 505; 6 Moo. P. C. C. N. S. 136; 38 L. J. Adm. 57; 21 L. T. 159; 17 W. R. 1028; 3 Mar. L. C. 276; 16 E. R. 677, P. C.

*Annotations:*—*As to* (3) **Consd.** The Ida (1872), L. R. 3 A. & E. 542; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. **Refd.** The St. George, [1926] P. 217. *As to* (5) **Consd.** The Staffordshire (1871), 25 L. T. 137. *Generally*, **Refd.** Currie *v.* Bombay Native Insce. (1869), L. R. 3 P. C. 72; The Empire of Peace (1869), 39 L. J. Adm. 12; The Dora Forster, [1900] P. 241.

**3330.** —— ——.]—To constitute a valid bottomry bond the money must be required for the necessities of the ship, & the authority of the master to borrow money on bottomry is based on such necessity. Reasonable inquiries by a lender may be evidence of his *bona fides*, but will not make a bond valid in respect of the several items for which it is given to the full extent of such items unless they are actually & entirely necessary.

By the law of England the master in a foreign port has no authority to bind the shipowner or cargo owner, except in case of necessity. The rule should be even more stringent as regards the cargo owner, for the master does not take goods on board as his agent, & is not his agent at all, unless an overruling necessity arises during the voyage (BRETT, M.R.).—THE PONTIDA (1884), 9 P. D. 177; 53 L. J. P. 78; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. L. C. 330, C. A.

**3331. What constitutes necessity—Meaning of term.**]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**3332.** —— **Repairs to ship.**] — THE VIER GEBROEDERS (1786), cited in 3 Ch. Rob. at p. 270; 165 E. R. 460.

*Annotation:*—**Apld.** The Gratitudine (1801), 3 Ch. Rob. 240.

**3333.** —— ——.]—(1) A master may hypothecate his cargo on freight for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage.

**PART VII. SECT. 6, SUB-SECT. 5.—B. (*a*).**

**3332 i.** *What constitutes necessity—Repairs to ship.*]—The master of a ship, in hypothecating the cargo as well as the ship for repairs executed at a foreign port to enable the vessel to prosecute the voyage, acts within the scope of his authority, thereby rendering the shipowners liable to indemnify the owners of the cargo in the event of the same being attached or sold by the holders of the *respondentia* bond, & that, irrespective of the validity of the bond as in a question between the holders thereof & the shipowners.—ANDERSTON FOUNDRY CO. *v.* LAW (1869), 7 Macph. (Ct. of Sess.) 836.—**SCOT.**

**3332 ii.** —— ——.]—A ship on a voyage from Newcastle to Liban came into collision with another vessel & put into Leith for repairs. The captain, who, along with the mate was owner of the ship, incurred a debt of £580 to a shipbroker, which included damages payable to the other vessel the cost of repairs, & other charges. Only a small part of this fund was chargeable against cargo, the bulk of it being chargeable only against ship & freight. The captain had no means of his own except a sum of £80. He granted a bond of bottomry over ship, freight, & cargo for £500. The owners of the cargo who were resident in Newcastle, got notice of the captain's intention to hypothecate the cargo, but refused to consent. The ship was sold for £155. The cargo was also sold:—*Held:* except to the extent of the freight, the bondholder had no right to the price of the cargo, as the master, in the circumstance, had no right to hypothecate it.—DYMOND *v.* SCOTT (1877), 5 R. (Ct. of Sess.) 196.—**SCOT.**

(2) Nothing can be better settled than that the master has a right to exercise this power [jettisoning cargo], in case of imminent danger. He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be that the ship should contribute its average proportion (SIR WILLIAM SCOTT).

(3) Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him. . . . What must be done? He must in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. . . . He is not absolutely bound to tranship. . . . If he had not the means of transhipping he is under an obligation to sell (SIR WILLIAM SCOTT).—THE GRATITUDINE (1801), 3 Ch. Rob. 240; 165 E. R. 450.

*Annotations:—As to* (1) **Consd.** Hussey *v.* Christie (1807), 13 Ves. 594; Morris *v.* Robinson (1824), 5 Dow. & Ry. K. B. 34; The Lord Cochrane (1844), 2 Wm. Rob. 320; La Constancia (1846), 2 Wm. Rob. 487; Benson *v.* Duncan (1849), 3 Exch. 644; The Jonathan Goodhue (1858), Sw. 355; The Karnak (1868), L. R. 2 A. & E. 289. *As to* (3) **Consd.** Freeman *v.* East India Co. (1822), 5 B. & Ald. 617; Wilkinson *v.* Wilson, The Bonaparte (1853), 8 Moo. P. C. C. 459; Duranty *v.* Hart (1863), 2 Moo. P. C. C. N. S. 289; The James Seddon (1866), L. R. 1 A. & E. 62; The Lizzie (1868), L. R. 2 A. & E. 254; Notara *v.* Henderson (1870), L. R. 5 Q. B. 346; Gunn *v.* Roberts (1874), 43 L. J. C. P. 233. **Refd.** Vlierboom *v.* Chapman (1844), 13 M. & W. 230; Williamson *v.* Wilson (1851), 18 L. T. O. S. 161; The Olivier (1862), Lush. 484; The Patria (1871), L. R. 3 A. & E. 436; Metcalfe *v.* Brittania Ironworks Co. (1876), 1 Q. B. D. 613; The Gaetano & Maria (1882), 7 P. D. 137. *Generally*, **Refd.** Idle *v.* Royal Exchange Assce. (1819), 3 Moore, C. P. 115; Cannan *v.* Meaburn (1823), 1 Bing. 243; Robertson *v.* Clarke (1824), 1 Bing. 445; The Cognac (1832), 2 Hag. Adm. 377; Rayne *v.* Benedict (1841), 5 Jur. 1176; La Constancia (1845), 2 Wm. Rob. 404; The Osmanli (1849), 3 Wm. Rob. 198; Hallett *v.* Wigram (1850), 9 C. B. 580; Gibbs *v.* Grey, Grey *v.* Gibbs (1857), 2 H. & N. 26; The Priscilla (1859), Lush. 1; Cammell *v.* Sewell (1860), 5 H. & N. 728; The Soblomsten (1866), L. R. 1 A. & E. 293; The Onward (1873), L. R. 4 A. & E. 38; The Pontida (1884), 9 P. D. 102; The St. George, [1926] P. 217.

**3334.** —— ——.]—DUNCAN *v.* BENSON, No. 3327, *ante*.

**3335.** —— **Value of cargo falling—Expenses of remaining at port heavy.**]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**3336.** —— **Continuation of voyage impossible—Without payment for repairs or supplies.**]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**3337.** —— **Heavy expenses of remaining in port.**]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**3338. Necessity for prospect of benefit to cargo owner.**]—THE GRATITUDINE, No. 3333, *ante*.

**3339.** ——.]—THE LORD COCHRANE (1844), 2 Wm. Rob. 320; 3 Notes of Cases, 172; 3 L. T. O. S. 487; 8 Jur. 714; 166 E. R. 775.

*Annotations:—***Consd.** The Onward (1873), L. R. 4 A. & E. 38. **Refd.** The Don Francisco (1861), Lush. 468; The Pontida (1884), 9 P. D. 102. **Mentd.** The Ollivier (1862), 6 L. T. 259.

**3340.** ——.]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante*.

**3341.** ——.]—(1) An American vessel laden with a cargo of timber, in the prosecution of a voyage, sustained damage, & was compelled to put into the Mauritius to repair & refit. She arrived there on June 11, 1870, & her master, being without funds, placed the ship in the hands of H. & co., a firm at the Mauritius, & they, before any attempt had been made to obtain money on the personal credit of the owners of the ship, who were affluent merchants in New York, proposed to advance money for the repairs on the master's draft on London, on his giving a bottomry bond on the ship, freight, & cargo, as collateral security. The master & H. & co., on July 29, wrote to the owners of the ship, informing them of this proposal, & on the same day the master & H. & co. wrote to the owners of the cargo, informing them that the vessel had sustained damage, & would have to undergo repair; but the letters to the owners of the cargo omitted all reference to the proposed loan on bottomry, & informed the owners of the cargo that they should hear further particulars by the next opportunity. The letters written by the master & H. & co. to the owners of the ship were forwarded by the owners of the ship to the owners of the cargo; but the owners of the cargo did not receive these letters till Sept. 8, when it was too late for them to communicate with the master by post. On Oct. 15, after the repairs had been completed, the master gave bills & executed a bottomry bond on the ship, freight, & cargo, according to the terms of the proposal made by H. & co., which had long before been assented to by him. The bills were made payable to H. & co., & were drawn on B. & co., their agents in London, at ninety days' sight. H. & co. gave the master a memorandum, stating that the bills were taken as collateral security, & that the bond should be cancelled on the prompt payment by the owners of the vessel to B. & co., of the amount of the bills. On Oct. 15 the ship sailed from the Mauritius, & safely arrived at Liverpool, her port of discharge, on Feb. 7, 1871. After the ship had sailed, the owners of the cargo were for the first time informed by letter from H. & co. that the bottomry bond had been given. The bond was transferred, & the bills of exchange were indorsed to B. & co. Neither the master nor the owners of the vessel had any funds in the hands of B. & co., & they neglected to provide funds to take up the bills, & informed B. & co. that they had determined not to take up the bond. In a suit to enforce the bond against the ship, freight, & cargo:—*Held:* the bond was invalid as to the cargo, on the ground that there was not, under the circumstances of the case, such a communication with the owners of the cargo as to satisfy the law.

A mere statement of injuries done to the ship, & of the consequent necessity of repairs, which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners. The law . . . may not require that the words bottomry of cargo should be used, but it requires that the fact itself should be stated, or, at least, that it should be an obvious & irresistable inference from circumstances stated (SIR ROBERT PHILLIMORE).

*Semble*, the bond was also invalid as to the cargo, upon the ground that the prospect of benefit to the cargo was not such as to justify the master in granting a bottomry bond upon the cargo.

The master is to remember the foundation of his authority to give a bottomry bond on cargo is the prospect of benefit, direct or indirect, to the proprietor of it. . . . He may sell a part of the cargo, but not the whole. Why? Because the former act may be, the latter cannot be, for the benefit of the proprietor. . . . He must endeavour to accomplish the contract between two parties whom, for the occasion, he

*Sect. 6.—The voyage: Sub-sect. 5, B. (a) & (b), & C.*]

represents for the common benefit of ship & cargo & therefore, as in the case of the sale he may not sell the whole cargo, so neither may he do what is in effect the same—repair the ship at the sole expense of, & without reasonable probability of benefit to, the cargo. . . . The prospect of benefit must be such as a man of ordinary prudence & knowledge of the subject would in the circumstances entertain. The master must endeavour to hold the balance evenly between his two principals; he must not sacrifice the ship to the cargo or the cargo to the ship. . . . I do not think upon the evidence before me that a reasonable & prudent owner, if present, would have allowed his cargo to be bottomried for such very extensive repairs. He would rather have paid the freight & reshipped the goods (SIR ROBERT PHILLIMORE).—THE ONWARD (1873), L. R. 4 A. & E. 38; 42 L. J. Adm. 61; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. L. C. 540.

*Annotation:—As to* (1) **Apld.** Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156.

**3342. Cargo not yet loaded.**]—THE TRIAL, No. 3383, *post.*

**3343.** ——.]—The master has no authority over the cargo till it is put on board.—THE JONATHAN GOODHUE (1858), Sw. 355; 3 L. T. 559; 166 E. R. 1165.

**3344. Where ship & freight subject to bottomry.**]—THE OSMANLI, No. 3386, *post.*

**3345. By what law governed—Law maritime.**]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante.*

**3346.** —— **Law of the flag.**]—Where a contract of affreightment does not provide otherwise, there, as between the parties to such contract in respect of sea damage & its incidents, the law of the ship should govern.

Pltf., a British subject at Danish West India Island, chartered a ship belonging to defts., who were French, for a voyage from St. Marc, in Haiti, to Havre, London or Liverpool, at the charterer's option, he knowing that the ship was French. The charterparty was entered into by the master in pursuance of his general authority as such, & not by any special authority from the owners. Pltf. shipped a cargo at St. Marc for Liverpool. On her voyage the ship sustained damage from a storm, which compelled her to put into a Portuguese port. There the master properly borrowed money upon bottomry of the ship, freight, & cargo, & repaired her, & she proceeded with the cargo & arrived safe at Liverpool. The bondholder proceeded in the Ct. of Admlty. against the ship, freight, & cargo, which being insufficient to satisfy the bond, he sued defts. as shipowners to indemnify him for the deficiency. Defts. abandoned the ship & freight in such a manner as by the French law absolved them from liability:—*Held:* pltf. was not entitled to recover, because the French law, as being that of the ship, governed the case.—LLOYD *v.* GUIBERT (1865), L. R. 1 Q. B. 115; 6 B. & S. 100; 35 L. J. Q. B. 74; 13 L. T. 602; 2 Mar. L. C. 283; 122 E. R. 1134, Ex. Ch.

*Annotations:—*Apld. The Bahia (1864), Brown & Lush. 292. Consd. Droege *v.* Suart, The Karnak (1869), L. R. 2 P. C. 505; The Empire of Peace (1869), 39 L. J. Adm. 12; The Patria (1871), L. R. 3 A. & E. 436; Nugent *v.* Smith (1875), 1 C. P. D. 19; The Gaetano & Maria (1882), 7 P. D. 137; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589; *Re* Missouri S.S. Co. (1889), 42 Ch. D. 321. [illegible] 328. Reld. The Nina (1867), 17 L. T. 391; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; The San Roman (1872), L. R. 3 A. & E. 583; Moore *v.* Harris (1876), 1 App. Cas. 318; The Moxham M. (1876), 46 L. J. P. 17; The Industric, [1894] P. 58; British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 2 Ch. 502; N. V. Kwik Hoo Tong Handel Maatschappij *v.* Finlay, [1927] A. C. 604. Mentd. James *v.* S. W. Ry. (1872), L. R. 7 Exch. 287; Cohen *v.* S. E. Ry. (1877), 25 W. R. 475; Chamberlain *v.* Napier (1880), 15 Ch. D. 614; De Cleremont *v.* Brasch (1885), 1 T. L. R. 370; Nouvelle Banque de L'Union *v.* Ayton (1891), 7 T. L. R. 377; Abdul Aziz Khan Sahib *v.* Commercial Bank of India (1903), 20 T. L. R. 46; Krell *v.* Henry, [1903] 2 K. B. 740; Shrichand *v.* Lacon (1906), 22 T. L. R. 245; R. *v.* Naguib, [1917] 1 K. B. 359; Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085; Matthey *v.* Curling, [1922] 2 A. C. 180.

**3347.** —— ——.]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante.*

**3348.** —— ——.]—THE GAETANO & MARIA, No. 3358, *post.*

*(b) Necessity for Communication with Owner.*

**3349. Duty to communicate.**]—(1) Bottomry bond upon the ship, freight, & cargo, taken up by the master of a small Swedish vessel at a port in Sweden. Part of the cargo was consigned to England:—*Held:* considering the distance between Sweden & England, & the means of communication, it was essential to the validity of the bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have obtained an answer within a period not inconvenient with the exigency of the circumstances of the case.

(2) A Swedish vessel bound from a port in Sweden to Hull, was driven, by stress of weather, to put back into another port in Sweden. This took place on Nov. 21, 1848. Ten days afterwards the cargo was unladen, & the ship found to be greatly damaged. The repairs were completed, & the cargo re-loaded. The master at once communicated with the owners of the ship, resident in Sweden, who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs, & the British Consul at the port where the vessel lay, wrote on behalf of the master, & as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, & referred to the necessity of repairs. No answer was made to this letter, & the master, in Mar. 1849, hypothecated the ship, freight, & cargo for the money borrowed for the repairs:—*Held:* such letter to the consignees was a sufficient notice to authorise the master raising money by bottomry on the cargo.—WILKINSON *v.* WILSON, THE BONAPARTE (1853), 8 Moo. P. C. C. 459; 14 E. R. 175, P. C.

*Annotations:—As to* (1) Consd. The Sultan (1859), Sw. 504; The Olivier (1862), Lush. 484. Apld. The Hamburg (1864), Brown. & Lush. 253. Distd. The Lizzie (1868), L. R. 2 A. & E. 254. Apld. Australasian Steam Navigation Co. *v.* Morse (1872), 8 Moo. P. C. C. N. S. 482; Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156; Acatos *v.* Burns (1878), 3 Ex. D. 282. Reld. The Cynthia (1852), 16 Jur. 748; Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; The St. George, [1926] P. 217. *As to* (2) Distd. Sieveking *v.* Maas (1856), 27 L. T. O. S. 264. Consd. The Olivier (1862), Lush. 484. Reld. The Rajah of Cochin (1859), Sw. 473; The Onward (1873), L. R. 4 A. & E. 38. *Generally,* Reld. The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36; The Gaetano & Maria (1881), 7 P. D. 1.

**3350.** ——.]—THE ELISE (1868), cited in 37 L. J. Adm. at p. 46.

*Annotation:—*Reld. The Karnak (1868), 37 L. J. Adm. 41.

**3351.** —— **Where practicable.**]—THE CYNTHIA (1852), 16 Jur. 748.

*Annotation:—*Reld. Mackenzie *v.* Poolley (1856), 25 L. J. Ex. 124.

**3352.** —— ——.]—The master of a ship, before giving a bottomry bond on ship, freight, & cargo, is bound as against owners of cargo, to communicate both with the owners of ship & the shippers or consignees of cargo, where such com-

munication is under all the circumstances reasonably practicable; but not otherwise.—THE OLIVIER (1862), Lush. 484; 31 L. J. P. M. & A. 137; 167 E. R. 219; *sub nom.* THE OLLIVIER, 6 L. T. 259; 1 Mar. L. C. 214.

*Annotation:*—**Consd.** The Staffordshire (1871), 25 L. T. 137.

**3353.** —— ——.]—DURANTY *v.* HART, THE HAMBURG (CARGO EX), No. 3142, *ante*.

**3354.** —— ——.]—A master cannot bottomry a ship without communication with his owner if communication be practicable, & *à fortiori* cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation.—KLEINWORT, COHEN & CO. *v.* CASSA MARITTIMA OF GENOA (1877), 2 App. Cas. 156; 36 L. T. 118; 25 W. R. 608; 3 Asp. M. L. C. 358, P. C.

*Annotation:*—**Apld.** The Gaetano & Maria (1881), 7 P. D. 1.

**3355.** —— **Likelihood of difficulty or delay.**]—THE SULTAN (CARGO EX), No. 3379, *post*.

**3356.** —— ——.]—The *Lizzie* sailed from Minatitlan in Jan. 1866, with a cargo for the United Kingdom. Having suffered sea damage, she put into Key West, Feb. 27, & there properly underwent some necessary repairs, which detained her until May 21. The master, not being able to raise money on personal security to defray the expenses of the repairs, gave a bottomry bond, dated May 19, on the ship, freight, & cargo. The master, before hypothecating, did not communicate with the owner or consignees of the cargo by reason of the great delay & uncertainty in the transmission of letters from Key West at that time. The vessel sailed on May 21, & arrived at her port of destination on July 2. A suit having been instituted against the vessel, her freight, & cargo, by the holders of the bottomry bond, the validity of which was contested by the consignees of the cargo:—*Held:* under the circumstances, the master was not bound to communicate with the consignees before hypothecating, & the bond was therefore binding upon the cargo.—THE LIZZIE (1868), L. R. 2 A. & E. 254; 19 L. T. 71; 3 Mar. L. C. 150.

*Annotation:*—**Refd.** The Karnak (1868), L. R. 2 A. & E. 289.

**3357.** —— **No reply received to previous communication.**]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**3358.** —— **Communication unnecessary by law of ship's flag.**]—The master of a foreign ship has power to bind the owner of cargo put on board his ship, by his bottomry bond, provided that it has been duly executed according to the law of the ship's flag. The rule of law, that the cargo is not bound by a bottomry bond executed by the master without previous communication with the cargo-owners, will not be enforced where it is shown that, by the law of the ship's flag, non-communication does not invalidate the bond.—THE GAETANO & MARIA (1882), 7 P. D. 137; 51 L. J. P. 67; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. L. C. 535, C. A.

*Annotations:*—**Consd.** The August, [1891] P. 328; The Industrie, [1894] P. 58. **Refd.** The Gas Float Whitton No. 2, [1896] P. 42.

**3359. Sufficiency of communication—Advertisement.**]—THE NUOVA LOANESE (1852), 17 Jur. 263.

**3360.** —— **Information to consignees of damage to vessel.**]—WILKINSON *v.* WILSON, THE BONAPARTE, No. 3349, *ante*.

**3361.** —— **Must state neccssity for hypothecation.**]—KLEINWORT, COHEN & CO. *v.* CASSA MARITTIMA OF GENOA, No. 3354, *ante*.

**3362. When communication practicable—Question of fact for jury.**]—ACATOS *v.* BURNS, No. 2841, *ante*.

**3363.** —— **What may be taken into consideration—Cost & risk of attempt.**]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**3364. Effect of failure to communicate—Where no means of communicating.**]—The master has a right to hypothecate the ship & cargo though lying in a port of the same country in which the owners reside, provided he has no means of communicating with the owners.—LA YSABEL (1812), 1 Dods. 273; 165 E. R. 1308.

*Annotations:*—**Consd.** Wallace *v.* Fielden, The Oriental (1851), 7 Moo. P. C. C. 398. **Refd.** The Trident (1839), 1 Wm. Rob. 29; The Staffordshire (1871), 25 L. T. 137.

**3365. Effect of insufficiency of communication.**]—THE ONWARD, No. 3341, *ante*.

*Compare* Part IV., Sect. 3, sub-sect. 7, F., *ante*.

*C. Rights of Lender.*

**3366. General rule—No right against cargo until ship & freight exhausted—Bond on ship & cargo.**]—THE PRINCE REGENT (1822), cited in 2 Wm. Rob. at p. 83; 166 E. R. 686.

*Annotations:*—**Consd.** The Dowthorpe (1843), 2 Wm. Rob. 73. **Expld.** The Mary Ann (1845), 9 Jur. 94. **Consd.** The Constancia (1846), 4 Notes of Cases, 512. **Apld.** The Priscilla (1859), Lush. 1. **Refd.** The Fortitude (1843), 2 Wm. Rob. 217; The Bonaparte (1850), 3 Wm. Rob. 298.

**3367.** —— —— **Bond on cargo alone.**]—Where three bonds had been given, one on the ship, another on the cargo, & the third on the ship, the freight not being expressly hypothecated, the wages, pilotage & towage, held to be payable out of the proceeds of the ship & freight rateably, notwithstanding the proceeds of the ship were insufficient to discharge the bonds.—LA CONSTANCIA (1846), 2 Wm. Rob. 460; 4 Notes of Cases, 512; 10 Jur. 845; 166 E. R. 829; *sub nom.* ANON., 7 L. T. O. S. 451; *subsequent proceedings*, 2 Wm. Rob. 487.

*Annotations:*—**Refd.** The Benares (1850), 14 Jur. 581; The Arab (1859), 5 Jur. N. S. 417; Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241; The Ambaticlos, The Cephalonia, [1923] P. 68.

**3368.** —— —— —— **Where other bonds on ship alone.**]—Where three bonds had been given, the first upon the ship alone, the second upon the cargo alone, & the third upon the ship alone:—*Held:* the last bond was entitled to priority, & must be paid out of the proceeds of the ship only; the first bond was payable out of the same proceeds, & if they were insufficient, the bondholder must go unpaid; & the cargo could not be applied to the discharge of the second bond until the proceeds of the ship & the freight were exhausted.—LA CONSTANCIA (1845), 2 Wm. Rob. 404; 4 Notes of Cases, 285; 6 L. T. O. S. 193; 10 Jur. 845; 166 E. R. 808; *subsequent proceedings* (1846), 2 Wm. Rob. 460.

*Annotations:*—**Distd.** The Priscilla (1859), Lush. 1. **Refd.** The Benares (1850), 14 Jur. 581; Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241.

**3369.** — **Bond on ship, freight & cargo.**]—A vessel being at Constantinople, in want of repairs, the master, with the knowledge & approbation of the owner borrowed money on bottomry. The bond was dated Oct. 12, 1858, & was secured on the ship & freight. A second bond on the ship, freight, & cargo, dated Dec. 11, 1858, was granted at Odessa; & a third, also on the ship, freight, & cargo, dated Jan. 13, 1859, at Syra. The balance of the proceeds, arising from the sale of the ship & from the freight, was insufficient to discharge all the claims under these several bonds:—*Held:* in order to leave a fund for the payment of the first bond, the ct. could not compel the owners of the cargo to contribute to the liquidation of the

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two last executed bonds, so long as the proceeds of the ship & freight were not exhausted.—THE PRISCILLA (1859), 1 Lush. 1; 1 L. T. 272; 5 Jur. N. S. 1421; 167 E. R. 1.

*Annotations:*—**Distd.** The Union (1860), Lush. 128. **Consd.** The Edward Oliver (1867), L. R. 1 A. & E. 379.

**3370. Right to follow substituted goods—Where original cargo sold.**]—ANON. (1709), 2 Eq. Cas. Abr. 479; 22 E. R. 407; *sub nom.* BUCKNAL *v.* ROISTON, Prec. Ch. 285, L. C.

*Annotations:*—**Refd.** Ryall *v.* Rolle (1749), 1 Atk. 165; Edwards *v.* Harben (1788), 2 Term Rep. 587. **Mentd.** West *v.* Skip (1749), 1 Ves. Sen. 239; Worsley *v.* Demattos & Slader (1758), 1 Burr. 467; Manton *v.* Moore (1796), 7 Term Rep. 67.

**3371. Right against cargo subsequently loaded.**]—THE TRIAL, No. 3383, *post.*

**3372. Where borrower bankrupt—Action for account.**]—WARNER *v.* WATSON (1737), West *temp.* Hard. 46; 25 E. R. 812, L. C.

**3373. Where ship abandoned as total loss—Part of cargo sold—Part transhipped.**]—Bond on ship, freight, & cargo, the money to be paid within twenty-one days of the ship's arrival in the port of London, & not to be demanded or recovered in case the ship & her cargo be lost, miscarry, or be cast away on the voyage. The ship never reached the port of London, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, & the proceeds brought to England, & part put into another ship, & also brought to England. The fact that the ship could not be repaired was not proved:—*Held:* the bond must be pronounced for & enforced against the proceeds of the cargo, & the cargo transhipped.—THE ELEPHANTA (1851), 18 L. T. O. S. 248; 15 Jur. 1185.

*Annotations:*—**Refd.** Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516; The Montrosa, [1917] P. 1.

**3374. Right of assignee of bond—Action for money had & received.**]—General *indebitatus assumpsit* for money had & received will lie for the assignee of a *respondentia* bond, the obligor having beforehand engaged by an indorsement to pay the same to any assignee.—FENNER *v.* MEARES (1779), 2 Wm. Bl. 1269; 96 E. R. 746.

*Annotations:*—**Refd.** Master *v.* Miller (1791), 4 Term Rep. 320. **Mentd.** Israel *v.* Douglas (1789), 1 Hy. Bl. 239; Johnson *v.* Collings (1800), 1 East, 98; Barlow *v.* Bishop (1801), 1 East, 431; White *v.* Parkin (1810), 12 East, 578; Hennings *v.* Rothschild (1827), 4 Bing. 315.

**3375. Amount recoverable—Limited to value of cargo.**]—A bottomry bondholder entered an action against the ship, cargo, & freight. The owners of the cargo appeared, & gave bail in the sum of £350. The proceedings were *in pœnam.* The bond was pronounced for, the ship sold, the proceeds of sale & the freight were brought into the registry. The claims for wages, which proved unexpectedly heavy, having been settled, the deficiency on the ship's account for the bond & proctor's costs amounted to £409 9*s.* 2*d.* which the owners of the cargo were called upon to pay. They tendered £350, the amount of their bail. Motion for a monition against the owners of the cargo to pay the balance rejected:—*Held:* though the master may become *ex necessitate* agent of the owners of the cargo, he can render them liable only to the value of the cargo.—THE NOSTRA SENORA DEL CARMINE (1854), 1 Ecc. & Ad. 303; 4 L. T. 92; 18 Jur. 730; 164 E. R. 175.

*Annotation:*—**Refd.** The Temiscouata (1855), 2 Ecc. & Ad. 208.

**3376. —— Commissions.**]—A commission on unlivery & reloading of the cargo, being an item in the account for the amount of which a bond had been given, objected to, & the balance tendered. Tender pronounced against with costs; & the registrar & merchants being directed to report on the above commission, it was subsequently disallowed.—THE CALYPSO (1834), 3 Hag. Adm. 162; 166 E. R. 366.

**3377. —— ——.**]—A mtgee. of ships who had also a lien on the cargoes, sold the ships & cargoes under an order of the ct., with the concurrence of the receiver, appointed in another suit for the administration of debtor's estate, & the master had allowed him 4 per cent. upon the proceeds arising from the sales by way of commission, which rate of commission he had been in the habit of receiving from the shipowner, who was then dead:—*Held:* (1) the mtgee. was not entitled to so large a brokerage; but he was entitled to a reasonable allowance, to be ascertained by the master, if the parties could not agree; (2) he was not entitled to any brokerage on the sale of another cargo, which he had sold as mtgee. without any order of the ct.—ARNOLD *v.* GARNER (1847), 2 Ph. 231; 16 L. J. Ch. 329; 9 L. T. O. S. 289; 11 Jur. 339; 41 E. R. 931, L. C.

*Annotation:*—*As to* (2) **Refd.** The Benwell Tower (1895), 72 L. T. 664.

**3378. —— ——.**]—Where cargo is unshipped, stored, & transhipped at a foreign port, & a *respondentia* bond is given to defray the charges, the ct., though considering the custom of the port, will not allow as items in the bond any commissions beyond a reasonable amount, calculated upon a principle of *quantum meruit.*

Commissions charged at St. Thomas's of 2 per cent. on the value of cargo for storage, & of 2½ per cent. for landing & reshipping, disallowed, & in lieu thereof reasonable sums allowed.

Commission of 5 per cent. on cash advances reduced to 2½ per cent., according to the practice observed in the registry.

Commissions on freight in respect of the vessels chartered to transhipper, disallowed.—THE GLENMANNA (1860), Lush. 115; 3 L. T. 182; 167 E. R. 53.

*Annotations:*—**Refd.** Anderson *v.* Hoen, The Flying Fish (1865), 3 Moo. P. C. C. N. S. 77; The Generous (1868), L. R. 2 A. & E. 57.

**3379. —— Several owners—Recovery from each pro rata.**]—(1) Where a vessel carrying cargo is stranded on a foreign coast & unable to proceed, & communication with the owners of the cargo would be attended with great delay & difficulty, the master of the ship, in order to transhipper & send on, may, on his own authority, give a *respondentia* bond to release the cargo lying under arrest for salvage.

(2) A bond, covering in part property not exposed to maritime risk, is bad as to that part, but may be valid as to the residue.

(3) Where a part only of goods hypothecated by a *respondentia* bond reaches its destination, such part is only liable to pay a proportional part of the money secured by the bond, namely, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given.

(4) The whole difference then in fact between *respondentia* & bottomry is this: That in bottomry ship & freight are hypothecated as well as the cargo; in *respondentia* the cargo alone is hypothecated (DR. LUSHINGTON).—THE SULTAN (CARGO EX) (1859), Sw. 504; 5 Jur. N. S. 1060; 166 E. R. 1235.

**3380. —— Premium payable in default of payment.**]—A bottomry bond on ship, freight, & cargo provided for payment of a bottomry loan, together with interest at 8 per cent., at or before

the expiration of five days after the arrival of the ship at her port of discharge. The bond further provided that an additional premium of 10 per cent. on the loan should become payable if default was made in payment. The ship having arrived at her port of discharge, default was made in payment of the bond, & a suit was instituted by the bondholder against ship, freight, & cargo, to recover the amount of the loan & interest, & the additional premium of 10 per cent. :—*Held :* the additional premium of 10 per cent. could not be enforced against the cargo, but the bondholder was entitled to interest at 4 per cent. from the date when the bond became payable until payment.—THE SOPHIA COOK (1878), 4 P. D. 30; 49 L. J. P. 16.

**3381. Foreign ship—Conclusiveness of foreign judgment.**]—A foreign judgment of a competent ct. is conclusive, & not open to examination by another ct. unless the judgment impeached carries on the face of it manifest error; as if it is shown to have been obtained by fraud, or wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem.*

A Greek ship having on board a cargo consigned to Malta, the port of destination, having encountered severe weather in her passage down the Black Sea, was obliged, for the preservation of her cargo, to jettison her boats, spars & cables, & being disabled, put into Constantinople, where the captain applied to the Greek Consular Ct., & obtained an order for a survey of the ship & cargo, & a sentence of average settlement, with the appointment of a curator, who by virtue of the authority conferred on him, hypothecated the cargo, & caused a bottomry bond to be executed thereon for freight & the necessary expenses of transhipping & forwarding the cargo. The cargo having been transhipped, arrived at Malta, where proceedings were taken in the Ct. of Commerce by the consignee to set aside the sentence of average settlement & to annul the bottomry bond. The Ct. of Commerce declared its incompetency to decide regarding the average settlement, but pronounced the bottomry bond null & void. On appeal to the Ct. of Appeal at Malta, that ct. reversed the decree of the Ct. of Commerce so far as regards its competency to decide the average act & settlement, & ordered, as regarded the decision of the nullity of the bottomry bond, that such decision should be set aside until a definite sentence on the average act & settlement should have been come to by the Ct. of Commerce. The Ct. of Commerce gave a decision on the case thus remitted against the consignee, which was equivalent to a nonsuit. On appeal from this decision, the Appellate Ct. of Malta were of opinion that the captain having taken the legal course before the Consular Tribunal at Constantinople, & that ct. having, on the report of experts, appointed a curator of the cargo, & declared the voyage ended at Constantinople, such curator was the attorney for the owners of the cargo, & had authority to hypothecate same; that where the formalities of a consular authority & verbal process justifying the expenses necessitating the loan are observed, the lender on the bottomry bond is exonerated from justifying the necessity for the loan or making inquiry as to the facts causing such necessity, & decided for the validity of the bond :—*Held :* the Greek Consular Ct. at Constantinople being a competent ct., having jurisdiction over a Greek ship & a cargo owned by Greek subjects, the sentence of that ct. was not open to examination by the Ct. of Commerce at Malta, & it must be presumed, in the absence of manifest error or fraud, that the Greek Consular Ct. rightly interpreted & applied the Greek law, by which they had the power they exercised of deciding that, in the circumstances, Constantinople should be considered the place of the ship's destination, & the average adjusted according to the law in force at that place; & the bottomry bond was, in the circumstances, necessary & valid.—MESSINA *v.* PETROCOCCHINO (1872), L. R. 4 P. C. 144; 8 Moo. P. C. C. N. S. 375; 41 L. J. P. C. 27; 26 L. T. 561; 20 W. R. 451; 1 Asp. M. L. C. 298; 17 E. R. 352, P. C.

*Annotations :*—**Refd.** The M. Moxham (1875), 1 P. D. 43; Pemberton *v.* Hughes, [1899] 1 Ch. 781; R. *v.* L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160.

——.]—*See* ADMIRALTY, Vol. I., pp. 125, 126, Nos. 315–317.

**3382. Priority of bondholder—As against claim for necessaries—Right to have assets marshalled.**]—Although the proceeds of ship & freight would be exhausted by the holders of a bottomry bond on ship, freight, & cargo, the ct. refused to marshal the assets in favour of a claim for necessaries against ship & freight, on the ground that, the owners of ship & freight being different persons from the owners of cargo, third parties, namely, the cargo owners, would be prejudiced by being, in effect, made to pay the claim of the necessaries men with which they had no concern.—THE CHIOGGIA, [1898] P. 1; 66 L. J. P. 174; 77 L. T. 472; 46 W. R. 253; 14 T. L. R. 27; 8 Asp. M. L. C. 352.

—— **As against holder of bond on ship & freight.**]—*See* Part IV., Sect. 3, sub-sect. 10, C., *ante.*

—— **As against mortgagee of ship.**]—*See* Part II., Sect. 3, sub-sect. 3, K. (*b*) iii., *ante.*

—— **As against master's claim for wages.**]—*See* Part XIX., Sect. 4, sub-sect. 4, *post.*

**Right to sue in Admiralty Court.**]—*See, generally,* ADMIRALTY, Vol. I., pp. 121–126, Nos. 267–317.

**Right to lien.**]—*See* Part XIX., Sect. 1, sub-sect. 6, *post.*

*D. Rights of Cargo Owner.*

**3383. Right against master—Failure of master to give notice of bond.**]—I shall order the freight to be brought in. With respect to the shippers abroad, the law is clear, that where the master has deserted his duty, & given no notice of a bond, he is to be answerable; the owners of the goods must have recourse to him; he has neglected this duty. But those who knew of the existence of the bond should have taken care to whom they paid the freight; the laches is theirs. I never saw a more proper bond, or a lower rate of interest in such a case (LORD STOWELL).—THE TRIAL (1820), 7 Notes of Cases, 68; Burrell, 338; 167 E. R. 599.

**3384. —— Injunction to restrain hypothecation —Necessity for proof of ownership—Where bills of lading transmitted to consignee.**]—RAYNE *v.* BENEDICT, No. 3431, *post.*

**3385. Right against shipowner—Implied promise to indemnify.**]—DUNCAN *v.* BENSON, No. 3327, *ante.*

**3386. —— Where shipowner insolvent.**]—Where the ship & freight may be the subject of bottomry, the cargo may be hypothecated; & the case of the arrest of a ship on account of a debt of the owner can form no exception, for where the ship is detained, the cargo is equally detained, whatever be the cause of detention. A cargo of a British merchant, however valuable, may be made the subject of bottomry for any debts due by the owner of the vessel, where, by law, the power of arresting the ship exists. If a bond be valid, the owner of the cargo must pay, not

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merely the cost of provisions & necessaries & repairs of that voyage, but any sum on account of which the ship may be detained, whatever the amount of the debt may be, & at whatever time the debt may have been incurred. . . . If the owner of the ship is insolvent the owner of the cargo has no remedy whatever, except against this insolvent owner of the ship (DR. LUSHINGTON). —THE OSMANLI (1850), 3 Wm. Rob. 198; 7 Notes of Cases, 322; 3 L. T. 559; 14 Jur. 93; 166 E. R. 937.

*Annotations:*—**Reld.** The North Star (1860), 29 L. J. P. M. & A. 73; The Edmond (1861), Lush. 211; The Karnak (1868), L. R. 2 A. & E. 289.

SUB-SECT. 6.—SALE OF CARGO.

*A. Authority of Master to Sell.*

*(a) In General.*

**3387. General rule—Master not authorised to sell cargo.**]—VAN OMERON *v.* DOWICK, No. 3442, *post.*

**3388.** —— ——.]—The master of a ship detained as prize & libelled in the Prize Ct. at Jamaica, gave bills of lading of the cargo to one who became bail for the ship & cargo there:—*Held:* the master had no authority to contract that the cargo should be sold in London & the proceeds remitted back to Jamaica, the owners being ready to give a sufficient security to indemnify the bail in London.—JOHNSON *v.* GRIEAVES (1810), 2 Taunt. 344; 127 E. R. 1111.

**3389.** —— ——.]—A captain of a ship is not justified in selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, & although a sale of the goods is the most beneficial course for the owner.—WILSON *v.* MILLAR (1816), 2 Stark. 1; 171 E. R. 553.

*Annotation:*—**Reld.** Idle *v.* Royal Exchange Assce. (1819), 8 Taunt. 755.

**3390.** —— ——.]—CANNAN *v.* MEABURN, No. 3402, *post.*

**3391.** —— ——.]—ROSETTO *v.* GURNEY, No. 3300, *ante.*

**3392.** —— ——.]—ACATOS *v.* BURNS, No. 2841, *ante.*

**3393.** —— —— **Though acting under order of Vice-Admiralty Court.**]—MORRIS *v.* ROBINSON, No. 3449, *post.*

**3394.** —— —— ——.]—CANNAN *v.* MEABURN, No. 3402, *post.*

—— —— **Unless necessity for sale.**]—*See* Sub-sect. 6, A. (*b*) i., *post.*

**3395. For whose benefit sale made—Party liable to sustain loss.**]—Hides insured from Valparaiso to Bordeaux free of particular average, unless the ship were stranded, arriving at Rio Janeiro on their way to Bordeaux in a state of incipient putridity, occasioned by a leak in the ship were sold for a fourth of their value at Rio, because, by the process of putrefaction, they would have been destroyed before they could have arrived at Bordeaux. The assured received the news of the damage to the hides & of their sale at the same time. When such a sale takes place, & in the opinion of the jury is justified by necessity & a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss (LORD ABINGER, C.B.)—ROUX *v.* SALVADOR (1836), 3 Bing. N. C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L. J. Ex. 328; 132 E. R. 413, Ex. Ch.

*Annotations:*—**Reld.** Fleming *v.* Smith (1848), 1 H. L. Cas. 513; Rosetto *v.* Gurney (1851), 11 C. B. 176; Farnworth *v.* Hyde (1865), 18 C. B. N. S. 835; Browning *v.* Provincial Insce. Co. of Canada (1873), 28 L. T. 853; Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Saunders *v.* Baring (1876), 34 L. T. 419; Cossman *v.* West, Cossman *v.* British America Assce. (1887), 13 App. Cas. 160; The Alsace Lorraine, [1893] P. 209; Asfar *v.* Blundell, [1896] 1 Q. B. 123; Cohen *v.* Standard Marine Insce. (1925), 30 Com. Cas. 139. **Mentd.** Hills *v.* London Assce. Corpn. (1839), 9 L. J. Ex. 25; Knight *v.* Faith (1850), 15 Q. B. 649; Navone *v.* Haddon (1850), 9 C. B. 30; Tronson *v.* Dent (1853), 8 Moo. P. C. C. 419; Grainger *v.* Martin (1863), 2 New Rep. 191; Martin *v.* Granger (1863), 11 W. R. 758; Stringer *v.* English & Scottish Marine Insce. (1870), 10 B. & S. 770; Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. 467; Thames & Mersey Marine Insce. *v.* Pitts & King, [1893] 1 Q. B. 476; Francis *v.* Boulton (1895), 65 L. J. Q. B. 153; Trinder, Anderson *v.* Thames & Mersey Marine Insce., Trinder, Anderson *v.* North Queensland Insce., Trinder, Anderson *v.* Weston, Crocker, [1898] 2 Q. B. 114; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781; Moore *v.* Evans, [1918] A. C. 185; Fooks *v.* Smith, [1924] 2 K. B. 508.

**3396. Right to sell limited to part of cargo only.**]—THE JESSIE MILLER, HEYDORN *v.* BIBBY (1855), 10 L. T. 243; *subsequent proceedings*, 25 L. T. O. S. 199.

**3397.** ——.]—THE ONWARD, No. 3341, *ante.*

**3398. What law applicable—Law of ship's flag.**]—A German vessel, loading at Singapore for London, took on board, with other cargo, a quantity of pepper shipped, by British subjects, under English bills of lading in the usual form. On the voyage heavy weather was experienced, & the vessel put into a port of distress, both the ship & a portion of the cargo being damaged. The master telegraphed to this effect to the ship's agent at Singapore, & the contents of the telegram were communicated to the various shippers, but no instructions were received. Thereupon the master, acting in good faith, on the best advice he could obtain, & believing it to be for the benefit of the cargo owners, sold, with other cargo, a considerable portion of the pepper, much of which might have been reshipped, & some of which was in fact sent on by the purchasers in other vessels to London, where it fetched substantially the price of sound pepper. In an action for breach of contract & conversion, brought by pltfs., who were the consignees of the whole, & the purchasers of part of the pepper so sold by the master:—*Held:* defts., the owners of the vessel, were not liable, as the law of the flag must be looked at to determine the propriety of the sale, & by German law the conduct of the master was justifiable.—THE AUGUST, [1891] P. 328; 60 L. J. P. 57; 66 L. T. 32; 7 Asp. M. L. C. 110.

*Annotation:*—**Reld.** The Industric, [1894] P. 58.

*(b) Necessity for Sale.*

i. *In General.*

**3399. General rule—Authority derived from circumstances of necessity.**]—THE COPENHAGEN, No. 3326, *ante.*

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**PART VII. SECT. 6, SUB-SECT. 6.—A. (a).**

**3387 i.** *General rule—Master not authorised to sell cargo.*]—The duty of the master of a vessel is primarily & generally to carry the cargo entrusted to him safely to its destination for the purpose of earning freight. Beyond that, except in exceptional circumstances, & when a pressing urgency arises, he has nothing to do with it & does not, as incidental to his position as a master, possess any power of sale over the cargo. It is, therefore, the duty of a person purchasing from the master to see that he has authority to deal with the cargo beyond the right to carry & deliver it & what the nature & extent of such authority is.—HICKMAN *v.* BAKER (1898), 31 N. S. R. (19 R. & G.) 208.—**CAN.**

**3387 ii.** —— ——.]—WARREN *v.* DUTHIE (1851), 3 Nfld. L. R. 249.—**NFLD.**

**3387 iii.** —— ——.]—MUTHAYA CHETTI *v.* MUTHAYA CHETTI (1882), I. L. R. 5 Mad. 334.—**IND.**

**PART VII. SECT. 6, SUB-SECT. 6.—A. (b) i.**

**3399 i.** *General rule—Authority derived from circumstances of necessity.*]—THE LOUIS NAPOLEON (1857), 6 L. T. 868.—**NFLD.**

**3399 ii.** —— ——.]—JOHNSON & IRVIN *v.* MAYSTON (1909), 30 N. L. R. 396.—**S. AF.**

**3400.** —— ——.]—(1) A. having shipped goods on board a vessel which is driven into a foreign port by stress of weather, part of these goods is sold by the captain to defray the expenses of repairing the vessel. A. is entitled to deduct from the demand, for freight, the sum for which the goods have been sold, & the circumstance of the shipowners having, during the voyage, assigned the freight to a third person makes no difference.

(2) The master of a vessel is not justified in selling any part of the cargo for the repairs of the ship in a foreign port, except in cases of urgent necessity.—CAMPBELL *v.* THOMPSON (1816), 1 Stark. 490; 171 E. R. 539, N. P.

*Annotations:—As to* (1) **N.F.** The Salacia (1862), Lush. 578. *As to* (2) **Consd.** Atkinson *v.* Stephens (1852), 7 Exch. 567.

**3401.** —— ——.]—FREEMAN *v.* EAST INDIA Co., No. 3448, *post.*

**3402.** —— ——.]—The captain of a ship has no authority to sell the cargo except in cases of absolute necessity, therefore where indigo was shipped at Calcutta consigned to London, under a bill of lading, by which the dangers & accidents of the sea, & of navigation of what kind soever were excepted, & the vessel sustained considerable damage in the course of the voyage, & put into the Mauritius in a sinking state, where the captain abandoned her, & placed her & the cargo at the disposal of the Vice-Admlty. Ct., who, after survey, ordered both to be sold; but it appeared that the cargo might have been transhipped there & forwarded to its port of destination by another vessel, & that his own ship might have been repaired, although at a considerable expense:—*Held:* the owners of the ship were liable to the owners of the cargo, in an action on the case for non-delivery thereof at the place of destination, as it was the duty of the captain either to have repaired the vessel, or transhipped the cargo.—CANNAN *v.* MEABURN (1823), 1 Bing. 243; 8 Moore, C. P. 127; 1 L. J. O. S. C. P. 84; 130 E. R. 98; *subsequent proceedings* (1824), 1 Bing. 465.

*Annotations:—***Consd.** Knight *v.* Faith (1850), 15 Q. B. 649. **Refd.** Cammell *v.* Sewell (1860), 6 Jur. N. S. 918; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

**3403.** —— ——.]—THE WEST *v.* BELL (1841), 4 L. T. 621.

**3404.** —— ——.]—The authority of the master of a ship to sell the goods of an absent owner is derived from the necessity of the situation in which he is placed; & consequently, to justify his selling, he must establish a necessity for the sale; & inability to communicate with the owner. Under these conditions, & by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation, within certain limits, of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner. The possibility of communicating with the owner depends on the circumstances of each case involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communication which may exist, & the general position of the master in the particular emergency. Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained before the sale. Where, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions.

The master is bound to employ the telegraph as a means of communication, where it can usefully be done; but the state of the particular telegraph, the way in which it is managed, & the possibility of transmitting explanatory messages, are proper subjects to be considered in determining the question of the practicability of communication.

The fact that the master cannot communicate with all the owners of a general cargo does not of itself justify him in selling without communication with any of the owners; but this fact, increasing the embarrassment of the master, is to be considered when an estimate of his conduct has to be formed.

A sale of cargo by the master may obviously be necessary, although another course might have been taken in dealing with it, for instance, if in this case the wool . . . could have been dried & repacked, & then stored & sent on, but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the master to sell (SIR MONTAGUE SMITH).—AUSTRALASIAN STEAM NAVIGATION Co. *v.* MORSE (1872), L. R. 4 P. C. 222; 8 Moo. P. C. C. N. S. 482; 27 L. T. 357; 20 W. R. 728; 1 Asp. M. L. C. 407; 17 E. R. 393, P. C.

*Annotations:—***Apld.** Acatos *v.* Burns (1878), 3 Ex. D. 282. **Refd.** Gaudet *v.* Brown, Geipel *v.* Cornforth, The Argos, The Hewsons (1873), L. R. 5 P. C. 134; Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566; The St. George, [1926] P. 217.

**3405.** —— ——.]—Where the owner of a ship had an agent at the port where she was lying, authorised & ready to supply the ship's requirements:—*Held:* the master had no implied authority to pledge the owner's credit at such port for necessaries supplied for the ship's use.

The captain has authority to bind the owners to pay for supplies or repay money advanced, only when the necessity of the case gives him that authority (BRETT, J.).—GUNN *v.* ROBERTS (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; 30 L. T. 424; 22 W. R. 652; 2 Asp. M. L. C. 250.

*Annotations:—***Refd.** Adair *v.* Young (1879), 12 Ch. D. 13; The Pontida (1884), 9 P. D. 177; The Orienta, [1894] P. 271.

**3406.** —— ——.]—ACATOS *v.* BURNS, No. 2841, *ante.*

**3407.** —— ——.]—ATLANTIC MUTUAL INSURANCE Co. *v.* HUTH, No. 3418, *post.*

**3408.** —— ——.]—*Semble*, the doctrine as to sale by an agent of necessity applies to a carrier by land as well as by sea provided that the necessary conditions exist, namely, that there is a real necessity for the sale, & that it is practically impossible to get the owner's instructions in time as to what shall be done.—SIMS & Co. *v.* MIDLAND RY. Co., [1913] 1 K. B. 103; 82 L. J. K. B. 67; 107 L. T. 700; 29 T. L. R. 81; 18 Com. Cas. 44, D. C.

*Annotations:—***Apld.** Springer *v.* G. W. Ry., [1921] 1 K. B. 257. **Refd.** Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566. **Mentd.** Coldman *v.* Hill, [1919] 1 K. B. 443.

### ii. *What Amounts to Necessity.*

**3409. Goods perishable.]** — TREMENHERE *v.* TRISILIAN (1672), 3 Keb. 91; 1 Sid. 453; 84 E. R. 612.

*Annotations:—***Consd.** Idle *v.* Royal Exchange Assce. (1819), 3 Moore, C. P. 115; Cannan *v.* Meaburn (1823), 1 Bing. 243. **Refd.** Hayman *v.* Molton (1803), 5 Esp. 65; The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36. **Mentd.** Carpenter *v.* Thornton (1819), 3 B. & Ald. 52.

**3410.** —— **No means of transhipment.]**—THE GRATITUDINE, No. 3333, *ante.*

**3411.** ——.]—The charterers of a ship took on board for freight sugar & other perishable goods, the property of various parties. The ship being unseaworthy, the sugars were damaged, & actions

*Sect.* 6.—*The voyage: Sub-sect.* 6, *A.* (*b*) *ii.*, *&* (*c*), *& B.* (*a*).]

were brought against the charterers by the owners of the sugars, & damages were recovered; the owners of the ship having notice of such actions. In an action by the charterers against the owner for the unseaworthiness & want of repair of the ship:—*Held:* they were entitled to recover the damages & costs paid in such actions.

*Semble*, the master has in some cases authority to sell a perishable cargo. At all events, he being the servant of the owners, they cannot dispute his authority.—BLYTH *v.* SMITH (1843), 5 Man. & G. 405; 6 Scott, N. R. 360; 12 L. J. C. P. 203; 7 Jur. 948; 134 E. R. 622.

*Annotations*:—**Refd.** Mors-le-Blanch *v.* Wilson (1873), L. R. 8 C. P. 227. **Mentd.** Broom *v.* Hall (1859), 7 C. B. N. S. 503; Clare *v.* Dobson, [1911] 1 K. B. 35.

**3412.** ——.]—THE JESSIE MILLER, HEYDORN *v.* BIBBY (1855), 7 L. T. 224; 25 L. T. O. S. 199.

**3413.** ——.]—ACATOS *v.* BURNS, No. 2841, *ante*.

**3414. Vessel damaged—Sale advised by surveyors.**]—Freight is insured on ship & a cargo of timber from Quebec to London. The ship sailed from Quebec, & on her voyage down the river St. Lawrence sprung a leak, & it became necessary for the preservation of the lives of the master & crew to run her on shore. She took the ground on the outside of a reef of rocks, & was there fixed & exposed to the full force of the stream, & in the way of the drift ice, then forming & floating down the river. One of the part owners & agent for the others resided at Quebec, & after two surveys, in which the surveyors stated, as their opinion, that it would be prudent to sell the ship & cargo, the master, under the direction of such part owner, sold the same. The ship however survived; was repaired by the purchasers, & afterwards brought a full cargo to London. In an action on the policy against the underwriters on freight for a total loss:—*Held:* in the circumstances, the master was warranted in selling the ship & cargo, & an abandonment of the freight was unnecessary.—IDLE *v.* ROYAL EXCHANGE ASSURANCE CO. (1819), 8 Taunt. 755; 3 Moore, C. P. 115; 129 E. R. 577; *on appeal*, 3 Brod. & Bing. 151, n.

*Annotations*:—**Consd.** Cambridge *v.* Anderson (1824), 1 C. & P. 213; Robertson *v.* Clarke (1824), 1 Bing. 445; Knight *v.* Faith (1850), 15 Q. B. 649; Tronson *v.* Dent (1853), 8 Moo. P. C. C. 419. **Expld.** Atlantic Mutual Insce. *v.* Huth (1880), 16 Ch. D. 474. **Consd.** Wade *v.* South of England Marine Insce. Assocn. (1888), 5 T. L. R. 8. **Refd.** Mount *v.* Harrison (1827), 4 Bing. 388; Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Alcock *v.* Royal Exchange Assce. Corpn. (1849), 13 Q. B. 292; Scottish Marine Insce. *v.* Turner (1853), 17 Jur. 631, n.; The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36; Cossman *v.* West, Cossman *v.* British America Assce. (1887), 13 App. Cas. 160.

**3415. Goods damaged—Where still merchantable.**]—TRONSON *v.* DENT, No. 3447, *post*.

**3416.** —— **Not worth forwarding.**]—HILL *v.* WILSON, No. 4848, *post*.

**3417. Excessive expense of warehousing goods.**]—ACATOS *v.* BURNS, No. 2841, *ante*.

**3418. Continuation of voyage impossible—Vessel hopelessly wrecked—No efforts at salvage made by master.**]—On Apr. 19, an Austrian ship with a valuable cargo on board ran upon a rock on the eastern side of Algoa Bay, distant fifty miles by sea & about eighty by land from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, & there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship & cargo for sale, & they were sold in one lot by auction on Apr. 30, for £9,500, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on June 19, the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that, in their opinion, no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to show that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck & cargo was the most advisable one in the interest of all parties concerned:—*Held:* no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; the sale was void; & pltfs. were entitled to the cargo saved, subject to a proper allowance for salvage & other expenses.

The master becomes agent for sale of the cargo . . . only where there is a necessity for that course, & it lies on those who claim title to cargo, as purchasers from the captain, to prove that this necessity clearly existed (COTTON, L.J.).—ATLANTIC MUTUAL INSURANCE CO. *v.* HUTH (1880), 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387; 4 Asp. M. L. C. 369, C. A.

*Annotation*:—**Refd.** Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

**3419. Expense of forwarding exceeding value of goods.**]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* MORSE, No. 3404, *ante*.

**3420.** ——.]—ATLANTIC MUTUAL INSURANCE CO. *v.* HUTH, No. 3418, *ante*.

(*c*) *Communication with Cargo Owner.*

**3421. Necessity for.**]—THE MARGERY, ANDERSON *v.* GELDART (1854), 4 L. T. 622.

**3422.** —— **Where reasonable expectation of reply.**]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* MORSE, No. 3404, *ante*.

**3423.** ——.]—ACATOS *v.* BURNS, No. 2841, *ante*.

**3424.** ——.]—A quantity of tomatoes belonging to pltf. were delivered to defts. at St. Helier, Jersey, for carriage to Covent Garden to be there delivered to pltf. The tomatoes were put on board the steamship *Croham*, the rest of the cargo consisting also of tomatoes for a large number of different consignees, on Sept. 20, but the *Croham* was detained at St. Helier by bad weather until Sept. 23. She arrived at Weymouth at 12.45 p.m. on Sept. 24, & on the morning of that day a strike of defts.' men broke out suddenly at Weymouth. There were two other vessels in the harbour to be unloaded first, so that the *Croham* could not be unloaded until Sept. 26. Defts.' traffic agent at Weymouth, being anxious about the cargo on account of the strike & the length of time the cargo had been on board, sent his head clerk on the arrival of the *Croham* on

PART VII. SECT. 6, SUB-SECT. 6.—A. (c).

**3421 i.** *Necessity for.*]—Where a voyage is abandoned, the shipowner will be liable in trover if the master sell the cargo without the authority of the shipper, where it is possible to communicate with him.—CONNOR *v.* SPENCE, SPENCE *v.* CONNOR (1878), 4 V. L. R. (L.) 243.—**AUS.**

d. *Burden of proof on*

To justify the sale of goods by

Sept. 24, to examine it, & the clerk having removed the hatches & examined the top tiers found them to be in very bad condition. The *Croham* was unloaded on the morning of Sept. 26, & the traffic agent decided to sell the cargo as a whole locally, the strike preventing the tomatoes being forwarded by railway. He accordingly did so. Pltf.'s tomatoes were in fairly sound condition, & pltf. could have been communicated with before selling. The railway strike ended suddenly in the afternoon of Sept. 26, after the sale had been effected. In an action by pltf. for damages for breach of the contract of carriage:—*Held:* in the circumstances, defts.' traffic agent with the knowledge he possessed on Sept. 24, ought then to have communicated with pltf. so as to get his instructions as to what he wished to be done with his tomatoes, & defts. were liable in damages for having sold the tomatoes without first communicating with pltf.—SPRINGER *v.* GREAT WESTERN RY. CO., [1921] 1 K. B. 257; 89 L. J. K. B. 1010; 124 L. T. 79; 15 Asp. M. L. C. 86.

*Annotation:*—**Reld.** Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

**3425. Communication impossible—How far justification for sale.**]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* MORSE, No. 3404, *ante*.

**3426.** —— ——.]—ACATOS *v.* BURNS, No. 2841, *ante*.

**3427.** —— ——.]—SIMS & CO. *v.* MIDLAND RY. CO., No. 3408, *ante*.

**3428. What constitutes possibility of communication—Depends on particular circumstances.**]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* MORSE, No. 3404, *ante*.

**3429.** —— **What may be taken into consideration—Distance of port from owners.**]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* MORSE, No. 3404, *ante*.

**3430.** —— —— **Means of communication—Duty of master to employ telegraph.**]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* MORSE, No. 3404, *ante*.

### *B. Rights of Cargo Owner.*

#### *(a) In General.*

**3431. Right against master—Injunction to restrain sale—On what conditions granted.**]—Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the ct. to restrain the captain from selling the cargo. But, before the ct. will grant such assistance, pltfs. must show their title to the goods, & must settle with the captain for what is due to him, & must exonerate the captain from his contract to deliver the goods at their place of destination, & from all liability on the bills of lading.—RAYNE *v.* BENEDICT (1841), 10 L. J. Ch. 297; 5 Jur. 598, 1176, L. C.

**3432. Right against shipowner.**]—DUNCAN *v.* BENSON, No. 3327, *ante*.

**3433.** —— **Right to sue in Admiralty Court.**]—LA CONSTANCIA, No. 4237, *post*.

**3434.** —— **Recovery of value of goods as at port of destination—If ship arrives.**]—ALERS *v.* TOBIN (1802), cited in Abbott's Merchant Shipping, 14th ed. at p. 551, N. P.

*Annotation:*—**Reld.** Atkinson *v.* Stephens (1852), 7 Exch. 567.

**3435.** —— —— ——.]—Where the master of a vessel sells part of a shipper's goods at an intermediate port, in order to raise money to provide for the repairs or other expenses of the vessel, which are necessary to enable him to prosecute & complete the voyage, & the vessel does not arrive at her port of destination, the shipper is not entitled to receive the clear value for which the goods would have sold at that port.

A declaration in *assumpsit* stated, that deft. was the owner of a certain ship then at a certain foreign port, & bound from thence to the port of London in Great Britain, & that pltf. caused certain goods of his to be shipped on board the ship, to be conveyed to London for certain freight; that the ship set sail, & on her voyage was much injured by tempestuous weather; & that the master was obliged to put into an intermediate port to have her repaired; & that, for the purpose of such repairs, & to pay them, & to enable the ship to leave that port, it became necessary for the master to raise a sum of money; & that, without doing so, the ship would have been unable to leave the port or to proceed to sea; & that, because the master could not otherwise raise the amount necessarily required, he sold certain of pltfs.'s goods, & with the amount so realised he paid the expenses of the repairs, etc. The declaration then stated, that deft., in consideration of the premises, promised pltf. to pay him the value for which the goods would have been sold if they had been delivered by deft. to pltf. at London.

Plea to the declaration, so far as the same claims to recover damages to a greater amount than the value of the ship, & freight thereinafter mentioned, that pltf. ought not to maintain his action to recover any damages to a greater amount than aforesaid, because, after the goods were shipped, & before any part thereof had been conveyed to the port of L., & whilst they were in the custody & under the control of the master, the master wrongfully, & without any authority in that behalf from deft., & without his knowledge, privity, or consent, sold the goods, & deft. thereby was unable to deliver them to pltfs.; & that, at the several times, deft. was the owner of the ship, being a British vessel & duly registered; that the goods were shipped by being received into the custody of the master, & deft. never personally accepted or received, nor did he interfere with them or the shipping, or the sale, except as such owner of the vessel; & that the shipping & sale took place after Sept., 1813; &, that the sale was done without the fault or privity of deft.; & further, that the value of the ship, together with the value of the freight due, or to grow due during the voyage, did not exceed a certain sum named. Verification, & prayer of judgment:—*Held:* (1) the declaration was bad in substance; (2) the plea was bad, as being pleaded to the damages merely. *Semble:* the plea did not disclose any defence under 53 Geo. 3, c. 159, upon which it professed to be founded.—ATKINSON *v.* STEPHENS (1852), 7 Exch. 567; 21 L. J. Ex. 329; 19 L. T. O. S. 111; 155 E. R. 1074.

**3436.** —— **Option to treat proceeds of sale as loan.**]—(1) Freight was payable by the terms of a charterparty upon delivery of cargo at the port of destination. The ship meeting with sea damage from heavy weather, the captain at an intermediate port justifiably sold part of the cargo shipped by the charterer, to raise funds for the necessary repairs. The cargo so sold fetched more than it would have done if carried to the port of destination. The ship, having completed her

master of a vessel without the consent of the owner of the goods it is not sufficient to show that they were not in a condition to forward; it should further appear that it was necessary to sell them at the time they were sold, & that before the sale it was impossible to communicate with the owner his instructions as to what should be done with them.—HOLMES *v.* UNION S.S. CO., LTD. (1895), 13 N. Z. L. R. 362.—**N.Z.**

*Sect. 6.—The voyage: Sub-sect. 6, B. (a) & (b) i.*]

repairs, proceeded to the port of destination with the remainder of the cargo. A general average statement was afterwards made up, under which the charterer received from the shipowner the amount realised by the cargo sold at the intermediate port. The shipowner claimed from the charterer freight *pro rata itineris* on the cargo so sold:—*Held:* he was not entitled to such freight.

(2) [The charterer] has, I think, an option to treat the proceeds of the sale as a loan, or he may say, "You have sold my goods against my will, & though by the maritime law that is not a wrongful sale, still I am entitled to & claim an indemnity against any loss occasioned by the sale (BRETT, J.).

(3) The basis of the claim of indemnity . . . is the supposition that the goods would fetch more at the port of destination than they did when sold. . . . If the goods fetch more at the intermediate port, the owner of the cargo naturally would elect to treat the matter as a loan, but when he thinks it is for his interest to insist & does insist on an indemnity . . . then he must allow for the freight that would have been earned by carrying them [to their destination] (BRETT, J.).—HOPPER *v.* BURNESS (1876), 1 C. P. D. 137; 45 L. J. Q. B. 377; 34 L. T. 528; 24 W. R. 612; 3 Asp. M. L. C. 149.

*Annotations:—As to* (1) **Reld.** Hill *v.* Wilson (1879), 4 C. P. D. 329; Castel & Latta *v.* Trechman (1884), Cab. & El. 276; St. Enoch Shipping Co. *v.* Phosphate Mining Co., [1916] 2 K. B. 624.

**3437. —— Indemnity against loss by sale—Duty to allow for freight.**]—HOPPER *v.* BURNESS, No. 3436, *ante*.

**Where sale unauthorised.**]—*See* Sub-sect. 6, B. (*b*), *post*.

**3438. Right against holder of bottomry bond on ship & freight—To deduct freight—Sale occasioned by delay of cargo owners.**]—Where the master has been under the necessity of selling part of the cargo to defray the expenses of the ship in a foreign port, the owners of the cargo, if they have been the authors of the delay by which the expenses were occasioned, have no right to deduct the whole or any part of the freight from the holder of a bottomry bond previously granted on the ship & freight.—THE ANGERONA (1814), 1 Dods. 382; 165 E. R. 1349.

**3439. Right against supercargo & surety—Sale negligently conducted—Omission to inquire into purchaser's ability to pay.**]—Supercargo negligently disposing of part of cargo without previously inquiring into the pecuniary ability of the purchaser to pay for it, held to have subjected himself & the person who granted a joint bond for the supercargo effectively discharging his duties to his employer, in damages.—BROWN *v.* HUDSONS (1837), 10 L. T. 275, N.P.

### (*b*) *Where Sale Wrongful.*

#### i. *In General.*

**3440. Rights against shipowners.**]—NOTARA *v.* HENDERSON, No. 3237, *ante*.

**3441. —— Action for money had & received—Whether waiver of claim for damages in tort.**]—(1) Where in a charterparty freight was to be paid at so much per ton, on a right & true delivery of the homeward bound cargo, from Honduras Bay to London; & the ship & cargo, after capture & recapture, having been wrecked at St. Kitt's, into which they were carried by the recaptors, a sale of the cargo was directed by the Vice Admlty. Ct. there, on the application of the master acting *bonâ fide* for the benefit of all concerned, but without orders from any; & the proceeds of the sale were remitted to the shipowners:—*Held:* the freighter might recover such proceeds in *assumpsit* for money had & received, without allowing freight *pro ratâ itineris*. For such form of action for the proceeds of an illegal sale of goods is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods, subject to the legal consequences of considering the demand as a debt, which admits of a set-off, etc., but does not recognise the right of the vendor so to convert the goods. & here the act of conversion, for such it must be taken to be, being made by the master, who is the general agent of the shipowners; & not by the act of a ct. of competent jurisdiction, was unlawful, & discharged the claim of the shipowners for freight *pro ratâ itineris*. But pltf. could not recover against the shipowners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because defts., having expressly contracted with pltf. under seal could not be charged in respect of the same subject-matter by a contract not under seal, & signed by their master only, & not by themselves.

(2) The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties, & the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight, but it is only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay anything (LORD ELLENBOROUGH, C.J.).—HUNTER *v.* PRINSEP (1808), 10 East, 378; 103 E. R. 818.

*Annotations:—As to* (1) **Apld.** The Louisa (1813), 1 Dods. 317; Cannan *v.* Meaburn (1824), 1 Bing. 465. **Consd.** Vlierboom *v.* Chapman (1844), 13 M. & W. 230. **Reld.** Thornton *v.* Fairlie (1818), 8 Taunt. 354; Hopper *v.* Burness (1876), 1 C. P. D. 137. *As to* (2) **Apld.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613; Thomas *v.* Harrowing S.S. Co., [1915] A. C. 58. **Reld.** Assicurazioni Generali *v.* S.S. Bessie Morris Co. (1892), 61 L. J. Q. B. 754. *Generally*, **Reld.** The Bahia (1864), Brown. & Lush. 292; Bradley *v.* Newson, [1919] A. C. 16. **Mentd.** Kynaston *v.* Crouch (1845), 14 M. & W. 266.

**3442. —— Damages for conversion.**]—Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven for the benefit of the shippers; & if he does so, though acting *bonâ fide* for the interest of all concerned, this is a tortious conversion for which the shipowner is liable.—VAN OMERON *v.* DOWICK (1809), 2 Camp. 42; 170 E. R. 1075, N.P.

*Annotations:—***Consd.** Joseph *v.* Knox (1813), 3 Camp. 320. **Reld.** Dunlop *v.* Lambert (1839), Macl. & Rob. 663. **Mentd.** De Bode *v.* R. (1846), 10 Jur. 773.

**3443. —— Deduction of value of goods from freight—Though freight assigned to third party.**]—CAMPBELL *v.* THOMPSON, No. 3400, *ante*.

**3444. ——.**]—THE SALACIA, No. 4760, *post*.

**3445. —— Action for non-delivery of cargo.**]—CANNAN *v.* MEABURN, No. 3402, *ante*.

**3446. —— Account.**]—(1) Certain consignments of oil were made from Columbo to certain persons resident in England. During the voyage several of the casks in which the oil was contained leaked. Some part of the oil which so escaped was wholly lost, but the greater part was collected together, & sold in one mass by the captain in the course of the voyage for £750. The shippers then agreed to share the proceeds in proportion to their respective losses:—*Held:* a bill in equity was

sustainable by the shippers against the shipowner for an account of the oil lost & the oil sold.

(2) In an action brought by the shipowner against an individual shipper for freight & average, the shipper could not set off his share, as ascertained by the agreement, of the monies arising from the oil sold; consequently, the shipper could maintain a bill in equity to establish a right of equitable set-off.—JONES *v.* MOORE (1841), 4 Y. & C. Ex. 351; 10 L. J. Ex. Eq. 11; 5 Jur. 431; 160 E. R. 1041.

*Annotations:*—*As to* (1) **Refd.** Spence *v.* Union Marine Insce. 1 C. P. 427. 1 W. R. 465.

**3447. —— Recovery of value of cargo.**]—A consignee of goods has such a right of property in the goods consigned to him as to maintain an action of *assumpsit* against the shipowner for non-delivery of the goods.

A cargo of opium, shipped at Calcutta, was, by the bill of lading, to be delivered at Hong Kong to resps. The ship came in collision at sea, with another vessel, & received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by the salt water. The master, who acted *bonâ fide* & to the best of his judgment, selected the damaged chests of opium & sold them by auction, & forwarded the remainder to Hong Kong. It appeared that the master might have had the damaged opium re-dried & repacked while the vessel was refitting, & have forwarded it, though deteriorated in value, with the other opium. Under such circumstances, in an action brought by the consignees against the shipowner for the value of the opium damaged & sold:—*Held:* it was the duty of the master to carry the cargo to its place of destination, as the goods could have been delivered in a merchantable, although damaged state.—TRONSON *v.* DENT (1853), 8 Moo. P. C. C. 419; 14 E. R. 159, P. C.

*Annotations:*—**Expld.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225. **Refd.** Cammell *v.* Sewell (1860), 5 H. & N. 728; Blasco *v.* Fletcher (1863), 32 L. J. C. P. 284; The Helene (1866), Brown. & Lush. 429; The Freedom (1871), 8 Moo. P. C. C. N. S. 29; The Argos, Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134; Atlantic Mutual Insce. *v.* Huth (1880), 16 Ch. D. 474; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

**3448. Right against purchasers of goods—Recovery of value of goods.**]—The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; & therefore where in the course of a voyage from India the ship was wrecked off the Cape of Good Hope; & some indigo, which was part of the cargo, was saved, & the same was there sold by public auction, by the authority of the captain, acting *bonâ fide* according to the best of his judgment for the benefit of all persons concerned; but the jury found there was no absolute necessity for the sale:—*Held:* the purchaser at such sale acquired no title, & the indigo having been sent to this country, the original owners were held entitled to recover its value.—FREEMAN *v.* EAST INDIA CO. (1822), 5 B. & Ald. 617; 1 Dow. & Ry. K. B. 234; 106 E. R. 1316.

*Annotations:*—**Refd.** Morris *v.* Robinson (1824), 3 B. & C. 196; Alcock *v.* Royal Exchange Assce. Corpn. (1849), 13 Q. B. 292; Cammell *v.* Sewell (1860), 5 H. & N. 728.

**3449. —— —— Effect of prior recovery against shipowners.**]—The master of a ship which was injured by the perils of the sea, put into the Mauritius, & there abandoned the ship & cargo, which were afterwards sold under an order of the Vice-Admiralty Ct. there, & the proceeds paid into that ct. The cargo was not damaged or perishable, nor was there any pressing necessity for the sale of it. The owners of the cargo brought an action on the case against the owners of the ship for wrongfully selling the cargo instead of carrying it to London, according to their contract, with a count in trover, & recovered a general verdict for the value of the ship & freight, which was one-fifth of the value of the cargo. They also sent out a power of attorney to an agent at the Mauritius to procure from the Vice-Admiralty Ct. there the proceeds of the sale which had been paid in. The agent demanded them, but they had been previously remitted to the High Ct. of Admlty. in this country. In an action for money had & received by the owners against the purchaser of the goods:—*Held:* (1) the captain had not any authority to sell the cargo, although acting *bonâ fide* & under the order of the Vice-Admiralty Ct.; (2) the recovery against the owners of the ship was no answer to the present action; (3) the proceeds of the sale at the Mauritius not having been paid when demanded, pltfs. were in the same situation as if no such demand had been paid, & therefore entitled to recover the value of the goods from deft.—MORRIS *v.* ROBINSON (1824), 3 B. & C. 196; 5 Dow. & Ry. K. B. 34; 107 E. R. 706.

*Annotations:*—*As to* (2) **Apld.** Knight *v.* Legh (1828), 1 Moo. & P. 528. *As to* (3) **Refd.** Valpy *v.* Sanders (1848), 5 C. B. 886; Rice *v.* Reed, [1900] 1 Q. B. 54. *Generally*, **Mentd.** Cammell *v.* Sewell (1860), 6 Jur. N. S. 918; Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584.

**3450. Right against shipowner & master jointly—Damages for conversion.**]—Trover lies against a shipowner for a sale by the master of goods, at a place short of their port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner. A cargo of salt was shipped by pltf. at Liverpool, for Calcutta, under a bill of lading making the same deliverable to A. & co., on payment of freight there, "as per charterparty." The ship sustained damage in quitting the harbour at Liverpool, & ultimately became so leaky that the master was compelled to run for Bahia, where, finding the state of the ship such as to render her incapable of continuing the voyage, & being unable to forward the salt to its destination, he sold it by public auction, remitting the proceeds to his owner, who tendered the amount, after making deductions for general average & expenses, to pltfs.:—*Held:* (1) the master & owner were jointly liable for the conversion; (2) it was not necessary for pltf. to give the charterparty in evidence; (3) the jury were warranted in estimating the damages at the cost price of the salt & the sum which pltf. had paid on account of freight.

I do not very well see how else they could estimate the value of the goods to the shipper than by taking the cost price, & adding thereto the expense incurred in getting them towards the merchant. What the cargo fetched by a forced sale at Bahia, clearly was no fair test. Pltf. did not want the goods there (CRESSWELL, J.).—EWBANK *v.* NUTTING (1849), 7 C. B. 797; 13 L. T. O. S. 94; 137 E. R. 316.

*Annotations:*—*As to* (1) **Refd.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225; Weir *v.* Bell (1878), 3 Ex. D. 238; Wagstaff *v.* Anderson (1880), 5 C. P. D. 171; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566. *As to* (3) **Refd.** Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649.

**3451. Right against brokers—As agents for purchasers of cargo.**]—A. acting for B., a foreign principal, but in his own name bought of C., in London, a cargo of wheat on board a certain vessel represented to be on its way from Galatz, payments to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, & the bill was duly paid. B. afterwards came to London, saw the contract, & ratified all that A. had done. It turned out that

*Sect. 6.—The voyage: Sub-sect. 6, B. (b) i. & ii. C. & D. Sect. 7: Sub-sect. 1, A. & B. (a).]*

the cargo had been fraudulently disposed of by the captain prior to the date of the contract of sale by C. to A.:—*Held:* B. could not maintain an action against A. to recover back the money paid, as upon a failure of consideration; but his only remedy, whether in his own name or in that of A., was against C., the seller.—RISBOURG *v.* BRUCKNER (1858), 3 C. B. N. S. 812; 27 L. J. C. P. 90; 30 L. T. O. S. 258; 6 W. R. 215; 140 E. R. 962.

**3452. —— As agents of shipowners.**]—On June 24 defts., who were ship brokers, wrote to pltfs., offering them "room" in a ship called *F. K. Dumas* for certain cement & stone from London to Callao. On June 25 defts. chartered the ship for the voyage, the charterparty providing (*inter alia*) that the whole ship should be at the disposal of the charterers, except the space necessary for the crew & stores; that the master & owners should give the same attention to the cargo, & in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by & for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; & that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On June 26 an agreement was made between defts., acting for the owners of the *F. K. Dumas*, & pltfs., that the former should receive on board cement & stone at certain freight from London to Callao, & sail on a certain day: freight to be paid one half on signing bills of lading, & the remainder on final discharge at Callao. The cement & stone were shipped, the half freight paid, & the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward pltfs.' goods to their destination, sold them. In an action against defts. for their value, the jury found that the sale was not justified:—*Held:* on the construction of the above documents there was no contract between pltfs. & defts. for the carriage of the goods from London to Callao.

As they are not principals, the only action that could be maintained against them would be that they professed to have an authority which they really did not possess. An agent who has no authority to make contracts cannot be sued as a principal (BRAMWELL, L.J.).—WAGSTAFF *v.* ANDERSON (1880), 5 C. P. D. 171; 49 L. J. Q. B. 485; 42 L. T. 720; 28 W. R. 856; 4 Asp. M. L. C. 290, C. A.

*Annotations:*—**Reld.** Herman *v.* Royal Exchange Shipping Co. & Patton (1884), Cab. & El. 413; Rodoconachi *v.* Milburn (1886), 56 L. J. Q. B. 202; Krüger *v.* Moel Tryvan Ship Co., [1907] A. C. 272; Armour *v.* Leopold Walford (London), [1921] 3 K. B. 473.

### ii. *Measure of Damages.*

**3453. Original cost of goods & freight advanced.**]—EWBANK *v.* NUTTING, No. 3450, *ante.*

**3454. Whether proceeds of sale.**]—EWBANK *v.* NUTTING, No. 3450, *ante.*

**3455. ——.**]—ACATOS *v.* BURNS, No. 2841, *ante.*

**3456. Loss by sale & freight advanced.**]—THE MARGERY, ANDERSON *v.* GELDART (1854), 4 L. T. 622.

**3457. Value of goods to owner if not sold.**]—ACATOS *v.* BURNS, No. 2841, *ante.*

**3458. Interest.**]—Interest allowed for a ship & cargo wrongfully taken by deft.; & this being done in the Indies, Indian interest allowed, deducting the charge of the return.—EKINS *v.* EAST INDIA CO. (1717), 1 P. Wms. 395; 2 Eq. Cas. Abr. 533; 24 E. R. 441, L. C.; *affd. sub nom.* EAST INDIA CO. *v.* EKINES (1718), 2 Bro. Parl. Cas. 382, H. L.

*Annotation:*—**Mentd.** Law *v.* East India Co. (1799), 4 Ves. 824.

### C. *Rights of Purchaser.*

**3459. Where sale unauthorised — Purchaser acquires no title.**]—FREEMAN *v.* EAST INDIA CO., No. 3448, *ante.*

**3460. —— Title acquired under law of country where goods sold—Goods subsequently brought to England.**]—A cargo of deals was shipped on board the Prussian vessel *Augusta Bertha*, by Russian merchants at Onega, for an English firm carrying on business at Hull. The vessel struck on the rocks on the coast of Norway, but the cargo was landed safely. A survey was held, when the surveyors recommended, as best for all parties, that the ship & cargo should be sold, & the cargo was sold accordingly. It appeared, that by the law of Norway, though the captain might not under such circumstances be able to justify the sale as between himself & the owners of the cargo, an innocent purchaser would have a good title to the property bought at such sale:—*Held:* the sale in Norway bound the property, & the goods, having afterwards come to this country, the owner claiming under such sale had a good title to them as against the underwriters to whom the cargo had been abandoned.—CAMMELL *v.* SEWELL (1860), 5 H. & N. 728; 29 L. J. Ex. 350; 2 L. T. 799; 6 Jur. N. S. 918; 8 W. R. 639; 157 E. R. 1371, Ex. Ch.

*Annotations:*—**Distd.** Liverpool Bank *v.* Foggo (1860), 2 L. T. 594. **Consd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115. **Apld.** Castrique *v.* Imrie (1870), L. R. 4 H. L. 414. **Reld.** The Justyn (1862), 6 L. T. 553; Simpson *v.* Fogo (1863), 1 Hem. & M. 195; The Empire of Peace (1869), 39 L. J. Adm. 12; Meyer *v.* Ralli (1876), 45 L. J. Q. B. 741; Eglinton *v.* Norman (1877), 46 L. J. Q. B. 557; Alcock *v.* Smith, [1892] 1 Ch. 238; Dulaney *v.* Merry, [1901] 1 K. B. 536. **Mentd.** Vadala *v.* Lawes (1890), 25 Q. B. D. 310.

### D. *Rights of Shipowner.*

**3461. Right against master—Injunction to restrain sale.**]—DELAFIELD *v.* GUANABEUS (1809), cited in Daniell's Chancery Practice, 8th ed., Vol. II. at p. 1407.

**3462. Wrongful sale—Right to sue in trover.**]—By an agreement between A., the owner of a ship, & B. & C., the ship was to be placed under the management of B. & C. to load outwards from Liverpool with a cargo for the Cape, Singapore, etc., consigned to their houses at these several ports. Before proceeding on the voyage, the captain received from B. & C. a letter of instruction, desiring him to proceed on his return from Singapore to the Cape, in which letter was the following passage: "on your arrival there, you will call upon our managing partner D., & follow such directions there as he may give you regarding such part of the cargo as is consigned to his firm, & which he requires to be landed there." At Singapore, B. & C. shipped coffee for London, to be delivered to the shippers' order, pursuant to bills of lading signed by the captain, & indorsed, without his knowledge, to certain persons in London. When the ship arrived at the Cape, the coffee being found to be in a heated state, was, by the orders of D., unshipped & sold. A. was afterwards compelled to pay the consignees of the coffee for the non-delivery thereof, D. being examined upon interrogatories, expressly stated

that he was not a partner with B. & C. In case brought by A. against B. & C., for wrongfully unshipping & selling certain coffee at the Cape of Good Hope, the declaration alleged, that " defts., by their agents at the said several ports, had & exercised the management & direction, ordering, control & government of the said ship, touching & in relation to the loading & unloading & freighting the same, & the consignment & disposition of the outward & homeward cargo thereof " :—*Held :* having as shipowner the possession of, & a special property in, the coffee which had been wrongfully sold at the Cape, he, pltf., was entitled to recover on a count in trover.—BROCKBANK *v.* ANDERSON (1844), 7 Man. & G. 295 ; 7 Scott, N. R. 813 ; 13 L. J. C. P. 102 ; 2 L. T. O. S. 458 ; 135 E. R. 124.

**3463. Contribution for general average.**] — HALLETT *v.* WIGRAM, No. 4178, *post.*

**Freight.**]—*See* Part VIII., Sect. 3, sub-sect. 4, D., *post.*

*Compare* Sub-sect. 6, B., *ante.*

## SECT. 7.—THE UNLOADING.

### SUB-SECT. 1.—ARRIVAL OF SHIP.

#### *A. In General.*

**3464. Liberty to overcarry—Discharge impossible without undue detention—Undue detention due to negligence—Of shipowner's agents.**]—A bill of lading contained the following clause : " If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to overcarry the cargo to London at merchant's risk, & deliver there to consignees or their assigns."

The ship was delayed at a port of call in the course of her voyage by the negligence of the shipowner's agents, with the result that, on her arrival at the port where the goods were to be discharged, the master found that the discharge could not be effected without undue detention, & he therefore overcarried the goods to London. In an action by the consignee to recover damages for the overcarriage of the goods :—*Held :* the damage was not so remote from the negligence of the shipowner's agents as to disentitle the consignee from succeeding in the action.—SEARLE *v.* LUND (1904), 90 L. T. 529 ; 20 T. L. R. 390 ; 9 Asp. M. L. C. 557, C. A.

**3465. Proviso for lightening cargo—To allow ship to enter port—Expenses of lightening caused by negligence—Recovery by charterer.**]—A shipowner is not entitled to burden the undertaking of the charterer of his vessel by using the space therein reserved for himself for a purpose which has no connection whatever with the voyage for which the vessel is engaged.

A charterparty provided that a steamer should load " a full & complete cargo . . . not exceeding what she can reasonably stow & carry over her tackle, apparel, provisions, & furniture," & proceed to a certain port & " there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port." The charterers lightened cargo at a port in anticipation of difficulty in getting into the next port. The shipowners then loaded a larger amount of bunker coal than was required for the chartered voyage, necessitating a second lightening outside the port of discharge :—*Held :* the charterers were entitled to recover the expenses of the second lightening from the shipowners, to whom the same had been paid under protest.—DARLING *v.* RAEBURN, [1907] 1 K. B. 846 ; 76 L. J. K. B. 570 ; 96 L. T. 437 ; 23 T. L. R. 354 ; 10 Asp. M. L. C. 429 ; 12 Com. Cas. 262, C. A.

#### *B. What Constitutes Arrival.*

##### *(a) In General.*

**3466. Arrival in port.**]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., No. 3543, *post.*

**3467. —— Ship not berthed.**]—MURPHY *v.* COFFIN, No. 3942, *post.*

**3468. —— ——.**]—SANDERS *v.* JENKINS, No. 3567, *post.*

**3469. —— —— Failure to give directions as to berth.**]—JAQUES & CO. *v.* WILSON (1890), 7 T. L. R. 119.

**3470. —— Dispatch to other port on account of strike.**]—THE FOX, No. 3869, *post.*

**3471. Arrival at gate of dock.**]—(1) A charterparty for a ship to sail to " London Surrey Commercial Docks " is not satisfied by the ship arriving at the gate of the docks but not entering into the docks.

(2) There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, & in close contiguity to the docks named, the authority to enter into the docks. The charterparty was to " London Surrey Commercial Docks, or as near thereto as she may safely get, & lie always afloat." As the docks were full the ship could not be given a discharging berth, & the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial ; the length of the delay was material. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys, the nearest place to the Surrey Commercial Docks where it could lie in safety afloat, & there discharged the cargo by lighters carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted & put in order on the wharf :—*Held :* under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, & to the charges for unloading.

(3) The contract in the charterparty as to demurrage was this : The cargo was to be supplied as fast as it could be taken on board, " & to be received at port of discharge as fast as steamer can deliver as above . . . & ten days' demurrage over & above the said laying-days " [there were no laying-days mentioned in the charterparty] " at £30 per day, payable day by day, it being agreed that for the payment of all freight, dead freight, & demurrage, the owner shall have absolute charge & lien on the said cargo. . . ." " The cargo to be brought to & taken from alongside the ship at merchants' risk & expense." The ship did not fulfil the engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk & expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks. When that difficulty arose

*Sect. 7.—The unloading: Sub-sect. 1, B. (a) & (b), & C. (a).]*

about the ship being admitted into the Surrey Commercial Docks, & the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, & on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, & delivery charges:—*Held:* he was warranted in so doing.

(4) There may be many possibilities within the contemplation of the contract of charterparty which are not actually present to the minds of the parties at the time of making it, & when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend, for they had neither thought, nor intention regarding it, but that which the parties, as fair & reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to these several rights & liabilities in the event of its occurrence (LORD WATSON).

(5) When by terms of a charterparty, a loaded vessel is destined to a particular dock or as near thereto as she may safely get, the first of these alternatives constitutes a primary objection, & in order to complete her voyage the vessel must proceed to & into the dock named, unless it has become in some sense impossible to do so (LORD WATSON).

(6) The legal effect, as regards the obligation on the merchant, is, I think, that he binds himself, on the ship arriving at the place where it is to be delivered, to take the cargo from alongside, & for that purpose to provide the proper appliances for taking delivery there. . . . If the ship may not get safely further than the entrance of the docks, . . . the merchant must provide lighters & other craft to take the cargo from alongside (LORD BLACKBURN).

(7) If the ship got to a discharging berth within the dock, the merchant was, by himself, or the dock co. as his agents, to provide proper means for landing the cargo on the quay (LORD BLACKBURN). —DAHL *v.* NELSON, DONKIN & CO. (1881), 6 App. Cas. 38; 50 L. J. Ch. 411; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. L. C. 392, H. L.; *affg.* S. C. *sub nom.* NELSON *v.* DAHL (1879), 12 Ch. D. 568, C. A.

*Annotations:—As to* (2) **Reld.** The Derwent (1901), 84 L. T. 360; The Lizzie, [1919] P. 22. *As to* (3) **Apld.** The Carisbrooke (1890), 15 P. D. 98. **Reld.** Sailing Ship Milverton Co. *v.* Cape Town & District Gas Light & Coke Co. (1897), 13 T. L. R. 548; Tillmanns *v.* S.S. Knutsford, [1908] 2 K. B. 385. *As to* (4) **Consd.** *Re* Comptoir Commercial Anversois *v.* Power, [1920] 1 K. B. 868. **Reld.** Countess Warwick S.S. Co. *v.* Le Nickel Soc. Anon., Anglo Northern Trading Co. *v.* Emlyn, Jones & Williams (1917), 87 L. J. K. B. 309. *As to* (5) **Apld.** The Alhambra (1880), 5 P. D. 256. **Consd.** Horsley *v.* Price (1883), 11 Q. B. D. 244. **Reld.** Allen *v.* Coltart (1883), 11 Q. B. D. 782. *As to* (6) **Apld.** The Fox (1914), 83 L. J. P. 89. **Reld.** Bulman & Dickson *v.* Fenwick, [1894] 1 Q. B. 179; Carlton S.S. Co. *v.* Castle Mail Packets Co., [1897] 2 Q. B. 485; Akt. Olivebank *v.* Danck Svovlsyre Fabrik (1919), 120 L. T. 629. *Generally*, **Reld.** Murphy *v.* Coffin (1883), 12 Q. B. D. 87; Castel & Latta *v.* Trechman (1884), Cab. & El. 276; Pyman *v.* Dreyfus (1889), 24 Q. B. D. 152; Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647; Monsen *v.* Macfarlane, [1895] 2 Q. B. 562; Bensaude *v.* Thames & Mersey Marine Insce. (1896), 75 L. T. 155; Watson *v.* Borner (1899), 4 Com. Cas. 335; Ardan S.S. Co. *v.* Weir (1905), 93 L. T. 559; Larsen *v.* Sylvester (1908), 99 L. T. 94; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; Embiricos *v.* Reid, [1914] 3 K. B. 45; Horlock *v.* Beal, [1916] 1 A. C. 486; Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Bank Line *v.* Capel, [1919] A. C. 435; Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Mentd.** Metropolitan Water Board *v.* Dick Ker, [1917] 2 K. B. 1; Matthey *v.* Curling, [1922] 2 A. C. 180; Tournier *v.* National Provincial & Union Bank of England, [1924] 1 K. B. 461.

**3472. Arrival in river.**]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., No. 3543, *post.*

**3473. Arrival in dock.**]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., No. 3543, *post.*

**3474. Arrival within limits of port.**]—VAN NIEVELT GOUDRIAN & CO. STOOMVAART MAATSCHAPPIJ *v.* FORSLIND (C. H.) & SON, No. 3925, *post.*

**3475. Arrival at named port "always afloat"—Nearest port where vessel may lie with safety.**]—Goods were shipped under a bill of lading to be delivered "at the port of S. B. always afloat." It was found to be impossible to unload at S. B. without taking ground, & the master discharged the goods at K. L., the nearest place where the vessel could lie in safety. In an action by the owners of the ship against the consignees of the goods for freight:—*Held:* the master acted reasonably in unloading at K. L., & the owners were entitled to freight.—TREGLIA *v.* SMITH'S TIMBER CO., LTD. (1896), 12 T. L. R. 363; 1 Com. Cas. 360.

*Annotation:*—**Reld.** Hall S.S. Co. *v.* Paul (1914), 111 L. T. 811.

———.]—*See, also,* Nos. 3480–3482, *post.*

**Arrival at place of discharge in port.**]—*See* Sub-sect. 2, post.

*(b) As Near as Ship can Safely Get.*

**3476. General rule—Arrival at named dock must be impossible.**]—DAHL *v.* NELSON, DONKIN & CO., No. 3471, *ante.*

**3477. Named port blocked with ice—Discharge at intermediate port.**]—A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on Dec. 17, at Kertch, which was as near as he could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; & he proceeded to discharge the cargo, notwithstanding the opposition of the charterers' agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway co. "freight & other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; & they, on Dec. 27, delivered it to the agent of the railway co. on his producing written authority from the co., together with copies of the charterparty & bill of lading, notwithstanding the captain's claim to retain it until the freight was paid. The agent of the co. gave a written acknowledgment that he had received the cargo

**PART VII. SECT. 7, SUB-SECT. 1.—B. (a).**

**3474 1.** *Arrival within limits of port.*] —LARRINAGA S.S. CO., LTD. *v.* GREEN & CO., [1916] 2 I. R. 126.—IR.

**PART VII. SECT. 7, SUB-SECT. 1.—B. (b).**

**2.** *General rule.*]—It is the duty of the captain if the ship cannot in safety go to the place ordered, to go only as near thereto as she safely may. —PYMAN *v.* NEWFOULDLAND RY. CO. (1882), 6 Nfld. L. R. 421.—NFLD.

**1.** *Congestion in port.*]—A vessel on arrival at a port could not get a berth at the quay as they were all occupied, & could not have been brought alongside the quay for want of water. She was, accordingly, moored to the quay at a distance of about 60 yards, another vessel lying between her & the quay:—*Held:* the vessel being moored as near the quay as was possible in the circumstances, had reached her place of discharge.—LA COUR *v.* DONALDSON & SON (1874), 1 R. (Ct. of Sess.) 912; 11 Sc. L. R. 524.—SCOT.

*Discharge at entrance to port.*]

on the power of the charterparty & bill of lading passed to him by the railway co. The ship then sailed from Kertch. The shipowner having sued the charterers for freight:—*Held:* (1) pltf. was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty; (2) pltf. was not entitled to freight *pro rata*, as no new contract for such freight had been made.—METCALFE *v.* BRITANNIA IRONWORKS CO. (1877), 2 Q. B. D. 423; 46 L. J. Q. B. 443; 36 L. T. 451; 25 W. R. 720; 3 Asp. M. L. C. 407, C. A.

*Annotations:—As to* (1) **Refd.** Horsley *v.* Price (1883), 11 Q. B. D. 244. *As to* (2) **Refd.** Castel & Latta *v.* Trechman (1884), Cab. & El. 276. *Generally*, **Refd.** Dahl *v.* Nelson, Donkin (1881), 50 L. J. Ch. 411.

**3478. Canal insufficiently deep—Discharge of part of cargo at mouth.**]—By the terms of a charterparty the ship was to take in a full cargo at Bombay, & proceed therewith to a safe port on the continent between Havre & Hamburg as ordered, "or so near thereto as she might safely get." The cargo was to be brought to & taken from alongside at merchant's risk & expense. The ship was ordered by the charterers to Koogerpolder in Holland. Koogerpolder is some distance up a canal, & the vessel with her full cargo on board drew too much water to proceed up the canal. No arrangements had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The portion of the cargo that required to be unloaded in order to enable the vessel to enter the canal was at least a third. The question arising under these circumstances between the shipowners & the charterers which of them ought to bear the expenses of lightering the cargo from the mouth of the canal to Koogerpolder:—*Held:* under the circumstances, the voyage under the charterparty ended at the mouth of the canal, & consequently the charterers ought to bear the above-mentioned expenses.—CAPPER & CO. *v.* WALLACE (1880), 5 Q. B. D. 163; 49 L. J. Q. B. 350; 42 L. T. 130; 28 W. R. 424; 4 Asp. M. L. C. 223, D. C.

*Annotations:*—**Consd.** Nielsen *v.* Wait (1885), 14 Q. B. D. 516. **N.F.** Reynolds *v.* Tomlinson (1896), 65 L. J. Q. B. 496; Hall S.S. Co. *v.* Paul (1914), 111 L. T. 811. **Refd.** Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38; The Alhambra (1881), 44 L. T. 637; Horsley *v.* Price (1883), 11 Q. B. D. 244.

**3479. —— ——.**]—REYNOLDS & CO. *v.* TOMLINSON, No. 3510, *post.*

**3480. "And always afloat"—Entry into port impossible without lightening.**]—THE ALHAMBRA, No. 3514, *post.*

**3481. —— —— Owing to state of tides.**]—A ship was chartered to unload at S. or "so near thereto as she may safely get at all times of tide & always afloat," & for delay in unloading the charterers were to pay demurrage. The state of the tide prevented the ship from reaching S. for four days after she arrived at the nearest point where she was able to float:—*Held:* according to the terms of the charterparty, this was a sufficient arrival of the ship at S. to found a claim for demurrage.—HORSLEY *v.* PRICE (1883), 11 Q. B. D. 244; 52 L. J. Q. B. 603; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. L. C. 106.

**3482. —— Entry into dock named refused by authorities—Discharge at nearest dock where ship able to be afloat.**]—DAHL *v.* NELSON, DONKIN & CO., No. 3471, *ante.*

**3483. Named ports blockaded—Discharge at other port.**]—Under a charterparty providing that the vessel should proceed to Tonapse & Taganrog, or "so near thereunto as she could safely get," & there deliver cargo:—*Held:* (1) these ports being under blockade, it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt; (2) the charterers having paid the freight under protest at Constantinople, the charterers were entitled to recover it back, as, on these facts, there was no implied contract to pay freight *pro rata*.—CASTEL & LATTA *v.* TRECHMAN (1884), Cab. & El. 276.

**3484. Berth in named port already occupied—Occupying vessel detained by strike.**]—THE FOX, No. 3869, *post.*

**3485. Congestion in port—Discharge in alternative port—By order of shipping controller.**]—MONGALDAI TEA CO., LTD. *v.* ELLERMAN LINES, LTD. (1920), 149 L. T. Jo. 302.

**Application of custom of port.**]—*See* Sect. 15, sub-sect. 5, *post.*

### *C. Port of Discharge.*

#### *(a) Port as Ordered.*

**Meaning of port generally.**]—*See* Nos. 1733–1735, *ante.*

**3486. Duty to name within reasonable time.**]—Where by the terms of a charterparty of a vessel bound for M., it was agreed that the vessel should, after delivering her outward cargo, with all convenient speed proceed to such one of certain specified ports as should be ordered at M. & there load from the factors of the charterer a full & complete cargo, etc., & therewith proceed to the United Kingdom:—*Held:* it was incumbent on the charterer to give orders as to the sailing of the vessel within a reasonable time after her arrival at M., & he was liable to an action for delaying to do so, though it did not appear from the declaration that the vessel had discharged her outward cargo.—WOOLLEY *v.* REDDELIEN (1843), 5 Man. & G. 316; 6 Scott, N. R. 199; 12 L. J. C. P. 152; 7 Jur. 930; 134 E. R. 585.

**3487. Duty to name possible port.**]—A charterparty provided that pltfs.' vessel should proceed with a cargo of nitrate to one of several ports in the United Kingdom for orders to discharge at a safe port in the United Kingdom or one of several named ports in Denmark, arrest & restraints of princes being mutually excluded. When the vessel arrived at one of the ports for orders, defts., holders of a bill of lading which incorporated the the above terms of the charterparty, ordered her to one of the named Danish ports, which had become an impossible port owing to the fact, known to defts., that the further importation of nitrate into Denmark had been prohibited by the British Govt. The master, being unable to go to the port ordered, discharged the cargo in the United Kingdom. In an action against defts. for freight:—*Held:* it was an implied term of the bill of lading that defts. should order the ship to a possible port & so give pltfs. an opportunity of earning freight, & as defts. had failed to do this, pltfs. were entitled to discharge the cargo where

—BREMNER & THOMSON *v.* BURRELL & Son (1877), 4 R. (Ct. of Sess.) 934.—

**h.** *Ship of too great draught to enter port.*]—Where a bill of lading states that goods shipped on board a vessel are to be delivered at the port of D., & the vessel is of too great a draught to permit of being taken to D., the delivery of the goods at the port of C., at which all goods by large vessels coming to D. are customarily discharged, is a sufficient discharge of the bill of lading.—BRISCOE & Co. *v.* SCOTT (1885), 4 N. Z. L. R. 143 (S. C.).—N.Z.

**PART VII. SECT. 7, SUB-SECT. 1.—C. (a).**

**k.** *Failure to berth owing to congestion.*]—A charterparty provided that the vessel should proceed to C. "& there discharge . . . as ordered." The vessel arrived at C. Dec. 4. Defts., the consignee, ordered the vessel to proceed

*Sect. 7.—The unloading: Sub-sect.* 1, *C.* (*a*) *&* (*b*) *i.*]

they did & to claim freight.—AKT. OLIVEBANK *v.* DANSK SVOVLSYRE FABRIK, [1919] 2 K. B. 162; 120 L. T. 629; 35 T. L. R. 373; 14 Asp. M. L. C. 426; *sub nom.* AKT. GEYSER *v.* DANSK SVOVLSYRE & SUPHERPHOSPHAT FABRIK, AKT. OLIVEBANK *v.* SAME, 88 L. J. K. B. 745; 24 Com. Cas. 178, C. A.

**Duty to name safe port.**]—*See* Sub-sect. 1, C. (*b*), *post.*

**3488. Failure to name port—Where condition to wait for orders at port of call—Master not bound to demand orders—Right to elect port of discharge.**] —Declaration alleged that deft., being master of a ship lying at Copenhagen, agreed with pltfs., by charterparty between them, that the ship should proceed to Nyland, & there load from pltfs.' factors a cargo of timber, & proceed therewith to a coal port, or a good & safe port in the Firth of Forth, or to London, or to a good & safe port on the East coast of Great Britain, as ordered, on signing bills of lading, or at Elsinore downwards, to wit, homewards, & deliver her cargo on being paid freight, that the ship did proceed to Nyland, & there load, & deft. signed a bill of lading for the cargo, in which it was stated, as the fact was, that the ship was bound for orders at Elsinore. that the ship arrived at Elsinore downwards, yet deft. would not communicate with pltfs., to wit in London, as he could have done, or wait a reasonable time at Elsinore downwards for orders; but, before a reasonable time had elapsed for pltfs. to give or send orders to Elsinore, deft. took the ship with the cargo, without orders & against the will of pltfs., to Leith, a port in the Firth of Forth, where pltfs. did not require the cargo to be, by which pltfs. were put to expense in bringing the cargo from Leith to London. Pleas: (*a*) as to deft. not communicating with pltfs., that deft. was not bound so to communicate, (*b*) as to the residue of declaration, that deft. waited a reasonable time at Elsinore downward for orders, but no orders were given or sent by pltfs. to Elsinore within a reasonable time; wherefore deft., after the lapse of a reasonable time for the receipt of orders, proceeded with the ship & cargo to Leith, being a good & safe port in the Firth of Forth, without any notice or knowledge that pltfs. did not wish the ship & cargo to proceed there or did not require the cargo there. On demurrer:—*Held:* pltfs. were not entitled to recover, deft. not being bound to communicate, & being justified, in the absence of orders, in taking the cargo to a place named in the charterparty.—SIEVEKING *v.* MAASS (1856), 6 E. & B. 670; 25 L. J. Q. B. 358; 27 L. T. O. S. 264; 2 Jur. N. S. 515; 4 W. R. 606; 119 E. R. 1013, Ex. Ch.

*Annotation:*—**Consd.** Procter Garrett Marston *v.* Oakwin S.S. Co., [1926] 1 K. B. 244.

**3489. —— —— Liability of charterers for damages — Where provision for demurrage**] — FRENCH *v.* GERBER, No. 1961, *ante.*

**3490. —— —— —— ——.**]—Pltfs., the shipowners, chartered a ship to defts., the charterers, to carry a cargo of grain. The charterparty provided that when loaded the ship was to proceed to a named port of call & there await orders as to the port of discharge. It further provided that "Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees, the charterers, of master's telegraphic report . . . of his arrival at the port of call, & for any detention waiting for orders, after the aforesaid twenty-four hours, the charterers or their agents shall pay to the steamer 30*s.* per hour. . . ." The steamer was detained at the port of call for over thirteen days. The sole cause of the detention was the deliberate refusal of the charterers to name a port of discharge. It suited their business arrangements to keep the steamer at the port of call. They admitted liability & paid a sum calculated at 30*s.* an hour for the period of detention less twenty-four hours. The shipowners treated the contract as still being in operation during the period of detention, but they contended that the detention clause had no application in the circumstances which had happened & that they were entitled to damages at common law. In an arbn., the umpire found in favour of the shipowners:—*Held:* the charterers were not entitled deliberately to neglect & refuse to send orders as to the port of discharge, but the shipowners, having treated the ship as being detained under the clause in question, were only entitled to damages at the agreed rate; & the charterers were not entitled to deduct a commission from the sum paid for detention.—ETHEL RADCLIFFE S.S. Co. *v.* BARNETT (1926), 95 L. J. K. B. 561; 135 L. T. 176; 42 T. L. R. 385; 70 Sol. Jo. 484; 17 Asp. M. L. C. 55; 31 Com. Cas. 222, C. A.

*Annotation:*—**Refd.** Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352.

**3491. —— —— Duty of ship to wait reasonable time.**]—(1) A charterparty provided that the ship should proceed to a port of call for orders concerning the port of discharge; that orders should be given to the master within twenty-four hours after receipt of his report of his arrival at the port of call, & that for any detention of the ship while awaiting orders after the twenty-four hours the charterers should pay the shipowners extra remuneration. Orders not having been sent within the twenty-four hours aforesaid, but having been sent within twenty-four hours after they had elapsed:—*Held:* it was the duty of the shipowners to have the ship at the port of call for the twenty-four hours & for a reasonable time thereafter; in the circumstances twenty-four hours after the expiration of the first period of twenty-four hours was a reasonable time; &, the ship having left before this reasonable time had elapsed, the owners had committed a breach of the charterparty.

(2) The charterers sold the cargo on board the ship as "shipped per *W.* arrived St. Vincent." The ship had arrived at St. Vincent, but, through the shipowners' breach of the charterparty, had left before the date of the contract. On discovering this the purchasers refused to accept the cargo except at a sum which was £300 below the contract price, to which the charterers agreed:—*Held:* it was a condition of the contract that the ship should have arrived at St. Vincent & should be there at the date of the contract; the purchasers were entitled to refuse the cargo except upon the terms that the contract price should be reduced by £300, & this compromise was a reasonable one, consequently the charterers could recover the sum of £300 from the shipowners as damages for the breach of the charterparty.—PROCTER GARRETT MARSTON, LTD. *v.* OAKWIN S.S. Co., [1926] 1 K. B. 244; 95 L. J. K. B. 375;

to the A. Dock to a suitable berth. Owing to the congested state of the shipping & circumstances over which deft. had no control, the vessel was not admitted to a berth until Feb. 22:—*Held:* in an action for demurrage, the charterparty must be construed as if the A. Dock had been originally named as the place of discharge, & the lay days commenced on Feb. 22.—ELLEFSEN *v.* STEPHAN (1902), S. C. 252; 12 C. T. R. 457.—S. AF.

134 L. T. 388 ; 42 T. L. R. 232 ; 16 Asp. M. L. C. 600 ; 31 Com. Cas. 213, C. A.

*Annotations :—As to* (1) **Consd.** Ethel Radcliffe S.S. Co. *v.* Barnett (1926), 95 L. J. K. B. 561. **Refd.** Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352.

**3492. —— Whether breach of contract as between seller & buyer of goods.**]—Where a contract was to be performed by acceptance of a cargo at the port of delivery, & the buyers were to name the port of delivery, the failure to do so & expression of inability to perform the contract is not *per se* a breach of the contract which remains unbroken, until the ship actually arrives at her port of final destination.—*Re* HALL, *Ex p.* HALLIDAY (1865), 12 L. T. 624 ; 11 Jur. N. S. 817 ; 13 W. R. 905, L. C.

**3493. Effect of naming impossible port—Port blockaded.**]—By a charterparty deft. engaged that his ship should return with all convenient speed to L. & there load a full & complete cargo of salt & proceed therewith to T. & deliver the same their freight free, & there or at St. M.'s load a homeward cargo of fruit. At the time the charterparty was entered into T. was in a state of blockade, which fact had been notified to Govt. & officially communicated to Lloyd's :—*Held :* the fact of the existence of the blockade was no excuse for the non-performance of the contract by deft., & did not render the voyage illegal in its inception.—MEDEIROS *v.* HILL (1832), 8 Bing. 231 ; 1 Moo. & S. 311 ; 1 L. J. C. P. 77 ; 131 E. R. 390.

*Annotations :*—**Consd.** Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125. **Refd.** The Helen (1865), L. R. 1 A. & E. 1.

**3494. —— Strike in progress—Application of express exemption clause.**]—BULMAN & DICKSON *v.* FENWICK & Co., No. 2757, *ante*.

**3495. —— Cargo declared contraband—Right of shipowner to damages for detention.**]—AKT. OLIVEBANK *v.* DANSK SVOVLSYRE FABRIK, No. 3487, *ante*.

**3496. What constitutes breach of charterparty—Express condition against "ice bound port"—Liability of charterer for damage to ship by ice.**]—A steamer was chartered for a Baltic round voyage in winter. The charterparty contained the following clause : "The steamer shall not be ordered to any port where fever or pestilence is present, or any port blockaded, or where hostilities are being carried on, or any icebound port, or any port where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall the steamer be obliged to force ice." The charterers ordered the steamer to Abo, a port in Finland, which is naturally icebound in winter, but is kept open all the year by means of ice breakers employed for that purpose by the Govt. of Finland. On the voyage to Abo the steamer encountered ice. The captain tried to force his way through, but failed, & the steamer remained fast in the ice until released by an ice breaker from Stockholm. The captain then continued his voyage & reached Abo. There it was found that the steamer had been injured by contact with the ice. The shipowners sued the charterers for breaches of the charterparty ; (*a*) in ordering the steamer to an icebound port ; (*b*) in ordering her to a port on her way to which she was obliged to force ice :—*Held :* (1) Abo was not an icebound port within the meaning of the charterparty, & there had been no breach by the charterers as firstly alleged ; (2) on the true construction of the charterparty there had been no breach by the charterers as secondly alleged.—LIMERICK S.S. Co. *v.* STOTT, [1921] 2 K. B. 613 ; 90 L. J. K. B. 865 ; 125 L. T. 516 ; 37 T. L. R. 674 ; 15 Asp. M. L. C. 323, C. A.

*Annotation :—Generally,* **Refd.** Wye Shipping Co. *v.* Chemin de fer Paris-Orleans, [1922] 1 K. B. 617.

### (*b*) *Safe Port.*

#### i. *In General.*

**3497. Effect of naming unsafe port—Right of master to refuse to enter.**]—THE MARY & SARAH, WILKINSON *v.* SHARLAND (1855), 3 L. T. 481.

**3498. ——— ———.**]—THE DUNCAN *v.* KÖSTER, THE TEUTONIA, No. 3165, *ante*.

**3499. —— Right of shipowner against charterers—Damages for detention of ship.**]—OGDEN *v.* GRAHAM, No. 3509, *post*.

**3500. —— Right of shipowner against consignor—Costs of defending action by consignee.**]—A shipowner entered into a charterparty with the consignor of goods by which he was to deliver them at a good & safe port to be named by the consignor. The consignor named a port at which it was found that the ship could not safely unload, & the captain proceeded elsewhere & unloaded. The consignee brought an action against the captain for damages for delivering elsewhere ; the consignor wrote to the captain : "We would recommend you to settle the matter in the best way you can." The shipowner defended the action & was ultimately successful ; but he incurred considerable costs in excess of those which the unsuccessful party had to pay :—*Held :* in an action by the shipowner against the consignor, such costs not being damages flowing from the consignor's breach of contract, & the consignor not having given authority to incur them, the shipowner could not recover them ; the amount recoverable by the shipowner in respect of port dues was only the difference between what he would have paid had the ship unloaded at the port named, & what he actually did pay ; & insurance on the voyage from the port named to a safe port must be taken to have been included in the claim for demurrage, which had been allowed in full.—EVANS *v.* BULLOCK (1877), 38 L. T. 34 ; 3 Asp. M. L. C. 552.

**3501. —— Duty of master to discharge in safe port.**]—Pltfs. shipped goods which were contraband of war on defts.' ship for carriage from London to Yokohama under a bill of lading containing the exception of "restraint of princes," & also a special clause that "if the entering of or discharging in the port, of discharge, shall be considered by the master unsafe by reason of war . . . the master may land the goods at the nearest safe & convenient port." The ship also carried goods belonging to other shippers. In the course of her voyage the ship arrived at Hong Kong, & on the day of her arrival there war was declared between China & Japan. There were at that time several Chinese war-vessels in & round the port of Hong Kong, & if the master had attempted to sail thence with the pltfs.' goods on board there would have been a serious danger of their being seized & confiscated. The master accordingly landed them there. In an action for breach of contract to carry the goods to Yokohama :—*Held :* (1) the risk of the goods being seized, if attempted to be carried further, amounted to a "restraint of princes" within the exception ; (2) such risk of seizure, on the voyage between Hong Kong & Yokohama, rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause ; (3) the master's duty to take care of the cargo justified him, apart from any exceptions in the bill of lading, in landing pltfs.' goods where he did.—NOBEL'S

*Sect. 7.—The unloading: Sub-sect. 1, D.; sub-sect. 2, A., B. & C.]*

order, contains a stipulation that all the goods are to be taken out in a certain number of days after arrival, or to pay demurrage, the indorsee of the bill of lading who takes out the goods is liable for demurrage, from the expiration of the lay days calculated from the arrival of the ship, without receiving any notice of that event.

Where there is such a bill of lading, if there be any inaccuracy in the entry of the ship's name at the custom house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose, was deprived of the usual means of being informed of the ship's arrival demurrage cannot be recovered.—HARMAN *v.* CLARKE (1815), 4 Camp. 159; 171 E. R. 51, N. P.

*Annotations:*—**Distd.** Fairbridge *v.* Pace (1844), 1 Car. & Kir. 317. **Refd.** Bourne *v.* Gatliff (1844), 11 Cl. & Fin. 45.

**3521. —— No custom or special contract.]**—HOULDER *v.* GENERAL STEAM NAVIGATION CO., No. 3698, *post*.

**3522. ——.]**—The shipowner . . . is not bound to give notice that his ship is so arrived & is so ready (BRETT, L.J.).—NELSON *v.* DAHL (1879), 12 Ch. D. 568; 41 L. T. 365; 28 W. R. 57; 4 Asp. M. L. C. 172, C. A.; *on appeal, sub nom.* DAHL *v.* NELSON, DONKIN & CO. (1881), 6 App. Cas. 38, H. L.

*Annotations:*—**Refd.** The Carisbrooke (1890), 15 P. D. 98; Carlton S.S. Co. *v.* Castle Mail Packets Co., [1897] 2 Q. B. 485; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499. **Mentd.** The Alhambra (1880), 5 P. D. 256; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Horsley *v.* Price (1883), 11 Q. B. D. 244; Murphy *v.* Coffin (1883), 12 Q. B. D. 87; Castel & Latta *v.* Trechman (1884), Cab. & El. 276; Pyman *v.* Dreyfus (1889), 24 Q. B. D. 152; Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647; Bulman & Dickson *v.* Fenwick, [1894] 1 Q. B. 179; Monsen *v.* Macfarlane, [1895] 2 Q. B. 562; Bensaude *v.* Thames & Mersey Marine Insce. (1896), 75 L. T. 155; Sailing Ship Milverton Co. *v.* Cape Town & District Gas Light & Coke Co. (1897), 13 T. L. R. 548; Watson *v.* Borner (1899), 4 Com. Cas. 335; The Derwent (1901), 84 L. T. 360; Ardan S.S. Co. *v.* Weir (1905), 93 L. T. 559; Larsen *v.* Sylvester (1908), 99 L. T. 94; Tillmanns *v.* S.S. Knutsford, [1908] 2 K. B. 385; Embiricos *v.* Reid, [1914] 3 K. B. 45; The Fox (1914), 83 L. J. P. 89; Horlock *v.* Beal, [1916] 1 A. C. 486; F. A. Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Countess Warwick S.S. Co. *v.* Le Nickel Soc. Anon., Anglo Northern Trading Co. *v.* Emlyn, Jones & Williams (1917), 87 L. J. K. B. 309; Metropolitan Water Board *v.* Dick Kerr, [1917] 2 K. B. 1; Akt. Olivebank *v.* Danck Svovlsyre Fabrik, [1919] 1 K. B. 388; Bank Line *v.* Capel, [1919] A. C. 435; The Lizzie, [1919] P. 22; *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868; Matthey *v.* Curling, [1922] 2 A. C. 180; Tournier *v.* National Provincial & Union Bank of England, [1924] 1 K. B. 461; Hirji Mulji *v.* Cheong Yue S.S. Co., [1926] A. C. 497; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3523. ——.]**—THE CLAN MACDONALD, No. 3806, *ante*.

**3524. —— Express clause in bill of lading—Effect of "notification clause" in ocean bill of lading.]**—E. CLEMENS HORST CO. *v.* NORFOLK & NORTH AMERICAN STEAM SHIPPING CO., LTD., No. 2223, *ante*.

**3525. Duty of consignee to inquire.]**—HOULDER *v.* GENERAL STEAM NAVIGATION CO., No. 3698, *ante*.

**3526. —— Inaccurate entry of ship's name.]**—HARMAN *v.* CLARKE, No. 3520, *ante*.

**3527. What is sufficient notification—Notification by post—Though letter not delivered.]**—E. CLEMENS HORST CO. *v.* NORFOLK & NORTH AMERICAN STEAM SHIPPING CO., LTD., No. 2223, *ante*.

**3528. Notice given to wrong persons.]**—When a ship is by the charter to be addressed, at the port of discharge, to the charterer's agents, the charterer is entitled to recover from the shipowner excess of freight received by other agents, to whom he has addressed the ship; & if it appear that the charterer's broker, if allowed to have the ship, would have sent to the consignees to come & take their goods, & thus have prevented delay, the shipowner cannot claim demurrage for delay caused by the absence of such notice to consignees.—BRADLEY *v.* GODDARD (1863), 3 F. & F. 638, N. P.

SUB-SECT. 2.—PLACE OF DISCHARGE IN PORT.

*A. In General.*

**3529. Whether ship bound to proceed to berth on Sunday.]**—BRERETON *v.* CHAPMAN, No. 3939, *post*.

**3530. What constitutes arrival at place of discharge—Entry for meter.]**—KELL *v.* ANDERSON, No. 3922, *post*.

**3531. —— "Off the berth."]**—THOMSON *v.* LONDON & GRAYS SEABORNE COAL CO., LTD. (1895), 12 T. L. R. 99.

**3532. No warranty to proceed to usual place in any event.]**—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante*.

**3533. More than one suitable place of discharge—Election by charterers or assignees of cargo.]**—Where at the port of discharge there are two docks both equally fit & proper to receive the ship, & one of them is the more usual for discharge of cargo of the kind carried by the ship, the charterers or assignees of the cargo have the right to decide at which berth the ship shall discharge, & the shipowners or their agent must comply with any request for a particular berth.—GEORGE H. IRELAND & SONS *v.* SOUTHDOWN S.S. CO., LTD. (1926), 136 L. T. 412; 17 Asp. M. L. C. 187; 32 Com. Cas. 73.

*B. Where Place Named in Contract.*

**3534. Duty of ship—To proceed to place named—Unless unsafe.]**—By a charterparty made between pltf. & deft. it was agreed that the ship *Bebec* should take on board from deft. a cargo of culm at Llannelly, & "proceed with all convenient speed to C.'s wharf, Rochester, or so near thereto as she might safely get." The ship arrived at Rochester on Oct. 24, & was moored at a place called the Buoys, which was distant about 300 yards from C.'s wharf. The master then gave deft.'s agent notice that the ship was ready to discharge the cargo; deft.'s agent ordered the master to proceed with the ship to C.'s wharf. In consequence of the state of the tides & the want of water, the ship was then unable to get to C.'s wharf, & deft.'s agent refused to send lighters to lighten the ship to enable her to do so. The ship did not reach C.'s wharf until Nov. 4. In an action for demurrage:—*Held:* deft. was not bound to unload the ship until she reached C.'s wharf, & the lay days did not begin until Nov. 4.

The master is bound to take his ship to C.'s wharf unless prevented by some permanent

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**3525 i.** *Duty of consignee to inquire.]*—Where the importer of goods has the bill of lading in his possession it is his duty to ascertain by what vessel the goods are coming, or to notify the agents of steamship cos. of the marks on the goods & asked that he be informed of their arrival.—MASSON *v.* MERCHANTS BANK OF CANADA (1898), Q. R. 14 S. C. 293.—CAN.

**3525 ii.** ——.]—It is the duty of the consignee to ascertain when the goods will arrive & to be ready to take delivery.—FREEMAN *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., LTD. (1913), I. L. R. 41 Calc. 703.—IND.

**PART VII. SECT. 7, SUB-SECT. 2.—B.**

1. *Construction of clause as to berthing at particular wharf.]*—A bill of lading had the following memorandum written on its margin: "Goods to be

obstruction. This is a contract to proceed to a certain place, & if in the ordinary course of navigation the ship could get there, the master was bound to take her (POLLOCK, C.B.).—BASTIFELL *v.* LLOYD (1862), 1 H. & C. 388; 31 L. J. Ex. 413; 10 W. R. 721.

*Annotations:*—**Consd.** The Alhambra (1880), 5 P. D. 256; Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Horsley *v.* Price (1883), 11 Q. B. D. 244.

**3535. Remedy for breach of contract—Injunction.**]—An interim injunction granted restraining shipowners from discharging part of a cargo in a particular dock contrary to the terms of the bills of lading.—WOOD & CO. *v.* ATLANTIC TRANSPORT CO., LTD. (1900), 5 Com. Cas. 121.

**3536. "Usual place of discharge"—Meaning of.**]—LEONIS S.S. CO., LTD. *v.* RANK (JOSEPH), LTD., No. 3959, *post*.

**3537. ——— ——— Necessity for sanction of authorities.**]—GOOD & CO. *v.* ISAACS, No. 3741, *post*.

**3538. ——— Right of cargo owner to select place—Where more places than one.**]—I am of opinion that upon general principles, upon which LORD KINGSDOWN truly says, for the sake of the public interest, questions of general mercantile law should be decided (*Kirchner* v. *Venus*, No. 4054, *post*), it was the duty of the master, in the circumstances stated, to have obeyed, when he did receive it, the order of the proprietor of the cargo. The charterparty being open, the place of discharge has necessarily to be supplied. It cannot, I think, be reasonably contended that a foreign master entering this port, perhaps for the first time, was entitled to select the dock which he considered to be "the usual place of discharge," & to disregard the direction of the proprietor of the cargo as to the dock in which his interests required that the cargo should be delivered (SIR ROBERT PHILLIMORE).—THE FELIX (1868), L. R. 2 A. & E. 273; 37 L. J. Adm. 48; 18 L. T. 587; 17 W. R. 102; 3 Mar. L. C. 100.

*Annotations:*—**Consd.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; Ireland *v.* Southdown S.S. Co. (1926), 136 L. T. 412. **Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41; Saunders *v.* Jenkins (1896), 13 T. L. R. 24; Armement Adolf Deppe *v.* Robinson, [1917] 2 K. B. 204; Michalinos *v.* Dreyfus (1924), 131 L. T. 177; Van Nievelt Goudrian, Stoomvaart Maatschappij *v.* Forslind (1925), 133 L. T. 457; Lewis *v.* Dreyfus (1926), 31 Com. Cas. 239.

**3539. ——— ——— ———.**]—GEORGE H. IRELAND & SONS *v.* SOUTHDOWN S.S. CO., LTD., No. 3533, *ante*.

**3540. Right of shipowner—Damages to ship's bottom—Against consignee.**]—Defts. had entered into a contract for a supply of stone to be delivered alongside a landing place at Iken Cliff, on the river Alde, in Suffolk, & the seller of the stone employed pltf.'s barge to carry the stone. Defts. had no interest in or right to use the bank of the river at Iken Cliff, except by permission of the owner obtained before they entered into the contract. At Iken Cliff there was no wharf or quay, or even bank, alongside which a barge could discharge, & there was no fixed or defined berth; but the landing place at Iken Cliff was a place at which barges such as pltf.'s could safely discharge by means of planks laid upon trestles from the barge to the bank of the river. Upon arrival at Iken Cliff, the master of the barge, by the advice of her pilot & a man in a fishing boat, selected a place as near the bank as her draught would permit, at which the barge was moored. She lay upon uneven ground & was damaged:—*Held:* defts. were not liable to pltf. for the damage, upon the ground that there was no representation, expressed or implied, by defts. that any particular spot was a proper place to take the ground, or to lie in for discharging; & it was for the master of the barge, knowing his own barge & her draught, to select the place where he would lie to discharge. He had no reason to expect that the bed of the river would be free from all inequalities, & there was nothing of which defts. were bound to give any warning to him.—PARKER *v.* PLOMESGATE RURAL COUNCIL (1903), 9 Com. Cas. 107.

**3541. ——— ——— Against charterers—Where breach of contract to lighter immediately.**]—Applts.' ship was chartered by resps. to convey a cargo of wheat from Port Arthur to Port Colborne. The contract provided that on arrival of the vessel at Port Colborne she was to proceed to resps.' elevator to lighter, & then proceed at once to her winter berth. On her arrival the berth alongside resps.' elevator, to which under the charter she was to proceed, was occupied by another vessel, & resps.' elevator was full. She was moved under protest to a position elsewhere, & after a few days she was able to get alongside the elevator, but the elevator was still full, & while she was waiting there to be lightered the water fell, & in settling down she rested on a large anchor in the harbour & sustained serious damage, in respect of which the action was brought:—*Held:* as the breach of contract immediately to lighter the vessel was the cause of the damage applts. were entitled to recover.—GREAT LAKES S.S. CO. *v.* MAPLE LEAF MILLING CO., LTD. (1924), 41 T. L. R. 21, P. C.

*C. Where Place to be Named.*

**3542. Duty of ship—To discharge at berth named—When insufficient water—Provision for discharge always afloat.**]—(1) A charterparty provided that the ship should load with a cargo & proceed therewith to a port "to discharge in a dock as ordered on arriving if sufficient water, or so near thereto as she may safely get always afloat":—*Held:* the ship was only bound to discharge in the dock named if there was sufficient water there at the time the order was given.

(2) The fact that the holder of a bill of lading, who is the indorsee thereof merely by way of security for advances made by him, & so not liable as owner of the goods under Bills of Lading Act, 1855 (c. 111), s. 1, demands & takes delivery of the goods under the bill of lading, is evidence of a new agreement by him to comply with all the conditions of the bill of lading, & to take delivery accordingly.—ALLEN *v.* COLTART (1883), 11 Q. B. D. 782; 52 L. J. Q. B. 686; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. L. C. 104.

*Annotations:*—*As to* (1) **Refd.** Horsley *v.* Price (1883), 52 L. J. Q. B. 603. *As to* (2) **Refd.** Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575.

**3543. Duty of party having right to name berth—To exercise right in reasonable time.**]—By a charterparty the vessel was to proceed to the Mersey & deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered, but, owing to the crowded state of the dock, delay occurred which prevented the vessel being berthed for some time after arrival. On a claim by the shipowners for demurrage arising from the delay:—*Held:* (1) the

discharged from ship berthed at C.'s wharf on arrival, provided there is a vacant berth within 48 hours:—*Held:* the captain was bound to berth his ship at C.'s wharf within 48 hours of arrival, provided there was a vacant berth within that time.—PARBURY *v.* PURDY (1876), 14 N. S. W. S. C. R. (L.) 207.—**AUS.**

*Sect. 7.—The unloading: Sub-sect. 2, C. & D.*]

obligation of the charterers to unload did not commence till the vessel was berthed.

The end of a carrying voyage is sometimes when the ship arrives at a particular port, sometimes when she arrives in a river, & at others when she is in a dock. The contract does not express any particular berth, but it does express the equivalent to that in using the words "as ordered," which I take to mean as ordered by the charterers. Does that give the charterers the right to fix the place where the carrying voyage is to end? Even without authority I should say that it did, but *Tapscott* v. *Balfour*, No. 3851, *post*, has dealt with a charterparty in a similar form, where a particular dock has to be named, the necessary result of the agreement being that when the charterer exercises that power, the result is the same as if the dock had been named in the charterparty (LORD ESHER, M.R.).

(2) The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock, that is one that is reasonably fit for the purpose of delivery. It will not do for instance to choose a dock the entrance to which is blocked. To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time (BOWEN, L.J.).—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., [1891] 2 Q. B. 647; 61 L. J. Q. B. 11; 65 L. T. 659; 40 W. R. 58; 7 T. L. R. 704; 7 Asp. M. L. C. 106, C. A.

*Annotations:—As to* (1) **Consd.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499. **Refd.** Good *v.* Isaacs, [1892] 2 Q. B. 555; Monsen *v.* Macfarlane, [1895] 2 Q. B. 562; Carlton S.S. Co. *v.* Castle Mail Packets Co., [1897] 2 Q. B. 485; Sanders *v.* Jenkins, [1897] 1 Q. B. 93; Piniero *v.* Dupre (1902), 18 T. L. R. 351. *As to* (2) **Consd.** Bulman & Dickson *v.* Fenwick, [1894] 1 Q. B. 179; Moel Tryvan Ship Co. *v.* Weir, [1910] 2 K. B. 844. **Refd.** Dobell *v.* Green, [1900] 1 Q. B. 526; Akt. Inglewood *v.* Millar's Karri & Jarrah Forests (1903), 88 L. T. 559; Jones *v.* Green, [1904] 2 K. B. 275; The Fox (1914), 83 L. J. P. 89; Akt. Olivebank *v.* Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162. *Generally*, **Refd.** Watson *v.* Borner (1899), 4 Com. Cas. 335; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3544. —— To name free berth.**]—By a charterparty it was agreed that pltf.'s vessel after loading a certain cargo should proceed "to London or Tyne dock to such ready quay berth as ordered by the charterers," "demurrage to be at the rate of £30 per running day," in no case, unless in berth before noon, were the lay-days to count before the day following that on which the vessel was in berth, & the captain or owners were to have an absolute lien on the cargo for all freight & demurrage in respect thereof. The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock there was no quay berth ready for her, & she was consequently detained one day beyond the time required for discharging her had she been able to have got alongside a quay berth on her arrival in the dock:—*Held:* the charterers were bound to name such a quay berth as was ready, & for the detention caused by the charterers neglecting to do so pltfs. were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause.—HARRIS *v.* JACOBS (1885), 15 Q. B. D. 247; 54 L. J. Q. B. 492; 54 L. T. 61; 5 Asp. M. L. C. 531, C. A.

*Annotation:*—**Refd.** Restitution S.S. Co. *v.* Sir John Pirie (1889), 61 L. T. 330.

**3545.** —— ——.]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., No. 3543, *ante*.

**3546. —— To name proper place for discharge.**]—JAQUES & CO. *v.* WILSON (1890), 7 T. L. R. 119.

**3547.** —— ——.]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., No. 3543, *ante*.

**3548.** —— ——.]—GEORGE H. IRELAND & SONS *v.* SOUTHDOWN S.S. CO., LTD., No. 3533, *ante*.

**3549. —— To name possible place for discharge —Cargo of explosives.**]—By a charterparty a ship was to load a cargo, including explosives & machinery, & proceed to certain ports, among others Buenos Ayres (including Boca), & there deliver the cargo in regular turn at the customary discharging places named by the charterers' agents into lighters or alongside the wharf according to the custom of the port; the owners authorised the charterers to sign bills of lading for the cargo as usual, & agreed to abide by all the conditions thereof, & the cargo was to be brought to & taken from alongside at the charterers' risk & expense. By the bill of lading the cargo was to be discharged at the consignees' wharf at Boca, provided the same was available, otherwise lighters were to be provided by the consignees. At Boca a ship carrying explosives was only allowed to discharge at a certain wharf, & the ship therefore could not go to the consignees' wharf (which was available), & the consignees' goods had to be lightered there. In an action by the shipowner against the charterers to recover the expense of lightering:—*Held:* the shipowner was entitled to recover, either upon the ground that the charterers, when they signed the bill of lading, knew that the explosives were on board & that they could not perform the contract without breaking the port regulations, & were therefore imposing a liability on the shipowner which did not come within the above clause in the charterparty authorising the charterers to sign bills of lading; or upon the ground that the charterers had only the right to direct the ship to go to such discharging places as were customary, & that the customary place at Boca for discharging a ship with explosives was the wharf appointed by the port regulations.—HULL STEAM SHIPPING CO. *v.* LAMPORT & HOLT (1907), 23 T. L. R. 445.

**3550. Liability for refusal to name berth—Remedy of shipowner—Measure of damages.**]—By a charterparty the owner was to carry a cargo of coals to London, & there deliver the same "at a good & safe wharf" to the freighter or assigns, paying freight 6*s.* per ton, etc. One market day to be allowed for sale, or 1½*d.* per ton additional freight for each market day's detention thereafter. The vessel came into collision with a steam tug in the Thames, & was sunk with the cargo on board, but was got up, & on the afternoon of Apr. 23, arrived at a tier at Wapping, whither she was ordered by the harbour-master. Notice of her arrival was on the same day given to the agents of the freighter, & they were required to name a wharf; but they declined to do so. On Apr. 24, the ship & freight were arrested by process out of the Admlty. Ct. in a suit instituted by the owners of the tug:—*Held:* pltf. was entitled to recover as damages for the refusal to name a wharf, & so refusing to accept the cargo, the amount he would have received as freight if the cargo had been duly delivered, there having been

a complete breach before the arrest; but he was not entitled to demurrage.—STEWART *v.* ROGERSON (1871), L. R. 6 C. P. 424.

*Annotation:*—**Refd.** Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570.

**3551. Liability for naming berth not free—Detention of ship.**]—HARRIS *v.* JACOBS, No. 3544, *ante*.

**3552. —— —— "Hindrance beyond charterer's control."**]—MILVERTON SAILING SHIP CO., LTD. *v.* CAPE TOWN & DISTRICT GAS LIGHT & COKE CO., LTD., No. 2770, *ante*.

**3553. —— —— Hindrance by default of consignees.**]—A charterparty provided that pltfs.' ship should proceed to Maryport (Senhouse Dock) & there deliver her cargo, as customary, where & as directed by consignees. At the date of the vessel's arrival at Maryport the purchasers of her cargo had already several vessels discharging in the dock, &, by reason thereof, under the dock regulations pltfs.' vessel was not permitted to enter the dock for some time:—*Held:* the charterers were not responsible for the delay so caused.—THE DERWENT (1901), 84 L. T. 360; *sub nom.* THE DEERHOUND, 49 W. R. 511; 17 T. L. R. 328; 45 Sol. Jo. 395; 9 Asp. M. L. C. 189; 6 Com. Cas. 104, D. C.

*Annotations:*—**Consd.** Harrowing *v.* Dupré (1902), 18 T. L. R. 594. **Refd.** Akt. Inglewood *v.* Millar's Karri & Jarrah Forests (1903), 88 L. T. 559.

*D. Where No Place Named.*

**3554. General rule—Usual place of discharge.**]—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante*.

**3555. —— ——.**]—(1) By charterparty it was agreed that pltfs.' steamship should proceed to Cronstadt & load a cargo of wheat, & therewith proceed to a port in the English or Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide & always afloat & deliver the same. Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner dispatched, for loading & discharging the steamer, & ten days on demurrage if required over & above the laying days at £25 per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4,325 quarters of wheat, & was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on Nov. 13. Sharpness Dock is within the port of Gloucester, & about seventeen miles from the basin within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on Nov. 13, but could not get nearer to Gloucester than Sharpness until part of her cargo was first discharged at Sharpness. On Nov. 14 & 15 the consignees discharged into lighters 1,585 quarters of the cargo, & then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, & arrived in the basin on Nov. 17. On Nov. 18 the residue of the cargo was discharged & the vessel returned to Sharpness, where she arrived on Nov. 19. In an action for demurrage evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain cargoes was at the basin within the city, & when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, & during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester Basin & by returning to Sharpness was not counted:—*Held:* the custom was not inconsistent with the express provision in the charterparty as to "running days," & the time occupied by the vessel in going from Sharpness to the basin & in returning to Sharpness ought to be excluded from the lay days, & pltfs. were entitled to one day's demurrage only.

(2) What is the general rule governing the delivery of a cargo? The ship has to go to the port to which she is ordered; but to go to the port is not enough. She has to deliver her cargo at the port to which she is ordered, according to the usual course of delivery at that port of such a cargo as that which she carries. She cannot deliver the cargo at any portion of the port to which she is ordered, at the choice of her owners. They are not obliged to deliver the cargo at any part of the port to which she is ordered, according to the choice of the charterer. Her owners have undertaken to deliver at the port, & not at any particular part of the port at the whim & pleasure of the charterer, or at the whim & pleasure of the ship's owners. But by the construction that is put upon charterparties, her owners are bound, & entitled, to deliver at the port only in one part of the port, namely, at the usual place of delivery at that port of a cargo such as that which she carries. Under these circumstances I have not the slightest doubt that if it were shown that for such cargoes as that which she carries, the usual mode of delivery of a ship was to unload her to one half or to any other proportion at one part of the port, & then, when she was lightened, to go on to another part of the port & there finish unloading, the usual place of delivery at that port would be at both those places. The usual place of delivering a cargo in such a port as that would be to go to the first place & there unload the ship, until she drew a particular draught of water, & then to go to the other place & finish unloading. In such a case as that, the owner of the ship would be bound, & entitled, to deliver the cargo from her in that way, unless some new stipulation had been made between him & the charterer as to the mode of unloading the ship (LORD ESHER, M.R.).

(3) Working days in England, by the custom & habits of the English, if not by their law, do not include Sundays. . . . Working days in an English charterparty, if there is nothing to show a contrary intention, do not include Christmas Day & some other days which are well known to be holidays (LORD ESHER, M.R.).

It is said that the "running days" mean "consecutive days." There is the fallacy of the argument. The meaning may be this, that in the absence of any custom the days of unloading would be consecutive . . . It is not ordinary English to say that "running days" mean "consecutive days" (COTTON, L.J.).—NIELSEN *v.* WAIT (1885), 16 Q. B. D. 67; 54 L. T. 344; 34 W. R. 33; 2 T. L. R. 34; 5 Asp. M. L. C. 553; *sub nom.* NEILSON & CO. *v.* WAIT & CO., 55 L. J. Q. B. 87, C. A.

*Annotations:*—*As to* (1) **Distd.** Reynolds *v.* Tomlinson, [1896] 1 Q. B. 586. **Refd.** Carlton S.S. Co. *v.* Castle Mail Packets Co. (1898), 78 L. T. 661; Hall S.S. Co. *v.* Paul (1914), 111 L. T. 811. *As to* (2) **Refd.** The Alne Holme (1893), 62 L. J. P. 51. *As to* (3) **Refd.** The Katy, [1895] P. 56; British & Mexican Shipping Co. *v.* Lockett, [1911] 1 K. B. 264.

**3556. —— ——.**]—SANDERS *v.* JENKINS, No. 3567, *post*.

*Sect. 7.—The unloading: Sub-sect. 2, D.; sub-sects. 3 & 4, A.*]

**3557. —— ——.**]—THE MARY THOMAS (1896), 12 T. L. R. 511.

**3558. Right of consignee—To name place for discharge—Within limits assigned in charterparty.**]—By the charterparty the ship was to proceed "to Plymouth, not higher than T. or N., or as near thereunto as she can safely get, & deliver" her cargo, with certain lay days & demurrage days. The port of Plymouth is a tidal estuary. On the ship's arrival in Plymouth the consignees ordered her to discharge at B., an ordinary landing place in the port of Plymouth, lower than T. or N. At this time the tides were neap: the vessel went as near to B. as she could in that state of the tide, & lay on the sand for some days, till, the tides being higher, she got to B. In an action for demurrage:—*Held:* the consignee had the option of naming any ordinary loading place in the port of Plymouth within the limits assigned, & the lay days did not commence till the vessel reached the place so named. The delay in getting to it being occasioned only in the ordinary course of navigation in a tidal harbour.—PARKER *v.* WINLOW (1857), 7 E. & B. 942; 27 L. J. Q. B. 49; 4 Jur. N. S. 84; 119 E. R. 1497.

*Annotations:*—**Consd.** Bastifell *v.* Lloyd (1862), 1 H. & C. 388; Dahl *v.* Nelson, Donkin (1881), 6 App. Cas. 38. **Reld.** Tapscott *v.* Balfour (1872), 42 L. J. C. P. 16; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Horsley *v.* Price (1883), 11 Q. B. D. 244; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; Universal Steam Navigation Co. *v.* McKelvie, [1923] A. C. 492; Kimber Coal Co. *v.* Stone & Rolfe, [1926] A. C. 414. **Mentd.** Williamson *v.* Barton (1862), 7 H. & N. 899; Concordia Chemische Fabrik Auf Actien *v.* Squire (1876), 34 L. T. 824; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 374; Rapkins *v.* Hall (1894), 10 T. L. R. 466.

**3559. —— —— Duty of master to obey.**]—THE FELIX, No. 3538, *ante*.

SUB-SECT. 3.—READINESS TO DISCHARGE AND RECEIVE.

**3560. Whether condition precedent to obligation of charterer to unload.**]—AKT. HELIOS *v.* EKMAN & Co., No. 2974, *ante*.

**3561. Necessity for readiness to receive.**]—Pltfs., as consignees under two different bills of lading, being bound to accept delivery of two parcels of goods, sent only one lighter to defts.' ship. As the goods were ready for delivery from two hatches at the same time some were landed by defts., & pltfs. had to pay landing charges in respect of them:—*Held:* in an action to recover such charges from defts., the only question for the jury was whether pltfs. had been in fact ready to take delivery of the goods at the proper time.—POLLITZER *v.* S.S. CASCAPEDIA (1886), 2 T. L. R. 413, D. C.

**3562. Effect of unreadiness—Omission to procure necessary papers—At request of consignee—Right of shipowner to demurrage.**]—It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of deft.—FURNELL *v.* THOMAS (1828), 5 Bing. 188; 130 E. R. 1032.

*Annotation:*—**Reld.** Alcock *v.* Taylor (1836), 6 Nev. & M. K. B. 296.

**3563. ——.**]—THE PATRIA, No. 2493, *ante*.

**3564. Necessity for notice of readiness to discharge.**]—BOURNE *v.* GATLIFF, No. 3695, *post*.

**3565. ——.**]—A condition in a bill of lading provided, in effect that on the arrival of the vessel in dock, the consignee of a portion of the cargo should be ready to receive the goods, & that in default, the master or agent of the ship should be at liberty to land the goods & warehouse them at the consignee's risk & expense. The vessel arrived, & the agent of the consignee made an immediate application for the goods, but was told that it was not known in what part of the ship they were. On receiving the same answer on the following day, the agent withdrew, handing to the mate a notice desiring him to give twenty-four hours' notice of his readiness to deliver the goods, in accordance, as the notice alleged, with 25 & 26 Vict. c. 63, ss. 66, 67. No such notice of readiness was given, &, there being no one to receive the goods, they were placed in a warehouse by the master of the ship, a charge of £5 17*s.* 3*d.* being thereby incurred. The consignee having threatened to charge his agent with the value of the goods unless he obtained delivery of the same, the agent paid the said sum under protest, & brought this action against the shipowner to recover such sum:—*Held:* the special contract in the bill of lading excluded the operation of Merchant Shipping Act Amendment Act; & the Act did not apply to a case where the shipowner was in *bonâ fide* ignorance of the position of the goods, regard being had to the premature demand of the agent of the consignee.—OLIVER *v.* COLVEN (1879), 27 W. R. 822, D. C.

**3566. What constitutes readiness to discharge—Pratique not granted.**]—By charterparty, a vessel was to have ninety running days, & ten days of demurrage, to commence from her arrival at W., being ready to unload & having received pratique. Declaration for breach of the charterparty stated that, although the vessel, on Aug. 24, was at W. ready to unload, & had received pratique, yet deft. did not, within ninety, etc., commencing on her arrival at W. & being ready to unload & receiving pratique, unload & load the vessel, but wrongfully detained her beyond the running days & days of demurrage. Plea, that the vessel was not ready to unload, & did not receive pratique, for a long time after her arrival at W., viz. for a time equal to that of the alleged wrongful detention: conclusion to the country. Issue thereon. It appeared in evidence that the vessel was ready, & at liberty, to unload at W. on Aug. 14, but had not gone through any form of receiving pratique, there being no quarantine establishment at W., nor any means of formally granting pratique:—*Held:* the issue on pltf.'s part, affirming that the vessel had received pratique, was sufficiently borne out by the proof; for she must be taken to have received pratique when she was at W. ready, & at liberty, to unload.—BALLEY *v.* DE ARROYAVE (1838), 7 Ad. & El. 919; 3 Nev. & P. K. B. 114; 1 Will. Woll. & H. 89; 2 Jur. 275; 112 E. R. 716; *sub nom.* BALLEY *v.* ARROGAVE, 7 L. J. Q. B. 91.

**3567. —— Ship not arrived at berth named by charterer.**]—By a charterparty a steamer when loaded with coal was to proceed to a certain port, "& as usual & customary deliver the same always afloat to the order" of the charterers "alongside any store craft steamer depot ship wharf or arsenal. . . . Time for delivery to count when steamer is ready to discharge." There was only one customary place of discharge at the port in question, & when the steamer arrived at the port that place was occupied. In an action for demurrage:—*Held:* the steamer was not "ready to discharge," & the time for delivery did not therefore commence until she was at the customary place of discharge in the port.

The authorities cited . . . are clear to show

that, if by a charterparty it is agreed that a ship shall go to a port & there unload, she must unless otherwise ordered go to the customary place of discharge in that port (COLLINS, J.).—SANDERS *v.* JENKINS, [1897] 1 Q. B. 93 ; 66 L. J. Q. B. 40 ; 2 Com. Cas. 12.

*Annotations :*—**Refd.** Akt. Inglewood *v.* Millar's Karri & Jarrah Forests (1903), 88 L. T. 559 ; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499.

**3568. —— Where time begins at place other than usual discharging place—Readiness to proceed to actual discharging berth—Freedom from customs & quarantine restrictions.**]—Where a charterparty or berth contract does not contain any express provisions to name a berth & does not provide for delivery " at a berth as ordered," & the ship arrives at the end of the voyage specified in the charterparty, & is anchored or moored waiting for orders, & is " ready to discharge " in the sense that there is nothing to prevent her being made ready at once, if desired, the lay days commence to run although she is not in a discharging berth.

When the ship's time begins at a place which is not a usual discharging berth, & she cannot be required to discharge at any other place, her obligation to be ready to discharge is fulfilled if she is free from Customs or quarantine restrictions & ready to proceed to her actual discharging berth & to discharge when she reaches it (SCRUTTON, L.J.).—ARMEMENT ADOLF DEPPE *v.* ROBINSON (JOHN) & CO., LTD., [1917] 2 K. B. 204 ; 86 L. J. K. B. 1103 ; 116 L. T. 664 ; 14 Asp. M. L. C. 84 ; 22 Com. Cas. 300, C. A.

*Annotations :*—**Consd.** Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172. **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3569. Duty of consignees to be ready to receive cargo.**]—HOULDER *v.* GENERAL STEAM NAVIGATION CO., No. 3698, *post.*

**3570. —— Goods landed before ship reported.**]—Goods were shipped from Messina to London, under bills of lading which provided that they should " be received by the consignees . . . immediately after the arrival of steamer, or the same will be warehoused by the agent of the ship at the expense & risk of the owner of the goods." The ship arrived, & before she was reported at the Custom house in accordance with Customs Consolidation Act, 1876 (c. 36), the goods, the consignees not being present to receive the same, were landed & warehoused. The practice in the Port of London is that when a Custom house officer is present upon the quay, the permission of the Custom authorities to discharge the cargo before report is assumed by the master, unless such permission is actually refused or the discharge forbidden. The consignees subsequently paid the warehouse charges under protest, & claimed to recover them from the shipowner :—*Held :* inasmuch as the possibility that the goods would be permitted to be landed before the ship was reported must be taken to have been within the contemplation of the parties at the time the contracts were made, there was an obligation upon the consignees under the bills of lading to be ready to receive the goods before the ship was reported, & therefore they were not entitled to recover the amount of the warehouse charges.—MAJOR & FIELD *v.* GRANT (1902), 18 T. L. R. 742 ; 7 Com. Cas. 231.

SUB-SECT. 4.—TO WHOM DELIVERY SHOULD BE MADE.

*A. In General.*

**3571. General rule—Person having property in goods.**]—ERICHSEN *v.* BARKWORTH, No. 3583, *post.*

**3572. Holder of bill of lading.**]—In an action on a charterparty by K. the former defts., as charterers, against the shipowner for not delivering a cargo on board the *M.* to pltfs. according to the charterparty, it appeared that the charterparty of the *M.* which was one of the vessels chartered for carrying ore under the contract above-mentioned, did not authorise the master to sign bills of lading as presented, but the shipowner, by the charterparty, agreed to deliver the cargo to pltfs. This cargo had also been fully drawn against, but M. obtained from the master bills of lading, as in the former case, & indorsed them for value to G. to whom the master delivered the cargo : —*Held :* deft. was not liable, on the ground that the master performed his contract by delivering the cargo according to bills of lading.

T., the owner of the *M.*, was not liable to K. for having delivered the ore shipped thereon to G., on the ground that the property in the ore had not passed to K., & that T. had performed his duty under the charterparty. — GABARRON *v.* KREEFT, KREEFT *v.* THOMPSON (1875), L. R. 10 Exch. 274 ; 44 L. J. Ex. 238 ; 33 L. T. 365 ; 24 W. R. 146 ; 3 Asp. M. L. C. 36.

*Annotations :*—**Refd.** Mirabita *v.* Imperial Ottoman Bank (1878), 3 Ex. D. 164 ; The Parchim, [1918] A. C. 157.

**3573. —— Holder producing one of set.**]—According to the usage of trade, the captain is not concerned to examine who has the best right on the different bills of lading. All he has to do is to deliver the goods upon one of the bills of lading (LEE, C.J.).—FEARON *v.* BOWERS (1753), 1 Hy. Bl. 364, n. ; 126 E. R. 214, N. P.

*Annotations :*—**Folld.** The Tigress (1863), Brown. & Lush. 38. **Dbtd. & Distd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. **Refd.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357.

**3574. —— —— Effect of prior indorsement for value—To holder of another part.**]—GLYN MILLS & CO. *v.* EAST & WEST INDIA DOCK CO., No. 2362, *ante.*

**3575. —— Bills presented by two different holders.**]—THE TIGRESS, No. 2368, *ante.*

**3576. Person first obtaining legal title—Variation between bills of lading.**]—CALDWELL *v.* BALL, No. 2300, *ante.*

**3577. Person having equitable title—Indorsee having notice of equitable right.**]—DICK *v.* LUMSDEN, No. 2381, *ante.*

**3578. Delivery to proper person.**]—GRANGE & CO. *v.* TAYLOR, No. 3826, *post.*

**3579. —— Discharge of master's liability.**]—CALDWELL *v.* BALL, No. 2300, *ante.*

**3580. —— ——.**]—GLYN MILLS & CO. *v.* EAST & WEST INDIA DOCK CO., No. 2362, *ante.*

**3581. Failure to deliver to proper person—Consignment of different cargoes—Acceptance of bills in respect of some cargoes—Appropriation of bills to cargoes question of fact.**]—A. residing in Russia, purchases different cargoes for B. in England, one of which A. consigns, in a vessel chartered by B. to his own agent in England. The master of a ship which conveys one of the cargoes contrary to the terms of the bill of lading, delivers

**PART VII. SECT. 7, SUB-SECT. 3.**

**3569 i.** *Duty of consignees to be ready to receive cargo.*]—It is the duty of the consignee to ascertain when the goods will arrive & to be ready to take delivery.—FREEMAN *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., LTD. (1913), I. L. R. 41 Calc. 703.—**IND.**

**PART VII. SECT. 7, SUB-SECT. 4.—A.**

**m.** *Failure to deliver to proper person.*]—A., the general agent for shipping B.'s flour, shipped 25 barrels of it as usual to A. Co. in K., & before the sailing of the ship, D., another agent, under special instructions from B., shipped the same flour to B. Co. in K., to be forwarded to M. :—*Held :* as the owner of the flour could at any time change its destination before the

*Sect. 7.—The unloading: Sub-sect. 4, A., B. & C. sub-sect. 5, A.*]

the cargo to B. who has at that time accepted & paid bills drawn by A. to the amount of the first two cargoes, but not to the amount of the whole of the cargoes. In an action against the master by A. for not delivering according to the bill of lading, it is a question for the jury whether, under the particular circumstances of the case, the accepted bills were agreed to be taken in payment of the particular cargoes.—MORGAN *v.* SKIRFIELD (1821), 3 Stark. 46; 171 E. R. 762, N. P.

**3582. Assignment of cargo—Notice given to master after consignor's bankruptcy—Whether assignees in bankruptcy may claim delivery.**]—On Nov. 11, 1857, A. assigned to deft. the cargo of a ship belonging to A., & then supposed, both by him & deft., to be about to set sail for England with the cargo, from the West Coast of Africa. Had deft. sent to the master of the ship, in Africa, early notice of the assignment, it would have reached him there before Feb. 12, 1858, the day on which the ship actually set sail thence on her homeward voyage. Deft., however, did not send the notice till Jan. 23, 1858, & the notice then sent never reached the master. On Mar. 1, 1858, A. became bkpt. On Apr. 14, 1858, the ship arrived in England; & on the same day the master, who then first had actual notice of the assignment, delivered the cargo to deft., notwithstanding a demand of it by A.'s assignees in bkpcy.:—*Held:* deft., not A.'s assignees in bkpcy., was entitled to the cargo; for it was not in the possession, order, or disposition of A. at the time of his bkpcy., with the consent of the true owner, deft., within 12 & 13 Vict. c. 106, s. 125, the facts of the case showing that deft. was guilty of no laches in omitting to send the master of the ship earlier notice of the assignment. *Qu.:* whether, under the circumstances, deft. need have sent the master any notice of the assignment at all.—ACRAMAN *v.* BATES (1860), 2 E. & E. 456; 29 L. J. Q. B. 78; 1 L. T. 322; 6 Jur. N. S. 294; 121 E. R. 172.

*B. Production of Bill of Lading.*

**3583. Necessity for—General rule.**]—(1) Defts., merchants at Hull, chartered pltfs.' ship to sail to Buctouche & there load a cargo of timber, & being so loaded to proceed to Gloucester & deliver the same on being paid freight. Thirty-five running days to be allowed for loading & discharging the cargo, & ten days on demurrage above the laying days at £5 per day. The ship arrived at Buctouche, & the loading was completed at the expiration of twenty-seven of the running days. The master signed bills of lading by which the cargo was deliverable "unto order or to assigns, he or they paying freight for the goods as per charterparty." The invoice of the cargo & bills of lading together with a bill drawn by the shipper on defts. for the price of the cargo was presented to defts. by the shipper's agent in London, but defts. refused to accept the bill or receive the cargo, on the ground that the shipment was not according to the contract. Defts. wrote to the shipper's agent & also to the master of the ship, offering to land the cargo & take care of it on their premises for whom it might concern. The shipper's agent gave notice to the master not to part with the cargo without production of the bill of lading. The vessel was ready to discharge her cargo, according to the charter, on Sept. 5. The lay days expired on Sept. 13. The vessel might have been discharged in five days. The bill of lading was not produced to the master until Sept. 22, & the delivery was completed on Sept. 30:—*Held:* defts. were liable for demurrage & detention of the vessel.

(2) The master by the bill of lading is liable to the person in whom the property vests. He has a right to demand the bill of lading or an indemnity, for by signing the bill of lading he binds himself to deliver the goods to the person who has the property in them (CROMPTON, J.).—ERICHSEN *v.* BARKWORTH (1858), 3 H. & N. 894; 28 L. J. Ex. 95; 32 L. T. O. S. 165; 5 Jur. N. S. 517; 7 W. R. 97, Ex. Ch.

*Annotations:*—*As to* (1) **Refd.** Stanton *v.* Austin (1872), L. R. 7 C. P. 651. *As to* (2) **Consd.** Mors-le-Blanch *v.* Wilson (1873), L. R. 8 C. P. 227.

**3584.** —— ——.]—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante*.

**3585.** —— ——.]—Where by the terms of a bill of lading the goods are to be delivered to a named consignee or his assigns, the master is not entitled to deliver the goods to such consignee without the production of one of the parts of the bill of lading. Pltfs. shipped goods in London on board a German vessel belonging to defts., under a bill of lading, drawn in two parts, by which the goods were to be delivered at a German port to the consignee named in the bill of lading or to his assigns. The master delivered the goods at the port of discharge to the consignee without the production of either part of the bill of lading:—*Held:* upon proof that the German law did not essentially differ from the English law, defts. were liable for wrongful delivery of the goods.—THE STETTIN (1889), 14 P. D. 142; 58 L. J. P. 81; 61 L. T. 200; 38 W. R. 96; 5 T. L. R. 581; 6 Asp. M. L. C. 395.

**3586. Liability of consignee for taking possession forcibly.**]—LUCAS *v.* NOCKELLS, No. 4069, *post*.

**3587. Detention by master until production.**]—ERICHSEN *v.* BARKWORTH, No. 3583, *ante*.

**3588. Right of master to indemnity—Where bill of lading not produced.**]—ERICHSEN *v.* BARKWORTH, No. 3583, *ante*.

**3589. Delivery without production—Liability of shipowner.**]—THE STETTIN, No. 3585, *ante*.

ship sailed, the owners of the ship were liable to B., through their master's last bill of lading, given to the special agent D., the flour having been forwarded by the master in mistake to A. Co. in K., & left there, instead of being forwarded, as last directed, through B. Co. to M.—GRAHAM *v.* BROWNE (1848), 5 U. C. R. 234.—**CAN.**

**PART VII. SECT. 7, SUB-SECT. 4.—B.**

**3583 i.** *Necessity for—General rule.*]—The holder of a bill of lading is not bound to hand over his bill of lading before getting delivery of the goods. It is questionable whether he should hand over the bill of lading contemporaneously with the delivery of the goods.—WILSON *v.* WATTS (1891), 12 N. S. W. L. R. (L.) 104; 8 N. S. W. W. N. 17.—**AUS.**

**3583 ii.** —— ——.]—There is no unqualified obligation on the part of consignees, to produce the bills of lading as soon as the ship is ready to discharge.—CARLBERG *v.* WEMYSS COAL CO., LTD., [1915] S. C. 616; 52 Sc. L. R. 515.—**SCOT.**

**3589 i.** *Delivery without production—Liability of shipowner.*]—MOLSONS BANK *v.* ST. LAWRENCE & CHICAGO FORWARDING CO. (1881), 25 L. C. J. 324; 5 L. N. 6.—**CAN.**

**3589 ii.** —— ——.]—Pltfs. knowing that defts. sometimes delivered goods without production of the shipping bills where not consigned "to order," consigned certain goods to C. Co. not yet incorporated, & defts. delivered them to an individual carrying on business in that name & at the ostensible office of the co., without production of the bill:—*Held:* defts. were not liable for misdelivery. Carriers are not required to take up shipping bills before the delivery of goods.—CONLEY *v.* CANADIAN PACIFIC RY. CO. (1900), 32 O. R. 258.—**CAN.**

**3589 iii.** —— ——.]—A bill of lading of the defts., covering wheat shipped, provided that its surrender should be

**3590.** —— ——.] — LONDON JOINT STOCK BANK, LTD. *v.* BRITISH AMSTERDAM MARITIME AGENCY, LTD., No. 2357, *ante*.

*C. Conflicting Claims.*

**3591. Inquiry by master as to merits.**]—FEARON *v.* BOWERS, No. 3573, *ante*.

**3592.** ——.]—THE TIGRESS, No. 2368, *ante*.

**3593. Right to interplead—Master having notice of another indorsement.**]—GLYN MILLS & CO. *v.* EAST & WEST INDIA DOCK CO., No. 2362, *ante*.

**3594.** —— **Master having knowledge of another indorsement.**]—GLYN MILLS & CO. *v.* EAST & WEST INDIA DOCK CO., No. 2362, *ante*.

——.]—*See, also*, INTERPLEADER, Vol. XXIX., pp. 459, 463, Nos. 73, 74, 114.

SUB-SECT. 5.—METHOD OF DISCHARGING CARGO.

*A. In General.*

**3595. General rule—Discharge to be performed in customary way.**]—FORD *v.* COTESWORTH, No. 3602, *post*.

**3596.** —— —— **Prevailing at port of discharge.**]—There is no general rule of law which governs the delivery of goods by shipowners, under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice & custom usually observed in the port or place of the delivery.—GATLIFFE *v.* BOURNE (1838), 4 Bing. N. C. 314; 1 Arn. 120; 5 Scott, 667; 7 L. J. C. P. 172; 132 E. R. 809; *subsequent proceedings, sub nom.* BOURNE *v.* GATLIFF (1844), 11 Cl. & Fin. 45, H. L.

*Annotations*:—**Consd.** The Argos, Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134. **Refd.** The Norway (1864), Brown. & Lush. 377. **Mentd.** Ross *v.* Hill (1846), 2 C. B. 877; Mitchell *v.* L. & Y. Ry. (1875), L. R. 10 Q. B. 256.

**3597.** —— —— ——.]—Goods were shipped under a bill of lading in these terms:—"Shipped in good order & condition by Petrocochino Bros., of Calcutta, in the steamer *Zeno*, bound for London, sixty-nine bales hides, being marked & numbered as per margin, & to be delivered in the like good order & condition from the ship's deck where the ship's responsibility shall cease, at the aforesaid port of London," etc., "on payment of freight," etc. On her arrival in London the *Zeno* went into the Victoria Docks, & notice was given to the consignees that she was ready to unload. The custom of the Victoria Docks as to the unloading of steamers was proved to be as follows:—The goods are taken from the deck of the vessel by the co.'s servants, & placed on the dock quay, or, if perishable, under sheds, &, if the consignee or his agent does not appear to claim them within twenty-four hours, they are warehoused by the co. If the consignee or his agent sends a lighter, they are put into the lighter from the quay by the servants of the co. The expenses of landing the goods & putting them into lighters are paid by the shipowner, but, if the goods are warehoused, this is done at the expense of the owner of the goods. Within the proper time the consignees of the sixty-nine bales sent a lighter for them. The whole sixty-nine were proved to have been landed by the co.'s servants & placed on the quay; but the evidence failed to satisfy the jury that more than sixty-eight were put into the lighter. The other bale was never traced:—*Held*: the shipowner was not responsible for the missing bale.

The general principle seems to be that where goods are consigned to a particular port, delivery is to be made according to the usage which prevails at that port (BRETT, J.).—PETROCOCHINO *v.* BOTT (1874), L. R. 9 C. P. 355; 43 L. J. C. P. 214; 30 L. T. 840; 2 Asp. M. L. C. 310.

*Annotations*:—**Consd.** Marzetti *v.* Smith (1883), 49 L. T. 580. **Refd.** Grange *v.* Taylor (1904), 90 L. T. 486.

**3598.** —— —— ——.]—NIELSEN *v.* WAIT, No. 3555, *ante*.

**3599.** —— —— ——.]—By charterparty between pltfs., shipowners, & defts., charterers, it was agreed that pltfs.' steamer should proceed with defts.' cargo to the Albert, Stanley, or Wapping Dock, Liverpool, as ordered, "Steamer to be discharged as fast as she can deliver." The vessel was ordered to the Albert Dock. She arrived there at 6 a.m. on a Monday, & the master handed to the dock co., a copy of the manifest of the cargo, together with a request & authority to discharge the cargo, & deliver it to the order of the consignees. As the berths around the dock were occupied, the vessel was moored, under the direction of the dock officials, alongside another steamer, & there remained until she could be hauled into a quay berth at midday on Thursday. It was customary at that dock for the whole of the discharge to be done by the dock co.'s servants at the quay, but owing to the quay being crowded with other cargo, the discharge was not commenced until Saturday, &, the intermediate days being Sunday & Bank Holidays, was not resumed until the following Tuesday. It was completed by 3 a.m. on the Wednesday being the tenth day from the arrival of the vessel in the dock. The discharge under ordinary circumstances, would occupy two days. In an action for demurrage:—*Held*: defts. were not liable, as the whole operation of the discharge was, by the custom of the dock, carried out by the dock co.'s servants at the quay & pltfs. had failed to make out any breach of the contract to discharge as fast as the ship could deliver.

There is no reference whatever in the charterparty to the custom of the port; but I do not think that the absence of reference to the custom of the port is of any very great importance; because it is obvious that the discharge of a vessel under such a charterparty as this at such a dock must take place in accordance with that which is the usual way of performing that operation (GORELL BARNES, J.).—THE JAEDEREN, [1892] P. 351; 61 L. J. P. 89; 68 L. T. 266; 7 Asp. M. L. C. 260; 1 R. 545.

*Annotation*:—**Consd.** Hulthen *v.* Stewart (1902), 71 L. J. K. B. 624.

required before delivery of the wheat. Defts. delivered the wheat without obtaining surrender of the bill of lading:—*Held*: defts. were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, & the words "more or less" in the bill of lading did not, in the circumstances, alter the matter.—TOLMIE *v.* MICHIGAN CENTRAL RY. CO. (1909), 19 O. L. R. 26; 14 O. W. R. 32; 9 Can. Ry. Cas. 336.—**CAN.**

**3589 iv.** —— ——.]—PIRIE & SONS *v.* WARDEN (1871), 9 Macph. (Ct. of Sess.) 523; 43 Sc. Jur. 280.—**SCOT.**

**PART VII. SECT. 7, SUB-SECT. 5.—A.**

**3596 i.** *General rule—Discharge to be performed in customary way—Prevailing at port of discharge.*]—ARDAN S.S. CO., LTD. *v.* WEIR & CO., THE ARDANDEARGE (1904), 6 F. (Ct. of Sess.) 294; 41 Sc. L. R. 230; *on appeal* (1905), 7 F. (H. L.) 126.—**SCOT.**

n. *Acquiescence in mode of discharge.*]—*Held*: defenders acquiescence in the mode of discharge had freed the ship from responsibility therefor.—THORSEN *v.* MCDAVALL & NEILSON, THE THEODOR KORNER (1892), 19 R. (Ct. of Sess.) 743; 29 Sc. L. R. 573.—**SCOT.**

*Sect. 7.—The unloading: Sub-sect. 5, A., B. & C. (a).*]

**3600. Special method of unloading—Due to defective condition of ship—Liability of shipowner for additional expense.**]—The owner of a homeward bound ship entering the West India Docks in so leaky a condition as to require immediate unloading & assistance, without waiting her turn to be quayed & unloaded in rotation in the import dock, in the manner required by the 39 Geo. 3, c. 69, is bound to bear the extra expenses of labourers for pumping the ship after the crew were discharged, & for delivering the cargo into lighters in the outward dock or basin; also for coopering previous to such delivery into lighters, & for the hire of such lighters; the co. having afterwards unladen the cargo out of such lighters upon the quays in the import dock, & performed the requisite cooperage, etc., upon such unlading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in its proper time & place.—BLACKETT *v.* SMITH (1810), 12 East, 518; 104 E. R. 203.

**3601. Warranty that goods suitable for handling by appliances in use at dock—Whether warranty implied.**]—TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE *v.* SHIPTON (H. S.) & SONS, No. 3608, *post*.

*B. Discharge a Joint Act.*

**3602. General rule.**]—Where a charterparty provides that the ship shall proceed to a certain port, & there, or as near thereto as she can safely get, deliver the cargo in the usual & customary manner, but is silent as to the time to be occupied in the discharge, the contract implied by law is, that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him; & there is no implied contract that the discharge shall be performed in the time usually taken at the port.

Where therefore a ship, under such a charterparty, was in the course of unloading at the port of discharge, & owing to a threatened bombardment of the port, the authorities there refused for several days to allow any more of the cargo to be landed, the loss from the delay must fall on the shipowner, & he cannot recover damages from the charterer.

The custom-house authorities will not allow any cargo to be landed except through the customs; & in consequence of their dilatoriness, & the general sluggishness of the population the ordinary discharge of a vessel at Callao is very slow (BLACKBURN, J.).

Delivering cargo is as much the duty of the shipowner as of the merchant, & consequently the contract, implied by the law, in the absence of any stipulation in a charterparty is that each party shall use reasonable diligence in performing his part of the delivery at the port of discharge, the merchant being ready to receive in the usual manner, & the owner by his captain & crew to deliver in the usual manner. So that there is no contract implied by law on the part of the shipowner to allow his vessel to be kept there for the usual time, if by reasonable diligence on the part of the merchant the cargo might be sooner taken away, & no contract implied by law on the part of the merchant to take the cargo out within such usual time, if he could not by reasonable diligence perform it; though very commonly there are stipulations to that effect (BLACKBURN, J.).

The contract which the law implies is only that the merchant & shipowner should each use reasonable dispatch in performing his part (BLACKBURN, J.).—FORD *v.* COTESWORTH (1868), L. R. 4 Q. B. 127; 9 B. & S. 559; 38 L. J. Q. B. 52; 19 L. T. 634; 17 W. R. 282; 3 Mar. L. C. 190; *affd.* (1870), L. R. 5 Q. B. 544, Ex. Ch.

*Annotations:*—**Distd.** The Argos, Gaudet *v.* Brown, The Howsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134. **Expld.** Thiess *v.* Byers (1876), 24 W. R. 611. **Apld.** Cunningham *v.* Dunn (1878), 3 C. P. D. 443. **Consd.** Fowler *v.* Knoop (1878), 40 L. T. 180. **Expld.** Nelson *v.* Dahl (1879), 12 Ch. D. 568. **Consd.** Wright *v.* New Zealand Shipping Co. (1879), 4 Ex. D. 165, n.; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Hick *v.* Raymond & Reid, [1893] A. C. 22; Ardan S.S. Co. *v.* Weir, [1905] A. C. 501; Laugham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Ralli *v.* Compania Naviera Sota y Aznar, [1920] 2 K. B. 287; Van Liewen *v.* Hollis, [1920] A. C. 239; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 189. **Reld.** Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 854; Hicks *v.* Rodocanachi (1892), 9 T. L. R. 141; Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638; Blackburn Bobbin Co. *v.* Allen, [1918] 1 K. B. 540. **Mentd.** Smith, Coney & Barrett *v.* Becker, Gray (1915), 112 L. T. 914; Foster's Agency *v.* Romaine (1916), 32 T. L. R. 331.

**3603.** ——.]—BUDGETT & CO. *v.* BINNINGTON & CO., No. 3609, *post*.

**3604.** ——.]—A charterparty for the carriage of spars from a port in Norway to London provided that the cargo should be discharged in the Surrey Commercial Docks, the discharging to take place in eight days, the cargo to be taken from alongside at merchants' risk & expense, the ship "to discharge over side in the river or dock into lighters or otherwise if required by consignees":—*Held*: the charterparty did not impose upon the ship's master & crew the obligation to get the spars outside the ship & into the lighters, & for that purpose to put men on board the lighters; but when they had brought the spars within reach of the consignees' men in the lighters, it was the duty of the latter to take their part in the joint operation of delivering & receiving the goods, & the consignees were liable to pay demurrage for delay caused by reason of their men in the lighters being too few to enable the discharge to be completed within the lay days.

The operation [of discharging cargo], therefore, which is to take eight days is an operation to be performed as between the shipowner & the consignees (LORD ESHER, M.R.).

Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery; that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, & does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more, he must put the goods in such a position that the consignee can take delivery of them (LORD ESHER, M.R.).—PETERSEN *v.* FREEBODY & CO., [1895] 2 Q. B. 294; 65 L. J. Q. B. 12; 73 L. T. 163; 44 W. R. 5; 11 T. L. R. 459; 8 Asp. M. L. C. 55; 14 R. 493, C. A.

*Annotations:*—**Distd.** Akt. Helios *v.* Ekman, [1897] 2 Q. B. 83. **Consd.** Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; The Rensfjell, The Ornesfjell, The Uppland, The Fritiof, The Svein Jarl (1924), 131 L. T. 764; Rederi Akt. Acolus *v.* Hillas (1925), 134 L. T. 184.

**3605.** ——.]—AKT. HELIOS *v.* EKMAN & CO., No. 2974, *ante*.

**3606. Application of general rule—Each party must use reasonable diligence in performing his part.**]—FORD *v.* COTESWORTH, No. 3602, *ante*.

**3607.** —— **Implied request by shipowner to shipper or charterer—Accident to charterer's servant—Whether indemnity implied.**]—Pltfs., who were the charterers of a ship from defts., the shipowners, gratuitously removed some hatch

beams on behalf of & at the implied request of the shipowners. While the beams were being removed by pltfs.' servants, one of pltfs.' servants engaged in the work, was accidently killed. Pltfs. paid to his dependants compensation in accordance with Workmen's Compensation Act, 1906 (c. 58). Pltfs. claimed to recover the sum paid as compensation from defts. on the ground that defts. had impliedly undertaken to indemnify pltfs. for loss or damage occasioned by the discharge of the cargo :—*Held :* there was no evidence of an implied undertaking by defts. to indemnify pltfs. ; the accident was not the direct or natural consequence of doing the discharging of the cargo, but was a consequence of the manner in which the discharging was done.—CORY & SON, LTD. *v.* LAMBTON & HETTON COLLIERIES, LTD. (1916), 86 L. J. K. B. 401 ; 115 L. T. 738 ; 10 B. W. C. C. 180 ; 13 Asp. M. L. C. 530, C. A.

**3608. —— —— Receiver to share extra expense of unloading.**]—A steamship belonging to pltfs. was chartered to carry a full & complete cargo of lawful merchandise at the option of the berth charterers from Alexandria to London, & she was to be discharged as fast as she could deliver in accordance with the custom of the port. The charterparty provided for demurrage at the rate of £250 per running day. About 500 tons of barley was loaded on board as part of the general cargo, & defts. were the indorsees of the bill of lading in respect of 300 tons. That bill of lading stated that the barley was shipped in good order & condition, & that the cargo was to be received by the consignees as fast as the steamer could deliver in accordance with the custom of the port. All unloading at the Port of London is done under statutory authority by the Port of London Authority who provide the necessary machinery & employ all the men. The work done by the men in the hold is on behalf of the ship, but the operations subsequent to the grain being elevated from the hold is on behalf of the receivers. The ordinary method at the Port of London for discharging grain in bulk is by employing pneumatic suction pumps. The barley loaded at Alexandria contained a quantity of sand & stones, with the result that the suction pump became choked & the discharge was thereby delayed for a day & a half. The men working on the discharge also demanded & received extra payment owing to the condition of the barley, but defts. were not required to assent to the extra payment. The Port of London Authority demanded from pltfs. & received payment for the extra cost of the discharge in respect of men & machinery. Pltfs. claimed to recover from defts. demurrage in respect of the day & a half during which the ship was delayed owing to the condition of the barley, alleging that it was an implied term of the contract under which the barley was shipped that it should be capable of being handled & unloaded expeditiously & effectively by the machinery & appliances in ordinary use at the port of discharge. Pltfs. also claimed to recover from defts. a proportion of the extra charges in connection with the discharge which they had been obliged to pay the Port of London Authority :—*Held :* (1) no warranty that the barley was capable of being handled & unloaded expeditiously & effectively by the machinery & appliances in ordinary use at the port of discharge could be implied, & therefore pltfs. were not entitled to recover in respect of the extra time taken in the discharge ; (2) pltfs. were entitled to recover from defts. a portion of the extra charges incurred in respect of the discharge, because a request by defts. to pltfs. to assent to the increased charges on behalf of defts. must be implied in law.—TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE *v.* SHIPTON (H. S.) & SONS, [1923] 1 K. B. 31 ; 92 L. J. K. B. 186 ; 128 L. T. 319 ; 38 T. L. R. 318 ; 16 Asp. M. L. C. 85 ; 28 Com. Cas. 64.

### *C. Duties Apart from Stipulation.*

#### *(a) Duties of Shipowner.*

**3609. Delivery over side of ship.**] — A cargo was shipped under a bill of lading incorporating a clause in the charterparty which fixed the number of lay days for unloading & allowed other days for demurrage. Neither the bill of lading nor the charterparty contained any exception of strikes. By the custom of the port of discharge a cargo, such as that to be unloaded was discharged by the joint act of the shipowner & the consignees. During the lay days a strike took place, both among the labourers employed on behalf of the ship & those employed by the consignees, with the result that the unloading ceased, & could not be resumed till some days after the expiration of the lay days :—*Held :* as the number of lay days was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners, owing to the strike, to do their part in the unloading.

Speaking generally of all contracts, a breach is excused where the party committing the breach has been prevented by the other side from carrying out his contract. Here the condition is that the cargo should be out of the ship in a certain number of days ; & if the shipowner, by any act of his, has prevented the discharge then, though the freighter's contract is broken, he is excused. It is said in this case that the delivery of the cargo is the joint act of the shipowner & the consignee, & that, if so, the shipowner has not fulfilled his part, & so has prevented the performance of the contract of the consignee. The delivery of a cargo is undoubtedly the joint act of the shipowner & the merchant freighter ; but naturally it is open to the parties to regulate the share in the discharge to be taken by either of them. In this case, the share to be taken has been regulated by custom, & the merchant freighter has not to begin his part, as is usually the case, when the cargo is brought to the rail of the ship. Such a course in the case of grain in bulk would be inconvenient, & so the merchant freighter supplies sacks, & loads the grain in the hold ; & then the shipowner resumes his ordinary duty, which is delivery over the ship's side. Now, has the shipowner failed in this duty through any default of his own, or of persons for whom he is responsible ? The persons for whom he is responsible are the persons who represent him in his absence. If, for instance, the master refused to discharge the cargo, the owner would be responsible (LORD ESHER, M.R.).

The non-delivery, in fact, was occasioned, by something which defts. could not foresee, & by the act of persons over whom they had no control. It was caused by the act of the workmen employed by the stevedore, & by their breach of contract

**PART VII. SECT. 7, SUB-SECT. 5.—C. (a).**

**o.** ***Expenses of discharge — Work done by labourers in pursuance of obligation to give delivery.***]—Bills of lading provided that cargo was to be "delivered within reach of vessel's tackles." By means of the vessel's hoisting tackles, trays holding cargo were lowered on to a wharf. The trays were supplied by the ship's stevedore. On the wharf, labourers freed the trays from the tackles so far as was necessary, & handed the goods to the consignee's lorry drivers :—

*Sect. 7.—The unloading: Sub-sect. 5, C. (a) & (b), & D.*]

with their employers. The shipowner had no control over these workmen, & is not responsible for the consequences of their acts, & consequently there there is nothing to relieve the consignees from the absolute contract to pay demurrage (LORD ESHER, M.R.).

The contract was to discharge the ship in a certain number of days, according to the terms of the charterparty; & there was a further stipulation that the charterer was to take the risk of unloading the cargo from alongside the ship. This stipulation is in terms unconditional, & it has frequently been called an absolute contract, by which I understand an unconditional contract.

I agree that there is an implied term in the contract, & that is, that the shipowner shall not prevent the freighter from performing his part of the contract; & if it is shown that this has happened, the freighter is discharged (LINDLEY, J.). —BUDGETT & Co. *v.* BINNINGTON & Co., [1891] 1 Q. B. 35; 60 L. J. Q. B. 1; 63 L. T. 742; 39 W. R. 131; 7 T. L. R. 15; 6 Asp. M. L. C. 592, C. A.

*Annotations:*—**Distd.** Maclay *v.* Bakers & Spiller (1900), 16 T. L. R. 401. **Consd.** Longham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Jenneson, Taylor *v.* Secretary of Sate for India, [1916] 2 K. B. 702; Armement Adolf Deppe *v.* Robinson, [1917] 2 K. B. 204; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172. **Refd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626; Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 854; Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70; Houlder *v.* Weir, [1905] 2 K. B. 267; The Fox (1914), 83 L. J. P. 89; Baird *v.* Price, Walker (1916), '15 L. T. 227 Alexander *v.* Akt. Dampskibet Hansa, [1920] A. C. 88 United States Shipping Board *v.* Durrell, [1923] 2 K. B. 739; United States Shipping Board *v.* Strick, [1926] A. C. 545; *Re* Ropner Shipping Co. & Cleeves Western Valleys Anthracite Collieries, [1927] 1 K. B. 879.

**3610.** ——.]—PETERSEN *v.* FREEBODY & Co., No. 3604, *ante*.

**Port of London.**]—*See* No. 3626, *post*.

**3611. Expenses of discharge—Repair of torn bags.**]—Where under a charterparty the shipowners have to discharge the cargo they must, unless the terms of the charterparty exempt them from this liability, bear any expense which may be necessary to discharge the cargo properly; for example, if the cargo is loaded in bags the shipowners must bear the expense of repairing torn bags in order to prevent the leakage of their contents.—LEACH & Co., LTD. *v.* ROYAL MAIL STEAM PACKET Co. (1910), 104 L. T. 319; 11 Asp. M. L. C. 587; 16 Com. Cas. 143.

**Discharge of shipowner's liability.**]—*See* Sub-sect. 6, *post*.

*(b) Duties of Consignee.*

**3612. Provision of proper appliances for taking delivery — Appliances ordinarily used at port of discharge.**]—WRIGHT *v.* NEW ZEALAND SHIPPING Co., LTD., No. 3726, *post*.

**3613. —— Modification of duty—By circumstances or special stipulations.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *post*.

**3614. —— Ship unable to get into berth.**]—DAHL *v.* NELSON, DONKIN & Co., No. 3471, *ante*.

**3615. —— Sacks.**]—BUDGETT & Co. *v.* BINNINGTON & Co., No. 3609, *ante*.

**3616. To have appliances ready—As soon as possible after ship's arrival.**]—WRIGHT *v.* NEW ZEALAND SHIPPING Co., LTD., No. 3726, *post*.

**3617. To make proper use of appliances—Modification of duty—By circumstances or special stipulations.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *post*.

**3618. To take delivery alongside.**]—DAHL *v.* NELSON, DONKIN & Co., No. 3471, *ante*.

**3619. —— Into lighter.**]—PETERSEN *v.* FREEBODY & Co., No. 3604, *ante*.

**3620. —— Landing of cargo prohibited by order in council—Whether duty performed by receiving cargo alongside.**]—A charterparty was made in France, by which it was stipulated that the ship should proceed to Trouville, a port in France, & should there load a cargo of hay, & proceed therewith direct to London; all cargo to be brought & taken from the ship alongside. The agent of deft., the charterer, told the master that the consignors would require the hay to be delivered at a particular wharf in Deptford Creek, & that he should proceed there on his arrival in London, which he promised to do. On arriving in the Thames, he was informed that by an Order in Council made under the Contagious Diseases (Animals) Act, 1869 (c. 70), it was illegal to land in Great Britain hay brought from France. The Order in Council was in existence when the charterparty was entered into, but neither of the parties knew of it, nor did the shipowner contemplate any violation of the law. Deft. after a time exported the hay & the shipowner brought an action against him to recover damages in respect of the detention of the ship:—*Held:* under these circumstances, deft. could not set up as a defence that the voyage was an illegal voyage.

The performance by receiving the cargo alongside in the river without landing it at all was both legal & practicable (BLACKBURN, J.).—WAUGH *v.* MORRIS (1873), L. R. 8 Q. B. 202; 42 L. J. Q. B. 57; 28 L. T. 265; 21 W. R. 438; 1 Asp. M. L. C. 573.

*Annotations:*—**Consd.** The Argos, Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134. **Refd.** Grey *v.* Tolme & Runge (1915), 31 T. L. R. 551. **Mentd.** Brightman *v.* Tate, [1919] 1 K. B. 463; Central India Mining Co. *v.* Soc. Coloniale Anversoise, [1920] 1 K. B. 753.

**3621. Provision of vessels for taking cargo.**]—DAHL *v.* NELSON, DONKIN & Co., No. 3471, *ante*.

**3622. Provision for proper means for landing cargo on quay—Discharging berth within quay.**]—DAHL *v.* NELSON, DONKIN & Co., No. 3471, *ante*.

**3623. Provision of sufficient men—To complete operation within lay days.**]—PETERSEN *v.* FREEBODY & Co., No. 3604, *ante*.

**3624. To bear expense of stowage into railway wagons—Payment by shipowner under mistake of law—Whether amount paid recoverable.**]—Pltfs. were the owners of the steamship *S.*, & defts. were the charterers. In the autumn of 1921 the vessel carried a full load of pit props from Finland to West Hartlepool according to defts.' order. Under the charterparty the cargo was "to be brought to & taken from alongside the steamer at the charterers' risk & expense, as customary." The cargo was discharged direct into railway wagons at quayside & a sum of £509 16*s.* 7*d.* was paid by defts. to the stevedores for the work of discharge. This sum of £509 16*s.* 7*d.* was debited to pltfs.' account with defts., & the amount finally due to the shipowners was agreed in an account stated between the parties & had been paid. In *The Rensfjell*, No. 4475, *post*, LORD MERRIVALE held that at West Hartlepool the cost of stowing the props in the railway wagons fell on the receiver. Pltfs. sought to recover £335 9*s.* 6*d.*, which repre-

*Held:* the master must give & the consignee receive the goods from the trays, which were for the time being part of the ship's tackles; the work done by the labourers was done in pursuance of the obligation to give delivery; & the cost of that work must therefore be borne by the shipowner.—WESTFAL LARSEN & Co. AKT. *v.* VACUUM OIL Co. PROPRIETARY, LTD., [1927] V. L. R. 542; 49 A. L. T. 109.—AUS.

sented the cost of such stowage into wagons & which had been included in the £509 19*s.* 7*d.* paid to the stevedores, but which, in accordance with the above decision, ought to have been paid by defts. & not debited to the shipowners', *i.e.*, pltfs.' account:—*Held:* the payment on account of the receiving & stowing into wagons was a voluntary payment. There was no compulsion, nor had there been any protest. The work was undertaken voluntarily under the mutual mistake to both the parties, & the authorities were clear that a voluntary payment in such circumstances was not recoverable.—AKT. DAMPSKIBS STEINSTAD *v.* PEARSON (WM.) & CO. (1927), 137 L. T. 533; 43 T. L. R. 531.

*D. Special Stipulations.*

**3625. Claim for damage to be made "before goods are removed"— Liability continuing until removal from railway station.**]—MOORE *v.* HARRIS, No. 1708, *ante*.

**3626. "London clause"—"Overside"—Whether custom of port overridden.**]—(1) The right of a consignee to claim delivery "overside" in the Port of London may be overridden by a clause in the bill of lading by which the shipowner is empowered "to land goods on the quays immediately on the ship's arrival."—BORROWMAN, PHILLIPS & CO. *v.* WILSON & CO. (1891), 7 T. L. R. 416, D. C.

**3627. —— Discharge of cargo at riverside wharf—Whether charges for unloading may be exacted.**]—PRODUCE BROKERS' CO., LTD. *v.* FURNESS, WITHY & CO., LTD., No. 1731, *ante*.

**3628. —— Discharge into "craft"— What vessels included.**]—Pltfs. agreed to carry in their steamer a cargo of wood from Savannah to London, for delivery to defts.' agents. The bill of lading incorporated the London clause A., which was in the following terms: "The shipowners shall at their option be entitled to land the goods on the quays or to discharge them into craft hired by them immediately on arrival & at consignee's risk & expense. . . ." Clause 3 of the bill of lading provided (*inter alia*): "The carrier shall have the liberty to convey goods in lighters to & from the ship at the risk of the owners of the goods. . . ." Clause 5 of the bill of lading provided that "the steamer shall be entitled to commence discharging immediately on arrival. The goods shall be taken from the ship's tackle directly on their coming to hand in discharging the ship; otherwise the master or ship's agent shall be at liberty to enter & land the goods, or put them into store warehouse or craft, or on quay, at the receiver's risk & expense; & shall have a lien on such goods until the payment of all costs & charges so incurred." Notice of the arrival of the vessel was sent to defts. &, no application having been made by them for delivery, pltfs. decided to discharge the goods, &, as they could not obtain more than one lighter, they hired four sailing barges in which to store the goods, there being no warehouse room available: —*Held:* as lighters were not available pltfs. were justified in using sailing barges & were entitled to recover from defts. the extra expense caused thereby.—UNITED STATES SHIPPING BOARD *v.* VIGERS BROTHERS (1924), 41 T. L. R. 26.

**3629. Cargo "to be discharged at usual fruit berth."**]—GOOD & CO. *v.* ISAACS, No. 3741, *post*.

**3630. Contract excluding custom of port—Delivery into lighter.**]—KEARON *v.* RADFORD & CO., No. 4401, *post*.

**3631. —— "Cargo to be taken from alongside."**]—BRENDA S.S. CO. *v.* GREEN, No. 4363, *post*.

**3632. Delivery "ex ship"—Goods taken into warehouse for dispatching to railway—Whether delivery in accordance with contract.**]—Pltfs. directed defts., the owners of a line of steamships which were carrying certain goods for delivery to pltfs., to "deliver *ex* ship to the railway co. to our order." The contract contained a clause protecting defts. from liability for damage to goods by fire. On arrival the goods were not taken direct to the railway station, but were placed in defts.' warehouse adjoining the quay. Here a fire broke out, & the goods were destroyed. Pltfs. brought an action for breach of contract & duty in handling the goods, contending that, in view of the instructions sent to defts., the goods should never have been put into the warehouse, & that, as they had been so dealt with, defts. were liable for their loss & could not avail themselves of the protection afforded by the terms of the contract:—*Held:* the expression "ex ship" did not exclude the taking of goods into warehouse for the purpose of dispatching them by cart to a railway, & in this case, the removal of the goods into the warehouse being justifiable, defts. were entitled to avail themselves of the protection afforded by the contract.—ESSEX COUNTIES FARMERS' CO-OPERATIVE ASSOCN., LTD. *v.* NEWHOUSE & CO., LTD. (1916), 86 L. J. K. B. 172; *sub nom.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCN., LTD. *v.* NEWHOUSE & CO., 115 L. T. 308; 13 Asp. M. L. C. 449.

**3633. "Steamer shall be entitled to commence discharging immediately after arrival"—Whether implied undertaking that facilities could be available.**]—Parcels of timber consigned to defts. were carried on board pltfs.' ship under bills of lading containing the following clause: "Steamer shall be entitled to commence discharging immediately after arrival . . . either into lighters or other craft or at the quay . . . & discharge continuously, day & night, also on Sunday from all hatches simultaneously, without intermission, all at the discretion of the master. . . . The goods shall be taken from the ship's tackle by the consignee of goods directly on their coming to hand. . . . If consignees fail to receive as above stated, & no facilities are available for discharging into craft or on wharf without delay to steamer, receivers shall pay . . . demurrage, at a fixed rate. The master's certificate shall be conclusive & binding both as to the extent of the delay . . . & the amount payable by consignees hereunder in respect of such delay. . . ." On arrival at the port of discharge no deep water berth was available, &, owing to the dimensions of the timber, discharge into lighters was impossible. The discharge accordingly was effected by delivery of the timber overside into the water, where it was received by defts.' agents, formed into rafts, & removed. No delay avoidable by defts. occurred in the discharge.

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**PART VII. SECT. 7, SUB-SECT. 5.—D.**

p. *Cargo "to be discharged according to the custom of the fruit trade of the port."*]—A ship that carries a cargo of fruit to the port of Montreal, under a charterparty with a clause, "that the cargo is to be brought to & taken from alongside at the shipper's expense, & to be stowed & discharged according to the custom of the fruit trade of the port, etc.," is not bound as a part of its obligations when discharging, to provide (*a*) shed accommodation in which to store the fruit, (*b*) men to sort & check the same according to marks, numbers & grades, no custom of the fruit trade to that effect being proved to exist at the port of Montreal.—TRACUZZI *v.* GLASGOW NAVIGATION CO. (1905), Q. R. 27 S. C. 371.—CAN.

q. *Ship to be lightered immediately on arrival to avert danger of grounding—Liability for breach.*]—GREAT LAKES S.S. CO. *v.* MAPLE LEAF MILLING CO., LTD. (Ont.), [1924] 4 D. L. R. 1101.—CAN.

r. *Cargo to be discharged free of expense to ship—Use of ship's winch & winchmen if required—Liability for damage to ship.*]—A charterparty pro-

*Sect. 7.—The unloading: Sub-sect. 5, D., E., F. & G. (a) & (b); sub-sect. 6.]*

The master certified that £2,792 was due from defts. in respect of six days' demurrage, & in the certificate attributed the delay to there being no vacant berth alongside the quay & no lighter available:—*Held:* (1) the words "steamer shall be entitled to commence discharging," etc., merely conferred a right, power of liberty upon the shipowners & did not imply an undertaking by the consignees that facilities would be available for the exercise of the right; (2) the goods were "taken from the ship's tackle directly on their coming to hand" in the business sense of those words; (3) the delay assessed by the master was not delay which he was empowered by the bills of lading to certify for demurrage, & that accordingly the certificate was not binding.—THE COAHOMA COUNTY, [1924] P. 95; 93 L. J. P. 141; 131 L. T. 575; 40 T. L. R. 355; 16 Asp. M. L. C. 342.

**3634. Goods to be "taken from ship's tackle directly on their coming to land" — Delivery of timber overside into water—Timber received in water & formed into rafts.**]—THE COAHOMA COUNTY, No. 3633, *ante*.

*E. Regulation by Custom or Usage.*

*See* Sect. 15, sub-sect. 4, D., *post*.

*F. "Consignee's Risk and Expense."*

**3635. Effect of insertion of clause—Whether provision for customary method of discharge excluded.**]—By charterparty between pltfs., shipowners, & defts., charterers, it was agreed that pltfs.' steamer should load a cargo of deals for defts. "The cargo to be brought to & taken from alongside the ship at merchant's risk & expense, where she can lie always afloat & safe" . . . "& being so loaded shall therewith proceed to Yarmouth, Norfolk, or so near thereunto as she may safely get, & deliver the same always afloat. . . ." The following clause was in writing: "The cargo to be supplied as fast as steamer can load & stow same, & discharged as fast as steamer can deliver & according to the custom of the respective ports. . . ." On arrival at Great Yarmouth the vessel was moored 15 feet from the quay edge, which was as near to the port as the vessel could lie always afloat, & in consequence 9*d*. per standard extra cost was incurred in the discharge. In an action by pltfs. to recover this amount, the judge gave judgment for defts., holding, that the written prevailed over the printed clause, & he admitted evidence of a custom that the shipowner must deliver on the quay; &, therefore, bear the extra cost of the discharge between the ship's rail & the quay. He also admitted telegrams & letters alleged to indicate the intention of the parties as to the construction of the contract:—*Held:* that judgment must be reversed on the ground that the evidence as to the custom was improperly admitted, as the two clauses were not inconsistent, the clause as to the cargo being 'taken from alongside the ship at merchant's risk & expense" dealing with the cost of the discharge, whilst the clause as to delivery, "according to the custom" dealt with the time & mode of the discharge.

I am asked to strike out the words "at merchant's risk & expense." It is said you must do so, because there are the words in writing, "& according to the custom of the respective ports." I read those words as meaning the mode of loading or unloading, or it may be as to where the goods are to be delivered; but that does not contradict that part of the contract which is staring one in the face, namely, that the taking to & from ship's rail is at merchant's expense (A. L. SMITH, J.).—THE NIFA, [1892] P. 411; 62 L. J. P. 12; 69 L. T. 56; 7 Asp. M. L. C. 324; 1 R. 540.

*Annotations:*—**Distd.** Akt. Helios *v.* Ekman (1897), 76 L. T. 537. **Consd.** Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397. **Reld.** Brenda S.S. Co. *v.* Green (1900), 69 L. J. Q. B. 445.

**3636. —— Whether custom of port excluded—Custom expressly excluded by contract.**]—BRENDA S.S. CO. *v.* GREEN, No. 4363, *post*.

**—— —— Custom not expressly excluded by contract.**]—*See* Nos. 4392–4395, *post*.

**3637. Application of clause—Expenses of discharge.**]—THE NIFA, No. 3635, *ante*.

*G. Sorting Different Consignments.*

*(a) Duties of Shipowner.*

**3638. Goods of same description under different bills of lading—Appropriation of correct quantity under each bill of lading.**]—BRADLEY *v.* DUNIPACE, No. 2279, *ante*.

**3639. —— Assortment of cargo—Consignee able to land cargo himself.**]—NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante*.

**3640. Goods consigned to different consignees—Delivery to proper consignees.**]—GRANGE & CO. *v.* TAYLOR, No. 3826, *post*.

**3641. Goods shipped in bulk—Different bills of lading for undivided portions—"Each bill of lading to bear its proportion of shortage & damage"—Apportionment of sound & unsound goods.**]—GRANGE & CO. *v.* TAYLOR, No. 3826, *post*.

*(b) Goods Distinguished by Marks.*

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article III., r. 3 (*a*), Article IV., r. 2 (*o*).

**3642. Marks obliterated during voyage—Apportionment of unidentifiable goods between consignees.**]—Cotton belonging to different owners was shipped in bales specifically marked, at Mobile for Liverpool; 43 bales belonged to pltfs., & were insured by defts. against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, & some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of the bales were so obliterated by sea water that none of the cotton lost or sold at Key West, & a portion only of that carried to Liverpool, could be identified as belonging to any

vided "cargo to be loaded, stowed, & discharged free of expense to steamer, with use of steamer's winch & winchmen if required":—*Held:* this clause had not the effect of transferring the duty of discharging the cargo from the shipowner, on whom it rests at common law, to the charterer, so as to render the latter responsible for damage received by the ship in the course of discharge.—BALLANTYNE & CO. *v.* PATON & HENDRY, [1912] S. C. 246; 49 Sc. L. R. 183.—**SCOT.**

**PART VII. SECT. 7, SUB-SECT. 5.—G. (a).**

1. *Goods shipped in bulk.*] — Hoofs, horns, & piths had been tendered in bulk as part of a cargo of bones; delay had been caused by the separation; & defenders had failed to prove any custom of the port entitling them to require the ship to effect such separation:—*Held:* pursuers were entitled to deliver the cargo in bulk as they received it, & to have decree for four days' demurrage on account of the delay caused by the separation.—CLACEVICH *v.* HUTCHESON & CO. (1887), 15 R. (Ct. of Sess.) 11; 25 Sc. L. R. 11.—**SCOT.**

**PART VII. SECT. 7, SUB-SECT. 5.—G. (b).**

**3642 i.** *Marks obliterated during voyage—Apportionment of unidentifiable goods between consignees.*]—SPALDING & VALENTINE, LTD. *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD., [1927] S. C. 103.—**SCOT.**

particular consignee. Two only of pltfs.' 43 bales were identified, & these were delivered to pltfs. :—*Held :* in respect of the cotton lost, & that sold at Key West, there was a total loss of a part of each owner's cotton, & all the owners became tenants in common of the cotton which arrived at Liverpool, & could not be identified ; the share of each owner's loss in the cotton totally lost or sold at Key West, & his share in the remainder which arrived at Liverpool being in the proportion that the quantity shipped by him bore to the whole quantity shipped according to the rule in cases of general average where it is not known whose goods are sacrificed : &, consequently, there was no total loss, either actual or constructive of pltf.'s 41 bales.—SPENCE *v.* UNION MARINE INSURANCE CO., LTD. (1868), L. R. 3 C. P. 427 ; 37 L. J. C. P. 169 ; 18 L. T. 632 ; 16 W. R. 1010 ; 3 Mar. L. C. 82.

*Annotations :*—**Expld. & Distd.** Sandeman, Stewart *v.* Tyzack & Branfoot S.S. Co., [1913] A. C. 680. **Consd.** Sinclair *v.* Brougham, [1914] A. C. 398. This decision has never been questioned for nearly fifty years (LORD SUMNER). **Refd.** Rose *v.* Bank of Australasia (1894), 6 R. 121 ; Smurthwaite *v.* Hannay, [1894] A. C. 494. **Mentd.** Harris *v.* Truman (1881), 7 Q. B. D. 340.

**3643. —— —— Shipowner's liability for non-delivery.**]—Bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, the bills of lading being similar. Upon arrival it was found that the number of bales landed fell short of those shipped, & that some of the landed bales could not be identified, their marks having been obliterated. These latter bales were sold & their proceeds distributed proportionately among the several consignees. Sixteen holders of bills of lading, nine being shippers & seven consignees, joined in one action against the shipowners claiming damages for non-delivery of the number of bales specified in their bills of lading respectively.

When the bales became unidentifiable, the several owners of cotton became, in point of law, owners in common of them in proportion to their respective interests, & the shipowner could only attribute such proportion in answer to any claim for non-delivery (LORD RUSSELL OF KILLOWEN). —SMURTHWAITE *v.* HANNAY, [1894] A. C. 494 ; 63 L. J. Q. B. 737 ; 71 L. T. 157 ; 43 W. R. 113 ; 10 T. L. R. 649 ; 7 Asp. M. L. C. 485 ; 6 R. 299, H. L. ; *revsg.* S. C. *sub nom.* HANNAY & CO. *v.* SMURTHWAITE, [1893] 2 Q. B. 412, C. A.

*Annotations :*—**Dbtd.** Sandeman *v.* Tyzack & Branfoot S.S. Co., [1913] A. C. 680. **Mentd.** Montgomery *v.* Foy, Morgan (1895), 43 W. R. 691 ; Peninsular & Oriental Steam Navigation Co. *v.* Tsuno Kijima, [1895] A. C. 661 ; Bennetts *v.* McIlwraith, [1896] 2 Q. B. 464 ; Carter *v.* Rigby, [1896] 2 Q. B. 113 ; Hunt *v.* Worsfold, [1896] 2 Ch. 224 ; The Marechal Suchet, [1896] P. 233 ; Sadler *v.* G. W. Ry., [1896] A. C. 450 ; Heimbs *v.* Newcastle Co-op. Soc. (1897), 76 L. T 109 ; Gower *v* Gouldridge, [1898] 1 Q. B. 348 ; Stroud *v.* Lawson, [1898] 2 Q. B. 44 ; Drincqbier *v.* Wood, [1899] 1 Ch. 393 ; Oxford & Cambridge Universities *v.* Gill, [1899] 1 Ch. 55 ; Thompson *v.* L. C. C., [1899] 1 Q. B. 840 ; Subramania Iyer *v.* R. (1901), 17 T. L. R. 736 ; The Assunta, [1902] P. 150 ; Bullock *v.* London General Omnibus Co., [1907] 1 K. B. 264 ; Lloyd *v.* Great Western Dairies Co., [1907] 2 K. B. 727 ; Compania Sansinena de Carnes Congeladas *v.* Houlder, [1910] 2 K. B. 354 ; Times Cold Storage Co. & Lowther & Blankley, Lowther & Blankley *v.* Times Cold Storage Co., [1911] 2 K. B. 100 ; Oesterreichische Export A.-G. *v.* British Indemnity Insce., [1914] 2 K. B. 747 ; *Re* Beck, Attia *v.* Seed (1918), 87 L. J. Ch. 335 ; Thomas *v.* Moore, [1918] 1 K. B. 555 ; Hare Spinning Co. *v.* Leigh, [1919] 1 Ch. 260 ; Payne *v.* British Time Recorder Co. & Curtis, [1921] 2 K. B. 1 ; Keen *v.* Towler (1924), 41 T. L. R. 86.

**3644. —— —— ——.**]—Bales of jute consigned to various consignees & specifically marked were shipped under bills of lading stating that the bales were received " marked & numbered as per margin," that the number of packages signed for was to be binding on the shipowner unless error or fraud be proved, but that the ship was not to be liable for " obliteration or absence of marks." On the discharge of the ship fourteen bales were missing & eleven bales forming part of the cargo shipped at the port of loading, were not marked as labelled in the bills of lading & could not be identified as belonging to any particular consignment. All the consignees received their full consignments except four, who refused to accept any of the eleven bales. In an action for freight by the shipowner against one of the four consignees, who had received six bales less than his full consignment, the consignee counterclaimed for shortage. The shipowner was willing to account to the four consignees for the value of the fourteen missing bales in proportion to their respective shortages, but claimed that the eleven bales ought to be allocated amongst them in the like proportion :—*Held :* as the shipowner had failed to deliver the full number of bales shipped, he was not entitled to claim that the non-delivery of any of the six bales was due to obliteration or absence of marks, & that he was liable for the full value of the six bales.—SANDEMAN & SONS *v.* TYZACK & BRANFOOT S.S. CO., LTD., [1913] A. C. 680 ; 83 L. J. C. P. 23 ; 109 L. T. 580 ; 29 T. L. R. 694 ; 57 Sol. Jo. 752 ; 12 Asp. M. L. C. 437, H. L.

**3645. —— Application of condition exempting shipowner from responsibility.**]—SANDEMAN & SONS *v.* TYZACK & BRANFOOT S.S. CO., LTD., No. 3644, *ante*.

**3646. Goods wrongly marked—Liability of shipowner—Clause exempting from liability if goods wrongly marked.**]—PARSONS *v.* NEW ZEALAND SHIPPING CO., No. 2275, *ante*.

**3647. —— —— Whether proof of identity admitted—Effect of Bills of Lading Act, 1855 (c. 111), s. 3.**]—PARSONS *v.* NEW ZEALAND SHIPPING CO., No. 2275, *ante*.

SUB-SECT. 6.—DISCHARGE OF SHIPOWNER'S LIABILITY.

**3648. How far liability continues—Until goods fully loaded on lighter.**]—ROBINSON *v.* TURPIN (1805), Peake, 203, n. ; 170 E. R. 130, N. P.

**3649. —— ——.**]—SMITH, HOGG & CO., LTD. *v.* BAMBERGER (LOUIS) & SONS, No. 4470, *post*.

**Custom of river Thames.**] —*See* No. 4442, *post*.

**——.**]—*Compare* INSURANCE, Vol. XXIX., p. 132, Nos. 835–845.

**3650. —— Until lighter can properly be removed from wharf.**]—ROBINSON *v.* TURPIN (1805), Peake, 203, n. ; 170 E. R. 130, N. P.

**3651. —— Goods discharged on to wharf.**]—SMITH, HOGG & CO., LTD. *v.* BAMBERGER (LOUIS) & SONS, No. 4470, *post*.

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**PART VII. SECT. 7, SUB-SECT. 6.**

**3651 i.** *How far liability continues—Goods discharged on to wharf.*]—If goods are placed on some customary wharf at a convenient time after the arrival of the vessel, in such a way as to be within the dominion of the person owning them, the liability of the shipowners is discharged.—BARRACLOUGH *v.* ORIENT STEAM NAVIGATION CO. (1883), 4 N. S. W. L. R. (L.) 75.—**AUS.**

**3651 ii. —— ——.**]—*Held :* as soon as the cargo was delivered on to the wharf the responsibility of the ship ceased, & from that point of time they were at the risk of the consignee.—WILKINSON HEYWOOD & CLARK, LTD. *v.* BRODIE (1902), 28 V. L. R. 669.—**AUS.**

**3651 iii. ——.**]—RIVERS *v.* DUNCAN, 2 R. de L. 75.—**CAN.**

**3651 iv. —— ——.**]—SCOTT *v.* HESCROFF (1852), 2 L. C. R. 477 ; 5 L. C. R. 274.—**CAN.**

**3651 v. ——.**]—BENNETT & CO. *v.* BLACK DIAMOND CO. (1894), 7 Nfld. L. R. 819.—**NFLD.**

**3651 vi. —— ——.**]—LANGLANDS (M.) & SONS *v.* MCMASTER (D.) & CO., [1907] S. C. 1090 ; 44 Sc. L. R. 805.—**SCOT.**

*Sect. 7.—The unloading: Sub-sects. 6 & 7, A. & B. (a) & (b) i.*]

**3652. —— Provision for cesser of liability in bill of lading—When goods leave ship's deck.**]—PETROCOCHINO *v.* BOTT, No. 3597, *ante*.

**3653. —— —— When goods free from ship's tackle.**]—Goods were shipped on board defts.' ship to be carried to Penang & delivered there to order or assigns under bills of lading which contained the condition that "in all cases & under all circumstances the liability of the co. shall absolutely cease when the goods are free of the ship's tackle, & thereupon the goods shall be at the risk for all purposes & in every respect of the shipper or consignee." They were delivered to landing agents appointed by defts., & for that purpose had been discharged from the ship's tackle into lighters sent by the agents, but by fraud, in which the landing agents participated, never reached the consignees:—*Held:* although there had been no delivery under the bills of lading, yet the provision as to cesser of defts.' liability directly the goods were "free of the ship's tackle" was perfectly clear, & it must be held to be operative & effectual to protect them.—CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD., [1909] A. C. 369; 78 L. J. P. C. 111; 100 L. T. 661; 25 T. L. R. 480; 53 Sol. Jo. 446; 11 Asp. M. L. C. 245; 14 Com. Cas. 189, P. C.

*Annotation:*—**Mentd.** Lancaster *v.* Turner, [1924] 2 K. B. 222.

**3654. —— —— Goods taken away fraudulently—Whether provision operative.**] — CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD., No. 3653, *ante*.

**3655. —— Until crew no longer able to assist in ship's operation.**]—PETERSEN *v.* FREEBODY & CO., No. 3604, *ante*.

**3656. What delivery is sufficient to discharge shipowner—Delivery to wharfinger.**]—BOURNE *v.* GATLIFF, No. 3695, *post*.

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**3652 i.** —— *Provision for cesser of liability in bill of lading—When goods leave ship's deck.*]—Where by an express condition of the bill of lading, it is provided that the responsibility of the shipowners shall cease as soon as the goods are discharged from the ship's deck to the wharf, the consignee cannot invoke in support of the claim for shortage, an alleged custom of the fruit importation trade at the port of arrival, to the effect that consignees usually take delivery only after sale of the goods by auction on the wharf, by giving delivery orders to the purchasers at the sale; & the fact that the shipowners permitted such sale on the wharf & assisted the consignee in the delivery of the goods to the purchasers, is not a waiver of the condition of the bill of lading.—HART *v.* PARSONS (1899), Q. R. 15 S. C. 515.—**CAN.**

**3652 ii.** —— —— ——.]—MACKINNON & MACKENZIE *v.* MINCHIN (1871), 6 Mad. 353.—**IND.**

**3652 iii.** —— —— ——.]—*Held:* a condition that "the shipowners' responsibility ceases on the goods leaving the ship's side" would not relieve the shipowners if it was clearly shown that the damage was done by improper handling on board.—ARNDT & COHEN *v.* D. A. DAMPSCHIFFS GESELLSCHAFT (1906), 23 S. C. 324.—**S. AF.**

**3653 i.** —— —— *When goods free from ship's tackle.*]—The condition of a bill of lading that the co. will not be responsible for loss or damage to cargo after discharge from ship's tackles, relieves the carriers from all risks as to damages from the moment of landing the goods.—IVEY & CO. *v.* QUEENSLAND STEAM SHIPPING CO., LTD. (1887), 2 Q. L. J. 188.—**AUS.**

**3653 ii.** —— —— ——.]—FAIRFAX *v.* NEW ZEALAND SHIPPING CO., LTD. (1912), 12 S. R. N. S. W. 572.—**AUS.**

**3653 iii.** —— —— ——.]—A clause in a bill of lading providing that the owner of the goods is to take delivery at a certain place "& all liability of" the shipowner "to cease as soon as the goods are free from the ship's tackles" does not purport to relieve the shipowner from liability for loss or damage to the goods arising from negligence, fault, or failure in the proper delivery of the goods, or to lessen, weaken or avoid the obligations of the master, officers, agents or servants of the ship properly to deliver the goods, &, therefore, such a clause is not avoided by Sea-Carriage of Goods Act, 1904, s. 5 (*a*) or (*c*).—AUSTRALASIAN UNITED STEAM NAVIGATION CO., LTD. *v.* HISKENS 1914), 18 C. L. R. 646.—**AUS.**

**3653 iv.** —— —— ——.]—DENHAM *v.* CLAN LINE OF STEAMERS, LTD. (1917), 17 S. R. N. S. W. 317; 34 N. S. W. W. N. 144.—**AUS.**

**3653 v.** —— —— ——.]—BRITISH INDIA STEAM NAVIGATION CO. *v.* IBRAHIM SULAIMAN (1895), I. L. R. 19 Mad. 169.—**IND.**

**a.** —— ——.]—*Held:* the landing of goods at a railway wharf did not discharge defts., & defts. were liable, notwithstanding the exceptions in the bill of lading for the injury to the goods by rain, whether caused in the act of landing or from the drippings from the shed, over which pltf. had no control.—ROBERTSON *v.* DOMINION S.S. CO. (1879), 13 N. S. R. (1 R. & G.) 149.—**CAN.**

**3656 i.** *What delivery is sufficient to discharge shipowner—Delivery to wharfinger.*]—To an action for not delivering goods shipped on board deft.'s vessel, to be carried to T. & there delivered to pltfs. or their assigns, defts. pleaded that they carried the goods to T., & there being no person there on pltf.'s behalf to receive the goods, or to whom notice of their arrival could be given, & no means of notifying pltfs., who lived at a distance, defts., having no warehouse of their own, & there not being any other warehouse there in which they could store the goods, after waiting a reasonable time, landed the goods at the only wharf there, where it was usual & customary to land goods, & placed them in charge of the person in charge of the wharf, so far as he would consent to take charge of them:—*Held:* the plea constituted no defence to the action.—CLOSE *v.* BEATTY (1878), 28 C. P. 470.—**CAN.**

**3656 ii.** —— ——.]—MORRISON *v.* FISHWICK (1879), 13 N. S. R. (1 R. & G.) 59.—**CAN.**

**b.** —— *Landing cargo on wharf.*]—AUSTRALASIAN STEAM NAVIGATION CO. *v.* THURSTON (1879), 2 N. S. W. S. C. R. (L.) 259.—**AUS.**

**c.** —— ——.]—The mere landing of goods on the wharf is not sufficient delivery. They must be so landed that the consignee can get them.—TINSLEY *v.* COOK (1881), 2 N. S. W. L. R. (L.) 383.—**AUS.**

**d.** —— ——.]—The usage that "the landing of goods after notice to the consignee at a convenient wharf, is complete delivery to consignee" does not establish that the mere placing them on the wharf will release the master from responsibility. There can be no efficient delivery under such "usage" unless the goods are so placed on the wharf as to be subject to the dominion of the consignee.—VIRGOE *v.* COOK (1882), N. S. W. L. R. (L.) 102.—**AUS.**

**e.** —— ——.] — Where pltfs. claimed for damages suffered by goods which had been delivered on the wharf at Q. after they had notified defts. that they wished to have them delivered into a lighter provided by themselves, but which defts. refused to do before payment of the freight:—*Held:* the master or owner of a vessel could not be compelled to deliver goods into a lighter before payment of freight, & delivery on the wharf was a good delivery.—JUSON *v.* AYLWARD (1862), 14 L. C. R. 164.—**CAN.**

**f.** —— *Delivery at port—Notice to consignee.*]—It is sufficient to discharge the owner of a vessel conveying goods from port to port, from liability for non-delivery, to show that the goods were delivered by the master at the port to which they were consigned, & notice given during the usual business hours to the consignees.—MCKAY *v.* LOCKHART (1836), 4 O. S. 407.—**CAN.**

**g.** —— *Storage in harbour board's shed—Effect of delay of consignee in taking delivery.*]—KENNEDY *v.* MCKEE (1906), 26 N. Z. L. R. 375.—**N.Z.**

**h.** —— *Delivery into hands of harbour porters employed by consignee.*]—In an action for payment of the freight of part of a cargo of jute shipped for delivery "at the port of D.," the consignee alleged in defence that the shipowners had failed to implement their contract by delivering the goods in good condition & stated a counter claim of damages on account of certain bales which had been injured by rain water while lying on the quay, where they had been deposited:—*Held:* defender had failed to instruct any custom of the port at variance with the general rule according to which delivery of each bale was complete as soon as it passed over the ship's side into the hands of the harbour porters employed for the consignee, & the shipowners were not liable for the damage in question.—BRITISH SHIPOWNERS' CO., LTD. *v.* GRIMOND (1876), 3 R. (Ct. of Sess.) 968; 13 Sc. L. R. 623.—**SCOT.**

**k.** —— ——.]—KNIGHT S.S. CO., LTD. *v.* FLEMING DOUGLAS & CO. (1898), 25 R. (Ct. of Sess.) 1070; 35 Sc. L. R. 834.—**SCOT.**

**l.** —— *Delivery to dock agent—Agent for consignee—Regulation of harbour board.*]—A regulation of the harbour board provided that all landing of cargo should be done by dock agents duly authorised by the board, that only one dock agent or firm of dock agents should be permitted to land cargo from any one ship, & that such dock agent or firm should be appointed by the agents of the ship on behalf of the consignees:—

**3657. —— Goods not claimed.**]—HOWARD *v.* SHEPHERD, No. 3782, *post.*

*See, now,* 1894 Act, s. 493.

**3658. —— Delivery to person producing one bill of lading—No notice of transfer of other.**]—BARBER *v.* MEYERSTEIN, No. 2371, *ante.*

**Duration of carriers' liability generally.**]—*See* CARRIERS, Vol. VIII., pp. 30–36, Nos. 176–206.

SUB-SECT 7.—THE TIME WITHIN WHICH DISCHARGE MUST TAKE PLACE.

*A. In General.*

**3659. When time commences—Arrival of ship.**]—DAHL *v.* NELSON, DONKIN & Co., No. 3471, *ante.*

**3660. —— ——.**]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & Co., No. 3543, *ante.*

**—— —— What constitutes arrival.**] — *See* Sub-sect. 1, B., *ante.*

**3661. —— Notification of readiness to discharge.**]—THE CARISBROOK, No. 3930, *post.*

**—— —— What constitutes readiness to discharge.**]—*See* Sub-sect. 3, *ante.*

**3662. —— When cargo brought within reach.**]—PETERSEN *v.* FREEBODY & Co., No. 3604, *ante.*

**Failure of consignee to take delivery within time—Right to land & warehouse cargo.**]—*See* Sub-sect. 8, *post.*

*B. Where Time Fixed.*

(*a*) *In General.*

**3663. How time fixed—Necessity for specifying clearly days & hours.**]—HULTHEN *v.* STEWART & Co., No. 3746, *post.*

**3664. —— "As fast as steamer can deliver during ordinary working hours"—Addition of exceptions clause—Effect of.**]—HULTHEN *v.* STEWART & Co., No. 3746, *post.*

**3665. "Immediately" — How interpreted.**]—ALEXIADI *v.* ROBINSON, No. 3697, *post.*

(*b*) *Absolute Liability of Consignee.*

i. *In General.*

**3666. General rule.**]—(1) The duty of providing, & making proper use of, sufficient means for the discharge of a cargo, when a ship which has been chartered arrives at its destination, & is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, & by the circumstances of the case. If, by the terms of the charterparty the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute & unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time. When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port.

A charterparty was entered into by which a vessel was to take on board a cargo of steel rails & fastenings, & proceed therewith to the port of East London in South Africa. In the charterparty was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp & lighters. These were under the absolute control of a co., to which the governmental authorities had transferred all their powers. The co. allowed vessels the use of the warp & lighters in turn, making no exception in favour of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the Govt. or of private individuals. The ship arrived at the port, found a great number of vessels, there, the number of lighters was insufficient, & the ship could not obtain its "turn" until more than thirty-one working days had elapsed after its arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port: —*Held:* in this case the shipowner was not entitled to maintain an action against the charterer for demurrage

There is no doubt that the duty of providing, & making proper use of, sufficient means for the discharge of cargo . . . lies, generally, upon the charterer. If, by the terms, of the charterparty, he has agreed to discharge it within a fixed period of time that is an absolute & unconditional engagement, for the non-performance of which he is answerable. . . . If, on the other hand, there is no fixed time, the law implies an agreement on his [the charterer's] part to discharge the cargo within a reasonable time. . . Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If, as in the present case, an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have evercome by the use of any reasonable diligence, ought, I think, to be taken into consideration (LORD SELBORNE, C.).

A charterparty in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be (LORD BLACKBURN).

(2) There is an absolute contract on his [the charterer's] part to furnish a cargo & he is bound to pay damages if it becomes impracticable to do so (LORD BLACKBURN).—POSTLETHWAITE *v.* FREELAND (1880), 5 App. Cas. 599; 49 L. J. Q. B. 630; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. L. C. 302, H. L.

*Annotations:—As to* (1) **Apld.** Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 854. **Consd.** Hick *v.* Raymond & Reid, [1893] A. C. 22. **Folld.** Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638. **Consd.** Hulthen *v.* Stewart, [1902] 2 K. B. 199; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109. **Refd.** Dahl *v.* Nelson, Donkin (1881), 50 L. J. Ch. 411; Aste & Kercheval *v.* Stumore, Weston (1884), Cab. & El. 319; Tillett *v.* Gwm Avon Works Proprietors (1886), 2 T. L. R. 675; Hick *v.* Tweedy (1890), 63 L. T. 765; Good *v.* Isaacs, [1892] 2 Q. B. 555; The Jaederen, [1892] P. 351; Furness, Withy *v.* White, [1894] 1 Q. B. 483; Smith & Service *v.* Rosario Nitrate Co., [1894] 1 Q. B. 174; The Derwent (1901), 84 L. T. 360;

*Held:* such dock agent was the person authorised to receive goods as agent for the consignee; the handing of the goods over the ship's side to such dock agent was a valid delivery to the consignee & absolved the ship from further responsibility.—HOLT & HOLT, LTD. *v.* UNION-CASTLE S.S. Co., LTD. (1901), 18 S. C. 38.—**S. AF.**

**PART VII. SECT. 7, SUB-SECT. 7.—B. (b) i.**

**3666 i.** *General rule.*]—If a charterer has agreed to load or unload within a fixed period of time, there is an absolute & unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing his contract, unless such impediments are covered by exemptions under the charter, or arise from the fault of the shipowner.—MCALONEY *v.* SPILHAUS (1901), 18 S. C. 321.—**S. AF.**

**3666 ii.** ——.]—HALVORSEN *v.* SOUTH AFRICAN LIGHTING ASSOCN., LTD. (1902), 16 E. D. C. 58.—**S. AF.**

*Sect. 7.—The unloading: Sub-sect. 7, B. (b) i. & ii.]*

Rodenacker *v.* May & Hassell (1901), 6 Com. Cas. 37; Ropner *v.* Stoate, Hosegood (1905), 92 L. T. 328; Smailes *v.* Hans Dessen (1906), 95 L. T. 809; Akt. Hekla *v.* Bryson, Jameson (1908), 100 L. T. 155; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; British & Mexican Shipping Co. *v.* Lockett, [1911] 1 K. B. 264; Love & Stewart *v.* Rowtor S.S. Co., [1916] 2 A. C. 527; Alexander *v.* Akt. Dampskibet Hansa, [1920] A. C. 88; Van Leiwen *v.* Hollis, [1920] A. C. 239; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 189; Hogarth *v.* Cory (1926), 95 L. J. P. C. 204; United States Shipping Board *v.* Strick, [1926] A. C. 545. *As to* (2) **Refd.** Ardan S.S. Co. *v.* Weir, [1905] A. C. 501; Vergottis *v.* Cory (1926), 95 L. J. K. B. 1002. *Generally*, **Mentd.** *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348.

**3667.** ——.]—BUDGETT & CO. *v.* BINNINGTON & CO., No. 3609, *ante*.

**3668.** ——.]—A ship was chartered to proceed to Archangel & load a cargo of timber & thereafter to proceed with the cargo to Ayr. The charterparty provided that the cargo was to be loaded & discharged at the rate of not less that 100 standards per day, whether berth available or not, "always provided the steamer can load & discharge at this rate," & that, in the event of the steamer being detained beyond the time stipulated as above for loading & discharging, demurrage should be paid at £70 per day & *pro rata* for any part thereof. The ship duly arrived at Ayr, & if the discharge had been carried out at the stipulated rate it would have been completed in six & one-third days, but owing to a shortage of labour at the port it occupied thirteen & one-third days. The shipowner claimed seven days' demurrage:—*Held:* (1) the general rule established by the authorities was that if the charterer had agreed to load or unload within a fixed period of time he was answerable for the non-performance of that agreement, whatever the nature of the impediments, unless they were covered by exceptions in the charterparty, or arose through the fault of the shipowner or those for whom he was responsible, & this rule applied to a case where the time was to be ascertained by reference to the rate of discharge; (2) the proviso in the charterparty had reference to the structural capacity & equipment of the ship & did not apply to a shortage of labour.—ALEXANDER (WILLIAM) & SONS *v.* AKT. DAMPSKIBET HANSA, [1920] A. C. 88; 88 L. J. P. C. 182; 122 L. T. 1; 35 T. L. R. 709; 63 Sol. Jo. 788; 14 Asp. M. L. C. 493; 25 Com. Cas. 13, H. L

*Annotations:—As to* (1) **Consd.** Cantiere Navale Triestina *v.* Russian Soviet Naphtha, Export Agency, [1925] 2 K. B. 172; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Ambatielos *v.* Anton Jurgens Margarine Works (1922), 38 T. L. R. 294; United States Shipping Board *v.* Durrell, [1923] 2 K. B. 739; *Re* Ropner Shipping Co. & Cleeves Western Valleys Anthracite Collieries (1927), 137 L. T. 221.

**3669. Delay due to cause beyond control of either party — Congested state of dock.]** — STRUCK *v.* TENANT (1806), cited in Abbott's Merchant Shipping, 14th ed. at p. 372, N. P.

**3670. —— Unlawful seizure of part of cargo— By customs officers.]**—It is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom house officers, in unlawfully seizing a part of the cargo.—BESSEY *v.* EVANS (1815), 4 Camp. 131; 171 E. R. 42, N. P.

*Annotation:*—**Refd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626.

**—— Mode of stowing goods—Under goods of other consignees—Delay of other consignees in removing goods.]**—A general ship took some silk on board to carry from Rotterdam to London on deft.'s account. On the margin of the bill of lading was written: "The consignee to clear the goods in 14 running days, after her arrival in port, or to pay £4 *per diem* for demurrage." The vessel was ready to deliver on Oct. 3. Deft. applied for, & was ready to receive his goods within the running days; but being undermost in the vessel, delivery could not be made till Oct. 22:—*Held:* pltf. was entitled to recover demurrage though he did not deliver the goods within the time allowed, being prevented by other goods, belonging to other consignees, which overlaid them.—HARMAN *v.* GANDOLPH (1815), Holt, N. P. 35; 171 E. R. 152, N. P.

*Annotation:*—**Refd.** Gullischen *v.* Stewart (1883), 11 Q. B. D. 186.

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WATNEY, No. 3880, *post*.

**3673. —— —— Right of consignee to have reasonable time for discharge—Whether liability suspended until lapse of reasonable time.]**—If a bill of lading stipulate for the payment of demurrage by the consignee of goods after a limited time from the ship's arrival, & his goods are so stowed as not to admit of delivery immediately on arrival, the consignee must have a reasonable time to discharge them, & is not liable to demurrage till after such reasonable time though the stipulated period has elapsed from the ship's being ready to deliver her cargo generally. But after such reasonable time, he is liable though the stipulated period has not elapsed, if computed from the time when the discharge of his own goods might have commenced.—ROGERS *v.* HUNTER (1827), 2 C. & P. 601; Mood. & M. 63; 172 E. R. 273, N. P.

*Annotations:*—**Apld.** Dobson *v.* Droop (1830), Mood. & M. 441. **N.F.** Porteus *v.* Watney (1878), 3 Q. B. D. 534. **Refd.** Ford *v.* Cotesworth (1870), 10 B. & S. 991; Dahl *v.* Nelson, Donkin (1881), 50 L. J. Ch. 441; Hick *v.* Raymond & Reid, [1893] A. C. 22.

**Landing of cargo — mode of discharge available.]**—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante*.

—— ——.]—WAUGH *v.* MORRIS, No. 3620, *ante*.

**Bad weather.]**—By a charterparty for a voyage with a cargo of timber from Pensacola to a safe port in the United Kingdom "sixteen working days were to be allowed the merchants for loading the ship at Pensacola, & to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, & ten days on demurrage over & above the said lying days at £10 per day."

The ship was ordered to M., & arrived at the usual place of discharge in the river & began unloading. It was the duty of the master to put the timber over the ship's side, & form it into rafts, & the charterer was to send tugs & take the rafts away. During the unloading bad weather came on, & though the ship did not leave her anchorage, the rafts could not be formed, & the charterer therefore could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship. An action having been brought by the shipowner against the charterer for the four days demurrage:—*Held:* where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days; & deft., therefore, was liable for the four days demurrage.—THIIS *v.* BYERS (1876), 1 Q. B. D. 244; 45 L. J. Q. B. 511; 3 Asp. M. L. C. 147; *sub nom.* THIS *v.* BYERS, 34

L. T. 526; *sub nom.* THIESS *v.* BYERS, 24 W. R. 611.

*Annotations*:—**Consd.** British & Mexican Shipping Co. *v.* Lockett, [1911] 1 K. B. 264. **Reid.** Porteus *v.* Watney (1878), 3 Q. B. D. 534; Nelson *v.* Dahl (1879), 12 Ch. D. 568; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Budgett *v.* Binnington, [1891] 1 Q. B. 35; Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 54; Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 189; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3677. —— Strike.**]—BUDGETT & CO. *v.* BINNINGTON & CO., No. 3609, *ante*.

**3678. —— Shortage of labour.**]—HICK *v.* RAYMOND & REID, No. 3710, *post*.

**3679. —— ——.**]—ALEXANDER (WILLIAM) & SONS *v.* AKT. DAMPSKIBET HANSA, No. 3668, *ante*.

**3680. Obligation to take goods out of or from alongside ship.**]—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante*.

**3681. Delay due to default of consignee.**]—AKT. HELIOS *v.* EKMAN & CO., No. 2974, *ante*.

**3682. Different bills of lading imposing unequal obligations—Some consignees having more onerous obligations—Whether discharged from liability.**]—A steamer loaded a general cargo at Gothenburg for London. The most part of the cargo was loaded under bills of lading which contained two clauses; the first clause provided that the cargo should be discharged at the rate of so many tons or standards a day & that demurrage should be at a certain rate a day to be paid by consignees in a certain proportion to the freight of the whole cargo; the second clause provided that time for discharging should begin to run twenty-four hours after the ship's arrival in a certain roadstead, whether a berth was available or not. A portion of the cargo was loaded under bills of lading from which the second clause had been struck out. Another portion was part of a consignment which had been shipped under a bill of lading on another steamer & had been transhipped on the steamer in question without any further bill of lading. The steamer arrived in the roadstead but was unable to find a berth for eleven days. Those bills of lading which contained the two clauses imposed on their holders liability for their proportion of thirty-three days' demurrage. The bills of lading from which clause 2 had been struck out imposed liability for a proportion of twenty-two days' demurrage. The bill of lading which comprised the transhipped portion provided for demurrage at a lower rate than that fixed by the others:—*Held*: a shipowner by giving bills of lading imposing upon consignees unequal obligations in relation to discharge & demurrage does not as a matter of law prevent those consignees who are under the more onerous obligations from performing those obligations, & there was in the circumstances no implied condition that all the bills of lading should be in the same terms.—UNITED STATES SHIPPING BOARD *v.* DURRELL (R.) & CO., [1923] 2 K. B. 739; 92 L. J. K. B. 1024; 129 L. T. 750; 39 T. L. R. 521; 16 Asp. M. L. C. 216; 28 Com. Cas. 333, C. A.; *subsequent proceedings* (1924), 29 Com. Cas. 157, C. A.

**3683. —— —— ——.**]—Where a ship carries a cargo of which different parcels are consigned to different bill of lading holders the fact that the shipowner has given to one bill of lading holder a longer, & to another bill of lading holder a shorter, time for unloading before becoming liable for demurrage does not of itself relieve the holder of the more onerous bill of lading of his contractual obligation. The giving of a longer time to another bill of lading holder does not of itself constitute a prevention by the shipowner of the performance of his contract by the bill of lading holder who has contracted to discharge in the shorter time; & the latter can only escape liability under his contract if he can show that by some act on the part of the shipowner he has been in fact prevented from carrying out his contract.—UNITED STATES SHIPPING BOARD *v.* DURRELL & CO., LTD., SAME *v.* DUFFELL & CO. (1924), 29 Com. Cas. 157, C. A.

**Excuses for delay.**]—*See* Sub-sect. 7, B. (*b*) ii. & iii., *post*.

ii. *Default of Shipowner.*

**3684. General rule.**]—There is, of course, an implied condition that the shipowner shall be ready & willing to deliver. If he wrongfully refuses to give over the goods, or if by reason of any default of his or of any obstacle for which he is responsible the consignee is unable to get his goods, this would afford a good answer to the claim, & this is the substance of the defence which is pleaded. . . . Now, the only thing which prevented the delivery in the present case was the inability of the master to get at the goods, because they were stowed at the bottom of the hold, & because the owners of the super-incumbent goods had neglected to take those goods away in proper time. Can this neglect of the other consignees be said to be the default of the master? If not, it is immaterial whose fault it was; for defts. undertook that, whether they were able to get away their

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**3678 i.** *Delay due to cause beyond control of either party—Shortage of labour.*]—RICKINSON, SONS & CO. *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, S.S. ARACHNE, [1918] S. C. 440.—**SCOT.**

**3681 i.** *Delay due to default of consignee.*]—When the ship arrived at her destination the consignees declined to pay freight except on the cement that was in good condition, & the ship was delayed in discharging the cargo. The master declined to continue to unload under his lien for freight pending a settlement of the dispute:—*Held*: while the ship was entitled to be paid the freight when the cargo was in "slings alongside," the master had not acted unreasonably in declining to unload under his lien, & the ship was entitled to demurrage under the circumstances.—PARRATT & CO. & HIND, ROLFE & CO. *v.* THE NOTRE DAME D'AVOR (1911), 13 Exch. C. R. 456; 16 B. C. R. 381.—**CAN.**

**3681 ii.** ——.]—CLYDESDALE SHIPOWNERS' CO. *v.* GALLAGHER, [1907] 2 I. R. 602.—**IR.**

**3681 iii.** ——.]—A charterparty contained a stipulation that the steamer should be discharged as fast as possible:—*Held*: the consignee, on being called on to take delivery of the cargo on rafts, a recognised mode of delivery, was liable in demurrage for the delay caused by his refusal.—LA COUR *v.* DONALDSON & SON (1871), 1 R. (Ct. of Sess.) 912; 11 Sc. L. R. 524.—**SCOT.**

**3681 iv.** ——.]—A charterparty stipulated that cargo discharged should be taken from off the quay by the charterers at a certain rate of tons per day. Owing to shortage of railway waggons, the rate of discharge was not maintainable. The shipowners thereupon completed the unloading by means of lighters from which the cargo was placed on waggons when available. In an action against charterers for such lighterage charges:—*Held*: the shipowners were entitled to minimise the delay in discharging as they had done & could recover their outlay from the charterers to the extent of the demurrage thereby saved.—CAZALET *v.* MORRIS & CO., S.S. CRONSTADT, [1916] S. C. 952.—**SCOT.**

**3681 v.** ——.]—THE VICTORIA (MASTER & OWNERS) *v.* SCOTT GUTHERIE & CO. (1890), 11 N. L. R. 129.—**S. AF.**

**m.** *Delay occasioned by carriers employed by consignees.*]—Action was brought by the owners of a vessel against the owners & consignees of a quantity of grain for damage occasioned by delay in receiving the cargo. The grain was brought by pltfs.' vessel from C. to K., where defts. employed a forwarding house to receive it & carry it to M.:—*Held*: defts. were liable notwithstanding the delay was occasioned by the carriers employed by defts. to receive & convey it forward on their account.—HENDERSON *v.* CAVERHILL (1862), 13 L. C. R. 77.—**CAN.**

**PART VII. SECT. 7, SUB-SECT. 7.—B. (b) ii.**

**3684 i.** *General rule.*]—The discharge of the cargo of a vessel occupied several days beyond the lay days stipulated in the charterparty. The crew worked with reasonable diligence, but it was impossible for them without assistance to discharge the cargo within the stipulated time. In an action for demurrage at the instance of the master:—*Held*:

*Sect. 7.—The unloading: Sub-sect. 7, B. (b) ii. & iii., & C. (a).]*

goods or not, they would pay demurrage if the ship was not cleared within the stipulated period, the contract being an absolute & not a conditional contract (LUSH, J.).—STRAKER *v.* KIDD, PORTEUS *v.* WATNEY (1878), 3 Q. B. D. 223; 47 L. J. Q. B. 365; 26 W. R. 511, 512; 4 Asp. M. L. C. 34, 34, n.; *on appeal*, 3 Q. B. D. 534, C. A.

*Annotations:*—**Consd.** Budgett *v.* Binnington, [1891] 1 Q. B. 35. **Refd.** Allen *v.* Coltart (1883), 11 Q. B. D. 782; Gullischen *v.* Stewart (1883), 11 Q. B. D. 186; Hick *v.* Rodocanachi, [1891] 2 Q. B. 626; Serraino *v.* Campbell, [1891] 1 Q. B. 283; Castlegate S.S. Co. *v.* Dempsey, [1892] Soviet Naphtha Export Agency, [1925] 2 K. B. 172. **Mentd.** Grange *v.* Taylor (1904), 90 L. T. 486; The Lizzie, [1919] P. 22.

**3685.** ——.]—BUDGETT & Co. *v.* BINNINGTON & Co., No. 3609, *ante*.

**3686.** ——.]—ALEXANDER (WILLIAM) & SONS *v.* AKT. DAMPSKIBET HANSA, No. 3668, *ante*.

**3687. What constitutes default—Wrongful interference.**]—Action for demurrage on a charterparty. The contract was for eighty-five running or lay days for the loading & discharge of the cargo, & fourteen days on demurrage: breaches, non-payment of demurrage for the fourteen days, & that defts. detained the vessel in unloading for eight further days. Second plea, that defts. did not keep or detain, in manner & form, etc. Third, that, at the time when the vessel was unloading, pltfs. wrongfully stopped the unloading. It appeared that the unloading was stopped, by the influence of ptlfs., for thirteen days: deducting these, the whole number of working days occupied in loading & unloading amounted to ninety; including them, to one hundred & three:—*Held:* on the second plea, it was a question for the jury whether defts. were not discharged of their liability by the interference of the pltfs.—BENSON *v.* BLUNT (1841), 1 Q. B. 870; 1 Gal. & Dav. 449; 10 L. J. Q. B. 333; 113 E. R. 1364.

*Annotation:*—**Apld.** Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70.

**3688.** —— ——.]—STRAKER *v.* KIDD, PORTEUS *v.* WATNEY, No. 3684, *ante*.

**3689.** —— **Refusal to discharge.**]—STRAKER *v.* KIDD, PORTEUS *v.* WATNEY, No. 3684, *ante*.

**3690.** —— ——.]—BUDGETT & Co. *v.* BINNINGTON & Co., No. 3609, *ante*.

### iii. *Excepted Clause.*

**3691. General rule.**]—ALEXANDER (WILLIAM) & SONS *v.* AKT. DAMPSKIBET HANSA, No. 3668, *ante*.

**3692. Exception of "detention through surf"—Whether applicable to complete operation of discharge—Including discharge from lighters on to beach.**]—BENNETTS & Co. *v.* BROWN, No. 3976, *post*.

**3693. Contract to discharge within fixed time unless prevented by cause beyond control—Cause always preventing discharge within time—Whether stipulation constitutes exception.**]—FRANCE, FENWICK & Co., LTD. *v.* SPACKMAN (PHILIP) & SONS, No. 2836, *ante*.

**3694.** —— —— **Failure to discharge within time—Protection by exceptions clause.**]—FRANCE, FENWICK & Co., LTD. *v.* SPACKMAN (PHILIP) & SONS, No. 2836, *ante*.

**Strike clause.**]—*See* Sect. 4, sub-sect. 16, B., *ante*.

**Application of ejusdem generis rule.**]—*See* Sect. 1, sub-sect. 3, C. (*b*), *ante*.

### *C. Where No Time Fixed.*

### (*a*) *In General.*

**3695. General rule — Discharge to be made within reasonable time.**]—Pltf. below declared in *assumpsit* upon a contract by defts. below safely & securely to carry & convey by a steam vessel certain goods of pltf. below from Belfast to Dublin & from thence to the port of London, & to deliver the same at the port of London to pltf. or his assigns, on payment of freight, etc., assigning for breach the non-delivery in London. Defts. below pleaded that the goods were put on board under a bill of lading, by which they were deliverable to pltf. below or his assigns on payment of freight; that, after the arrival of the vessel at London with the goods on board, deft. below caused them to be unshipped & safely & securely landed & deposited in & upon a certain wharf called Fenning's Wharf, at the port of London, there to remain until they could be delivered to pltf. below or his assigns according to the tenor & effect of the bill of lading, the said wharf being a place at which goods conveyed in steam vessels from Dublin to London were used & accustomed to be landed & deposited for the use of the consignees thereof, & a place fit & proper for such purpose; & that afterwards, & whilst the goods remained & were deposited upon the said wharf for the purposes aforesaid, & before a reasonable time for delivery thereof according to the tenor & effect of the bill of lading had elapsed, the goods were there destroyed by an accidental fire, & that, after the arrival of the vessel at London with the goods on board, defts. below were ready & willing to deliver the same to pltf. below or his assigns according to their promise, but that neither pltf. below or his assigns was or were there ready to receive the same, whereupon defts. below caused the goods to be unshipped & landed on Fenning's Wharf, there to

the consignee was liable for two days' delay caused by the vessel being unable to find a berth at the quay; but the consignee was not liable for subsequent delay, because there was an implied obligation on the master to give delivery within the time, & as he had failed to do so he could not claim demurrage.—HAUSEN *v.* DONALDSON (1874), 1 R. (Ct. of Sess.) 1066; 11 Sc. L. R. 580.—**SCOT.**

**PART VII. SECT. 7, SUB-SECT. 7.—B. (b) iii.**

**3691 i.** *General rule.*]—MCALONEY *v.* SPILHAUS (1901), 18 S. C. 321.—**S. AF.**

**3691 ii.** ——.]—If charterers have in terms of a charterparty, fixed a minimum rate at which the ship is to be discharged from the time when the lay days begin to run, an absolute obligation will rest upon the charterers to have the work done within the time specified unless they can shield themselves behind some special exemption in the contract.—HALVORSEN *v.* SOUTH AFRICAN LIGHTING ASSOCN., LTD. (1902), 16 E. D. C. 58.—**S. AF.**

**3694 i.** *Contract to discharge within fixed time unless prevented by cause beyond control—Failure to discharge within time—Protection by exceptions clause.*]—By a charterparty a ship was bound to proceed to C. & deliver her cargo there, "at a discharging berth or berths as ordered." The charterers were exempt from liability for delay caused by "stoppage on railways, quarantine, or any cause beyond the personal control of the charterers." The failure to discharge the cargo within the time allowed by the charterparty was due entirely to the default of the railway co. in not providing waggons. In an action for demurrage:—*Held:* the default of the railway co. was covered by the words "or any cause beyond the personal control of the charterers."—HIBERNIAN S.S. CO., LTD. *v.* SUTTONS, LTD. (1912), 47 I. L. T. 39.—**IR.**

**PART VII. SECT. 7, SUB-SECT. 7.—C. (a).**

**3695 i.** *General rule—Discharge to be made within reasonable time.*]—Where a charterparty provides that a steamer is to be loaded with the greatest possible dispatch day & night, but there is no provision as to the time & manner of unloading, the law implies an obligation to discharge with all reasonable diligence, having regard to the situation & circumstances existing & the appliances in use at the time, at the port of discharge.—VAN BUSKIRK *v.* NORTH RIVER LUMBER CO. (1905), 40 N. S. R. 532.—**CAN.**

remain until pltf. below or his assigns should come & receive the same, or until the same could be conveyed & delivered to pltf. below or his assigns, with the same averment of the place usual, fit, & proper, as in the third plea; & that afterwards, & whilst the goods remained & were deposited upon the said wharf for the purposes aforesaid, & before pltf. below or his assigns came or sent for the same, & before defts. below were requested to deliver the same to pltf. below or his assigns, or a reasonable time for conveying them from the said wharf to pltf. below or his assigns had elapsed & before the same could be removed therefrom, the goods were destroyed there by an accidental fire:—*Held:* both these pleas were bad in substance, inasmuch as they neither alleged a delivery of the goods to the consignee or his assigns, nor that a delivery at Fenning's Wharf was a delivery to him or them according to the usage of the port of London with respect to goods on such a voyage, nor that pltf. below had notice of the arrival of the goods, nor that a reasonable time for pltf. below or his assigns to come & receive them had elapsed when the goods were landed or when they were destroyed, nor that pltf. below or his assigns had notice that defts. below were ready & willing to deliver the goods.—BOURNE *v.* GATLIFF (1844), 11 Cl. & Fin. 45; 7 Man. & G. 850; 8 Scott, N. R. 604; 8 E. R. 1019, H. L.

*Annotations:*—**Refd.** Burges *v.* Wickham (1863), 3 B. & S. 669; The Norway (1864), Brown. & Lush. 377. **Mentd.** Ross *v.* Hill (1846), 2 C. B. 877; Mathewson *v.* Ray (1847), 16 M. & W. 329; Simpson *v.* Margitson (1847), 11 Q. B. 23; Richards *v.* L. B. & S. C. Ry. (1849), 7 C. B. 839; Grey *v.* Friar (1850), 15 Q. B. 901; Butterworth *v.* Brownlow (1865), 19 C. B. N. S. 409; Bradshaw *v.* Irish North Western Ry. (1873), 21 W. R. 581; Mitchell *v.* L. & Y. Ry. (1875), L. R. 10 Q. B. 256; Chapman *v.* G. W. Ry. (1880), 5 Q. B. D. 278; Bruner *v.* Moore, [1904] 1 Ch. 305.

**3696.** —— ——.]—On a charterparty, by which the ship was to load at Pernambuco, & thence sail to any one or all of three other ports named, & at any or either thereof load a full cargo for the homeward voyage, for which freight was to be paid at a certain rate in full for the whole voyage, the cargo from Pernambuco being freight free, as well as the goods shipped at any of the ports at which the vessel shall load her homeward cargo, seventy running days to be allowed, if the ship be not sooner despatched, for loading, discharging, & reloading at the several ports, demurrage payable at a certain rate for lay days beyond. The vessel not having loaded any goods for her homeward voyage at one of the three intermediate ports, but having loaded it entirely at the last of the three, & having consumed all the running days before sailing on her homeward voyage from such port:—*Held:* (1) freight was not due on the voyage to any of the intermediate ports; (2) demurrage was not due for unloading days at the port of delivery in this country; (3) the seventy running days "for loading, discharging & reloading," only applied to the ports of loading, intermediate discharge, & reloading, & the charterers were entitled to a reasonable time for unloading the homeward cargo in London without paying demurrage.—SWEETING *v.* DARTHEZ (1854), 14 C. B. 538; 2 C. L. R. 1375; 23 L. J. C. P. 131; 23 L. T. O. S. 93; 18 Jur. 958; 2 W. R. 414; 139 E. R. 221.

**3697.** —— ——.]—(1) In an action by the consignees of goods against shipowner for non-delivery of goods according to bills of lading, in which there was a condition that the goods should be taken from the ship by the consignees immediately the ship was ready for discharge, & that otherwise they would be landed or put into craft at the merchant's risk & expense, & the goods having been landed at a dock the day after the ship was ready for discharge, but after the consignees were ready to receive on payment of freight, & the goods having been detained for some time for dock charges, payment of which was refused:—*Held:* it was for the jury whether the consignees had complied with the condition, or whether, if not, deft. had gone beyond it in landing the goods, but, even if pltfs. were entitled to recover, yet they might have received the goods on payment of a small sum under protest, they would not be entitled to recover full damages for the delay, as their proper course was to have paid the disputed sum under protest, & then sued to recover it.

(2) When a man is called upon by a contract to do an act, & no time is specified, he is allowed a reasonable time for doing it; & what is a reasonable time may depend on all the circumstances of the case. But here the word used being "immediately," it implies that there is a more stringent requisition than what is ordinarily implied in the word "reasonable," but still it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is impossible (COCKBURN, C.J.).—ALEXIADI *v.* ROBINSON (1861), 2 F. & F. 679, N. P.

**3698.** —— ——.]—(1) Apart from custom or special contract, the shipowner is not bound to give notice to consignee of the arrival of ships; but the consignee is bound, within a reasonable time after the arrival, to be ready to remove & receive his goods, & in default of his so doing, the shipowner may land them, & demand wharfage or other proper charges for landing.

(2) The general principle is that when the goods are sent, with a bill of lading or without, the shipowner has a right to expect from the consignee of the goods reasonable diligence to inquire after the arrival of the ship (COCKBURN, C.J.).

(3) It is for the jury to say whether any such custom [to give the consignee notice either of arrival or expected arrival in the Newcastle trade] has been established; . . . it must not be a mere occasional practice, but a practice binding upon all; it must not be limited, but must be universal & general, & applicable to every consignee. . . . A carrier by land or sea is only bound, apart from special contract or custom or course of dealing, to take the goods to the place or port to which he goes. . . . It is the duty of the consignee, apart from special custom or contract, to use due & reasonable diligence to discover when the ship arrives with his goods on board. Of course, he cannot be expected to have his lighters always lying in the river ready to receive goods coming from abroad, but he is entitled to a reasonable time after the ship has arrived (COCKBURN, C.J.).—HOULDER *v.* GENERAL STEAM NAVIGATION CO. (1862), 3 F. & F. 170, N. P.

**3695 ii.** —— ——.]—A charterparty which provides that the cargo is "to be discharged as customary for steamers at port of discharge" is in effect an open charterparty, under which it is the right of the ship & the duty of the consignee to have the cargo discharged with reasonable dispatch. The giving of reasonable dispatch is a requirement which the consignee is bound to satisfy *de die in diem*. He cannot, by working extra hard on one day, entitle himself to idle on another day; & if he has done more than an average quantity at the beginning of the discharge, he cannot on that account relax the measure of reasonable diligence towards the end.—ABERDEEN GLEN LINE S.S. Co. *v.* MACKEN, THE GAIRLOCH, [1899] 2 I. R. 1; 32 I. L. T. 33.—**IR.**

**3695 iii.** ————.]—Where the bills of lading do not specify a time within which discharge is to be effected, the obligation on the consignees is to use the utmost dispatch in the circumstances.—CARLBERG *v.* WEMYSS COAL CO., LTD., [1915] S. C. 616; 52 Sc. L. R. 515.—**SCOT.**

*Sect.* 7.—*The unloading: Sub-sect.* 7, *C.* (*a*) & (*b*) *i.* & *ii.*]

**3699.** —— ——.]—FORD *v.* COTESWORTH, No. 3602, *ante.*

**3700.** —— ——.]—FOWLER *v.* KNOOP, No. 2456, *ante.*

**3701.** —— ——.]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante.*

**3702.** —— ——.]—THE CLAN MACDONALD, No. 3806, *post.*

**3703.** —— ——.]—CASTLEGATE S.S. CO. *v.* DEMPSEY, No. 3717, *post.*

**3704.** —— ——.]—HICK *v.* RAYMOND & REID, No. 3710, *post.*

**3705.** —— ——.]—LYLE SHIPPING CO. *v.* CARDIFF CORPN., No. 3745, *post.*

**3706.** —— ——.]—ZILLAH SHIPPING CO. *v.* MIDLAND RY. CO. (1902), 19 T. L. R. 63; 47 Sol. Jo. 70, C. A.

—— ——.]—*Compare* SALE OF GOODS, Vol. XXXIX., pp. 551, 552, Nos. 1596–1599.

**3707. Discharge "immediately ship is ready"—Meaning of "immediately."**]—ALEXIADI *v.* ROBINSON, No. 3697, *ante.*

**3708. Discharge possible before usual time—Whether shipowner must allow vessel to be kept for usual time.**]—FORD *v.* COTESWORTH, No. 3602, *ante.*

**3709. Discharge "immediately on arrival"—Option of delivering before lapse of reasonable time.**]—Where there is a provision in a bill of lading that the ship "may commence discharging immediately on arrival" it gives the shipowner the option of delivering before the lapse of what would be a reasonable time according to the custom of the dock & the usual mode of discharge.—NEPTUNE STEAM NAVIGATION CO. *v.* SCLATER & PROCTOR, THE DELANO (1894), 71 L. T. 544; 7 Asp. M. L. C. 523, D. C.; *affd.*, [1895] P. at p. 49, C. A.

*Annotations:*—**Mentd.** The Tynwald, [1895] P. 142; The Theodora, [1897] P. 279; Williams *v.* Wallis & Cox, [1914] 2 K. B. 478.

### (*b*) *Circumstances Considered in Estimating Reasonableness of Time.*

#### i. *In General.*

**3710. No reasonable time in abstract.**]—Where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo, his obligation is to discharge within a reasonable time. That obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him.

A cargo was shipped for the port of London under bills of lading which did not specify the time within which the consignees were to take discharge of it. Upon the arrival of the ship in the dock the dock co., as agents for the consignees, began to unload the cargo. The unloading was interrupted for several days by a strike of the dock labourers which delayed the discharge far beyond the time which would otherwise have sufficed. Throughout the time during which the discharge ceased & the dock co. were unable to supply labour to effect it, it was not possible for the consignees either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way:—*Held:* the consignees were not liable in damages to the shipowner for the delay.

If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them, & it would have been no answer to a charge that they had failed to fulfil their obligation, to say that the circumstances had rendered it impossible for them to do so. The bills of lading in the present case contained no such stipulation, &, therefore, in accordance with ordinary & well known principles the obligation of resps. was that they should take discharge of the cargo within a reasonable time. . . . There is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. . . . The only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. . . .

It is true that in the case of *Postlethwaite* v. *Freeland*, No. 3666, *ante*, the point which has now to be determined did not directly arise, inasmuch as in that case the charterparty contained the stipulation that the cargo was to be discharged with all despatch according to the custom of the port, & I cannot agree . . . that this was necessarily the same as the implied obligation to discharge within a reasonable time. . . . The circumstances which prevented the vessel being discharged within the ordinary time were not beyond the control of defts. It was not shown that they could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, & so have avoided the delay which took place (LORD HERSCHELL, C.).—HICK *v.* RAYMOND & REID, [1893] A. C. 22; 62 L. J. Q. B. 98; 68 L. T. 175; 41 W. R. 384; 37 Sol. Jo. 145; 7 Asp. M. L. C. 233; 1 R. 125; *sub nom.* HICKS *v.* RODOCANACHI, 9 T. L. R. 141, H. L.; *affg.* S. C. *sub nom.* HICK *v.* RODOCANACHI, [1891] 2 Q. B. 626, C. A.

*Annotations:*—**Consd.** Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 54; Carlton S.S. Co. *v.* Castle Mail Packets Co., [1898] A. C. 486; Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638. **Apld.** Maclay *v.* Bakers & Spiller (1900), 16 T. L. R. 401. **Consd.** Hulthen *v.* Stewart, [1902] 2 K. B. 199. **Apld.** Sims *v.* Mid. Ry., [1913] 1 K. B. 103. **Refd.** Ropner *v.* Stoate, Hosegood (1905), 92 L. T. 328; Akt. Hekla *v.* Bryson, Jameson (1908), 100 L. T. 155; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; The Lizzie, [1919] P. 22; Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287; Stewart *v.* Rank (1920), 36 T. L. R. 728; Van Liewen *v.* Hollis, [1920] A. C. 239; Transoceanica Soc. Italiana Di Navigazione *v.* Shipton, [1923] 1 K. B. 31. **Mentd.** R. *v.* Roberts, *Ex p.* Scurr, [1924] 2 K. B. 695; Verlest's Administratrix *v.* Motor Union Insce., [1925] 2 K. B. 137.

**3711.** ——.]—CARLTON S.S. CO. *v.* CASTLE MAIL PACKETS CO., No. 2802, *ante.*

**3712. What circumstances are considered—Ordinary circumstances.**]—BURMESTER *v.* HODGSON, No. 3754, *post.*

**3713.** —— ——.]—FORD *v.* COTESWORTH, No. 3602, *ante.*

**3714.** —— ——.]—WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD., No. 3726, *post.*

**3715.** —— **Existing circumstances.**]—ALEXIADI *v.* ROBINSON, No. 3697, *ante.*

**3716.** —— ——.]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante.*

**3717.** —— ——.]—By a charterparty it was agreed that the ship should deliver her cargo at a certain port as customary, & that the discharge should be "with all dispatch as customary & ten days on demurrage over & above the said lying days at 6*d.* per net register ton per day." According to the custom of the port, the discharge was carried out by the dock co., & it was delayed for four days in consequence of a strike among the dock labourers. In an action by the shipowners against the charterers for damages for this delay:—*Held:* no definite time was fixed by the charterparty for the unloading to take place in, & therefore a reasonable time under the circumstances should be allowed, & the delay was a circumstance which arose out of the application of a custom of

the port, & the charterers were not liable.—CASTLEGATE S.S. Co. *v.* DEMPSEY, [1892] 1 Q. B. 854; 61 L. J. Q. B. 620; 66 L. T. 742; 40 W. R. 533; 8 T. L. R. 523; 36 Sol. Jo. 460; 7 Asp. M. L. C. 186, C. A.

*Annotations:*—**Consd.** The Alne Holme, [1893] P. 173. **Reld.** Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638; Rederi Akt. Acolus *v.* Hillas (1925), 95 L. J. K. B. 103; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3718.** —— ——.]—HICK *v.* RAYMOND & REID, No. 3710, *ante*.

**3719.** —— ——.]—LYLE SHIPPING CO. *v.* CARDIFF CORPN., No. 3745, *post*.

**3720.** —— **All circumstances.**]—BUDGETT & CO. *v.* BINNINGTON & CO., No. 3609, *ante*.

**3721.** —— ——.]—HICK *v.* RAYMOND & REID, No. 3710, *ante*.

**3722.** —— **All obligations of the contract.**]—CARLTON S.S. CO. *v.* CASTLE MAIL PACKETS CO., No. 2802, *ante*.

**3723. Circumstances causing delay must not be caused by consignee.**]—HICK *v.* RAYMOND & REID No. 3710, *ante*.

**3724. Cause of delay contemplated by both parties—Ship having to wait its turn.**]—HARROWING *v.* DUPRÉ, No. 3729, *post*.

**3725.** —— —— **"In regular turn" stated in contract.**]—THE CORDELIA, No. 4427, *post*.

ii. *Natural Conditions of Port.*

**3726. General rule.**]—Defts. chartered pltf.'s vessel, the *C.*, for a voyage to the port of L. The charterparty provided that the cargo was "to be brought to & taken from alongside free of expense & risk to the ship"; but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, & when the *C.* arrived, the port was crowded with vessels, about half of which belonged to defts. or had been consigned to them. Seventy-two days elapsed after the arrival of the *C.* before her discharge was completed by defts.' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging the other vessels lying at the port:—*Held:* in determining whether the terms of the charterparty had been broken by defts., the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account.

I will proceed to consider what circumstances will entitle the charterer to allowances for delay. I apprehend that he will be entitled to an allowance if any difficulty arises from the natural or physical peculiarities of the port, such as that the ship is obliged to lie at some considerable distance from the land, or that while the wind is blowing from certain points of the compass ships cannot be unloaded into lighters; he may be entitled to an allowance also if after a ship has been partly unloaded in deep water, she is brought into shallower water for the more convenient discharge of her cargo; whether the unloading can go on during the change of berth is a question of fact upon which the jury must give their opinion. I think also that allowance must be made for any holidays usually observed at the port, & during which no work is done (COTTON, L.J.).

For the purpose of ascertaining what is a reasonable time defts. are not entitled to excuse delay, which would be otherwise inexcusable, by alleging that they had sent so many vessels to the port that the number of lighters which they had engaged did not enable them to unload pltf.'s ship within what would otherwise have been a reasonable time. It was the duty of defts. to provide sufficient appliances for unloading pltf.'s ship (COTTON, L.J.).

The charterer must have them [appliances] ready, either when the ship arrives or within a short time, such as a day or a couple of days, after her arrival (COTTON, L.J.).—WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD. (1878), 4 Ex. D. 165, n.; 40 L. T. 413; 4 Asp. M. L. C. 118, C. A.

*Annotations:*—**Distd.** Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599. **Apld.** Tillett *v.* Cwm Avon Works Proprietors (1886), 2 T. L. R. 675. **Consd.** Hick *v.* Raymond & Reid, [1893] A. C. 22; Van Liewen *v.* Hollis, [1920] A. C. 239. **Reld.** Furness, Withy *v.* White, [1894] 1 Q. B. 483; Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109.

**3727. Delay caused by rules of port authorities.**]—FORD *v.* COTESWORTH, No. 3602, *ante*.

**3728.** —— **Necessity for assent of harbour authorities.**]—GOOD & CO. *v.* ISAACS, No. 3741, *post*.

**3729.** —— **Dock regulations as to order of discharge.**]—Under a charterparty defts., in fulfilment of a contract for the sale of Spanish ore, shipped a cargo of ore on board a steamship, to be delivered at Maryport, as customary, where & as directed by consignee. At Maryport, by the harbour regulations, consignees having one vessel already discharging for them cannot have another vessel berthed to discharge for them if a vessel of any other consignee is awaiting a berth. Defts., on the arrival of the ship, had four other vessels chartered by them, with cargoes of ore for the same purchasers, who were treated by the harbour authorities as the consignees awaiting a berth, & many vessels for other consignees were also waiting. The ship was consequently unable to get a berth for twenty days after arrival:—*Held:* the delay was not the fault of the charterers, & where, under such a charterparty, the delay complained of is such as ought to have been in the contemplation of both parties at the time of the contract, the shipowner has no cause of action against the charterer.

It is good law that if the performance of a contract is rendered impossible by the act of one of the parties to it the other party is excused; & it is also good law that if one of the parties unduly delays the performance by the other he forfeits his own right to complain of the delay, & probably also renders himself liable to make good any damage the other may suffer by the delay. But these rules must be applied with reference to the circumstances of each case, & must be read with reasonable limitations. Thus, if it appears that the delay complained of was such as both parties ought to have contemplated when the contract was entered into, then no complaint can be based upon it (BIGHAM, J.).—HARROWING *v.* DUPRÉ (1902), 18 T. L. R. 594; 7 Com. Cas. 157.

*Annotation:*—**Reld.** Akt. Inglewood *v.* Millar's Karri & Jarrah Forests (1903), 88 L. T. 559.

**3730. Dilatoriness of customs authorities.**]—FORD *v.* COTESWORTH, No. 3602, *ante*.

**3731.** ——.]—A ship was chartered by a co. running a regular line to proceed from Calcutta to New York, & she was in accordance with the charterparty consigned to agents nominated by the charterers. The ship was to discharge her cargo as fast as she could put out & according to the custom of the port. The bills of lading, which

*Sect. 7.—The unloading: Sub-sect. 7, C. (b) ii. & iii.*]

were in the American & Indian Line form, contained the following clause: "Customs formalities & detentions at New York to be at the risk & expense of consignee of goods." According to the law of the United States, goods cannot be removed from a ship until the customs examination has taken place & the duty paid, but if the ship belongs to a regular line the cargo may be unloaded on to a wharf, where the customs formalities must be complied with. On the arrival of the ship at New York, she discharged on to a wharf & the cargo was tiered, expenses being thereby incurred for wharf hire, watching cargo, & for breaking down cargo for customs examination. Delivery of the cargo from the wharf was not completed until seven days after the ship had left the wharf. The ship was not discharged as fast as she could put out to the extent of five days, owing to compliance with customs formalities. The agents took no steps to enforce against the consignees any claim for expenses, charges, demurrage, or detention caused by compliance with customs formalities. The charterers assumed full responsibility for the acts of the agents:—*Held:* (1) the clause "Customs formalities & detentions at New York to be at the risk & expense of consignee of goods" meant that the consignees of goods could make no claim against the ship in respect of charges & delays caused by compliance with Customs formalities, & each consignee was required to pay the charges which naturally appertained to his parcel of goods, but he was not liable to pay any part of the general charges for wharf hire, tiering, or breaking down; the term "detention" referred to the detention of the goods & not of the ship &, therefore, the five days' detention of the ship was not an "expense" within the meaning of that clause; (2) in the absence of specific instruction to the agents to assert a lien there was no breach of duty on the part of the agents in abstaining from asserting a lien or from bringing a number of actions against the consignees.—COBRIDGE S.S. CO., LTD. *v.* BUCKNALL S.S. LINES, LTD. (1910), 15 Com. Cas. 138, C. A.

**3732. General sluggishness of population.**]—FORD *v.* COTESWORTH, No. 3602, *ante*.

**3733. Ship obliged to lie some distance from land.**]—WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD., No. 3726, *ante*.

**3734. Discharge into lighters prevented—While wind blows from certain directions.**]—WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD., No. 3726, *ante*.

**3735. Necessity for bringing ship into shallower water—For more convenient discharge.**]—WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD., No. 3726, *ante*.

**3736. Holidays usually observed at port.**]—WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD., No. 3726, *ante*.

**3737. Means of discharge under control of harbour authority.**]—CASTLEGATE S.S. CO. *v.* DEMPSEY, No. 3717, *ante*.

**3738.** ——.]—At Sunderland, where the discharge is carried out on behalf of both shipowner & consignee by the River Wear Comrs., *semble*, the consignee would not be liable to the shipowner for delay & negligence on the part of the Commissioners.—WEIR & CO. *v.* ROBINSON (1897), 14 T. L. R. 80; *sub nom.* WEIR & CO. *v.* RICHARDSON, 3 Com. Cas. 20.

. The Kingsland, [1911] P. 17.

**3739.** ——.]—By charterparty it was provided that a cargo of pit props should be discharged with the customary steamship dispatch as fast as the steamer could deliver during the ordinary working hours of the port, but according to the custom thereof, & should the steamer be detained beyond the time stipulated as above, demurrage should be paid at *4d.* per net registered ton per day, & *pro rata* for any part thereof. The discharge was to be effected by the receiver's stevedore, the steamer paying so much per fathom; but, by the custom of the port, the harbour authority discharged the cargo, & some delay occurred. In an action for demurrage brought by the shipowner against the charterer:—*Held:* the charterer was not liable for delay due to circumstances beyond his control, that is to say, he was not responsible for the acts of an authority who was not his servant or agent, or was no more his agent than that of the shipowner.

It has been laid down . . . that a provision like the one in this charterparty requires the customary steamship despatch in discharging "having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, & all other circumstances in existence . . . attending the discharge of this particular cargo, not being circumstances brought about by the person whose duty it is to take delivery, or circumstances within his control." One of the circumstances in existence attending the discharge of this particular cargo was that the discharging was to be done by the harbour authority. There was delay by them in discharging (*per* CUR.).—THE KINGSLAND, [1911] P. 17; 80 L. J. P. 33; 105 L. T. 143; 27 T. L. R. 75; 12 Asp. M. L. C. 38; 16 Com. Cas. 18, D. C.

iii. *Custom of Port.*

**3740. Express reference to custom of port—Duty to use usual methods of dispatch at port.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante*.

**3741.** —— ——.]—By a charterparty the vessel was to proceed to Hamburg with a cargo of oranges "to be discharged at usual fruit berth as fast as steamer can deliver, as customary, & where ordered by the charterers." The ship was at Hamburg ready to deliver on Mar. 6, 1889, but the usual fruit berths were then fully occupied, & the fruit warehouses were full, & owing to the action of the harbour authorities the ship could not commence discharging until Mar. 11, when she was discharged as fast as she could deliver:—*Held:* (1) the obligation of the charterers to unload did not commence until the ship was berthed in a usual fruit berth; (2) the ship could not be said to be so berthed until she occupied a berth with the assent of the harbour authorities; (2) in the provision in the charterparty "as fast as steamer can deliver, as customary," the word "customary" must be taken to refer to the discharge & delivery by the ship, rather than to the taking delivery by the charterer or consignee, & to mean that the discharge & delivery must be as fast as the custom of the port would allow; (4) there was no delay for which the charterers were responsible, the shipowners were not entitled to any demurrage.—

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PART VII. SECT. 7, SUB-SECT. 7.—C. (b) iii.

n. *Express reference to custom of port—Duty to use utmost dispatch practicable.*]—CROWN S.S. CO., LTD. *v.* LEITCH, [1908] S. C. 506; 45 Sc. L. R. 402.—SCOT.

o. —— —— *Whether consignee liable for circumstances beyond control.*]—A bill of lading for a cargo of grain provided "cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding." When the vessel arrived at the port of delivery there were other vessels lying there discharging similar cargoes to the same

GOOD & Co. *v.* ISAACS, [1892] 2 Q. B. 555; 61 L. J. Q. B. 649; 67 L. T. 450; 40 W. R. 629; 8 T. L. R. 476; 36 Sol. Jo. 396; 7 Asp. M. L. C. 212, C. A.

*Annotations:*—*As to* (1) **Refd.** Monsen *v.* Macfarlane, [1895] 2 Q. B. 562; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499. *As to* (3) **Apld.** Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 854. **Consd.** Hulthen *v.* Stewart, [1902] 2 K. B. 199. **Refd.** The Jaederen, [1892] P. 351; Hick *v.* Raymond & Reid, [1893] A. C. 22; Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638; Akt. Hekla *v.* Beyson, Jameson (1908), 100 L. T. 155; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Transoceanica Soc. Italiana di Navigazione *v.* Shipton, [1923] 1 K. B. 31.

**3742.** —— ——.]—FAWCETT & Co. *v.* BAIRD & Co. (1900), 16 T. L. R. 198.

**3743.** —— **Whether obligation to discharge within reasonable time implied.**]—HICK *v.* RAYMOND & REID, No. 3710, *ante*.

**3744.** —— ——.]—CASTLEGATE S.S. Co. *v.* DEMPSEY, No. 3717, *ante*.

**3745.** —— ——.]—A ship was chartered to load a cargo of wood, to be carried to the port of Cardiff, & then to be "discharged with all reasonable despatch as customary." The custom at the port of Cardiff was to discharge such a cargo into the waggons of certain railways that had access to the quay. The charterers arranged with one of these railways for the supply of waggons to take the cargo. Without any negligence on their part, but owing to stress of work at the port, by reason of which there was a deficiency in the number of waggons available, the discharge of the ship was delayed. In an action against the charterers for the detention of the ship:—*Held:* the charterers having done their best to procure the appliances that were customarily used at the port for discharging such a ship, & having used them with proper dispatch, were not liable for the delay.

I am myself inclined to think that it matters not . . . whether the words "as customary" are in the contract or not, for if not they would be implied (SMITH, L.J.).

A charterer is not liable for delay if he has, under the circumstances, used all reasonable diligence in procuring the discharge, & in considering what is reasonable diligence you must have regard (*inter alia*) to the appliances for discharge customary at the port (ROMER, L.J.).—LYLE SHIPPING CO. *v.* CARDIFF CORPN., [1900] 2 Q. B. 638; 69 L. J. Q. B. 889; 83 L. T. 329; 49 W. R. 85; 16 T. L. R. 536; 9 Asp. M. L. C. 128; 5 Com. Cas. 397, C. A.

*Annotations:*—**Apld.** Hulthen *v.* Stewart, [1902] 2 K. B. 199. **Refd.** Fawcett *v.* Baird (1900), 16 T. L. R. 198; Rodenacker *v.* May (1901), 6 Com. Cas. 37; Temple, Thomson & Clarke *v.* Runnalls (1902), 18 T. L. R. 822; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Stewart *v.* Rank (1920), 36 T. L. R. 728; Van Liewen *v.* Hollis, [1920] A. C. 239.

**3746.** —— **Duty to use utmost dispatch practicable.**]—A clause in a charterparty providing that the cargo is to be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, is not tantamount to fixing a definite number of days or hours during which the discharge is to be completed. To create such a liability the days or hours must be specified in plain terms. This construction of the clause is not affected by a special exception in the case of a strike, a lock-out or epidemics. Demurrage is not due if the discharge is effected with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery, & all other circumstances not brought about by or within the control of the person whose duty it is to take delivery.

By charterparty it was agreed that a steamer should proceed to a named port, & there deliver a cargo of timber "to be discharged with customary steamship dispatch, as fast as the steamer can deliver . . . according to the custom of the port," with an exception in respect of delay caused by a strike or lock-out. The ship duly arrived at the port, & was ready to deliver the cargo, but delivery was delayed by the crowded state of the dock to which she was ordered. There was evidence that she could not have been discharged more quickly, under the circumstances, elsewhere in the port, & that the consignees had used all reasonable means to procure the discharge:—*Held:* they had performed their obligation under the charterparty, & were not liable for demurrage.—HULTHEN *v.* STEWART & Co., [1903] A. C. 389; 72 L. J. K. B. 917; 88 L. T. 702; 19 T. L. R. 513; 9 Asp. M. L. C. 403; 8 Com. Cas. 297, H. L.; *affg.*, [1902] 2 K. B. 199, C. A.

*Annotations:*—**Apld.** Temple, Thomson & Clarke *v.* Runnalls (1902), 18 T. L. R. 822; Smailes *v.* Hans Dessen (1906), 95 L. T. 809. **Consd.** Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109. **Apld.** Van Liewen *v.* Hollis, [1920] A. C. 239. **Consd.** Van Nievelt Goudrian Stoomvaart Maatschappij *v.* Forslind (1925), 133 L. T. 457. **Refd.** Sea S.S. Co. *v.* Price, Walker (1903), 8 Com. Cas. 292; The Arne (1904), 73 L. J. P. 34; Ropner *v.* Stoate, Hosegood (1905), 92 L. T. 328; Akt. Hekla *v.* Bryson, Jameson (1908), 100 L. T. 155; The Kingsland, [1911] P. 17; Sims *v.* Midland Ry., [1913] 1 K. B. 103; Love & Stewart *v.* Rowtor S.S. Co., [1916] 2 A. C. 527; Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193; Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287; Sota & Aznar *v.* Ralli (1920), 36 T. L. R. 456; Bargate S.S. Co. *v.* Penlee & St. Ives Stone Quarries (1921), 90 L. J. K. B. 572; Verelst's Administratrix *v.* Motor Union Insce., [1925] 2 K. B. 137.

**3747.** —— —— **Whether consignee liable for circumstances beyond control.**]—A ship was chartered to load wood cargo at a Swedish port for delivery at Hull, Victoria or Albert Dock as ordered, & by the charterparty the cargo was to be discharged with customary steamship dispatch as fast as steamer can deliver but according to the custom of the port, & in the event of the detention of the ship beyond the time stipulated as above demurrage was payable at a daily rate. By the custom of the port of Hull it was the duty of the receiver of a wood cargo to arrange for the steamship, on or before her arrival in dock, a vacant available & suitable berth to which she could forthwith proceed, & also to provide a clear quay space &/or a sufficient & continuous supply of bogies. Shortly before the arrival of the ship at Hull the cargo was consigned in three parcels to three firms of timber merchants at Hull by indorsement of the bills of lading, which incorporated the conditions of the charterparty. The ship was ordered by the charterer to the Victoria Dock without any communication with the receivers or any of them. Owing to the congestion of traffic at the dock the ship had to wait several days for a vacant berth & the receivers were unable to provide either a clear quay space or a sufficient & continuous supply of bogies, which were under the control of the dock owners, & as a consequence the ship took eleven days longer to discharge than she would have done if there had been continuous dispatch. Upon a claim for demurrage by the shipowner against the receivers the trial judge found that the detention of the ship was due to causes beyond the control of the receivers:—*Held:* under a charterparty in the above form the

consignees, &, owing to scarcity of labour, due mainly to the war, the consignees were unable to obtain extra men in sufficient numbers to enable them to receive the cargo as fast as the vessel could deliver it. In an action against them for demurrage in respect of the delay thus occasioned:—*Held:* the consignees were not liable in demurrage in respect that their obligation under the bill of lading was not an absolute obligation to receive the cargo as fast as the vessel could deliver, but only an obligation to use all reasonable dispatch in receiving it

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obligation was to discharge with the utmost dispatch practicable, excluding affection by circumstances not under the control of the charterer, & the custom imposed no higher obligation on the receiver; & consequently that the claim failed.—VAN LIEWEN *v.* HOLLIS BROTHERS & CO., LTD., [1920] A. C. 239; 89 L. J. P. 86; 122 L. T. 659; 36 T. L. R. 148; 25 Com. Cas. 83; 14 Asp. M. L. C. 596, H. L.; *affg.* S. C. *sub nom.* THE LIZZIE, [1919] P. 22, C. A.

*Annotation:*—**Reld.** Bargate S.S. Co. *v.* Penlee & St. Ives Stone Quarries (1921), 125 L. T. 280.

**3748. —— "Delivery to be continuous notwithstanding custom"—Absolute liability of consignee.**]—A bill of lading provided that the goods were to be received by the consignee "immediately the vessel is ready to discharge & continuously at all such hours as the Custom House authorities may give permission for the ship to work, any custom of the port to the contrary notwithstanding": *Held:* immediately the ship was ready to discharge, there was an absolute obligation on the consignee to receive the cargo continuously, even though the appliances of the port were not then available.—MACLAY *v.* SPILLER & BAKER, LTD. (1901), 17 T. L. R. 391; 6 Com. Cas. 217, C. A.

*Annotation:*—**Distd.** Reid *v.* Lee (1901), 17 T. L. R. 771.

**3749. No express reference to custom of port—Whether reference implied.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante*.

**3750.** —— ——.]—THE JAEDEREN, No. 3599, *ante*.

**3751.** —— ——.]—LYLE SHIPPING CO. *v.* CARDIFF CORPN., No. 3745, *ante*.

**3752.** —— ——.]—It is true that the words which appeared in the charterparty in that case [*Hulthen* v. *Stewart & Co.*, No. 3746, *ante*] "according to the custom of the respective ports," are not to be found in the charterparty in the present case, but it is clear that those words must be implied (COLLINS, M.R.).—TEMPLE, THOMSON & CLARKE *v.* RUNNALLS (1902), 18 T. L. R. 822, C. A.

*Annotation:*—**Reld.** Bargate S.S. Co. *v.* Penlee & St. Ives Stone Quarries (1921), 125 L. T. 280.

**Usages of the particular ports.**]—*See* Sect. 15, sub-sect. 5, *post*.

iv. *Actual State of Affairs Existing at Port.*

**3753. Ship having to wait her turn.**]—If the freighter of a ship employed to bring a cargo of wine into the port of London, covenant to unload her in the usual & customary time at her port of discharge he is not liable for the detention of the ship in the London Docks, if she is there unloaded in her turn into the bonded warehouses.—RODGERS *v.* FORRESTERS (1810), 2 Camp. 483; 170 E. R. 1226, N. P.

*Annotations:*—**Folld.** Burmester *v.* Hodgson (1810), 2 Camp. 488. **Apld.** Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Hick *v.* Tweedy (1890), 63 L. T. 765. **Consd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626. **Reld.** Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127

**3754. Congested state of port—Crowded docks.**]—If by the bill of lading of a cargo of brandy brought into the London Docks, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee, is to discharge the ship in the usual & customary time for unloading such a cargo which is the time within which the brandies can be unloaded in the docks into the bonded warehouses. Therefore, the consignee is not, under these circumstances, liable to make compensation to the owner of the ship, in the nature of demurrage, for any delay occasioned by the crowded state of the London Docks, although the cargo might have been landed sooner? if the duties had been immediately paid.

The law could only use an implied promise . . . to discharge the ship in the usual & customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in her turn, into bonded warehouses (MANSFIELD, C.J.).—BURMESTER *v.* HODGSON (1810), 2 Camp. 488; 170 E. R. 1228, N. P.

*Annotation:*—**Dbtd.** Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127. **Apld.** Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Hick *v.* Tweedy (1890), 7 T. L. R. 144. **Consd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626. **Reld.** Dahl *v.* Nelson, Donkin (1881), 6 App. Cas. 38; Hick *v.* Raymond & Reid, [1893] A. C. 22.

**3755. —— Crowded quay.**]—THE JAEDEREN, No. 3599, *ante*.

**3756. —— Fruit berths full.**]—GOOD & CO. *v.* ISAACS, No. 3741, *ante*.

**3757. —— Ultimate discharge in unusual place.**]—A charterer sold a cargo of pit props to G. The charterparty provided that freight was to be paid at Barry, at 25*s.* all per cubic fathom delivered as ascertained in the customary manner at place of discharge; the cargo to be supplied to & received from the steamer in the manner & at the rate customary at such port during customary working hours, & a further ten days on demurrage; owner to have absolute lien for freight. G. gave notice to the dock co. at Barry to secure a berth for the ship, according to custom, but, eventually, he declined to accept the cargo as it was in excess of what he had purchased, & cancelled his notice. When the ship arrived at Barry, on June 26, all the berths, where it was customary for cargoes of pit props to be discharged, were occupied, but a piece of land which had never been used before for the discharge of pit props was cleared, & the ship reached a berth on July 4 & commenced discharging, part of the freight having been paid in advance. As the balance of the freight was not paid, the discharge was stopped on July 7, & negotiations ensued. The captain was advised by his solr. that he could not safely land the cargo subject to the ship's lien under 1894 Act, ss. 493, 494. There was considerable confusion as to who were the persons entitled to receive the cargo. Payment of the freight was promised but not made, & eventually, on July 15, the cargo was discharged subject to the ship's lien under 1894 Act, ss. 493, 494. The discharge was completed on July 21; in the ordinary course of events the discharge would have been completed on July 13. Defts. were subsequently appointed agents of the charterers, & it was agreed that they were to be treated for the purposes of legal proceedings as indorsees of the bill of lading at the time of the arrival of the ship & at all material times thereafter. In an action for demurrage:—*Held:* (1) although there was a breach of contract on the part of defts. in not giving the customary notice to provide a berth for the ship, yet, as in fact pltfs. suffered no damage through the default of defts., since delivery according to the custom of the port was impossible till July 5, the damages must be nominal; (2) under the special circumstances of the case, having regard to the confused condition of the parties entitled to receive the cargo, & to the advice given to the captain by his solr., the

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by every method, customary or otherwise, which was practicable in the existing circumstances; &, upon the facts established in the case, defenders were not in breach of this obligation.—RICKINSON, SONS & CO. *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, S.S. ARACHNE, [1918] S. C. 440.—SCOT.

captain acted reasonably in not landing the cargo earlier under 1894 Act, with the view to mitigate the damages.—SMAILES & SON *v.* HANS DESSEN & Co. (1906), 95 L. T. 809; 10 Asp. M. L. C. 319; 12 Com. Cas. 117, C. A.

**3758.** ——.]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante*.

**3759.** ——.]—HULTHEN *v.* STEWART & Co., No. 3746, *ante*.

**3760. Insufficient means of discharge available—Lighters.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante*.

**3761.** —— ——.]—REID *v.* LEE & SONS, No. 2750, *ante*.

**3762.** —— **Railway wagons.**]—LYLE SHIPPING Co. *v.* CARDIFF CORPN., No. 3745, *ante*.

**3763.** —— ——.]—FAWCETT & Co. *v.* BAIRD & Co. (1900), 16 T. L. R. 198.

**3764.** —— ——.]—THE ARNE, No. 3786, *post*.

**3765. Shortage of labour owing to strike.**]—CASTLEGATE S.S. Co. *v.* DEMPSEY, No. 3717, *ante*.

**3766.** ——.]—Defts. chartered pltfs.' vessel to load a cargo of timber, & therewith proceed to Sharpness & deliver the same "cargo to be . . . taken from alongside vessel as customary at port of . . . discharge . . . (&) to be discharged with the customary steamer despatch of the port . . . Sundays . . . any time lost by reason of . . . strikes, lockouts, or combinations of workmen—whether partial or general—not to count as part of the . . . discharging time. . . . If, through any fault of the merchants or charterers, the vessel be longer detained, demurrage to be paid at the (agreed) rate. . . . The usual custom of the wood trade of each port to be observed by each party in cases where not special expressed." The customary mode of discharging timber at Sharpness is into lighters, by which the timber is taken up the canal to Gloucester, but when the vessel arrived on a Wednesday at Sharpness there were no lighters available, owing to a strike in the port of Gloucester amongst the labourers in the timber trade, who discharged the lighters there, so that the timber lighters were waiting at Gloucester to be unloaded. The strike at Gloucester came to an end on the Friday. On Saturday the discharge commenced, & was completed by noon on the following Tuesday week, that is, on the eleventh day (excluding Sundays) after the vessel's arrival. According to the customary steamer despatch the discharge would have occupied four & a half days. Pltfs. sued defts. in the county ct. for five days twenty-two hours' demurrage. The county ct. judge found that, after the strike came to an end, defts., with the exception of one day, on which they were in default, did all that could reasonably be expected to discharge the vessel, & gave judgment for pltfs. for £22 5*s*. 10*d*., one day's demurrage. Pltfs. appealed:—*Held:* defts. were not responsible beyond the one day, as the parties contemplated the customary mode of discharge, which was by lighters, & the discharge in that manner was delayed by the strike within the meaning of the charter-party.—THE ALNE HOLME, [1893] P. 173; 62 L. J. P. 51; 68 L. T. 862; 41 W. R. 572; 9 T. L. R. 364; 7 Asp. M. L. C. 344; 1 R. 607, D. C.

*Annotations:*—**Consd.** Smith & Service *v.* Rosario Nitrate Co., [1893] 2 Q. B. 323. **Refd.** *Re* Lockie & Craggs (1901), 86 L. T. 388.

**3767.** ——.]—HICK *v.* RAYMOND & REID, No. 3710, *ante*.

**3768.** ——.]—REID *v.* LEE & SONS, No. 2750, *ante*.

v. *Conduct of Consignee.*

**3769. Taking all reasonable steps—Procuring necessary order from Treasury.**]—The consignee of a particular parcel of goods by a general ship is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land these goods, which the consignee used the utmost diligence to obtain.—HILL *v.* IDLE (1815), 4 Camp. 327; 1 Stark. 111; 171 E. R. 104, N. P.

*Annotations:*—**Consd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626. **Refd.** Ford *v.* Cotesworth (1868), 9 B. & S. 559.

**3770.** —— **Supplying deficiency in means of discharge—Lighters.**] — WRIGHT *v.* NEW ZEALAND SHIPPING Co., LTD., No. 3726, *ante*.

**3771.** —— —— ——.]—HICK *v.* RAYMOND & REID, No. 3710, *ante*.

**3772.** —— —— ——.]—REID *v.* LEE & SONS, No. 2750, *ante*.

**3773.** —— —— **Railway wagons.**] — LYLE SHIPPING Co. *v.* CARDIFF CORPN., No. 3745, *ante*.

**3774.** —— **Discharging on quay where lighters insufficient.**]—MILVERTON SAILING SHIP Co., LTD. *v.* CAPE TOWN & DISTRICT GAS LIGHT & COKE Co., LTD., No. 2770, *ante*.

**3775.** —— **Finding alternative method of discharge—When usual methods not available.**]—A charterparty provided that a cargo of Danzig oak logs should be discharged at Millwall Dock "with all despatch as fast as steamer can deliver, as customary." The more usual method at that dock is to discharge such a cargo into railway trucks, but it is practicable to discharge into lighters:—*Held:* it was the duty of the receivers of the cargo, if railway trucks could not be obtained, to discharge into lighters.—RODENACKER *v.* MAY (1901), 6 Com. Cas. 37.

*Annotations:*—**Consd.** Stewart *v.* Rank (1920), 36 T. L. R. 728. **Distd.** Michalinos *v.* Dreyfus (1924), 131 L. T. 177. **Refd.** Hulthen *v.* Stewart (1902), 71 L. J. K. B. 624.

**3776.** —— —— ——.]—HULTHEN *v.* STEWART & Co., No. 3746, *ante*.

**3777. Delay due to consignee's previous engagements—Whether charterers liable.**]—Pltfs.' steamship was chartered to defts., who sold a cargo ex ship, R. Dock. The purchasers of the cargo were lessees of a wharf in the R. Dock, & had sole control over the wharf & the berthing of vessels there. The charterparty provided that the vessel should proceed to the purchasers' wharf & there deliver her cargo. "Time for discharge to count

**PART VII. SECT. 7, SUB-SECT. 7.—C. (b) iv.**

**3758 i.** *Congested state of port.*]—The bills of lading provided that the consignees should take delivery as quickly as the goods could be delivered in the ship's slings from the ship. Owing to the crowded state of the port, there was considerable delay in the discharge, & the evidence showed that it was impossible for defts., owing to lighters being unobtainable, to hasten the discharge:—*Held:* defts. were not liable for demurrage.—THE MARGA *v.* SEARLE (1903), 20 S. C. 485.—**S. AF.**

**3760 i.** *Insufficient means of discharge available — Lighters.*]—THE VICTORIA (MASTER & OWNERS) *v.* SCOTT GUTHERIE & Co. (1890), 11 N. L. R. 129.—**S. AF.**

**3760 ii.** —— ——.]—THE MARGA *v.* SEARLE (1903), 20 S. C. 485.—**S. AF.**

**3762 i.** —— *Railway wagons.*]—Delay was occasioned through failure of a railway co. to supply sufficient trucks:—*Held:* the consignees were not liable in demurrage.—WYLLIE *v.* HARRISON & Co. (1885), 13 R. (Ct. of Sess.) 92; 23 Sc. L. R. 62.—**SCOT.**

**3762 ii.** —— ——.]—A ship with a cargo of pit props, at the port of delivery, was berthed at a quay where, by the rules of the harbour, such a cargo could not be deposited. Delay in taking delivery took place in consequence of a railway co. failing to provide a sufficient supply of trucks:—*Held:* it was no answer to a claim for demurrage that the delay was caused by the fault of the railway co.—KRUUSE *v.* DRYNAN & Co. (1891), 18 R. (Ct. of Sess.) 1110; 22 Sc. L. R. 958.—**SCOT.**

**3762 iii.** —— ——.]—CAZALET *v.* MORRIS & Co., S.S. CRONSTADT, [1916] S. C. 952; 53 Sc. L. R. 716.—**SCOT.**

**p.** *Shortage of labour owing to war.*]—RICKINSON, SONS & Co. *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, S.S. ARACHNE, [1918] S. C. 440.—**SCOT.**

*Sect. 7.—The unloading: Sub-sect. 7, C. (b) v.; sub-sect. 8, A. (a) & (b).]*

from 6 a.m. after ship is in every respect ready in berth." The vessel arrived in the R. Dock on Feb. 8, & was then ready to discharge. Other vessels arrived at the dock after pltfs.' vessel, were given preference to suit the business arrangements of the purchasers, who did not give pltfs.' vessel a berth until Feb. 14. By a contract between the charterers & the purchasers the cargo was to be discharged at the rate of 300 tons per working day from the time when the ship was ready to discharge, otherwise the purchasers were to pay demurrage as per charterparty:—*Held:* the lay days did not begin to run until 6 a.m. on Feb. 15, & the charterers were not responsible for the delay in getting into berth though they did not insist on their rights under the contract with the purchasers.—WATSON *v.* BORNER (H.) & Co., LTD. (1900), 16 T. L. R. 524; 5 Com. Cas. 377, C. A.

*Annotations:*—**Consd.** The Deerhound (1901), 49 W. R. 511; Akt. Inglewood *v.* Millar's Karri & Jarrah Forests (1903), 88 L. T. 559. **Refd** Harrowing *v.* Dupré (1902), 18 T. L. R. 594.

**3778.** —— ——.]—THE DERWENT, No. 3553, *ante*.

**3779. Ordering men away to unload another ship—Consignees also dock authority.]**—ZILLAH SHIPPING CO. *v.* MIDLAND RY. CO. (1902), 19 T. L. R. 63; 47 Sol. Jo. 70, C. A.

SUB-SECT. 8.—LANDING AND WAREHOUSING CARGO.

*A. Apart from Statutory Provisions.*

*(a) Power to Land and Warehouse.*

**3780. General nature of power.]**—(1) A bill of lading remains in force until there has been a complete delivery of the goods thereunder to a person having a right to receive them, & is not spent or exhausted by the landing & warehousing of them at a sufferance wharf, at all events so long as they are under stop for freight.

A. was indorsee of a bill of lading, drawn in a set of three, making cotton deliverable in London on payment of freight, the cotton had been lately landed, under an entry made by A. at a sufferance wharf in the port of London, with a stop thereon for freight; on Mar. 4 A. obtained from M. an advance of £2,500 on the deposit of two copies of the bill of lading, M. assuming the third to be in the hands of the master. On Mar. 6, the stop for freight being then removed, A. who had in Feb. instructed B., a broker, to take samples of the cotton & to offer it for sale, obtained from B. an advance of £2,000 on the deposit of the third copy of the bill of lading, which A. had fraudulently retained. On Mar. 11, B., being informed of the prior advance by M., sent his copy of the bill of lading to the wharf, & procured the cotton to be transferred into his own name, & afterwards sold it & received the proceeds:—*Held:* the bill of lading, when deposited with M., retained its full force & effect; there was therefore a valid pledge of the cotton to M.; & he could maintain an action against B., either for the proceeds of the sale, as money received to his use, or for wrongful conversion of the cotton.

The wharfinger under these circumstances was, at the lowest, the common agent for the shipowner & for the consignee or holder of the bill of lading, agent for the consignee or holder, upon his producing the bill of lading showing that he was entitled to the goods, & upon his paying the freight, to transfer the goods into his name, & to deliver them to him or give him a warrant for them, & agent for the shipowner, to retain possession of the goods, & to permit no one to exercise any control over them until the claim for freight had been satisfied (WILLES, J.).

(2) What would have been the master's duty? He might have kept the goods on board the vessel on demurrage, at all events for a reasonable time; thus using the ship as a warehouse. That was found to be exceedingly inconvenient, & led to frequent disputes between the shipowner & the consignee. But another course was open to the master. Having obtained a new employment for his vessel, he would be unwilling that she should be used as a mere warehouse, especially as the demurrage he might recover would often be no sufficient compensation for the detention in an inconvenient & perhaps an expensive port; & the law gave him the alternative of landing & warehousing the goods, giving notice to the consignee that they were at his disposal on payment of the freight, & having an action for the charges. That also was very inconvenient; for, although the shipowner's liability as a carrier would be thus got rid of, he would incur a new liability as a warehouseman. It was inconvenient & unjust that the master should be forced to abandon his lien, or incur a chance of litigation in his new capacity of warehouseman, with all its dangers & risks. Accordingly, we find that a series of Acts of Parliament has been passed for the purpose of relieving the master from that difficulty.

The Act of 1862 substantially gives the master the same powers, with some extension, which he had under the local Acts, & powers very similar to those given to him under a variety of foreign codes. Where the holder of the bill of lading presents himself, but is not ready to pay the freight, the master is entitled to secure himself by putting the goods into a warehouse. If there be any dispute or delay in the adjustment or payment of the freight, such dispute is to be settled in the way pointed out by the Act. But, until the freight is paid, or the course so pointed out is pursued, the master still has a hold upon the goods for purposes contemplated in the bill of lading (WILLES, J.).—MEYERSTEIN *v.* BARBER (1866), L. R. 2 C. P. 38; 36 L. J. C. P. 48; 15 L. T. 355; 12 Jur. N. S. 1020; 15 W. R. 173; 2 Man. L. C. 420; *affd. sub nom.* BARBER *v.* MEYERSTEIN (1870), L. R. 4 H. L. 317, H. L.

*Annotations:*—*As to* (1) **Consd.** Mors-Le-Blanch *v.* Wilson (1873), L. R. 8 C. P. 227; Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Refd.** The Rona (1884), 51 L. T. 28. *As to* (2) **Consd.** Furness, Withy *v.* White, [1894] 1 Q. B. 483. *Generally*, **Refd.** The John Bellamy (1870), L. R. 3 A. & E. 129; Young *v.* Lambert (1870), L. R. 3 P. C. 142; Glyn, Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. **Mentd.** Hilton *v.* Tucker (1888), 39 Ch. D. 669; Mills *v.* Charlesworth (1890), 25 Q. B. D. 421; Morris *v.* Delobbel Flipo (1892), 66 L. T. 320; Dublin City Distillery *v.* Doherty, [1914] A. C. 823.

**3781. —— Under usual stipulation in bill of lading.]**—HICK *v.* RODOCANACHI, No. 3792, *post*.

**3782. When power arises—After waiting reasonable time.]**—(1) The indorsee of a bill of lading cannot maintain an action on the case for non-delivery of the goods.

(2) The master of a ship, after waiting a reason-

PART VII. SECT. 7, SUB-SECT. 8.—A. (a).

**3782 i.** *When power arises—After waiting reasonable time.]*—Where goods are conveyed under a bill of lading to be delivered in good order & condition, upon payment of freight & the ship has arrived & taken up her moorings, & the master is ready to deliver the goods to the consignee according to his contract, but the latter is unwilling to pay the freight & receive them, the master may, after reasonable time, land the goods, & if they are so landed on a convenient & accustomed wharf, at a convenient hour in good order & condition, ready for delivery to the

able time at a foreign port, & no person having produced the bill of lading, may deliver the goods to some person to keep till the bill of lading is produced.

A declaration stated that deft., a shipowner, received on board thirty casks of cochineal, shipped by R. to Bombay; that the master delivered bills of lading to R., & that deft. undertook to deliver to the order of R. or assigns; that by the custom of merchants the goods were deliverable to a *bonâ fide* assign of the bill, on production; that R. assigned the bills to pltf. as security for moneys due; that pltf. was *bonâ fide* assign, & that it was deft.'s duty to deliver to pltf. Breach, that deft. delivered to other persons, not *bonâ fide* holders. Plea, that R. was agent for M. D. & co. at Bombay, & pltf. was a broker; that R. had an order from M. D. & co.; that pltf. was agent for R. to purchase, & did purchase the goods, & sent the invoice to R., & that R. sent a notice & copy of the invoice to M. D. & co.; that the bill of lading was delivered to pltf. as agent of R.; that pltf. did not deliver or send the bill to R. or to M. D. & co.; that pltf. fraudulently procured R. to indorse the bill to pltf. to secure a debt; that the ship remained at Bombay four months, & no holder producing the bill, the master delivered to M. D. & co., who produced the invoice & letter of advice:—*Held:* the declaration was bad as a declaration in case; also it was substantially bad as a declaration in trover for not averring property in pltf., or a conversion.—HOWARD *v.* SHEPHERD (1850), 9 C. B. 297; 19 L. J. C. P. 249; 137 E. R. 907.

*Annotation:*—*Generally*, **Mentd.** Gerhard *v.* Bates (1853), 22 L. J. Q. B. 364.

**3783. —— Consignee to take delivery immediately—Meaning of "immediately."**]—ALEXIADI *v.* ROBINSON, No. 3697, *ante*.

**3784. —— Power to warehouse—Goods to be delivered ex ship to rail.**]—Pltfs. contracted with defts., owners of a line of local steamers, for the carriage of goods to be delivered "*ex* ship on rail," & directed them to deliver a particular cargo "*ex* ship to the railway co. to our order." The contract contained a clause protecting defts. from liability for damage to the goods by fire whilst (*inter alia*) being warehoused. The goods, on arrival at the quay, were placed in defts.' warehouse adjoining thereto, & were destroyed by fire. In an action by pltfs. for damages for loss of the goods:—*Held:* on the facts, the removal of the goods to defts.' warehouse was justifiable, &, consequently, they were protected by the exceptions clause contained in the contract.—ESSEX COUNTIES FARMERS' CO-OPERATIVE ASSOCN., LTD. *v.* NEWHOUSE & CO., LTD. (1916), 86 L. J. K. B. 172; *sub nom.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCN., LTD. *v.* NEWHOUSE & CO., 115 L. T. 308; 13 Asp. M. L. C. 449.

**3785. Duration of power—Consignee offering to receive when part cargo landed.**]—By proviso in a bill of lading, simultaneously with the ship being ready to unload the whole or any part of the goods, forty pipes of lemon juice, the consignee was bound to be ready to receive the same from the ship's side; & in default the master or agent of the ship was authorised to enter the goods at the custom house, & land, warehouse, or place them in lighters at the risk & expense of the consignee. After part of the goods had been landed by the shipowner, but not before, the consignee was ready & offered to receive the remainder, but the shipowner refused to deliver them to him, & landed them himself:—*Held:* the contract was divisible; & unless the shipowner had been prejudiced in the delivery of the remainder, by the default of the consignee in not being ready to receive the whole, he was bound to deliver them. *Semble:* Merchant Shipping Act, 1862 (c. 63), s. 67, Articles 5, 7, should be similarly construed.—WILSON *v.* LONDON, ITALIAN, & ADRIATIC STEAM NAVIGATION CO. (1865), L. R. 1 C. P. 61; Har. & Ruth. 29; 35 L. J. C. P. 9; 13 L. T. 435; 12 Jur. N. S. 52; 14 W. R. 101; 2 Mar. L. C. 279.

*Annotation:*—**Consd.** Oliver *v.* Colven (1879), 27 W. R. 822.

**3786. Whether power divests shipowner of other remedies.**]—In an action by shipowner against receivers of cargo for damages for detention of his vessel, a county ct. judge gave judgment for defts. on the ground that the stipulation in the bill of lading that the goods were "to be taken from the ship by the consignees at their expense immediately after their arrival, & as fast as steamer can deliver or the same will be transhipped into lighters, or landed, or warehoused at the expense & risk of the proprietors of such goods," divested the shipowner of any other remedy than that of landing or lightering the goods:—*Held:* the shipowner had an option, so that he was not deprived of his ordinary remedy by not exercising the power of landing or lightering the goods; &, further, the shipowner was entitled to judgment, as the receivers of the cargo had failed to show that they had done their best in the actual circumstances to make the appliances of the port available.

Pltfs. showed, without contradiction, what the capacity of their steamer was, & then it was shown further that the delay arose from dearth of wagons. That, I think, made out a *primâ facie* case in favour of pltfs. (JEUNE, P.).—THE ARNE, [1904] P. 154; 73 L. J. P. 34; 90 L. T. 517; 20 T. L. R. 221; 9 Asp. M. L. C. 565, D. C.

**Right to land for protection of lien—At common law.**]—*See* Sect. 13, sub-sect. 10, A., *j*

**Under statute.**]—*See* Sect. 13, sub-sect. 10, B., *post*.

### (*b*) *Effect of Landing Cargo.*

**3787. At common law—Shipowner's liability—As warehouseman.**]—MEYERSTEIN *v.* BARBER, No. 3780, *ante*.

consignee, on payment of the freight, the contract to deliver, etc., under the bill of lading, is satisfied on the master's part.—COOPER *v.* DOWNWARD (1870), 9 N. S. W. S. C. R. (L.) 59.—**AUS.**

q. ——.]—A bill of lading, given by defts. to pltf. for certain goods, contained a stipulation that the goods were to be taken from the steamer's tackles by the consignees as fast as the steamer could discharge, failing which the steamer's agents were to be at liberty to land the same into godowns:—*Held:* for the speedy discharge of their vessel the shipowners were entitled to land & wharf the goods.—COSSIM HOSSEIN SOORTU *v.* LEE PHEE CHUAN (1879), I. L. R. 5 Calc. 477; 5 C. L. R. 157.—**IND.**

r. ——.]— BRITISH INDIA STEAM NAVIGATION CO. *v.* IBRAHIM SULAIMAN (1895), I. L. R. 19 Mad. 169.—**IND.**

t. *Power of master as agent of consignee to contract for carriage to convenient place.*]—By a clause in a bill of lading it was provided that "Consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the master or agent shall be at liberty to land & warehouse the goods, or discharge them into a store ship or hulk, or into lighters, or on a wharf, as customary, at the merchant's risk & expense":—*Held:* the master or agent had implied authority to make, as the agent of the consignee, a contract with lightermen, for the carriage of the goods from the ship's side to a safe & convenient place.—BOYES *v.* MOSS & CO. (1892), 18 V. L. R. 225.—**AUS.**

a. *Rules & customs of port.*]—A shipmaster is only bound as to storage to follow the rules & customs of the port where he takes his cargo, unless there be an agreement to the contrary.—WINN *v.* PELISSIER (1871), 1 R. C. 246; 3 R. L. O. S. 32.—**CAN.**

**PART VII. SECT. 7, SUB-SECT. 8.—A. (b).**

b. *At common law — Shipowner's liability—To charges.*]—SCOTT *v.* FINLAY (1883), I. L. R. 7 Bom. 386.—**IND.**

*Sect. 7.—The unloading: Sub-sect. 8, A. (b), & B. (a), (b), (c) & (d).]*

**3788. —— —— To charges—Consignee offering to receive cargo after part landed.**]—WILSON *v.* LONDON, ITALIAN & ADRIATIC STEAM NAVIGATION Co., No. 3785, *ante.*

**As to lien.**]—*See* Sect. 13, sub-sect. 10, A., *post.*

*B. Statutory Provisions.*

*(a) In General.*

*See* 1894 Act, ss. 492–501.

**3789. Nature of power & duties.**]—MEYERSTEIN *v.* BARBER, No. 3780, *ante.*

**3790. Act does not vary mode of delivery—Under contract.**]—Goods were shipped under a bill of lading at Calcutta to be delivered in like good order & condition from the ship's tackles (where the ship's responsibility shall cease) at the port of London, etc. On arrival in the Port of London the consignee demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, & was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to & paying certain dock charges. In an action by the consignee against the shipowner to recover the amount so paid, the jury found that there was a custom for steamships having a general cargo (deft.'s ship's being such) coming into the port of London, & using the docks, to discharge the goods on the quay & thence into lighters:—*Held:* the custom found was not inconsistent with the terms of the bill of lading, & the shipowner was entitled to discharge the goods on the quay & was not liable for the charges sought to be recovered.

The Act [M. S. Act, 1862 (c. 63)] provides that, as long as the consignee is present & ready to take delivery, delivery shall be made to him, but otherwise the shipowner may land the goods himself; but there is nothing in the sect. of the Act [sect. 7] which has been relied on to oblige the shipowner to deliver to a consignee, who is ready to take delivery, in any way he may please & in a manner opposed to the custom of the port at which the vessel may be (BRETT, M.R.).—MARZETTI *v.* SMITH & Co. (1883), Cab. & El. 6; 49 L. T. 580; 5 Asp. M. L. C. 166, C. A.

**3791. —— Under custom of the port.**]—MARZETTI *v.* SMITH & Co., No. 3790, *ante.*

**3792. Option on master to adopt statutory powers.**]—(1) In an action by pltf., the shipowner, against the consignees of the cargo for delay in unloading the ship it appeared that defts. were consignees under a bill of lading which imposed no express limit of time within which the goods were to be unloaded, but contained a stipulation that the goods were to be applied for within twenty-four hours after the ship's arrival, otherwise the master of the ship might himself unload at the expense of the consignees, & should have a lien on the goods for all freight & expenses. The ship arrived in the port of discharge, & defts. duly applied for the goods & commenced to unload them; but a strike of the dock labourers occurred, & the unloading was delayed for about a month, & was then completed by defts. Both pltf. & defts. did all they could under the circumstances to expedite the unloading of the ship:—*Held:* the bill of lading containing no stipulation as to the time within which the cargo was to be discharged, defts. were entitled to a reasonable time, & in the absence of any special provision on the subject the reasonableness of the time for unloading must be considered with reference to the circumstances which existed at the time of unloading; & as the strike could not be attributed to any default on the part of defts., they were not liable for the delay.

(2) The master is under no obligation to land the goods & assert his lien instead of allowing the consignee to land them, & leaving him to be sued for the payments he ought to make. The master is empowered to do this, but he is under no obligation to exercise the power. He is the person to decide whether he will exercise it or not (LINDLEY, L.J.).—HICK *v.* RODOCANACHI, [1891] 2 Q. B. 626; 61 L. J. Q. B. 42; 65 L. T. 300; 40 W. R. 161; 7 T. L. R. 732; 7 Asp. M. L. C. 97, C. A.; *affd. sub nom.* HICK *v.* RAYMOND & REID, [1893] A. C. 22, H. L.

*Annotations:—As to* (1) **Consd.** Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 54. **Reld.** Carlton S.S. Co. *v.* Castle Mail Packets Co., [1898] A. C. 486; Lyle Shipping Co. *v.* Cardiff Corpn., [1900] 2 Q. B. 638; Maclay *v.* Bakers & Spiller (1900), 16 T. L. R. 401; Hulthen *v.* Stewart, [1902] 2 K. B. 199; Ropner *v.* Stoate Hosegood (1905), 92 L. T. 328; Akt. Hekla *v.* Bryson, Jameson (1908), 100 L. T. 155; Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Sims *v.* Mid. Ry., [1913] 1 K. B. 103; Ralli *v.* Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287; Stewart *v.* Rank (1920), 36 T. L. R. 728; Van Liewen *v.* Hollis, [1920] A. C. 239; Transoceanica Societa Italiana di Navigazione *v.* Shipton, [1923] 1 K. B. 31; Vorlest's Administratrix *v.* Motor Union Insce., [1925] 2 K. B. 137. *Generally,* **Mentd.** R. *v.* Roberts, *Ex p.* Scurr, [1924] 2 K. B. 695.

**3793. Liability of owner of goods—Charges for watching.**]—A local dock Act enacted that the master of a vessel or owner of cargo may cause the cargo to be deposited in a transit shed, & that the goods should be removable from such shed by the same process in all respects as if the cargo were still on board:—*Held:* the porter watching the shed could sue the owner of goods for watching the goods while there.—BOUMPHREY *v.* HOUGHTON (1891), 55 J. P. 729; 7 T. L. R. 548.

*Annotation:*—**Reld.** Cardiff S.S. Co. *v.* Jameson (1903), 88 L. T. 87.

**Effect on lien.**]—*See* Sect. 13, sub-sect. 10, B., *post.*

*(b) Right of Shipowner to Land and Warehouse.*

*See* 1894 Act, ss. 492–501.

**3794. When right arises—On default of owner—Default due to any cause.**]—MIEDBRODT *v.* FITZSIMON, THE ENERGIE, No. 4146, *post.*

**3795.** —— ——.]—GLYN MILLS & Co. *v.* EAST & WEST INDIA DOCK Co., No. 2362, *ante.*

**3796. —— Ship unable to be discharged within time allowed by charterparty.**]—SMAILES & SON *v.* HANS DESSEN & Co., No. 3757, *ante.*

**3797. Duration of right—Owner offering to receive cargo when part landed.**]—WILSON *v.* LONDON, ITALIAN & ADRIATIC STEAM NAVIGATION Co., No. 3785, *ante.*

**3798. Exclusion of Act by special contract.**]—OLIVER *v.* COLVEN, No. 3565, *ante.*

*(c) Delivery on Deposit of Freight.*

**3799. To whom delivered—Person to whom shipowner bound to deliver under contract.**]—GLYN MILLS & Co. *v.* EAST & WEST INDIA DOCK Co., No. 2362, *ante.*

**3800. Right to delivery of goods—Upon deposit of amount of freight—Goods not landed under the statutory provisions.**]—Certain goods were shipped at Antwerp on board the steamship *H.* owned by defts., the C. co., consigned to pltfs. at Southampton under a bill of lading which provided (*inter alia*) as follows: "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge . . . or otherwise they may be landed, put into lighters, or stored . . . at the expense of the consignee of the goods. . . .

Freight to be paid at destination before delivery. . . . The co. shall have a lien upon the goods for the payment thereof, as well as a general lien, not only for the freight of the same, but for all other freights, storages, or other charges owing to the co. by the shipper, consignee, or owners." The vessel arrived at Southampton, & was ready to discharge, but pltfs. did not take delivery. The goods were landed by the master of the *H.* & stored with a warehouseman, with instructions that the goods were to be held for the shipowners, & not to be delivered to any person without their instructions, which were to be accompanied by their release, for the freight. The bill of lading was sent by pltfs. to the warehouseman with the sum due for freight as under 1894 Act, ss. 493–496. The warehouseman, acting upon the instructions of the shipowners that the goods were not to be delivered to pltfs. until payment of freight to the shipowners had been made, refused to deliver the goods. In an action by pltfs. for the delivery of the goods on payment of freight to the warehouseman :—*Held :* as the shipowners had not landed the goods & stored them in the warehouse under the provisions of 1894 Act, the consignees had no right to delivery of the goods by the warehouseman on depositing the amount due for freight.—DENNIS & SONS, LTD. *v.* CORK S.S. CO., LTD., [1913] 2 K. B. 393 ; 82 L. J. K. B. 660 ; 108 L. T. 726 ; 29 T. L. R. 489 ; 12 Asp. M. L. C. 337 ; 18 Com. Cas. 177.

**3801. Deposit of amount of freight—No evidence of personal liability—By person taking delivery—Delivery taken as agent.**]—Where cargo is deposited by a shipowner with a warehouseman under 25 & 26 Vict. c. 63, ss. 62–72, now 1894 Act, ss. 492–496, subject to a stop for freight, & the consignee deposits the freight with the warehouseman & takes delivery of the goods from him, no contract by the consignee to be personally liable for the freight is to be inferred from his acceptance of the goods, & the Act creates no such personal liability. In these circumstances a consignee, who is so named in the bills of lading, but who has no property in the goods & takes delivery only as agent for the owner, cannot be sued for the freight.

Upon payment of the amount claimed, therefore, by applts. to the dock co., the lien of the shipowner ceased. Any remedy which the shipowner had for the recovery of his freight of course remained intact (LORD HERSCHELL, C.).—WHITE & CO. *v.* FURNESS, WITHY & CO., [1895] A. C. 40 ; 64 L. J. Q. B. 161 ; 72 L. T. 157 ; 11 T. L. R. 129 ; 7 Asp. M. L. C. 574 ; 11 R. 53, H. L. ; *revsg.* S. C. *sub nom.* FURNESS, WITHY & CO. *v.* WHITE (W. N.) & CO., [1894] 1 Q. B. 483, C. A.

*Annotations :*—**Foll.** Euterpe S.S. Co. *v.* Bath (1897), 2 Com. Cas. 196. **Reid.** Montgomery *v.* Foy, Morgan, [1895] 2 Q. B. 321. **Mentd.** McCheane *v.* Gyles (No. 2) (1902), 71 L. J. Ch. 446.

**3802. Action for declaration of title to deposit—Right of shippers to be joined as defendants.**]—Cargo having been placed by the shipowner in the custody of a warehouseman with notice of a lien for freight under 1894 Act, s. 493, the consignees, who had no property in the cargo, but were merely agents of the shippers for the sale of it, in order to obtain possession of it, deposited the amount of the freight claimed with the warehouseman with a notice to retain it under 1894 Act, s. 496. The shipowner brought an action against the consignees for a declaration of title to the money so deposited, & an order for payment of it to him :—*Held :* there was jurisdiction under R. S. C., Ord. 16, r. 11, to order that the shippers of the cargo should be added as defts. in the action, in order that they might counterclaim against pltf. damages for short delivery & injury to cargo.—MONTGOMERY *v.* FOY, MORGAN & CO., [1895] 2 Q. B. 321 ; 65 L. J. Q. B. 18 ; 73 L. T. 12 ; 43 W. R. 691 ; 11 T. L. R. 512 ; 8 Asp. M. L. C. 36 ; 14 R. 575, C. A.

*Annotation :*—**Mentd.** McCheane *v.* Gyles (No. 2), [1902] 1 Ch. 911.

**Effect on lien.**]—*See* Sect. 13, sub-sect. 10, B., *post.*

*(d) Assortment and Making Entry.*

*See* 1894 Act, s. 493 (4) & (5).

**3803. Consignee not ready to receive—Goods erroneously entered—Goods improperly described in bill of lading—Shipowner not liable.**]—When a consignee is not ready to receive the cargo of rum, & the shipowners, desirous to get their ship clear, unload the cargo, & enter it with the excise, but erroneously, whereby they are seized :—*Held :* the shipowners are not liable to the consignees for the non-delivery of the rums, as the bill of lading did not properly describe the same.—SHIRWELL *v.* SHAPLOCK (1815), 2 Chit 397.

**3804. Failure to make entry of imported goods—Notice of readiness to deliver.**]—By Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 67, a shipowner is empowered to land goods imported in his ship from foreign parts subject to the condition, that " if before the goods are landed the owner thereof has made entry for the landing & warehousing thereof at any particular wharf other than that at which the ship is discharging, & has offered & been ready to take delivery thereof, & the shipowner has failed to make such delivery, & has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods twenty-four hours' notice in writing of his readiness to deliver the goods, & shall, if he lands or unships the same without such notice, do so at his own risk & expense " :—*Held :* (1) the owner of the goods when he makes an offer to take delivery of them must be in a condition to receive the same if the offer be then accepted in order to entitle him to the benefit of such condition ; (2) when such offer was made, the shipowner, if he then failed not only to make delivery of the goods, but also to give such owner of the goods information of the time at which they could be delivered, was bound to give the twenty-four hours' notice above specified before he landed the goods, although he was never asked to give such information.—BERRESFORD *v.* MONTGOMERIE (1861), 17 C. B. N. S. 379 ; 5 New Rep. 283 ; 34 L. J. C. P. 41 ; 10 L. T. 814 ; 10 Jur. N. S. 823 ; 12 W. R. 1060 ; 2 Mar. L. C. 50 ; 144 E. R. 153.

**3805. Landing for assortment—Failure to take delivery.**]—THE CLAN MACDONALD, No. 3806, *post.*

**3806. —— Statutory provisions as to failure to make entry not applicable.**]—When goods are landed under 25 & 26 Vict. c. 63, s. 67, (6), sub-sect. 7 does not apply, for the latter refers only to the discharging of cargo overside, & not to the landing of it for the purposes of assortment on the wharf, & the written notice referred to in sub-sect. 7 applies, therefore, to cases arising under that sub-sect. only. It is the duty of the owner of the goods who receives either a written or verbal notice that he can have them to take them away within a reasonable time, & that whether sub-sect. 6 or sub-sect. 7 applies to the case. Notice to the lightermen employed by the owner of the goods is notice to the owner himself.

A ship arrived in dock with a general cargo on Dec. 12, & began to unload on the quay on Dec. 13.

*Sect. 7.—The unloading: Sub-sect. 8, B. (d); sub-sect. 9, A. & B. (a) & (b).]*

Pltfs., owners of some of the goods, sent a lighterman & barge to receive their portion of the cargo on Dec. 13. It was not then ready. On Dec. 14, the lighterman again attended, but could obtain no information. On Dec. 14, the firm of lightermen wrote to defts., the shipowners, stating they had made application for the goods & inclosing a notice requiring twenty-four hours' notice of defts.' readiness to deliver the goods, & stating that they would not be responsible for any landing charges. On Dec. 15 the landing of the cargo was completed, & the lighterman was that day verbally informed he could have the goods on the morning of Dec. 15. He did not attend, & the goods were not taken away till Dec. 29. Pltfs. paid the dock charges under protest, & brought an action to recover them back:—*Held:* they could not recover them.

Defts. allege that the cargo was discharged according to the custom of the port of London with regard to the discharge of vessels in dock, viz., by the cargo being unloaded by the dock co.'s servants, & by them landed upon the dock quay, & sorted ready for removal by the parties entitled to take delivery of goods from the vessel . . . the alleged custom was not established by the evidence (HANNEN, P.).—THE CLAN MACDONALD (1883), 8 P. D. 178; 52 L. J. P. 89; 49 L. T. 408; 32 W. R. 154; 5 Asp. M. L. C. 148.

SUB-SECT. 9.—REMEDIES FOR BREACH OF CONTRACT.

*A. In General.*

**Remedies against carriers, generally.**] — *See* CARRIERS, Vol. VIII., pp. 225–228, Nos. 1438–1473.

**Who may sue—Transferee of bill of lading.**]—*See* Sect. 3, sub-sect. 9, C. (*b*), *ante*.

*B. Non-Delivery.*

*(a) In General.*

**3807. Goods wrongfully seized by government officers.**]—If goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of govt., so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of govt.—GOSLING *v.* HIGGINS (1808), 1 Camp. 451; 170 E. R. 1018, N. P.

*Annotations:*—**Consd.** Spence *v.* Chodwick (1847), 10 Q. B. 517. **Refd.** The Newport (1858), Sw. 335.

**3808. Who may maintain action—Agent resident in England—Shipping goods on behalf of owner abroad & paying freight.**]—A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, & pays freight for them, may maintain an action in his own name for not delivering them according to the bill of lading.—JOSEPH *v.* KNOX (1813), 3 Camp. 320; 170 E. R. 1397, N. P.

*Annotation:*—**Refd.** Dunlop *v.* Lambert (1839), Macl. & Rob. 663.

**3809. Non-arrival of vessel—Whether evidence of negligence.**]—In an action against the owner of a chartered vessel, for negligence in consequence of which pltf.'s goods were lost, the non-arrival of the vessel at her destined port, is not even *primâ facie* evidence of negligence.—BOYSON *v.* WILSON (1816), 1 Stark. 236; 171 E. R. 458, N. P.

**3810. Goods reshipped on other vessel—By shipbrokers without authority—Delivery refused except on tender of bill of lading sent by first ship.**]—SIMPSON *v.* YOUNG, No. 3146, *ante*.

**3811. Action on original bill of lading—Bill of lading altered on voyage—To meet necessity of deviation.**]—Pltf. shipped eight bales of cloth, each above the value of £20, for carriage by a steamer belonging to deft. co. from London to Odessa under a bill of lading which excepted liability on the part of the co. for goods above the value of £20 per package, unless the value was therein declared & extra freight paid. Pltf. did not declare the value of the goods or pay the extra freight. The bill of lading (clause 2) reserved to the co. liberty for the steamer, before or after proceeding towards her port of discharge, to proceed to any port or ports whatsoever, although in a contrary direction, in any order, for any purpose whatsoever, & such ports were to be deemed included in the intended voyage, & it provided (clause 4) that in case the whole or part of the goods specified therein were not from any cause, including negligence on the part of the co.'s servants, found for delivery, or it was inconvenient for the ship's purposes to deliver during the vessel's delay at their port of destination, the co. was only bound to forward them to the port of destination from any subsequent port by any other steamer, either belonging to the co. or to other persons, & proceeding either directly or indirectly to such port, such carriage to be at the co.'s expense but at the merchant's risk. The contemplated voyage was to Constantinople & thence to the Black Sea ports, including Odessa. On the arrival of the ship at Constantinople in Apr. 1919, it appeared that Odessa was likely to be captured forthwith by the Soviet forces, & accordingly it was agreed between the respective agents of pltf. & deft. co., that the destination of five of the bales should be changed from Odessa to Batoum & that the remaining three should be discharged at Constantinople, either then or on the ship's return voyage. They were not then discharged, & the ship proceeded to Batoum & back by Novorossisk to Constantinople. The five bales consigned to Batoum remained on board after the ship had left that port. The three which were to have been brought back to Constantinople were landed at Novorossisk for no explained reason & were detained by deft. co.'s agents for two months.

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**PART VII. SECT. 7, SUB-SECT. 9.—A.**

c. *Who may sue — Consignee.*] — ADAMS *v.* CROSBY (1881), 14 N. S. R. (2 R. & G.) 331; 2 C. L. T. 94.—CAN.

d. —— ——.] — FRIENDLY *v.* CANADA TRANSIT CO. (1885), 10 O. R. 756.—CAN.

e. *Delayed delivery — Measure of damages—Difference between market price at port of discharge at contract time & at time of delivery.*]—CO-OPERATIVE BOX CO. OF NEW SOUTH WALES *v.* PIKE (E. D.) & CO., LTD. (1919), 19 S. R. N. S. W. 424; 36 N. S. W. W. N. 140.—AUS.

f. —— *Vessel quarantined & forbidden to proceed to wharf—Permission to discharge by lighter refused.*]—GROVE & SONS, LTD. *v.* UNION S.S. CO. OF NEW ZEALAND, LTD., [1920] N. Z. L. R. 601.—N.Z.

**PART VII. SECT. 7, SUB-SECT. 9.—B. (a).**

g. *Agreement exempting from liability in case of loss of ship.*]—NUSSERVANJI JEHANGIR KHAMBATA *v.* VOLKART BROTHERS (1888), I. L. R. 13 Bom. 15.—IND.

h. *Goods destroyed by fire — No adequate means provided for extinguishment—No sufficient watch.*]—RIVER STEAM NAVIGATION CO. *v.* CHOUTMULL (1898), L. R. 26 Ind. App. 1; I. L. R. 26 Calc. 398, P. C.—IND.

k. *Evidence — Onus of proof.*] — SMALL *v.* BELVEA (1883), 24 N. B. R. 16.—CAN.

l. —— ——.]—DANMULL *v.* BRITISH INDIA STEAM NAVIGATION CO. (1886), I. L. R. 12 Calc. 477.—IND.

m. —— ——.]—LYONS *v.* UNITED

Neither the five bales nor the three bales had since been heard of. In an action by pltf. for non-delivery of the goods:—*Held:* the terms of the original bill of lading applied to the carriage to the substituted destinations, but in the absence of special protective provisions in the bill of lading, the over-carriage of the five bales & the landing & detention of the three bales at Novorossisk constituted a deviation from the contract of carriage so as to deprive deft. co. of the benefit of the exceptions in the bill of lading; & in the circumstances neither clause 2 nor clause 4 afforded any protection to the co.—CUNARD S.S. Co. *v.* BUERGER, [1927] A. C. 1; 96 L. J. K. B. 18; 135 L. T. 494; 42 T. L. R. 653; 17 Asp. M. L. C. 92; 32 Com. Cas. 183, H. L.; *affg.* S. C. *sub nom.* BUERGER *v.* CUNARD S.S. Co., [1925] 2 K. B. 646, C. A.

(*b*) *Measure of Damages.*

**3812. Cost price of cargo—Sum paid on account of freight.**]—EWBANK *v.* NUTTING, No. 3450, *ante.*

**3813.** —— ——.]—Goods were shipped on deft.'s ship under a charterparty, which provided that, if required, the whole freight should be advanced subject to a deduction for interest & insurance. The freight was paid in advance, & the amount was insured. The charterers sold the goods to pltfs. at a price covering cost, freight, & insurance. The cargo was lost by the negligence of defts. In action for the loss of the goods:—*Held:* pltfs. were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified pltfs. were entitled to be subrogated to the rights of pltfs. in respect of the advanced freight, & to have the action maintained for their benefit to the amount insured, as it would, but for the insurance, have formed part of the damages to which pltfs. would have been entitled.—DUFOURCET *v.* BISHOP (1886), 18 Q. B. D. 373; 56 L. J. Q. B. 497; 56 L. T. 633; 6 Asp. M. L. C. 109.

**3814.** —— —— **Insurance premium—Capture in consequence of deviation.**]—Where goods destined to a foreign part are captured in consequence of a deviation, the owners of the goods are entitled to recover from the owners of the ship, only the prime cost of the goods, together with the shipping charges, & not the expense of effecting a policy of insurance upon them, without direct proof that the goods at the time of the loss were enhanced in value beyond their first price to the amount sought to be recovered for insurance.—PARKER *v.* JAMES (1814), 4 Camp. 112; 171 E. R. 37, N. P.

*Annotations:*—**Refd.** Davis *v.* Garrett (1830), 6 Bing. 716; Morrison *v.* Shaw, Savill & Albion Co., [1916] 2 K. B. 783. **Mentd.** Lilley *v.* Doubleday (1881), 44 L. T. 814.

**3815.** —— —— —— **"Steamer lost or not lost."**]—Goods were shipped under a charterparty containing the following stipulation: "Four-fifths of the freight, calculated on the quantity shipped, to be advanced & paid in cash in one month from the steamer's sailing from her last port in Great Britain, steamer lost or not lost." The steamer sailed on July 12; was lost through the negligence of her master on July 19; the loss was known on July 21; on July 26 the charterer paid four-fifths of the freight to the shipowner. In an action by the charterer against the shipowner to recover damages for breach of contract:—*Held:* notwithstanding the clause "steamer lost or not lost" the charterer was entitled to take into account & recover the advance freight so paid, & the premiums of insurance, in addition to the prime cost of the goods.—TURNBULL *v.* GREAT EASTERN & PENINSULAR NAVIGATION CO. (1885), Cab. & El. 595; *sub nom.* GREAT INDIAN PENINSULA RY. CO. *v.* TURNBULL, 53 L. T. 325; 33 W. R. 874; 1 T. L. R. 570; 5 Asp. M. L. C. 465.

**3816.** —— **With sum for estimated profit—Where no market for goods.**]—(1) Pltfs. chartered deft.'s ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom. The charterparty provided that the master was to sign bill of lading at any rate of freight & as customary at port of lading without prejudice to the stipulation of the charterparty. There was also a cesser of liability clause. A cargo was shipped under the charterparty at Alexandria by & on account of the charterers, & a bill of lading was given containing an exception, which was not in the charterparty, protecting the shipowners from liability for damage arising from any act, neglect, or default of the pilot, master, or mariners. The cargo was lost by the negligence of the master. In an action for non-delivery of the cargo, the jury found that there was no special custom at Alexandria with regard to the form of bill of lading in use there:—*Held:* whether such finding were right or wrong, the terms of the charterparty did not authorise the giving of a bill of lading containing the before-mentioned exception; &, even if they did, in the absence of express provision to the contrary, as between the shipowners & the charterers only, the charterparty could be regarded as constituting the contract, & the bill of lading must be looked on as a mere receipt for the goods; &, consequently, defts. were liable for non-delivery of the cargo. (2) Pltfs. having sold the cargo "to arrive," at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived:—*Held:* in estimating the damages such market value must be looked to, & not the price at which pltfs. had sold the cargo. The charterparty provided that sufficient cash for ship's disbursements should be advanced, if required, to the captain by the charterers on account of freight subject to insurance only.

There is the question as to the amount of the damages. . . . If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper & adding to that the estimated profit he would make at the port of destination If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to pltf. . . . It is admitted that, if pltfs. had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods . . . would be an accidental circumstance as between themselves & the shipowners (LORD ESHER, M.R.).

(3) Pltfs. having advanced sums for ship's disbursements on account of freight as provided

STATES & AUSTRALIA S.S. Co., [1921] N. Z. L. R. 585.—N.Z.

n. —— ——.]—CUNNINGHAM *v.* COLVILS, LOWDEN & CO. (1888), 16 R. (Ct. of Sess.) 295; 26 Sc. L. R. 249.—SCOT.



o. *Difference between market price at port of loading plus freight on one side & cost of replacement at port of discharge.*]—CO-OPERATIVE BOX CO. *or* NEW SOUTH WALES *v.* PIKE (E. D.) & CO., LTD. (1919), 19 S. R. N. S. W. 424; 36 N. S. W. W. N. 140.—AUS.

p. *Reduction by claim for general average—Onus of proof.*]—In an action against charterers of a vessel for non-

*Sect. 7.—The unloading: Sub-sect. 9, B. (b), C., D. & E.*]

for in the charterparty:—*Held:* in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well.—RODOCANACHI *v.* MILBURN (1886), 18 Q. B. D. 67; 56 L. J. Q. B. 202; 56 L. T. 594; 35 W. R. 241; 3 T. L. R. 115; 6 Asp. M. L. C. 100, C. A.

*Annotations:—As to* (1) **Refd.** Temperley S.S. Co. *v.* Smyth, [1905] 2 K. B. 791; Krüger *v.* Moel Tryvan Ship Co. (1907), 13 Com. Cas. 1; Jamal *v.* Moolla Dawood, [1916] 1 A. C. 175. *As to* (2) **Consd.** The Leitrim, [1902] P. 256. **Apprvd.** Williams *v.* Agius, [1914] A. C. 510. **Distd.** Watts, Watts *v.* Mitsui, [1917] A. C. 227. **Apld.** Slater *v.* Hoyle & Smith, [1920] 2 K. B. 11. **Refd.** Wertheim *v.* Chicoutimi Pulp Co., [1911] A. C. 301; Lebeaupin *v.* Crispin, [1920] 2 K. B. 714; Montevideo Gas & Drydock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 544; Sheik Mohammad Habib Ullah *v.* Bird (1921), 37 T. L. R. 405; Taylor *v.* Bank of Athens, Pinnock *v.* Same (1922), 91 L. J. K. B. 776; *Re* Hall & Pim (1927), 137 L. T. 585. *As to* (3) **Refd.** Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373.

**3817. Market value at port of discharge—Less unpaid freight—Sale of cargo "to arrive."**]—RODOCANACHI *v.* MILBURN, No. 3816, *ante.*

**3818. —— Deduction of advance freight.**]—RODOCANACHI *v.* MILBURN, No. 3816, *ante.*

**3819. Difference between price agreed to be paid & market price at port of discharge—Deduction of insurance & expenses—Voyage abandoned.**]—WATTS, WATTS & CO., LTD. *v.* MITSUI & CO., LTD., No. 2549, *ante.*

**3820. Cost of replacement at port of discharge—& interest until judgment.**]—Pltfs. delivered to deft.'s servants on a quay at Glasgow, for shipment on board deft.'s vessel which lay alongside, several cases containing machinery, which was intended for the erection of a saw mill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing "merchandise." Deft. knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained machinery, without which the mill could not be erected, could not be found on board, & pltfs. were obliged to send to England to replace the lost articles:—*Held:* (1) deft. was liable for the loss of the machinery, as delivery to deft.'s servants alongside the vessel was equivalent to a delivery on board; (2) the measure of damages for the breach of contract was the cost of replacing the lost articles in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment, by way of compensation for the delay.

It is not necessary, in order to render a shipowner liable for the loss of the goods of a shipper, that the goods should have been actually delivered on board the ship.

In the absence of notice of the consequences which will ensue from a part of goods shipped being lost, & of any contract express or implied to be answerable for such consequences, the shipper of such goods, on a part thereof being lost, is, over & beyond the sum necessary to replace it, only entitled as for the delay to receive interest on the said sum till payment, even though the rest of the goods have been rendered useless till the portion lost was replaced.—BRITISH COLUMBIA SAW-MILL CO. *v.* NETTLESHIP (1868), L. R. 3 C. P. 499; 37 L. J. C. P. 235; 18 L. T. 604; 16 W. R. 1046; 3 Mar. L. C. 65.

*Annotations:—As to* (1) **Refd.** Horne *v.* Midland Ry. (1873), L. R. 8 C. P. 131. *As to* (2) **Refd.** The Northumbria (1869), L. R. 3 A. & E. 6; Wagstaff *v.* Anderson (1879), 4 C. P. D. 283; The Crathie, [1897] P. 178; Bostock *v.* Nicholson, [1904] 1 K. B. 725; Slater *v.* Hoyle & Smith, [1920] 2 K. B. 11; Montevideo Gas & Drydock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 544; Patrick *v.* Russo-British Grain Export Co., [1927] 2 K. B. 535. *Generally,* **Refd.** Scaramanga, Manoussin *v.* English (1895), 1 Com. Cas. 99.

**3821. Goods subsequently delivered by another ship—Fall in value at port of discharge.**]—Deft., the master of a vessel in the cotton trade, signed a bill of lading for four hundred bales of cotton said to be shipped on board that vessel, then lying in a port of the United States & bound for Liverpool. The bill of lading was indorsed over to pltfs., who carried on their business in Liverpool. When the vessel arrived at Liverpool, on Oct. 26, 1885, she was found to have on board only 165 bales of cotton; & deft. informed pltfs. that another ship would arrive in a few days with the remainder of the bales. The second ship with 235 bales arrived on Oct. 29. Pltfs. accepted the bales of cotton on board both ships. The price of cotton fell between Oct. 26 & Oct. 29, 1885. Pltfs. afterwards brought an action in the county ct. at Liverpool against the master of the vessel to recover, on the ground of non-delivery of the 400 bales of cotton, the fall in the market price between Oct. 26 & Oct. 29, 1885. The county ct. judge gave judgment for pltfs. for the amount claimed. Deft. appealed:—*Held:* the county ct. judge was right, & pltfs. were entitled to recover the loss caused by the fall in the value of the cargo as damages for non-delivery.—SMITH, EDWARDS & CO. *v.* TREGARTHEN (1887), 56 L. J. Q. B. 437; 57 L. T. 58; 35 W. R. 665; 3 T. L. R. 688; 6 Asp. M. L. C. 137, D. C.

*Annotation:*—**Refd.** Aronson *v.* Mologa Holzindustrie A/G. Leningrad (1927), 32 Com. Cas. 276.

**3822. Loss of interest—With sum paid for insurance.**]—NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante.*

**3823. Accidental circumstance—Opportunity for exceptional sale at port of discharge.**]—RODOCANACHII *v.* MILBURN, No. 3816, *ante.*

**3824. —— Necessity for notice or express contract.**]—BRITISH COLUMBIA SAW-MILL CO. *v.* NETTLESHIP, No. 3820, *ante.*

**3825. —— —— Supply of coal to gas company.**]—Defts. contracted with pltfs. that they would carry a part cargo of gas coal to Monte Video & there deliver it to pltfs. They knew at the time of entering into the contract that the coal was required by pltfs. for manufacturing gas at Monte Video, & accordingly carried the coal there, but by mistake delivered a smaller quantity of steam coal to pltfs., who, there being no market for the supply of gas coal, used the steam coal in order to keep their works going, with the result that the steam coal was of considerably less value to them than the gas coal contracted for:—*Held:* pltfs. in the circumstances acted reasonably in making use of the steam coal & were entitled to recover the loss of the value of the gas coal to them for the purpose of manufacturing gas & by-products, such as coke, tar, etc.—MONTE VIDEO GAS & DRY DOCK

delivery of goods under a bill of lading, if deft. claims that the damages should be reduced by a claim for general average, the burden is on him to establish the liability & show the amount. —BURPEE *v.* CARVILL (1875), 16 N. B. R. (3 Pug.) 141.—CAN.

**q.** *Market value at time when tort committed.*]—On Aug. 18, 1921, pltf. co. had shipped 602 bags of shellac, per the *C.* which was then lying in the port of C. bound for P., & had obtained a bill of lading in respect thereof. On the same day fire broke out in the hold in which the shellac was stored owing to the negligence of defts.' servants, & damaged the shellac. Subsequently the shellac was sold. The vessel sailed from C. on Aug. 26, 1921, & completed the discharge of her cargo at P. on Oct. 22, 1921:—*Held:* pltf. co. was entitled to damages on the basis of the market value of the goods at the time when the tort was committed, *i.e.* at C.—ROGERS PYATT SHELLAC CO. *v.* KING (JOHN) & CO., LTD. (1925), I. L. R. 53 Calc. 239.—IND.

CO., LTD. *v.* CLAN LINE STEAMERS, LTD. (1921), 37 T. L. R. 866, C. A.

.]—*See, further,* DAMAGES, Vol. XVII., pp. 104–106

*C. Short Delivery.*

**3826. Error in apportioning goods.**]—Bills of lading for undivided portions of a bulk cargo of grain contained the following clause & note in margin: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage &/or sweepings, if any."

"Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage & damage, if any."

By an error in apportioning damaged grain one consignee received a full consignment of sound grain. One of the other consignees, refusing to accept more than his proportionate share of damaged grain, received a consignment which was 108 quarters short. In an action for short delivery:—*Held:* the error was caused by the consignees' agents, & the clause in the bills of lading cast no duty on the shipowner to apportion the good & unsound grain.—GRANGE & CO. *v.* TAYLOR (1904), 90 L. T. 486; 52 W. R. 429; 20 T. L. R. 386; 48 Sol. Jo. 353; 9 Asp. M. L. C. 559; 9 Com. Cas. 223.

**3827. Measure of damages—Actions by shippers against charterers—Liability of shipowner for costs & damages recovered.**]—BLYTH *v.* SMITH, No. 3411, *ante.*

**3828. —— Effect of indemnification allunde.**]—H. was a shipowner, & L. loaded a quantity of barley on his ship & received bills of lading. The ship was unable to load the whole of the barley, & L. agreed to indemnify the holder of the bills of lading. One bill of lading came into the hands of B., who handed it to M., & M. advanced £5,057 16*s.* 4*d.* upon it. M. received less than the quantity of barley covered by his bill of lading, as the holders of the other bills took delivery first from the agents of H., & he called upon B. to make good the deficiency, which he did by making certain payments & delivering some barley. M. sold the barley, & rendered B. an account showing a balance remaining due on the transaction from B. of £12 1*s.* 9*d.* Afterwards B. failed, owing M. some £1,651:—*Held:* as between M. & H., M. had the full property in the barley covered by his bill of lading, & H. had been guilty of a conversion, but M. could only recover £12 1*s.* 9*d.* as damages.—MONTGOMERY *v.* HUTCHINS (1905), 94 L. T. 207; 10 Asp. M. L. C. 223.

*D. Wrongful Delivery.*

**Delivery without requiring production of bill of lading.**]—*See* Nos. 3589, 3590, *ante.*

**3829. Delivery to wharfinger—Under supposed claim of wharfinger's lien—Trover.**]—When the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, the owner upon demand & denial may maintain trover against the captain, unless the latter can establish the wharfinger's rights.—SYEDS *v.* HAY (1791), 4 Term Rep. 260; 100 E. R. 1008.

*Annotations:*—**Refd.** Gatliffe *v.* Bourne (1838), 5 Scott, 667. **Mentd.** Moon *v.* Raphael (1835), 2 Bing. N. C. 310; R. *v.* Wynn (1887), 56 L. T. 749.

*E. Negligent Discharge.*

**3830. Delivery in lighters—Lighter insufficiently made fast to steamer.**]—WARRENER *v.* CHRISTY (1854), 7 L. T. 166.

**3831. Lumpers using can hooks instead of slings.**]—THE VESTA, OEBRICKS *v.* ROBINSON (1854), 7 L. T. 398.

**PART VII. SECT. 7, SUB-SECT. 9.—C.**

r. *What amounts to short delivery.*]—Chains attached together for the purpose of delivery compose one whole, & delivery of one cannot be held made unless the whole are delivered.—MCMASTER & WALKER (1858), 8 L. C. R. 171.—**CAN.**

t. *Mixing goods.*]—WADDELL *v.* MACBRIDE (1858), 7 C. P. 382.—**CAN.**

a. *Notice of loss.*]—A consignee who complains of short delivery or damage to goods ought to protest with all possible diligence in order that the alleged loss may be investigated.—GAHERTY *v.* TORRANCE (1862), 6 L. C. J. 313; 13 L. C. R. 401.—**CAN.**

b. *Evaporation caused by heating.*]—Deft. carried a large quantity of oats for pltf. to B., & pltf. brought action for short delivery. Deft. pleaded evaporation caused by heating, due, as he alleged, partly to the excessive warmth of the season & partly to delay on the part of pltf. in taking delivery of the cargo, which was the fault of pltf. himself:—*Held:* a carrier is bound to deliver all the cargo entrusted to him, unless the loss or damage is proved to have been occasioned by causes for which he is in no way responsible, & the heating of the cargo during the voyage must be held to be a sufficient cause of diminution up to 3 per cent. of the cargo in such case.—SEYMOUR *v.* SINCENNES (1869), 1 L. C. L. J. 118; 1 R. L. O. S. 716.—**CAN.**

c. *Short delivery resulting from sales made with knowledge & consent of conveyor—Action by assignee of bill of lading.*]—In an action brought by pltfs., as assignees of a bill of lading against deft., the master of a vessel, for the short delivery of a cargo of produce, the evidence showed that the cargo was the property of T., & was merely shipped to pltfs. to sell on his account, & that the short delivery complained of resulted from the sales made by H., with the knowledge & consent of T.:—*Held:* pltfs. could not recover.—SHATFORD *v.* LE BLANC (1888), 20 N. S. R. (8 R. & G.) 373; 9 C. L. T. 64.—**CAN.**

d. *Claim for short delivery to be made at a certain place within a certain time—Reasonable condition.*]—BRITISH INDIA STEAM NAVIGATION CO., LTD. *v.* HAJEE MAHOMED ESACK & CO. (1881), I. L. R. 3 Mad. 107.—**IND.**

e. *No evidence as to how goods were lost—Onus of proof.*]—BRITISH INDIA STEAM NAVIGATION CO. *v.* RAT ANSIRAMJI (1896), I. L. R. 22 Bom. 184.—**IND.**

f. *Condition as to marking goods not complied with—Reasonableness of condition.*]—ROWE & SONS, LTD. *v.* UNION S.S. CO. OF NEW ZEALAND, LTD. (1909), 29 N. Z. L. R. 97.—**N.Z.**

g. *Proof of shipping of quantity mentioned in bill of lading—Necessity for.*]—An action at the instance of onerous indorsees of a bill of lading against the ship's owner for short delivery is irrelevant, unless it be averred that the quantity mentioned in the bill of lading was shipped.—M'LEAN & HOPE *v.* MUNCK (1867), 5 Macph. (Ct. of Sess.) 893; 39 Sc. Jur. 504.—**SCOT.**

h. *Goods measured by weight—Slight discrepancy between weight stated on bill of lading & that ascertained on delivery.*]—HORSLEY *v.* GRIMOND (1894), 21 R. (Ct. of Sess.) 410.—**SCOT.**

**PART VII. SECT. 7, SUB-SECT. 9.—D.**

k. *Error caused by absence or obliteration of marks.*]—A bill of lading exempted the owners from errors caused by absence or obliteration of marks. Owing to defective marks the cargo was discharged at a wrong destination, & after delay was shipped to the proper destination & there arrived in a damaged condition:—*Held:* as the owners admitted receipt of the cargo in good order & condition, the *onus* was on them to show that the damage was not due to their negligence; the absence of marks did not affect the matter.—JURIDINI *v.* DEUTSCHE OOST-AFRIKA LINIE (1905), 19 E. D. C. 74.—**S. AF.**

**PART VII. SECT. 7, SUB-SECT. 9.—E.**

l. *Discharge in open roadstead in bad weather—Accident.*]—In the act of discharging into a boat alongside, a hogshead of brandy was held on the mainrail for a steady chance to lower it; the ship then gave a heavy roll, which took the hogshead out of the men's hands, & dashed it against the ship's side, whereby the contents were lost:—*Held:* the shipmaster was not liable, the loss being considered accidental, consequent on having to discharge cargo in an open roadstead in bad weather.—MILNE *v.* GRIERSON (1862), 7 L. T. 102.—**CEYLON.**

m. *Loss through defects in gearing*

*Sect. 7.—The unloading: Sub-sect. 9, E.; sub-sect. 10. Sect. 8: Sub-sects. 1 & 2, A. & B. (a).]*

**3832. Mast of vessel breaking through insufficiency of tackle.**]—BARNARD *v.* AARON (1862), 7 L. T. 24; *subsequent proceedings, sub nom.* BURNARD *v.* AARON & SHARPLEY, 31 L. J. C. P. 334.

**Liability for act of independent contractor—Stevedores employed to discharge cargo.**]—*See* MASTER & SERVANT, Vol. XXXIV., p. 25, Nos. 44, 45; NEGLIGENCE, Vol. XXXVI., p. 99, Nos. 661, 662.

SUB-SECT. 10.—LIEN.

*See* Sect. 13, *post.*

## SECT. 8.—DEMURRAGE.

### SUB-SECT. 1.—IN GENERAL.

**3833. Who may sue—Master—On implied promise to pay demurrage.**]—The master of a ship cannot maintain *assumpsit* in his own name upon an implied promise to pay demurrage.—BROUNCKER *v.* SCOTT (1811), 4 Taunt. 1; 128 E. R. 226.

*Annotations:*—**Distd.** Cawthron *v.* Trickett (1864), 15 C. B. N. S. 754. **Refd.** Evans *v.* Forster (1830), 1 B. & Ad. 118; Moeller *v.* Young (1855), 5 E. & B. 7; Smith *v.* Sieveking (1855), 4 E. & B. 945.

**3834.** —— —— ——.]—The master of a ship who by the bill of lading has undertak n to deliver goods to the consignee on payment of freight, cannot maintain an action against the consignee on an implied contract to pay demurrage.—EVANS *v.* FORSTER (1830), 1 B. & Ad. 118; L. & Welsb. 285; 8 L. J. O. S. K. B. 348; 109 E. R. 731.

*Annotations:*—**Refd.** Smith *v.* Sieveking (1855), 4 E. & B. 945; Cawthron *v.* Trickett (1864), 15 C. B. N. S. 754.

**3835. —— Partnership in freight—Demurrage clause collateral to partnership.**]—Pltf., having chartered a steamer, agreed with defts. to take out some engines in her to Barcelona, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained (*inter alia*) the following condition. (*b*) That she should not be required to lie on her berth longer than ten days.

The steamer was put on her berth at Liverpool, &, by consent of her owner, the beams in her hatchways were removed, for the stowage of the engines, at the joint expense of pltf. & defts. The engines, which exceeded 20 cwt. in weight, were then brought alongside; & it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the shipowner to the further widening of the hatchways was thereupon obtained, on condition that the ship should, before sailing, be made right, to the satisfaction of Lloyd's surveyor. In consequence of the necessary delay for widening the hatchways & making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten. Pltf. having brought this action, on the second clause of the agreement, for demurrage in respect of the detention by defts. of the ship on her berth beyond ten days:—*Held:* defts. were liable on that clause, it being collateral to & independent of any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect.—BLECH *v.* BALLERAS (1860), 3 E. & E. 203; 29 L. J. Q. B. 261; 2 L. T. 599; 6 Jur. N. S. 1243; 121 E. R. 418.

**3836. Vessel on demurrage—Shipowner not entitled to use vessel for own purposes.**]—Apart from specific provision in the charterparty, a shipowner is not entitled, while the chartered vessel is on demurrage, to use her for his own purposes & to suit his own convenience, *e.g.*, in bunkering her, if by such use she is not available for the purposes of the charterer.—*Re* ROPNER SHIPPING CO., LTD. & CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, [1927] 1 K. B. 879; 96 L. J. K. B. 654; 137 L. T. 221; 43 T. L. R. 384; *sub nom.* ROPNER SHIPPING CO., LTD. *v.* CLEAVES WESTERN VALLEYS ANTHRACITE COLLIERIES, LTD., 32 Com. Cas. 259, C. A.

**3837. Running days—Meaning of—Prevention of waste of time by freighter—In loading & unloading.**]—PRINGLE *v.* MOLLETT, No. 3904, *post.*

—— **Computation of.**]—*See* Sub-sect. 3, C., *post.*

### SUB-SECT. 2.—LIABILITY FOR DEMURRAGE.

*A. Who may be Liable.*

**3838. Party directly responsible for delay.**]—SEEGER *v.* DUTHIE, No. 2804, *ante.*

**3839. Person employed by consignee to sell cargo—After consignment—Liability for demurrage on whole voyage.**]—The charterer of a ship having consigned his cargo to P., who placed it in deft.'s hands to sell it, deft., by an agreement which stated those facts, undertook to pay pltf., the owner of the ship, freight & demurrage, if any were due, & in every respect to put himself in the place of the charterer. Fifty running days were allowed by the charterparty for loading & unloading, & ten for demurrage, at £10 a day. The ship having occupied ninety-five days in loading & unloading, several of which elapsed after the date of deft.'s agreement:—*Held:* he was liable in damages in respect of demurrage for the whole, & a sufficient consideration appeared on the face of the agreement.—BENSON *v.* HIPPIUS (1828), 4 Bing. 455; 3 C. & P. 186; 1 Moo. & P. 246; 6 L. J. O. S. C. P. 64; 130 E. R. 843.

**3840. Holder or assignee of bill of lading.**]—STINDT *v.* ROBERTS, No. 2443, *ante.*

**3841. —— Sufficiency of stipulation in bill of lading & charterparty.**]—The consignee of a bill of lading, which makes the goods deliverable to him or assigns "paying for the goods as per charterparty," does not, by taking the goods at the

*of ship.*]—In discharging a cargo of salt, loaded in bulk, part of the cargo was lost through defects in the gearing of the vessel, by reason of which some of the contents of the buckets in which salt was swung ashore was jerked out, & fell between the ship & quay. The charterparty bore that the cargo was to be brought to & taken from alongside:—*Held:* this obligation had not been implemented, & the ship was liable for the loss.—AVON S.S. CO. *v.* LEASK & CO. (1890), 18 R. (Ct. of Sess.) 280; 28 Sc. L. R. 226.—**SCOT.**

**PART VII. SECT. 8, SUB-SECT. 1.**

n. *Who may sue.*]—The master of a vessel, as master, has no right to sue for demurrage, unless there be an implied contract to pay him the same.—CHANDLER *v.* SYDNEY & LOUISBURG COAL & RY. CO. (1886), M. L. R. 2 S. C. 319; 18 R. L. O. S. 412.—**CAN.**

o. *Demurrage & damages for detention distinguished.*]—Demurrage is agreed damages to be paid for delay of the ship in loading or unloading beyond an agreed period; the distinction between demurrage & damages for detention being that the one is liquidated damages & the other unliquidated.—MOOR LINE, LTD. *v.* DISTILLERS CO., LTD., [1912] S. C. 514; 49 Sc. L. R. 407.—**SCOT.**

**PART VII. SECT. 8, SUB-SECT. 2.—A.**

p. *Consignee — Necessity for agreement to pay freight.*]—SHOVAH *v.* CANADA SUGAR REFINING CO. (1885), 29 L. C. J. 154.—**CAN.**

q. *Charterer — Necessity for agree-*

destination, make himself liable to pay for demurrage in the port of loading, according to the rate stipulated in the charterparty; though there be an express stipulation for a lien on the goods for such demurrage.—SMITH *v.* SIEVEKING (1855), 5 E. & B. 589; 26 L. T. O. S. 177, 182; 1 Jur. N. S. 1135; 4 W. R. 25; 119 E. R. 600, Ex. Ch.

*Annotations:*—**Consd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522; Porteus *v.* Watney (1878), 3 Q. B. D. 534. Möller *v.* Young (1855), 25 L. J. Q. B. 94; Erichsen *v.* Barkworth (1858), 5 Jur. N. S. 517; The Patria (1871), L. R. 3 A. & E. 436; S.S. County of Lancaster *v.* Sharp (1889), 24 Q. B. D. 158; Serraino *v.* Campbell, [1891] 1 Q. B. 283.

**3842. —— No stipulation in bill.**]—CHAPPEL *v.* COMFORT, No. 2404, *ante*.

**3843. —— Liability question of fact.**]—It is a question of fact for the jury, whether the indorsee of a bill of lading is liable for demurrage.—WEGENER *v.* SMITH (1854), 15 C. B. 285; 3 C. L. R. 47; 24 L. J. C. P. 25; 24 L. T. O. S. 76; 139 E. R. 432.

*Annotations:*—**Apld.** Smith *v.* Sieveking (1855), 4 E. & B. 945. **Consd.** Chappel *v.* Comfort (1861), 10 C. B. N. S. 802; Gray *v.* Carr (1871), L. R. 6 Q. B. 522; Porteus *v.* Watney (1878), 3 Q. B. D. 534. **Distd.** S.S. County of Lancaster *v.* Sharp (1889), 24 Q. B. D. 158. **Refd.** Moeller *v.* Young (1855), 5 E. & B. 7; Shadforth *v.* Cory (1863), 11 W. R. 340; The Norway (1864), Brown. & Lush. 226; Fry *v.* Chartered Mercantile Bank of India, London & China (1866), Har. & Ruth. 858; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Sewell *v.* Burdick (1884), 54 L. J. Q. B. 156; Serraino *v.* Campbell, [1891] 1 Q. B. 283; Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998.

**3844. Party to whom delivery order given.**]—A charterparty contained a clause that pltf.s' ship should load a complete cargo at T. & then proceed to London or Tyne Dock "to such ready quay berth as ordered by charterers," & there deliver to the affreighters or assigns; demurrage to be at the rate of £30 per running day. On arrival of the ship at the Millwall Docks, London, a delay occurred by reason of there being no quay berth ready to receive her. She discharged part of the cargo into lighters, & the remainder when she got into a quay berth. Pltfs. claimed a lien on the cargo in respect of such delay, & deposited the cargo with the dock co., with notice not to deliver the same until payment of the amount claimed. Defts., who were the owners of the cargo by virtue of certain delivery orders from the charterers or their assigns, claimed delivery of the cargo, & having paid to the co. the amount claimed by pltfs., gave the co. notice not to part with the same as they disputed pltf.s' lien:—*Held:* defts. were liable for the amount claimed, as the word "ready" was introduced into the charterparty for the protection of pltfs. & defts. were in the same position as the charterers, who under the charterparty were bound to name a quay berth to receive the ship as soon as she was ready to proceed there.—HARRIS *v.* JACOBS (1885), 15 Q. B. D. 247; 54 L. J. Q. B. 492; 54 L. T. 61; 5 Asp. M. L. C. 531, C. A.

*Annotation:*—**Refd.** Restitution S.S. Co. *v.* Pirie (1889), 61 L. T. 330.

**3845. Consignee of cargo—On acceptance of delivery.**]—JESSON *v.* SOLLY, No. 2442, *ante*.

**3846. —— ——.**]—Applts. chartered vessels for the carriage of coal sold by them to resp., who made a contract with them specifying the rate of delivery & the amount payable by resp. for demurrage. The charges for demurrage under the contract exceeded those payable by applts. to the owners under the several charterparties:—*Held:* delivery of the several cargoes having been accepted by resp., applts. were not precluded from recovering demurrage by any breach of contract committed by them. The only remedy of resp. in that case was to sue for damages in respect of such breach.—HOULDER BROTHERS & CO., LTD. *v.* PUBLIC WORKS COMR., PUBLIC WORKS COMR. *v.* HOULDER BROTHERS & CO., LTD., [1908] A. C. 276; 77 L. J. P. C. 58; 98 L. T. 684; 11 Asp. M. L. C. 61, P. C.

**Agents of charterers—Charterparty signed by agents.**]—*See* AGENCY, Supp. III., p. 67, No. 2549a.

**3847. Freighter—Though shipowner's lien on cargo released.**]—HARRISON *v.* SPAITH, No. 2447, *ante*.

**3848. Charterer—Where agreement to share profit & loss with owner.**]—POTTER (JOHN) & CO. *v.* BURRELL & SON, No. 3181, *ante*.

**3849. —— Under colliery guarantee—Not incorporated in charterparty.**]—(1) A "cesser clause" in a charterparty applies not merely to liability for demurrage, but to liability incurred through detention in the nature of demurrage.

(2) A clean bill of lading is a bill of lading which contains nothing in the margin qualifying the words in the bill of lading itself.

(3) It was agreed by charterparty between pltfs., the owners of a steamship, & defts. the charterers, that the ship should proceed to C. & there "load in the usual & customary manner a cargo of coals," & proceed to T. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee, in 108 colliery working hours." The cargo was to be unloaded at a specified rate per day, "or charterers to pay demurrage at the rate of 30*s.* per hour." The master was to sign "clean bills of lading without alteration as presented by charterers." "The charterers' liability under this charter party to cease on the cargo being loaded & the advance freight paid, the owners having a lien on the cargo for the balance of the freight & demurrage." By a colliery guarantee, the proprietors of the colliery undertook to load the ship for defts. in 108 hours. "Demurrage, if any, to be at the rate of 20*s.* per hour." The vessel was not loaded in 108 colliery working hours. In an action for damages for demurrage, or in the alternative for detaining the vessel an unreasonable time at the port of loading:—*Held:* defts. were not liable, as the "cesser clause" in the charterparty covered the claim made by pltfs.

(4) *Semble*, the owners of the ship have no right of action against the charterers under the colliery guarantee unless the guarantee is incorporated with the charterparty; but by the custom of the trade, the owners of the ship have such a right of action against the colliery proprietors.—RESTITUTION S.S. CO. *v.* SIR JOHN PIRIE & CO. (1889), 61 L. T. 330; 5 T. L. R. 641; 6 Asp. M. L. C. 428; *affd.*, 64 L. T. 491, n., C. A.

*Annotations:*—*As to* (1) **Refd.** Clink *v.* Radford (1891), 7 T. L. R. 327. *As to* (3) **Refd.** Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507.

**3850. —— —— Trade usage.**]—RESTITUTION S.S. CO. *v.* SIR JOHN PIRIE & CO., No. 3849, *ante*.

### *B. When Liability Arises.*

#### *(a) In General.*

**3851. General rule—At end of lay days.**]—B. chartered the vessel of T. under terms "to proceed direct to any Liverpool or Birkenhead dock as

*ment to pay freight.*]—SHOVAH *v.* CANADA SUGAR REFINING CO. (1885), 29 L. C. J. 154.—**CAN.**

r. ——.]—FORSYTH *v.* SUTHERLAND (1898), 31 N. S. R. (19 R. & G.) 391.—**CAN.**

t. *Purchaser of part of cargo—Several purchasers—Liability of one purchaser for delay of all.*]—VOLKART BROTHERS *v.* NUSSERVANJI JEHANGIR KHANBATTA (1889), I. L. R. 13 Bom. 392.—**IND.**

*Sect. 8.—Demurrage: Sub-sect. 2, B. (a) & (b).]*

ordered by charterers, & there load in the usual & customary manner a full & complete cargo of coals," the vessel to "be loaded at the rate of 100 tons per working day, loading not to commence before July 1." It was estimated that the time necessary to load the vessel would be twenty-three days. B. indicated a certain dock to which the vessel was to proceed; at this dock B. employed a coal agent who was engaged in a large business there in loading ships. By a rule of the dock only three ships in charge of one agent could be admitted into the dock at one time for the purposes of loading; the loading was usually performed by the coals being "tipped" on board the vessel by means of a "tip" or spout, but on some occasions the coal was conveyed on board within the dock by lighters. T.'s vessel arrived outside the dock for the purpose of taking the cargo on board on July 3, but on that day B.'s agent had already, not only the three ships he was entitled to have inside the dock loading at one time actually within the dock & so engaged, but two more waiting outside ready to enter. Consequently T.'s ship could not enter the dock until July 11, & then in consequence of the coal agent's particular spout being engaged loading other ships, her B.'s vessel, turn for the spout did not arrive until July 23. No attempt was made by the coal agent during this interval to put coals on board by means of lighters, which it was not disputed could have been done. On July 3, B.'s agent not having provided coal, the vessel had to wait until July 29, when the loading actually commenced. In an action for demurrage at the stipulated rate, from July 26 until Aug. 15, when the loading was actually completed, reckoning the time from July 3, when the vessel was ready to enter the dock until July 26, as the twenty-three lay days for loading the vessel:—*Held:* the lay days did not begin when the vessel arrived outside the docks, but as it was usual in the collier trade to employ a loading agent, & as the terms upon which the vessels in charge of such agents were admitted to the docks were made publicly known & were not unreasonable, the lay days should be calculated from the day when the vessel was admitted to the dock in accordance with such terms, viz., July 11, & the commencement of such calculation was on & from that day, & not from the day when the turn of the vessel to go to the spout arrived, & demurrage should be computed from the expiration of such lay days until the loading of the vessel was completed.—TAPSCOTT *v.* BALFOUR (1872), L. R. 8 C. P. 46; 42 L. J. C. P. 16; 27 L. T. 710; 21 W. R. 245; 1 Asp. M. L. C. 501.

*Annotations:*—**Consd.** Ashcroft *v.* Crow Orchard Colliery Co. (1874), L. R. 9 Q. B. 540; Nelson *v.* Dahl (1879), 12 Ch. D. 568; Stephens *v.* Harris (1887), 57 L. J. Q. B. 203; Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647; The Derwent (1901), 84 L. T. 360; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Davies *v.* McVeagh (1879), 4 Ex. D. 265; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599; Kay *v.* Field (1882), 8 Q. B. D. 594; Saunders *v.* Jenkins (1896), 13 T. L. R. 24; Carlton S.S. Co. *v.* Castle Mail Packets Co. (1898), 78 L. T. 661; Watson *v.* Borner (1899), 4 Com. Cas. 335; Armement Adolf Deppe *v.* Robinson, [1917] 2 K. B. 204.

**3852.** —— ——.]—THE ANNA (1901), 18 T. L. R. 25, D. C.

**3853.** —— ——.]—By a charterparty, by which a ship was chartered for the carriage of a cargo from Cardiff to Bermuda, it was provided that "the cargo shall be discharged at the average rate of not less than 210 tons per working day, weather permitting, the time to commence in accordance with the custom of the port; Sundays & all holidays, & time lost through strikes or locks out of workmen, accidents, frosts, floods, rains, winds, rollers, or any other cause whatever beyond the control of the consignee of the cargo, not to count as discharging time: demurrage to be paid at the rate of 4*d.* per net register ton per day, & *pro rata*, employed beyond the time allowed for discharging." The ship arrived at Bermuda with her cargo. The time allowed for discharging began to run at 6 a.m. on Monday, July 15, 1901, & the discharge of the cargo was not completed till 3 p.m. on Monday, July 29. It was admitted that, on the assumption that a fraction of a day was to be taken into consideration, the time allowed, at the rate of discharge mentioned in the charterparty, for discharging the cargo was a period of eleven working days & a portion of a twelfth day, ending at 9 a.m. on Saturday, July 27:—*Held:* upon the true construction of the charterparty, the demurrage began to run at 9 a.m. on Saturday, July 27, & not at the end of that day.—YEOMAN *v.* R., [1904] 2 K. B. 429; 73 L. J. K. B. 904; 52 W. R. 627; 20 T. L. R. 524; 48 Sol. Jo. 491; 9 Com. Cas. 269, C. A.; *affg.* S. C. *sub nom.* YEOMAN'S PETITION OF RIGHT, 47 Sol. Jo. 516.

*Annotations:*—**Consd.** Houlder *v.* Weir, [1905] 2 K. B. 267. **Refd.** Nelson *v.* Nelson Line (Liverpool) (No. 3) (1907), 76 L. J. K. B. 531.

**3854. Necessity for express stipulation.]**—*Indebitatus assumpsit* will not lie for demurrage, unless there be an express contract to pay it.—HORN *v.* BENSUSAN (1841), 9 C. & P. 709; 2 Mood. & R. 326, N. P.

**3855.** ——.]—CHAPPEL *v.* COMFORT, No. 2404, *ante*.

**3856.** ——.]—Defts. purchased on the London Coal Exchange, from factors, who were the consignees, a cargo of coals then on board a vessel in the Thames, & signed a turn paper in these terms: "To the meter appointed to weigh the undermentioned cargo. We, the undersigned, having bought of P. & co. the cargo of coals, to be worked at the rate of 49 tons per working day, hereby direct & require you to work the cargo, & deliver same to us, etc." The document stated that the ship was to be cleared at Dudman's Dock. Some delay took place at Dudman's Dock, from previous arrivals of vessels which had to be cleared before pltf.'s vessel's turn to clear arrived, & the shipowner then brought this action for damages in respect of such detention:—*Held:* the action was not maintainable, as there was no such contract between pltf. & defts. as to render them liable for demurrage for not unloading & discharging the ship at the rate mentioned.—SHADFORTH *v.* CORY (1863), 2 New Rep. 373; 32 L. J. Q. B. 379; 8 L. T. 736; 11 W. R. 918; 1 Mar. L. C. 363, Ex. Ch.

**3857.** ——.]—Goods were shipped on board pltfs.' vessel under a bill of lading in which defts. were named as consignees. The property in the goods had not passed to defts. by reason of the consignment within Bills of Lading Act, 1855 (c. 111), & they were, & were known by pltfs. to

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**3854 i.** *Necessity for express stipulation.*]—Deft., the owner of wheat, shipped it on board pltf.'s vessel consigned to M. The bill of lading made the freight payable by the consignees, but contained nothing as to the days allowed for unloading or demurrage. The vessel was delayed at M. several days, in transferring the wheat into a ship, which the consignees ordered pltf. to put it on board of; & pltf. sued as upon a contract by deft. to receive the wheat from him within a reasonable time after arrival:—*Held:* such a contract was to be implied from the bill of lading & evidence.—KEMP *v.* MCDOUGALL (1864), 23 U. C. R. 380. —CAN.

acting as agents. By the bill of lading, the cargo was to be delivered on payment of freight "& other conditions as per charterparty." By the charterparty demurrage was payable, & pltfs. had a right of lien in respect thereof. Before the arrival of the vessel at the port of discharge pltfs. informed defts. that demurrage was payable in respect of delay at the port of loading. Defts. refused to pay demurrage, but paid the freight, & took delivery of part of the cargo, pltfs. exercising their lien for demurrage over the residue :—*Held :* there was no evidence of a contract on the part of the defts. to pay demurrage.—S.S. COUNTY OF LANCASTER *v.* SHARP & Co. (1889), 24 Q. B. D. 158 ; 59 L. J. Q. B. 22 ; 61 L. T. 692 ; 6 Asp. M. L. C. 448, D. C.

**3858.** ——.]—THE KINGSLAND, No. 3739, *ante.*

**3859.** —— **Claim for delay beyond agreed demurrage days.**]—By a charterparty, under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading & delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require" : the ship having been compelled to put into an intermediate port of her ports of loading & discharge, & the freighter having detained the vessel ten days there, & also fourteen days more than ten days at the port of delivery, in an action on the charterparty :—*Held :* the master could not recover on this covenant for more than the ten days demurrage, at £5 per day, at the port of London, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading & discharge ; & a breach, averring that pltf. did not pay £5 per day for demurrage for the extra delay beyond the ten days at the port of delivery, & the delay at Bristol, as well as for the demurrage for ten days' delay at the port of delivery, was bad.—STEVENSON *v.* YORK (1790), 2 Chit. 570.

**3860.** —— **Claim for delay at ports other than specified — Intermediate ports.**]—STEVENSON *v.* YORK, No. 3859, *ante.*

**3861.** —— —— ——.]—In an action of covenant for demurrage on a charterparty given "while waiting at Portsmouth for convoy, & discharging her cargo at Barcelona," pltf. can only claim demurrage at those two places ; not for any delays at other intervening places.—MARSHALL *v.* DE LA TORRE (1795), 1 Esp. 367 ; 170 E. R. 387, N. P.

**3862.** —— —— **Demurrage relating only to port of loading.**]—ALCOCK *v.* TAYLOR (1837), 1 Jur. 513 ; *previous proceedings* (1836), 6 Nev. & M. K. B. 296.

**3863.** —— —— ——.]—By a charterparty it was agreed that the ship, then lying at Genoa, should sail "on or before July 30, 1859," to Monte Video & Lima, with goods for third parties, & thence proceed with all convenient dispatch to Callao where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, & to the owners for taking in certain specified light freight, & thirty days over & above the lay days, at £7 per day ; & then came the following provision,—"Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation." The vessel did not leave Genoa until Sept. 8 :—*Held :* this was **not** a detention during the "voyage," within the meaning of the penalty clause.—VALENTE *v.* GIBBS (1859), 6 C. B. N. S. 270 ; 28 L. J. C. P. 229 ; 33 L. T. O. S. 146 ; 5 Jur. N. S. 1213 ; 7 W. R. 500 ; 141 E. R. 459.

*Annotation :*—**Consd.** Barker *v.* M'Andrew (1865), 18 C. B. N. S. 759.

**3864.** —— —— **Demurrage relating only to port of discharge.**]—By a charterparty made with deft., pltf.'s ship was to proceed to W., & there load a cargo "in the customary manner," & proceed to R. & deliver, "the cargo to be discharged in ten working days (weather permitting), commencing, etc. Demurrage at £2 per 100 tons reg. per day. . . . The ship to have an absolute lien on cargo for freight & demurrage, the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship." The customary rate of loading at W. was proved to be twenty tons a day :—*Held :* the clauses for lien & for exemption of the charterer applied only to demurrage at the port of discharge, not to damages for delay at the port of loading.—LOCKHART *v.* FALK (1875), L. R. 10 Exch. 132 ; 44 L. J. Ex. 105 ; 33 L. T. 96 ; 23 W. R. 753 ; 3 Asp. M. L. C. 8.

*Annotations :*—**Consd.** Clink *v.* Radford, [1891] 1 Q. B. 625. **Apld.** Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507. **Consd.** Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352. **Refd.** G. W. Ry. *v.* Phillips, [1908] A. C. 101 ; Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998.

**3865.** —— **Agreement limiting lay days insufficient.**]—Where a ship was let to freight by charterparty from pltf. to deft., a clause in the deed—"& it is hereby covenanted & agreed by & between the parties that forty days shall be allowed for unloading & loading again, etc." :—*Held :* to raise an implied covenant on the part of the freighter not to detain the ship for loading & unloading, etc., beyond the forty days & if he detain her for any longer time the owner's remedy is upon that covenant, & not in *assumpsit*, as upon an implied new contract.—RANDALL *v.* LYNCH (1810), 12 East, 179 ; 2 Camp. at p. 356 ; 104 E. R. 71.

*Annotations :*—**Consd.** Brown *v.* Johnson (1842), 10 M. & W. 331. **Apld.** Thiis *v.* Byers (1876), 1 Q. B. D. 244. **Refd.** Ford *v.* Cotesworth (1868), L. R. 4 Q. B. 127 ; Norden S.S. Co. *v.* Dempsey (1876), 1 C. P. D. 654 ; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599. **Mentd.** Edwards *v.* Vere (1833), 5 B. & Ad. 282 ; Wright *v.* Goddard (1838), 8 Ad. & El. 144 ; Ivens *v.* Elwes (1854), 3 Eq. Rep. 163.

**3866. Effect of stipulation—Where no time fixed.**]—Where a charterparty provides for demurrage, but not for any fixed time, it is the duty of the ship, if she has not loaded her full cargo within the lay days, to wait for a reasonable time longer.—WILSON & COVENTRY, LTD. *v.* OTTO THORESEN'S LINIE, [1910] 2 K. B. 405 ; 79 L. J. K. B. 1048 ; 103 L. T. 112 ; 26 T. L. R. 546 ; 54 Sol. Jo. 655 ; 11 Asp. M. L. C. 491 ; 15 Com. Cas. 262.

*Annotations :*—**Expld.** Western S.S. Co. *v.* Amaral, Sutherland, [1913] 3 K. B. 366. **Dbtd.** Inverskip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193. **Refd.** Proctor, Garratt, Marston *v.* Oakwin S.S. Co. (1925), 133 L. T. 633 ; *Re* Ropner Shipping Co. & Cleeves Western Valleys Anthracite Collieries (1927), 137 L. T. 221.

*(b) Particular Causes of Delay.*

**3867. International dispute.**] — STRINGER *v.* GIMMELL (1843), 1 L. T. O. S. 259.

**3868. Strike.**]—BUDGETT & Co. *v.* BINNINGTON & Co., No. 3609, *ante.*

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**3868 i.** *Strike.*]—GRANITE CITY S.S. Co., LTD. *v.* IRELAND & SON (1891), 19 R. (Ct. of Sess.) 124 ; 29 Sc. L. R. 115.—**SCOT.**

**3868 ii.** ——.]—LILLY & Co. *v.* STEVENSON (D. M.) & Co. (1895), 22 R. (Ct. of Sess.) 278 ; 32 Sc. L. R. 212.—**SCOT.**

**3868 iii.** ——.]—A charterparty, which allowed ten days on demurrage

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**3869.** ——.]—Deft. chartered a steamship from pltfs., who were the owners, to take a cargo of flour from Hull to London & there deliver the cargo " as ordered, or so near thereto as she may safely get." The charterparty also provided that the cargo was to be discharged in two " weather working " days, & if the vessel was longer delayed demurrage was payable. The charterer ordered the vessel to go to Keen's Wharf in the Thames, but owing to a strike in the port she could not get to the wharf, & was ordered by the harbour-master to East-lane Tier, a quarter of a mile away. After 17 days' delay she was taken to Chatham & there discharged. Strike was not one of the perils excepted in the charterparty. Pltfs. brought an action against deft. to recover 17 days' demurrage :—*Held :* the ship had never become an arrived ship & therefore demurrage was not payable.—THE FOX (1914), 83 L. J. P. 89 ; 30 T. L. R. 576, C. A.

**3870.** ——.]—Pltfs., who were the owners of a sailing ship under charter to the Wheat Commission, made an agreement with defts., who were the receivers of the cargo, whereby defts. agreed to discharge the cargo. During the discharge the labourers demanded additional wages, & defts., who considered the demand unjustified, & who were under an agreement with the Flour Committee of the Wheat Commission to make no change in the rate of wages without the consent of the committee, refused to pay the additional wages until the committee authorised them to do so. The result was that the work was suspended for some weeks, but, the authority of the committee having been given, defts. gave way & the discharge was completed. In an action for demurrage :—*Held :* defts. were not bound to do more than take all steps which were reasonable in the circumstances, & as their action in refusing to pay the extra wages was reasonable in the circumstances they were not liable in respect of the delay caused thereby.—STEWART (J.) & CO. *v.* RANK (J.), LTD. (1920), 36 T. L. R. 728.

**3871. Frost or ice.**]—THOMPSON *v.* WAGNER (1815), 4 Camp. 335, n. ; 171 E. R. 107, N. P.

**3872.** ——.]—By a charterparty it was stipulated that the vessel should proceed to S. for orders. When she arrived there she was ordered to B. to load a full cargo of wheat. Seventeen running days, Sundays & any other recognised holidays excepted were to be allowed for loading & unloading, & the days on demurrage over & above the said lay days, at £40 per running day. By clause 11 : " Except as herein provided, detention by frost or ice from B. down to S. . . . shall not count as lay days." On Dec. 10, the vessel, by direction of the charterers, entered the dock at B. to load part of her cargo. On Dec. 12 the dock became frozen over & it became impossible for the vessel to be moved & she remained there until Apr. :—*Held :* clause 11 must be construed to mean that if there was ice which prevented the loading & that ice was within the limits specified, that is to say, from B. down to S., the charterers were entitled to rely upon the fact of ice being in the dock at B. as a cause of prevention.—MICHALINOS & CO. *v.* DREYFUS (L.) & CO. (1924), 131 L. T. 177 ; 40 T. L. R. 370 ; 68 Sol. Jo. 645 ; 16 Asp. M. L. C. 330 ; 29 Com. Cas. 221, C. A.

**3873. Foul weather.**]—THIIS *v.* BYERS, No. 3676, *ante.*

**3874. Failure to discharge at usual rate.**]—THE NORVAL, BILLING *v.* CORY (1856), 6 L. T. 370.

**3875.** ——.]—THE NESTOR, WRIGHT *v.* RICKETT (1857), 6 L. T. 370.

**3876.** ——.]—By charterparty, pltf., a shipowner, engaged to receive & load on board his vessel, at Liverpool, a full & complete cargo of coal " to be loaded with the usual dispatch of the port," " or, if longer detained, to be paid 40*s.* per day demurrage." The vessel was to " load in the Bramley Moore or Wellington Docks, High Level Railway," by the published regulations of which no coal agent was allowed to have more than three vessels in these docks at the same time. Defts. acted as their own coal agents ; & in consequence of their having other vessels with previous engagements, pltf.'s vessel, although ready, could not be loaded until her turn after defts.' other chartered vessels. In an action for demurrage in respect of this delay :—*Held :* the contract of defts. to load with the usual dispatch of the port was absolute, & could not be excused by their other engagements, even if pltfs. has been aware of them.—ASHCROFT *v.* CROW ORCHARD COLLIERY CO. (1874), L. R. 9 Q. B. 540 ; 43 L. J. Q. B. 194 ; 31 L. T. 266 ; 22 W. R. 825 ; 2 Asp. M. L. C. 397.

*Annotations :*—**Consd.** Davies *v.* McVeagh (1879), 4 Ex. D. 265 ; Nelson *v.* Dahl (1879), 12 Ch. D. 568. **Expld.** Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599. **Distd.** Murphy *v.* Coffin (1883), 12 Q. B. D. 87. **Consd.** Tillett *v.* Cwm Avon Works Proprietors (1886), 2 T. L. R. 675 ; **Distd.** The Derwent (1901), 84 L. T. 360. **Expld.** Harrowing *v.* Dupré (1902), 18 T. L. R. 594. **Apld.** Hogarth *v.* Cory (1926), 136 L. T. 172. **Refd.** Watson *v.* Borner (1899), 4 Com. Cas. 335 ; Van Liewen *v.* Hollis, [1920] A. C. 239.

beyond the lay days at a certain rate, contained a clause providing that the days for discharging should not count during the continuance of a strike, & also providing that in case of delay " by reason of " a strike no " claim for damages " should lie. The ship was detained at the port of discharge for four days beyond the lay days, not owing to the continuance of a strike, but owing to congestion following on the termination of a strike. In an action for demurrage for these four days :—*Held :* the detention was a " delay by reason of " a strike, which excluded claims for damages, & claims for damages for delay were not limited to claims for detention beyond the demurrage period, but included claims for demurrage.—MOOR LINE, LTD. *v.* DISTILLERS CO., LTD., [1912] S. C. 514 ; 49 Sc. L. R. 407.—**SCOT.**

**3868 iv.** ——.]—A charterparty, which allowed ten days on demurrage beyond the lay days at a specified payment per day, contained a clause providing that, if the cargo could not be discharged " by reason of " a strike or lockout, " the days " should not count during the continuance thereof, & also providing that " in case of any delay by reason of the before-mentioned causes no claim for damages " should lie. Owing to congestion at the port of discharge, due to a strike which had ended before the vessel arrived, she did not obtain a berth until the expiry of the lay days, & ten days were required for her discharge. In an action for a sum representing demurrage for these ten days :—*Held :* as the strike had terminated before the ship's arrival, the clause of exemption was inapplicable, & decree granted.—WESTOLL *v.* LINDSAY, [1916] S. C. 782 ; 53 Sc. L. R. 608.—**SCOT.**

**3868 v.** ——.]—In an action for demurrage against the charterers they pleaded a clause of exception, averring that the delay had been caused by a strike :—*Held :* defenders were liable in demurrage, in respect that, even if the strike were the direct cause of the delay, which was not proved, the failure of the charterers to contract for the timeous delivery of the cargo was a failure to take reasonable measures to prevent avoidable delay, which excluded them from the benefit of the exception in the charterparty.—DAMPSKIBSSELSKABET DANMARK *v.* POULSEN & Co., [1913] S. C. 1043.—**SCOT.**

**3868 vi.** ——.]—In an action by shipowners against the endorsees for demurrage :—*Held :* the strike clause in the charterparty was intended solely for the benefit of the shipowners, & not for the benefit of the charterers ; but, in any event, the connection of the strike with the delay was so remote as to make the strike clause inapplicable.—SCHELE *v.* LUMSDEN & CO., [1926] S. C. 709 ; 53 Sc. L. R. 581 ; [1916] 1 S. L. T. 390.—**SCOT.**

**3873 i.** *Foul weather.*]—The state of the weather will not relieve the charterer from demurrage unless so stated in the charterparty.—STEER *v.* PHILLIP (1892), 7 Nfld. L. R. 586.—**NFLD.**

**3877. Inability of consignee to remove cargo—Through delay of other consignees.**]—A general ship took brandies on board, under bills of lading, which allowed twenty lay days for delivery of the goods in London, & stipulated for £4 per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks until forty-six days after the twenty days: some of the goods, which were undermost, could not, though demanded, be taken out till the upper tiers were cleared:—*Held:* each of those consignees was liable, on a general count for demurrage, to pay the £4 per day for the forty-six days. —LEER *v.* YATES (1811), 3 Taunt. 387; 128 E. R. 154.

*Annotations:*—**Apld.** Harman *v.* Gandolph (1815), Holt, N. P. 35. **Dbtd.** Rogers *v.* Hunter (1827), Mood. & M. 63. **Distd.** Kell *v.* Anderson (1842), 10 M. & W. 498. **Apprvd.** Porteus *v.* Watney (1878), 3 Q. B. D. 534. **Refd.** Brereton *v.* Chapman (1831), 7 Bing. 559; Thlis *v.* Byers (1876), 1 Q. B. D. 244.

**3878.** —— ——.]—If a bill of lading stipulate for the payment of demurrage by the consignee of goods after a limited time from the ship's arrival, & his goods are so stowed as not to admit of delivery immediately on arrival, the consignee must have a reasonable time to discharge them, & is not liable to demurrage till after such reasonable time, though the stipulated period has elapsed from the ship's being ready to deliver her cargo generally. But after such reasonable time, he is liable, though the stipulated period has not elapsed, if computed from the time when the discharge of his own goods might have commenced.—ROGERS *v.* HUNTER (1827), 2 C. & P. 601; Mood. & M. 63; 172 E. R. 273, N. P.

*Annotations:*—**Expld.** Dobson *v.* Droop (1830), Mood. & M. 411. **Consd.** Ford *v.* Cotesworth (1870), 10 B. & S. 991. **N.F.** Porteus *v.* Watney (1878), 3 Q. B. D. 534. **Consd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626. **Refd.** Dahl *v.* Nelson, Donkin (1881), 50 L. J. Ch. 411; Hick *v.* Raymond & Reid, [1893] A. C. 22.

**3879.** —— ——.]—Where a bill of lading stipulates for demurrage after a certain time, the owner can only recover for the time during which the goods remain owing to the default of the consignee. —DOBSON *v.* DROOP (1830), 4 C. & P. 112; Mood. & M. 441; 172 E. R. 630, N. P.

*Annotation:*—**N.F** Porteus *v.* Watney (1878), 3 Q. B. D. 534.

**3880.** —— ——.]—(1) A charterparty entered into between pltfs. & B. & co. for the conveyance of grain from C. to L. stipulated that fourteen working days were to be allowed for loading & unloading at the port of discharge, & ten days on demurrage at £35 a day. The vessel having been loaded, one of the bills of lading was indorsed to the defts. Defts.' grain was stowed at the bottom of the main hold, & that of the other shippers on the top of it. The bill of lading, indorsed to defts. contained the words "paying freight for the same goods & all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of defts.' having failed to take away their goods within the lay days, defts. were unable to obtain delivery of their grain, & three days' demurrage was incurred:—*Held:* defts. were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees.

(2) The bill of lading is, "on paying freight for the same goods, & all other conditions, as per charterparty." . . . Those words in a bill of lading are to be treated as words of reference to the charterparty & they therefore introduce into the bill of lading every condition that is in the charterparty by way of preference; so that they bring into the bill of lading every condition of the charterparty in its terms, & make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely & absolutely insensible & inapplicable, they must be struck out (BRETT, L.J.).—PORTEUS *v.* WATNEY (1878), 3 Q. B. D. 534; 47 L. J. Q. B. 643; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. L. C. 34, C. A.; *affg.* S. C. *sub nom.* STRAKER *v.* KIDD, PORTEUS *v.* WATNEY, 3 Q. B. D. 223.

*Annotations:*—*As to* (1) **Apld.** Budgett *v.* Binnington, [1891] 1 Q. B. 35. **Refd.** Hick *v.* Rodocanachi, [1891] 2 Q. B. 626; Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 54; Cantiere Navale Triestina *v.* Handelsvertretung der Russ. Soz. Föd. Soviet Republik Naphtha Export, [1925] 2 K. B. 172. *As to* (2) **Consd.** Gullischen *v.* Stewart (1883), 11 Q. B. D. 186; Serraino *v.* Campbell, [1891] 1 Q. B. 283; United States Shipping Board *v.* Durrell, [1923] 2 K. B. 739. **Refd.** Grange *v.* Taylor (1904), 90 L. T. 486. *Generally*, **Refd.** Allen *v.* Coltart (1883), 11 Q. B. D. 782; Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998; The Lizzie, [1919] P. 22.

**3881. Refusal of charterer to load—On discovery of error in statement of tonnage.**]—The agents of the shipowner before the making of the charterparty stated that the vessel was not more than 200 tons burden as they believed, & thereupon a charterparty was signed stating the vessel to be of the measurement of 180 to 200 tons or thereabouts, & the charterer undertook to load a complete cargo. It turned out that the vessel held 257 tons, & upon ascertaining this the charterer refused to load the vessel, whereupon the owner rechartered her:—*Held:* the owner was entitled to recover damages from the charterer, viz. the difference of freight between that agreed to by defts. & that at which she was rechartered, & also demurrage for the days between her arrival in England & the days on which the negotiation for an arrangement was broken off.—BARKER *v.* WINDLE (1856), 6 E. & B. 675; 2 Jur. N. S. 1069; 4 W. R. 603; 119 E. R. 1015; *sub nom.* WINDLE *v.* BARKER, 25 L. J. Q. B. 349; 27 L. T. O. S. 206, Ex. Ch.

*Annotations:*—**Refd.** Wheelton *v.* Hardisty (1857), 8 E. & B. 285; Behn *v.* Burness (1862), 1 B. & S. 877; Corkling *v.* Massey (1873), 42 L. J. C. P. 153.

**3882. Congestion in dock.**]—MILVERTON SAILING SHIP CO., LTD. *v.* CAPE TOWN & DISTRICT GAS LIGHT & COKE CO., LTD., No. 2770, *ante*.

**3882 i.** *Congestion in dock.*]—The discharge of the cargo of a vessel occupied several days beyond the lay days stipulated in the charterparty. The crew worked with reasonable diligence, but it was impossible for them without assistance to discharge the cargo within the stipulated time. In an action for demurrage at the instance of the master:—*Held:* the consignee was liable for two days' delay caused by the vessel being unable to find a berth at the quay.—HANSEN *v.* DONALDSON & SONS (1874), 1 R. (Ct. of Sess.) 1066; 11 Sc. L. R. 590.—**SCOT.**

**3882 ii.** ——.]—HARRIS *v.* HAYWOOD GAS COAL CO. (1877), 14 Sc. L. R. 605. —**SCOT.**

**3882 iii.** ——.]—A clause in a charterparty stipulating for demurrage excepted from the hours named for loading & discharging "detention by cranes" "or any other unavoidable cause." In an action for demurrage at the instance of the shipowners against the charterers:—*Held:* the failure of the ship to get a berth, & cranes at the port of loading, owing to a congestion of other ships in the port, was not "detention by cranes" within the exception; & the words, "or any other unavoidable cause," must be construed *ejusdem generis* with the previous enumerated exception which fell under the class of a breakdown in the arrangements, & did not cover failure to obtain a berth through congestion of ships.—ABCHURCH S.S. CO., LTD. *v.* STINNES, [1911] S. C. 1010; 48 Sc. L. R. 865; [1911] 2 S. L. T. 72.—**SCOT.**

**3882 iv.** ——.]—HALVORSEN *v.* SOUTH AFRICAN LIGHTING ASSOCN., LTD. (1902), 16 E. D. C. 58.—**S. AF.**

*Sect. 8.—Demurrage: Sub-sect. 2, B. (b) & C.*]

**3883. Inadequate means of unloading.**] — JOHNSON *v.* BELL (1840), 6 L. T. 257, N. P.

**3884.** ——.]—PETERSEN *v.* FREEBODY & Co., No. 3604, *ante.*

**3885. Transfer of ship to less congested dock—Delay through merchants' refusal to share expense of transfer.**]—The Commercial Docks, to which a ship was ordered, being full, the merchants directed her to be taken into the Grand Surrey Canal; but, as they would not agree to bear some portion of the expense of going up the river, the master declined to do so. Demurrage held to be due as claimed by him in terms of charterparty.—THE URANIA, EBERT *v.* WYNDHAM (1854), 6 L. T. 257.

**3886. Removal of cargo for reconditioning.**]—By a charterparty it was agreed that the ship should proceed to Leith & to London & there load cargo to be shipped by the charterers; & that a stevedore should be "appointed by the charterers in London only, but employed & paid for by owners." Cargo was loaded at Leith by the charterers, no information as to the London cargo being then asked for by the captain. On the voyage to London, owing to bad weather, some of the cargo was damaged & some was shifted. After the arrival of the vessel at London it was necessary to land the damaged cargo to be reconditioned, & to restow the cargo which had shifted. It also became necessary to shift some of the cargo to enable the London cargo to be properly stowed. Owing to these matters, & to some delay on the part of the stevedore who had been appointed under the terms of the charterparty, three days more than those allowed by the charterparty were occupied in loading at London:—*Held:* (1) the stevedore was the servant of the owners, & the charterers were not liable for demurrage arising either from his delay or from the necessity of moving the cargo; & (2) the charterers were not liable for any of the expenses of moving the cargo because they were either expenses of stowage or of work done for the benefit of the cargo without the authority of the charterers.—HARRIS *v.* BEST, RYLEY & Co. (1892), 68 L. T. 76; 9 T. L. R. 149; 7 Asp. M. L. C. 272; 4 R. 222, C. A.

**3887. Delay caused by stevedore—Stevedore employed & paid by owner—Appointed by charterer.**]—HARRIS *v.* BEST, RYLEY & Co., No. 3886, *ante.*

**3888. Mismanagement by master & crew.**]—In an action on a charterparty, against the charterer, for not loading within a reasonable time, & for not loading in turn:—*Held:* a condition precedent to the right of pltf. to recover, that the ship should have been in a condition to receive the cargo; &, therefore, upon issues raised, whether deft. did load within a reasonable time, & whether they loaded in turn, they were at liberty to give in evidence circumstances which showed that they had been prevented from loading so soon as they otherwise might, by the negligence & fault of the master & crew.—TAYLOR *v.* CLAY (1846), 9 Q. B. 713; 16 L. J. Q. B. 44; 8 L. T. O. S. 157; 11 Jur. 277; 115 E. R. 1448.

*Annotation:*—**Reld.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3889. Intervention of owner.**] — BENSON *v.* BLUNT, No. 3687, *ante.*

**3890. Delay by request of consignee.**]—The consignee of a cargo requested the master of the vessel not to take her alongside a wharf, as, if he did, it would get down the price of the goods. The master consequently delayed procuring the certificate required by 7 & 8 Geo. 4, c. 56, s. 15, authorising the landing & unshipping the cargo:—*Held:* the owner was not thereby precluded from claiming demurrage, as the delay or detention of the vessel was attributable to the act of the consignee.—PALMER *v.* THOMAS (1828), 2 Moo. & P. 296; 7 L. J. O. S. C. P. 73.

**3891.** ——.]—FURNELL *v.* THOMAS, No. 3562, *ante.*

**3892. Delay with consent of charterer.**]—In *assumpsit* upon a memorandum of charter, varied by a subsequent agreement between pltfs. & deft., the declaration stated that the charter was made "between certain persons trading under the firm of G., on behalf of the owners of the vessel, & deft."; that it was agreed that the ship, then at A., should sail to B., & there load certain quantities of iron & coals, & should proceed therewith to C. & there deliver the same, on payment of freight, etc.; forty running days to be allowed for loading at B. & for unloading at C., to commence on Dec. 16, 1834. After mutual promises, the declaration averred that the ship then being at A., with the consent of pltfs. & deft., & at the request of deft., remained at A. for the purpose of receiving certain coals, part of her cargo for the voyage, in lieu of loading such coals at B.; that the ship was, without any default or neglect of pltfs., detained for that purpose at A. until Dec. 17; that deft. discharged pltfs. from performing that part of the charter which related to the sailing of the ship from A. to C., up to & until she had completed the loading of the coals at A.; that being so loaded, the ship proceeded to B., & arrived there on Jan. 10, 1835, & took in the remainder of her cargo. The declaration assigned four breaches; first, that defts. detained the ship at B. twenty days over & above the lay days & the days of demurrage, whereby pltfs. were put to expense in maintaining the master & mariners, & whereby a large sum of money became payable to pltfs. for demurrage; secondly, that defts. further detained the ship at C., whereby pltfs. were put to further expense in maintaining, etc.; thirdly, non-payment of freight; fourthly, non-payment of demurrage. Deft. pleaded to so much of the first count as related to the demurrage, that he did not consent & request that the ship might remain at A. Upon a trial of the issue taken by this plea, it was found by the jury that deft. had consented to the new arrangement, but that pltfs. & not deft. made the request:—*Held:* consent only was material, & the verdict so found upon this issue was a verdict for pltfs.—GALLOWAY *v.* JACKSON (1842), 3 Man. & G. 960; 3 Scott, N. R. 753; 12 L. J. Ex. 502; 133 E. R. 1426, Ex. Ch.; *revsg.* S. C. *sub nom.* JACKSON *v.* GALLOWAY (1838), 5 Bing. N. C. 71.

**3893. Failure to present bill of lading within given time.**]—ERICHSEN *v.* BARKWORTH, No. 3583, *ante.*

**3894. Custom of port.**]—A ship was chartered to go from Liverpool to Dantzic, or as near thereto as it could get. Thirty days were allowed for loading & unloading. It was compelled by the state

**3883 i.** *Inadequate means of unloading.*]—BURNETT *v.* CONGER (1874), 23 C. P. 590.—**CAN.**

**3883 ii.** — —.]—TURNBULL, SCOTT & Co. *v.* CRUICKSHANK & Co. (1904), 7 F. (Ct. of Sess.) 265; 42 Sc. L. R. 207; 12 S. L. T. 446.—**SCOT.**

**a.** *Delay through default of consignee.*]—A charterparty contained a stipulation that the steamer should be discharged as fast as possible:—*Held:* the merchant on being called on to take delivery of the sleepers on rafts, a recognised mode of delivery, was liable in demurrage for the delay caused by his refusal.—LA COUR *v.* DONALDSON & SON (1874), 1 R. (Ct. of Sess.) 912; 11 Sc. L. R. 524.—**SCOT.**

**3894 i.** *Custom of port.*]—HILLSTROM *v.* GIBSON & CLARK (1870), 8 Macph. (Ct. of Sess.) 463; 22 L. T. 248.—**SCOT.**

of the port of Dantzic to lie to, about four miles from that town, at a place called Fairwater. It was ready to take in a cargo on Mar. 14, but notice was not given to the agent of the freighter till Mar. 16, when he immediately took measures to send a cargo over the ice to the vessel, which was fully loaded by Apr. 5. It was then found that the ship could not pass the bar with a full cargo, & about sixty tons were, therefore, taken out & put into lighters. The vessel did not pass the bar till Apr. 14, when it took in that part of the cargo which had been previously taken out, & was ready for sea. It occupied six full days for unloading at the port of discharge in England. In an action for demurrage, the learned judge told the jury, that the question, whether the days from Apr. 5 to Apr. 14 were to be struck out of the account, depended on their opinion as to the custom of loading vessels at Dantzic; & therefore left it to the jury to say, whether the freighter had been guilty of delay:—*Held:* this direction was right.—HERRING *v.* WARD (1839), 8 L. J. Q. B. 218.

**3895.** ——.]—GOOD & Co. *v.* ISAACS, No. 3741, *ante*.

**3896.** ——.]—HULTHIEN *v.* STEWART & Co., No. 3746, *ante*.

**3897.** —— **Insufficient lighters—Lighters available only in rotation.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante*.

**3898.** —— **Inconsistent with terms of charterparty.**]—LOVE & STEWART, LTD. *v.* ROWTOR S.S. Co., LTD., No. 1712, *ante*.

**3899. Failure to provide cargo.**]—In Feb. 1923, defts. purchased a quantity of coal from a colliery for shipment at Barry. It was the duty of the vendors to send the coal to Barry & load the steamship. On Mar. 26 defts. chartered pltf.'s steamship *Panaghis Vergottis* to load a full & complete cargo of coal. The cargo was to be loaded in one hundred & forty-four running hours, but the vessel could be & was in fact loaded in thirty-six running hours. Defts. nominated the vessel to the sellers on Mar. 27 on account of their purchase. The vessel was ordered to Barry Docks to load, & she arrived in Barry Roads on Apr. 10. Under the charterparty she did not become an arrived ship until she got into the dock. In ordinary times steamers are allowed to enter Barry Dock upon arrival, but no vessel is ordered to a tip unless in the opinion of the dock authority there is sufficient coal in hand to ensure continuous loading. This would generally mean about one-third of her cargo. It is not usual in Barry Dock to have coal in readiness at the dock in large quantities before the ship for which it is intended arrives in dock or at the tip. It would be impossible to store in the sidings in advance the whole cargo of each ship before it arrived in the dock or at the tip. Coal can be brought from many collieries down to the dock in a few hours. But not infrequently Barry Dock is congested with vessels loaded & waiting to be loaded. In those times the practice of the dock authority is, as defts. knew, to require an emergency stemming note to be signed by the master of the steamship & the shipper. Before the dock authority would accept the shipper's signature they had to be satisfied that there was then sufficient coal in hand to ensure continuous loading. When the *Panaghis Vergottis* arrived in Barry Roads on Apr. 10, Barry Dock was crowded with vessels loading & waiting to be loaded. The master of the *Panaghis Vergottis* signed the emergency stemming note on Apr. 11, & the agent of the colliery was willing to sign it on Apr. 12; but as he could not satisfy the dock authority that he had any coal for the vessel actually in hand he was not allowed to sign it, & the *Panaghis Vergottis* was not allowed to enter the dock, & so lost her turn. She was not admitted to the dock till Apr. 19. Pltf. claimed damages for the detention of the ship between Apr. 11 & 19 on the ground that defts. had failed to comply with their absolute obligation as charterers to provide a cargo, & secondly that defts. had committed a breach of an implied term of the charterparty to do what was required of the ship by the practice of the port to enable the ship to enter the dock & become an arrived ship:—*Held:* (1) defts.' failure to provide a cargo by the time the *Panaghis Vergottis* arrived in Barry Roads did not constitute a breach by them of their absolute duty to provide a cargo, as it was necessary for a ship to become an arrived ship before the shipper's duty to provide a cargo arose, & therefore defts. would have complied with their obligation if after the ship arrived in the dock they had provided a cargo in sufficient time to enable them to finish the loading in the lay days; (2) inasmuch as defts. knew that periods of congestion occurred at Barry, & that the dock authority had in such times to take special measures to ensure the prompt loading of ships & the rapid clearing of their docks, which might involve shippers being called upon to comply with requirements beyond those which they had ordinarily to observe, there was an implied term in the charterparty that defts. would do whatever was reasonable in order to enable pltf.'s ship to enter the dock & become an arrived ship, & in refusing to assist pltf.'s ship to get into dock by complying with the dock authority's requirements to have at least one-third of the vessel's cargo ready defts. had broken their contract & were liable in damages.—VERGOTTIS *v.* CORY (WILLIAM) & SON, LTD., [1926] 2 K. B. 344; 95 L. J. K. B. 1002; 135 L. T. 254; 17 Asp. M. L. C. 71; 31 Com. Cas. 262.

*Annotation:* As to (1) & (2) **Consd.** Hogarth *v.* Cory (1926), 95 L. J. P. C. 204.

**3900. Failure to comply with dock regulations—Thereby delaying entry of ship into dock.**]—VERGOTTIS *v.* CORY (WILLIAM) & SON, LTD., No. 3899, *ante*.

### *C. When Liability Ceases.*

**3901. When ship loaded.**]—KISH *v.* CORY, No. 4005, *post*.

**3894 ii.** ——.]—STEPHENS, MAWSON & GOSS *v.* MACLEOD & Co. (1891), 19 R. (Ct. of Sess.) 39; 29 Sc. L. R. 30.—**SCOT.**

**3894 iii.** ——.]—TURNBULL, SCOTT & Co. *v.* CRUICKSHANK & Co. (1904), 7 F. (Ct. of Sess.) 265; 42 Sc. L. R. 207; 12 S. L. T. 446.—**SCOT.**

**3899 i.** *Failure to provide cargo.*]—SCHOFIELD *v.* GIBSON (1878), 17 N. B. R. (1 P. & B.) 619.—**CAN.**

**3899 ii.** ——.]—LILLY & Co. *v.* STEVENSON (D. M.) & Co. (1895), 22 R. (Ct. of Sess.) 278; 32 Sc. L. R. 212.—**SCOT.**

**b.** *Disease rendering animal cargo unserviceable.*]—The prevalence of a disease among horses, which rendered a large number for a time unserviceable, is no defence to a claim by a vessel against the consignee for demurrage.—LACROIX *v.* JACKSON (1873), 17 L. C. J. 329.—**CAN.**

**c.** *Failure to name port of discharge or destination.*]—THE SILVERSTREAM (N. S.) (1911), 10 E. L. R. 73.—**CAN.**

**d.** *Separation of cargo.*]—CLACEVICH *v.* HUTCHESON & Co. (1887), 15 R. (Ct. of Sess.) 11; 25 Sc. L. R. 11.—**SCOT.**

**e.** *Delay until consignee obtained security for freight.*]—A ship in the course of delivering a cargo of timber suspended delivery for two days till the consignee should find security for the freight. In an action for two days' demurrage:—*Held:* the shipowners were not entitled to demurrage, as they might have completed unshipment of the cargo & yet retained their lien.—THORSEN *v.* MCDAVALL & NEILSON, THE THEODOR KORNER (1892), 19 R. (Ct. of Sess.) 743; 29 Sc. L. R. 573.—**SCOT.**

**PART VII. SECT. 8, SUB-SECT. 2.—C.**

**3901 i.** *When ship loaded.*]—A charterparty provided, "charterer's liability to cease as soon as the cargo is shipped in terms of this charter, captain having

**3904.** —— —— ——.]—(1) The charterer of a ship for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost, after the completion of the loading.

(2) The meaning of " running days " is, that the freighter shall not waste time in loading & unloading (LORD ABINGER, C.B.).—PRINGLE *v.* MOLLETT (1840), 6 M. & W. 80 ; 9 L. J. Ex. 148 ; 151 E. R. 330.

**3905.** —— —— **Accidental impossibility of obtaining clearances.**]—Where there is a stipulation in a charterparty that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river where she lay ; but after her loading is completed, he is not liable for any delay that may arise in dispatching her, occasioned by the accidental impossibility of obtaining her clearances.—BARRET *v.* DUTTON (1815), 4 Camp. 333 ; 171 E. R. 106.

*Annotations :*—**Refd.** Palmer *v.* Thomas (1828), 2 Moo. & P. 296 ; Pringle *v.* Mollett (1840), 6 M. & W. 80 ; Budgett *v.* Binnington, [1891] 1 Q. B. 35 ; Hick *v.* Rodocanachi, [1891] 2 Q. B. 626.

**3906.** —— —— **Loading additional stiffening coal.**]—SANGUINETTI *v.* PACIFIC STEAM NAVIGATION CO., No. 1955, *ante*.

**3907. Cesser of liability clause—At port of loading.**]—In a charterparty entered into by a broker for a foreign charterer, the clause as to demurrage at the port of loading was, " fourteen days for loading in the Tyne, or the captain to receive £5 per day for demurrage day by day," & at the port of discharge " demurrage over & above the said lying days at £5 per day " ; & a protecting clause followed in these terms : " This charter being concluded by N. S. L., the broker, on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners & master agreeing to rest solely on their lien on the cargo for freight & demurrage " :—*Held :* demurrage in this protecting clause included only demurrage at the port of discharge, & the broker's liability for demurrage at the port of loading did not cease on the cargo

*Annotations :*—**Consd.** Francesco *v.* Massey (1873), L. R. 8 Exch. 101. **Refd.** Milvain *v.* Perez (1861), 3 E. & E. 495 ; Bannister *v.* Breslauer (1867), L. R. 2 C. P. 497 ; Christoffersen *v.* Hansen (1872), L. R. 7 Q. B. 509 ; Kish *v.* Cory (1875), L. R. 10 Q. B. 553 ; French *v.* Gerber (1876), 1 C. P. D. 737 ; Hough *v.* Manzanos (1879), 4 Ex. D. 104 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507 ; Kimber Coal Co. *v.* Stone & Rolfe, [1926] A. C. 414.

**3909.** —— **Inconsistency with bill of lading.**]—GULLISCHEN *v.* STEWART BROTHERS, No. 1946, *ante*.

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SUB-SECT. 3.—COMPUTATION OF DEMURRAGE.

*A. In General.*

**3910. Day—Fraction of day counting as day.**]—(1) Under a charterparty from Riga to London the charterers were to " load & discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, & ten days on demurrage over & above the said lying days at £25 per day " :—*Held :* that the lying days from the context meant " working " & not " running " days, & consequently that Sunday was not to be counted. (2) The ship got into dock in London on a Tuesday evening at 5 p.m. She could not get to her berth till 8 a.m. on the Wednesday, when she began unloading, & continued till 8 p.m. She began again at 4 a.m. on Thursday, & finished at 8 a.m. All the lay days had been consumed at the port of loading :—*Held :* in the case of demurrage a fraction of a day counted as a day, & consequently the charterers were liable for two days' demurrage. —COMMERCIAL S.S. CO. *v.* BOULTON (1875), L. R. 10 Q. B. 346 ; 44 L. J. Q. B. 219 ; 33 L. T. 707 ; 23 W. R. 854 ; 3 Asp. M. L. C. 111.

*Annotations :*—**Refd.** Angier *v.* Stewart (1884), Cab. & El. 357 ; The Katy, [1895] P. 56 ; Nelson *v.* Nelson Line, Liverpool, *Re* The Same, [1907] 2 K. B. 705.

*Compare* No. 3853, *ante*.

**3911. Demurrage payable for baulk days—Usage of coal trade.**]—HORNE *v.* CORY (1837), 6 L. T. 257.

**3912. Demurrage time to correspond with lay time—Exclusion of non-working days.**]—(1) A

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an absolute lien on the cargo for all freight, dead freight, & demurrage " :—*Held :* so soon as a cargo had been shipped, no liability could be enforced against the charterers, & a claim would not lie against them for demurrage at the port of loading incurred before the loading was completed.—SALVESEN & Co. *v.* GUY & Co. (1885), 13 R. (Ct. of Sess.) 85 ; 23 Sc. L. R. 59.—**SCOT.**

**3908** 1. *Cesser of liability clause—At port of discharge.*]—LANE *v.* SORENSEN (1891), 8 S. C. 121.—**S. AF.**

**PART VII. SECT. 8, SUB-SECT. 3.—A.**

*t. Day.*]—" Days " mean the same as running days, or consecutive days, unless there be some particular custom. —GIBBON *v.* MICHAEL'S BAY LUMBER Co. (1885), 7 O. R. 746.—**CAN.**

*g. Actual loss or damage suffered —Failing express agreement.*]—MARCHAND *v.* RENAUD (1862), 6 L. C. J. 119.—**CAN.**

*h.* —— *Conjectural loss not sufficient.*]—When demurrage is claimed against wrongdoers, conjectural loss

charterparty contained a clause that the cargo was to be loaded in seventy-two hours, from 5 p.m. Saturdays to 7 a.m. Mondays, & holidays excepted, & "if longer detained charterers to pay steamer 16*s.* 8*d.* per like hour demurrage":—*Held:* in calculating the hours for demurrage under this clause, the demurrage does not run continuously, but the hours of demurrage must be calculated with the same exceptions as the lay hours.

(2) The charterparty also contained a clause that "the captain shall sign charterer's bills of lading as presented, without qualification except by adding weight unknown, within twenty-four hours after being loaded, or pay £10 for every day's delay, as & for liquidated damages, until the ship is totally lost or the cargo delivered":—*Held:* the clause imposed a penalty only, & did not confer a right to liquidated damages for the refusal of the captain to sign bills of lading, & as the charterer had in fact suffered no damage by such refusal, he was entitled to nominal damages only.—RAYNER *v.* REDERIAKT. CONDOR, [1895] 2 Q. B. 289; 64 L. J. Q. B. 540; 73 L. T. 96; 8 Asp. M. L. C. 43; 1 Com. Cas. 80; 15 R. 542.

**3913. Vessel detained for repairs—Period of detention omitted.**]—Where demurrage commences to be payable under a charterparty owing to the default of the charterers in failing to provide a quay berth at the port of loading, the obligation to pay demurrage continues, in the absence of any default of the shipowner, until the completion of the loading.

A ship was chartered to go to a foreign port for a cargo, the charterers guaranteeing a cargo & quay berth ready at the port of shipment; owing to their inability to provide a quay berth the ship went on demurrage &, while lying at anchor waiting for a quay berth, was run into by another vessel. The ship was properly taken by her captain to another port for repair, & during her absence for that purpose a quay berth fell vacant which would otherwise have been given to her. After her return to the port of loading she was kept waiting a further six weeks for a quay berth. The shipowners claimed demurrage for the six weeks, but not for the period during which she was absent for repairs:—*Held:* upon the return of the ship to the port of loading the demurrage period was resumed without any break in the continuity of the demurrage obligation, & the charterers were liable to pay demurrage from that date until the loading was completed.—TYNE & BLYTH SHIPPING CO. *v.* LEECH, HARRISON & FORWOOD, [1900] 2 Q. B. 12; 69 L. J. Q. B. 353; 48 W. R. 590; 16 T. L. R. 197; 44 Sol. Jo. 296; 5 Com. Cas. 155.

*Annotation:*—**Consd.** Cantiere Navale Triestina *v.* Russian Soviet Naphtha Export Agency, [1925] 2 K. B. 172.

**3914. Period of removal from port—Or unfitness for loading or discharging.**]—A charterparty of an Italian ship provided that two hundred & sixteen running hours, Sundays & holidays excepted, weather permitting, should be allowed the charterers for loading & discharging, & that the lay days should commence from the time the steamer was ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth. The exceptions clause excepted "restraint of princes, rulers & people." The ship arrived at Batoum, & notice of readiness to load was given, & the lay days began to run. Owing however to a dispute between the Russian & Italian Govts. the ship was ordered by the port authorities to leave Batoum & also Russian waters, & accordingly the ship went to Constantinople. Subsequently permission was obtained to load the ship at Batoum & she returned after being absent from the port a little over a fortnight. The owners subsequently claimed demurrage from the charterers, on the basis that the lay days continued to run during the period the ship was absent from Batoum:—*Held:* the lay days continued to run notwithstanding that the ship was compelled to leave the port by order of the port authorities.

Statement in Scrutton *On Charterparties & Bills of Lading*, 11th edition, art. 129, p. 342, that "If the ship has to be removed from the port, or becomes unfit for loading or discharging, *e.g.* by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage," dissented from.—CANTIERE NAVALE TRIESTINA *v.* RUSSIAN SOVIET NAPHTHA EXPORT AGENCY, [1925] 2 K. B. 172; 94 L. J. K. B. 579; 133 L. T. 162; 41 T. L. R. 355; 69 Sol. Jo. 443; 16 Asp. M. L. C. 501, C. A.

*Annotation:*—**Distd.** *Re* Ropner Shipping Co. & Cleeves Western Valleys Anthracite Collieries, [1927] 1 K. B. 879.

### *B. Lay Days.*

#### (*a*) *In General.*

**3915. What may be included—Whether Sundays.**]—BROWN *v.* JOHNSON, No. 3926, *post.*

**3916.** —— ——.]—By a charterparty it was provided that the ship was to load a cargo of coal & deliver the same at Algoa Bay, & the cargo was "to be received from alongside according to the custom & law of the port of destination free of expense & risk to the ship at the average rate of not less than 120 tons per weather working day, Sundays & holidays excepted, time to count twenty-four hours after arrival in Algoa Bay & captain's notification to charterers' agents that vessel is ready to deliver, demurrage, if any, to be paid at the rate of 4*d.* per net registered ton per running day." The cargo consisted of 3,483 tons of coal, & on two Sundays during the period of the discharge of the cargo, the cargo was discharged. On certain other days during the discharge of the cargo, which were weather working days & none of them Sundays, the vessel was not only discharging cargo, but was also taking in ballast, which latter operation retarded & reduced the discharge of the cargo. The vessel could not safely have discharged more than a certain portion of her cargo at Algoa Bay without taking in ballast, & to have done so would have endangered the ship & the cargo remaining on board:—*Held:* (1) on the true construction of the charterparty, the charterers were entitled to thirty lay days for the discharge of the cargo, & the two Sundays would not count as lay days, but were in the nature of working overtime; (2) the charterers were not entitled to treat the days upon which ballast was taken in as not counting as lay days, as the delay so caused was not a breach of obligation on the part of the owners.—HOULDER *v.* WEIR, [1905] 2 K. B. 267; 74 L. J. K. B. 729; 92 L. T. 861; 21 T. L. R. 503; 49 Sol. Jo. 501; 10 Asp. M. L. C. 81; 10 Com. Cas. 228.

*Annotations:*—*As to* (1) **Refd.** Nelson *v.* Nelson Line (Liverpool), [1907] 1 K. B. 788, n.; Whittall *v.* Rahtken's Shipping Co., [1907] 1 K. B. 783. *As to* (2) **Refd.** *Re* Ropner Shipping Co. & Cleeves Western Valleys Anthracite Collieries, [1927] 1 K. B. 879.

is not sufficient. Proof must be given that a voyage or market has been lost & injury sustained.—THE JAMES *v.* THE SEA NYMPH (1851), 5 L. T. 121. —**IR.**

*k. Rate stipulated in charterparty.*] —— & Co. *v.* JOHNSTONE (1821), 1 Sh. (Ct. of Sess.) 69; 20 Fac. Coll. 399.—**SCOT.**

*Sect. 8.—Demurrage: Sub-sect. 3, B. (a) & (b) i.*]

**3917. —— Fraction of a day—Right to whole day.**]—HOULDER *v.* WEIR, No. 3916, *ante*.

**3918. —— Reasonable ballasting time.**] —HOULDER *v.* WEIR, No. 3916, *ante*.

**3919. —— Time ship absent from port.**]—CANTIERE NAVALE TRIESTINA *v.* RUSSIAN SOVIET NAPHTHA EXPORT AGENCY, No. 3914, *ante*.

**3920. Specified quantity discharged per day.**]—The London Corn Trade Association Contract, which was incorporated in a charterparty, provided that the time for discharge of a cargo of grain should be: "One running day for every 400 tons up to 2,800 tons, &, for all quantities in excess, 500 tons per day; but in no case less than five days": —*Held:* upon the true construction of the contract, the time to be allowed for discharge of a cargo, whatever its size, was one day for every 400 tons up to 2,800 tons, & one day for every 500 tons in excess of 2,800 tons.—TURNER, BRIGHTMAN & CO. *v.* BANNATYNE & SONS, LTD. (1904), 91 L. T. 618; 20 T. L. R. 782; 10 Asp. M. L. C. 1; 9 Com Cas. 306, C. A.

(*b*) *Commencement of Lay Days.*

i. *In General.*

**3921. Arrival of ship.**]—HARMAN *v.* CLARKE, No. 3520, *ante*.

**3922.** ——.]—By the stipulation of a charterparty the vessel was to take in a cargo of coal at Newcastle, & proceed therewith to London or as near thereto as she could safely get, & deliver the same to the freighters or their assigns, etc.: to be delivered in five working days, demurrage over & above the said lying days £2 per day. The vessel arrived in the port of London, off Gravesend, on Mar. 9, & on Mar. 10, the cargo was sold, & the vessel entered by the freighters for a meter. On Mar. 20, she received an order from the harbour master to proceed to the Pool: on Monday, Mar. 22, she commenced working out her cargo, & was cleared on Mar. 27. It appeared that in consequence of the factors certificate that she was a metered vessel, the harbour master had detained her at Gravesend till Mar. 20, when her turn arrived for her to proceed to the Pool & discharge her cargo; that if she had not been on the meter's list, this regulation would not have applied, & she might have proceeded to the Pool at once; that it was occasionally the practice for factors not to enter such vessels in the meter's list, but that it was desirable that the cargo should be sold, subject to metage, by a sworn meter:—*Held:* under these circumstances the vessel was not to be considered as having arrived at her place of discharge until Mar. 20, & therefore the lying days did not begin to count till then.—KELL *v.* ANDERSON (1842), 10 M. & W. 498; 12 L. J. Ex. 101; 152 E. R. 567.

*Annotations:*—**Consd.** Tapscott *v.* Balfour (1872), L. R. 8 C. P. 46. **Expld.** Davies *v.* McVeagh (1879), 4 Ex. D. 265. **Refd.** Shadforth *v.* Cory (1863), 11 W. R. 340; Norden Steam Co. *v.* Dempsey (1876), 1 C. P. D. 654; Nelson *v.* Dahl (1879), 12 Ch. D. 568; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499.

**3923. Arrival in port.**]—(1) Where under a charterparty a certain number of days are allowed for loading & unloading, though the freighters are entitled to so many whole days, they may agree either expressly, or by implication from their conduct to treat part of a day as a whole day. A vessel was not ready to discharge until late on the day of arrival at the port of discharge, but the freighters, at the request of the master, agreed to commence the discharge then:—*Held:* the lay days commenced to run from the day of arrival at the port of discharge.

(2) "Running days for loading & unloading" in a charterparty mean calendar days, & not periods of twenty-four hours, reckoning from the hour of commencing the loading or unloading, as the case may be.—THE KATY, [1895] P. 56; 64 L. J. P. 49; 71 L. T. 709; 11 T. L. R. 116; 39 Sol. Jo. 165; 7 Asp. M. L. C. 527; 11 R. 683, C. A.

*Annotations:*—*As to* (1) **Consd.** Nelson *v.* Nelson Line Liverpool, *Re* The Same, [1907] 2 K. B. 705. *As to* (2) **Refd.** Rhymney S.S. Co. *v.* Iberian Iron Ore Co., Forest S.S. Co. *v.* Same (1898), 79 L. T. 240. *Generally*, **Refd.** Houlder *v.* Weir (1905), 10 Com. Cas. 228; The Fox (1914), 83 L. J. P. 89; Orpheus Steam Shipping Co. *v.* Bovill (1916), 114 L. T. 750.

**3924.** ——.]—STEEL, YOUNG & CO. *v.* ROSE, RICHARDS (T. P.), LTD. (1915), 139 L. T. Jo. 28.

**3925.** ——.]—By charterparties printed in the Scanfin form, to which certain typed additions were made, vessels were chartered to bring pit props from the Baltic to West Hartlepool. Clause 13 of the printed form provided that the cargo should be discharged in the customary manner as fast as the vessel could deliver during the ordinary working hours of the port, & by clause 15, should the vessel not be discharged with dispatch in the manner provided, demurrage was to be paid at the rate of £40 per day. Clause 24, which was typed, provided that the owners should pay the charterers dispatch money for all time saved in loading & discharging at the rate of £20 per day, & by clause 26 the cargo was "to be loaded & discharged according to the custom of the ports, but not less than the average rate of 100 fathoms per weather working day, Sundays & holidays excepted, reversible.

At West Hartlepool the docks were owned by the railway co., & vessels could only discharge their cargo in their turn at the berths assigned to them by the railway co. When these steamers arrived at West Hartlepool they found the port congested, with the result that there was delay in discharging their cargoes. In an action by the shipowners claiming demurrage:—*Held:* clause 26 imposed upon the charterers the obligation to discharge in a fixed time, & the vessel being an arrived ship when she arrived within the limits of the port of West Hartlepool, the obligation of the charterers to discharge ran from the date of such arrival.—VAN NIEVELT GOUDRIAN & CO. STOOMVAART MAATSCHAPPIJ *v.* FORSLIND (C. H.) & SON (1925), 133 L. T. 457; 41 T. L. R. 481; 69 Sol. Jo. 559; 16 Asp. M. L. C. 521; 30 Com. Cas. 263, C. A.

**3926. Arrival in dock—Vessel put in charge of dock officials—Delay in arriving at place of unloading.**]—(1) By a charterparty made in London, upon a vessel for a voyage from London to Honduras & back to some port in the United Kingdom, twenty-five running days for every 100 tons of mahogany were to be allowed for loading the ship

**PART VII. SECT. 8, SUB-SECT. 3.—B. (a).**

**3917 1.** *What may be included—Fraction of a day—Right to whole day.*]—Where a ship spent four & a half days at the port of call over & above the period allowed for orders, & five & a half at the port of discharge:—*Held:* in calculating lay days a fraction of a day was to be counted as an entire day, & consequently eleven lay days were to be credited to the shipowner.—HOUGH *v.* ATHYA & SON (1879), 6 R. (Ct. of Sess.) 961; 16 Sc. L. R. 553.—**SCOT.**

1. —— *Time spent in lightening.*]—A ship was chartered to "proceed to a safe port in the United Kingdom, or so near thereunto as she may safely get always afloat at any time of the tide." She was ordered to Glasgow, but owing to her draught of water had to discharge part of the cargo off Greenock before proceeding to Glasgow. In an action for demurrage:—*Held:* the voyage was completed at Greenock, so far as regarded the cargo discharged there, & the time spent in lightening at Greenock was to be included in the lay days.—DICKINSON *v.* MARTINI & CO. (1874), 1 R. (Ct. of Sess.) 1185.—**SCOT.**

at Honduras, & fifteen days for discharging at the destined port in the United Kingdom:—*Held:* in the absence of any custom, Sundays were to be computed in the calculation of the lay days at the port of discharge.

(2) The ship arrived at Hull the port of her destination, on Feb. 1, & was reported; on Feb. 2, she entered the dock, & was given in charge of the dock officer, but did not get to the place of unloading till Feb. 4, in consequence of the full state of the docks, the officer refusing to take her out of her turn; & the discharge was not completed till Feb. 22:—*Held:* the lay days were to be calculated from the period of her arrival in dock, & not at the place of unloading.—BROWN *v.* JOHNSON (1842), 10 M. & W. 331; 11 L. J. Ex. 373; 152 E. R. 497.

*Annotations:*—*As to* (2) **Consd.** Nielsen *v.* Wait (1885), 16 Q. B. D. 67. **Refd.** Parker *v.* Winlo (1857), 27 L. J. Q. B. 49; Shadforth *v.* Cory (1863), 11 W. R. 340; Norden Steam Co. *v.* Dempsey (1876), 1 C. P. D. 654; Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499. *Generally* **Refd.** Thits *v.* Byers (1876), 1 Q. B. D. 244; Davies *v.* McVeagh (1879), 4 Ex. D. 265.

**3927.** ——.]—TAPSCOTT *v.* BALFOUR, No. 3851, *ante.*

**3928.** ——.]—Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:—*Held:* by the general law the lay days commenced from the time the ship arrived in the dock; but it was competent to the consignee to show, notwithstanding pltf. was a foreigner, that there was a custom in the port of Liverpool, that in the case of timber ships, the lay days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge.—NORDEN S.S. CO. *v.* DEMPSEY (1876), 1 C. P. D. 654; 45 L. J. Q. B. 764; 24 W. R. 984, D. C.

*Annotations:*—**Consd.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499. **Mentd.** Baily *v.* British Equitable Assce. (1904), 73 L. J. Ch. 240.

**3929.** ——.]—DAVIES *v.* MCVEAGH, No. 3961, *post.*

**3930.** ——.]—By the terms of a charterparty the ship was to load a cargo of coals at Glasgow, & therewith "proceed to Odessa, or so near thereto as she might safely get, & deliver the same to the said freighters or assigns alongside any safe wharf, store, craft, steamer, depot, ship, or arsenal, as ordered by receiver. Cargo to be discharged at the average rate of not less than 330 tons per working day, Sundays & holidays excepted, & ten days on demurrage over & above the said lay days at 16*s.* 8*d.* per hour, except, etc. Time for loading & unloading to commence from the time the steamer is ready, & intimation has been given in writing." The ship arrived at Odessa on Nov. 16. Due notice was given on the same day of her readiness to discharge cargo, & she was ordered to discharge alongside the wharf or quay, which was the usual place for the discharge of coal cargoes at Odessa. She did not get alongside the quay till Nov. 20, the berths being occupied. In an action for demurrage:—*Held:* the time for discharging commenced from the time when intimation of the ship's readiness to discharge in the port was given, & not from the time of her arrival alongside the quay.—THE CARISBROOK (1890), 15 P. D. 98; 59 L. J. P. 37; 62 L. T. 843; 38 W. R. 543; 6 Asp. M. L. C. 507.

*Annotations:*—**Overd.** Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647. **Consd.** Sanders *v.* Jenkins, [1897] 1 Q. B. 93. **Refd.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499.

**3931. Arrival at named place.**]—PARKER *v.* WINLOW, No. 3558, *ante.*

**3932.** ——.]—STRAHAN *v.* GABRIEL (1879), cited in 12 Ch. D. at p. 589.

*Annotations:*—**Consd.** Nelson *v.* Dahl (1879), 12 Ch. D. 568. **Apld.** Murphy *v.* Coffin (1883), 12 Q. B. D. 87. **Refd.** Hick *v.* Tweedy (1890), 63 L. T. 765; Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647.

**3933.** ——.]—THARSIS SULPHUR & COPPER CO. *v.* MOREL BROTHERS & CO., No. 3543, *ante.*

**3934.** ——.]—WATSON *v.* BORNER (H.) & CO., LTD., No. 3777, *ante.*

**3935.** ——.]—MODESTO, PINEIRO & CO. *v.* DUPRE & CO., No. 2783, *ante.*

**3936.** ——.]—AKT. INGLEWOOD *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD., No. 2791, *ante.*

**3937.** ——.]—(1) A charterparty provided that pltfs.' steamship should "proceed as ordered by the charterers or their agents to the undermentioned place or places, & there receive from them a full & complete cargo of wheat . . . viz. at one or two safe loading ports or places in the river Parana . . . time for loading shall commence to count twelve hours after written notice has been given by the master . . . that the vessel is in readiness to receive cargo." The vessel arrived at Bahia Blanca & anchored three ship's lengths from the railway pier at a place which, though not the usual loading place, was a possible loading place. The master gave the charterers notice of readiness to load. The charterers desired the *Leonis* to go alongside the pier, but all the berths alongside were already occupied, & the vessel lay at anchor for over a month, during which time no cargo came alongside, but eventually she succeeded in getting to a berth alongside the pier & shortly afterwards completed her loading:—*Held:* under the terms of the charterparty the lay days began to run when the vessel had reached her anchorage near the railway pier & the stipulated notice of readiness to load had been given by the master, as she was then an arrived ship, & at the disposition of the charterers, although she had not reached a berth.

(2) The words "usual place of discharge" in a port mean the commercial ambit of the port as distinguished from the whole port, in its geographical or maritime sense.—LEONIS S.S. CO., LTD. *v.* RANK, LTD., [1908] 1 K. B. 499; 77 L. J. K. B. 224; 24 T. L. R. 128; 52 Sol. Jo. 94; 13 Com. Cas. 136, C. A.

*Annotations:*—*As to* (1) **Consd.** Anglo-Hellenic S.S. Co. *v.* Dreyfus (1913), 108 L. T. 36; Armement Adolf Deppe *v.* Robinson, [1917] 2 K. B. 204. **Apld.** Van Nievelt Goudrian Stoomvaart Maatschappij *v.* Forslind (1925), 133 L. T. 457. **Consd.** United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Baird *v.* Price, Walker (1916), 115 L. T. 227; Michalinos *v.* Dreyfus (1924), 131 L. T. 177; Ireland *v.* Southdown S.S. Co. (1926), 136 L. T. 412. *As to* (2) **Refd.** Langham S.S. Co. *v.* Gallagher (1911), 12 Asp. M. L. C. 109; Hall, S.S. Co. *v.* Paul (1914), 111 L. T. 811. *Generally,* **Refd.** Larsen *v.* Sylvester (1908), 99 L. T. 94.

**3938.** ——.]—A charterparty provided that the ship should discharge her cargo at a certain rate, "time to count twenty-four hours after arrival in or off port of destination whether berth available or not." The ship was ordered to Havre. In the course of the voyage she received orders from the French Admlty. to go to Cherbourg, & there await her turn for a discharging berth at Havre. Notice was given that if she disobeyed those orders & went to Havre she would on arrival there be at once sent back to Cherbourg, a distance of seventy-five miles, to await her turn. She obeyed the orders & put in to Cherbourg, & remained there for several days until she received permission from the French authorities to proceed:—*Held:* the fact that she would have been ordered back if she had gone to Havre, & that her

*Sect.* 8.—*Demurrage: Sub-sect.* 3, *B.* (*b*) *i.*]

going there would consequently have been useless, did not make her arrival at Havre any the less a condition precedent to the lay days beginning to run, & her time did not count while she was lying at Cherbourg waiting her turn.—PLATA (OWNERS) *v.* FORD & CO., [1917] 2 K. B. 593; 86 L. J. K. B. 1473; 117 L. T. 27; 22 Com. Cas. 211; 14 Asp. M. L. C. 93.

**3939. Arrival at usual place of discharge.**]—The lay days allowed by a charterparty for a ship's discharge are to be reckoned from the time of her arrival at the usual place of discharge, & not at the port merely, though she should for the purposes of navigation discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge. *Qu.:* whether the master of a vessel, having entered a port, is bound to proceed to the ultimate place for discharging her cargo on a Sunday.—BRERETON *v.* CHAPMAN (1831), 7 Bing. 559; 5 Moo. & P. 526; 131 E. R. 216.

*Annotations:*—**Refd.** Brown *v.* Johnson (1842), 10 M. & W. 331; Whitwell *v.* Harrison (1848), 2 Exch. 127; The Felix (1868), L. R. 2 A. & E. 273; Norden Steam Co. *v.* Dempsey (1876), 1 C. P. D. 654; Nelson *v.* Dahl (1879), 12 Ch. D. 568; Nielsen *v.* Wait (1885), 14 Q. B. D. 516; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499.

**3940.** ——.]—SANDERS *v.* JENKINS, No. 3567, *ante*.

**3941. Arrival alongside wharf.**]—BASTIFELL *v.* LLOYD, No. 3534, *ante*.

**3942.** ——.]—A vessel under a charterparty "to proceed to D. & deliver cargo alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered," was ordered by the charterers to discharge at the railway wharf, but was not able to obtain a berth there for twenty-four hours after her arrival:—*Held:* the shipowners could not claim demurrage for the delay, as the "lays days" did not commence until the vessel was berthed at the place ordered.—MURPHY *v.* COFFIN (1883), 12 Q. B. D. 87; 32 W. R. 616; 5 Asp. M. L. C. 531, n., D. C.

*Annotations:*—**N.F.** The Carlsbrook (1890), 15 P. D. 98. **Consd.** United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Pyman *v.* Dreyfus (1889), 24 Q. B. D. 152; Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647; Watson *v.* Borner (1899), 4 Com. Cas. 335; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499.

**3943.** ——.]—THE CARISBROOK, No. 3930, *ante*.

**3944.** ——.]—A charterparty provided that a steamer was to load a cargo at Sunderland, & proceed therewith to Genoa or Savona, as ordered, & there deliver her cargo alongside wharf &/or vessel &/or craft as ordered; & that the cargo was to be taken from alongside by consignees at port of discharge at the average rate of 500 tons per day, weather permitting, Sundays & holidays excepted, "provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day. . . . Time to commence when steamer is ready to unload & written notice given, whether in berth or not. In case of strikes, lock outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage." The steamer was ordered to Savona, & arrived & was moored at the Punta, inside the port & harbour, on Sept. 22, 1909, when she gave notice of her readiness to unload. All the berths alongside wharves were occupied by other vessels, & the steamer could not get to a berth alongside the wharf until Sept. 25, when unloading commenced. By reason of certain rules made by the shore labourers, & recognised & sanctioned by the port authorities, shore labourers would not discharge vessels until they were in berth alongside a wharf, &, further, cargo was not brought to the rail by the ship's crew but by the shore labourers. These rules had for several years been part of the regulations of the port of Savona. Pltfs., the owners of the steamer, in an action against defts., who had chartered the vessel & were the shippers of the cargo, contended that time began to run as from the notice of Sept. 22 & claimed demurrage, while defts. contended that no demurrage was payable on the grounds (*a*) that the steamer was not an arrived ship & ready to unload until berthed at the wharf, & (*b*) that, the delay being due to the rules of the port, the case was within the clause as to strikes, etc.:—*Held:* (1) time commenced to run when the steamer was ready to unload "whether in berth or not" on notice being given; (2) the delay caused by the regulations was not a matter *ejusdem generis* with strikes, lock outs, & civil commotions, & was not within the strike clause of the charterparty; & defts. were liable.—NORTHFIELD S.S. CO. *v.* COMPAGNIE L'UNION DES GAZ, [1912] 1 K. B. 434; 81 L. J. K. B. 281; 105 L. T. 853; 28 T. L. R. 148; 17 Com. Cas. 74; 12 Asp. M. L. C. 87, C. A.

*Annotations:*—*As to* (1) **Refd.** Baird *v.* Price, Walker (1916), 115 L. T. 227. *As to* (2) **Apprvd.** Alexander *v.* Akt. Dampskibet Hansa, [1920] A. C. 88. *Generally*, **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3945. Arrival at a general berth—Coal vessel.**]—JENNETT *v.* MEEK (1860), 3 L. T. 817; 1 Mar. L. C. 40.

**3946. Arrival under coal tip—"Usual colliery guarantee."**]—By a charterparty between pltfs. & defts. it was provided that pltfs.' vessel should proceed to Grimsby & there load a cargo of coal in the usual manner according to the custom of the place from such colliery as the charterers might direct; & the loading time should be thirty-six running hours "on terms of usual colliery guarantee." The vessel arrived at the usual loading dock at Grimsby & was ready to load on July 19. Owing to the coal strike in South Wales a very large number of vessels were waiting to load coal at Grimsby, & pltfs.' vessel was unable to get a berth at a coal tip until July 29, when she was loaded within thirty-six hours. The coal was loaded from collieries at which no "colliery guarantee" was in use:—*Held:* defts. were not liable to pay demurrage, because there was a "usual colliery guarantee" in use at Grimsby, by which the time for loading did not commence until the vessel came under a coal tip.

What is the meaning of the word "usual"?

**PART VII. SECT. 8, SUB-SECT. 3.—B. (b) i.**

**3939 i.** *Arrival at usual place of discharge.*]—The computation of time during which lay days are to run begins, in the absence of anything to the contrary in the contract, with the arrival of the ship at the usual or designated place of discharge in the port of destination.—M'INTOSH *v.* SINCLAIR (1877), I. R. 11 C. L. 456.—**IR.**

**3945 i.** *Arrival at a general berth—Coal vessel.*]—A charterparty stipulated that the vessel should "proceed to a loading berth in L. docks, as ordered, & there load in ten working days, as customary, a full & complete cargo of steam coals." On Apr. 16, the master intimated to the charterers that the ship, then lying at a loading berth was ready to receive her cargo. The charterers had, however, entered her in the dock master's books for a crane berth, for which the vessel had to wait her turn till May 3. In an action for demurrage:—*Held:* under the charterparty the charterers had the choice of a loading berth, but the lay days commenced to run from Apr. 17, when the loading might have been commenced.—DAIL'ORSO *v.* MASON & CO. (1876), 3 R. (Ct. of Sess.) 419; 13 Sc. L. R. 270.—**SCOT.**

A thing is none the less " usual " because there are exceptions to its use & because there are persons who object to use it. It is " usual " if it is in general use (LORD RUSSELL, C.J.).—SHAMROCK S.S. Co. *v.* STOREY & Co. (1899), 81 L. T. 413; 16 T. L. R. 6; 8 Asp. M. L. C. 590; 5 Com. Cas. 21, C. A.

*Annotations:*—**Expld.** Thorman *v.* Dowgate S.S. Co., [1910] 1 K. B. 410. **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3947. Arrival in outer harbour—Port with inner & outer harbours.**]—By charterparty it was agreed that pltf.'s steamship should proceed to " Odessa or so near thereunto as she might safely get," & there load a cargo, " twelve running days," Sundays excepted, "to be allowed for loading & discharging, & ten days on demurrage over & above the said lay days." The port of Odessa contained an outer & an inner harbour. The vessel arrived at a point in the outer harbour at which she was as near as she might safely get to a loading berth, & the master gave notice to defts.', the charterers, agents that she was ready to load. The cargo was stored at a quay in the inner harbour, & the agents were unwilling to load it elsewhere. The quays in the two harbours were the only places at which it was practicable to load, but there was no custom by which steamships under charterparty were not considered ready to receive cargo until after being moored alongside a quay. Owing to the crowded state of the port there was much delay before the vessel was able to take her place at the quay in the inner harbour where the cargo was stored, & she was not loaded till more than twelve days had elapsed from the time of her arrival in the outer harbour:—*Held:* the lay days were to be computed from the time of the arrival of the vessel in the outer harbour, & defts. were liable for demurrage.—PYMAN BROTHERS *v.* DREYFUS BROTHERS & Co. (1889), 24 Q. B. D. 152; 38 W. R. 447; *sub nom. Re* PYMAN & Co. & DREYFUS & Co., 59 L. J. Q. B. 13; 61 L. T. 724; 6 T. L. R. 2; 6 Asp. M. L. C. 444, D. C.

*Annotations:*—**Apprvd.** Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499. **Refd.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3948. Mooring alongside quay—Custom of port.**]—NORDEN S.S. Co. *v.* DEMPSEY, No. 3928, *ante*.

**3949.** ——.]—ANGLO-HELLENIC S.S. Co., LTD. *v.* DREYFUS (LOUIS) & Co., No. 4358, *post*.

**3950. Delivery of notice of readiness.**]—THE CARISBROOK, No. 3930, *ante*.

**3951.** ——.]—A charterparty, dated July 16, 1894, provided that the ship should proceed to a customary loading place in the Royal Dock, Grimsby, & there receive a cargo of coal " to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." Demurrage to be at the rate of 4*d.* per ton per day.

By a colliery guarantee, dated July 20, 1894, the colliery co. agreed with the charterers to load the ship with a cargo of coal " in fifteen colliery working days after the said ship is wholly unballasted & ready in dock at Grimsby to receive her entire cargo, strikes of pitmen, etc., always excepted. Time not to commence before Aug. 2. Time to count from the day following that on which notice of readiness is received, the said notice, in writing, to be handed to office . . . as soon as the ship is actually ready as above stipulated & not before. . . . The ship to move to the spout & proceed with her loading whenever required to do so during the entire continuance of her lay days. Demurrage as per charterparty, but not exceeding 4*d.* per registered ton per colliery working day." The customary loading place for coal in the Royal Dock, Grimsby, was under a " spout " or shoot, through which the coal was shot on board the ship.

Notice that the ship was ready was given on Sept. 3. She had to wait her turn to get under the spout, &, but for delay for which it was admitted the charterers were responsible, she could have been placed under it on Sept. 17. She did not in fact get under it until Oct. 10. The loading was completed on Oct. 13. In an action by the shipowner against the charterers for demurrage:—*Held:* the provisions of the colliery guarantee as to loading were incorporated into the charterparty, & the fifteen lay days commenced to run from the day after that on which notice was given that the ship was ready in the dock at Grimsby to receive the cargo.—MONSEN *v.* MACFARLANE & Co., [1895] 2 Q. B. 562; 65 L. J. Q. B. 57; 73 L. T. 548; 11 T. L. R. 561; 8 Asp. M. L. C. 93; 1 Com. Cas. 51, C. A.

*Annotations:*—**Consd.** Shamrock S.S. Co. *v.* Storey (1898), 4 Com. Cas. 80. **Apld.** Thorman *v.* Dowgate S.S. Co., [1910] 1 K. B. 410. **Refd.** Saunders *v.* Jenkins (1896), 13 T. L. R. 24; Weir *v.* Pirie, (No. 1) (1898), 3 Com. Cas. 263.

**3952.** ——.]—LEONIS S.S. Co., LTD. *v.* RANK, LTD., No. 3937, *ante*.

**3953.** ——.]—NORTHFIELD S.S. Co. *v.* COMPAGNIE L'UNION DES GAZ, No. 3944, *ante*.

**3954. Twenty-four hours after receipt of notice of arrival.**]—BRYDEN *v.* NIEBUHR, No. 1947, *ante*.

**3955. Report at custom house—& in free pratique.**] — MACBETH *v.* WILD & Co. (1900), 16 T. L. R. 497.

**3950 i.** *Delivery of notice of readiness.*]—The words " lay days to count when the ship is ready in a proper loading or discharging berth respectively," mean, when the vessel is at the port named, has discharged ballast, & the master has given notice to the charterer that he is ready to receive cargo; whereupon, it is the duty of the charterer, not the master, to provide a proper loading berth.—LOVITT *v.* SNOWBALL (1895), 33 N. B. R. 263.—**CAN.**

**3950 ii.** ——.]—On Aug. 28, the master mailed a notice to the charterer that the vessel was then at loading berth & ready to receive cargo on Aug. 29. At the time notice was sent, the vessel was not at loading berth:—*Held:* the vessel should have been at loading berth ready to receive cargo at the time notice was sent, & the notice was insufficient.—CUSHING *v.* MCLEOD (1900), 20 C. L. T. 107; 2 N. B. Eq. Rep. 63.—**CAN.**

**m.** *Report at custom house.*]—A vessel having been ordered to Savona, anchored in the roads there on a Tuesday morning, & was reported at the custom house at 3 *p.m.* on that day, but had to wait until a later date before she could get into the harbour, & until a still later date before she got into the berth where she discharged her cargo. In an action for demurrage it was admitted that the roads were outside the geographical limits of the port of Savona & of what was known commercially as the port, & were the ordinary place at which vessels lay until there should be room in the harbour where alone discharging could be effected. The pursuers averred " that according to the custom of the port, vessels on arrival in the roads are reported at the custom house, & are allotted berths in the harbour according to the order of reporting ":—*Held:* assuming the pursuer's averment to be accurate, the time at which under the charterparty the lay days began was 3 *p.m.* on Tuesday, the hour of reporting at the custom house, although the vessel had not then arrived a a place in the harbour where she could discharge.—HORSLEY LINE, LTD. *v.* ROECHLING BROTHERS, [1908] S. C. 866; 45 Sc. L. R. 691.—**SCOT.**

**n.** *Lightening ship.*]—A charterparty provided for payment of demurrage by the charterer for every day's detention of the vessel by his default, & that she should be ordered to a port where she could discharge " always afloat ": by the bill of lading she was ordered to the " Port of Newry "; from the weight of the cargo, the depth of water, & the draught of the vessel, it was necessary to discharge part of her cargo at " The Pool " in Carlingford Roads, about 10 miles from Newry:—*Held:* " The Pool " being within the " Port of Newry " in its legal sense & not as a geographical expression, the lay days began to run from the date of the commencement of the discharge at " The Pool."—CAFFARINI *v.* WALKER (1876), I. R. 10 C. L. 250.—**IR.**

**o.** *Effect of failure of charterers to provide cargo.*]—A ship arrived on Nov. 13, & on the same day the master

*Sect.* 8.—*Demurrage: Sub-sect.* 3, *B.* (*b*) *i. & ii., C. & D.*]

**3956. Completion of voyage—No direction as to berth.**]—ARMEMENT ADOLF DEPPE *v.* ROBINSON (JOHN) & CO., LTD., No. 3568, *ante.*

**3957. Provision of sufficient cargo—To commence loading.**]—*Re* RICHARDSONS & M. SAMUEL & CO., No. 1680, *ante.*

ii. *Vessel to Load or Unload in Turn.*

*See* Sect. 15, sub-sect. 4, B., *post.*

*C. Running Days.*

**3958. Whether calendar days.**]—THE KATY, No. 3923, *ante.*

**3959.** ——.]—A clause in a charterparty provided as follows: "Cargo to be loaded at the rate of 200 tons per running day, Sundays & holidays excepted . . . & time for loading shall commence to count twelve hours after written notice has been given by the master, brokers, or agents, on working days between 9 a.m. & 6 p.m. to the charterers or their agents that the vessel is in readiness to receive cargo . . .":—*Held:* the running days contemplated by the clause were running days beginning at the expiration of twelve hours after the giving of the notice by the master, & were not calendar days counting from midnight to midnight. —LEONIS S.S. CO., LTD. *v.* RANK (JOSEPH), LTD. (1908), 24 T. L. R. 280; 11 Asp. M. L. C. 142; 13 Com. Cas. 161; *on appeal*, 99 L. T. 513, C. A.

*Annotation:*—**Refd.** Langham S.S. Co. *v.* Callagher (1911), 12 Asp. M. L. C. 109.

**3960. Whether consecutive days.**]—NIELSEN *v.* WAIT, No. 3555, *ante.*

**3961. Commencement of—Arrival in loading dock.**]—By a charterparty it was agreed that pltf. should at L. load on the deft.'s vessel, the *P.*, a cargo of coal, & that she should proceed therewith to D., "the vessel to be loaded & discharged in nineteen running days, or if longer detained, to pay £4 per day demurrage." At the foot of the charterparty was a memorandum, "Vessel to load in B. M. dock or W. Dock, high level." On the day following the execution of the charterparty, the *P.* was, as a matter of favour, admitted into the W. Dock, & was then ready to receive her cargo, but owing to the regulations of the dock authorities, she did not begin to load until about a fortnight later. Upon her arrival at D. disputes arose between her captain & pltf. as to the form of the bill of lading, & in consequence thereof her cargo was not unloaded until twenty days had elapsed after the expiration of the nineteen running days, if calculated from the time of her admission into the W. Dock. In order to obtain delivery of the cargo, pltf. was obliged to pay £80 claimed as demurrage in respect of the twenty days, which he now sued to recover back:—*Held:* the nineteen running days were to be calculated from the time when the *P.* was admitted into the W. Dock, pltf. was liable for demurrage, & the action would not lie.—DAVIES *v.* MCVEAGH (1879), 4 Ex. D. 265; 48 L. J. Q. B. 686; 41 L. T. 308; 28 W. R. 143; 4 Asp. M. L. C. 149, C. A.

*Annotations:*—**Consd.** Nelson *v.* Dahl (1879), 12 Ch. D. 568. **Dbtd.** Murphy *v.* Coffin (1883), 12 Q. B. D. 87. **Apld.** The Carisbrook (1890), 15 P. D. 98. **Expld.** Tharsis Sulphur & Copper Co. *v.* Morel, [1891] 2 Q. B. 647. **Refd.** Postlethwaite *v.* Freeland (1880), 28 W. R. 833; Hick *v.* Tweedy (1890), 63 L. T. 765; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**3962.** —— **Notice of readiness to load.**]—LEONIS S.S. CO., LTD. *v.* RANK (JOSEPH), LTD., No. 3959, *ante.*

**3963. Duration of—Seventy running days in the whole.**]—STEVENSON *v.* YORK (1790), 2 Chit. 570.

**3964.** —— **Time at final port of discharge excluded.**]—SWEETING *v.* DARTHEZ, No. 3696, *ante.*

*D. Working Days.*

**3965. When implied—Discharge in specified number of days.**]—Where there is a clause in a bill of lading, that the cargo shall be taken out in a certain number of days, or to pay demurrage, it means working days, not running days.—COCHRAN *v.* RETBERG (1800), 3 Esp. 121; 170 E. R. 560, E. R.

*Annotation:*—**Refd.** Brown *v.* Byrne (1854), 23 L. J. Q. B. 313.

**3966. Conventional day.**]—By a charterparty the *Ben Vrackie* was to proceed to Marmagoa & there load a cargo of ore, which was "to be shipped at the rate of 500 tons per clear working day of 24 hours (weather permitting), Sundays & holidays always excepted; & to be discharged at 500 tons per like day (except in the case of . . . scarcity of workmen, epidemics . . . interventions of sanitary, Customs, & other constituted authorities, or any cause beyond the personal control of shipper, charterer, or consignees, which may hinder the loading or discharge of the said vessel. In these cases lay day hours not to count & demurrage not to accrue. In case charterers can arrange to load or discharge ship on Sundays or holidays, captain to allow work to be done, half such time actually used to count. Days to be averaged over all voyages performed under & during the entire currency of this charter to avoid demurrage. Loading time to count from 6 a.m. after ship is reported at Custom House & ready free of turn. . . . Time not to count at port of loading & discharge between the hours of 1 p.m. on Saturdays & 7 a.m. on Mondays. Ship to work day & night if requested to do so." The *Ben Vrackie* arrived at Marmagoa in April, 1908. Earlier in the same year plague had broken out at Marmagoa, but it had come to an end in April. The plague had caused a scarcity of workmen, & that had delayed the vessels which arrived at Marmagoa before the *Ben Vrackie*, & she had to wait until some of those prior vessels had left the berths. Additional delay was caused to the *Ben Vrackie* by the fact that another vessel which arrived after her was allowed by the railway co. owning the wharf to get a berth in priority to the *Ben Vrackie*. At Marmagoa the working day was 10½ hours. The *Ben Vrackie* having been detained for some time at Marmagoa, the shipowners claimed demurrage:—*Held:* (1) under the charterparty a "day" was not a calendar day, but a conventional day; (2) the vessel's right to demurrage at Marmagoa must be determined according to the number of days occupied there in loading, although the charterers would be entitled to abate the amount of such demurrage by taking credit for any time saved at the port of discharge; (3) the charterers were not excused by the exceptions of scarcity of workmen or epidemics, inasmuch as it had not been shown that either of these causes had hindered the loading of the *Ben Vrackie;* (4) the act of the railway co. in allowing another vessel to get a berth before the *Ben Vrackie* was not an intervention of "sanitary, customs, & other constituted authorities"

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gave written intimation to the charterers that the ship was ready to receive cargo. On Nov. 14, a berth was available for loading the cargo, but as there was no cargo forward for the ship, the berth, in accordance with the harbour rules, was given to another vessel:—*Held:* the lay days commenced to run on Nov. 14, as the ship would have been berthed on that date but for the fault of the charterers in failing to have the cargo ready for shipment.—LILLY & CO. *v.* STEVENSON (D. M.) & CO. (1895), 22 R. (Ct. of Sess.) 278; 32 Sc. L. R. 212.—SCOT.

within the meaning of those words in the exceptions clause.—WATSON BROTHERS *v.* MYSORE MANGANESE CO., LTD. (1910), 102 L. T. 169; 26 T. L. R. 221; 54 Sol. Jo. 234; 11 Asp. M. L. C. 364; 15 Com. Cas. 159.

*Annotation:—As to* (1) **Consd.** Orpheus S.S. Co. *v.* Bovill (1916), 114 L. T. 750.

**3967. Whether Sundays excluded.**] — COMMERCIAL S.S. CO. *v.* BOULTON, No. 3910, *ante.*

**3968.** ——.]—NIELSEN *v.* WAIT, No. 3555, *ante.*

**3969.** ——.]—By a charterparty dated Apr. 13, 1915, pltfs. chartered their vessel, the *O.*, to an American export co. to carry a cargo of 6,350 tons of grain from Newport News to Avonmouth. By a contract of sale the ownership of the cargo passed to defts. The charterparty & the bill of lading, which was to complete & supersede the charterparty, provided that the vessel should "be loaded according to berth terms, and with customary berth dispatch, & if detained longer than five days, Sundays & holidays excepted, charterers to pay demurrage [at a certain rate] . . . provided that such detention shall occur by default of charterers or their agents, & same rate of demurrage to apply at port of discharge," & further, that she should discharge at Avonmouth, "in accordance with the rules of the Bristol Channel & West of England Corn Trade Assocn." It was also provided that the steamer might discharge at all hours when the customs authorities would allow her to do so, provided that an extra expense in working at night or on Sundays should be borne by the party ordering the work. The rules of the Bristol Channel & West of England Corn Trade Assocn. provided that a steamer carrying a cargo of 6,350 tons should be allowed eight "working days of twenty-four hours each," Sundays excluded, to discharge. The *O.* arrived off Avonmouth at 8.15 a.m. on Tuesday, July 6, & by the terms of the charterparty & bill of lading the lay days began at that time. The discharge was finished at 5 p.m. on July 23. Pltfs. claimed demurrage in respect of eight days, nine hours, alleging that, allowing for exclusion of Sunday, July 11, the lay days ended at 8.15 a.m. on July 15:—*Held:* (1) the provision that the same rate of demurrage should apply at the port of discharge as at the port of shipment did not necessarily imply that the liability of the charterers was restricted at the port of discharge as at the port of shipment; (2) "a working day of twenty-four hours" meant a period of twenty-four hours commencing at the time when the ship was ready to discharge, excluding Sundays & certain other excepted days.—ORPHEUS STEAM SHIPPING CO. *v.* BOVILL & SONS (1916), 114 L. T. 750; 13 Asp. M. L. C. 404.

**3970. Holidays excluded — Christmas Day.**]—NIELSEN *v.* WAIT, No. 3555, *ante.*

**3971. Fraction of days included.**]—COMMERCIAL S.S. CO. *v.* BOULTON, No. 3910, *ante.*

**3972.** ——.]—YEOMAN *v.* R., No. 3853, *ante.*

**3973. "Working day of twenty-four hours."**]—A charterparty provided that the charterers were "to be allowed 350 tons per working day of twenty-four hours, weather permitting, Sundays & holidays excepted, for loading & discharging . . . same to count from 6 a.m. of the day following the day when steamer is reported at the Custom-house, unless she be reported before noon, in which case time to count from notice of readiness & in every respect ready to load or discharge respectively in free pratique. Steamer to work at night if required. Also on Sundays & holidays, such time not to count as lay days unless used:—*Held:* the charterers were entitled to twenty-four working hours, for the loading or discharging of each 350 tons.

There is no such thing as "a working day of twenty-four hours"; the thing is absurd; nobody supposes people to work for twenty-four hours (LORD HALSBURY, C.).—FOREST S.S. CO. *v.* IBERIAN IRON ORE CO. (1899), 81 L. T. 563; 16 T. L. R. 59; 9 Asp. M. L. C. 1; 5 Com. Cas. 83, H. L.; *affg.* S. C. *sub nom.* RHYMNEY S.S. CO., LTD. *v.* IBERIAN IRON ORE CO., LTD., FOREST S.S. CO., LTD. *v.* IBERIAN IRON ORE CO., LTD. (1898), 79 L. T. 240, C. A.

*Annotations:*—**Apld.** Watson *v.* Mysore Manganese Co. (1910), 102 L. T. 169. **Consd.** Orpheus S.S. Co. *v.* Bovill (1916), 114 L. T. 750.

**3974.** ——.]—ORPHEUS STEAM SHIPPING CO. *v.* BOVILL & SONS, No. 3969, *ante.*

**3975. Weather working day—Mode of computation.**]—A charterparty provided that cargo should be loaded at a certain rate per weather-working day. On certain days owing to bad weather cargo could only be loaded for a few hours:—*Held:* the time so occupied in loading cargo was not to be reckoned against the charterers as a whole, but as a part only, of a weather-working day.

Where work is stopped by bad weather, but a substantial quantity of work is done, though not amounting to half a day, it is to be reckoned as half a day: where substantially more than half a day's work is done, though not amounting to a whole day, it is to be counted as a whole day; no smaller fraction than half a day should be taken into the calculation.—BRANCKELOW S.S. CO. *v.* LAMPORT & HOLT, [1897] 1 Q. B. 570; 66 L. J. Q. B. 382; 2 Com. Cas. 89.

*Annotations:*—**Refd.** Nelson *v.* Nelson Line, Liverpool, [1907] 2 K. B. 705; Whittall *v.* Rahtken's Shipping Co., [1907] 1 K. B. 783.

**3976. —— Construed in natural & ordinary meaning—Admissibility of evidence of custom to contrary.**]—The expression "weather working day," as used of lay days for loading or discharging a vessel, has a natural & ordinary meaning, namely, a day on which the work of loading or discharging is not prevented by bad weather. Therefore, where by a charterparty the charterers bind themselves to take delivery of the cargo at an average rate per weather working day, evidence of a custom that at the port of discharge the expression bears a different meaning is not admissible.

By a charterparty a vessel was to proceed to one or two safe ports between Valparaiso & Pisagua inclusive, as ordered on arrival at Valparaiso, & there deliver the cargo in the usual & customary manner alongside such wharf, etc., where she could always safely lie afloat as directed by the consignees. The exceptions clause included a provision, "detention through . . . delay by . . . surf . . . not to count in the time allowed for

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**PART VII. SECT. 8, SUB-SECT. 3.—D.**

**3967 i.** *Whether Sundays excluded.*]—In computing demurrage Sunday is to be reckoned as one of the days to be allowed for. If the parties wish to exclude any days from the computation they must be expressed.—GIBLON *v.* MICHAEL'S BAY LUMBER CO. (1885), 7 O. R. 746.—**CAN.**

**3967 ii.** ——.]—The ch rterers of a vessel engaged to take delivery of cargo, which was to be unloaded under an agreement with the owners, "as fast as ship could put it out," & to supply & put on board ballast. The vessel was detained beyond the lay days by delay on the part of the charterers to take delivery as fast as the ship could put it out, & by their not supplying ballast to keep the ship in trim during the disch rging:—*Held:* although no protest had been taken they were liable to the owners in demurrage for the number of days which the ship was detained over the lay days, & in this question, Sundays, holidays, & days when the weather prevented unloading, ought not to be computed.—PRICE *v.* THOMSON & GRAY (1885), 22 Sc. L. R. 690.—**SCOT.**

p. *Holidays excluded — Feast of*

*Sect. 8.—Demurrage: Sub-sect. 3, D., E. & F.*]

loading or discharging." The cargo was to be taken delivery of from alongside ship at port of discharge, "at the average rate of not less than 250 tons per weather working day (Sundays & holidays excepted)." . . . The vessel was ordered to discharge at Valparaiso:—*Held:* (1) evidence was not admissible to show that by the custom of the port of Valparaiso a surf day (*i.e.*, a day on which the surf on the beach is so heavy that lighters cannot land their cargo there without unusual difficulty & delay) does not count as a weather working day, & surf days were fixed by the decision of the port captain; (2) the exception "detention through . . . delay by . . . surf . . . not to count in the time allowed for . . . discharging," was not limited to detention through delay caused by surf in the discharge of the cargo from the ship into lighters, but included detention through delay caused by surf in landing the cargo from the lighters on to the beach.—BENNETTS & CO. *v.* BROWN, [1908] 1 K. B. 490; 77 L. J. K. B. 515; 98 L. T. 281; 24 T. L. R. 199; 52 Sol. Jo. 160; 11 Asp. M. L. C. 10; 13 Com. Cas. 110.

*Annotation:—As to* (1) **Dbtd.** British & Mexican Shipping Co. *v.* Lockett, [1911] 1 K. B. 264.

**3977. —— "Surf days."**]—BENNETTS & CO. *v.* BROWN, No. 3976, *ante*.

**3978. —— ——.**]—BRITISH & MEXICAN SHIPPING CO., LTD. *v.* LOCKETT BROTHERS & CO., LTD., No. 4504, *post*.

**3979. Colliery working day—Exclusion of non-working hours—Saturday to Monday.**]—A charterparty provided that a ship should proceed to a named port & there load, "in the usual & customary manner always afloat in days to be arranged colliery working days, as per colliery guarantee form," a cargo of coal. The colliery guarantee provided for the loading of the ship in fifteen days, & contained certain exceptions as to time, which were "not to be computed as part of the aforesaid loading time, unless used," including holidays, time from 5 p.m. on Saturday until 7 a.m. on Monday, & any time lost through strikes causing a stoppage at the colliery. The colliery guarantee also provided that "for the purpose of this guarantee all holidays & full day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding, & to end at 7 a.m. the working day, following such holiday or stoppage & that demurrage, if any, was to be at certain specified rates per day, "demurrage to be in accordance with the above scale payable per colliery working day, or in proportion for any part of a day, which for the purpose of computation shall be divisible into twenty-four parts." The parties had agreed that demurrage at the port of loading should be payable at a certain rate other than that specified in the scale in the colliery guarantee. In an action by the shipowners claiming demurrage at the port of loading:—*Held:* in computing the time for which demurrage was payable, the time after 5 p.m. on the days preceding, & the time before 7 a.m. on the days succeeding, Sundays & holidays did not count.—CLINK *v.* HICKIE, BORMAN & CO. (1899), 15 T. L. R. 408; 4 Com. Cas. 292, C. A.

*Annotation:—***Apld.** Saxon S.S. Co. *v.* Union S.S. Co. (1899), 68 L. J. Q. B. 914.

**3980. —— —— ——.**]—Defts. chartered pltfs.' ship to load a cargo of coal. The charterparty provided that the ship should proceed to a named dock, & there load a cargo of coal in twelve clear working days, Sundays & holidays excepted, "subject to the conditions of the colliery guarantee," "demurrage at loading port as per colliery guarantee." The colliery guarantee provided for the loading of the ship in twelve days, & contained certain exceptions as to time, which were "not to be computed as part of the aforesaid loading time, unless used," including all holidays whereby work was suspended at the docks or colliery, time from 5 p.m. on Saturday until 7 a.m. on Monday, & any time lost through strikes causing a stoppage of the colliery. The colliery guarantee also provided that "for the purpose of this guarantee all holidays & full day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding, & to end at 7 a.m. the working day following such holiday or stoppage"; & that demurrage, if any, was to be at certain specified rates per day, varying in proportion to the tonnage of the vessel, "demurrage to be in accordance with the above scale payable per colliery working day." The ship proceeded to the port named. The lay days commenced on Mar. 16, & expired on Mar. 31. On Apr. 9 a strike commenced at the colliery. The ship remained at the port. On May 24, the strike continuing, the colliery co. gave notice that they could not load the ship, which notice was, on May 26, communicated to pltfs. They, with reasonable dispatch, obtained another charterparty, & the ship left the port on June 17:—*Held:* (1) "colliery working day" meant a day which was an ordinary working day at the colliery in normal circumstances, although no work might, in fact, have been done at the colliery on such day; (2) the exception as to time lost through strikes only applied to the lay days & not to the time when the ship was on demurrage; (3) the shipowners were justified in keeping the ship at the port after the strike commenced, & were entitled to demurrage for every day from Mar. 31 up to June 17, excluding Sundays & holidays; (4) in calculating the period of demurrage no account was to be taken of the conventional extension of Sundays & holidays, & the demurrage period included the time from 5 p.m. to midnight before & from midnight to 7 a.m. after Sundays & holidays.—SAXON S.S. CO. *v.* UNION S.S. CO. (1900), 69 L. J. Q. B. 907; 83 L. T. 106; 16 T. L. R. 527; 9 Asp. M. L. C. 114; 5 Com. Cas. 381, H. L.

*Annotations:—As to* (1) **Apld.** Orpheus S.S. Co. *v.* Bovill (1916), 114 L. T. 750. **Refd.** British & Mexican Shipping Co. *v.* Lockett, [1911] 1 K. B. 264. *As to* (4) **Refd.** Clink *v.* Hickie, Borman (1899), 15 T. L. R. 408. *Generally*, **Refd.** Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352.

**3981. —— Strike days included.**]—SAXON S.S. CO. *v.* UNION S.S. CO., No. 3980, *ante*.

**3982. Specified quantity discharged per diem—Day lost through wet weather.**]—A., B., C., & D., agreed to purchase a cargo of coals, in certain proportions,

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kept as a national holiday in Peru, is not a working day.—HOLMAN *v.* PERUVIAN NITRATE CO. (1878), 5 R. (Ct. of Sess.) 657; 15 Sc. L. R. 349.—**SCOT.**

**3977 i.** *Weather working day—"Surf days."*]—In an outward & a homeward charterparty a certain number of "working days" were allowed for discharging the outward & loading the homeward cargo. In an action for demurrage by the owner:—*Held:* days in which the work of loading & discharging vessels in the open roadstead of a foreign port could not be carried on on account of the surf, & on which by local custom such work was stopped by order of the captain of the port, were "working days" within the meaning of the charterparty.—HOLMAN *v.* PERUVIAN NITRATE CO. (1878), 5 R. (Ct. of Sess.) 657; 15 Sc. L. R. 349.—**SCOT.**

q. "*Working day of twenty-four consecutive hours.*"]—A charterparty provided that the ship was to be loaded & discharged "at the rate of 500 tons per working day of 24 consecutive hours (weather permitting), Sundays & holidays always excepted":—*Held:*

to be severally taken & received out of the ship by them respectively at the rate of 40 chaldrons per day, & to settle their turns among themselves; & further agreed that in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally & respectively liable for their several & respective defaults: at the rate of 40 chaldrons per day, the whole cargo would have been cleared in nine days; but in consequence of one of the days being wet only 5 chaldrons were taken out on that day; & on the tenth day some of A.'s coals remained on board:—*Held:* working-days only were within the meaning of the contract, & as one day was wet, A. was not bound to pay demurrage for the tenth day.—HARPER *v.* M'CARTHY (1806), 2 Bos. & P. N. R. 258; 127 E. R. 625.

*Annotation:*—**Refd.** Thiis *v.* Byers (1876), 1 Q. B. D. 244.

**3983. —— Delay through strike of discharging workmen.**]—DOBELL *v.* WATTS, WARD & CO. (1891), 7 T. L. R. 622, C. A.

*Annotation:*—**Consd.** Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70.

**3984. ——.**]—By a charterparty dated July 13, 1915, pltfs. chartered the steamship *M. B.* to defts. for a voyage with a cargo of timber from Archangel to Sharpness Docks. By clause 10 of the charter the cargo was to be discharged with the customary steamer dispatch of the port, & in the ordinary working hours. By clause 11 demurrage was fixed at £90 per day "where delay occasioned through any fault of the charterer." By clause 20 the steamer was to be discharged at the average rate of 100 standards of timber per weather working day. On Sept. 22, 1915, the *M. B.* arrived at Sharpness Docks with a cargo of 747 standards of timber. Pltfs. alleged that under the charter the lay days commenced on the following day, & that, therefore, by clause 20, the unloading should have been completed by Oct. 1, whereas in fact it was not completed until Oct. 19; & they claimed £1,582 10*s.* demurrage:—*Held:* (1) pltfs. were entitled to succeed, since defts. had failed to comply with the terms of the charter, which was a "fixed lay-day" charter, the effect of clause 20 being to quantify by agreement that which would have been achieved by the application of clause 10; (2) where clause 20 operated the words in clause 11 "where delay occasioned through any fault of the charterer," became inapplicable.—BAIRD & CO. *v.* PRICE, WALKER & CO. (1916), 86 L. J. K. B. 935; 115 L. T. 227; 13 Asp. M. L. C. 448.

*E. Sundays and Holidays Excepted.*

**3985. Holidays excepted—Sundays included.**]—Action for demurrage upon a charterparty, which contained the following clause:—"The vessel to be loaded in Liverpool in fourteen days, & to be discharged, weather permitting, at not less than twenty-five tons per working day (holidays excepted), the said days to commence on the ship being in turn, & ready to deliver; all days above the said days to be paid demurrage at the rate of £5 sterling per day." The cargo was to be delivered at Constantinople:—*Held:* Sundays were to be included in the calculation of the lay days allowed for loading.—NIEMANN *v.* MOSS (1860), 29 L. J. Q. B. 206; 6 Jur. N. S. 775.

**3986. —— Work done in holidays—Whether treated as lay days—Presumption of agreement.**]—BRANCKELOW S.S. CO. *v.* LAMPORT & HOLT (1897), [1907] 1 K. B. 787, n.; 76 L. J. K. B. 534, n.; 96 L. T. 886, n.; 12 Com. Cas. 189, n.; 10 Asp. M. L. C. 472, n.

*Annotations:*—**Apprvd.** Nelson *v.* Nelson Line, Liverpool, [1907] 2 K. B. 705. **Consd.** Whittall *v.* Rahtken's Shipping Co., [1907] 1 K. B. 783.

**3987. —— —— —— Work at request of charterers.**]—(1) A charterparty provided that thirteen running days, Sundays & holidays excepted, should be allowed the charterers for loading the cargo. Demurrage for any days over & above the laying days was to be paid at the rate of £35 per day. By the direction of the charterers work was done in loading the ship on a Sunday after the lay days had begun to run & before they had expired:—*Held:* the proper inference to be drawn was that the parties had agreed to include that day among the lay days, & notwithstanding the express terms of the charterparty, that day was to be counted as a lay day.

(2) In the absence of any indication to the contrary, the same inference is to be drawn when work is in fact done in loading the ship on a Sunday or holiday, whether by the direction or at the request of the charterers or not.

(3) The charterparty also provided that the ship should proceed to a named port & there load a cargo. The charterers were to have the option of using one or two neighbouring ports in the district of the named port, time in shifting ports to count as lay days:—*Held:* a Sunday or holiday occupied at the request of the charterers in shifting from one port to another in the district of the named port was to be included in the lay days.—WHITTALL & CO. *v.* RAHTKEN'S SHIPPING CO., LTD., [1907] 1 K. B. 783; 76 L. J. K. B. 538; 96 L. T. 885; 23 T. L. R. 346; 10 Asp. M. L. C. 471; 12 Com. Cas. 226.

*Annotation:*—*As to* (1) **Apld.** Nelson *v.* Nelson Line, Liverpool, [1907] 2 K. B. 705.

**3988. —— —— ——.**]—NELSON (JAMES) & SONS, LTD. *v.* NELSON LINE (LIVERPOOL), LTD., No. 4044, *post.*

**3989. Sundays excepted—Work done on Sundays—Whether treated as lay days—Presumption of agreement.**]—BRANCKELOW S.S. CO. *v.* LAMPORT & HOLT (1897), [1907] 1 K. B. 787, n.; 76 L. J. K. B. 534, n.; 96 L. T. 886, n.; 12 Com. Cas. 189, n.; 10 Asp. M. L. C. 472, n.

*Annotations:*—**Apprvd.** Nelson *v.* Nelson Line, Liverpool, [1907] 2 K. B. 705. **Consd.** Whittall *v.* Rahtken's Shipping Co., [1907] 1 K. B. 783.

**3990. —— —— —— Work at request of charterers.**]—WHITTALL & CO. *v.* RAHTKEN'S SHIPPING CO., LTD., No. 3987, *ante.*

**3991. —— Lay days exhausted in loading—Sundays not excepted in subsequent delay.**]—THE VALHALLA (1908), *Times*, July 27.

*F. Days Saved.*

**3992. General rule.**]—By charterparty between pltf. & defts. it was agreed that pltf.'s ship should

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a "working day of 24 consecutive hours" meant a period of 24 actually consecutive hours, *i.e.* including the hours of night, & not an artificial period made up for 24 working hours, *i.e.* excluding the hours of night.—TURNBULL, SCOTT & CO. *v.* CRUICKSHANK & CO. (1904), 7 F. (Ct. of Sess.) 265; 42 Sc. L. R. 207; 12 S. L. T. 446.—**SCOT.**

r. *Twelve hours.*]—A charterparty provided that the ship was to be loaded in nine "working days," & to be discharged as customary "per like working day . . . loading time to count from 6 *a.m.* after the ship is at the Custom House & ready . . . demurrage over & above he said lying days at 16*s.* 8*d.* per hour . . . the steamer to work day & night if required to do so" at the port of discharge:—*Held:* the "working day" at the port of loading was a day of twelve hours from 6 *a.m.* & not a day of 24 hours, & consequently that the ship was on demurrage from 6 *p.m.* of the last lay day.—MEIN *v.* OTTMANN (1904), 6 F. (Ct. of Sess.) 276; 41 Sc. L. R. 144.—**SCOT.**

**PART VII. SECT. 8, SUB-SECT. 3.—F.**

**3992 1.** *General rule.*]—The time occupied in loading a vessel is not in the

*Sect.* 8.—*Demurrage: Sub-sect.* 3, *F.*; *sub-sect.* 4. *Sect.* 9: *Sub-sect.* 1.]

proceed to Bilbao & there load a full & complete, or part, cargo of iron ore, & deliver the same at Middlesbrough. "400/500 tons per working day, Sundays & holidays excepted, to be allowed the charterers for loading, & 300 discharging, all demurrage over & above the said days at the rate of 2*s.* per hour for every 100 tons cargo. The lay days to commence day after arrival, & being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage." "If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading & discharging to be at the rate of 300 tons per working day." The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesbrough, where she discharged her cargo at a higher rate per day:—*Held:* in calculating the demurrage, the days for loading & unloading must be kept separate, & the charterers had no right to add together the whole number of days occupied in loading & unloading for the purpose of ascertaining the average amount of work done on each day.—MARSHALL *v.* BOLCKOW (1881), 6 Q. B. D. 231; 29 W. R. 792, D. C.

**3993. Effect of express stipulation—Average of days.**]—Where a charterparty gives liberty to the charterers "to average the days for loading & discharging in order to avoid demurrage," the charterers may add together at the port of loading the days allowed for the two operations of loading & discharging, & the ship does not come on demurrage till the days so added together are exhausted.—MOLIÈRE S.S. CO., LTD. *v.* NAYLOR, BENZON & CO. (1897), 13 T. L. R. 187; 2 Com. Cas. 92.

**3994.** —— ——.] — WATSON BROTHERS *v.* MYSORE MANGANESE CO., LTD., No. 3966, *ante*.

**3995.** —— **Reversible terms for loading & discharging.**]—LOVE & STEWART, LTD. *v.* ROWTOR S.S. CO., LTD., No. 1712, *ante*.

**3996.** —— —— **Exclusion of Sundays, holidays & non-weather days.**]—In a charterparty which provided that cargo was to be supplied at a certain rate per working day of twenty-four consecutive hours, Sundays & holidays excepted & weather permitting, the exceptions clause as to delay in loading by excepted causes ended thus: "Lay days not to count during the period of such delay or hindrance & demurrage not to accrue." It further provided: "At charterers' option any days or parts of days not occupied in loading may be added to the time for discharging, & any extra time consumed in loading may be deduced from the time for discharging":—*Held:* the expression "extra time consumed in loading" meant time beyond what was expressly provided for in the charterparty as applicable to the whole of that period, that is to say, Sundays & holidays & non-weather days were excluded from computation.—REDERIAKT. TRANSATLANTIC *v.* COMPAGNIE FRANCAISE DES PHOSPHATES DE L'OCEANIE (1926), 136 L. T. 619; 17 Asp. M. L. C. 216; 32 Com. Cas. 126, C. A.

**3997. Effect of payment of dispatch money.**]—A charterparty provided that the charterers were to have "the option of averaging days for loading & discharging, in order to avoid demurrage . . . dispatch money at the rate of ten shillings per hour to be paid for any time saved in loading or discharging, to be settled in loading or discharging ports respectively." The vessel was loaded within the time allowed, & the charterers claimed dispatch money for the days saved & the amount so due to them was indorsed on the charterparty. At the port of discharge the lay days were exceeded, & the shipowners claimed in respect thereof demurrage:—*Held:* the charterers could not exercise their option of averaging days of loading & discharge, because the question of how the time saved at port of loading was to be treated must be considered as closed when the vessel sailed from port, & therefore the shipowners were entitled to claim in full demurrage.—OAKVILLE S.S. CO. *v.* HOLMES (1899), 48 W. R. 152; 16 T. L. R. 54; 44 Sol. Jo. 75; 5 Com. Cas. 48.

*Annotation:*—**Refd.** The Nollisement *v.* Bunge & Born, [1916] 1 K. B. 805.

**3998. Days counted to correspond with lay days—Sundays & fête days excluded.**]—THE GLENDEVON, No. 4042, *post*.

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SUB-SECT. 4.—LIEN FOR DEMURRAGE.

**3999. Right to lien—Where expressly stipulated.**]—GRAY *v.* CARR, No. 1958, *ante*.

**4000.** —— ——.] — SMITH *v.* SIEVEKING, No. 3841, *ante*.

**4001.** —— ——.] — HARRIS *v.* JACOBS, No. 3844, *ante*.

**4002.** —— **Where not expressly stipulated.**]—Where the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight, according to different rates for three descriptions of goods:—*Held:* the shipowner had no lien upon the goods actually on board for the amount of the dead freight, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated; & there being no lien in such a case either by the usage of trade or the express contract of the parties, nor had the shipowner any lien for demurrage.—PHILLIPS *v.* RODIE (1812), 15 East, 547; 104 E. R. 950.

*Annotations:*—**Consd.** Birley *v.* Gladstone (1814), 3 M. & S. 205; Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Refd.** Pearson *v.* Goschen (1864), 17 C. B. N. S. 352; McLean & Hope *v.* Fleming (1871), L. R. 2 Sc. & Div. 128.

**4003.** —— ——.]—Where by charterparty the shipowners covenanted to receive a full cargo, & the freighter to load the same, & to pay so much

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absence of stipulation, to be lumped with the time occupied in discharging her to the effect of working off by extra dispatch in the one operation demurrage incurred by delay in the other.—AVON S.S. CO. *v.* LEASK & CO. (1890), 18 R. (Ct. of Sess.) 280; 28 Sc. L. R. 226.—**SCOT.**

**PART VII. SECT. 8, SUB-SECT. 4.**

**3999 i.** *Right to lien—Where expressly stipulated.*]—FORSYTH *v.* SUTHERLAND (1898), 31 N. S. R. (19 R. & G.) 391.—**CAN.**

**3999 ii.** —— ——.]—Pltf. chartered a steamer from deft. to take salt from C. to S. The charterparty provided that the master should have a lien on the cargo for demurrage, etc. The steamer was delayed in loading for 7 days. When she arrived in S. the cargo was delivered to pltfs. except 300 tons, which the master held, claiming a lien thereon for demurrage. Pltfs. thereupon took action, claiming delivery of the salt & damage for non-delivery. Deft. pleaded a lien & counterclaimed for demurrage. Pltfs. set up in reply that they were prevented by gales of wind & stress of weather from loading the steamer:—*Held:* deft. was entitled to a lien, & the reply of pltfs. disclosed no answer to the counterclaim.—JOB *v.* BOE (1900), 8 Nfld. L. R. 405.—**NFLD.**

**t.** —— *Where not expressly stipulated.*]—Where a bill of lading contained this condition, "demurrage charged on all cars not unloaded within 24 hours after the arrival":—*Held:* under this condition a lien upon the goods carried was created,

for every ton of flax, etc., which should be delivered at the King's beams at L., & so much *per diem* for demurrage, & the parties mutually bound themselves, especially the shipowners the ship, her tackle, & appurtenants, & the freighter the goods to be laden & put on board, in a penal sum, for the performance of every article contained in the charterparty:—*Held:* the shipowners had not a lien upon the goods actually brought home to L. for a sum of money claimed to be due in respect of goods which were put on board at the loading port, but afterwards relanded, & restored to the agent of the freighter, under process of the law at the loading port, nor for a sum claimed for dead freight, nor for a sum claimed for demurrage.—BIRLEY *v.* GLADSTONE (1814), 3 M. & S. 205; 105 E. R. 587.

*Annotations:*—**Consd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Refd.** Belcher *v.* Capper (1842), 4 Man. & G. 502; Pearson *v.* Goschen (1864), 17 C. B. N. S. 352; McLean & Hope *v.* Fleming (1871), L. R. 2 Sc. & Div. 128.

**4004. Extent of express lien—Detention beyond demurrage days.**]—GRAY *v.* CARR, No. 1958, *ante*.

**4005.** ——— ———.]—By a charterparty cargo was to be loaded in thirteen working days, & to be discharged at not less than 30 tons per working day. Ten days' demurrage to be allowed above the said days. Charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight & demurrage:—*Held:* the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. *Qu.:* whether the lien for "demurrage" would have extended to damages for detention beyond the demurrage days.—KISH *v.* CORY (1875), L. R. 10 Q. B. 553; 44 L. J. Q. B. 205; 32 L. T. 670; 23 W. R. 880; 2 Asp. M. L. C. 593, Ex. Ch.

*Annotations:*—**Refd.** French *v.* Gerber (1876), 1 C. P. D. 737; Sanguinetti *v.* Pacific Steam Navigation Co. (1877), 2 Q. B. D. 238; Clink *v.* Radford, [1891] 1 Q. B. 625; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507; Restitution S.S. Co. *v.* Sir John Firie (1899), 61 L. T. 330; Rederiact. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998.

**4006.** —— **Detention at port of loading.**]—LOCKHART *v.* FALK, No. 3864, *ante*.

**4007.** ——— ———.]—CLINK *v.* RADFORD & CO., No. 1962, *ante*.

**4008.** ——— ———.]—The word "demurrage" in a lien clause does not cover damages for undue detention at the port of loading, & the cesser clause does not exempt the charterer from liability for the delay.—DUNLOP & SONS *v.* BALFOUR, WILLIAMSON & CO., [1892] 1 Q. B. 507; 61 L. J. Q. B. 354; 66 L. T. 455; 40 W. R. 371; 8 T. L. R. 378; 36 Sol. Jo. 306; 7 Asp. M. L. C. 181, C. A.

*Annotations:*—**Refd.** Castlegate S.S. Co. *v.* Dempsey, [1892] 1 Q. B. 854; United States Shipping Board *v.* Strick, [1926] A. C. 515.

**4009.** —— —— **"Loading excepted" in cesser clause.**]—LISTER *v.* VAN HAANSBERGEN, No. 1954, *ante*.

**4010.** ——— ——— **For provision of stiffening coal.**]—SANGUINETTI *v.* PACIFIC STEAM NAVIGATION CO., No. 1955, *ante*.

**4011.** ——— ——— **Demurrage payable day by day.**]—REDERIACT. SUPERIOR *v.* DEWAR & WEBB, No. 4138, *post*.

**4012.** —— **Detention at discharge ports.**]—LOCKHART *v.* FALK, No. 3864, *ante*.

**4013. Abandonment of lien—Omission of stipulation in sub-charterparty.**]—(1) In a charterparty deft. agreed to "load a full & complete cargo, say about 1,100 tons":—*Held:* the words "say about 1,100 tons" were words of contract & not of expectation only; deft. was bound to load a full cargo unless that exceeded such a quantity as might reasonably be described as "about 1,100 tons"; if the ship would hold much more than 1,100 tons, then deft. was not bound to load a full & complete cargo, but only such a quantity as might reasonably be described as "about 1,100 tons"; there was no rule of law as to the exact meaning of such phrases as "about 1,100"; it was for the jury in every case to determine what percentage above or under 1,100 may reasonably be allowed.

(2) Acting here as a jury, for the purpose of assessing the damages, & for the purposes of this case only, the ct. fixed upon 3 per cent. as a reasonable percentage to be allowed in this case, & interpreted the agreement to mean that if the ship would hold only 1,133 tons or less, then deft. was bound to load a full & complete cargo, but that if the ship would hold over 1,133 tons, then deft. was only bound to load 1,133 tons & no more. The ship could safely have carried 1,210 tons. Deft. loaded 1,080:—*Held:* pltf. was entitled to recover dead freight for 53 tons.

(3) A shipowner let his ship to pltf. by a charterparty, reserving to his captain an absolute lien on the cargo for freight & demurrage. Pltf. let the ship to deft. by a charterparty not expressly reserving any lien. The captain received deft.'s goods on board under the subcharter:—*Held:* the shipowner must be taken to have known the terms of the subcharter, & by receiving goods under it on board his ship he abandoned the lien for demurrage reserved to him by the head charter.—MORRIS *v.* LEVISON (1876), 1 C. P. D. 155; 45 L. J. Q. B. 409; 34 L. T. 576; 24 W. R. 517; 3 Asp. M. L. C. 171.

*Annotations:*—*As to* (1) **Distd.** Carnegie *v.* Connor (1889), 24 Q. B. D. 45. **Refd.** Carlton S.S. Co. *v.* Castle Mail Packets Co. (1897), 13 T. L. R. 375; Miller *v.* Borner, [1900] 1 Q. B. 691. *As to* (2) **Refd.** The Resolven (1892), 9 T. L. R. 75. *Generally*, **Refd.** Harrison *v.* Micks, Lambert (1917), 86 L. J. K. B. 573.

**4014. Master's right of lien.**]—DICKENSON *v.* LANO, No. 4365, *post*.

**4015. Failure of agent to exercise lien—Absence of instructions.**]—COBRIDGE S.S. CO., LTD. *v.* BUCKNALL STEAMSHIP LINES, LTD., No. 3731, *ante*.

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## SECT. 9.—DAMAGES FOR DETENTION.

### SUB-SECT. 1.—IN GENERAL.

**4016. Beyond lay days.**]—RANDALL *v.* LYNCH, No. 3865, *ante*.

**4017.** ———.]—WOOLLEY *v.* REDDELIEN, No. 3486, *ante*.

**4018. Beyond demurrage days.**]—Where a charterparty stipulates for seventy-five running days, & twenty days on demurrage, if the ship is detained for extra days the remedy is not by an *indebitatus* count for demurrage, but by action on the charterparty itself.—CROPTON *v.* PICKERNELL (1847), 16 M. & W. 829; 153 E. R. 1427.

**4019. For unreasonable time—No time stipulated.**]—Pltfs., shipowners sued consignees for damages for delay in unloading. In the bills

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as well for demurrage as for freight.—MURRAY *v.* GRAND TRUNK RY. CO. (1874), 5 R. L. O. S. 746.—**CAN.**

a. ——— ———.]—LAND *v.* WOODWARD (1848), 5 U. C. R. 190.—**CAN.**

b. — — ———.]—THE DRAKE (CARGO EX) (1885), 5 C. L. T. 471.—**CAN.**

**4012 i.** *Extent of express lien—Detention at discharge ports.*]—LAMB *v.* KASELACK, ALSEN & CO. (1882), 9 R. (Ct. of Sess.) 482; 19 Sc. L. R. 336.—**SCOT.**

**PART VII. SECT. 9, SUB-SECT. 1.**

c. *For unreasonable time.*]—TENNENT *v.* CARMICHAEL (1843), 5 Dunl. (Ct. of Sess.) 639.—**SCOT.**

*Sect. 9.—Damages for detention: Sub-sect. 1.]*

of lading there was no stipulation as to the time for unloading, & pltfs.' vessel could only be discharged at one of three berths, the property of the consignees, which at the time of the arrival of pltfs.' ship at the port had all been occupied by other vessels with cargoes belonging to defts. The discharge of pltfs.' ship was thereby delayed for several days:—*Held:* it having been an implied term in the contract that defts. should discharge the cargo within a reasonable time, pltfs., under the circumstances, could recover damages for the loss occasioned by the delay.—TILLETT & CO. *v.* CWM AVON WORKS PROPRIETORS (1886), 2 T. L. R. 675, D. C.

**4020. Failure to obtain certificates—As to fitness of cargo.**]—THE CANTON & THE HALCYON, TORR *v.* FERRICKS (1854), 8 L. T. 30.

**4021. Non-payment of freight—Liability of consignee.**]—Declaration that, in consideration that pltf., at deft.'s request, would deliver wheat, then on board pltf.'s ship, having been conveyed therein for freight to be paid by the person who should receive it, to deft. with lighters provided by deft., deft. promised to receive it in a reasonable time: breach, that deft. made default in receiving in a reasonable time, whereby pltf. was detained an unreasonable time in discharging. Deft. traversed the promise & the default, & pleaded that pltf. was not ready to deliver.

It was proved that, by charterparty, pltf., owner of a ship, agreed with the freighter to deliver a cargo at the port of discharge on payment of freight, conformably to the bills of lading; & a certain number of lay days were allowed, after which demurrage was to be charged at a given rate per day; the bills of lading stipulated for delivery to the freighter, or his assigns, on paying freight as per charterparty. Deft. became assignee of the bill of lading, gave notice thereof to pltf., & demanded the goods, sending his lighters to receive them. Pltf. delivered a portion, & demanded payment for freight on so much; deft. refusing to pay, pltf. refused to deliver the residue, & the running days expired. Some time after, pltf. delivered the residue, & was paid the remaining freight. On a case, authorising the ct. to draw inferences of fact:—*Held:* neither the contract nor the breach was proved.—YOUNG *v.* MOELLER (1855), 5 E. & B. 755; 4 W. R. 149; 119 E. R. 662, *sub nom.* MÖLLER *v.* YOUNG, 25 L. J. Q. B. 94; 26 L. T. O. S. 183; 2 Jur. N. S. 393, Ex. Ch.

*Annotations:*—**Consd.** Brown *v.* Tanner (1868), 3 Ch. App. 597. **Reld.** Barker *v.* Windle (1856), 2 Jur. N. S. 1069; Erichsen *v.* Barkworth (1858), 3 H. & N. 601; Chappel *v.* Comfort (1861), 10 C. B. N. S. 802; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Furness, Withy *v.* White, [1894] 1 Q. B. 483; Smailes *v.* Hans Dessen (1905), 94 L. T. 492; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575.

**4022. Non-payment of dues—Detention by harbour authorities.**]—Timber was consigned by pltf.'s ship *Johan* to deft., & landed & delivered to him in a harbour by the statute for the regulation of which certain dues were payable thereon by him. Deft. failing to pay these dues, the *Johan* was detained for nine days by the harbour authorities, at the expiration of which time the master obtained her release by paying the demand himself:—*Held:* assuming that deft. was by the statute liable to pay the dues, & that the detention of the vessel was justifiable, pltf. was only entitled to recover the amount he had paid for the dues, but not damages for the time the vessel was detained; inasmuch as he might at once have procured her release by payment of the money.—MOLLER *v.* JECKS (1865), 19 C. B. N. S. 332; 144 E. R. 815.

*Annotation:*—**Reld.** Lyle Shipping Co. *v.* Cardiff Corpn. (1899), 5 Com. Cas. 87.

**4023. Detention pending Government authorisation of discharge.**]—MITCHELL, COTTS & CO. *v.* STEEL BROTHERS & CO., LTD., No. 1753, *ante*.

**4024. Failure to present bill of lading to master—Within reasonable time.**]—By a charterparty a steamer was to load a cargo & proceed therewith to one of certain named ports of call, at the master's option for orders, unless orders were given on signing bills of lading, to discharge at a port on the continent within certain limits. By clause 13 the steamer was to be loaded at the rate of a certain number of tons per day, otherwise demurrage was to be paid by the charterers; & by clause 16 dispatch money was to be paid "for all time saved in loading" at the rate of £15 a day. By clause 21 the master was to sign bills of lading in the form indorsed thereon at any rate of freight that the charterers might require, but any difference in amount between the bill of lading freight & the total gross chartered freight was to be settled at the port of loading before the steamer sailed. By clause 22 orders as to the port of discharge were to be given to the master within twenty-four hours after notice of arrival at the port of call & for any detention after that the charterers were to pay 30*s.* per hour. The steamer loaded in eight days, nineteen days before the expiration of the lay days, & the masters applied to the charterers for the bills of lading & orders, but they were not forthcoming until the expiration of three days from the completion of the loading, owing to the charterers, who had decided to give orders for the port of discharge on signing bills of lading, not having made up their minds as to the port to which they would order the steamer. The steamer sailed on the expiration of the third day. It was agreed that the charterers had the right to keep the steamer for twenty-four hours after completion of the loading for the purpose of settling accounts, & the shipowners claimed damages for the detention of the steamer during the two remaining days:—*Held:* (1) after the loading had been completed, the charterers were not entitled to keep the steamer for the full period of the lay days; they were under a obligation to present bills of lading to the master for signature within a reasonable time, which by the agreement was twenty-four hours, after completion of the loading, & they had committed a breach of contract in having delayed to do so for two days beyond the twenty-four hours; & there being no agreed rate of damages specified in the charterparty for the breach the shipowners were entitled to recover the loss actually sustained; (2) the charterers were entitled to dispatch money for the whole of the nineteen days saved in the loading.—NOLISEMENT (OWNERS) *v.* BUNGE & BORN, [1917] 1 K. B. 160; 86 L. J. K. B. 145; 115 L. T. 732; 13 Asp. M. L. C. 524; 22 Com. Cas. 135.

**4025. Congestion in docks.**]—If by reason of the crowded state of the London docks, a ship is detained there before she can be unloaded, a longer time than is allowed for that purpose, by the terms of the charterparty, the freighter is liable for this detention to the owner of the ship.—RANDALL *v.* LYNCH (1809), 2 Camp. 352; 170 E. R. 1181, N. P.; *subsequent proceedings* (1810), 12 East, 179.

*Annotations:*—**Distd.** Rodgers *v.* Forresters (1810), 2 Camp. 483; Norden Steam Co. *v.* Dempsey (1876), 1 C. P. D. 654. **Consd.** Davies *v.* McVeagh (1879), 4 Ex. D. 265; Nelson *v.* Dahl (1879), 12 Ch. D. 568; Postlethwaite *v.* Freeland (1880), 5 App. Cas. 599. **Distd.** Gullischen *v.* Stewart (1883), 11 Q. B. D. 186. **Apld.** Budgett *v.*

Binnington, [1891] 1 Q. B. 35. **Distd.** Neptune Steam Navigation Co. *v.* Sclater &;Proctor, The Delano (1894), 71 L. T. 544. **Apprvd.** Alexander *v.* Akt. Dampskibet Hansa, [1920] A. C. 88. **Refd.** Parker *v.* Winlo (1857), 27 L. J. Q. B. 49; Thiis *v.* Byers (1876), 1 Q. B. D. 244; Porteus *v.* Watney (1878), 3 Q. B. D. 534; Dahl *v.* Nelson, Donkin (1881), 6 App. Cas. 38.

**4026.** ——.] — WRIGHT *v.* NEW ZEALAND SHIPPING CO., LTD., No. 3726, *ante*.

**4027. Loss of regular turn—For unloading.**]—By a bill of lading the vessel was to be unloaded in regular turn:—*Held:* the consignor was liable for her detention beyond her regular turn, although there was no express contract for demurrage in the bill of lading.—CAWTHORN *v.* TRICKETT (1864), 15 C. B. N. S. 754; 3 New Rep. 383; 33 L. J. C. P. 182; 9 L. T. 609; 12 W. R. 311; 1 Mar. L. C. 414; 143 E. R. 981.

**4028. —— For loading—Meaning of "turn."**]—By a charterparty, the ship was to proceed to Newcastle, &, on arrival there, "be ready forthwith, in regular turns of loading, to take on board a full & complete cargo of four keels of coals, & the remainder coke." The loading of coal at Newcastle is by Act of Parliament regulated by "turns"; but there is no statutory regulation as to the loading of coke. In an action upon the charterparty in the county ct., for not loading the coke within a reasonable time:—*Held:* the expression "regular turns of loading," with reference to coal, meant in "turn," at the spout, as directed by the Act of Parliament; & evidence which was offered to show that the usage or practice of Newcastle was to load coke "in turn" in the same manner, was improperly rejected.—LEIDEMANN *v.* SCHULTZ (1853), 14 C. B. 38; 2 C. L. R. 87; 23 L. J. C. P. 17; 17 J. P. 745; 139 E. R. 17; *sub nom.* SCHULTZ *v.* LEIDEMANN, Saund. & M. 163; 22 L. T. O. S. 101; 18 Jur. 42; 2 W. R. 35.

*Annotations:*—**Refd.** Hudson *v.* Clementson (1856), 18 C. B. 213; Schroder *v.* Ward (1863), 13 C. B. N. S. 410; Tapscott *v.* Balfour (1872), L. R. 8 C. P. 46; Postlethwaite *v.* Freeland (1879), 4 Ex. D. 155; United States Shipping Board *v.* Strick, [1926] A. C. 515. **Mentd.** Foster *v.* Smith (1856), 18 C. B. 156.

**4029.** —— ——.]—Deft. chartered pltf.'s ship upon the terms that she should go to a foreign port for a cargo, & "there, in the usual & accustomed manner, load in her regular turn." The ship went to the port, but owing to deft.'s default was not ready when her turn came, & was consequently detained eleven days. When her turn came round again she was ready, but the wind coming on to blow, & the harbour being crowded, the harbour master refused to allow the ship to go up to load, & she was consequently detained three days. Pltf. having sued on the charterparty claiming damages for the detention:—*Held:* the detention for the three days was the legal & natural consequence of deft.'s default in not having the ship ready for the first turn, & pltf. was entitled to damages in respect of the three days as well as the eleven days.—JONES *v.* ADAMSON (1876), 1 Ex. D. 60; 45 L. J. Q. B. 64; 35 L. T. 287; 3 Asp. M. L. C. 253, D. C.

*Annotation:*—**Refd.** South Wales & Liverpool S.S. Co. *v.* Nevill's Dock & Ry. Co., Nevill's Dock & Ry. Co. *v.* Maatschappij S.S. Bestevaer, Rotterdam (1913), 108 L. T. 568.

**4030. Failure to provide cargo.**]—It is the duty of a charterer to have a reasonable portion of the cargo ready to be loaded on the ship when she comes to her loading berth, & to be in a position to supply the rest when required, & if the dock authorities refuse to allow a ship to come to a loading berth, because there is not a reasonable portion of the cargo there ready for her, the charterer is liable to pay damages for the detention of the vessel in consequence of such refusal.—HOGARTH *v.* CORY BROTHERS & CO. (1926), L. R. 53 Ind. App. 230; 95 L. J. P. C. 204; 136 L. T. 172; 17 Asp. M. L. C. 175; 32 Com. Cas. 174, P. C.

**4031. Overcarriage of cargo.**]—SEARLE *v.* LUND, No. 3464, *ante*.

**4032. Threatened bombardment.**] — FORD *v.* COTESWORTH, No. 3602, *ante*.

**4033. Failure to take goods "as fast as steamer can deliver."**]—THE ARNE, No. 3786, *ante*.

**4034. Commencement of liability for delay—On notice of arrival.**]—Pltfs. chartered a ship to defts. by a charterparty which provided (*inter alia*), as follows: "time for discharging to count twenty-four hours after arrival at or off port of discharge & notice of arrival handed to receivers . . . & if vessel is detained owing to congestion of ships or traffic receivers to pay damages for detention . . .," & "if & when the price of good class bunker coals ordinarily used in this trade is reduced to 80*s.* per ton, the freight to be 10*s.* per standard less." In the events which happened pltfs. claimed damages for detention & defts. counterclaimed for a reduction of freight on account of a fall in the price of bunker coal. One of defts. also counterclaimed because the quantity of cargo delivered was less than the quantity stated in the bill of lading:—*Held:* (1) the detention clause covered the period between the giving of notice & the arrival of the ship at her discharging berth; (2) defts. were entitled to a reduction of freight because at the material time the price of bunker coal was not more than 80*s.* per ton at ports on the north-east English coast; (3) in the particular circumstances, the statement in the bill of lading with regard to the amount of cargo shipped was conclusive against pltfs.—CHARLTON S.S. CO., LTD. *v.* ALLEN (T. W.) & SONS, LTD. (1921), 38 T. L. R. 70.

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**4030 i.** *Failure to provide cargo.*]—In an action by owners of a vessel for damages for undue detention:—*Held:* defenders were not excused for their failure to have a cargo ready in due time by reason of the unusual demand upon the colliery with which they had contracted.—GARDINER *v.* MACFARLANE, MCCRINDELL & CO., THE LISMORE (1893), 20 R. (Ct. of Sess.) 414; 30 Sc. L. R. 541.—**SCOT.**

**d.** *Default of railway company.*]—A. shipped some stone to B., in O., by vessel, to be transhipped at P., & carried by the O. Ry. Co. A detention of eleven days took place at P. through the railway co., for which A. brought this action against B., claiming damages for the detention of the vessel. There being no evidence to show that the consignee undertook more than to receive the stone at O.:—*Held:* he was not responsible for the detention of the vessel.—MCGREVY *v.* RATHBONE (1860), 11 C. P. 186.—**CAN.**

**e.** *Failure to obtain coaling order—Coaling order necessary by custom of port—Knowledge of both parties.*]—By charterparty which did not fix any time for loading a ship was chartered to go to the port of N. & there load "in the usual & customary manner" a cargo of coals which the charterers bound themselves to ship. By the custom of the port of N., of which both parties were aware, a berth to load coal cannot be obtained until a coaling order from the colliery is produced. The charterers duly ordered a cargo of coals from the W. colliery, & instructed their agent at N. to attend to the loading of the ship. When she arrived, owing to an exceptional press of business at the W. & other local collieries, she failed to obtain coaling orders, & could not therefore get a loading berth. It was proved that the course taken by the charterers in ordering a cargo from the W. colliery was in the circumstances reasonable:—*Held:* the charterers were not liable in damages to the shipowners for the detention of the ship owing to delay in loading, on the ground that where no definite time is fixed for loading, & both parties are aware of the conditions of the port of loading, the charterer fulfils his obligation if he takes all reasonable means to have the cargo loaded at the earliest time compatible with these conditions.—ARDAN S.S. CO., LTD. *v.* WEIR & CO., THE ARDANDEARGE (1904), 6 F. (Ct. of Sess.) 294; 41 Sc. L. R. 230; *on appeal*, (1905), 7 F. (Ct of Sess.) (H. L.) 126.—**SCOT.**

**f.** *Remoteness of damage.*]—Where a vessel is detained by the charterers beyond the agreed time for loading, & is lost in a storm during such detention, the loss of the vessel is too remote a consequence of the detention to form the subject of an action against the charterers.—TOBIN *v.* SYMONDS (1866), 6 N. S. R. (2 Old.) 141.—**CAN.**

*Sect. 9.—Damages for detention: Sub-sect. 2. Sects. 10, 11 & 12.]*

SUB-SECT. 2.—MEASURE OF DAMAGES.

**4035. At demurrage rate.**]—If a ship is detained beyond the days of demurrage allowed by the charterparty, the stipulated demurrage is *primâ facie* the measure of compensation for the further time; but it is competent to the owner or the freighter to show that this would be more or less than a fair compensation for the detention.—MOORSOM *v.* BELL (1811), 2 Camp. 616; 170 E. R. 1270, N. P.

*Annotations:*—**Refd.** Gullichsen *v.* Stewart (1883), 31 W. R. 745; R. *v.* Marylebone County Court Judge & G. W. Ry., *Ex p.* Phillips, [1907] 2 K. B. 664.

**4036. —— Covering whole period of detention—Period of demurrage not stipulated.**]—Where a charterparty provides that if the ship is detained at the port of discharge after the expiry of the lay days demurrage shall be payable at a certain specified rate, but is silent as to the period for which she may be so kept on demurrage, if after the expiry of a reasonable time beyond the lay days the shipowner, instead of landing the goods & taking his ship away, allows her to be further detained, the demurrage rate of compensation will apply to the whole period of detention & not merely to the reasonable time.—WESTERN S.S. CO. *v.* AMARAL SUTHERLAND & CO., [1913] 3 K. B. 366; 82 L. J. K. B. 1180; 109 L. T. 217; 29 T. L. R. 660; 58 Sol. Jo. 14; 12 Asp. M. L. C. 358; 19 Com. Cas. 1; discharged, *on appeal*, [1914] 3 K. B. 55, C. A.

*Annotations:*—**Folld.** Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193. **Refd.** Ethel Radcliffe S.S. Co. *v.* Barnett (1926), 42 T. L. R. 385.

**4037.** —— ——.]—A charterparty provided: steamer to be loaded with customary berth dispatch &, if detained longer than five days charterers to pay demurrage at the rate of 4*d.* per ton per day provided such detention shall occur by default of charterers or their agents. The original port of loading having been wrecked by a tidal wave the ship was by agreement diverted to another port, where great difficulty was experienced in loading & dispatching ships at & from that port. At the expiration of a reasonable time beyond the lay days the charterers had not commenced to load the steamer & she was further detained for the purpose of loading. Pltfs. claimed damages for the detention beyond the reasonable time:—*Held:* the demurrage rate of compensation applied to the whole period of detention, & therefore pltfs. were not entitled to damages as distinguished from the demurrage rate for the extra period of detention.—INVERKIP S.S. CO., LTD. *v.* BUNGE & CO., [1917] 2 K. B. 193; 86 L. J. K. B. 1042; 117 L. T. 102; 14 Asp. M. L. C. 110; 22 Com. Cas. 200, C. A.

*Annotations:*—**Apld.** Ethel Radcliffe S.S. Co. *v.* Barnett (1926), 95 L. J. K. B. 561. **Refd.** Proctor, Garratt, Marston *v.* Oakwin S.S. Co. (1925), 133 L. T. 633; Akt. Reidar *v.* Arcos, [1927] 1 K. B. 352.

**4038. Loss actually sustained—No agreed rate.**]—NOLISEMENT (OWNERS) *v.* BUNGE & BORN, No. 4024, *ante*.

——.]—*See, also*, DAMAGES, Vol. XVII., p. 104, No. 176.

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SECT. 10.—**DISPATCH MONEY.**

**4039. Meaning of.**]—MACCOY *v.* WEST & PENROSE (1898), 15 T. L. R. 84.

**4040. Right to dispatch money.**]—NOLISEMENT (OWNERS) *v.* BUNGE & BORN, No. 4024, *ante*.

**4041. How calculated.**]—A charterparty contained the following clause: "Demurrage, if any, at the rate of 20*s.* per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Dispatch money 10*s.* per hour on any time saved in loading or for discharging." Four days were saved in loading & five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day, would make 216 hours, or at twelve hours a day, 108 hours:—*Held:* "dispatch money" was payable under the charterparty at the rate of 10*s.* per hour per day of twenty-four hours.—LAING *v.* HOLLWAY (1878), 3 Q. B. D. 437; 47 L. J. Q. B. 512; 26 W. R. 769, C. A.

*Annotations:*—**Consd.** The Glendevon, [1893] P. 269; Nelson *v.* Nelson Line, Liverpool, *Re* Same, [1907] 2 K. B. 705. **Apld.** *Re* Royal Mail Steam Packet Co. & River Plate S.S. Co., [1910] 1 K. B. 600. **Folld.** Mawson Shipping Co. *v.* Beyer, [1914] 1 K. B. 304.

**4042.** ——.]—Pltf.'s steamer was chartered by defts. to carry a cargo of coals, to be discharged at the rate of 200 tons per day weather permitting, Sundays & fête days excepted, according to the custom of the port of discharge, & if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved":—*Held:* Sundays & fête days were excluded both in the computation of the time allowed for discharging, & in that of the time saved, so that dispatch money, by way of set-off to a claim for freight, was only payable, by plfts. to defts., on the difference between the number of hours actually occupied by defts. in the discharge, & the total number of the hours which the charterparty allowed them.—THE GLENDEVON, [1893] P. 269; 62 L. J. P. 123; 70 L. T. 416; 7 Asp. M. L. C. 439; 1 R. 662, D. C.

*Annotations:*—**Consd.** Nelson *v.* Nelson Line, Liverpool, *Re* Same, [1907] 2 K. B. 705. **Distd.** *Re* Royal Mail Steam Packet Co. & River Plate S.S. Co., [1910] 1 K. B. 600; Mawson Shipping Co. *v.* Beyer, [1914] 1 K. B. 304.

**4043.** ——.]—ROWLAND & MARWOOD'S S.S. CO., LTD. *v.* NILSON, SONS & CO., LTD., No. 1717, *ante*.

**4044.** ——.]—By a charterparty, "seven weather working days, Sundays & holidays excepted," were "to be allowed by shipowners to charterers for loading," & for any time beyond that period the charterers were to pay demurrage at the rate of £40 per day, & "for each clear day saved in loading the charterers" were to "be paid or allowed by the owners the sum of £20." The loading of a ship under this charterparty was continued during holidays. No evidence was given of any agreement in fact varying the terms of the charterparty & providing that the holidays in question should count as lay days:—*Held:* no inference of law could be drawn so varying the terms, & the charterers, having loaded in days less than the lay days, were entitled to dispatch money, £20 per day, for days "saved in loading."

It is a question, not of law, but of fact, whether or not there was an agreement varying the terms of the charterparty & providing that the holidays in question should count as lay days, I am unable to see any evidence of such an agreement (LORD LOREBURN, C.).

There are some things so commonly known & practices so universal that, without evidence other than the transaction itself, one infers a contract. What the parties do is itself, where there is such a known course of dealing, evidence of their agreement. In such a case the mere actings of the parties in accordance with usage is of itself evidence of a contract (LORD HALSBURY.).—NELSON (JAMES) & SONS, LTD. *v.* NELSON LINE (LIVERPOOL), LTD., [1908] A. C. 108; 77 L. J. K. B. 456; 98 L. T.

322; 24 T. L. R. 315; 52 Sol. Jo. 278; 11 Asp. M. L. C. 1; 13 Com. Cas. 235, H. L.; *revsg.* S. C. *sub nom.* NELSON & SONS, LTD. *v.* NELSON LINE, LIVERPOOL, LTD., *Re* SAME, [1907] 2 K. B. 705, C. A.

*Annotations:*—**Consd.** *Re* Royal Mail Steam Packet Co., & River Plate S.S. Co., [1910] 1 K. B. 600. **Distd.** Mawson Shipping Co. *v.* Beyer, [1914] 1 K. B. 304. **Refd.** Whittall *v.* Rahtken's Shipping Co., [1907] 1 K. B. 783; British & Mexican Shipping Co. *v.* Lockett, [1911] 1 K. B. 264; Rederiakt. Transatlantic *v.* Compagnie Francaise des Phosphates de l'Oceanie (1926), 136 L. T. 619.

**4045.** ——.]—A charterparty provided that twenty running days should be allowed for the discharge of the cargo, "holidays & time between 1 p.m. Saturdays & 7 a.m. Mondays excepted," & that the shipowners should pay dispatch money "for each running day saved." The discharge of the ship took 12 days 13 hours & was completed at 10 a.m. Saturday, Feb. 27. If the whole period of time allowed by the charterparty had been taken for the discharge, the lay days, by reason of the excepted time, would not have expired until 9 a.m. on March 10, or 10 days 23 hours after the discharge was actually completed. The shipowners contended that dispatch money was only payable in respect of the difference between 20 days & 12 days 13 hours, *i.e.*, 7 days 11 hours:—*Held:* the charterers were entitled to dispatch money in respect of the subsequent time between 1 p.m. on Saturdays & 7 a.m. on Mondays included in the lay days, the same being running days "saved" within the meaning of the charterparty, & dispatch money was therefore payable in respect of 10 days 23 hours.—*Re* ROYAL MAIL STEAM PACKET CO., LTD. & RIVER PLATE S.S. CO., LTD., [1910] 1 K. B. 600; 79 L. J. K. B. 673; 15 Com. Cas. 124; *sub nom.* ROYAL MAIL STEAM PACKET CO. *v.* RIVER PLATE STEAM PACKET CO., 102 L. T. 333; 11 Asp. M. L. C. 372.

*Annotation:*—**Follid.** Mawson Shipping Co. *v.* Beyer, [1914] 1 K. B. 304.

**4046.** ——.]—By the terms of a charterparty for a voyage the entire cargo, consisting of 5,142 units, was to be loaded at the average rate of 500 units per running day of twenty-four consecutive hours, Sundays & non-working holidays excepted. If the ship was longer detained demurrage was to be paid at a certain rate per running day. The charterparty contained this clause: "Owners agree to pay charterers £10 per day for all time saved in loading":—*Held:* a Sunday was to be counted among dispatch days although Sundays were excluded from lay days.—MAWSON SHIPPING CO., LTD. *v.* BEYER, [1914] 1 K. B. 304; 83 L. J. K. B. 290; 109 L. T. 973; 12 Asp. M. L. C. 423; 19 Com. Cas. 59.

*Annotation:*—**Refd.** Rederiakt. Transatlantic *v.* Compagnie Francaise des Phosphates de l'Oceanie (1926), 136 L. T. 619.

**4047.** —— **Rate of exchange.**]—By a decree of the Republic of Argentina dated Dec. 2, 1881, & passed for the purpose of establishing the relative value of certain coins in circulation as compared with the lawful currency of the country, an English sovereign was made a legal tender at a fixed rate:—*Held:* this decree only regulated the value of sovereigns as compared with Argentine currency, & did not affect international transactions, & if payments under an English charterparty, which were to be made in sterling in London, were, for the convenience of the parties made in Argentina, they should be made at the current rate of exchange, whether it be below or above the rate at which an English sovereign was made a legal tender.—ATLANTIC SHIPPING & TRADING CO. *v.* DREYFUS (LOUIS) & CO. (NO. 2), STATHATOS & CO. *v.* DREYFUS (LOUIS) & CO. (1922), 91 L. J. K. B. 518; 127 L. T. 415; 38 T. L. R. 556; 15 Asp. M. L. C. 570, H. L.

**4048. Effect of payment of dispatch money—On claim for days saved.**]—OAKVILLE S.S. CO. *v.* HOLMES, No. 3997, *ante.*

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## SECT. 11.—FREIGHT.

*See* Part VIII., *post.*

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## SECT. 12.—PRIMAGE.

**4049. Right of master to primage—When received by owners from freighters.**]—Where there is a written agreement between the master & owners of a ship, not mentioning primage, & the owners have received payments in respect of a primage from the freighters:—*Held:* the master, by usage of trade, is entitled to such payments.—CHARLETON *v.* COTESWORTH (1825), Ry. & M. 175; 171 E. R. 984, N. P.

*Annotation:*—**Refd.** Caughey *v.* Gordon (1878), 3 C. P. D. 419.

**4050.** —— **Effect of agreement with owner for sum for "all cabin & other allowances."**]—(1) Primage belongs of right to the master of a ship; & nothing but an express agreement can exempt the consignee of the goods from the liability to pay it.

(2) By the ancient & uniform usage the owner is entitled to the freight, & the master to the primage; & each has a lien upon the cargo in respect of his own claim (BAYLEY, J.).

(3) An agreement between the owner & the master, that the latter should have certain wages, "& a sum certain in full for all cabin or other allowances":—*Held:* not sufficient to take away the master's right of primage.—BEST *v.* SAUNDERS (1828), 3 Man. & Ry. K. B. 4; Dan. & Ll. 183; 7 L. J. O. S. K. B. 50.

*Annotation:*—**Apld.** Caughey *v.* Gordon (1878), 27 W. R. 50.

**4051.** —— **Lien for enforcement.**]—BEST *v.* SAUNDERS, No. 4050, *ante.*

**4052. Against whom recoverable—Consignee—Unless exempted by express agreement.**]—BEST *v.* SAUNDERS, No. 4050, *ante.*

**4053.** —— **Indorsees of bill of lading—As agents for charterers—Where express agreement with owner not to claim primage.**]—By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60*s.* per ton in full, ship paying all port charges, pilotages, & towages; the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange, & commission; the captain to sign bills of lading for cargo as presented, at any rate of freight required by the charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing. The master, who was paid a fixed salary, "to include all charges & allowances," signed a bill of lading for the whole cargo, making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, & other conditions as per charterparty, with 5 per cent. primage in cash on delivery as customary." The cargo was received at the port of discharge by defts., the indorsees of the bill of lading, as agents of the charterer, & the freight paid:—*Held:* defts. were not liable for primage.

Upon the facts stated we are to assume that, by

*Sect.* 12.—*Primage.* *Sect.* 13: *Sub-sects.* 1, 2 & 3, *A.* (*a*).]

arrangement between the owner & the master, the latter is precluded from claiming primage; & yet this action is brought by the master to recover that which he has expressly stipulated with his owner that he will not claim. I think, notwithstanding the terms of the bill of lading, he is not entitled to maintain it (LORD COLERIDGE, C.J.).—CAUGHEY *v.* GORDON & Co. (1878), 3 C. P. D. 419; 27 W. R. 50.

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## SECT. 13.—LIEN.

### SUB-SECT. 1.—IN GENERAL.

**4054. Origin—Implication of law.**]—(1) The right of lien arises either by implication of law, or by express contract between the parties.

(2) Freight is the reward payable to the carrier for the safe carriage & delivery of goods. It is payable only on safe carriage & delivery. If the goods are safely carried, the master of the ship has a lien on the goods for the amount of the freight due for such carriage, & cannot be compelled to part with the goods till such freight be paid.

(3) Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract, whether a lien does or does not exist. When the contract made gives no lien, a ct. of law will not supply one by implication.

(4) D. & co., of Liverpool, shipped goods for Sydney. The bill of lading stated the goods to be to the shipper's order or assigns, "he, or they paying freight for the goods here as per margin." In the margin it was stipulated as follows:—"Freight payable in Liverpool to M., one month after sailing, vessel lost or not lost." The bill of lading passed into the hands of K. & co. as indorsees for value. On the ship's arrival at Sydney, the port of delivery, the master was advised by the shipowner that the sum agreed to be paid as freight at Liverpool, had not been paid, & he refused to deliver the goods to K. & co., the assignees of the bill of lading unless freight was paid, claiming a lien on the goods for the unpaid freight:—*Held:* the amount agreed to be paid by the shippers at the port of shipment, one month after sailing of the ship, did not acquire the legal incident of freight, though described under that name in the bill of lading, it being merely money to be paid for taking goods on board & undertaking to carry, & not for carrying the goods; & there was no right of lien on the goods by the shipowner in respect of such sum of money being unpaid; (5) as the bill of lading provided that the freight was payable to a third party, M., & not to the shipowner, payment for freight to the master or shipowner, would be no answer to an action in England, by M. in the name of the shipowner, for non-payment of freight.—KIRCHNER *v.* VENUS (1859), 12 Moo. P. C. C. 361; 33 L. T. O. S. 81; 5 Jur. N. S. 395; 7 W. R. 455; 14 E. R. 948, P. C.

*Annotations:—As to* (3) **Consd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Reld.** McLean & Hooper *v.* Fleming (1871), L. R. 2 Sc. & Div. 128; The Canada (1897), 13 T. L. R. 238. *As to* (4) **Expld.** Allison *v.* Bristol Marine Insco. (1876), 1 App. Cas. 209. **Distd.** Great Indian Peninsula Ry. *v.* Turnbull (1885), 53 L. T. 325. **Reld.** Smith, Hill *v.* Pyman, Bell, [1891] 1 Q. B. 742; Weir *v.* Girvin, [1900] 1 Q. B. 45. *Generally,* **Reld.** Pearson *v.* Goschen (1864), 17 C. B. N. S. 352; Buckle *v.* Knoop (1867), L. R. 2 Exch. 125; The Felix (1868), L. R. 2 A. & E. 273; Fisher *v.* Smith (1878), 4 App. Cas. 1. **Mentd.** Sweeting *v.* Pearce (1859), 6 Jur. N. S. 753.

—— ——.]—*See, also,* Sub-sect. 3, A., *post.*

**4055. —— Express contract.**]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

—— ——.]—*See, also,* Sub-sects. 2, 3, B., *post.*

**4056. Removal of goods from wharf to a distance—Under alleged authority given by lien.**]—A vessel was chartered on a voyage out & home, & by the charter the charterer was to ship & the captain to receive at the discharging port, a cargo of lead, receiving freight for same at a certain rate per ton when delivered. When the vessel arrived on her homeward voyage at Newcastle, her port of discharge, a dispute arose between the charterers & the shipowner as to the payment of the freight; & they then agreed that the vessel should discharge 5 tons of the lead at a time, which was to be landed on the wharf, & weighed to ascertain when 5 tons had been discharged, & the freight was to be then paid on each 5 tons as weighed. Certain lead was accordingly landed on the wharf for the purpose of being weighed. M., who was acting under the orders of, & indemnified by, the shipowner, conveyed this lead from the wharf at Gateshead, where the ship was lying, to his warehouse on the opposite side of the river:—*Held:* the shipowner's lien for the freight was lost by the removal of the lead from the wharf, & pltf. was entitled to recover.—HAMMOND *v.* M'CRIE (1855), 3 C. L. R. 1198; 6 L. T. 835.

**4057. Lien in addition to claim for detention—Cargo kept on ship after opportunity for unloading.**]—MODESTO PINEIRO & Co. *v.* DUPRE & Co., No. 2783, *ante.*

**4058. Lien only for sums due—Not for sums accruing due.**]—WEHNER *v.* DENE STEAM SHIPPING Co., No. 2496, *ante.*

**As against assignee in bankruptcy.**]—*See* BANKRUPTCY, Vol. V., p. 710, No. 6212.

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### SUB-SECT. 2.—EXPRESS LIEN.

**4059. Strictly construed.**]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

**For freight.**]—*See* Sub-sect. 3, B., *post.*

**For dead freight.**]—*See* Sub-sect. 3, D., *post.*

**For charges.**]—*See* Sub-sect. 6, *post.*

**For demurrage.**]—*See* Sub-sect. 7, *post.*

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### SUB-SECT. 3.—FOR FREIGHT.

#### *A. At Common Law.*

##### (*a*) *In General.*

**4060. General rule.**]—Master has a lien on the cargo for the freight.—ANON. (1701), 12 Mod. Rep. 447, 511; 88 E. R. 1442, 1484.

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**PART VII. SECT. 13, SUB-SECT. 1.**

*g. Bankruptcy of intended consignee—Delivery not required—Storage of goods in warehouse of shipowners' agent—Lien for general debt.*]—Certain goods having been shipped in a carrying vessel, & deposited, on their arrival at the port of destination, in the warehouse of the shipowners' agent:—*Held:* in a question with the shippers, the agent had no right of lien over the goods for the general debt of a party to whom the shippers had intended to consign them, but who had become bankrupt, in consequence of which no delivery was ever required on his behalf.—RIDLEY & Co. *v.* SLOAN (1837), 15 Sh. (Ct. of Sess.) 469; 12 Fac. Coll. 424.—**SCOT.**

**PART VII. SECT. 13, SUB-SECT. 3.—A. (a).**

**4060 i.** *General rule.*]—COOPER *v.* DOWNWARD (1870), 9 N. S. W. S. C. R. (L.) 59.—**AUS.**

**4060 ii.** ——.]—BUFFALO & LAKE HURON RY. Co. *v.* GORDON (1858), 16 U. C. R. 283.—**CAN.**

**4060 iii.** ——.]—DANEAU *v.* ST. LAWRENCE S.S. Co. & RICHARDSON (1907), Q. R. 33 S. C. 9.—**CAN.**

**4061.** ——.]—The sentence of the Vice-Admlty. Ct. having condemned the ship with her tackle, freight, etc. & the vessel being afterwards restored upon appeal, a lien for freight upon the cargo accrues to the master or owners.—THE JENNET (1810), 1 Act. 332; 12 E. R. 129.

**4062.** ——.]—DICKENSON *v.* LANO, No. 4365, *post.*

**4063.** ——.]—THE GALAM (CARGO EX), No. 4075, *post.*

**4064.** ——.]—TATE *v.* MEEK, No. 4090, *post.*

**4065.** ——.]—If the owner of a ship covenant by charterparty to let her to freight, & deliver the cargo in good order & condition, & the freighters covenant to pay freight on safe delivery of the cargo, one-third in cash, & the remaining two-thirds by approved bills of exchange at four months date:—*Held:* the delivery of the cargo & payment of freight were concomitant acts, & the owner had a lien on the cargo till he was satisfied for the amount of freight remaining due.—YATES *v.* RAILSTON (1818), 8 Taunt. 293; 2 Moore, C. P. 294; 129 E. R. 396.

*Annotations:*—**Consd.** Christie *v.* Lewis (1821), 2 Brod. & Bing. 410; Belcher *v.* Capper (1842), 4 Man. & G. 502. **Refd.** Tate *v.* Meek (1818), 2 Moore, C. P. 278; Dean *v.* Hogg (1834), 3 L. J. C. P. 113.

**4066.** ——.]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

**4067. Nature of right—Additional security.**]—BROWNLOW *v.* HOSEGOOD (1859), 32 L. T. O. S. 261.

**Payment of freight & delivery of cargo concurrent acts.**]—*See* Nos. 4726–4730, *post.*

**4068. Effect of charterparty — Charterparty amounting to a demise.**]—The owner of a vessel has no lien for the hire stipulated by charterparty for the voyage, on the goods shipped by the charterer; because the latter is the owner of the ship for the voyage, & the first owner has no possession of the ship or goods, without which there can be no lien.—HUTTON *v.* BRAGG (1816), 7 Taunt. 14; 2 Marsh. 339; 129 E. R. 6.

*Annotations:*—**Distd.** Tate *v.* Meek (1818), 2 Moore, C. P. 278; Saville *v.* Campion (1819), 2 B. & Ald. 503; Faith *v.* East India Co. (1821), 4 B. & Ald. 630. **Dbtd.** Christie *v.* Lewis (1821), 2 Brod. & Bing. 410. **Consd.** Dean *v.* Hogg (1834), 10 Bing. 345. **Refd.** Crawshay *v.* Homfray (1820), 4 B. & Ald. 50; Belcher *v.* Capper (1842), 4 Man. & G. 502; Thompson *v.* Small (1845), 1 C. B. 328; The Alan Ker, How *v.* Kirchner (1857), 30 L. T. O. S. 296; The Great Eastern (1868), L. R. 2 A. & E. 65.

**4069.** —— ——.]—A shipowner, by a charterparty, let his ship for a year, to take any goods on board which the freighter should tender, & the freight was to be paid ten days after the delivery of the cargo:—*Held:* the owner had sufficient possession of the ship to maintain trespass against wrongdoers for entering her, although he had no lien on the cargo for the freight.

Although [the consignees] were entitled to have the cargo delivered to them under the bill of lading, yet they had no right to take it by force, without producing the bill of lading (BEST, C.J.).—LUCAS *v.* NOCKELLS (1828), 4 Bing. 729; 2 Y. & J. 304; 1 Moo. & P. 783; 130 E. R. 950, Ex. Ch.; *on appeal* (1833), 7 Bli. N. S. 140, H. L.

*Annotations:*—**Refd.** Nockells *v.* Lingham (1838), 2 Jur. 438; The Alan Ker, How *v.* Kirchner (1857), 30 L. T. O. S. 296. **Mentd.** Bristol Grdns. *v.* Wait (1834), 1 Ad. & El. 264; Price *v.* Peek (1834), 1 Bing. N. C. 380; Ridgway *v.* Hungerford (1835), 4 Nev. & M. K. B. 797; Sabourin *v.* Neale (1836), 2 Har. & W. 103; Oakes *v.* Wood (1837), 2 M. & W. 791; Ransford *v.* Copeland (1837), 6 Ad. & El. 482; Carnaby *v.* Welby (1838), 8 Ad. & El. 872 It. *v.* Thomas (1838), 8 Ad. & El. 183; Drewe *v.* Lainson (1840), 11 Ad. & El. 529; Woods *v.* Durrant (1846), 16 M. & W. 149; Cobbett *v.* Hudson (1849), 13 Q. B. 497; Spotswoode *v.* Barrow (1850), 19 L. J. Ex. 226; Howett *v.* Macquire (1851), 7 Exch. 80; Morant *v.* Chamberlain (1861), 30 L. J. Ex. 299; Sinclair *v.* Broughton & Government of India (1882), 47 L. T. 170; Allen *v.* Flood, [1898] A. C. 1; Assets Development Co. *v.* Close No. 2 (1901), 46 Sol. Jo. 12.

**4070.** —— **Charterparty not a demise.**]—SAVILLE *v.* CAMPION, No. 2047, *ante.*

**4071. Priority of lien.**]—Freight is, in all ordinary cases, a lien which is to take place of all others (SIR WILLIAM SCOTT).—THE VROW HENRICA (1803), 4 Ch. Rob. 342; 165 E. R. 634.

**4072.** —— **Lien of agent of owner—Agent discounting bill for owner—Priority over holders of other bills from owner.**]—A person purchased a ship of C. in consideration of three bills of exchange, which he indorsed & delivered to the vendor. He about the same time wrote an order to his agent, W., directing him to pay the amount of one of the bills, £750, to C., out of the freight of the ship. By a subsequent written order he directed W. to satisfy out of the freight the amount of any current bills given by him in payment for, the vessel. W., after accepting both orders, discounted for C. the £750 bill:—*Held:* upon the construction of the orders & the circumstances of the case generally, the second order was not a revocation of the first, & the lien of W. on the freight, for the amount of the £750 bill, was prior to that of the holders of the other bills.—MILN *v.* WALTON (1843), 2 Y. & C. Ch. Cas. 354; 7 Jur. 892; 63 E. R. 156.

**4073. Effect of transhipment.**]—MATTHEWS *v.* GIBBS, No. 3276, *ante.*

**4074. Lien entire.**]—The lien of a shipowner for freight being entire, is not lost or waived by allowing part of the goods to be taken away on payment of a portion only of the freight, without some express contract with the express or implied authority of the shipowner.—PEREZ *v.* ALSOP (1862), 3 F. & F. 188, N. P.

**4075. Voyage not completed by default of owner.**]—(1) If in the course of a voyage a ship carrying cargo is damaged by perils of the seas, the shipowner, intending to carry the cargo to destination, is entitled to a reasonable time for repairing his ship or for transhipping, & for this purpose to retain the cargo.

(2) If he is prevented from carrying the cargo to destination by the act or default of the owner, he has a possessory lien on the cargo for the entire freight, & for contribution to any general average expenses incurred.

A cargo which had been discharged from a condemned French vessel was lying in the island of Terceira. The owner in England chartered a ship for a lump sum to go out & bring the cargo to one of several ports, according to orders to be given at Scilly or Falmouth, the port of call: one of these ports was Hamburg. In accordance with this charter the ship proceeded to Terceira & took on board the cargo, upon which, unknown to the shipowner, who also acted as master there was a *respondentia* bond given to pay other expenses than the expenses of carrying on, & made payable at Falmouth, which was not one of the ports of destination specified in the charter. In the voyage to England the ship was stranded at Scilly, & general average expenses were incurred, & the cargo was landed & stored Feb. 23, in the shipowner's name. The charterer, who was aware of the bond, ordered the shipowner, Feb. 25, to carry the cargo to Hamburg. Thereupon the cargo was arrested by Admlty. warrant, Mar. 4, at the suit of the *respondentia* bondholder. The owner not appearing, nothing was done by any party until May 23, when the cargo was removed to London by order of the ct., & then sold. The shipowner, however, in the meanwhile settled with his underwriters on ship & freight, nearly upon the terms of a total loss. The legal origin of the bond was not disputed:—*Held:* the shipowner was prevented from

*Sect.* 13.—*Lien: Sub-sect.* 3, *A.* (*a*), (*b*) & (*c*), & *B.*]

carrying on the cargo by the default of the owner; he therefore had a possessory lien on the cargo for his full freight & general average; & such lien must be satisfied in preference to the *respondentia* bond, upon the ground that so carrying the cargo, the shipowner had rendered services in the nature of salvage to the bond.

(3) A claim for freight gives the master a possessory lien at common law.—THE GALAM (CARGO EX) (1863), Brown. & Lush. 167; 33 L. J. P. M. & A. 97; 167 E. R. 327; *sub nom.* CLEARY *v.* M'ANDREW THE GALAM (CARGO EX), 2 Moo. P. C. C. N. S. 216; 3 New Rep. 254; 9 L. T. 550; 10 Jur. N. S. 477; 12 W. R. 495; 1 Mar. L. C. 408, P. C.

*Annotations:*—*As to* (1) **Refd.** The Bahia (1864), Brown. & Lush. 292. *As to* (2) **Folld.** The Soblomsten (1866), L. R. 1 A. & E. 293. **Consd.** The Daring (1868), L. R. 2 A. & E. 260; The Sorfareren (1915), 85 L. J. P. 121. **Refd.** Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. *Generally*, **Refd.** The Veritas, [1901] P. 301.

**4076. Assessment of amount—What deductions allowed.**]—NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante.*

**4077. Voyage not commenced.**]—It was provided by a charterparty that £250, part of the freight, should be advanced in cash on signing bills of lading & clearing at the Custom House, & that for the security & payment of all freight, dead freight, demurrage, & other charges, the master or owners should have an absolute lien & charge on the cargo. The ship was loaded & cleared at the Custom-House, but the £250 was not paid, & consequently the captain did not sign bills of lading, and the ship never started on her voyage. The charterer having become insolvent, his trustee in liquidation gave notice to the owner that he disclaimed all interest under the charterparty. The owner claimed a lien on the cargo for the £250 as freight:—*Held:* the ship never having earned or commenced to earn freight, no lien arose.—*Re* CHILD, *Ex p.* NYHOLM (1873), 43 L. J. Bcy. 21; 29 L. T. 634; 22 W. R. 174; 2 Asp. M. L. C. 165, L. C. & L. J.

**4078. "Ship lost or not lost."**]—When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," & the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage thereof is described as "freight" in the bills of lading.—NELSON *v.* PROTECTION OF WRECKED, ETC. PROPERTY ASSOCN. (1874), 43 L. J. C. P. 218.

**4079. Cargo damaged but capable of being forwarded.**]—Pltfs.' cargo of coals on board the *K.* was damaged by a collision at C., the port of loading, & had to be unloaded. It was ultimately reshipped & carried on to B., & used by pltfs. in smithies, though it was not purchased for this purpose. The shipowner was not willing to ship a fresh cargo except on fresh terms, & pltfs. did not ascertain what those terms were. On a reference as to damages, in an action between the owners of the coal & the owners of the vessel with which the *K.* came into collision, the assistant registrar decided that pltfs. were only entitled to recover the difference between the value of sound & damaged coal at the port of loading, & that if the value was that at the port of destination it must be taken to be the value of smithy coal. On objection to this report:—*Held:* the shipowner had a right to insist on carrying on the same cargo; it appearing that he had been willing to take a fresh cargo on fresh terms, it was the duty of pltfs. to have ascertained what those terms were, so as to diminish the loss as much as possible, before comparing the loss on the damaged cargo at B., & that from the sale of it a C., & shipping a fresh one. The coal having been used for a particular purpose, was not a reason for estimating its value at that of coal ordinarily used for such purpose.—THE BLENHEIM (1885), 10 P. D. 167; 54 L. J. P. 81; 53 L. T. 916; 34 W. R. 154; 5 Asp. M. L. C. 522.

*Annotation:*—**Refd.** Assicurazioni Generali *v.* S.S. Bessie Morris Co., [1892] 1 Q. B. 571.

**Where freight payable otherwise than on delivery.**]—*See* Sub-sect. 3, A. (*b*), *post.*

(*b*) *Freight Payable Otherwise than on Delivery.*

**4080. Whether lien exists—Freight payable before delivery—Two months after sailing.**]—THOMPSON *v.* SMALL, No. 1912, *ante.*

**4081.** —— ——.]—S. shipped goods on board pltf.'s ship, then at Glasgow & bound for Lima. By the bill of lading the goods were to be delivered at Lima to deft., "freight for the goods to be paid by the shipper"; & in the margin was written: "freight payable one month after sailing, ship lost or not lost." S. handed the bill of lading to deft.'s house at Glasgow, defendant having one also at Lima, who made thereon an advance to S.; the goods were consigned to deft. by S. for sale. S. did not pay the freight in the month; & pltf. wrote to the master, informing him of this, & desiring him not to deliver the goods without payment of freight. Deft. at Lima demanded the goods; but the master, who had received the letter at Lima, refused to deliver them without payment of freight:—*Held:* the master was justified in detaining them, the lien for freight as against the consignee not being waived by the terms of the bill of lading.—NEISH *v.* GRAHAM (1857), 8 E. & B. 505; 27 L. J. Q. B. 15; 4 Jur. N. S. 49; 120 E. R. 189.

*Annotations:*—**Dbtd.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361. **Refd.** Kern *v.* Deslandes (1861), 8 Jur. N. S. 191; Tamvaco *v.* Simpson (1865), 19 C. B. N. S. 453; The Canada (1897), 13 T. L. R. 238.

**4082.** —— ——.]—FOSTER *v.* COLBY, No. 4113, *post.*

**4083.** —— ——.]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

**4084.** —— **Freight payable after delivery.**]—A shipowner has a lien upon the cargo for freight, *i.e.*, for the carriage, conveyance, & delivery of goods, but such lien is destroyed by his entering into a contract at variance with that lien; as where he by contract agrees to be paid after delivery of the cargo, & not at the time of delivery.

A bill of lading contained this form: "Freight for the same goods to be paid by the shipper"; & in the margin of the bill: "Freight payable one month after sailing, ship lost or not lost." The

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**4078 i.** "*Ship lost or not lost.*"]—Some iron being shipped, the bills of lading for which stated the freight to be paid at port of loading, ship lost or not lost:—*Held:* the master had no lien for freight on the iron at port of destination.—THE TORRENT, DYMES *v.* COPP (1856), 6 L. T. 836.—**IND.**

**4078 ii.** ——.]—Freight on goods not being paid by the shippers, according to the terms of the bill of lading, which were "freight payable here" (at the shipping port) "one month after sailing, vessel lost or not lost": —*Held:* the master had a lien on the goods for the freight.—THE DUMFRIESSHIRE, MIDDLETON *v.* FRASER (1856), 6 L. T. 836.—**STRAITS SETTLEMENTS.**

**h.** *Sentence of condemnation reversed.*]—THE JENNET (1810), C. R. 3 A. C. 332.—**CAN.**

**k.** *Rate of freight in charterparty—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading—Payment by shipper of difference under protest.*]—RALLI BROTHERS *v.* CHABILDAS LALLUBHAI (1899), I. L. R. 23 Bom. 551.—**IND.**

owner of the ship on the arrival at her destination claimed a lien on the goods for the freight, & refused to deliver the goods to the consignees until the freight had been paid:—*Held:* the shipowner had not lien on the goods consigned, as the sum claimed was not freight, properly so called, & was concluded by the contract, which stipulated for a payment to be made in lieu of freight, & to be made at a fixed period having no reference to the delivery of the goods.—HOW *v.* KIRCHNER (1857), 11 Moo. P. C. C. 21; 6 W. R. 198; 14 E. R. 602; *sub nom.* THE ALAN KER, HOW *v.* KIRCHNER, 30 L. T. O. S. 296, P. C.

*Annotations:*—**Folld.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361. **Refd.** The Canada (1897), 13 T. L. R. 238.

**4085.** —— —— **Ten days after delivery.**]—LUCAS *v.* NOCKELLS, No. 4069, *ante*.

**4086.** —— —— **Two months after inward report.**]—A charterparty stipulated that the ship should proceed from London to Bombay, &, being there loaded should proceed to London, & discharge in any dock the freighters might appoint & delver her cargo "on being paid freight at & after the rate of £4 per ton," etc. By a subsequent clause it was stipulated, that the freight was to be paid "on unloading & right delivery of the cargo, in cash, two months after the vessel's inward report at the custom house":—*Held:* upon the construction of these stipulations taken together, the freight was not payable until two months after the inward report; & the shipowner had not, after the cargo was discharged pursuant to the charterparty, any lien thereon for the freight.—ALSAGER *v.* ST. KATHERINE'S DOCK CO. (1845), 14 M. & W. 794; 15 L. J. Ex. 31; 153 E. R. 696.

*Annotations:*—**Refd.** Shand *v.* Sanderson (1859), 28 L. J. Ex. 278; Tamvaco *v.* Simpson (1865), 19 C. B. N. S. 453. **Menti.** Baumvoll Manufactur Von Scheibler *v.* Gilchrest, [1891] 2 Q. B. 310.

### (c) *Extent of Lien.*

**4087. Part remaining unloaded—Retained for whole freight—Belonging to one person & under one consignment.**]—SODERGREN *v.* FLIGHT & JENNINGS (1796), cited 6 East, at p. 622; 102 E. R. 1428, N P.

*Annotations:*—**Distd.** Birley *v.* Gladstone (1814), 3 M. & S. 205. **Consd.** Moorsom *v.* Kymer (1814), 2 M. & S. 303. **Refd.** Hanson *v.* Meyer (1805), 6 East, 614; Cock *v.* Taylor (1811), 13 East, 399.

**4088.** —— —— ——.]—Where several goods, belonging to one owner are carried the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight. But if there be two contracts to carry, with different termini to the voyage in each contract, no lien attaches for freight under the one contract, upon goods shipped under the other & improperly detained on board by the carrier. Goods are divested of a lien by a complete delivery. It is for the jury to say whether there has been a complete delivery.—BERNAL *v.* PIM (1835), 1 Gale, 17.

**4089.** —— —— **Goods consigned to different consignees.**]—SODERGREN *v.* FLIGHT & JENNINGS (1796), cited 6 East, at p. 622; 102 E. R. 1428, N. P.

*Annotations:*—**Refd.** Hanson *v.* Meyer (1805), 6 East, 614; Cock *v.* Taylor (1811), 13 East, 399; Birley *v.* Gladstone (1814), 3 M. & S. 205; Moorson *v.* Kymer (1814), 2 M. & S. 303.

**4090.** —— —— ——.]—Deft., as owner of a vessel, covenanted by charterparty with A., as freighter, to take on board a cargo in the Brazils, & deliver the same in England. A. covenanted to put the cargo on board, & pay freight at a certain rate per ton; part in money on the arrival of the vessel, & the remainder by bills a two months after the delivery of the cargo. The owner bound the vessel & her freight, & the freighter bound the cargo, for the due performance of their respective covenants. Part of the cargo was shipped for A., & part for other consignees. Deft. delivered the goods to the other consignees, on payment of the freight, at a less rate than that contracted for by the charterparty; but refused to deliver to pltfs. the goods consigned to A., which A. had assigned to them, without their paying the whole of the freight due under the terms of the charterparty:—*Held:* deft. was justified in detaining the goods of pltfs. until payment of the freight stipulated for by the charterparty, as the delivery of the goods & the payment of the freight were to be considered as concomitant acts.—TATE *v.* MEEK (1818), 8 Taunt. 280; 2 Moore, C. P. 278; 129 E. R. 391.

*Annotations:*—**Folld.** Yates *v.* Railston (1818), 8 Taunt. 293. **Consd.** Saville *v.* Campion (1819), 2 B. & Ald. 503; Christie *v.* Lewis (1821), 2 Brod. & Bing. 410. **Folld.** Campion *v.* Colvin (1836), 3 Bing. N. C. 17.

**4091.** —— —— **Goods shipped under different contracts.**]—BERNAL *v.* PIM, No. 4088, *ante*.

### *B. Express Lien.*

**4092. Under charterparty — Agreement with master by factor.**]—Where a factor makes an agreement for the hire of a ship with the master, on his own account, for £48 a month, & not on the part of the merchants his principals, they are not liable, nor their goods put on board, to satisfy the master's demand, but they are liable to pay the factor the freight for the cargo; & as he was bound by the charterparty, which gave the master a specific lien on the goods, he has a right to be paid in the first place, before the assignees of the factor under a commission of bkpcy. against him, who stand only in the place of the bkpt.—PAUL *v.* BIRCH (1743), 2 Atk. 621; 26 E. R. 771.

*Annotations:*—**Consd.** Christie *v.* Lewis (1821), 2 Brod. & Bing. 410. **Refd.** Hutton *v.* Bragg (1816), 7 Taunt. 14; Faith *v.* East India Co. (1821), 4 B. & Ald. 630; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171.

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**PART VII. SECT. 13, SUB-SECT. 3.—A. (c).**

l. *General rule.*]—Goods or freight when landed on a wharf are delivered, but they cannot be removed from thence, without the master's consent, until the freight be paid, until which time he has a lien for such freight upon the whole of the cargo.—PATTERSON *v.* DAVIDSON, 2 R. de L. 77.—**CAN.**

m. ——.]—A carrier has a right to retain possession of goods until the whole freight be paid, even where the freight is at a fixed rate per package, & the goods not all ready for delivery.—BREWSTER *v.* HOOKER (1857), 1 L. C. J. 90.—**CAN.**

n. ——.]—A common carrier by water has a lien upon every portion of goods carried for the payment of the whole freight due by the owner or consignee of the goods, & a tender by the owner of the cargo of the freight due on each load, as discharged & loaded on a cart, is insufficient.—BREARTER *v.* HOOKER (1857), 7 L. C. R. 55.—**CAN.**

o. ——.]—A shipowner's lien for freight extends to every part of the goods belonging to each consignee.—NEILL *v.* REED (1859), 9 N. B. R. (4 All.) 246.—**CAN.**

p. *Ship becoming total loss — Employment of another vessel to take cargo to destination—Lien for extraordinary expense so incurred.*]—Where a vessel carrying goods is stranded & lost by stress of weather, the master may, to save the cargo, employ another vessel to take it to the place of destination, & the owners of such goods will be liable for an extraordinary expense so incurred, in addition to the freight.—ROGERS *v.* HOOKER (1857), 15 U. C. R. 63.—**CAN.**

q. *Right to withhold delivery of instalment for general balance.*]—A shipping co. has no right to withhold delivery for their general balance, though they can withhold delivery of any parcel until the expense of carriage was paid.—STEVENSON *v.* LIKLY (1824), 3 Sh. (Ct. of Sess.) 291.—**SCOT.**

r. *Cargo placed on board by sub-freighter—Lien to extent of sub-freight.*]—A shipmaster appointed by the owners of a vessel employed under a charterparty has, as representing the owners, a lien over a cargo placed on board by a sub-freighter to the extent of the sub-freight, irrespective of any stipulations regarding the payment thereof between the sub-freighter & the charterer.—YOULE *v.* COCHRANE (1868), 6 Macph. (Ct. of Sess.) 427; 40 Sc. Jur. 222.—**SCOT.**

*Sect.* 13.—*Lien: Sub-sect.* 3, *B., C., D. & E.; sub-sect.* 4, *A.*]

**4093. —— Rights of shipper without notice of charterparty—Duty to inquire as to existence.**]—When a person without notice of any charterparty between the shipowner & the charterer ships goods on board a vessel which is advertised as a general ship by the charterer only, such goods are not subject to a lien which may be reserved by the charterparty to the shipowner in respect of overdue freight; & under such circumstances an intending shipper is not bound to enquire as to the existence of a charterparty.—THE STORNOWAY (1882), 51 L. J. P. 27; 46 L. T. 773; 4 Asp. M. L. C. 529.

**4094. —— As security for payment of hire—Duration.**]—A lien on sub-freight given by a charterparty to a shipowner as security for the payment to him of the hire of the ship can only be exercised before such sub-freight has been paid to the charterer or his agent, &, therefore, when once the sub-freight has been so paid the shipowner has no right, by virtue of his lien, to follow the sub-freight.—TAGART, BEATON & Co. *v.* JAMES FISHER & SONS, [1903] 1 K. B. 391; 72 L. J. K. B. 202; 88 L. T. 451; 51 W. R. 599; 9 Asp. M. L. C. 381; 8 Com. Cas. 133, C. A.

*Annotations:*—**Expld. & Distd.** Molthes Rederi Akt. *v.* Ellerman's Wilson Line, [1927] 1 K. B. 710. **Refd.** Wehner *v.* Dene S.S. Co. (1905), 10 Com. Cas. 139.

**4095. Lien for previously unsatisfied freight—Due from shippers or consignees—Freight due from third party.**]—By an order made in a debenture-holders' action, pltf., W., was appointed receiver & manager of the business of Ind, Coope & Co., Ltd., a brewery co., & he carried on the business of the co. as before. By a letter signed "Ind Coope & Co., Ltd., by W., receiver & manager," defts. were instructed to carry to Malta a quantity of beer consigned to the co. c/o the co.'s agents at Malta. Defts. carried the beer to Malta under a bill of lading which named the co. as the consignees & provided that the shipowner should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight "due either from shippers or consignees to the shipowner." Defts. for many years had carried beer for the co. to Malta under bills of lading in this form, & they claimed a lien on the beer in question for certain unsatisfied freight due to them from the co. before pltf.'s appointment:—*Held:* (1) defts. were not entitled to a lien for arrears of freight, because in truth pltf. & not the co. was both shipper & consignee, & notice of this fact was conveyed to defts. by the form of the shipping instructions.

(2) (LORD ATKINSON) pltf. had no power without the leave of the ct. to create such a lien.—MOSS S.S. Co., LTD. *v.* WHINNEY, [1912] A. C. 254; 81 L. J. K. B. 674; 105 L. T. 305; 27 T. L. R. 513; 55 Sol. Jo. 631; 12 Asp. M. L. C. 25; 16 Com. Cas. 247, H. L.; *affg.* S. C. *sub nom.* WHINNEY *v.* MOSS S.S. Co., LTD., [1910] 2 K. B. 813, C. A.

*Annotation:*—*As to* (1) **Refd.** Parsons *v.* Sovereign Bank of Canada, [1913] A. C. 160.

**4096. Power of receiver & manager to create—Leave of court.**]—MOSS S.S. Co., LTD. *v.* WHINNEY, No. 4095, *ante*.

*C. When Freight Payable by Bill of Exchange.*

**4097. Part freight to be secured by bill on delivery—Lien till bill produced.**]—Where the owner covenanted to deliver the cargo agreeably to bills of lading, & the freighters covenanted to pay one-third in cash on arrival, & the remainder on delivery of the cargo by good bills of exchange, at four months' date; if the captain land the goods in his own name, & offer them to the freighter at one delivery, on receiving the stipulated freight:—*Held:* the owner has a lien on them until such bills of exchange are produced by the freighter.—YATES *v.* MEYNELL (1818), 8 Taunt. 302; 2 Moore, C. P. 297; 129 E. R. 399.

*Annotation:*—**Refd.** Christie *v.* Lewis (1821), 2 Brod. & Bing. 410.

**4098. Part freight payable by bill—Before delivery.**]—By charterparty between deft., owner of a ship, & G. deft. granted & to freight let, & G. took & to freight hired the ship for the voyage. Deft. covenanted that the master should receive on board at London, goods to be sent alongside by G., & deliver them from alongside at Newfoundland, according to bills of lading, there receive, & deliver at Demerara other goods, in like manner, & there, in like manner, receive other goods, & deliver them in the London docks, according to bills of lading; & that the ship's boats should assist in loading & unloading, so as the exclusive duties & operations of the ship should not be thereby impeded. In consideration whereof G. covenanted to send & take from alongside goods, & to pay for the freight & hire of the ship for the voyage £2,600, with primage, etc., one quarter part thereof on delivery of goods at Newfoundland, by good bills at sixty days' sight on London, & the remainder by good bills at two months' date from the day of the ship's report inwards at the port of London. The voyage was performed, & goods of third persons brought from Demerara under bills of lading, deliverable to the consignees on payment of certain specified freights therein mentioned, which freights deft. received, no bill for the three-quarters freight per charterparty having been given or tendered to him, & a bill for one quarter given at Newfoundland having been dishonoured:—*Held:* (1) notwithstanding the words of grant, taking the whole charterparty into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; &, as the freight per charterparty was to be paid to him by good bills, prior to the delivery of the homeward cargo, he had a lien thereon for such freight; (2) he had a right to receive the freight per bills of lading from the consignees, & had a like lien on such freight when so received.—CHRISTIE *v.* LEWIS (1821), 2 Brod. & Bing. 410; 5 Moore, C. P. 211; 129 E. R. 1025.

*Annotation:*—*Generally*, **Refd.** Belcher *v.* Capper (1842), 4 Man. & G. 502.

**4099. Acceptance of bill—Waiver of lien.**]—Where the owner of a ship having a lien on the goods until the delivery of good & approved bills for the freight, took a bill of exchange in payment, & though he objected to it at the time, afterwards negotiated it:—*Held:* such negotiation amounted to an approval of the bill by him, & it was a relinquishment of his lien on the goods.—HORNCASTLE *v.* FARRAN (1820), 3 B. & Ald. 497; 106 E. R. 743.

*Annotations:*—**Apld.** Pooley *v.* Budd (1851), 14 Beav. 34. **Refd.** Tamvaco *v.* Simpson (1865), 19 C. B. N. S. 453; Gunn *v.* Bolckow, Vaughan (1875), 32 L. T. 781. **Mentd.** Nicholl *v.* Thomas (1850), 15 L. T. O. S. 50.

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**PART VII. SECT. 13, SUB-SECT. 3.—C.**

t. *Acceptance of bill.*]—ARBUTHNOT *v.* DAIGRE (1864), 2 Mad. 88.—**IND.**

a. ——.]—THOMAS *v.* OGLE (1865), Bourke, 100.—**IND.**

b. ——.]—OGLE *v.* NASHHOLM (1865), Bourke, 171.—**IND.**

c. ——.]—PENINSULAR & ORIENTAL STEAM NAVIGATION CO. *v.* SMALL (1865), Bourke, 309.—**IND.**

**4100.** —— ——.]—By a memorandum of charter, made at Liverpool, it was agreed that the ship should load a cargo there, & proceed to China, & there deliver the same agreeably to bills of lading, & afterwards load a full cargo of tea or other lawful merchandise for Liverpool or London, & deliver the same to the charterers or their assigns, they paying freight for the same at the rate of £7 10*s.* per ton of 50 cubic feet for tea delivered, for the round out & home; other goods if shipped, to pay in customary proportion; in consideration whereof, the outward cargo to be carried freight free: payment to become due & to be made as follows: £800 on sailing, by charterers' acceptance at three months' date, & the balance on the unloading & delivery of the cargo, by approved bills on London at two months' date, or cash: "the master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charterparty; & the owners to have an absolute lien upon the cargo for the recovery of all freight, dead-freight, demurrage, etc., due the ship under this charterparty." By another memorandum, indorsed on the above, Singapore was substituted for China; & it was agreed, that, on delivery of the cargo in Singapore, the freighters' agents there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be £3,375 in full; that, should the vessel proceed to China, the freighters should pay an additional freight of 30*s.* per ton on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China; & an acceptance at three months for £900 on the ship's sailing from Liverpool, was substituted for £800. The ship was laden by the charterers chiefly as a general ship; but they shipped on their own account goods for which the master signed bills of lading making the goods deliverable at Singapore to M. & co., or assigns, paying freight as per margin: in the margin, the freight, in the aggregate, £196 12*s.*, was declared to be "payable in Liverpool one month after sailing of vessel, lost or not lost." The vessel sailed from Liverpool on Feb. 21, 1856, & the charterers gave their acceptance at three months for £900 which became due on May 23, & was dishonoured: —*Held:* the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees, M. & co., who had advanced money to the consignors upon the shipment; but not for the £900.—GILKISON *v.* MIDDLETON (1857), 2 C. B. N. S. 134; 26 L. J. C. P. 209; 140 E. R. 363.

*Annotations:*—**Folld.** Neish *v.* Graham (1857), 8 E. & B. 505. **Apld.** Foster *v.* Colby (1858), 3 H. & N. 705. **Dbtd.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361. **Distd.** Tamvaco *v.* Simpson (1865), 19 C. B. N. S. 453. **Consd.** Wehner *v.* Dene S.S. Co., [1905] 2 K. B. 92. **Refd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449; Kern *v.* Deslandes (1861), 10 C. B. N. S. 205; Smidt *v.* Tiden (1874), 30 L. T. 891; Hayn *v.* Culliford (1878), 3 C. P. D. 410; Hayn, Roman *v.* Culliford (1879), 27 W. R. 541; The Canada (1897), 13 T. L. R. 238.

**4101.** —— ——.]—M. chartered deft.'s ship to carry a cargo of coal to Alexandria, where the same was to be delivered on freight being paid; & the charterparty stipulated "the freight to be paid on unloading & right delivery of the cargo less advances, in cash, at current rate of exchange; one-half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading; owner to insure the amount & deposit with charterer the policy, & to guarantee the same." M. accordingly gave his acceptance for the half freight, & a receipt on account of such freight as per charterparty was indorsed on the bill of lading, which bill of lading was signed by the captain & afterwards duly indorsed to pltf. for value. On the arrival of the ship at Alexandria, M. having in the meantime become insolvent, the master refused to deliver the cargo to pltf. unless the whole of the freight was paid or guaranteed, although the acceptance given by M. was not then due. A guarantee was then given by one B. for pltf. under protest, & the cargo was delivered, & B. being afterwards compelled to pay the amount of such guarantee on the dishonour of M.'s acceptance, pltf. repaid him:—*Held:* pltf. was entitled to recover the half freight from deft., as during the currency of M.'s acceptance deft. had no lien for it, & the refusal to deliver the cargo was therefore wrongful. —TAMVACO *v.* SIMPSON (1866), L. R. 1 C. P. 363; Har. & Ruth. 374; 35 L. J. C. P. 196; 14 L. T. 893; 14 W. R. 376; 2 Man. L. C. 383, Ex. Ch.

*Annotations:*—**Refd.** Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649; Allinson *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209.

*D. Dead Freight.*

**4102. General rule — No lien.**] — PHILLIPS *v.* RODIE, No. 4002, *ante*.

**4103.** —— ——.]—BIRLEY *v.* GLADSTONE. No. 4003, *ante*.

**4104.** —— ——.]—GRAY *v.* CARR, No. 1958, *ante*.

**4105. Whether lien by express contract.**] — PHILLIPS *v.* RODIE, No. 4002, *ante*.

**4106.** ——.]—MCLEAN & HOPE *v.* FLEMING, No. 2949, *ante*

**4107.** ——.]—KISH *v.* TAYLOR, No. 3170, *ante*.

**4108.** —— **Charterparty—Bills of lading also giving lien for freight as agreed—Tender of freight for carriage—Refusal to deliver goods except on payment of dead freight.**]—Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of a conversion unless he can sustain both.

In an action of trover by freighter against shipowner to recover the goods, the charterparty giving a lien for dead freight, but the master to sign bills of lading, which bound the goods for "freight as agreed," the freighter having when he demanded the goods been prepared to pay the freight for carriage, & the shipowner having refused to deliver the goods except on payment of the dead freight:—*Held:* freight for carriage alone was due, the refusal was an implied dispensation of tender of it, & trover could be maintained.—KERFORD *v.* MONDEL (1859), 28 L. J. Ex. 303; 33 L. T. O. S. 289.

*Annotations:*—**Distd.** Watson *v.* Pearson (1863), 11 W. R. 702. **Apld.** The Norway (1864), Brown. & Lush. 377. **Refd.** Allen *v.* Smith (1863), 11 W. R. 446.

*E. As Against Holder of Bill of Lading.*

*See* Sub-sect. 4, *post*.

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SUB-SECT. 4.—AS AGAINST HOLDER OF BILL OF LADING.

*A. Holder Having Property of the Cargo.*

**4109. Lien only for bill of lading freight.**]—A ship is chartered for a particular voyage for a gross sum by way of freight. The captain signs bills of lading for the cargo, which is the property of & consigned to a third person specifying a rate of freight amounting to a less sum than that mentioned in the charterparty:—*Held:* the ship owner had no lien on the cargo beyond the freight

*Sect.* 13.—*Lien: Sub-sect.* 4, *A., B., C., D. & E.; sub-sects.* 5 *& 6.*]

specified in the bills of lading.—MITCHELL *v.* SCAIFE (1815), 4 Camp. 298; 171 E. R. 95, N. P.

*Annotations:*—**Refd.** Belcher *v.* Capper (1842), 4 Man. & G. 502; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 92, n.

**4110.** ——.]—GILKISON *v.* MIDDLETON, No. 4100, *ante.*

**4111.** —— **Holder agent of charterer—Possession adverse to charterer.**]—SHAND *v.* SANDERSON, No. 4881, *post.*

*B. Indorsee for Value.*

**4112. Freight expressed to be paid in bill of lading.**]—The captain of a ship signed a bill of lading, expressing the freight of the goods to have been paid. He did so upon an assurance that it should be paid before the ship sailed. This was not done. The bill of lading was assigned over for value to a third person:—*Held:* as against that person, the owners had no lien upon the goods for the freight.—HOWARD *v.* TUCKER (1831), 1 B. & Ad. 712; 9 L. J. O. S. K. B. 108; 109 E. R. 951.

*Annotations:*—**Expld.** Hubbersty *v.* Ward (1853), 8 Exch. 330. **Consd.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361. **Refd.** Grant *v.* Norway (1851), 10 C. B. 665; Gledstanes *v.* Allen (1852), 12 C. B. 202; Pearson *v.* Göschen (1864), 4 New Rep. 404.

**4113. Lien only for bill of lading freight—No notice of charterparty.**]—S. & W. chartered a ship from Liverpool to Calcutta & home for the sum of £7,000. "The freight to be paid £1,250 on vessel clearing from Liverpool, & £1,000 on delivery of the outward cargo at Calcutta, the remainder in cash two months from the vessel's report inwards, & after right delivery of the cargo, or under discount at 5 per cent. *per annum* at freighter's option. The master to sign bills of lading at any rate of freight required without prejudice to his charterparty. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight & demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. & C. who were the charterer's agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5*s.* per ton, the current rate being £5 10*s.* Against this shipment S. & C. drew a bill of exchange & indorsed & delivered it together with the bill of lading for value:—*Held:* (1) assuming the charterparty to have created a lien for the charterparty freight as against the charterer, a *bonâ fide* indorsee of the bill of lading, without notice of the charterparty, was entitled to the linseed on payment of the bill of lading freight; (2) the charterparty did not create any lien in respect of that part of the freight which was payable at two months after the vessel's report inwards.—FOSTER *v.* COLBY (1858), 3 H. & N. 705; 28 L. J. Ex. 81; 32 L. T. O. S. 110; 157 E. R. 651.

*Annotations:*—*As to* (1) **Apld.** Shand *v.* Sanderson (1859), 4 H. & N. 381. *As to* (2) **Distd.** Paynter *v.* James (1867), L. R. 2 C. P. 348. *Generally,* **Refd.** Kern *v.* Deslandes (1861), 10 C. B. N. S. 205; Pearson *v.* Göschen (1864), 17 C. B. N. S. 352; Reynolds *v.* Jex (1865), 7 B. & S. 86.

**4114.** ——.]—FRY *v.* CHARTERED MERCANTILE BANK OF INDIA, No. 2450, *ante.*

*C. Holder Identified in Interest with Charterer.*

**4115. Whether lien for whole chartered freight—Charterer indebted to consignees.**]—By a charterparty, freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out & home, in manner following, viz.: a certain sum in advance on the ship's clearing outwards, & the residue half in cash & half in approved bills, upon the delivery of the homeward cargo; the owner also appointed S. master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; & the owner expressly instructed S. to be careful to sign all bills of lading with the clause, "Freight payable, as by charterparty." The ship was consigned to C. & co., in Calcutta, by whom she was put up, for her homeward voyage, as a general ship, & different merchants shipped goods by her, C. & co. taking for homeward freight bills payable sixty days after delivery of the cargo; & a new master having been appointed by C. & co., in conjunction with S., signed bills of lading with the clause, "Payable freight agreeable to freight bill." The freight bills were made payable in London to B. & co. to whom the charterer was indebted for advances on the outward cargo, & who, as well as C. & co., were cognisant of the terms of the charterparty:—*Held:* (1) the owner of the ship had a lien on these goods to the extent of the homeward freight.

C. & co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, & B. & co. their agents, those goods were by the bill of lading consigned to B. & co.:—*Held:* (2) as between the owner of the ship & B. & co. the goods were to be considered as the goods of the charterer, & liable to the owner's lien on them for the freight due by charterparty. (3) In the charterparty, the freighter promised to pay & defray two-thirds of the port charges: the owner having paid the whole was held to have no lien on the goods shipped for those charges.—FAITH *v.* EAST INDIA CO. (1821), 4 B. & Ald. 630; 106 E. R. 1067.

*Annotations:*—*As to* (1) **Apld.** Campion *v.* Colvin (1836), 3 Scott, 338. **Distd.** Shand *v.* Sanderson (1859), 4 H. & N. 381. *Generally,* **Refd.** Gilkison *v.* Middleton (1857), 2 C. B. N. S. 134; Jenkinson *v.* Willey (1857), 29 L. T. O. S. 96; Pearson *v.* Goschen (1864), 17 C. B. N. S. 352.

**4116.** —— **Bill of lading pledged to secure charterer's debt.**]—A lien on the lading of a ship having been expressly reserved to the owner by a charterparty, held that goods which the charterer purchased & put on board, & then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even as against an indorsee of the bill of lading, subject not only to that freight, but to the shipowner's lien for a balance due to him under the charterparty, whether possession of the ship was by the charterparty completely out of the shipowner & vested in the charterer, or not.—SMALL *v.* MOATES (1833), 9 Bing. 574; 2 Moo. & S. 674; 131 E. R. 729.

*Annotations:*—**Consd.** Belcher *v.* Capper (1842), 4 Man. & G. 502. **Apld.** Gledstanes *v.* Allen (1852), 12 C. B. 202. **Consd.** Kern *v.* Deslandes (1861), 10 C. B. N. S. 205. **Distd.** Peek *v.* Larsen (1871), L. R. 12 Eq. 378; Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826. **Refd.** Turner *v.* Liverpool Dock Co. Trustees (1851), 17 L. T. O. S. 212; Odams *v.* Avery (1852), 19 L. T. O. S. 63; Gilkison *v.* Middleton (1857), 2 C. B. N. S. 134; West Hartlepool Steam Navigation Co. *v.* Tagart, Beaton (1903), 19 T. L. R. 251.

**4117.** —— ——.]—WEST HARTLEPOOL STEAM NAVIGATION CO., LTD. *v.* TAGART, BEATON & CO. (1903), 19 T. L. R. 251, C. A.

**4118.** —— **Goods belonging to charterer.**]—An owner, who remains in possession of a ship, has a lien on the goods on board belonging to the charterer, but directed in the bills of lading to be delivered to a consignee, for the freight due under the charterparty.—CAMPION *v.* COLVIN (1836), 3 Bing. N. C. 17; 2 Hodg. 116; 3 Scott, 338; 5 L. J. C. P. 317; 132 E. R. 315.

*Annotation:*—**Refd.** Foster *v.* Colby (1858), 3 H. & N. 705.

**4119. —— Goods consigned to agents of charterer.**]—By a charterparty, it was stipulated that the ship should proceed to Penang, & there load a full and complete cargo of legal merchandise from the charterers' factors, & proceed therewith to London & there deliver the same on being paid freight "a lump sum of £2,800 in full of all charges." At the end of the charterparty was the following clause:—"The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charterparty, the charterers shipped at Penang goods as their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to pltfs., the correspondents of the charters in London, who were under a general engagement to honour bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, & who were largely in advance at the time of the shipment in question:—*Held:* the owners had a lien upon the goods for the entire lump freight.—GLEDSTANES *v.* ALLEN (1852), 12 C. B. 202; 6 L. T. 790; 138 E. R. 879.

*Annotations:*—**Consd.** Kern *v.* Deslandes (1861), 10 C. B. N. S. 205. **Apld.** Rodoconachi *v.* Millburn (1886), 17 Q. B. D. 316. **Consd.** Hansen *v.* Harrold, [1894] 1 Q. B. 612; West Hartlepool Steam Navigation Co. *v.* Tagart, Beaton (1903), 19 T. L. R. 251. **Refd.** Pearson *v.* Goschen (1864), 17 C. B. N. S. 352; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

**4120.** ——.]—KERN *v.* DESLANDES, No. 4121, *post*.

*D. Incorporation of Charterparty in Bill of Lading.*

**4121. Whether lien for whole charter freight—Bills of lading to be signed without prejudice to charterparty.**]—By a charterparty which was negotiated by A. as agent of B., the charterer (B.) engaged to pay a lump-freight of £735 for a voyage to the coast of Africa & back to London, payable in cash on correct delivery of the return cargo: & the charterparty contained the following clause: "The master to sign bills of lading at any rate of freight, without prejudice to this charter." B., the charterer, shipped certain oil on his own account for London, for which the master signed a bill of lading making the oil deliverable to A. or assigns, "he or they paying freight for the said goods as usual." This bill of lading B. indorsed to A. in part payment of advances made by him on the purchase of the outward cargo:—*Held:* A. having notice of the terms of the charterparty, the owner was entitled to a lien on the oil for the entire charter freight.—KERN *v.* DESLANDES (1861), 10 C. B. N. S. 205; 30 L. J. C. P. 297; 5 L. T. 349; 8 Jur. N. S. 194; 1 Mar. L. C. 156; 142 E. R. 430.

*Annotations:*—**Distd.** Fry *v.* Chartered Mercantile Bank of India (1866), L. R. 1 C. P. 689. **Dbtd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Consd.** West Hartlepool Steam Navigation Co. *v.* Tagart, Beaton (1903), 19 T. L. R. 251. **Refd.** Pearson *v.* Goschen (1864), 17 C. B. N. S. 352.

**4122. —— —— Sub-charter.**]—TURNER *v.* HAJI GOOLAM MAHOMED AZAM, No. 2495, *ante*.

**4123. —— "Freight as per charterparty."**]—FRY *v.* CHARTERED MERCANTILE BANK OF INDIA, No. 2450, *ante*.

**4124. —— "Conditions as per charterparty."**]—GARDNER *v.* TRECHMANN. No. 2515, *ante*.

**4125. —— Obligations of charterer outside charterparty.**]—REDERIACT. SUPERIOR *v.* DEWAR & WEBB, No. 4138, *post*.

**4126. —— Shippers without notice of charterparty.**]—Where a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty. A person who, without notice of any charterparty, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charterparty containing objectionable provisions. A Norwegian vessel was advertised as a general ship by C. & co., an English firm, described in the advertisement as brokers. Pltfs. entered into an agreement with C. & co. for the carriage of certain goods at a stipulated rate of freight, & placed the goods on board before they had notice of any charterparty affecting the ship. It afterwards proved that C. & co. were charterers of the vessel under a charterparty, which provided that the owner should have a lien for freight, dead freight, & demurrage. The captain refused to sign bills of lading, except subject to the charterparty, or to return the goods to pltfs.:—*Held:* the owners of the ship were not entitled to retain the goods in satisfaction of their claims under the charterparty, pltfs. were entitled to have the goods delivered to them free from any claim by the owners.—PEEK *v.* LARSEN (1871), L. R. 12 Eq. 378; 40 L. J. Ch. 763; 25 L. T. 580; 19 W. R. 1045; 1 Asp. M. L. C. 163.

*Annotations:*—**Distd.** Jones *v.* Hough (1879), 5 Ex. D. 115. **Apld.** The Stornoway (1882), 51 L. J. P. 27. **Distd.** Ralli *v.* Paddington S.S. Co. (1900), 5 Com. Cas. 121. **Refd.** Hayn, Roman *v.* Culliford (1879), 27 W. R. 541. **Mentd.** Armstrong & Nickoll & Knight *v.* Allan (1892), 9 T. L. R. 38.

*E. Master Exceeding his Authority.*

**4127. Collusion with consignee.**] — FAITH *v.* EAST INDIA CO., No. 4115, *ante*.

**4128. Freight made payable to persons other than the owners.**]—REYNOLDS *v.* JEX, No. 4532, *post*.

**4129. Freight made payable at port of loading.**]—THE CANADA (1897), 13 T. L. R. 238.

*Annotation:*—**Refd.** The Shillito (1897), 3 Com. Cas. 44.

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SUB-SECT. 5.—WHERE SUB-CHARTER.

**4130. Goods loaded on terms in sub-charter—Notice of terms of charterparty.**]—THARSIS SULPHUR & COPPER MINING CO. *v.* CULLIFORD, No. 2520, *ante*.

**4131. —— Shipowner with notice.**]—MORRIS *v.* LEVISON, No. 4013, *ante*.

**4132.** ——.]—TURNER *v.* HAJI GOOLAM MAHOMED AZAM, No. 2495, *ante*.

**4133. Express lien on all freights—Duration.**]—TAGART, BEATON & CO. *v.* JAMES FISHER & SONS, No. 4094, *ante*.

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SUB-SECT. 6.—FOR CHARGES.

**4134. No common law lien.**]—The master of a ship has no right to detain goods for wharfage, if the consignee tenders the freight, & requires them to be delivered over the ship's side.—BISHOP *v.* WARE (1813), 3 Camp. 360; 170 E. R. 1411, N. P.

**4135.** ——.]—BIRLEY *v.* GLADSTONE, No. 4003, *ante*.

*Sect.* 13.—*Lien: Sub-sect.* 11. *Sect.* 14: *Sub-sects.* 1 & 2, *A.*]

at B., & two-thirds on right delivery of the cargo, by good & approved bills payable in London at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one-third freight was paid, & the consignee of the cargo declared his election to pay the remaining two-thirds in cash less interest:—*Held:* the delivery of the cargo & payment of the balance of the freight were to be concurrent acts, & the master was not bound to deliver the cargo unless the consignee paid or was ready & willing at the same time to pay the balance of the freight.

(2) Disputes having arisen during the delivery of the cargo, the master required payment of the freight for the amount of cargo delivered each day over the ship's side into the consignee's boats, & refused to deliver any more cargo, on the consignees refusing to pay on delivery as required. . . . The master was justified . . . for his lien would be lost by delivery of the goods without payment (BOVILL, C.J.).—PAYNTER *v.* JAMES (1867), L. R. 2 C. P. 348; 15 L. T. 660; 15 W. R. 493; 2 Mar. L. C. 450; *affd.* (1868), 18 L. T. 449, Ex. Ch.

*Annotations:*—**Refd.** Stewart *v.* Rogerson (1871), L. R. 6 C. P. 424; Miedbrodt *v.* Fitzsimon, The Energie (1875), 44 L. J. Adm. 25.

**4151. Effect of capture.**]—Master being turned out of possession upon the vessel's being captured does not deprive him of his lien for the freight in case of her recapture.—*Re* WELFITT, *Ex p.* CHEESMAN (1763), 2 Eden. 181 28 E. R. 866, L. C.

*Annotation:*—**Refd.** *Re* Atkinson, *Ex p.* Good (1837), 2 Deac. 389.

**4152. By embargo.**] — THE THERESA BONITA (1802), 4 Ch. Rob. 236; 165 E. R. 597.

**4153. Effect of sale of ship—On lien of creditors.**]—Where ships sailed with ballast from London to Jamaica & was sold on her voyage there, & afterwards sailed from Jamaica to London with goods shipped on a contract with the owners of the ship at the time of the shipping, creditors of the quondam owners have no lien on the freight due in respect of the voyage from Jamaica.—*Ex p.* HILL (1815), 1 Madd. 61; 2 Rose, 448; 56 E. R. 24.

*Annotations:*—**Consd.** Green *v.* Briggs (1848), 6 Hare, 395; **Refd.** The Neptune (1834), 3 Hag. Adm. 129.

**4154. Removal from wharf.**]—HAMMOND *v.* M'CRIE, No. 4056, *ante.*

**4155. Contract at variance with lien.**]—HOW *v.* KIRCHNER, No. 4084, *ante.*

**4156. Withdrawal of ship—Non-payment of hire under time charter.**]—WEHNER *v.* DENE STEAM SHIPPING CO., No. 2496, *ante.*

**Effect of landing goods.**]—*See* Sub-sect. 10, *ante.*

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## SECT. 14.—GENERAL AVERAGE.

### SUB-SECT. 1.—IN GENERAL.

*See* Carriage of Goods by Sea Act, 1924 (c. 22), Article V.

**4157. Nature of right—Distinguished from "particular average."**]—THE COPENHAGEN, No. 3326, *ante.*

**4158.** ——.]—MONTGOMERY & CO. *v.* INDEMNITY MUTUAL MARINE INSURANCE CO., No. 4176, *post.*

**4159.** ——.]—SIMONDS *v.* WHITE, No. 4160, *post.*

**4160. Origin of right.**]—(1) A loss by general average is to be calculated between owner of ship & the owner of goods according to the law of the port of discharge.

(2) The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, & of universal reception among commercial nations (ABBOT, C.J.).—SIMONDS *v.* WHITE (1824), 2 B. & C. 805; 4 Dow. & Ry. K. B. 375; 2 L. J. O. S. K. B. 159; 107 E. R. 582.

*Annotations:*—*As to* (1) **Apld.** Dalglish *v.* Davidson (1824), 5 Dow. & Ry. K. B. 6. **Consd.** Atwood *v.* Sellar (1879), 4 Q. B. D. 342; Wavertree Sailing Ship Co. *v.* Love, [1897] A. C. 373. **Refd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; Stewart *v.* West India & Pacific S.S. Co. (1873), 27 L. T. 820; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. *As to* (2) **Refd.** The Patria (1871), L. R. 3 A. & E. 436; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579; Svendsen *v.* Wallace (1885), 10 App. Cas. 404; The Brigella, [1893] P. 189. *Generally,* **Refd.** Briggs *v.* Merchant Traders' Ship Loan & Assce. Assocn. (1849), 13 L. T. O. S. 68; Huth *v.* Lamport & Holt (1886), 34 W. R. 386.

**4161.** ——.]—CROOKS *v.* ALLAN, No. 4204, *post.*

**4162.** ——.]—PIRIE & CO. *v.* MIDDLE DOCK CO., No. 4229, *post.*

**4163.** ——.]—Pltfs. shipped certain cattle as a deck cargo on board deft.'s vessel; during the voyage a storm arose, & owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper & necessary on the part of the master for the safety of deft.'s vessel:—*Held:* pltfs. could not recover from the defts. a general average contribution, for the loss of the cattle.

It is not necessary to say what is the origin or principle of the rule, but, to judge from the way it is claimed in England, it would seem to arise from an implied contract *inter se* to contribute "by those interested." To this rule there is an exception, viz., deck cargo jettisoned is not entitled to general average contribution. . . . To this exception, however, there are two exceptions . . . viz. that coasting vessels are without the exception, & also those cases where by custom the deck cargo is one customary in the trade & perhaps also from the port (BRAMWELL L.J.).—WRIGHT *v.* MARWOOD (1881), 7 Q. B. D. 62; 29 W. R. 673; *sub nom.* WRIGHT *v.* MARWOOD, GORDON *v.* MARWOOD, 50 L. J. Q. B. 643; 45 L. T. 297; 4 Asp. M. L. C. 451, C. A.

*Annotations:*—**Consd.** Burton *v.* English (1883), 12 Q. B. D. 218. **Refd.** Strang, Steel *v.* Scott (1889), 14 App. Cas. 601; The Marpessa, [1891] P. 403; The Brigella, [1893] P. 189; Ruabon S.S. Co. *v.* London Assce., [1900] A. C. 6; Apollinaris Co. *v.* Nord Deutsche Insce., [1904] 1 K. B. 252.

**4164.** ——.]—BURTON *v.* ENGLISH, No. 4218, *post.*

**4165.** ——.]—(1) The right of contribution in respect of jettisoned cargo is based on the danger to ship & cargo requiring sacrifice to which all must contribute.

(2) Such right does not belong to the wrongdoers whose acts have led to the jettison, or to those who are legally responsible for them.

(3) Where a ship is stranded through the negligence of her master, & thereby ship & cargo are placed in a position of such imminent danger as to make it prudent & necessary to jettison part of the cargo in order to save the remainder & the ship:—*Held:* innocent owners of the jettisoned cargo are entitled to general average; (4) *secus* with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract. (5) The rules of maritime law relating to the rights & remedies resulting from a proper case of jettison are:—Each owner of jettisoned goods becomes a creditor of ship & cargo saved; he has a direct claim against each of the owners of ship & cargo for a *pro rata* contribution towards his indemnity, which he can recover (*a*) by direct action; (*b*) by enforcing through the ship master, who is his agent for that

purpose, a lien on each parcel of goods salved to answer its proportionate liability.

(6) There are two well-established exceptions to the rule of contribution for general average. . . . When a person who would otherwise have been entitled to claim contribution has, by his own fault occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved. . . . The second exception is in the case of deck cargo. . . . According to the rules of maritime lien, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; & their jettison is therefore regarded . . . as a justifiable riddance of incumbrances which ought never to have been there. . . . But the exception does not apply, either (*a*) in those cases where, according to the established custom of navigation, such cargoes are permitted or (*b*) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship (LORD WATSON).

(7) The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes (LORD WATSON).—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO. (1889), 14 App. Cas. 601; 5 T. L. R. 705; 6 Asp. M. L. C. 419; *sub nom.* STEEL & CO. *v.* SCOTT (A.) & CO., 59 L. J. P. C. 1; 61 L. T. 597; 38 W. R. 452, P. C.

*Annotations:*—*As to* (4) **Refd.** The Carron Park (1890), 15 P. D. 203. *As to* (5) **Refd.** Nobel's Explosives Co. *v.* Rea (1897), 2 Com. Cas. 293. *As to* (6) **Refd.** Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540; Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51. *As to* (7) **Refd.** Ruabon S.S. Co. *v.* London Assce., [1900] A. C. 6. *Generally*, **Consd.** Kish *v.* Taylor, [1912] A. C. 604.

**Jurisdiction of Admiralty Court.**] — *See* ADMIRALTY, Vol. I., p. 157, Nos. 655–658.

**4166. Right to general average contribution — No lien on ship given merely to cargo owners.**]—(1) A right to general average contribution from a ship after adjustment gives owners of cargo no lien on the ship by the law maritime.

(2) A debt for general average contribution arising in respect of an outward voyage being a personal debt only is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward.—THE NORTH STAR (1860), Lush. 45; 29 L. J. P. M. & A. 73; 2 L. T. 264; 167 E. R. 24.

*Annotations:*—*As to* (1) **Refd.** The Daring (1868), L. R. 2 A. & E. 260. *As to* (2) **Consd.** The Edmond (1861), Lush. 211; Cleary *v.* McAndrew, The Galam (Cargo Ex) (1863), 2 Moo. P. C. C. N. S. 216. **Refd.** The Karnak (1868), L. R. 2 A. & E. 289.

**4167. Debt for general average contribution—Not sufficient foundation for bottomry bond—For homeward voyage.**]—THE NORTH STAR, No. 4166, *ante*.

**4168. York-Antwerp Rules incorporated in bill of lading.**]—CHELLEW *v.* ROYAL COMMISSION ON SUGAR SUPPLY, No. 4303, *post*.

SUB-SECT. 2.—WHEN RIGHT ARISES.

*A. In General.*

**4169. Loss incurred for preservation of other interests.**]—SHEPPARD *v.* WRIGHT (1698), Show. Parl. Cas. 18; 1 E. R. 13, H. L.

*Annotations:*—**Refd.** Deering *v.* Winchelsea (1787), 2 Bos & P. 270; Hallett *v.* Bousfield (1811), 18 Ves. 187.

**4170.** ——.]—THE COPENHAGEN, No. 3326, *ante*.

**4171.** —— **Voluntary sacrifice.**] — *Semble:* where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship & cargo & freight belong to one only or to different adventurers, or whether they are partially interested.—OPPENHEIM *v.* FRY (1863), 3 B. & S. 873; 2 New Rep. 116; 8 L. T. 385; 11 W. R. 725; 1 Mar. L. C. 333; 122 E. R. 326; *on appeal* (1864), 5 B. & S. 348, Ex. Ch.

*Annotations:*—**Consd.** Montgomery *v.* Indemnity Mutual Marine Insce., [1902] 1 K. B. 734. **Refd.** The Brigella, [1893] P. 189. **Mentd.** Roddick *v.* Indemnity Mutual Marine Insce. (1895), 44 W. R. 27.

**4172.** —— ——.]—JOHNSON *v.* CHAPMAN, No. 4216, *post*.

**4173.** —— ——.]—A ship was submerged in deep water with heavy cargo on board; there was a common peril of destruction imminent over ship & cargo as they lay submerged; the most convenient mode of saving ship or cargo or both was by raising the ship together with the cargo; the cost of the raising would be an extraordinary expense for the common benefit of both, & the cargo would be liable to general average contribution.

In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away (BLACKBURN, J.).—KEMP *v.* HALLIDAY (1865), 6 B. & S. 723; 34 L. J. Q. B. 233; 13 L. T. 256; 11 Jur. N. S. 852; 13 W. R. 1035; 2 Mar. L. C. 271; 122 E. R. 1361; *on appeal* (1866), L. R. 1 Q. B. 520, Ex. Ch.

*Annotations:*—**Refd.** Walthew *v.* Mavrojani (1870), 39 L. J. Ex. 81; Denoon *v.* Home & Colonial Assce. (1872), L. R. 7 C. P. 341; Harrison *v.* Bank of Australasia (1872), L. R. 7 Exch. 39; Anderson *v.* Ocean S.S. Co. (1884), 10 App. Cas. 107; The Raisby (1885), 10 P. D. 114; Marine Insce. *v.* China Transpacific S.S. Co. (1886), 11 App. Cas. 573. **Mentd.** Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Macbeth *v.* Maritime Insce., [1908] A. C. 144.

**4174.** —— ——.]—ANDERSON *v.* OCEAN S.S. CO., No. 4281, *post*.

**4175.** —— ——.]—Shippers chartered a ship to carry a cargo of coals from Cardiff to Esquimault. In the course of the voyage the coal heated to such an extent that if the ship had continued her voyage the ship & cargo would have been totally lost. The master, for the safety of all concerned, put into a port of refuge & landed the coal, which was subsequently surveyed & found to be in such a condition as to be incapable of being carried with safety to its destination. The master accordingly abandoned the voyage, & the chartered freight was lost:—*Held:* the freight had not been sacrificed under such circumstances as to make the loss the subject of general average contribution.

To constitute a general average loss so as to be the subject of a general average contribution, two things at least must co-exist: (*a*) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship & cargo; (*b*) such sacrifice or expenditure must be made at the time when a common danger to ship & cargo existed, for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general average contribution (A. L. SMITH, L.J.).—IREDALE *v.* CHINA TRADERS INSURANCE CO., [1900] 2 Q. B. 515; 69 L. J. Q. B. 783; 83 L. T. 299; 49 W. R. 107; 16 T. L. R. 484; 44 Sol. Jo. 607; 9 Asp. M. L. C. 119; 5 Com. Cas. 337, C. A.

**4176.** —— ——.]—The rule as to what constitutes a general average or not is founded upon the consideration whether it is for the benefit of all who are or may be interested in the accomplishment of the voyage, or only for the benefit of a particular party (VAUGHAN WILLIAMS, L.J.).

*Sect.* 14.—*General average: Sub-sect.* 2, *A. & B.*]

The phrase " general average " . . . is used in contra-distinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, & not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss, & not to the effects of it. It looks to the consideration whether the act is intended for the benefit of all concerned in the voyage, & not in particular to the consideration who are to contribute towards the indemnity (VAUGHAN WILLIAMS, L.J.).—MONTGOMERY & Co. *v.* INDEMNITY MUTUAL MARINE INSURANCE Co., [1902] 1 K. B. 734; 71 L. J. K. B. 467; 86 L. T. 462; 50 W. R. 440; 18 T. L. R. 479; 46 Sol. Jo. 410; 9 Asp. M. L. C. 289; 7 Com. Cas. 120, C. A.

**4177. —— Extraordinary sacrifice.**]—An action upon premises lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.

All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship & cargo come within general average & must be borne proportionably by all who are interested (LAWRENCE, J.).—BIRKLEY *v.* PRESGRAVE (1801), 1 East, 220; 102 E. R. 86.

*Annotations:*—**Distd.** Covington *v.* Roberts (1806), 2 Bos. & P. N. R. 378. **Consd.** Job *v.* Langton (1856), 6 E. & B. 779. **Expld.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Apld.** The Bona, [1895] P. 125. **Expld.** The Leitrim, [1902] P. 256. **Consd.** Austin Friars S.S. Co. *v.* Spillers & Bakers (1915), 113 L. T. 805. **Refd.** Jackson *v.* Strong (1824), M'Cle. 245; Jones *v.* Nanney (1824), M'Cle. 25; Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203; Harrison *v.* Bank of Australasia (1872), L. R. 7 Exch. 39; The Brigella, [1893] P. 189; McCall *v.* Houlder (1897), 76 L. T. 469; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540; Soc. Nouvelle D'Armement *v.* Spillers & Bakers, [1917] 1 K. B. 865.

**4178. —— ——.**]—A claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship & the rest of the cargo from an impending danger: not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea.—HALLETT *v.* WIGRAM (1850), 9 C. B. 580; 19 L. J. C. P. 281; 15 L. T. O. S. 137; 137 E. R. 1018.

*Annotations:*—**Consd.** Walthew *v.* Mavrojani (1870), L. R. 5 Exch. 116; Harrison *v.* Bank of Australasia (1872), L. R. 7 Exch. 39; Atwood *v.* Sellar (1880), 5 Q. B. D. 286; McCall *v.* Houlder (1897), 76 L. T. 469. **Refd.** Atkinson *v.* Stephens (1852), 7 Exch. 567; The Daring (1868), L. R. 2 A. & E. 260; Svensden *v.* Wallace (1884), 13 Q. B. D. 69.

**4179. —— In unusual & abnormal manner.**]—THE BONA, No. 4203, *post.*

—— **Particular instances.**]—*See* Sub-sect. 2, B., C., *post.*

**4180. Expenditure for benefit of ship & cargo.**]—BIRKLEY *v.* PRESGRAVE, No. 4177, *ante.*

**4181.** ——.]—KEMP *v.* HALLIDAY, No. 4173, *ante.*

**4182.** ——.]—ATWOOD *v.* SELLAR, No. 4332, *post.*

**4183.** ——.]—IREDALE *v.* CHINA TRADERS INSURANCE CO., No. 4175, *ante.*

**4184. —— To avoid extraordinary & abnormal perils.**]—In pursuance of a charterparty a sailing vessel left San Francisco for Queenstown, & was there ordered to Sharpness in the Bristol Channel. The usual practice for a sailing vessel going from Queenstown to Sharpness is for her to be towed a short distance out of Queenstown & a short distance into Sharpness. The master of the vessel hired a Dutch tug to tow her the whole way from Queenstown to Sharpness, being of opinion that that course was necessary owing to the presence of enemy submarines in the neighbourhood. In hiring the tug the master acted on his own judgment & responsibility. Although the vessel passed through waters in which she anticipated submarines, she did not see one, & of vessels alleged to have been sunk or damaged in the waters through which she passed on her voyage three-quarters were steamships. The vessel always used a tug when entering or leaving port. In an action brought by the owners of the vessel against the owners of the cargo for a general average contribution in respect of the hire of the tug:—*Held:* the claim could not be sustained, inasmuch as a general average expenditure must be incurred to avoid extraordinary, & abnormal perils as distinguished from the ordinary & normal perils of the sea, & the risk of being attacked or destroyed by the King's enemies was not an extraordinary & abnormal peril upon a voyage of the kind during the war.—SOCIÉTÉ NOUVELLE D'ARMEMENT *v.* SPILLERS & BAKERS, LTD., [1917] 1 K. B. 865; 86 L. J. K. B. 406; 116 L. T. 284; 33 T. L. R. 189; 14 Asp. M. L. C. 16; 22 Com. Cas. 211.

**4185.** —— ——.]—An action at law may be maintained to recover a contribution in the nature of general average by one shipper of goods against another.

Where the master of a ship in a foreign port was arrested by process out of a ct. of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on her account, & the master not being able to raise money by other means, that he might procure his liberation & pursue the voyage, sold a part of the cargo:—*Held:* the owner of the goods so sold, had no right to a contribution in the nature of general average from the shippers of the other goods on board which arrived safely at the port of destination.—DOBSON *v.* WILSON (1813), 3 Camp. 480; 170 E. R. 1453, N. P.

*Annotations:*—**Refd.** Sarguy *v.* Hobson (1827), 1 Y. & J. 347; Hallett *v.* Wigram (1850), 19 L. J. C. P. 281; Strang, Steel *v.* Scott (1889), 14 App. Cas. 601.

**4186.** —— ——.]—ROYAL MAIL STEAM PACKET CO. *v.* ENGLISH BANK OF RIO DE JANEIRO, No. 4272, *post.*

—— **Particular instances.**]—*See* Sub-sect. 2, D., *post.*

**4187. Existence of common peril—Necessity for.**]—JOHNSON *v.* CHAPMAN, No. 4216, *post.*

**4188.** —— ——.]—IREDALE *v.* CHINA TRADERS INSURANCE CO., No. 4175, *ante.*

**4189.** —— ——.]—HAMEL *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., No. 4241, *post.*

**4190. —— What is common peril—Matter containing elements of destruction within itself—Developing during voyage.**]—JOHNSON *v.* CHAPMAN, No. 4216, *post.*

**4191. Peril must exist—Mere apprehension insufficient.**]—Under a mistaken assumption of fire the captain of a ship caused steam to be turned into the hold to extinguish the supposed fire, & so damaged pltfs.' goods. On a claim by them for a general average loss against defts. as insurers:—

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**PART VII. SECT. 14, SUB-SECT. 2.—A.**

**4180 i.** *Expenditure for benefit of ship & cargo.*]—A liability to general average contribution arises only where both ship & cargo are in imminent & uncontemplated peril & there is expenditure or sacrifice to secure their safety.—KIDD *v.* THOMSON (1899), 26 A. R. 220.—**CAN.**

*Held:* the "peril" being in fact non-existent, there was no general average loss, & even if there were, defts. were not liable, as the loss had not been caused through a peril insured against, such a peril having never existed.—WATSON (JOSEPH) & SON, LTD. *v.* FIREMEN'S FUND INSURANCE CO. OF SAN FRANCISCO, [1922] 2 K. B. 355; 92 L. J. K. B. 31; 127 L. T. 754; 38 T. L. R. 752; 66 Sol. Jo. 648; 16 Asp. M. L. C. 93; 28 Com. Cas. 73.

**4192. Exclusion by custom.**]—ACHARD *v.* RING, No. 4226, *post.*

*B. Loss affecting Ship and Equipment.*

**4193. Loss caused by bad weather—Sacrifice of tackle.**]—BIRKLEY *v.* PRESGRAVE, No. 4177, *ante.*

**4194. —— Through press of sail.**]—POWER *v.* WHITMORE, No. 4244, *post.*

**4195. —— Abnormal pumping operations—Ships' stores used as fuel.**]—Pltf.'s ship sailed from Melbourne for London, having on board, as is usual with sailing vessels on this voyage, a donkey engine, which was equivalent to ten additional men, & without which, or the ten additional men, she would not have been seaworthy. The engine was used for pumping & also for other ship's purposes. The ship had on board a sufficient stock of coals for an ordinary voyage, & was expressly found to be seaworthy. On Mar. 10 she encountered bad weather, which continued till Apr. 1, & then moderated. During this time she strained, & made much water, & she continued afterwards to leak; the water could only be kept under by pumping, & for this purpose it was necessary to use the engine, without which she could not have been kept afloat. On Apr. 16 the stock of coals was refuced to one & a half tons, & the captain, in order to obtain fuel, directed some spare spars & wood, which were part of the ship's stores, to be cut up to burn with the coal; wood alone would not have sufficed to get up the steam. On May 5 the ship obtained some coal from a passing vessel, & on May 16 put into port to obtain a further supply. On arriving in the Thames the engine broke down fron overwork. The ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine. Pltf. claimed from defts., who were owners of cargo, a general average contribution in respect of (1) the spars & wood; (*b*) the extra coal; & (*c*) the injury to the donkey engine:—*Held:* (KELLY, C.B. & BRAMWELL, B.) the facts showed an imminent peril requiring the sacrifice of the spars & wood, & pltf. was therefore entitled to a general average contribution in respect of them; but he was not so entitled in respect of the coal or the injury to the donkey engine. (2) (MARTIN & CLEASBY, BB.), no such emergency had occurred as to entitle pltf. to a general average contribution in respect of any of the above matters.—HARRISON *v.* BANK OF AUSTRALASIA (1872), L. R. 7 Exch. 39; 41 L. J. Ex. 36; 25 L. T. 944; 20 W. R. 385; 1 Asp. M. L. C. 198.

*Annotations:—Generally,* **Consd.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69; The Bona, [1895] P. 125. **Refd.** Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653; Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362.

**4196.** —— —— ——.]—A ship sailed well equipped & manned for the voyage, having a donkey engine on board, & a reasonable supply of coals to work it foi pumping purposes. The ship met with very heavy weather & sprang a leak, & in order to keep her afloat, it became necessary to use the engine for pumping, & the coals running short, the captain burnt with the coals the ship's spare spars & some of her cargo:—*Held:* the sacrifice of the spars & cargo was general average.—ROBINSON *v.* PRICE (1877), 2 Q. B. D. 295; 46 L. J. Q. B. 551; 36 L. T. 354; 25 W. R. 469; 3 Asp. M. L. C. 407, C. A.

*Annotations:*—**Refd.** Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; The Bona, [1895] P. 125.

**4197. —— —— Costs of extra supply of coal.**]—HARRISON *v.* BANK OF AUSTRALASIA, No. 4195, *ante.*

**4198. —— —— Cargo used as fuel.**]—ROBINSON *v.* PRICE, No. 4196, *ante.*

**4199. —— —— Injury done to donkey engine.**]—HARRISON *v.* BANK OF AUSTRALASIA, No. 4195, *ante.*

**4200. —— Dangerous mast cut away.**]—CORRIE *v.* COULTHARD (1877), 3 Asp. M. L. C. 546, n., C. A.

*Annotations:*—**Distd.** Shepherd *v.* Kottgen (1877), 2 C. P. D. 585. **Refd.** Watson *v.* Firemen's Fund Insce. Co. of San Francisco, [1922] 2 K. B. 355.

**4201.** —— ——.]—Whilst on a voyage to H., a vessel met with a storm, which caused parts of the rigging to give way: the mainmast in consequence began to lurch violently, & was cut away by the captain's orders; if the mast had not been cut away, it would, in all probability have fallen overboard in a few minutes, & in so doing might have torn up the decks & caused the vessel to founder; the vessel having outlived the storm, was repaired at a port of refuge, & proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury whether at the time when the mast was cut away it was virtually a wreck & valueless; but he did not ask them to find whether if the weather had moderated the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere incumbrance:—*Held:* a proper direction.—SHEPHERD *v.* KOTTGEN (1877), 2 C. P. D. 585; 47 L. J. Q. B. 67; 37 L. T. 618; 26 W. R. 120; 3 Asp. M. L. C. 544, C. A.

*Annotations:*—**Consd.** Iredale *v.* China Traders Insce., [1899] 2 Q. B. 356. **Refd.** Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; The Bona, [1895] P. 125; Montgomery *v.* Indemnity Mutual Marine Insce., [1901] 1 K. B. 147; Barque Robert S. Besnard Co. *v.* Murton (1909), 101 L. T. 285.

**4202. Loss by fire—Total loss of ship & cargo.**]—CHELLEW *v.* ROYAL COMMISSION ON SUGAR SUPPLY, No. 4303, *post.*

**4203. Refloating stranded ship—Damage to intentionally strained engines—& value of coals consumed.**]—If in endeavouring to refloat a steamship stranded in a position of peril, the engines are intentionally worked, at the risk of damage, for the common safety, the damage so caused to the engines is a general average loss, & the value of the coal consumed in working the engines is also the subject of general average contribution.

The case, therefore, admittedly depends upon whether the use of the engines in this case was a normal or ordinary mode of using them, or whether the engines were used, not only under unusual circumstances, but in an unusual & abnormal manner (LORD ESHER, M.R.).—THE BONA, [1895] P. 125; 64 L. J. P. 62; 71 L. T. 870; 43 W. R. 289; 11 T. L. R. 209; 39 Sol. Jo. 246; 7 Asp. M. L. C. 557, C. A.

*Annotation:*—**Refd.** Soc. Nouvelle D'Armement *v.* Spillers & Bakers. [1917] 1 K. B. 865.

**4204. Loss caused by enemy vessels—Escape necessitating unusual press of sail.**]—If a ship, in order to escape from a privateer, carry an unusual press of sail, & succeed in getting away, but sustain damage in so doing, this is a particular, not a

*Sect.* 14.—*General average: Sub-sect.* 2, *B. & C.* (*a*) & (*b*).]

general average.—COVINGTON *v.* ROBERTS (1806), 2 Bos. & P. N. R. 378; 127 E. R. 674.

*Annotations:*—**Distd.** The Bona, [1895] P. 125. **Refd.** Soc. Nouvelle D'Armement *v.* Spillers & Bakers, [1917] 1 K. B. 865.

**4205. —— Jettison of stores after capture.**]—PRICE *v.* NOBLE, No. 4298, *post.*

**4206. —— Damage in resisting capture.**]—The expenditure of ammunition, in resisting capture by a privateer the damage done to the ship in the combat, & the expense of curing the wounded sailors, are not the subject of general average by the law of England.—TAYLOR *v.* CURTIS (1816), 6 Taunt. 608; 2 Marsh. 309; 128 E. R. 1172.

*Annotations:*—**Refd.** Brown *v.* Stapyleton (1827), 12 Moore, C. P. 334; English & American Shipping Co. *v.* Indemnity Mutual Marine Insce., The Bona (1894), 11 R. 707; The Bona, [1895] P. 125; Soc. Nouvelle D'Armement *v.* Spillers & Bakers, [1917] 1 K. B. 865.

**4207. —— Ammunition expended resisting capture.**]—TAYLOR *v.* CURTIS, No. 4206, *ante.*

**4208. —— Medical supplies for wounded sailors.**]—TAYLOR *v.* CURTIS, No. 4206, *ante.*

*C. Loss affecting Cargo.*

(*a*) *Jettison.*

**4209. General rule.**] — HICKS *v.* PALINGTON (1590), Moore, K. B. 297; 72 E. R. 500.

**4210. ——.**] — THE GRATITUDINE, No. 3333, *ante.*

**4211. ——.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & Co., No. 4165, *ante.*

**4212. Deck cargo.**]—MYER *v.* VANDER DEYL (1803), cited in Abbott on Shipping, 5th ed., at p. 355, n.

*Annotations:*—**Dbtd.** Millward *v.* Hibbert (1842), 3 Q. B. 120. **Refd.** Svensden *v.* Wallace (1885), 54 L. J. Q. B. 497.

**4213. —— Carried according to trade custom.**]—The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the shipowner for a loss by jettison.—GOULD *v.* OLIVER (1837), 4 Bing. N. C. 134; 3 Hodg. 307; 5 Scott, 445; 7 L. J. C. P. 68; 132 E. R. 740; *subsequent proceedings* (1840), 2 Man. & G. 208.

*Annotations:*—**Refd.** Millward *v.* Hibbert (1842), 3 Q. B. 120; Hall *v.* Janson (1855), 24 L. T. O. S. 289; Miller *v.* Titherington (1861), 30 L. J. Ex. 217.

**4214. —— ——.**]—WRIGHT *v.* MARWOOD, No. 4163, *ante.*

**4215. —— ——.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & Co., No. 4165, *ante.*

**4216. —— Carried by agreement.**] — Deck cargo, timber, lawfully laden pursuant to charter-party, having broken adrift in consequence of stormy weather, & impeding the navigation & endangering the safety of the vessel, was necessarily thrown overboard:—*Held:* the shipper was entitled to claim general average in respect thereof as against the shipowner.

In order to make jettison the subject of a general average contribution two conditions must be fulfilled. First of all there must be common danger. It must be a maritime peril & it must be common to the whole adventure which would exclude the case of a subject-matter that had within itself the elements of destruction which developed themselves during the storm . . . secondly there must be a sacrifice in the sense of intentional sacrifice (WILLES, J.).—JOHNSON *v.* CHAPMAN (1865), 19 C. B. N. S. 563; 35 L. J. C. P. 23; 14 W. R. 264; 144 E. R. 907; *sub nom.* THE SHOOTING STAR, JOHNSON *v.* CHAPMAN, 15 L. T. 70; 2 Mar. L. C. 404.

*Annotations:*—**Distd.** Wright *v.* Marwood, Gordon *v.* Marwood (1881), 7 Q. B. D. 62. **Consd.** Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540. **Refd.** Shepherd *v.* Kottgen (1877), 47 L. J. Q. B. 67; Greenshields, Cowie *v.* Stephens, [1908] A. C. 431.

**4217. —— ——.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & Co., No. 4165, *ante.*

**4218. —— —— "At merchant's risk."**]—(1) It was stipulated in a charterparty that the "ship should be provided with a deck cargo if required at full freight, but at merchant's risk":—*Held:* the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo, shipped by the charterers, & necessarily jettisoned to save the ship & the rest of the cargo.

(2) Those who wish to make exceptions in their own favour, & by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words (BOWEN, L.J.).

(3) By what law does the right arise to general average contributions? . . . It does not arise from any contract at all, but from the old Rhodian laws & has become incorporated into the law of England as the law of the ocean (BRETT, M.R.).—BURTON *v.* ENGLISH (1883), 12 Q. B. D. 218; 53 L. J. Q. B. 133; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. L. C. 187, C. A.

*Annotations:*—*As to* (2) **Expld.** Mendl *v.* Ropner, [1913] 1 K. B. 27. *As to* (3) **Consd.** Newall *v.* Royal Exchange Shipping Co. (1884), 33 W. R. 342. **Refd.** Royal Exchange Shipping Co. *v.* Dixon (1886), 12 App. Cas. 11; Strang, Steel *v.* Scott (1889), 14 App. Cas. 601; The Marpessa, [1891] P. 403; The Brigella, [1893] P. 189; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540; Ruabon S.S. Co. *v.* London Assce., [1900] A. C. 6; Austin Friar S.S. Co. *v.* Spillers & Bakers, [1915] 1 K. B. 833. *Generally*, **Refd.** Norman *v.* Binnington (1890), 25 Q. B. D. 475.

**4219. —— On coasting vessels.**]—WRIGHT *v.* MARWOOD, No. 4163, *ante.*

(*b*) *Damage by Water.*

**4220. In extinguishment of fire.**]—Pltf. shipped bark on board deft.'s general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, & a hole was cut in the side of the ship, & her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted, the

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**PART VII. SECT. 14, SUB-SECT. 2.—C. (a).**

**4212 i.** *Deck cargo.*]—The owners of goods stored under the deck are not liable to contribute by way of general average to the loss of goods laden on deck & thrown overboard from necessity in a storm, & with the hope of saving the ship & cargo. *Semble:* the shipowner would, in such a case, be liable to general average.—GIBB *v.* MCDONELL (1850), 7 U. C. R. 356.—CAN.

**4213 i.** —— *Carried according to trade custom.*]—Where the usage is proved to carry a deck cargo, if that cargo be thrown overboard in a storm to lighten the vessel, the owner of the vessel is liable for average to the owner of the deck cargo, without proving the value of the cargo in the hold, & taking it into account.—GROUSELLE *v.* FERRIE (1842), 6 O. S. 454.—CAN.

**4213 ii.** —— ——.]—Where goods are laden on deck according to the custom of a particular trade, the owner thereof is entitled to contribution in general average for loss by jettison.—MARKS *v.* WATSON (1843), 4 N. B. R. (2 Kerr) 211.—CAN.

**4213 iii.** —— ——.]—Whenever it is shown that the loading of cargo on deck is lawful by reason of contract, or the usage of trade, the rule of the maritime law as to general average contribution applies, & all the interests in jeopardy are bound to contribute for any portion of cargo jettisoned for their preservation, & the legal right to contribution which results therefrom can only be repelled or displaced by a plainly established usage negativing the claim to such contribution, the burden of establishing which is upon deft.—CAMERON *v.* DOMVILLE (1878), 17 N. B. R. (1 P. & B.) 647.—CAN.

**4216 i.** —— *Carried by agreement.*]—CAMERON *v.* DOMVILLE (1878), 17 N. B. R. (1 P. & B.) 647.—CAN.

cargo on board would in all probability have been destroyed, & the ship seriously damaged. Pltf.'s bark was destroyed by the water poured into the ship. In an action for general average contribution in respect of the destruction of pltf.'s bark, it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:—*Held:* whether or not the loss was, according to the general law of England, the subject of general average contribution, pltf., by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract, & he was bound by it, even if different from British law.—STEWART *v.* WEST INDIA & PACIFIC S.S. CO. (1873), L. R. 8 Q. B. 362; 42 L. J. Q. B. 191; 28 L. T. 742; 21 W. R. 953; 2 Asp. M. L. C. 32, Ex. Ch.

*Annotations:*—**Apld.** Hendricks *v.* Australasian Insco. (1874), L. R. 9 C. P. 460. **Distd.** Atwood *v.* Sellar (1880), 5 Q. B. D. 286. **Apld.** Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426. **Distd.** Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653.

**4221. —— Exception from liability clause in contract.**]—Where a bill of lading contained an exception of "fire on board," & the goods carried under it were injured in consequence of the water used to extinguish a fire occurring during the voyage:—*Held:* the exception did not exempt the shipowners from liability to contribution in general average towards the loss sustained by the owner of the goods so injured. Nor were they exempted by virtue of 17 & 18 Vict. c. 104, s. 503. The exception in the bill of lading & 17 & 18 Vict. c. 104, s. 503 had reference only to the obligation on the contract to deliver the goods, & did not take away the ordinary liability of the shipowner to contribute in general average, as owner, when a fire had occurred & a sacrifice had been properly made to save the whole adventure.—SCHMIDT *v.* ROYAL MAIL S.S. CO. (1876), 45 L. J. Q. B. 646; 4 Asp. M. L. C. 217, n.

*Annotations:*—**Apld.** Crooks *v.* Allan (1879), 5 Q. B. D. 38. **Consd.** Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653; Burton *v.* English (1883), 12 Q. B. D. 218; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540. **Apprvd.** Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51. **Refd.** The Marpessa, [1891] P. 403.

**4222. —— ——.**]—CROOKS *v.* ALLAN, No. 4294, *post.*

**4223. —— Plea of statutory exception.**]—SCHMIDT *v.* ROYAL MAIL S.S. CO., No. 4221, *ante.*

**4224. —— ——.**]—ASPINWALL *v.* MERCHANT SHIPPING CO. (1876), cited in 45 L. J. Q. B. at p. 648.

*Annotations:*—**Folld.** Schmidt *v.* Royal Mail S.S. Co. (1876), 45 L. J. Q. B. 646. **Consd.** Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653. **Apprvd.** Greenshields, Cowie *v.* Stephens (1907), 98 L. T. 89.

**4225. —— ——.**]—Coal shipped without negligence on the part of any one took fire by spontaneous combustion, & the water used in extinguishing the fire damaged the whole cargo of coal:—*Held:* (1) by maritime law the owners of the coal were entitled to claim against the ship contribution in general average in respect of the sacrifices voluntarily made for the common advantage of all, the fire having been caused by the inherent qualities of the coal, or, in other words, by spontaneous combustion, without default on the part of the shippers; (2) 1894 Act, s. 502, afforded no defence to the claim.—GREENSHIELDS, COWIE & CO. *v.* STEPHENS & SONS, [1908] A. C. 431; 77 L. J. K. B. 985; 99 L. T. 597; 24 T. L. R. 880; 52 Sol. Jo. 727; 11 Asp. M. L. C. 167; 14 Com. Cas. 41, H. L.

**4226. —— Scuttling of ship.**]—Damage to cargo by scuttling a ship to put out a fire is the subject of general average contribution.

There is no valid custom excluding the loss from general average.

Pltf. chartered a ship from deft., & by the charterparty it was provided, "all questions of general average to be settled according to the custom of the London underwriters at Lloyd's." A fire broke out on board, the ship was scuttled to extinguish it, & the cargo was damaged thereby. The loss was adjusted as general average, & pltf. brought his action to recover from deft. the ship's contribution. The judge directed the jury that the loss was general average according to law, & the question was whether there was a valid custom excluding such loss from general average. The jury found that no such custom existed, & the verdict was entered for pltf.—ACHARD *v.* RING (1874), 31 L. T. 647; 2 Asp. M. L. C. 422.

*Annotations:*—**Apld.** Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653.

**4227. —— ——.**]—To pour water upon the cargo pursuant to the master's orders for the purpose of extinguishing a fire which has broken out in a ship's hold, is a general average act, & if the cargo is thereby injured, the owner is entitled to a contribution. Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo & the ship from mutual rights & liabilities.

Defts. were the owners of the *H.*, which having arrived at her port of destination at the end of a voyage, unloaded about 1300 tons of her cargo; about 100 tons remained on board. Whilst she was lying at a wharf, a fire broke out in her hold, & in order to extinguish it her master caused water to be poured into her, whereby some goods, forming part of the cargo & belonging to pltfs., were damaged. The *H.* might have been scuttled & raised again; but if the fire had not been extinguished, she would have been in peril of partial destruction:—*Held:* defts. were liable to contribute by way of general average for the damage done to pltf.'s goods.

It has been said that defts. vessel might have been scuttled; but the expense of raising & repairing her would have entitled her owners to a general average contribution (BRETT, L.J.).—WHITECROSS WIRE CO., LTD. *v.* SAVILL (1882), 8 Q. B. D. 653; 51 L. J. Q. B. 426; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. L. C. 531, C. A.

*Annotations:*—**Refd.** Iredale *v.* China Traders Insce., [1899] 2 Q. B. 356; Cope *v.* Sharp (No. 2), [1912] 1 K. B. 496.

**4228. —— ——.**]—A fire having broken out on board a ship the master put into port & endeavoured to extinguish it. The fire increased, & the captain of the port, who had been sent for by the master, ordered that the ship should be scuttled. In the opinion of the master the scuttling of the ship was for the benefit of the ship & cargo, & he did not object to the orders of the master of the port:—*Held:* the scuttling of the ship was a general average act.—THE BIRKHALL, PAPAYANNI & JERONICA *v.* GRAMPIAN S.S. CO., LTD. (1896), 12 T. L. R. 540; 1 Com. Cas. 448.

**4229. —— Fire caused by inherent defect in cargo.**]—P. shipped a cargo of coals upon D.'s ship to be carried to S., & there delivered on payment of freight. A fire broke out spontaneously in the coals, & portions were thrown overboard, & the remainder so wetted & damaged by water poured upon them to extinguish the fire, that they were necessarily discharged, & sold at a port of refuge. Owing to no freight being payable there, they

*Sect.* 14.—*General average: Sub-sect.* 2, *C.* (*b*) & (*c*), & *D.* (*a*) & (*b*).]

realised net a larger sum than if they had safely reached their destination; but the freight upon them was wholly lost:—*Held:* (1) the shipowner was entitled to a contribution in general average for the lost freight.

(2) *Semble:* there was no claim on account of the cargo; first, because there was no loss on account of it; secondly, because the vice in it was the cause of the sacrifice.

*Semble:* the right to general average is not founded upon contract, or the relations created by contract, but upon a rule of the common law & upon the principle of the ancient maritime law. —PIRIE & CO. *v.* MIDDLE DOCK CO. (1881), 44 L. T. 426; 4 Asp. M. L. C. 388.

*Annotations:—As to* (1) **Expld.** Iredale *v.* China Traders Insce., [1899] 2 Q. B. 356. *As to* (2) **Expld.** Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51.

**4230. —— Cargo sold without loss.**]—PIRIE & CO. *v.* MIDDLE DOCK CO., No. 4229, *ante*.

**4231. Bows tipped for rudder repairs.**]—A ship, laden with a perishable cargo which could not by any means be discharged, having on her voyage become unnavigable & incapable of moving through damage to her propeller, is, with her cargo, in peril, although the ship be tight & strong & the cargo sound. If tipping the ship head down to repair her propeller be resorted to, & in the course of the operation a portion of the cargo be damaged by salt water, the cargo owners have a right to a general average contribution. The operation of so tipping the ship is under the circumstances a general average act, & the loss a general average & not a particular average loss.—MCCALL & CO. *v.* HOULDER (1897), 66 L. J. Q. B. 408; 76 L. T. 469; 13 T. L. R. 280; 8 Asp. M. L. C. 252; 2 Com. Cas. 129.

(*c*) *Other Sacrifices.*

**4232. Theft of cargo—By pirates.**]—HICKS *v.* PALINGTON (1590), Moore, K. B. 297; 72 E. R. 590.

**4233. Part of cargo given to pirates—To save remainder.**]—HICKS *v.* PALINGTON (1590), Moore, K. B. 297; 72 E. R. 590.

**4234. Cargo appropriated at diminished price—By hostile mob—From stranded vessel.**]—If an armed force board a ship, & take part of the cargo, the underwriters are not liable on a count, stating the loss to be by a seizure by people to pltfs. unknown; for people in the policy means "the governing power of the country." Where, after such a seizure, the vessel was stranded, & part of the cargo, consisting of corn, taken by the mob at their own price, the loss cannot be recovered, as for a general average; but for such part as in consequence of the stranding was damaged & thrown overboard, the insured may recover on a count stating the loss to be by stranding.—NESBITT *v.* LUSHINGTON (1792), 4 Term Rep. 783; 100 E. R. 1300.

*Annotations:*—**Refd.** Burnett *v.* Kensington (1797), 7 Term Rep. 210; Wells *v.* Hopwood (1832), 3 B. & Ad. 20; Thames & Mersey Marine Insce. *v.* Pitts & King, [1893] 1 Q. B. 476; Sivewright *v.* Allen (1906), 75 L. J. K. B. 476; Bolivia Republic *v.* Indemnity Mutual Marine Assce., [1909] 1 K. B. 785.

**4235. Loss by stranding.**]—NESBITT *v.* LUSHINGTON, No. 4234, *ante*.

**4236. Sale of cargo—Proceeds required for release of master—Master arrested for debt to ship's agent.**]—DOBSON *v.* WILSON, No. 4185, *ante*.

**4237. —— To procure funds for repairs.**]—(1) Where the master of a Peruvian vessel, bound from Lima to London, had sold some silver, part of the homeward cargo, at Bahai, to raise funds for repairing the ship, the ct. refused to entertain a claim by the consignees of the silver to share rateably in the proceeds of the ship, freight, & part of the cargo, brought into the registry to answer demands of bottomry, wages, pilotage, & towage.

(2) Where property is so sacrificed it is a subject of general average, or proportionate contribution.

(3) Where portions of the cargo on board a ship are sold by the master during the voyage for the repairs of the ship, the owners of such cargo have no lien upon the ship, nor any *persona standi* to sue the owners in the Ct. of Admlty.—LA CONSTANCIA (1846), 2 Wm. Rob. 487; 4 Notes of Cases, 677; 3 L. T. 381; 10 Jur. 845; 166 E. R. 839.

*Annotations:—As to* (2) **Distd.** Cleary *v.* McAndrew, The Galam (Cargo Ex) (1863), 3 New Rep. 254. *Generally*, **Refd.** The Benares (1850), 14 Jur. 581; The Daring (1868), L. R. 2 A. & E. 260.

**4238. —— ——.**]—HALLETT *v.* WIGRAM, No. 4178, *ante*.

**4239. Cargo consumed for voyage purposes—Vessel ordered to distant quarantine station—Failure to obtain bunker coal.**]—WALFORD DE BAERDEMAECKER & CO. *v.* GALINDEZ BROTHERS, No. 3096, *ante*.

**4240. Depreciation in value of cargo—Vessel putting into intermediate port for repairs—Port subject to embargo—Unloading at destination prohibited.**]—Pltfs. shipped a deck cargo of cattle & sheep on board defts.' ship for carriage from Buenos Ayres to Deptford under a contract which provided that the ship should on no account call at a Brazilian port before landing her live stock. The reason for this provision was that by an order of the Board of Agriculture foreign animals could not be landed in the United Kingdom if the ship conveying them had touched at a Brazilian port in the course of her voyage. During the voyage the ship sprung a leak, & the master, for the safety of all concerned, put into a Brazilian port for repairs. Pltfs. thereby suffered loss in consequence of the live stock being unable to be landed in the United Kingdom, & having to be sold elsewhere at lower prices than would have been realised in the English market. The master at the time when he resolved to put into the Brazilian port knew that this would be the result of his so doing:—*Held:* the depreciation of the live stock was a loss which pltfs. were entitled to have made good in general average.—ANGLO-ARGENTINE LIVE STOCK & PRODUCE AGENCY *v.* TEMPERLEY SHIPPING CO., [1899] 2 Q. B. 403; 68 L. J. Q. B. 900; 81 L. T. 296; 48 W. R. 64; 15 T. L. R. 472; 8 Asp. M. L. C. 595; 4 Com. Cas. 281.

*Annotation:*—**Refd.** Austin Friars S.S. Co. *v.* Spillers & Bakers, [1915] 1 K. B. 833.

**4241. Damage through unloading for repairs to ship.**]—The owner of cargo which, not having been itself in any peril, has suffered damage from having been unloaded to enable repairs to be done to a ship which has through ordinary perils of navigation suffered a particular average loss is not entitled to general average contribution from the owner of the ship.

A ship, having through ordinary perils of navigation sustained injuries which prevented her from proceeding upon her voyage, put back into port for repairs. To enable the ship to be repaired the cargo, which was never in peril, was unloaded, &, in the process of being unloaded, was damaged: —*Held:* the owners of the cargo were not entitled to general average contribution from the owners of the ship.—HAMEL *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., [1908] 2 K. B. 298; 77

L. J. K. B. 637 ; 98 L. T. 861 ; 24 T. L. R. 535 ; 11 Asp. M. L. C. 71 ; 13 Com. Cas. 270.

*D. Extraordinary Expenditure.*

*(a) Wages and Maintenance of Crew.*

**4242. General rule—Not recoverable.**]—The owner of a British ship may avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a British freighter of goods, under a charter made in Britain, with the expenses of wages & provisions for the seamen, incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average.—DALGLISH *v.* DAVIDSON (1824), 5 Dow. & Ry. K. B. 6.

**4243.** ——— ———.]—A time charterparty provided that general average should be according to York Antwerp Rules, 1890. Bills of lading containing the like provision were signed by the master. The vessel put into ports of refuge in such circumstances that, under the terms of the charterparty, hire continued to run, & the owners had to pay for wages & provisions during the period of detention. The owners recovered contribution from cargo in respect of wages & provisions:—*Held:* there being no clause in the charterparty giving the charterers the right to such contribution, they were not entitled to recover it from the shipowners.—HOWDEN & CO. *v.* S.S. NUTFIELD CO., LTD. (1898), 14 T. L. R. 172 ; 3 Com. Cas. 56.

**4244. Forced detention in port of refuge.**]—The wages & provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of the ship & cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average ; nor the expenses of such repair ; nor the wages, & provisions of the crew during her detention in port, to which she returned, & was detained there, on account of adverse winds & tempest ; nor the damage occasioned to the ship & tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore & stranded.—POWER *v.* WHITMORE (1815), 4 M. & S. 141 ; 105 E. R. 787.

*Annotations:*—**Distd.** Dent *v.* Smith (1869), L. R. 4 Q. B. 414. **Consd.** Atwood *v.* Sellar (1880), 5 Q. B. D. 286 ; Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Refd.** Simonds *v.* White (1824), 2 B. & C. 805 ; Simonds *v.* Hodgson (1829), 6 Bing. 114 ; Hallett *v.* Wigram (1850), 9 C. B. 580 ; Hall *v.* Janson (1855), 4 E. & B. 500 ; Wilson *v.* Bank of Victoria (1867), 8 B. & S. 290 ; Walthew *v.* Mavrojani (1870), L. R. 5 Exch. 116 ; Harris *v.* Scaramanga (1872), L. R. 7 C. P. 481 ; Harrison *v.* Bank of Australasia (1872), L. R. 7 Exch. 39 ; Messina *v.* Petrococchina (1872), L. R. 4 P. C. 144 ; Stewart *v.* West India & Pacific S.S. Co. (1873), 27 L. T. 820 ; The Bona, [1895] P. 125.

**4245.** ——— **Effect of inclusion in foreign adjustment.**]—DALGLISH *v.* DAVIDSON, No. 4242, *ante*.

**4246.** ——— **No agreement for contribution in charterparty.**]—HOWDEN & CO. *v.* S.S. NUTFIELD CO., LTD., No. 4243, *ante*.

**4247. Ship delayed for damage itself subject of general average.**]—By a time charter it was provided that in the event of loss of time from damage preventing the working of the vessel for more than twenty-four hours the payment of hire should cease until she should be again in an efficient state to resume her service. Whilst loading a cargo of coals under a sub-charter, a fire broke out on board the ship, & certain refrigerating machinery wit which she was fitted was damaged by water used to extinguish it, necessitating repairs which occupied thirty-one days. In an action brought by the shipowners against underwriters to recover a general average contribution in respect of the loss of hire during the time the damage by water was being repaired:—*Held:* such contribution could not be recovered.

There appear to me to be strong reasons for holding that at any rate wherever the delay is to repair damage, which is itself the subject of general average, the wages & maintenance of the crew during such delay should be allowed by law in general average (GORELL BARNES, J.).—THE LEITRIM, [1902] P. 256 ; 71 L. J. P. 108 ; 87 L. T. 240 ; 51 W. R. 158 ; 18 T. L. R. 819 ; 9 Asp. M. L. C. 317 ; *sub nom.* HUDSON *v.* BRITISH & FOREIGN MARINE INSURANCE CO., 8 Com. Cas. 6.

**4248. York-Antwerp Rules.**]—CHELLEW *v.* ROYAL COMMISSION ON SUGAR SUPPLY, No. 4303, *post*.

*(b) Expenses occasioned by Repairs.*

**4249. Expenses of repairs.**]—If A. let his ship to B. for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship ; & for the safety of the ship it becomes necessary during the voyage to put into a port to refit ; the expense of refitting must be borne entirely by A. ; & B. is not liable to contribute to it in proportion to his interest in the cargo, as for a general average.—JACKSON *v.* CHARNOCK (1800), 8 Term Rep. 509 ; 101 E. R. 1517.

**4250.** ———.]—POWER *v.* WHITMORE, No. 4244, *ante*.

**4251.** ——— **Repairs necessary for prosecution of voyage.**]—Where a ship in the course of her voyage was run foul of by another ship & damaged, & the captain was in consequence obliged to cut away part of the rigging & to return to port to repair the damage & cutting away, without which the ship could not have prosecuted her voyage, or safely kept the sea:—*Held:* the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further, & of unloading the goods for the purpose of making the repairs, were a general average. *Secus* the master's expenses during the unloading, repairing, & reloading, & crimpage to replace deserters during the repairs.—PLUMMER *v.* WILDMAN (1815), 3 M. & S. 482 ; 105 E. R. 691.

*Annotations:*—**Distd.** Power *v.* Whitmore (1815), 4 M. & S. 141. **Consd.** Hallett *v.* Wigram (1850), 9 C. B. 580. **Dbtd.** Job *v.* Langton (1856), 6 E. & B. 779. **Consd.** Harrison *v.* Bank of Australasia (1872), L. R. 7 Exch. 39. **Expld.** Atwood *v.* Sellar (1880), 5 Q. B. D. 286. **Consd.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Refd.** Hall *v.* Janson (1855), 4 E. & B. 500 ; Walthew *v.* Mavrojani (1870), L. R. 5 Exch. 116 ; The Bona, [1895] P. 125 ; McCall *v.* Houlder (1897), 66 L. J. Q. B. 408.

**4252.** ——— ———.]—WILSON *v.* BANK OF VICTORIA, No. 3216, *ante*.

**4253.** ——— **Ship unseaworthy at commencement of voyage.**]—LINDSAY *v.* KLEIN, THE TATJANA, No. 3126, *ante*.

**4254. Expenses of unloading of cargo.**]—Where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading & unloading the cargo, & taking care of it, & the wages & provisions of the workmen hired for the repairs,

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**PART VII. SECT. 14, SUB-SECT. 2.—D. (b).**

**4254 1.** *Expenses of unloading of cargo.*]—Where a ship is obliged to go into port for the benefit of the whole concern, the charges of unloading & reloading the cargo & taking care of it, & the wages & provisions of the workmen hired for the repairs, become general average.—AINSWORTH *v.* CUSACK (1858), 4 Nfld. L. R. 236.—**NFLD.**

*Sect. 14.—General average: Sub-sect. 2, D. (b), (c) & (d).*]

become general average.—DA COSTA *v.* NEWNHAM (1788), 2 Term Rep. 407; 100 E. R. 219.

*Annotations:*—**Dbtd.** Hallett *v.* Wigram (1850), 9 C. B. 580. **N.F.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Refd.** Williams *v.* London Assce. (1813), 1 M. & S. 318. **Mentd.** Lohre *v.* Aitchison (1877), 2 Q. B. D. 501.

**4255.** ——.]—THE COPENHAGEN, No. 3326, *ante.*

**4256.** ——.]—PLUMMER *v.* WILDMAN, No. 4251, *ante.*

**4257.** ——.]—(1) The expenses necessarily incurred in unloading & reloading the cargo for the purpose of repairing the ship that she may be made capable of proceeding on her voyage have been held to give a claim to general average contribution (LORD CAMPBELL, C.J.).

(2) To let in verbal evidence of a voyage for the purpose of contradicting & nullifying an express written contract would be contrary to all principle (LORD CAMPBELL, C.J.).—HALL *v.* JANSON (1855), 4 E. & B. 500; 3 C. L. R. 737; 24 L. J. Q. B. 97; 24 L. T. O. S. 289; 1 Jur. N. S. 571; 3 W. R. 213.

*Annotations:*—*As to* (1) **Consd.** Atwood *v.* Sellar (1880), 5 Q. B. D. 286. **Dbtd. & N.F.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Consd.** Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298. *Generally,* **Mentd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209.

**4258.** ——.]—WILSON *v.* BANK OF VICTORIA, No. 3216, *ante.*

**4259.** ——.]—ATWOOD *v.* SELLAR, No. 4332, *post.*

**4260.** ——.]—(1) A ship having during a voyage sprung a dangerous leak, the captain, for the safety of ship & cargo, put into a port of refuge to repair, where in order to repair the ship the cargo was necessarily landed:—*Held:* the expenses of reloading the cargo after the ship had been repaired & of pilotage & port charges on the ship leaving the port were not general average expenses.

The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average, necessarily depends on the circumstances of each case. . . . The first test is whether such item itself fulfils, as against some or all of the interest to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one (BOWEN, L.J.).

(2) If necessary for the common preservation of both ship & cargo, the unloading will be in itself a general average sacrifice (BOWEN, L.J.).—SVENSDEN *v.* WALLACE (1884), 13 Q. B. D. 69; 53 L. J. Q. B. 385; 50 L. T. 799; 5 Asp. M. L. C. 232, C. A.; *affd.* (1885), 10 App. Cas. 404, H. L.

*Annotations:*—*As to* (1) **Consd.** McCall *v.* Houlder (1897), 76 L. T. 469; Iredale *v.* China Traders Insce., [1900] 2 Q. B. 515; Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298. **Refd.** Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362; The Brigella, [1893] P. 189; Chellew *v.* Royal Commission on Sugar Supply, [1922] 1 K. B. 12. *As to* (2) **Distd.** Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298. *Generally,* **Mentd.** Assicurazioni Generali & Schenker *v.* S.S. Bessie Morris Co. & Browne (1892), 61 L. J. Q. B. 754; Balmoral S.S. Co. *v.* Marten, [1901] 2 K. B. 896.

**4261. Expenses of taking care of cargo.**]—DA COSTA *v.* NEWNHAM, No. 4254, *ante.*

**4262. Expenses of warehousing of cargo.**]—ATWOOD *v.* SELLAR, No. 4332, *post.*

**4263. Expenses of transhipment of cargo.**]—THE COPENHAGEN, No. 3326, *ante.*

**4264.** ——.]—HALL *v.* JANSON, No. 4257, *ante.*

**4265.** ——.]—ATWOOD *v.* SELLAR, No. 4332, *post.*

**4266.** ——.]—SVENSDEN *v.* WALLACE, No. 4260, *ante.*

**4267. Wages & provisions of repairing workmen.**]—DA COSTA *v.* NEWNHAM, No. 4254, *ante.*

**4268. Master's expenses.**]—PLUMMER *v.* WILDMAN, No. 4251, *ante.*

*(c) Expenses occasioned by Stranding.*

**4269. Refloating ship—After cargo safely removed.**]—By a case stated between assured & underwriters on ship, it appeared that the ship, having sailed from Liverpool with a cargo on board, ran on shore, accidentally on the coast of Ireland. In order to get her off it became necessary to discharge the whole of the cargo, which was accordingly taken out & placed in store at Dublin. The ship was then got off by digging a channel for her, & employing a steam tug, & was towed to Liverpool to be repaired. The cargo was shipped in another vessel, & forwarded to its destination; but, for the purposes of the case, was to be considered as having been carried on by the original ship after she had been repaired:—*Held:* the expenses incurred, after the cargo was in safety, in getting off the ship & towing her to Liverpool for repair were not chargeable to general average, but to ship alone.

We do not say that there may not be a case where, after a fortuitous stranding of the ship & the cargo has been unloaded, expense voluntarily incurred by the owner of the ship to get her off, & to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average (LORD CAMPBELL, C.J.).—JOB *v.* LANGTON (1856), 6 E. & B. 779; 26 L. J. Q. B. 97; 27 L. T. O. S. 218; 3 Jur. N. S. 109; 4 W. R. 641; 119 E. R. 1054.

*Annotations:*—**Distd.** Moran *v.* Jones (1857), 7 E. & B. 523. **Apld.** Walthew *v.* Mavrojani (1870), L. R. 5 Exch. 116. **Distd.** Atwood *v.* Sellar (1880), 5 Q. B. D. 286. **Consd.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69. **Apld.** Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362.

**4270.** —— ——.]—MORAN *v.* JONES, No. 4305, *post.*

**4271.** —— ——.]—Extraordinary expenses incurred in getting off a stranded ship, after the cargo has been removed to a place of safety, are not, in the absence of exceptional circumstances, general average to which the owner of cargo is liable to contribute, although the goods remain in the control of the shipowner's agents. *Semble:* such expenses may, as against the owner of cargo so removed, be general average if the goods cannot be otherwise carried forward, or only at a greater expense, or after a delay which would deteriorate the goods.

A ship laden with cargo, while still in port, was driven ashore on Oct. 5, the cargo was unshipped, & by Oct. 19 was landed & warehoused in safety under the superintendence & control of the shipowners' agents; an attempt was then made to

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**4261 i.** *Expenses of taking care of cargo.*]—AINSWORTH *v.* CUSACK (1858), 4 Nfld. L. R. 236.—**NFLD.**

**k.** *Expenses of reloading cargo.*]—AINSWORTH *v.* CUSACK (1858), 4 Nfld. L. R. 236.—**NFLD.**

**4267 i.** *Wages & provisions of repairing workmen.*]—AINSWORTH *v.* CUSACK (1858), 4 Nfld. L. R. 236.—**NFLD.**

**PART VII. SECT. 14, SUB-SECT. 2.—D. (c).**

**l.** *Refloating ship.*]—Where a vessel was dangerously stranded by accident arising from the perils of navigation, & without fault of the master:—*Held:* the expense incurred by the master in hiring a steamer to haul her off, & by which he was enabled to proceed to his destination, gave a claim for contribution against the owners of the cargo, upon general average.—GROVER *v.* BULLOCK (1849), 5 U. C. R. 297.—**CAN.**

**m.** *Voluntary stranding.*] — The owners of a vessel have no right to average on account of expenses occasioned by stranding, when the strand-

float the vessel, which was abandoned on Nov. 24. Subsequently a second attempt was made which, on Dec. 31 succeeded; the ship was taken into port & repaired, &, after reshipping the cargo, proceeded to its destination:—*Held:* the expenses of getting the vessel off were not general average to which the owners of cargo were bound to contribute. — WALTHEW *v.* MAVROJANI (1870), L. R. 5 Exch. 116; 39 L. J. Ex. 81; 22 L. T. 310; 3 Mar. L. C. 382, Ex. Ch.

*Annotations:*—**Distd.** Atwood *v.* Sellar (1880), 5 Q. B. D. 286. **Apld.** Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362. **Refd.** Svensden *v.* Wallace (1884), 13 Q. B. D. 69.

**4272.** —— ——.]—A steamer, carrying among other cargo a large amount of specie, ran aground & lay in a dangerous position. The specie was landed by the master soon after the vessel struck. After the landing of the specie the master jettisoned part of the cargo, & had recourse to other extraordinary measures for getting off the vessel. These measures succeeded, & she completed her voyage with the cargo remaining on board. The specie was conveyed to a neighbouring port, whence it was sent on in another vessel, but for the purposes of the case was to be treated as having arrived in the steamer:—*Held:* the losses & expenses incurred in getting the steamer off, & the expenses incurred in landing & conveying the specie, were not general average to which the owners of the specie were liable to contribute.

If the act be not done to avert some danger common to ship & cargo, it does not constitute a case of general average (WILLS, J.).—ROYAL MAIL STEAM PACKET CO. *v.* ENGLISH BANK OF RIO DE JANEIRO (1887), 19 Q. B. D. 362; 57 L. J. Q. B. 31; 36 W. R. 105; 3 T. L. R. 784, D. C.

**4273. Bringing cargo to place of safety.**—HINGSTON *v.* WENDT, No. 3244, *ante*.

**4274. Forwarding cargo.**]—A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager & other persons to take part in the necessary salvage operations, & the whole of the cargo was saved, transhipped, & brought forward to London, & the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, & in sending out lighters & necessary appliances to France, & in the identification of the cargo, preparing for the sale, answering the inquiries of & arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting & arranging with consignees, & receiving & paying proceeds, & generally conducting the business," was charged partly to general average, & partly as particular average on the several interests rateably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services & for commission on the sale of unidentified cargo, & on disbursements:—*Held:* under the circumstances the amount was improperly charged & could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight.—SCHUSTER *v.* FLETCHER (1878), 3 Q. B. D. 418; 47 L. J. Q. B. 530; 38 L. T. 605; 26 W. R. 756; 3 Asp. M. L. C. 577.

*Annotations:*—**Consd.** Prehn *v.* Bailey, The Ettrick (1881), 6 P. D. 127. **Dbtd.** Rose *v.* Bank of Australasia, [1894] A. C. 687.

**4275.** —— **Before refloating operations commenced.**]—ROYAL MAIL STEAM PACKET CO. *v.* ENGLISH BANK OF RIO DE JANEIRO, No. 4272, *ante*.

**4276.** —— —— **Vessel abandoned.**]—Where after a disaster at sea the shipowner, not merely with a view to freight, but in the interests of the whole adventure or of the cargo owners, & before electing to abandon the ship & carry on the cargo in another ship, incurs necessary expenses on landing a perishable cargo & carrying it to a place of safety, the expenses are not to be charged to freight alone, but are either a general average charge or a charge against cargo or a charge against cargo & freight, as the case may be. Where such a disaster happens there is no rigid rule of law that the shipowner may not employ experienced persons to act in his place for the benefit of all concerned. Whether he is entitled to do so & make the extraordinary expenditure a general average charge depends on the circumstances of the case & whether he acts reasonably & properly. So as to the right to charge against the cargo owners a commission to a commission merchant for arranging the sale of unidentified bales of cargo.—ROSE *v.* BANK OF AUSTRALASIA, [1894] A. C. 687; 63 L. J. Q. B. 504; 70 L. T. 422; 7 Asp. M. L. C. 445; 6 R. 121, H. L.

**4277. Sale of unidentified cargo.**]—SCHUSTER *v.* FLETCHER, No. 4274, *ante*.

**4278. Expenses of salvage agent.**]—ROSE *v.* BANK OF AUSTRALASIA, No. 4276, *ante*.

*(d) Other Cases.*

**4279. Cost of salvage.**]—SCHUSTER *v.* FLETCHER. No. 4274, *ante*.

**4280.** ——.]—Where a ship carrying cargo is sunk in the Thames in consequence of a collision caused by her own negligence, & her owner limits his liability under Merchant Shipping Act, 1862 (c. 63), s. 54, & the Thames Conservancy raise the ship & cargo under their special Acts & deliver them to the shipowner on payment of the expenses of raising, the shipowner has no lien on the cargo & no claim against the cargo owner for the cargo's proportion of the cost of raising.—PREHN *v.* BAILEY, THE ETTRICK (1881), 6 P. D. 127; 45 L. T. 399; 4 Asp. M. L. C. 465, C. A.

*Annotations:*—**Refd.** Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51. **Mentd.** Fulham Vestry *v.* Minter, [1901] 1 K. B. 501.

**4281.** —— ——.]—(1) A shipowner who has paid a salvage claim without action brought by the salvors may maintain an action for general average contribution against the owner of cargo. But in such suit the fact that the shipowner had by contract made by himself or his master become bound to pay the sum actually paid is not conclusive as to the whole amount being chargeable to general average. It is a question of fact to be decided at

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ing was not voluntary; & the mere steering a vessel to a less dangerous place for stranding, when she is inevitably driving to the shore, is not a voluntary stranding.—GIBB *v.* MCDONELL (1850), 7 U. C. R. 356.—**CAN.**

n. ——.]—A vessel was disabled by a gale near a lee shore, so that she could not work off, & after the anchors had dragged until she began to pound on the bottom, the master, with the view not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, where she was stranded & abandoned by the crew. Deft., the owner of the cargo, afterwards got it out at his own expense:—*Held:* the stranding was not voluntary, & the cargo was not liable to general average.—DANCEY *v.* BURNS (1880), 31 C. P. 313.—**CAN.**

o. ——.]—A ship being voluntarily run ashore & totally lost on the strand, & cargo saved; loss of ship considered a subject of general average, —WILEY *v.* HOVILS & RUSSELL (1857). 10 L. T. 243.—**S. AF.**

*Sect.* 14.—*General average: Sub-sect.* 2, *D.* (*d*); *sub-sect.* 3, *A., B. & C.*]

the trial whether any, &, if any, what sum is chargeable.

(2) General average . . . is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison, but its principle applies, & it has been applied, to all other cases of voluntary sacrifice for the benefit of all, that is, if properly made (LORD BLACKBURN).—ANDERSON *v.* OCEAN S.S. Co. (1884), 10 App. Cas. 107; 54 L. J. Q. B. 192; 52 L. T. 441; 33 W. R. 433; 5 Asp. M. L. C. 401, H. L.; *revsg.* S. C. *sub nom.* OCEAN S.S. CO. *v.* ANDERSON (1883), 13 Q. B. D. 651, C. A.

*Annotations:—As to* (1) **Reid.** The Raisby (1885), 10 P. D. 114; The Prinz Heinrich (1888), 13 P. D. 31; The Leon Blum, [1915] P. 90.

—— **Suing & labouring clause in insurance policy.**]—*See* INSURANCE, Vol. XXIX., p. 239, No. 1922.

——.]—*See, generally*, Part XV., Sect. 10.

**4282. Cost of entering & quitting port of refuge—Pilotage & other charges.**]—ATWOOD *v.* SELLAR, No. 4332, *post.*

**4283.** —— ——.]—SVENSDEN *v.* WALLACE, No. 4260, *ante.*

**4284. Expenses of prosecuting voyage—Use of auxiliary steam power—Extraordinary expenditure for coals.**]—WILSON *v.* BANK OF VICTORIA, No. 3216, *ante.*

**4285. Cost of cutting passage from icebound port.**]—A vessel having had to put back to repair defective machinery became icebound in port:—*Held:* the expense of breaking up the ice so as to give her a passage to the open sea was not a matter of general average contribution.—WESTOLL *v.* CARTER (1898), 14 T. L. R. 281; 3 Com. Cas. 112.

**4286. Cost of towing ship & cargo to safety.**]—ANDERSON *v.* OCEAN S.S. Co., No. 4281, *ante.*

**4287. Expenses arising from damage by excepted peril—Negligence of shipowners servants.**]—THE CARRON PARK, No. 2680, *ante.*

**4288.** ——.]—MILBURN & CO. *v.* JAMAICA FRUIT IMPORTING & TRADING CO. OF LONDON, No. 2508, *ante.*

**4289. Whether whole expenditure chargeable to general average—Question for jury.**]—ANDERSON *v.* OCEAN S.S. Co., No. 4281, *ante.*

**4290. Damage to property—Where directly consequential in general average act—Owners of ships & cargo joint tort-feasors.**]—AUSTIN FRIARS S.S. Co., LTD. *v.* SPILLERS & BAKERS, LTD., No. 4310, *post.*

**4291. Crimpage to replace deserters.**]—PLUMMER *v.* WILDMAN, No. 4251, *ante.*

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SUB-SECT. 3.—ENFORCEMENT OF RIGHT.

*A. In General.*

**4292. Preparation of average statement—Duty of shipowner—Within reasonable time.**]—Where, by an average bond executed at the port of discharge, consignees of cargo undertook to furnish to the shipowners a correct account & particulars of the value of the goods delivered, in order that the amount of average contribution to which they were liable might be ascertained & adjusted "in the usual manner":—*Held:* (1) these words did not imply as a condition of the obligation that the shipowners should employ an average stater at the port of discharge; a shipowner may make out his own average statement, & is not bound to employ an average stater either at the port of discharge or elsewhere.

(2) There is no obligation on a shipowner to have a general average statement made up at the ship's port of destination, or at any particular place, so long as it is made up in a reasonable time.—WAVERTREE SAILING SHIP CO. *v.* LOVE, [1897] A. C. 373; 66 L. J. P. C. 77; 76 L. T. 576; 13 T. L. R. 419; 8 Asp. M. L. C. 276, P. C.

**4293.** —— **Whether employment of adjuster necessary.**]—WAVERTREE SAILING SHIP CO. *v.* LOVE, No. 4292, *ante.*

**4294. Liability for non-enforcement—By shipowner—Action for damages.**]—A shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average & securing its payment.

Pltfs. shipped goods at Liverpool on board a steamer belonging to defts. under a bill of lading, by which defts. undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded, upon the condition before & after expressed, thence per railway to the station nearest to Toronto, etc., & among the conditions was the following: "The shipowner or railway co. are not to be liable for any damage to any goods which is capable of being covered by insurance, etc."

In the course of the voyage pltfs.' goods sustained damage which came under the heading of general average. The ship returned to Liverpool, & the cargo was discharged & handed over by defts. to a co. to be distributed & disposed of for the benefit of the parties concerned, without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged to get an average statement made out, or taking any steps to enable pltfs. to recover contribution:—*Held:* the bill of lading did not relieve deft. from contribution to general average, &, they were liable to an action by pltfs. for their omission to take the necessary steps to secure an adjustment & payment of the general average.

The office of the bill of lading is to provide for the rights & liabilities of the parties in reference to the contract to carry & is not concerned with liabilites to contribution in general average (LUSH, J.).

If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution, a clause which not only deprives the shipper of an ancient & well-understood right, but which might avoid his policy & deprive him also of recourse to the underwriter, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type & in such a part of the document as that a person of ordinary capacity & care could not fail to see it. A bill of lading is not the contract, but only the evidence of the contract (LUSH, J.).

The right to detain for average contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled & of collecting the amount, & the

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**PART VII. SECT. 14, SUB-SECT. 2.—D. (d).**

**4285 i.** *Cost of cutting passage from icebound port.*]—There is no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, & a tug is employed for the purpose of releasing her to enable her to complete her voyage.—KIDD *v.* THOMSON (1899), 26 A. R. 220.—CAN.

**4286 i.** *Cost of towing ship & cargo to safety.*]—SINGER MANUFACTURING CO. *v.* WESTERN ASSURANCE CO. (1896), Q. R. 10 S. C. 379.—CAN.

usage has always been substantially in accordance with this law, & has become part of the common law of the land (LUSH, J.).—CROOKS *v.* ALLAN (1879), 5 Q. B. D. 38; 49 L. J. Q. B. 201; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. L. C. 216.

*Annotations :*—**Consd.** Burton *v.* English (1883), 12 Q. B. D. 218; Strang, Steel *v.* Scott (1889), 14 App. Cas. 601. **Apld.** Nobel's Explosives Co. *v.* Rea (1897), 2 Com. Cas. 293. **Refd.** Huth *v.* Lamport (1886), 55 L. J. Q. B. 239; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540; Hamel *v.* Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298; Whinney *v.* Moss S.S. Co. (1910), 102 L. T. 177; Armour *v.* Walford (London), [1921] 3 K. B. 473.

**4295.** ————————.]—Where a general average loss has occurred through the jettison of cargo, the shipowner is liable to an action for damages for delivering the rest of the cargo without taking a general average bond from the consignees to secure the shippers of the jettisoned cargo.—NOBEL'S EXPLOSIVES CO., LTD. *v.* REA (1897), 2 Com. Cas. 293.

*B. By Whom Enforceable.*

**4296. Owners of cargo.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante*.

**4297. Owners of ship.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante*.

**4298. —— Though insured.**]—(1) The owners of a ship's cargo are liable to contribution, for ship's stores necessarily thrown overboard, after a vessel was captured, & while she was in the hands of an enemy.

(2) The accident of an owner having effected an insurance, does not affect his right to recover general average.—PRICE *v.* NOBLE (1811), 4 Taunt. 123; 128 E. R. 275.

**4299. Parties responsible for damage.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante*.

**4300. Shipper—Against co-shipper.**]—DOBSON *v.* WILSON, No. 4185, *ante*.

*C. Against Whom Enforceable.*

**4301. Shipowner.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante*.

**—— Effect of damage by excepted peril.**]—*See* Nos. 4222, 4223, 4287, 4288, *ante*.

**4302. Cargo owner.**]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante*.

**4303. —— Total loss before voyage terminated—After average expenditure incurred—York-Antwerp Rules.**]—By York-Antwerp Rules, 1890, r. 17, the contribution to a general average act shall be made upon the actual values of the property at the termination of the adventure.

A ship left Cuba with a cargo of sugar under bills of lading whereby the cargo was to be carried to Queenstown for orders & to be delivered to named consignees at the port of destination. The bills of lading provided that general average should be payable according to York-Antwerp rules.

On her way from Cuba to Queenstown the ship sustained damage to her hull & engines, & the master put into a port of refuge in the Azores where he incurred expenses for maintenance & wages of officers & crew & for port charges. By rr. 10 & 11 of the York-Antwerp rules these are to be admitted as general average expenses. Soon after leaving the port of refuge the ship & cargo were totally lost at sea by fire.

The shipowner claimed contribution in general average from the consignee of the cargo :—*Held :* the claim failed, inasmuch as at the termination of the adventure, namely, on the loss of the ship & cargo, the cargo had no value. *Qu. :* whether the claim would have succeeded apart from the York-Antwerp rules.—CHELLEW *v.* ROYAL COMMISSION ON SUGAR SUPPLY, [1922] 1 K. B. 12; 91 L. J. K. B. 58; 126 L. T. 103; 37 T. L. R. 903; 15 Asp. M. L. C. 393; 27 Com. Cas. 1, C. A.

**4304. Consignee of cargo.**]—A consignee, not the owner, of goods, receiving them in pursuance of a bill of lading, whereby the ship owner agrees to deliver them to the consignee, by name. he paying freight, is not liable for general average, although he has had notice, before he received the goods, that they have become subject to that charge. *Semble :* he would be so liable if the consignor had, by the bill of lading, made the payment of general average a condition precedent to the delivery of the goods.

A consignee, who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability (LORD TENTERDEN, C.J.).—SCAIFE *v.* TOBIN (1832), 3 B. & Ad. 523; 1 L. J. K. B. 183; 110 E. R. 189.

*Annotations :*—**Refd.** Briggs *v.* Merchant Traders Assocn. (1849), 13 Q. B. 167; Castellain *v.* Thompson (1862), 13 C. B. N. S. 105; Hingston *v.* Wendt (1876), 1 Q. B. D. 367; Walford De Baerdemaecker *v.* Galindez (1897), 2 Com. Cas. 137.

**4305. Person entitled to freight.**]—A ship, being chartered out & in for a homeward cargo, but having some goods on board outwards became stranded soon after sailing. The goods together with material of the ship were put on board lighters by the master & sent back to port & warehoused there. The ship after some days was got off & returned to port & when she had been repaired the goods were reshipped & carried forward to their destination without any interference of the owner of them :—*Held :* (1) the landing of the goods was part of the continuous operation for getting the ship off & sending her back to port, there to be repaired, with a view to prosecute the original adventure, & the goods & chartered freight must both contribute in general average with the ship to the expenses necessarily incurred in getting her off after the goods were landed; (2) if the goods had not remained liable, the freight must still have contributed to this general average with the ship.—MORAN *v.* JONES (1857), 7 E. & B. 523; 26 L. J. Q. B. 187; 29 L. T. O. S. 86; 3 Jur. N. S. 663; 4 W. R. 503; 119 E. R. 1340.

*Annotations :*—*As to* (1) **Consd.** The Brigella, [1893] P. 189; S.S. Carisbrook Co. *v.* London & Provincial Marine & General Insce., [1902] 2 K. B. 681. **Refd.** Hingston *v.* Wendt (1876), 1 Q. B. D. 367; Svensden *v.* Wallace (1884), 13 Q. B. D. 69; Montgomery *v.* Indemnity Mutual Marine Insce., [1902] 1 K. B. 734. *As to* (2) **Consd.** S.S. Carisbrook Co. *v.* London & Provincial Marine & General Insce., [1902] 2 K. B. 681. **Refd.** Kemp *v.* Halliday (1866), 6 B. & S. 723; Hingston *v.* Wendt (1876), 1 Q. B. D. 367. *Generally*, **Refd.** Walthew *v.* Mavrojani (1870), L. R. 5 Exch. 116; Attwood *v.* Sellar (1879), 41 L. T. 83; Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362.

**4306.** ——.]—A vessel was chartered to proceed from Fleetwood to Savannah & there load for the charterers a cargo which she was to deliver at a specified port of discharge on being paid freight. On the voyage to Savannah the ship grounded, & in getting off sustained injuries which constituted a general average loss. The injuries were repaired, & the vessel duly loaded the cargo under the charterparty & earned the chartered freight. In an action by shipowners against underwriters on ship to recover the loss sustained :—*Held :* the chartered freight was liable to contribute to the general average loss.—CARISBROOK S.S. CO. *v.* LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., [1902] 2 K. B. 681; 71 L. J. K. B. 978; 87 L. T. 318; 50 W. R. 691; 18 T. L. R. 783; 46 Sol. Jo. 699; 9 Asp. M. L. C. 332; 7 Com. Cas. 253, C. A.

**4307. —— Advance freight paid by charterer.**]—By a charterparty for a voyage from Cardiff to San Francisco with a cargo of coals, the owners

*Sect.* 14.—*General average: Sub-sect.* 3, *C. & D.* (*a*) *& (b); sub-sect.* 4.]

engaged to deliver the same " on being paid freight at & after the rate of £4 10*s.* per ton of 20 cwt. delivered "; & the instrument contained the following stipulation: " The freight to be paid by good & approved bills on London at six months' date from date of sailing, less cost of insurance, to be effected by the charterer at ship's expense, or in cash, under discount equal thereto, at charterer's option; less, in either case, £800, which is to be paid on delivery of cargo, in cash, at the current rate of exchange." The freight, to the extent of £4,807, was paid in advance, & a general average loss was sustained on the voyage:—*Held:* the owners were not liable to contribute to such general average in respect of the freight so advanced, but only in respect of the £800 which was to be paid at the end of the voyage; but the charterers, who had an insurable interest in that portion of the freight were the parties to contribute.—FRAYES *v.* WORMS (1865), 19 C. B. N. S. 159; 2 Mar. L. C. 209; 144 E. R. 747; *sub nom.* TRAYES *v.* WORMS, 6 New Rep. 295; 34 L. J. C. P. 274; 12 L. T. 547; 11 Jur. N. S. 639; 13 W. R. 898.

*Annotations:*—**Refd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209; Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373; Rodoconachi *v.* Milburn (1886), 17 Q. B. D. 316.

——.]—*See, also,* INSURANCE, Vol. XXIX., p. 231, Nos. 1869, 1870.

**4308. Owner of provisions—Damage to passenger ship.**]—Provisions do not contribute to general average, even where the cargo of the ship consists only of passengers.—BROWN *v.* STAPYLETON (1827), 4 Bing. 119; 12 Moore, C. P. 334; 5 L. J. O. S. C. P. 121; 130 E. R. 713.

*Annotation:*—**Refd.** Denoon *v.* Home & Colonial Assce. (1872), L. R. 7 C. P. 341.

**4309. Captors of prize ship—Pre-existing liability of cargo owner.**]—Where a claim by the ship against the cargo for a general average contribution exists before the cargo is captured as prize, the captors take *cum oncre* of the cargo's contribution to the general average loss.—THE SORFAREREN (1915), 85 L. J. P. 121; 114 L. T. 46; 32 T. L. R. 108; 13 Asp. M. L. C. 223; 1 Br. & Col. Pr. Cas. 589; *on appeal* (1917), 117 L. T. 259, P. C.

*Annotations:*—**Refd.** The Axel Johnson, The Drottning Sophia, [1917] P. 234; The Parchim, [1918] A. C. 157.

**4310. Joint tortfeasor.**]—While pltfs.' ship was proceeding up the Severn bound for Sharpness Docks with a cargo of maize, she stranded a short distance off the docks. Next morning she was got off, & was being towed to a place where she could be beached, but commenced to leak so badly that the master & pilot decided to attempt to enter the docks. They contemplated that she would be damaged in so doing & would strike a pier of the docks, but it was a lesser risk than trying to beach her would have been, & was a reasonable & prudent thing to do in the interests of ship & cargo. She succeeded in entering the docks, but in so doing damaged both herself & the pier. The shipowners claimed contribution in general average from the owners of the cargo in respect of both items of damage:—*Held:* (1) the taking of the ship into the docks was a general average act; (2) the damage to the ship was a general average sacrifice & the damage to the pier a general average expenditure, & the cargo owners must contribute in respect of both items; (3) the common law rule that there is no contribution between joint tortfeasors was not applicable in general average.—AUSTIN FRIARS S.S. CO., LTD. *v.* SPILLERS & BAKERS, LTD., [1915] 3 K. B. 586; 84 L. J. K. B. 1958; 113 L. T. 805; 31 T. L. R. 535; 13 Asp. M. L. C. 162; 20 Com. Cas. 342, C. A.

**Liability of insurers.**]—*See* INSURANCE, Vol. XXIX., pp. 231–233, Nos. 1866–1880.

*D. Mode of Enforcement.*

(*a*) *In General.*

**4311. Action.**]—DOBSON *v.* WILSON, No. 4185, *ante.*

**4312.** ——.]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante.*

**4313. —— Defence to action by shipowner—Unseaworthiness of vessel.**]—(1) To an action by a shipowner against a shipper of goods to recover his proportion of average loss, deft. pleaded that his promise was subject to a condition, viz. that the ship was seaworthy at the commencement of the voyage, & that she was not then seaworthy:—*Held:* a bad plea.

(2) He further pleaded, that there never was any express promise to the effect in the declaration mentioned; that the ship was unseaworthy at the commencement of the voyage, & that the average loss was occasioned & arose from & in consequence of such unseaworthiness:—*Held:* a good plea, inasmuch as it showed that pltf.'s actionable negligence & misconduct produced the very damage for which he sought to recover contribution from defts.; &, probably, also on the ground of avoidance of circuity of action.—SCHLOSS *v.* HERIOT (1863), 14 C. B. N. S. 59; 2 New Rep. 33; 32 L. J. C. P. 211; 8 L. T. 246; 10 Jur. N. S. 76; 11 W. R. 596; 1 Mar. L. C. 335; 143 E. R. 366.

*Annotations:*—**Folld.** Strang, Steel *v.* Scott (1889), 14 App. Cas. 601. *As to* (2) **Refd.** Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426; The Ettrick (1881), 6 P. D. 127; Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51; Kish *v.* Taylor, [1912] A. C. 604.

(*b*) *Lien.*

**4314. Right of owner.**]—The owner of a ship has a lien on the cargo for general average. . . . As the contribution to salvage is in the nature of a general average, it is subject to the same rule, & is in effect the same (LORD DENMAN, C.J.).—BRIGGS *v.* MERCHANT TRADERS' SHIP LOAN & INSURANCE ASSOCN. (1849), 13 Q. B. 167; 18 L. J. Q. B. 178; 13 L. T. O. S. 68; 13 Jur. 787; 116 E. R. 1227.

*Annotation:*—**Mentd.** King *v.* Accumulative, etc., Insce. (1857), 30 L. T. O. S. 119.

**4315. —— Priority to respondentia bond.**]—THE GALAM (CARGO EX), No. 4075, *ante.*

**4316. Exercised through master.**]—THE SOBLOMSTEN, No. 4780, *post.*

**4317.** ——.]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante.*

**4318. —— Enforcement of exercise by master.**]—(1) Lien for general contribution to individual loss by property thrown overboard for the safety of the ship, under the right of the master to require security, not extended to an injunction against delivering the cargo, receiving the freight, & parting with any share of the ship.

(2) The mode of adjustment not confined by

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**PART VII. SECT. 14, SUB-SECT. 3.—D. (a).**

*p. Defence—False invoices.*]—It is no ground of defence to a common carrier by water for not carrying goods safely from a foreign country, or on a claim for general average, that the owner of the goods had prepared false invoices to defraud the revenue laws.—GROUSETTE *v.* FERRIE (1842), 3 Ont. Dig. 6157.—**CAN.**

**PART VII. SECT. 14, SUB-SECT. 3.—D. (b).**

*q. Jurisdiction.*]—The ct. has jurisdiction to enforce a possessory lien for general average when it arises

usage to arbn.—HALLETT *v.* BOUSFIELD (1811), 18 Ves. 187 ; 34 E. R. 288.

*Annotations :—As to* (1) **Consd.** Strang, Steel *v.* Scott (1889), 14 App. Cas. 601. **Refd.** Giles *v.* Grover (1832), 9 Bing. 128.

**4319. Cargo owners' right to lien on ship.**]—THE NORTH STAR, No. 4166, *ante.*

**4320. Release of goods on consignee's security—Security must be reasonable.**]—Where a shipowner in the exercise of his lien for general average requires security from the owner of the cargo liable to contribution without insisting upon immediate payment of the amount due, the security so required must be reasonable. Defts., who had a lien upon goods on board their ship for general average, did not demand payment of the amount due, but required as security that the consignees should make a deposit of 10 per cent. on the estimated value of the goods in the joint names of defts. & their average adjuster, or in the names of defts., or in the name of the average adjuster, or should execute a bond providing that the deposit should be held as a security for the general average & particular charges, & that the parties in whose name it stood might pay thereout such sums as they should from time to time consider ought to be paid to the owners or master on account of money actually disbursed by them or him, or to enable them or him to pay off & discharge claims which formed part of the general average & other expenses. It also provided that all questions of general average should be referred to the average adjuster of the shipowner, subject to an appeal from the adjustment to arbitrators, whose decision should be final :—*Held :* the conditions of the deposit & the form of the bond were both unreasonable, & could not in the circumstances be imposed upon the consignees.—HUTH & Co. *v.* LAMPORT, GIBBS & SON *v.* LAMPORT (1886), 16 Q. B. D. 735 ; 55 L. J. Q. B. 239 ; 54 L. T. 663 ; 34 W. R. 386 ; 2 T. L. R. 288 ; 5 Asp. M. L. C. 593, C. A.

*Annotation :*—**Refd.** Albemarle Supply Co. *v.* Hind (1927), 43 T. L. R. 783.

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SUB-SECT. 4.—ADJUSTMENT.

**4321. Duty of shipowner to procure.**]—CROOKS *v.* ALLAN, No. 4294, *ante.*

**4322. Where adjustment made—Voyage terminated at intermediate port.**]—HILL *v.* WILSON, No. 4848, *post.*

—— ——.]—*See, also,* ARBITRATION, Vol. II., p. 526, No. 1631 ; INSURANCE, Vol. XXXIX., pp. 234, No. 1885.

**4323. Mode of adjustment—Whether confined by usage to arbitration.**]—HALLETT *v.* BOUSFIELD, No. 4318, *ante.*

**4324. —— According to practice at port of delivery.**]—SIMONDS *v.* WHITE, No. 4160, *ante.*

**4325. —— —— Voyage unavoidably broken at prior port.**]—DALGLISH *v.* DAVIDSON, No. 4242, *ante.*

—— ——.]—*See, also,* INSURANCE, Vol. XXIX., pp. 234, 235, Nos. 1884–1888.

**4326. Amount of contribution—Principles of assessment.**]—In ascertaining the general average contribution to be paid by the shipowner in respect of goods jettisoned, the value of such goods is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment. If, from the circumstances, & the damaged condition of the rest of the cargo, it may fairly be assumed that the jettisoned goods would, if they had not been thrown overboard, have arrived in the like damaged condition, their value is to be taken to be the sum they would have realised as damaged goods. A ship sailed from Liverpool for Calcutta with 2,000 tons of salt on board, all belonging to one merchant. The day after she sailed, the ship struck on a bank on the Irish coast, &, after throwing overboard 1,000 tons of the salt, was got off & put back to Liverpool, where the remainder of the cargo was unloaded & found to be all, with the exception of about 100 tons, so damaged as to be nearly unfit to be forwarded, & worthless. The charterer had paid £1,250 in advance for freight. In an action by the owner against an underwriter on the ship, to recover a general average contribution in respect of the salt so jettisoned, upon a case stated for the opinion of the ct. as to the principle by which the average stater was to be guided in ascertaining the value of the jettisoned goods :—*Held :* in ascertaining the contribution to be paid by the shipowner to the owner of the cargo, in respect of the salt jettisoned, it was to be valued at the price which it would have been worth at Liverpool had it been brought back there, the average stater taking into account the probability of its arriving at the port of adjustment in a sound or a damaged state, or in a state in which it could have been forwarded, so as to take advantage of the prepaid freight.

(2) The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand & the benefit derived on the other (BOVILL, C.J.).

(3) The rules as to contribution & adjustment seem to me to depend upon the probable state of things at, & to have reference to, the time & place of adjustment, that is to say, when & where the adjustment ought to take place (BOVILL, C.J.). —FLETCHER *v.* ALEXANDER (1868), L. R. 3 C. P.

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incidentally in the progress of a cause over which the ct. has jurisdiction.—THE ANNIE M. ALLEN, 3 C. L. T. 108.—**CAN.**

**4320 i.** *Release of goods on consignee's security—Security must be reasonable.*]—The master of a vessel is not bound to accept in lieu (either wholly or in part) of his lien for general average upon goods carried by him, the bond of the consignees of such goods, or to accept any other security except such as he thinks reasonable & proper upon the statement of adjustment to be payable by the consignees or owners.—SHAW & Co. *v.* HOUSTON (1883), 1 Q. L. J. 182.—**AUS.**

**4320 ii.** —— ——.]—Where there has been a general average loss within the exceptions in the bill of lading, & the adjustment of contributions is likely to occupy a long period, the consignees are entitled to delivery of their goods on executing bonds for amounts which are estimated to be sufficient to cover the probable contributions.—MCLEAN *v.* LIVERPOOL ASSOCN. (1883), 9 V. L. R. (L.) 93.—**AUS.**

**4320 iii.** —— ——.]—The privilege & right of retention accorded to the owners & master of a vessel upon the goods on board the ship for the amount of contribution for which these are liable, is subject to the terms of the bill of lading, & where it is stipulated therein that in case of contribution "average bond to be given with value therein, or sufficient security to be given as required by the master," the latter is not entitled to exact a cash deposit of the alleged amount of contribution before delivering the goods to the consignees, but the latter are entitled to get possession of the goods on giving good & sufficient security for the payment of the amount of the claim when finally adjusted.—LAW *v.* MUNDERLOH (1893), Q. R. 4 S. C. 456.—**CAN.**

**r.** *Loss of lien.*]—*Held :* although the master had indeed abandoned the vessel, yet as it was done solely for the purpose of saving life, & on her being brought into port the owner had received possession of her by order of the ct. several days before the cargo was restored to its owners, & as the possession of the vessel by the salvors had not been adverse to the owner but in his interest & in his behalf, the vessel had never been really out of her owner's legal possession so as to deprive him of his lien upon the cargo, & therefore his claim for general average should be allowed.—THE ANNIE M. ALLEN, 3 C. L. T. 108.—**CAN.**

*Sect.* 14.—*General average: Sub-sect.* 4. *Sect.* 15: *Sub-sect.* 1.]

375; 37 L. J. C. P. 193; 18 L. T. 432; 16 W. R. 803; 3 Mar. L. C. 69.

*Annotations:*—*As to* (2) **Apld.** Chellew *v.* Royal Commission on Sugar Supply (1921), 91 L. J. K. B. 58, C. A. *As to* (3) **Consd.** Hill *v.* Wilson (1879), 4 C. P. D. 329. *Generally,* **Refd.** Kish *v.* Taylor (1912), 81 L. J. K. B. 1027.

**4327.** —— ——.]—Pltfs. chartered their steamship, the *B.*, to proceed to one of certain named ports in the United States, & there load a cargo for the United Kingdom or Continent, & insured "chartered homeward freight" with deft. The policy described the voyage as from Liverpool to Delaware Breakwater, & thence to Baltimore, New York, Philadelphia, or Newport News, & thence to any port in the United Kingdom or Continent, & provided that general average charges should be payable "as per foreign statement, if required." The ship left Liverpool in ballast, but, having met with bad weather, her tanks were found to be leaking, & she had to put into Holyhead, where certain expenses were incurred. She afterwards returned to Liverpool, where she was repaired, & subsequently proceeded on the chartered voyage & loaded a cargo at Baltimore, which she carried to Barrow & there delivered. None of the expenses at Holyhead or Liverpool were incurred for the preservation of ship & freight. An average statement was subsequently prepared, according to what were alleged to be the provisions of American law, showing general average expenses at Holyhead & Liverpool, which were apportioned as between ship & freight. In an action by pltfs. to recover from deft. in respect of a general average loss under the policy on chartered freight:—*Held:* deft. was not liable.

The contribution is based on the benefit derived from the sacrifice by each interest, in other words, on the values saved, in the case of freight, this is the amount of freight at risk, minus the expenses of earning it which would have been saved if the ship had been lost (GORELL BARNES, J.).—THE BRIGELLA, [1893] P. 189; 62 L. J. P. 81; 69 L. T. 834; 7 Asp. M. L. C. 403; 1 R. 616; *sub nom.* TEMPERLEY *v.* MACKINNON, THE BRIGELLA, 9 T. L. R. 399.

*Annotation:*—**N.F.** Montgomery *v.* Indemnity Mutual Marine Insce., [1902] 1 K. B. 734.

**4328.** —— ——.]—MONTGOMERY & CO. *v.* INDEMNITY MUTUAL MARINE INSURANCE CO., No. 4176, *ante.*

**4329.** —— **Contribution pro rata.**]—THE COPENHAGEN, No. 3326, *ante.*

**4330.** —— ——.]—BIRKLEY *v.* PRESGRAVE, No. 4177, *ante.*

**4331.** —— ——.]—LA CONSTANCIA, No. 4237, *ante.*

**4332.** —— ——.]—(1) Where a vessel goes into a port of refuge, in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing & reloading goods necessarily unloaded for the purpose of repairing the injury, & expenses incurred for pilotage & other charges on the vessel leaving the port, are also the subject of general average.

(2) The principle which underlies the whole doctrine of general average contribution is that the loss immediate & consequential caused by a sacrifice for the benefit of cargo, ship & freight, should be borne by all (*per* CUR.).

(3) The practice of the average adjusters appears to us to be neither founded on true principles nor to be in accordance with the views of the text writers & . . . to be opposed to legal decisions (*per* CUR.).—ATWOOD *v.* SELLAR (1880), 5 Q. B. D. 286; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. L. C. 283; *sub nom.* ATTWOOD *v.* SELLAR, 49 L. J. Q. B. 515, C. A.

*Annotations:*—*As to* (1) **Consd.** Svensden *v.* Wallace (1885), 10 App. Cas. 404. **Refd.** Anglo-Argentine Live Stock & Produce Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403; The Leitrim, [1902] P. 256; Hamel *v.* Peninsula & Oriental Steam Navigation Co., [1908] 2 K. B. 298; Chellew *v.* Royal Commission on Sugar Supply, [1922] 1 K. B. 12. *As to* (3) **Apld.** Svendson *v.* Wallace (1882), 46 L. T. 742. **Consd.** Svensden *v.* Wallace (1885), 10 App. Cas. 404. **Refd.** Piric *v.* Middle Dock Co. (1881), 44 L. T. 426; Balmoral S.S. Co. *v.* Marten, [1901] 2 K. B. 896; S.S. Carlsbrook Co. *v.* London & Provincial Marine & General Insce. (1901), 50 W. R. 42; *Generally,* **Refd.** Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653; Assicurazioni Generali & Schenker *v.* S.S. Bessie Morris & Browne (1892), 61 L. J. Q. B. 754.

**4333.** —— ——.]—STRANG, STEEL & CO. *v.* SCOTT (A.) & CO., No. 4165, *ante.*

**4334.** —— **Value of jettisoned cargo.**] —FLETCHER *v.* ALEXANDER, No. 4326, *ante.*

**4335.** —— **Freight lost.**]—THE BRIGELLA, No. 4327, *ante.*

—— **Damage to ship.**]—*See* INSURANCE, Vol. XXIX., p. 271, Nos. 2191, 2192.

**4336. Practice of adjusters—Failure to accord with established principles.**]—ATWOOD *v.* SELLAR, No. 4332, *ante.*

**4337.** —— **Evidence of trade usage—Implied term in contract between shipowner & cargo owner.**]—A long-continued practice of average adjusters who prepare their statements according to the law as laid down by the cts. is no evidence of such a custom or usage of trade as can be impliedly incorporated in a contract between a shipowner & owner of cargo.

Defts. who were the owners of cargo in an action against them by the shipowner to recover a general average contribution in respect of expenses caused by the ship putting into a port of refuge, landing, storing, & reshipping the cargo, & leaving the port, alleged a custom of trade that in such a case the expenses incurred in & about warehousing the cargo were apportioned among the owners of the cargo alone, & the expenses of reshipping the cargo, port dues, etc., were borne by the owners of the ship & freight.

Several witnesses were called who gave evidence to the effect that for sixty or seventy years the practice of average adjusters had been as stated by defts., but that, in consequence of the decision in *Atwood* v. *Sellar*, No. 4332, *ante*, some average adjusters had altered their mode of adjustment in such a case:—*Held:* this was not evidence of a custom of trade which could be left to the jury.—SVENDSON *v.* WALLACE (1882), 46 L. T. 742; 30 W. R. 841; 4 Asp. M. L. C. 550, D. C.

**Liability of adjuster for negligence.**]—*See* ARBITRATION, Vol. II., p. 429, No. 792.

**4338. York-Antwerp Rules.**] — CHELLEW *v.* ROYAL COMMISSION ON SUGAR SUPPLY, No. 4303, *ante.*

## SECT. 15.—CUSTOMS AND USAGES IN RELATION TO CARRIAGE OF GOODS.

### SUB-SECT. 1.—IN GENERAL.

*See, generally,* CUSTOM & USAGES, Vol. XVII., pp. 25 *et seq.*

**4339. Must be established.**]—When a ship has been chartered to be loaded in "regular turn,"

**PART VII. SECT. 15, SUB-SECT. 1.**

**4339 i.** *Must be established.*]—A custom which in effect supersedes a statutory rule ought to be established by most conclusive & cogent proof.—GEORGIAN BAY NAVIGATION CO. *v.* THE SHENANDOAH & THE CRETE (1902), 8 Exch. C. R. 1.—**CAN.**

**4339 ii.** ——.]—A method of dis-

it is for the jury, as between shipowner & charterer, what "regular turn" means, & it will not mean merely the usage of the place of loading, unless it is known or established.—LAWSON *v.* BURNESS (1862), 1 H. & C. 396; 2 F. & F. 793; 10 W. R. 733; 158 E. R. 939.

*Annotations:*—**Consd.** Tapscott *v.* Balfour (1872), L. R. 8 C. P. 46; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Postlethwaite *v.* Freeland (1879), 4 Ex. D. 155; Kay *v.* Field (1882), 8 Q. B. D. 594; Barque Quilpué *v.* Brown (1904), 90 L. T. 765.

**4340. —— General & universal practice.**]—Where a custom is sought to be set up giving an implied leave to a captain to stow goods on deck, it is not sufficient to prove that the practice is a frequent one. The custom must be proved to be so general & universal in the trade, & in the particular port from which the goods are taken, that every one shipping goods there must be taken to know that other people's goods, if not his goods, might probably be stowed on deck, & unless such custom is proved, a captain has no authority to bind any one by a jettison of the deck cargo.—NEWHALL *v.* ROYAL EXCHANGE SHIPPING CO. (1885), 33 W. R. 868; *sub nom.* DIXON *v.* ROYAL EXCHANGE SHIPPING CO., LTD., 1 T. L. R. 490, C. A.; *on appeal, sub nom.* ROYAL EXCHANGE SHIPPING CO. *v.* DIXON (1886), 12 App. Cas. 11, H. L.

*Annotations:*—**Refd.** Diederichsen *v.* Farquharson, [1898] 1 Q. B. 150; *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348. **Mentd.** Tancred, Arrol *v.* Steel Co. of Scotland (1890), 15 App. Cas. 125; Shaw *v.* Symmons, [1917] 1 K. B. 799.

**4341. —— Desirability insufficient.**]—HOULDER *v.* GENERAL STEAM NAVIGATION CO., No. 3698, *ante*.

**4342. —— Occasional exceptions.**]—SHAMROCK S.S. CO. *v.* STOREY & CO., No. 3946, *ante*.

**4343. —— Not merely by agreement.**]—There is no proved custom at the port of Sharpness that a steamer with a cargo of wood under a Baltic Steam Bristol Channel Charterparty, containing provisions that "cargo to be loaded & discharged with the customary steamer dispatch of the port, & in the ordinary working hours thereof" & "the usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed," is properly discharged if the cargo is discharged at an average rate of 90 standards per weather working day.

Such a custom would be unreasonable.

A custom cannot be established merely by three or four important classes of persons in a community of a port agreeing that it is desirable. It must be enforced (KENNEDY, J.).

A custom which gives a preference to steamers merely because they come from Baltic ports, as against vessels carrying practically the same class of goods from the other side of the Atlantic, although the steamers are identical in size & in facilities for discharge with all the advantages of modern timber carrying ships, would not be a reasonable custom (KENNEDY, J.).—SEA S.S. CO., LTD. *v.* PRICE, WALKER & CO., LTD. (1903), 19 T. L. R. 519; 8 Com. Cas. 292.

*Annotations:*—**Apld.** Ropner *v.* Stoate, Hosegood (1905), 92 L. T. 328. **Consd.** Baird *v.* Price, Walker (1916), 115 L. T. 227.

**4344. —— Three or four witnesses speaking to practice five years old.**]—By a charterparty, A., the owner, agreed that the ship should proceed to the Tyne, & there load a cargo of coals, & proceed therewith to Algiers, & deliver the same there, on payment of certain freight. B., the charterer, engaged that the vessel should be unloaded at a certain average rate per day; & that, if detained for a longer period, he would "pay for such detention at the rate of £5 *per diem*, to reckon from the time of the vessel being ready to unload, & in turn to deliver." According to the general regulations of the port of Algiers, vessels may commence unloading as soon as they enter within the mole, but, by a special regulation of the French govt., coals destined for the use of the marine department are required to be unladen at a particular spot, & in a given order: *Held:* evidence was admissible to show that the words "in turn to deliver" had by the usage of the particular trade acquired a known meaning in reference to this special regulation with respect to coals for the use of the French marine department, although A. was not cognizant of the fact of the coals having been shipped under a contract with the French govt.; but the testimony of three or four witnesses, speaking to a course of business that had only grown up within about five years, & with reference to charterparties the language of which was not identical with that of the charterparty in question, was insufficient to establish such general usage; the special regulation as to the unloading of coals for the French marine department, was to be considered one of the regulations of the port, binding upon all vessels entering the port.—ROBERTSON *v.* JACKSON (1845), 2 C. B. 412; 15 L. J. C. P. 28; 6 L. T. O. S. 256; 10 Jur. 98; 135 E. R. 1006.

*Annotations:*—**Apld.** Leidemann *v.* Schultz (1853), 14 C. B. 38. **Consd.** Lawson *v.* Burness (1862), 1 H. & C. 396; United States Shipping Board *v.* Strick, [1926] A. C. 545. **Refd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; Tapscott *v.* Balfour (1872), L. R. 8 C. P. 46; Bruner *v.* Moore, [1904] 1 Ch. 305. **Mentd.** Simpson *v.* Margitson (1847), 11 Q. B. 23.

**4345. —— Sufficiency of uniformity of practice—Settled & established practice.**]—A steamer loaded a cargo of barley in sacks at a North Pacific port under a charterparty which provided for discharge at a port in the United Kingdom "according to the custom at port of discharge for steamers" The steamer was ordered to discharge at the Port of Leith, where the consignees demanded delivery of the barley in the original sacks. The shipowners, however, claimed the right to discharge the cargo according to a custom, which they alleged prevailed at that port with regard to cargoes of grain shipped on steamers from North Pacific ports, whereby the grain was bulked in the hold, from which it was hoisted in tubs to the deck & poured into sacks of a uniform size.

It was proved that in the last twenty years some eighty cargoes of grain from North Pacific ports had been discharged at Leith, & in every case but two the discharge had been effected by the receivers bulking the cargo in the hold. In every instance, however, the shipowners had written a formal letter protesting against being held liable for the number of sacks shipped if that method of discharge was adopted. The greater number of these cargoes had been consigned to two firms of receivers, & the evidence of both of these firms was that this method of

charging esparto grass into railway wagons, adopted for the convenience of a single receiver whose consignments of esparto grass have amounted to from four to six cargoes *per annum* for twenty years, &, except for an occasional delivery of a small quantity into lorries for one or two other traders, comprise the whole of the esparto grass handled at the port, does not amount to a practice so certain, uniform, notorious & reasonable as to constitute a custom of the port.—CAZALET *v.* MORRIS & CO., S.S. CRONSTADT, [1916] S. C. 953.—**SCOT.**

**4340 i. ——** *General & universal practice.*]—A trade custom must be uniform & universal.—HOGARTH & SONS *v.* LEITH COTTON SEED OIL CO., [1909] S. C. 955; 46 Sc. L. R. 593.—**SCOT.**

*Sect. 15.—Customs and usages in relation to carriage of goods: Sub-sects. 1, 2 & 3, A.*]

discharge did not depend upon custom, but had merely been adopted by them to suit their convenience & to save expense:—*Held:* in spite of the uniformity of the practice, the shipowners had failed to prove a custom of port binding on the consignees.

The distinction should be made plain between a settled & established practice in the general sense of the mere occurrence of instances, many of which may have sprung from express contract, & a settled & established practice which amounts to the acceptance of a binding obligation of a custom apart from particular bargain (LORD SHAW OF DUNFERMLINE).—STRATHLORNE S.S. CO., LTD. *v.* BAIRD (HUGH) & SONS, LTD., [1916] S. C. (H. L.) 134.

**4346.** ——.]—FAWCETT & CO. *v.* BAIRD & CO. (1900), 16 T. L. R. 198.

**4347.** ——.]—A bill of lading, incorporating conditions of a charterparty, provided "time for discharging at destination shall be according to the custom of the port for steamers at port of discharge, demurrage, if incurred, to be paid by consignees at the rate of fourpence sterling per gross register ton per day." An alleged custom was set up to the effect that the consignee could not be required to take delivery at a faster rate than about 500 tons per day at the port of Bristol for River Plate grain cargoes. A vessel discharged a grain cargo, under the above bill of lading, at Avonmouth Dock, Bristol. The alleged custom had been a matter of dispute for years. The facilities of discharge as regard ships & the three docks in the port of Bristol had increased since the origin of the alleged custom. The rate of discharge, in fact, was often in excess of 500 tons per day:—*Held:* no such custom now existed at Bristol for grain steamers generally or for River Plate grain steamers. The charterparty must be read as "custom, if any, at the port of discharge." Where a custom relates directly to the obligations of parties under certain circumstances, it must, in order to be valid & to be binding on parties who do not know of the existence of the custom as a fact, be reasonable. The custom was quite inapplicable to the state of things at present existing, & there was no such settled & established practice in the port as to satisfy the words of the charterparty. If the custom applied to the altered circumstances, it was unreasonable. Contracting out of a custom may become so general as to destroy the custom. When a custom becomes the exception & not the rule, there is no longer a custom.—ROPNER & CO. *v.* STOATE, HOSEGOOD & CO. (1905), 92 L. T. 328; 21 T. L. R. 245; 49 Sol. Jo. 262; 10 Asp. M. L. C. 32; 10 Com. Cas. 73.

*Annotations:*—**Distd.** Akt. Hekla *v.* Bryson, Jameson (1908), 100 L. T. 155. **Refd.** Baird *v.* Price, Walker (1916), 115 L. T. 227.

**4348.** ——.]—Defts., three separate firms of Hull timber merchants, were sued in the Hull County ct for demurrage as indorsees of bills of lading for parcels of a wood cargo carried in pltf.'s steamship to Hull. The bills of lading incorporated the terms of the charterparty, which provided that the vessel was to be discharged with customary steamship dispatch as fast as she could deliver, but according to the custom of the port. Pltf. alleged that by the custom of the port, embodied in a printed document headed "Statement of Custom & Practice," which was drawn up in 1899, receivers of wood cargoes were under an absolute obligation to provide clear quay space for unloading or a continuous supply of bogies, so that, on the arrival of the vessel in dock, she could be forthwith discharged at her full rate of discharge:—*Held:* whether the alleged custom did or did not exist was a question of fact; on the evidence pltf. had not established it; even assuming the custom had been proved, inasmuch as the effect of it would be to impose an obligation upon receivers for delay which they could not prevent, the question would have arisen whether the custom was reasonable.

If such a custom exists it must be notorious & certain, & its existence must be as capable of proof as other allegations of fact (EVE, J.).—THE LIZZIE, [1919] P. 22; 88 L. J. P. 83; 35 T. L. R. 130; 24 Com. Cas. 117, C. A.; *affd. sub nom.* VAN LIEWEN *v.* HOLLIS BROTHERS & CO., LTD., [1920] A. C. 239, H. L.

*Annotation:*—**Refd.** Bargate S.S. Co. *v.* Penlee & St. Ives Stone Quarries (1921), 125 L. T. 280.

**4349. Must be reasonable.**]—FAWCETT & CO. *v.* BAIRD & CO. (1900), 16 T. L. R. 198.

**4350.** ——.]—SEA S.S. CO., LTD. *v.* PRICE, WALKER & CO., LTD., No. 4343, *ante*.

**4351.** ——.]—ROPNER & CO. *v.* STOATE, HOSEGOOD & CO., No. 4347, *ante*.

**4352.** ——.]—Pltfs., the *A.*, loaded with a cargo of Bombay wheat in bags arrived at Belfast on Dec. 28. Deft. was the indorsee of the bill of lading, which contained a provision that if the consignee did not take delivery of the goods as soon as the ship was ready to discharge, they should be landed & warehoused at the expense of the owner of the goods. The discharge of this cargo commenced on Dec. 29. For four days up to Tuesday night the cargo was discharged by whipping—a process by which one bag at a time is hoisted from the hold by the ship's tackles to a point above a weighing machine, placed at the height of a man's shoulder on an elevated staging on the deck near the hatch. It is then, when weighed, taken by the merchant's stevedore. Pltfs. having complained to their agent of the slowness of the discharge, & insisting that the cargo should be hurried out at top speed, pltfs.' agent informed deft.'s stevedore that he would discharge the rest of the cargo by hoisting—a process by which five bags at a time were raised from the hold of the vessel & placed on the deck, from which they were trucked to the weighing bridge, which, in the case of discharge by hoisting, is only a few inches above the deck. Deft. refused to take delivery by hoisting, or to accept delivery from the ship's rail of bags so hoisted, & the remainder of the cargo was discharged by pltfs.' men into a warehouse:—*Held:* the alleged custom as to the average rate of discharge having been abandoned by deft., the alleged custom of whipping, even if there was sufficient evidence to prove it, was unreasonable, & pltfs. were entitled to the damages in question.—GALLAHER *v.* CLYDESDALE SHIPOWNERS CO., LTD., [1908] 2 I. R. 482, H. L.

**4353.** ——.]—THE LIZZIE, No. 4348, *ante*.

**4354.** —— **Evidence of unreasonableness.**]—BOTTOMLEY *v.* FORBES, No. 4407, *post*.

**4355. Must be notorious.**]—THE LIZZIE, No. 4348, *ante*.

**4355 i.** *Must be notorious.*]—A trade custom, in order to be binding upon the public generally, must be shown to be known to all persons whose interests require them to have knowledge of its existence.—PARSONS *v.* HART (1900), 30 S. C. R. 473; 20 C. L. T. 372.—**CAN.**

**4355 ii.** ——.]—A trade custom must be notorious.—HOGARTH & SONS *v.* LEITH COTTON SEED OIL CO., [1909] S. C. 955; 46 Sc. L. R. 593.—**SCOT.**

**4356. Must be certain.**]—THE LIZZIE, No. 4348, *ante*.

**4357. Enforcement against foreigners.**]—THE COGNAC (1832), 2 Hag. Adm. 377; 166 E. R. 281.

*Annotations*:—**Refd.** The Glenmanna (1860), Lush. 115. **Mentd.** The Heart of Oak (1841), 1 Wm. Rob. 204.

**4358. Custom of foreign port—Limited to custom—Not to law of country founded on it.**]—A custom is a reasonable & universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreement to observe it, but because "it is in effect the common law within that place to which it extends."

When the English cts. construe a charterparty as making lay days begin when the ship is ready to load, though not in berth, & foreign cts. treat the lay days as beginning when the vessel is in berth, the local law or action based upon it cannot be treated as a custom of the port:—*Held*: on the evidence, defts. had failed to establish the existence of a custom at the port of Novorossisk that lay days only begin to count from the time the vessel is moored alongside the quay.—ANGLO-HELLENIC S.S. CO., LTD. *v.* DREYFUS (LOUIS) & CO. (1913), 108 L. T. 36; 29 T. L. R. 197; 57 Sol. Jo. 246; 12 Asp. M. L. C. 291.

**4359. Usage of London—Proof of usage in London & other English ports.**]—MILWARD *v.* HIBBERT, No. 2994, *ante*.

**4360. Usage observed at ports of estuary—Applicability to new port in same estuary.**]—UNITED STATES SHIPPING BOARD *v.* WESTROPE & CO. (1924), 19 Lloyd, L. R. 246.

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SUB-SECT. 2.—EFFECT OF USAGES ON CONTRACTS FOR CARRIAGE.

*See, generally*, CUSTOM & USAGES, Vol. XVII., pp. 39 *et seq.*

**4361. Duty to ship goods according to custom—Of country whence imported.**] — BENSON *v.* SCHNEIDER, No. 1936, *ante*.

**4362. —— Of port of loading—Ship chartered to load at particular port.**]—SMITH & SERVICE *v.* ROSARIO NITRATE CO., No. 2559, *ante*.

**4363. Express exclusion of custom—Extent of exclusion—Unloading.**]—By a charterparty a cargo of timber was to be shipped at a Baltic port & delivered at the Surrey Commercial Docks, London. The charterparty contained a clause, "The cargo to be brought to & taken from alongside the steamer at charterers' risk & expense, any custom of the port notwithstanding":—*Held*: the exclusion of the custom of the port related to the whole clause, & the shipowners were therefore only bound to deliver over the ship's rail, & were not bound by any custom of the port of London requiring a shipowner to do work outside the ship.—BRENDA S.S. CO. *v.* GREEN, [1900] 1 Q. B. 518; 69 L. J. Q. B. 445; 82 L. T. 66; 48 W. R. 321; 16 T. L. R. 226; 44 Sol. Jo. 277; 9 Asp. M. L. C. 55; 5 Com. Cas. 195, C. A.

**Particular usages.**]—*See* Sub-sect. 4, *post*.

**Exclusion by special stipulation—Method of discharge of cargo.**]—*See* Nos. 3626, 3630, *ante*.

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SUB-SECT. 3.—ADMISSIBILITY OF EVIDENCE.

*A. In General.*

*See, generally*, CUSTOM & USAGES, Vol. XVII., pp. 40–50, Nos. 444–556.

**4364. General rule.**]—In all mercantile contracts & adventures, parol evidence of usage in such cases allowed.—BLUNT *v.* CUMYNS (1751), 2 Ves. Sen. 331; 28 E. R. 213, L. C.

**4365. Where no contract in writing—Usage as between shipper & shipowner—As to payment of freight.**]—(1) Deft., manager of a stone quarry, signed a shipping note, expressing that stone was shipped on board pltf.'s vessel to be carried for the owner of the quarry, who, however, never appeared. In reality it was shipped for the purchaser of the stone, the real consignee. In an action for freight & demurrage, evidence of usage that in such cases the quarry owner never paid freight, etc., was admitted, & the question, whether the stone was shipped for deft., was left to the jury upon all the circumstances.

(2) There is no contract in writing & the usage is not as between consignor & consignee, but as between shipper & shipowner, I think, therefore, that the evidence is admissible (BLACKBURN, J.).

(3) The master of the ship has a lien for freight, but not for demurrage, so that as to the latter, he would be likely to enter into some express contract (BLACKBURN, J.).—DICKENSON *v.* LANO (1860), 2 F. & F. 188, N. P.

**4366. Where inconsistent with general law—Usage for consignee to deduct from freight—Value of missing goods.**]—A consignee of goods, or an indorsee of a bill of lading, has no right to have the value of missing goods deducted from the freight payable in respect of the goods delivered. This being the general law, it cannot be altered by a universal practice of merchants, which is not confined to any particular place or trade, to have the value of such goods deducted from the freight.

*Semble*: Bills of Lading Act, 1855 (c. 111), s. 3, by which a bill of lading in the hands of an indorsee for value is made conclusive evidence of the shipment of the goods therein mentioned, against the master signing the same, applies to a master & part owner who has signed it, in an action for freight brought by him on behalf of himself & the other owners of the vessel.—MEYER *v.* DRESSER (1864), 16 C. B. N. S. 646; 33 L. J. C. P. 289; 10 L. T. 612; 2 Mar. L. C. 27; 143 E. R. 1280; *sub nom.* MAYER *v.* DRESSER, 12 W. R. 983.

*Annotations*:—*As to* (1) **Consd.** The Norway (1864), Brown. & Lush. 377; Produce Brokers Co. *v.* Olympia Oil & Cake Co., [1916] 1 A. C. 314. **Refd.** Maspons y Hermano *v.* Millared (1882), 9 Q. B. D. 530. *Generally*, **Refd.** Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112.

**4367. —— Custom of port—As to commencement of lay days.**]—NORDEN S.S. CO. *v.* DEMPSEY, No. 3928, *ante*.

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**4356 i.** *Must be certain.*]—A trade custom must be definite & certain.—HOGARTH & SONS *v.* LEITH COTTON SEED OIL CO., [1909] S. C. 955; 46 Sc. L. R. 593.—SCOT.

**4357 i.** *Enforcement against foreigners.*]—In the case of a river traversed annually by thousands of vessels & used by two nations, & custom which in effect supersedes a statutory rule ought to be established by the most conclusive & cogent proof; & when it is sought to make it binding on foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed among mariners generally, & extended to mariners sailing on vessels carrying a foreign flag & habitually traversing a busy river.—GEORGIAN BAY NAVIGATION CO. *v.* THE SHENANDOAH & THE CRETE (1902), 8 Exch. C. R. 1.—CAN.

**PART VII. SECT. 15, SUB-SECT. 2.**

**t.** *Necessity for notice & acquiescence.*]—Action for money earned by pltfs. as forwarders & carriers. Plea, that according to the custom & usage of forwarders & carriers existing at Toronto, consignees are authorised to pay wharfingers the amount due from them to such forwarders & carrying of their goods, & that deft. so paid this money:—*Held*: assuming the alleged custom to be valid, notice thereof to pltf., if not acquiescence therein, should be alleged.—TORRANCE *v.* HAYES (1852), 2 C. P. 338.—CAN.

**a.** *Effect of recognition of custom.*]—KINGSTON FORWARDING CO. *v.* UNION BANK OF CANADA (1895), 1 Cout. Dig. 541-2.—CAN.

*Sect.* 15.—*Customs and usages in relation to carriage of goods: Sub-sect.* 3, *A., B., C. & D.*]

**4368. Where consistent with contract—Custom of port.**]—BUCKLE *v.* KNOOP, No. 4374, *post.*

**4369.** —— ——.]—MARZETTI *v.* SMITH & Co., No. 3790, *ante.*

**4370.** —— ——.]—NIELSEN *v.* WAIT, No. 3555, *ante.*

**4371.** —— ——.]—AKT. HELIOS *v.* EKMAN & Co., No. 2974, *ante.*

**4372. Custom as to personal liability of agent—Where principal undisclosed—Charterparty signed "as agent."**]—Where a person contracts in the body of a charterparty & signs "as agent," his principal being undisclosed, evidence is admissible to show a custom that he shall be personally liable if he does not disclose his principal's name within a reasonable time.—HUTCHINSON *v.* TATHAM (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; 22 W. R. 18.

*Annotations:*—**Consd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141. **Reid.** Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 374; Pike *v.* Ongley (1887), 18 Q. B. D. 708.

——.]—*See, generally,* AGENCY, Vol. I., pp. 635–637, Nos. 2576–2590.

**Usages inconsistent with contract.**] —*See* Sub-sect. 3, D., *post.*

*B. To Explain Terms.*

*See, generally,* CUSTOM & USAGES, Vol. XVII., pp. 42–47, Nos. 470–522.

**4373. Custom of port—As to measurement of goods loaded.**]—BOTTOMLEY *v.* FORBES, No. 4407, *post.*

**4374.** —— ——.]—By a charterparty made in London between pltf., a shipowner, & defts., Liverpool merchants, it was agreed that pltf.'s ship should sail to Bombay for a cargo of cotton or wool, & having loaded, should proceed to London or Liverpool as ordered, & deliver same on being paid freight as follows, viz.: "75*s.* per ton of 50 cubic feet delivered for cotton or wool." It is the practice at Bombay to compress the bales of cotton before shipment by machinery into the smallest possible space, & upon being unloaded at the port of discharge they expand considerably. Pltf. claimed to be entitled to have the freight calculated, under the above charterparty, according to the measurement of the bales after being unloaded, & brought his action to recover a balance of freight still due to him according to this mode of calculation. Evidence was given at the trial of the existence of a usage in the Bombay trade by which freight was payable under charterparties, in similar terms to that in question, upon the measurement of the bales before shipment; but no direct evidence was given to show that pltf. was aware of this usage:—*Held:* apart from the evidence of usage upon the true construction of the contract, the freight was payable on the measurement before shipment, & the evidence of usage was admissible as not contradicting the terms of the charterparty.—BUCKLE *v.* KNOOP (1867), L. R. 2 Exch. 125; 36 L. J. Ex. 49; 16 L. T. 231; 15 W. R. 588; 2 Mar. L. C. 491; *affd.*, L. R. 2 Exch. 333, Ex. Ch.

**4375.** —— **As to turns of loading.**]—LEIDEMANN *v.* SCHULTZ, No. 4028, *ante.*

**4376.** —— —— **Provision to load in turn "as customary."**]—THE DEFENDER, FROST *v.* EDLMANN (1856), 4 L. T. 742.

**4377.** —— **As to method of loading.**]—CUTHBERT *v.* CUMMING, No. 1905, *ante.*

**4378.** —— **As to payment of primage.**]—A charter of James II. granted & confirmed to the master, pilots, & seamen of Newcastle-upon-Tyne certain ancient dues, called primage to be paid by all persons being owners of goods brought in any ship from beyond the seas into the river Tyne, or any creek or member belonging to the port of Newcastle-upon-Tyne, "in manner & form following—that is to say, aliens & strangers born, & all other persons who with their ships shall arrive within the port, or in any of the said creeks or members, & not belonging to same, before they depart with their ships from the port, or forth of the creeks, shall pay the duties aforesaid; & every free merchant & inhabitant of Newcastle arriving with their ships within the Tyne shall pay the duties aforesaid within ten days after the landing of the goods." The charter also granted to the corpn. all perquisites, ancient duties, & profits which they had theretofore lawfully had & enjoyed: provided that the sums thereby granted should be in lieu of all other duties theretofore received. In an action for dues in respect of merchandise whereof defts., being merchants & natives of Sunderland, were the owners, & which had been brought by vessels into the port of Sunderland, being a creek or member of the port of Newcastle:—*Held:* evidence of usage was admissible in explanation of the charter, & evidence of payment of the duty, under the same circumstances as those under which pltfs. in error were charged since 1584, was not inconsistent with the right construction of the charter, inasmuch as the first clause imposed the duty upon all persons, & the second clause only prescribed the manner in which some were to pay it.—BRADLEY *v.* NEWCASTLE-UPON-TYNE (PILOTS) (1853), 2 E. & B. 427; 23 L. J. Q. B. 35; 18 Jur. 240; 1 W. R. 394; 118 E. R. 826; *sub nom.* NEWCASTLE-UPON-TYNE (MASTER PILOTS & SEAMEN) *v.* BRADLEY, 1 C. L. R. 479; 22 L. T. O. S. 291, Ex. Ch.

**4379.** —— **As to delivery "alongside"—Provision to unload "according to custom of port."**]—A charterparty provided that the cargo, which consisted of timber, should "be taken from alongside at merchants' risk & expense, according to the custom of the port." The vessel discharged at the port of Grimsby. By the custom of that port timber cargoes are taken from the ship's holds by means of the ship's winches & slings by stevedores employed & paid by the shipowner, & by them carried to the far side of the quay, about 60 feet from the side of the vessel, & there "lumped," or roughly piled. It was practically impossible to deposit the cargo on any other part of the quay:—*Held:* the shipowner was bound to carry the cargo across the quay & "lump" it at his own expense, & such delivery constituted delivery "alongside," within the meaning of the charterparty.—STEPHENS *v.* WINTRINGHAM (1898), 3 Com. Cas. 169.

*Annotations:*—**Distd.** Brenda S.S. Co. *v.* Green (1900), 48 W. R. 321. **Overd.** Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397.

**4380. Custom of trade—As to meaning of "cargo" & "freight."**]—LEWIS *v.* MARSHALL, No. 1897, *ante.*

**4381.** —— **As to rate of freight.**]—PHILLIPPS *v.* BRIARD, No. 4383, *post.*

**4382.** —— ——.]—By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, at the rate of 80*s.* per cwt., gross weight, tallow, & other goods, grain, or seed, in proportion, as per London Baltic printed rates":—*Held:* extrinsic evidence was admissible to show that, by the usage of the trade, the meaning of the bill of lading was that 80*s.* per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured.—RUSSIAN

STEAM-NAVIGATION TRADING CO. *v.* SILVA (1863), 13 C. B. N. S. 610; 143 E. R. 242.
*Annotation:*—**Consd.** Southampton Steam Colliery Co. *v.* Clarke (1870), L.R. 6 Exch. 53.

*C. To Add Terms.*

**4383. General rule.**]—A declaration on a charterparty made between pltfs. & deft. stated that it was agreed between deft., the owner of the ship *Maggie*, & pltfs., the charterers, that the ship should load a cargo in London, & proceed to Hong Kong, & deliver the same, "the ship to be consigned to the charterers' agent in China, free of commission on that charter"; that according to the custom of merchants in London, when a ship, chartered in London for China, is agreed to be consigned to the charterers' agents, whether consigned free of commission on that charter or not, it is the right & duty of such agents to procure a charter or cargo for the ship, & they are entitled to be paid the usual broker's commission on the amount of freight payable under such charter, unless excluded by special contract; but in case the owners of the ship procure a charter or cargo for the ship, without any default of the consignees, the consignees are entitled to the broker's commission on any freight payable under such charterparty, unless such right is excluded by special contract; that the ship arrived in China, & pltfs.' agents, as consignees, performed their duty free of commission on the outward voyage, & were ready to procure a charter or cargo for Hong Kong; that deft. did not permit them to procure such charter or cargo, but, without the default of pltfs.' agents, himself procured a cargo. Breach, non-payment by deft. of any commission on the cargo:—*Held:* parol evidence of the mercantile usage was not admissible to vary the terms of the charterparty.—PHILLIPPS *v.* BRIARD (1856), 1 H. & N. 21; 25 L. J. Ex. 233; 4 W. R. 486; 156 E. R. 1101.

**4384. Course of business—Termination of wharfinger's liability.**]—Defts. who were wharfingers & agents for a steamship co., upon being applied to by pltfs. for a through rate for the carriage of goods from London to Cork, wrote in reply, quoting a through rate from London to Cork, at owner's risk, including collection & delivery at other side, & freight & wharfage at both ends. The through rate was paid, & the goods were delivered to defts. The goods were damaged on the voyage from London to Cork:—*Held:* upon the true construction of the letter from defts. to pltfs. there was no contract by defts to carry the goods from London to Cork, & therefore evidence of the previous course of business between the parties was admissible to show what the contract was; & that course of business showed that defts. received the goods upon the terms that when once the goods were shipped their liability ceased.—PONTIFEX & WOOD, LTD. *v.* HARTLEY & CO. (1893), 62 L. J. Q. B. 196; 9 T. L. R. 184; 4 R. 245, C. A.

**4385. Annexing incident to terms—Porters' charges on unloading.**]—CARDIFF S.S. CO., LTD. *v.* JAMESON, No. 4454, *post*.

*D. Usage Inconsistent with Contract.*

**4386. Whether admissible.**]—HALL *v.* JANSON, No. 4257, *ante*.

**4387. —— Custom of port—As to cost of pressing wool.**]—COCKBURN *v.* ALEXANDER, No. 1902, *ante*.

**4388. —— —— As to payment of freight.**]—By the terms of a bill of lading, 110 bales of cotton, shipped at New Orleans, were to be delivered at the port of Liverpool unto order or to assigns, he or they paying freight for the said goods, five eighths of a penny sterling per pound, with 5 per cent., primage, & average accustomed, etc. This bill of lading was indorsed to deft., & he received the 110 bales of cotton under it, & he claimed to retain £1 16*s.* 3*d.* from £138 11*s.* 3*d.* the amount of freight specified, on the ground that, by the custom of Liverpool, he was entitled to deduct three months' discount from the amount of freight:—*Held:* the evidence of such custom was admissible to vary the terms of the written contract, & deft. was entitled to retain the £1 16*s.* 3*d.*—BROWN *v.* BYRNE (1854), 3 E. & B. 703; 2 C. L. R. 1599; 23 L. J. Q. B. 313; 23 L. T. O. S. 154; 18 Jur. 700; 2 W. R. 471; 118 E. R. 1304.

*Annotations:*—**Apld.** Lucas *v.* Bristow (1858), E. B. & E. 907. **Refd.** Cuthbert *v.* Cumming (1855), 10 Exch. 809; Hall *v.* Janson (1855), 4 E. & B. 500; Phillipps *v.* Briard (1856), 1 H. & N. 21; M'Kune *v.* Joynson (1858), 5 C. B. N. S. 218; Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361; Sweeting *v.* Pearce (1861), 9 C. B. N. S. 534; Rederi Akt. Acolus *v.* Hillas (1925), 134 L. T. 184. **Mentd.** Hughes *v.* Humphreys (1851), 1 Jur. N. S. 42; Humfrey *v.* Dale (1857), 7 E. & B. 266; Abbott *v.* Bates (1875), 33 L. T. 491; Robinson *v.* Mollett (1875), 44 L. J. C. P. 362; Johnson *v.* Raylton (1881), 7 Q. B. D. 438.

**4389. —— —— —— Measurement of cargo.**]—BUCKLE *v.* KNOOP, No. 4374, *ante*.

**4390. —— —— As to loading—According to custom.**]—HUDSON *v.* CLEMENTSON, No. 4420, *post*.

**4391. —— —— —— Contract to load according to custom of port.**]—METCALFE, SIMPSON & CO. *v.* THOMPSON, PATTRICK & WOODWARK (1902), 18 T. L. R. 706.
*Annotation:*—**Refd.** Akt. Hekla *v.* Bryson Jameson (1908), 100 L. T. 155.

**4392. —— —— As to unloading—Contract for payment "as customary."**]—HOLMAN *v.* WADE (1877), *Times*, May 11, C. A.
*Annotations:*—**Consd.** Mowbray, Robinson *v.* Rosser (1922), 91 L. J. K. B. 524. **Apprvd.** Palgrave, Brown S.S. Turid, [1922] 1 A. C. 397. **Apld.** Rederi Akt. Acolus *v.* Hillas (1925), 95 L. J. K. B. 103. **Refd.** The Nifa, [1892] P. 411.

**4393. —— —— —— ——.**]—By a charterparty the vessel was to deliver at Hambourg, "or so near thereto as she could safely get"; to discharge as customary; the cargo to be brought to & taken from alongside the ship at merchant's risk & expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach Hambourg. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. & sent in them to Hambourg. Her owner having sued the charterer to recover the lighterage expenses:—*Held:* a defence alleging that by the custom of the port of Hambourg deft. was not bound to take delivery elsewhere than at Hambourg was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, & pltf. was entitled to recover the lighterage expenses.—HAYTON *v.*

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**PART VII. SECT. 15, SUB-SECT. 3.—D.**

**4388 i.** *Whether admissible—Custom of port—As to payment of freight.*]—*Held:* evidence tendered to prove a custom between the shipper & the shipowner that freight was not payable until the delivery of the goods, was inadmissible because it contradicted the written terms of the contract of affreightment contained in the bills of lading.—UNION S.S. CO., LTD. *v.* WICKES, LTD. (1909), 28 N. Z. L. R. 581.—**N.Z.**

b. —— —— *As to loading—Charge for receiving, stacking & transferring cargo to ship's slings.*]—SIEMON (W.) & SONS, LTD. *v.* ALLEN (SAMUEL) & SONS, LTD., [1925] S. R. Q. 269.—**AUS.**

c. —— —— *As to unloading.*]—On arrival of a ship at Leith the consignees offered to take delivery over the ship's side, but the shipowners, on account of the delay which such a mode of discharge would entail, landed the cargo into shed, where it was assorted & delivered. The consignees having refused to pay the landing & extra

*Sect.* 15.—*Customs and usages in relation to carriage of goods: Sub-sect.* 3, *D.; sub-sect.* 4, *A. & B.*]

IRWIN (1879), 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665; 4 Asp. M. L. C. 212, C. A.

*Annotations:*—**Consd.** Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397. **Refd.** Horsley *v.* Price (1883), 11 Q. B. D. 244; The Nifa, [1892] P. 411.

**4394.** —— —— —— ——.]—A vessel was chartered to carry a cargo of timber to Yarmouth under a charterparty which provided that the vessel should deliver the cargo at Yarmouth "always afloat . . . cargo to be . . . taken from alongside the steamer at charterers' risk & expense as customary." On her arrival at Yarmouth the vessel to lie "always afloat" could not come nearer than 13 feet out from the quay. In these circumstances the custom of the port was that a wooden staging should be erected between the ship about to discharge & the quay, & that stevedores employed by the shipbrokers on behalf of the shipowners should carry the cargo from the ship's rail over the staging & dump the same on the quay at not less than 10 feet from the quay edge, & that the whole cost of this work should be borne by the shipowners. This work was done & was paid for by the shipowners under protest. In an action by the shipowners against the charterers for the difference between the cost of the whole work & the rate for delivery at the ship's rail:—*Held:* the custom was inconsistent with the provision in the charterparty that the cargo should be taken from alongside the steamer at charterers' expense, & the shipowners were entitled to succeed.—PALGRAVE, BROWN & SON, LTD. *v.* S.S. TURID, [1922] 1 A. C. 397; 91 L. J. P. 81; 66 Sol. Jo. 349; 27 Com. Cas. 216; *sub nom.* THE TURID, 127 L. T. 42; 38 T. L. R. 423; 15 Asp. M. L. C. 538, H. L.

*Annotations:*—**Apld.** Mowbray, Robinson *v.* Rosser (1922), 91 L. J. K. B. 524; Rederi Akt. Acolus *v.* Hillas (1926), 96 L. J. K. B. 186. **Refd.** Akt. Dampsskibsselskabet Primula (in Liquidation) *v.* Horsley (1923), 40 T. L. R. 11; The Rensfjell, The Ornesfjell, The Uppland, The Fritioff, The Svein Jarl (1924), 131 L. T. 764; Akt. Dampskibs Steinstad *v.* Pearson (1927), 137 L. T. 533.

**4395.** —— —— —— ——.]—REDERI AKT. ACOLUS *v.* HILLAS (W. N.) & Co., No. 4485, *post.*

**4396.** —— —— —— **Lightening of vessel.**]—THE ALHAMBRA, No. 3514, *ante.*

**4397.** —— —— —— ——.]—NIELSEN *v.* WAIT, No. 3555, *ante.*

**4398.** —— —— —— ——.]—REYNOLDS & Co. *v.* TOMLINSON, No. 3510, *ante.*

**4399.** —— —— —— **Contract to deliver.**]—MARZETTI *v.* SMITH & Co., No. 3790, *ante.*

**4400.** —— —— —— **"According to custom."**]—THE NIFA, No. 3635, *ante.*

**4401.** —— —— —— ——.]—The ship was to deliver into lighter. The admitted custom was that there should be a delivery to the charterer out of the ship's holds. It would be inconsistent with the charterparty to read into it "delivery to be taken by the charterer out of the holds of the ship." The words, "according to the custom of the port," refer to the customary machinery & means. The admitted custom is inconsistent with the words "deliver . . . into lighter" (KENNEDY, J.).—KEARON *v.* RADFORD & Co. (1895), 11 T. L. R. 226.

**4402.** —— —— —— ——.]—REYNOLDS & Co. *v.* TOMLINSON, No. 3510, *ante.*

**4403.** —— —— —— ——.]—THE RENSFJELL, THE ORNESFJELL, THE UPPLAND, THE FRITIOFF, THE SVEIN JARL, No. 4475, *post.*

**4404.** —— **Custom for charterers' agents to procure freight on commission—Consignment free of commission.**]—PHILLIPPS *v.* BRIARD, No. 4383, *ante.*

**4405.** —— **Custom for consignee to have option of taking goods without weighing.**]—Wool was shipped in Australia for delivery in this country under bills of lading which provided that freight was "to be paid on delivery in cash, without deduction, on gross weight at Queen's beam." The shipowner alleged that by the custom of the trade the consignee had the option of having the goods weighed at his own expense, or of taking the goods without weighing at the bill of lading weight, plus two per cent.:—*Held:* there was no such custom as alleged & if there had been such a custom, it would have been bad in law as contradicting the express terms of the bill of lading.—GULF LINE, LTD. *v.* LAYCOCK & Co., SAME *v.* SAME (1901), 18 T. L. R. 14; 7 Com. Cas. 1.

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SUB-SECT. 4.—PARTICULAR USAGES.

*A. Freight.*

**4406. Meaning of freight—Passengers' passage money—Sydney.**]—LEWIS *v.* MARSHALL, No. 1897, *ante.*

**4407. Measurement of cargo—Pressed cotton.**]—By a charterparty made in London deft. engaged to ship on board pltf.'s vessel at Bombay a full cargo at a certain price per ton, cotton to be calculated at 50 cubic feet per ton, & other goods according to the scale of tonnage of the East India co. In an action of *assumpsit* for the freight:—*Held:* (1) it was competent to deft. to give evidence of a custom at Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk; (2) it was competent to pltf., in order to show the unreasonableness of the alleged custom, to give evidence in reply, that the cotton had increased in bulk 15 per cent. upon the screw measurement by the time it was put on board the vessel.—BOTTOMLEY *v.* FORBES (1838), 5 Bing. N. C. 121; 1 Arn. 431; 6 Scott, 866; 8 L. J. C. P. 85; 2 Jur. 1016; 132 E. R. 1051.

*Annotations:*—*As to* (1) **Apld.** Buckle *v.* Knoop (1867), L. R. 2 Exch. 125. **Refd.** Robertson *v.* Jackson (1845), 2 C. B. 412; Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361. *As to* (2) **Refd.** Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112.

**4408.** —— **Wool—Option of weighing or taking bill of lading weight plus two per cent.—Australian**

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weighing charges, the shipowners raised an action to recover them, & averred that it was the custom of all ships discharging at the Port of Leith mixed or general cargoes similar to that carried by them & deliverable to a number of receivers, to send the cargo into shed, & thereafter assort the several parcels according to their various marks at the expense of the receivers. After a proof:—*Held:* the pursuers had failed in their case on each of these three separate grounds, that the custom averred by them was indefinite & uncertain, that it was not uniform, universal, & notorious, & that it was inconsistent with the terms of the written contract of affreightment.—HOGARTH & SONS *v.* LEITH COTTON SEED OIL CO., [1909] S. C. 955; 46 Sc. L. R. 593.—**SCOT.**

d. —— ——.]—A trade custom, in order to be binding upon the public generally, must be shown to be known to all persons whose interests required them to have knowledge of its existence, &, in any case, the terms of a bill of lading, inconsistent with & repugnant to the custom of a port, must prevail against such custom.—PARSONS *v.* HART (1900), 30 S. C. R. 473.—**CAN.**

**PART VII. SECT. 15, SUB-SECT. 4.—A.**

e. *Payment of freight of fish on delivery—St. John's.*]—There is no usage in the port of St. John's for the trade to pay the "freighters" the freight of fish upon due delivery.—BAINE, JOHNSTON & Co. *v.* BOYD (1899), 8 Nfld. L. R. 286.—**NFLD.**

f. *Deduction—Loss by leakage.*]—A cargo of 26,778 gallons of molasses was shipped from Cuba, & on arrival in Newfoundland it was reduced to 18,575 gallons by leakage. It was found by the jury that the custom of the trade in England to pay freight only on the

**wool trade.**]—GULF LINE, LTD. *v.* LAYCOCK & CO., SAME *v.* SAME, No. 4405, *ante*.

**4409. Payment of freight by bill—Scottish coal trade—In London.**]—HARRIS *v.* TIMBERLEY (1840), 4 L. T. 742.

**4410. —— Caen stone trade.**]—The custom of the Caen stone trade being to pay freight half in cash & half by a bill at two months, the agent of the owners of Caen stone which was brought by a vessel to an English port, verbally offered the captain of the vessel which brought it half the amount of the freight in cash, & also offered to give the captain *per proc.* the acceptance of the principal for the other half, if the captain would draw a bill. This the captain refused :—*Held :* a sufficient tender of the freight, as it was the duty of the captain to draw the bill.—LUARD *v.* BUTCHER (1846), 2 Car. & Kir. 29, N. P.

**4411. Discount — Goods from Alexandria—Freight payable on delivery.**]—JARVIS *v.* RATHBONE (1853), 6 L. T. 557.

**4412. —— Goods from certain ports—Liverpool.**]—BROWN *v.* BYRNE, No. 4388, *ante*.

**4413. —— —— ——.**]—The custom in the trade at Liverpool that, in the absence of special stipulation, three months' interest or discount is deducted from freights payable under bills of lading, on goods coming from all ports in the United States of North America, was applied to ships coming from the ports of Texas, when it was admitted into the confederacy of the United States in 1846 ; & on the first shipment from California for Liverpool, after it became one of the United States in 1848, the custom was submitted to without dispute. The same custom applies to all ships coming from the ports of British North America & from South America. In the case of vessels arriving from the East Indies, China & Australia, the custom is to allow sixty days discount, & of vessels from the rest of the world not before mentioned to make no allowance : —*Held :* there was evidence from which a jury might infer that the custom as to shipments from the United States of North America extended to ports in California.—FALKNER *v.* EARLE (1863), 3 B. & S. 360 ; 32 L. J. Q. B. 124 ; 7 L. T. 672 ; 9 Jur. N. S. 847 ; 11 W. R. 307 ; 1 Mar. L. C. 279 ; 122 E. R. 136.

**4414. Freight stated for one class of goods—Proportionate rates for other classes.**]—RUSSIAN STEAM-NAVIGATION TRADING CO. *v.* SILVA, No. 4382, *ante*.

**4415. Interest on overdue freight.**]—MERCHANT SHIPPING CO. *v.* ARMITAGE, No. 4837, *post*.

**4416. Deduction—For missing goods.**]—MEYER *v.* DRESSER, No. 4366, *ante*.

**4417. —— "Address Commission."**]—NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante*.

**In regular turn.**]—*See* Sub-sect. 4, B., *post*.

*B. "In Regular Turn."*

**4418. Loading—Primâ facie meaning.**]—The words "in regular turn" in a charterparty *primâ facie* mean the regular turn of the port of loading.

But it may be shown, either from the construction of the charterparty itself, or by evidence, that the words were intended to have a different meaning.

The charterparty, dated Feb. 6, 1900, of a sailing ship, then at Hamburg, provided that she should proceed to the port of Newcastle, New South Wales, & there "in the usual & customary manner load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the freighters may name," a cargo of coal, which the freighters bound themselves to ship. The coal was to be carried to South America. The charterers were themselves the owners of the Duckenfield Colliery. On Apr. 6, 1900, they sold to purchasers in South America the cargo of Duckenfield coal to be shipped by this ship. The ship arrived at Newcastle on Aug. 3, 1900, & was not berthed for loading until Oct. 6. Her loading was completed on Oct. 9.

By the regulations & custom of the port a loading berth could not be obtained until a loading order from the colliery was lodged.

On the arrival of the vessel a large number of other ships, which were entitled to priority over her, were waiting to load coals from the Duckenfield Colliery, & the charterers were unable to give her a loading order until Oct. 5, when it was lodged & application made to the berthing master for a berth. On the evidence the ct. held that the charterers had not chartered more vessels to load their coal than in the ordinary course of their business. The purchasers of the coal refused to accept any other kind of coal, though the charterers endeavoured to induce them to do so :—*Held :* upon the construction of the charterparty & with reference to the rules & custom of the port, the words "regular turn" must be taken to mean the regular turn of the colliery.—BARQUE QUILPUÉ, LTD. *v.* BROWN, [1904] 2 K. B. 264 ; 73 L. J. K. B. 596 ; 90 L. T. 765 ; 9 Asp. M. L. C. 596 ; 9 Com. Cas. 13, C. A.

*Annotations :*—**Consd.** Einar Bugge A. S. *v.* Bowater (1925), 31 Com. Cas. 1. **Refd.** Jones *v.* Green, [1904] 2 K. B. 275 ; Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193.

**4419. —— Coal trade—Newcastle-on-Tyne.**]—LEIDEMANN *v.* SCHULTZ, No. 4028, *ante*.

**4420. —— —— Sunderland.**]—Defts. chartered a ship from Sunderland to Carthagena, engaging that she should "with all possible dispatch load in the south dock, in the customary manner, from defts.' agents, a full & complete cargo of coke, to be loaded in regular turn." In an action for not loading the ship "in regular turn," pursuant to the charterparty :—*Held :* evidence was not admissible to show, that, according to the custom of the port of Sunderland, under such a contract, the ship owner was bound to wait his turn according to a list kept by a coke manufacturer not named in the contract, but mentioned at the time the contract was entered into, provided reasonable dispatch was used.—HUDSON *v.* CLEMENTSON (1856), 18 C. B. 213 ; 25 L. J. C. P. 234 ; 27 L. T. O. S. 125 ; 139 E. R. 1349.

*Annotation :*—**Refd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115.

**4421. —— —— ——.**]—THE DEFENDER, FROST *v.* EDLMANN (1856), 4 L. T. 742.

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quantity delivered did not apply to Newfoundland, & judgment was that freight must be paid on the quantity shipped.—O'DWYER *v.* MCLEA (1851), 3 Nfld. L. R. 243.—**NFLD.**

**g.** *Carriage free where freight paid on return cargo.*]—Where pltf. claimed freight on goods from S. to T., from which port he was to bring back a cargo of fish at 1*s.* per quintal, the defence set up was the usage & custom of the trade to carry such goods free ; the ct. left it to the jury to say whether there was a custom or usage as would exempt deft. from payment of freight. —KEATING *v.* MCBRIDE (1857), 4 Nfld. L. R. 164.—**NFLD.**

**PART VII SECT. 15, SUB-SECT. 4.—B.**

**h.** *Loading — Coal trade — Whitehaven.*]—Pltf.'s sailing vessel was chartered by deft. to proceed to Whitehaven for a cargo of coals. The charterparty provided that "regular turn" should be allowed for loading. By the custom of the port of Whitehaven, steam vessels, though they arrive in port after sailing vessels, are loaded with coals before the sailing vessels ; but as between sailing vessels themselves, sailing vessels are loaded in the order of their arrival in port. Pltfs. were ignorant that this was the

*Sect. 15.—Customs and usages in relation to carriage of goods: Sub-sect. 4, B., C. & D. (a) & (b).]*

**4422. —— —— Newcastle, New South Wales.**]—BARQUE QUILPUÉ, LTD. *v.* BROWN, No. 4418, *ante*.

**4423. —— —— Delagoa Bay.**]—A ship was chartered to proceed to Delagoa Bay & there load a cargo of coal for carriage to Suez. By clause 3 of the charterparty "the cargo to be loaded . . . in regular turn as customary at the rate of 1,000 tons per day . . . commencing when written notice is given of steamer being . . . ready to load." The ship arrived at Delagoa Bay & anchored within the commercial limits of the port on July 30, 1920, & notice of readiness to load was given on the following day. At Delagoa Bay there was only one loading berth, which was then occupied by another vessel, & the ship had to await her turn until Aug. 26. In the actual loading there was a saving on the time allowed:—*Held:* upon the true construction of the contract the obligation to load in turn at the specified rate was to become binding when the notice of readiness was given but did not become actually operative until the turn arrived.—UNITED STATES SHIPPING BOARD *v.* STRICK (FRANK C.) & CO., [1926] A. C. 545; 95 L. J. K. B. 776; 135 L. T. 185; 42 T. L. R. 556; 17 Asp. M. L. C. 40; 31 Com. Cas. 357, H. L.

*Annotation:*—**Refd.** Hogarth *v.* Cory (1926), 95 L. J. P. C. 204.

**4424. Unloading—Particular usage in particular trade—Coal for French Marine Department—Algiers.**]—ROBERTSON *v.* JACKSON, No. 4344, *ante*.

**4425. —— Order of entry in colliery book—Newcastle on Tyne.**]—LAWSON *v.* BURNESS (1862), 1 H. & C. 396; 10 W. R. 733; 158 E. R. 939.

*Annotations:*—**Refd.** Tapscott *v.* Balfour (1872), L. R. 8 C. P. 46; Postlethwaite *v.* Freeland (1879), 4 Ex. D. 155; Kay *v.* Field (1882), 8 Q. B. D. 594; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507; Barque Quilpué *v.* Brown (1904), 90 L. T. 765; United States Shipping Board *v.* Strick, [1926] A. C. 545.

**4426. —— Shortage of lighters—East London, South Africa.**]—POSTLETHWAITE *v.* FREELAND, No. 3666, *ante*.

**4427. —— One vessel at a time—The Nob, River Exe.**]—By charterparty it was agreed between pltf., shipowner, & defts., charterers, that pltf.'s vessel should "proceed to the Nob near Topsham in the river Exe, or to Topsham Quay, as ordered on arrival . . . & deliver defts.' cargo of 180 tons of phosphate, in regular turn with other seagoing vessels at the average rate of 30 tons per weather working day."

Pltf.'s vessel was ordered to, & duly arrived at, the Nob; but, though ready to deliver her cargo, she was kept waiting some days whilst another vessel, also consigned to defts., & already there, was being discharged by lighters sent by defts., after which the discharge of pltf.'s vessel was proceeded with. Pltf. claimed demurrage, at the agreed rate per day, on the ground that the time allowed for unloading began to count from the day the vessel was in her discharging berth at the Nob ready to deliver her cargo, & that the lay days had been exceeded. Defts. contended that they had complied with the terms of the charterparty by commencing the discharge of pltf.'s vessel "in regular turn" on the day after the completion of the discharge of the other vessel at the particular discharging berth to which pltf.'s vessel had been ordered:—*Held:* "in regular turn" at the Nob meant one vessel at a time.—THE CORDELIA, [1909] P. 27; 78 L. J. P. 48; 100 L. T. 197; 11 Asp. M. L. C. 202.

*Annotation:*—**Folld.** United States Shipping Board *v.* Strick, [1926] A. C. 545.

*C. As to Loading.*

**4428. Loading sugar—Trinidad.**]—CUTHBERT *v.* CUMMING, No. 1905, *ante*.

**4429. Negotiability of mate's receipts—Bombay.**]—HATHESING *v.* LAING, LAING *v.* ZEDEN, No. 2207, *ante*.

**4430. "Cargo of lawful produce & merchandise"—Usage to carry passengers.**] — SHAW, SAVILL & CO. *v.* AITKEN, LILBURN & CO., No. 1933, *ante*.

**4431. Stowage on deck.**]—NEWHALL *v.* ROYAL EXCHANGE SHIPPING CO., No 4340, *ante*.

——.]—*Compare* Sect. 14, sub-sect. 2, C. (*a*), *ante*.

**4432. Loading timber in Baltic—First open water.**]—KEMPE *v.* BATT & CO. (1888), 5 T. L. R. 27.

**4433. Termination of liability of wharfingers—Goods placed on board.**]—PONTIFEX & WOOD, LTD. *v.* HARTLEY & CO., No. 4384, *ante*.

**4434. Bringing minerals direct from mines by rail—Foreign port.**]—SMITH & SERVICE *v.* ROSARIO NITRATE CO., No. 2559, *ante*.

**4435. Colliery guarantee — Grimsby.**]—SHAMROCK S.S. CO. *v.* STOREY & CO., No. 3946, *ante*.

**4436. Colliery order before berth occupied—Newcastle, New South Wales.**]—JONES, LTD. *v.* GREEN & CO., No. 2872, *ante*.

**4437.** —— —— ——.]—ARDAN S.S. CO. *v.* WEIR (ANDREW) & CO., No. 2848, *ante*.

**4438. Loading certain quantity per day—Timber—Onega & White Sea ports.**]—METCALFE, SIMPSON & CO. *v.* THOMPSON, PATTRICK & WOODWARK (1902), 18 T. L. R. 706.

*Annotation:*—**Refd.** Akt. Hekla *v.* Bryson, Jameson (1908), 100 L. T. 155.

**4439. Lighterage charges—Trinidad.**]—SCRUTTON *v.* CHILDS, No. 2958, *ante*.

**4440. Interpretation of "shipment"—Alleged custom to load into railway cars.**]—In an English contract, the word "shipment" means the loading of goods on to a ship, & it cannot be successfully contended that, by custom of the trade in the country of origin of the goods, it means loading into railway cars. Such a construction would be

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usage of the port. Pltf.'s vessel, though she arrived before several steam vessels, was delayed until they were first loaded; but she was loaded in the order of her arrival as regarded the other sailing vessels in harbour. Pltfs. claimed demurrage:—*Held:* the expression "regular turn" in the charterparty should, in the absence of exclusive words, be construed as "regular turn" according to the usage of the port of Whitehaven; it was not material that pltfs. were ignorant of such usage; & pltfs. could not recover.—KING *v.* HINDE (1883), 12 L. R. Ir. 113.—**IR.**

**PART VII. SECT. 15, SUB-SECT. 4.—C.**

**4431** l. *Stowage on deck.*]—Where it is the usage of the trade to carry a deck cargo in inland navigation, & such usage is known to the shipper, he cannot hold the master or owner responsible for a part of the deck cargo swept off in a storm, the bill of lading excepting the dangers of navigation.—STEPHENS *v.* MCDONELL (1842), 3 Ont. Dig. 6445.—**CAN.**

k. *Time for bringing freight alongside ship.*]—Where no time is fixed for the bringing of freight alongside the ship, the carrier, according to the usage of trade in the port of Montreal, has a right to call for the freight when he needs it, in order to complete loading of cargo in time for the regular sailing of the ship. A steamship was to take a barge load of deals, & fair warning was given that 7 *a.m.* on a day named would be the last time permitted for the barge to come alongside. The barge did not come alongside till 1.30 *p.m.*, at which time the ship was preparing to take cattle on board to complete her cargo, preparatory to sailing:—*Held:* the carrier was justified in refusing to take the deal.—TAYLOR *v.* CANADA SHIPPING CO. (1888), M. L. R. 4 S. C. 371.—**CAN.**

l. *Manner of loading.*]—The words "to be loaded as customary at Sydney" apply to the manner of loading only, *e.g.*, by means of lighters or by crane, & do not import into the contract a custom regulating the order in which vessels are to be loaded.—

inconsistent with the terms expressed by the parties, & would not explain, but vary the contract.—MOWBRAY, ROBINSON & CO. *v.* ROSSER (1922), 91 L. J. K. B. 524; 126 L. T. 748; 38 T. L. R. 413; 66 Sol. Jo. 315, C. A.

**"Regular turn."**]—*See* Sub-sect. 4, B., *ante*.

*D. Unloading.*

*(a) In General.*

**4441. Duty of consignee to pack & look after goods—Ship undergoing quarantine—Arrival from Turkey.**]—DUNNAGE *v.* JOLLIFFE (1789), cited in Abbott's Merchant Shipping, 14th ed., p. 565.

**4442. Guarding goods loaded into lighter—Custom of river Thames.**]—By the custom of the river Thames the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, & cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them.—CATLEY *v.* WINTRINGHAM (1792), Peake, 202; 170 E. R. 129, N. P.

**4443. Notice of arrival—Newcastle.**]—HOULDER *v.* GENERAL STEAM NAVIGATION CO., No. 3698, *ante*.

**4444. Supply of barges—Separate parcels under one bill—London.**]—POLLITZER *v.* S.S. CASCAPEDIA (1886), 2 T. L. R. 413, D. C.

**4445. Method of discharge—By dock company's servants at quay—Assortment—London.**]—THE CLAN MACDONALD, No. 3806, *ante*.

**4446. —— —— Liverpool.**]—THE JAEDEREN, No. 3599, *ante*.

**4447. Expenses of discharge from ship's hold—Ipswich.**]—KEARON *v.* RADFORD & CO. (1895), 11 T. L. R. 226.

**4448. "Alongside" — Cargo "lumped" on quay.**]—STEPHENS *v.* WINTRINGHAM, No. 4379, *ante*.

**4449. —— Sunderland.**] — Defts. chartered a steamer of pltfs. to carry a cargo of pit props from the Baltic to Sunderland. The charterparty provided (*inter alia*) that the steamer should be discharged according to the custom of the port, & that the cargo should be taken from alongside the steamer at charterers' expense as customary. The cargo arrived at Sunderland in due course, & pltfs. now sued to recover balance of freight. Defts. claimed to retain certain expenses which they had been put to in connection with the discharge of the cargo, & paid the remainder of the sum claimed into ct. At the point in Sunderland docks where the pit props were unloaded there were lines of railway parallel with, & close to, the edge of the quay; & as the dock authority would not allow those lines to be obstructed it was necessary that the pit props, after being discharged on to the quay, should be moved back away from the steamer to a piece of vacant land clear of the railway lines. Defts. contended that by a custom of the port the expense of moving the pit props back must be borne by pltf. shipowners, & also that the words in the charterparty which bound defts. to take the goods "from alongside as customary" had a customary meaning at Sunderland, & that "from alongside" meant "from some point on the quay clear of the railway lines":—*Held:* the evidence failed to establish either ground of defence, & the action therefore succeeded.—AKT. DAMPFSSKIBSSELSKABET PRIMULA *v.* HORSLEY (GEORGE) & CO., LTD. (1923), 40 T. L. R. 11; 68 Sol. Jo. 253.

**Exclusion of custom of port—By special stipulation.**]—*See* Nos. 3626, 3630, 3631, *ante*.

*(b) Incidence of Port and Dock Charges, etc.*

**4450. Pressing wool.**]—COCKBURN *v.* ALEXANDER, No. 1902, *ante*.

**4451. Loading lighters — London.**] — PETROCOCHINO *v.* BOTT, No. 3597, *ante*.

**4452. Stacking — Hull.**] — HOLMAN *v.* WADE (1877), *Times*, May 11, C. A.

*Annotations:*—**Apprvd.** Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397. **Apld.** Rederi Akt. Acolus *v.* Hillas (1925), 95 L. J. K. B. 103. **Refd.** The Nifa, [1892] P. 411; Mowbray, Robinson *v.* Rosser (1922), 91 L. J. K. B. 524.

**4453. Contribution to overtime of lightermen—London.**]—Pltf. alleged that, by a custom of the river Thames, where a "foreign" or "oversea" cargo of sugar or similar heavy goods was discharged into lighters, the lightermen were entitled to be paid a shilling an hour for working overtime by the persons who got the benefit of the overtime work, in addition to the payment for overtime which the lightermen received from their employers under Lord Brassey's award:—*Held:* the alleged custom was unreasonable & was not proved.—GREY *v.* BUTLER'S WHARF, LTD. (1898), 14 T. L. R. 217; 3 Com. Cas. 67.

**4454. Trucking & piling—Liverpool.**]—Bills of lading provided that certain currants were "to be delivered from the ship's deck when the ship's responsibility shall cease. . . . Simultaneously with the ship being ready to unload the said goods . . . the consignee is hereby bound to be ready to receive the goods from the ship's side, & in default thereof the master of the agent of the ship is authorised" to enter, land, & warehouse them at the expense of the consignee:—*Held:* (1) a custom, that in the discharge of dried fruit cargoes the charges for trucking from the shed & piling in the transit-shed are to be paid for by the ship, was good, as it did not contradict the bills of lading, but merely annexed an incident to them; (2) these charges were not included in the all-round charge made by the master porters under the Mersey Docks Acts & the bye-laws of the Mersey Docks & Harbour Board.—CARDIFF S.S. CO., LTD. *v.* JAMESON (1903), 88 L. T. 87; 19 T. L. R. 159; 9 Asp. M. L. C. 367, D. C.

**4455. Moving & piling — Sunderland.**] — AKT. DAMPFSSKIBSSELSKABET PRIMULA *v.* HORSLEY (GEORGE) & CO., LTD., No. 4449, *ante*.

**4456. Charge for use of quay — Santos.**] — SOCIETA ANONIMA UNGHERESE DI ARMAMENTI MARITTIMO *v.* HAMBURG SOUTH AMERICAN S.S. CO., No. 1744, *ante*.

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GARDINER *v.* MACFARLANE, MCCRINDELL & CO., THE LISMORE (1893), 20 R. (Ct. of Sess.) 414; 30 Sc. L. R. 541.—**SCOT.**

**m.** *Expenses of loading.*]—GLENGARNOCK IRON & STEEL CO., LTD. *v.* COOPER & CO. (1895), 22 R. (Ct. of Sess.) 672; 32 Sc. L. R. 546; 3 S. L. T. 36.—**SCOT.**

**PART VII. SECT. 15, SUB-SECT. 4.—D. (a).**

**n.** *Discharging certain quantity per day—Dublin.*]—There is no established custom of the port of Dublin to discharge cargoes of steamers at an average rate of 350 tons per day, calculated on the whole period of discharge.—ABERDEEN GLEN LINE S.S. CO. *v.* MACKEN, THE GAIRLOCH, [1899] 2 I. R. 1; 32 I. L. T. 33.—**IR.**

**o.** *Removal from custody of landing agent.*]—Where the existence of a custom of the port of Table Bay was proved to show that when goods were removed from a landing agent's custody, the removal was taken as a proof that the goods were in good order, & as extinguishing the liability of the landing agent:—*Held:* the custom did not bind the ct., which would consider all the circumstances of the case; but the existence of this custom threw the whole *onus* of proof on the person who alleged that the goods had been damaged while in the landing agent's care.—DUKE & CO. *v.* MCKENZIE & CO. (1898), 15 S. C. 390.—**S. AF.**

*Sect.* 15.—*Customs and usages in relation to carriage of goods: Sub-sect.* 4, *D.* (*b*), (*c*) & (*d*).]

**Stacking timber on quay.**]—*See* Nos. 4470, 4474, *post.*

**Delivery of timber into barges overside.**]—*See* Nos. 4467, 4470, *post.*

*Compare* No. 2958, *ante.*

(*c*) *Grain Cargo.*

**4457. Rate of discharge—Two hundred tons per day—Bristol.**]—THE COUNTY OF SALOP (1886), cited 92 L. T. at p. 331; 21 T. L. R. at p. 247; 10 Com. Cas. at p. 81.

*Annotation:*—**Consd.** Ropner *v.* Stoate Hosegood (1905), 10 Com. Cas. 73.

**4458. —— Five hundred tons per day—Bristol.**]—ROPNER & CO. *v.* STOATE, HOSEGOOD & CO., No. 4347, *ante.*

**4459. Discharge overside—Where grain in bulk—Grain put in sacks in hold—Duty of merchant to supply sacks.**]—BUDGETT & CO. *v.* BINNINGTON & CO., No. 3609, *ante.*

**4460. —— —— —— Adjustment of account—Hull.**]—A cargo of wheat in bags was shipped on pltfs.' steamer from Australian ports to Hull by several consignors, in parcels, for several consignees, including both deft. cos. & on the arrival of the steamer at Hull some of the wheat had escaped from the bags & could not be identified as having come from any particular parcel. Pltfs., in the course of discharge, caused any slack bags to be filled with the loose grain & delivered to each of the consignees in proper number of bags provisionally & subject to account, & at the close of the discharge ascertained the proportion which the total weight of the bags discharged bore to the total bill of lading weights, & in the case of any consignee who had received less than his proper proportion, made up the deficiency as far as possible out of the loose grain. In case of dispute the shipowner made out a *pro rata* statement, showing all the proportions to be delivered. Although each of deft. companies had received its proper number of bags first deft. co. alleged the delivery to them to be 5 tons short, & the delivery to second deft. co. to be the same amount in excess, of their proper respective quantities. In an action by pltfs. against first deft. co. for freight & in the alternative against second deft. co. for the return of wheat delivered to the second instead of to first deft. co., first deft. co. counterclaimed against their co-defts. for wheat delivered to, & wrongly retained by, the latter. The judge found, upon the evidence, that pltfs. in making delivery as above described had acted in accordance with a custom of the Port of Hull, & that by this custom any consignee who had provisionally received more than his proper share had received the excess to the use of those consignees who were still in deficiency & was under an obligation to deliver it to such consignees on demand. He also found that the *pro rata* statement was binding on all consignees. He accordingly gave judgment for pltfs. against first deft. co. & for first deft. co. on their counterclaim against their co-defts.:—*Held:* the judge's decision must be affirmed, on the grounds that there was evidence to support the judge's finding as to the custom & that it was neither unreasonable nor uncertain & was therefore valid in law & that any consignee having knowledge of the custom was under an implied contract to redeliver to any other such an amount as the proportional distribution required, & on the ground that, whether there was sufficient evidence of a clear & uniform custom or not, second deft. co. had full cognisance of the method of dealing with wheat at the Port of Hull, & as they allowed loose grain which was the joint property of all the consignees to be placed in their bags, the law would raise an implied promise on their part that they would redeliver to consignees whose weight was short such a quantity as was shown by the *pro rata* statement to be the proper quantity to be delivered.—PENINSULAR & ORIENTAL STEAM NAVIGATION CO., LTD. *v.* LEETHAM (H.) & SONS, LTD. & KEIGHLEY, MAXSTED & CO. (1915), 32 T. L. R. 153, D. C.

**4461. —— Consignee weighing cargo on board—& paying charges—London.**]—Pltfs., shipowners, alleged that by a custom of the Port of London, when a grain cargo in bags was discharged overside, it was the duty of the consignee to give an order to the dock co., to weigh the cargo on board & to pay the dock co.'s charges for so doing:—*Held:* there was no such custom as alleged.—MARWOOD *v.* TAYLOR (1901), 17 T. L. R. 565; 6 Com. Cas. 178, C. A.

*Annotation:*—**Refd.** Gulf Line *v.* Laycock (1901), 7 Com. Cas. 1.

**4462. Discharge on quay—No demand within twenty-four hours by consignee—London.**]—It is clear that there is a custom, perfectly well known, that when grain arrives in the Port of London, whether in bulk or in bags, & delivery of it is not demanded by the consignees within twenty-four hours after the ship's arrival, the ship is entitled to discharge on the quay (HUDDLESTON, B.).—ASTE, SON & KERCHEVAL *v.* STUMORE, WESTON & CO. (1884), 1 Cab. & El. 319; *on appeal*, 1 Cab. & El. 321, C. A.

**4463. "Whipping."**]—GALLAHER *v.* CLYDESDALE SHIPOWNERS CO., LTD., No. 4352, *ante.*

**4464. Custom of Immingham.**] — UNITED STATES SHIPPING BOARD *v.* WESTROPE & CO. (1924), 19 Lloyd. L. R. 246.

(*d*) *Timber Cargo.*

**4465. Beginning of lay days—Liverpool.**] — NORDEN S.S. CO. *v.* DEMPSEY, No. 3928, *ante.*

**4466. Delivery overside — Middlesbrough.**] — THIIS *v.* BYERS, No. 3676, *ante.*

**4467. —— Incidence of expense of stowage in barges—London.**]—FENWICK *v.* HOWARD (1890), *Times*, June 23.

*Annotations:*—**Refd.** Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70; Glasgow Navigation Co. *v.* Howard (1910), 102 L. T. 172.

**4468. —— —— ——.**]—DUNDEE LOCH LINE CO. *v.* HOWARD BROTHERS & CO. (1896), 2 Com. Cas. 73, n.

*Annotations:*—**Consd.** Akt. Helios *v.* Eckman (1897), 2 Com. Cas. 70. **Refd.** Glasgow Navigation Co. *v.* Howard (1910), 102 L. T. 172.

**4469. —— —— ——.**]—AKT. HELIOS *v.* EKMAN & CO., No. 2974, *ante.*

**4470. —— —— ——.**]—Pltfs.' steamer was chartered for the conveyance of a cargo of timber from Archangel to London, the charterparty providing, "The cargo to be brought to & taken from alongside the steamer at the charterer's risk & expense as customary." Defts. were indorsees

**PART VII. SECT. 15, SUB-SECT. 4.—D. (d).**

**p.** *Chaining, rafting & measuring—Belfast.*]—A cargo consisted of log timber to be delivered at the port of Belfast, & a custom of that port was proved to the effect that the delivery of log timber to the consignee was to be made after the ship had chained & rafted the timber, & it had been measured by the official measurer:—*Held:* the consignee, & not the shipowner, was liable to pay the expense of such rafting; & as the measuring was for the benefit of both shipowner & consignee, the latter was not entitled to waive the chaining & measuring & insist on the timber being delivered log by log over the vessel's side.—NORTHMOORE S.S. CO. *v.* HARLAND & WOLFF, LTD., [1903] 2 I. R. 657.—**IR.**

of bills of lading which incorporated the terms of the charterparty. On arrival pltfs. discharged part of the cargo on to the quay & stacked it there & discharged part of it into lighters & stowed it in the lighters, & they brought this action, alleging that as defts. did not take the cargo from alongside the steamer they, pltfs., had had to incur the expense of stacking on the quay & of stowage in the lighters. Defts. pleaded that by the custom of the Port of London the shipowners were bound to bear the cost of unloading & stacking timber on the quay alongside the ship, &, in the case of overside discharge, the cost of delivery & stowage in the lighters :—*Held :* by the custom in question the shipowners were under an obligation to bear all costs of unloading & stacking on the quay & of delivery & stowage in the lighters, & as there was no inconsistency between the custom & the charterparty the action failed.—SMITH, HOGG & CO., LTD. *v.* BAMBERGER (LOUIS) & SONS (1928), 44 T. L. R. 659, C. A.

**4471. —— Liability for improper stowage in barge—London.**]—AKT. HELIOS *v.* EKMAN & CO., No 2974 *ante*.

**4472. —— Sufficiency of craft & men—London.**]—By the custom & practice of the Port of London in the case of cargoes of lumber, including both Baltic & pitch pine lumber, the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, & is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein. The shipowner is bound to do the whole work of delivering the goods into the craft & of stowing the goods therein in the reasonable & ordinary manner, so that the goods may not be damaged or imperilled, & so that the craft may be loaded to the usual & reasonable extent & may be properly & safely navigable.—GLASGOW NAVIGATION CO., LTD. *v.* HOWARD (W. W.) BROTHERS & CO. (1910), 102 L. T. 172 ; 26 T. L. R. 247 ; 11 Asp. M. L. C. 376 ; 15 Com. Cas. 88.

*Annotations :*—**Distd.** Palgrave, Brown *v.* S.S. Turid, [1922] 1 A. C. 397. **Refd.** Rederi Akt. Aeolus *v.* Hillas (1925), 95 L. J. K. B. 103.

**4473. —— Work outside ship—London.**]—BRENDA S.S. CO. *v.* GREEN, No. 4363, *ante*.

**4474. Lumping on quay—Incidence of expense—Grimsby.**]—STEPHENS *v.* WINTRINGHAM, No. 4379, *ante*.

**4475. —— —— West Hartlepool & Sunderland.**]—Pltfs. claimed from defts. the cost of discharging cargoes of sawn goods & pit props, of which defts. were consignees, at West Hartlepool & Sunderland. The goods were carried under the terms of the "Scanfin" charterparty, 1899, by which it is provided that the cargo shall be "loaded & discharged with customary dispatch . . . according to the custom of the respective ports. . . . Cargo to be brought to & taken from alongside at the charterer's risk & expense as customary." In some cases an additional clause was added, by which the shipowner was required to employ the charterer's stevedores & pay the usual fee & cost only.

At the ports of West Hartlepool & Sunderland timber is discharged either by the ships' tackle or by means of shore cranes owned by the dock co. In either case, the cargo is swung out from the ship in a sling, which is met & released on shore by stevedores' gangs. In some cases the sling containing the cargo is lowered into railway trucks standing on the railway along the quay, in other cases it is carried back by the stevedores' gangs to merchants' allotted cargo spaces in rear of the discharging berth. In either event the cargo, after release from the crane tackle, requires to be stowed in the wagon or stacked upon the quay. Rates are charged by the stevedores inclusive of the whole of these operations at a fixed sum per standard, & stevedores' accounts made up on this basis are commonly submitted to & paid by the shipowners or their agents.

Defts. contended that they were not liable, under the terms of the charterparty, to pay any part of the stevedores' charges, since, by the custom of the ports, "alongside" meant on the quay, & if part of the stacking space was in this sense "alongside," then the whole space must also be alongside ; alternatively, they contended that there was a custom for the shipowners to pay the fixed sum charge per standard, inclusive of the whole operation of discharge & stacking cargo :—*Held :* (1) the words "cargo to be discharged according to the custom of the respective ports" related only to the use of dispatch in the process of discharge, &, any custom not consistent with the express terms of the charterparty, such as the custom alleged, being excluded, defts. were bound to pay such proportion of the cost of discharge as represented the operations performed after the cargo had been put at the disposal of the receiver by loosing of the sling ; (2) the additional clause requiring the ship to employ charterer's stevedores & pay the usual fee & cost only did not affect the rights of the parties under the charterparty ; (3) a custom for the shipowners to pay a fixed sum per standard inclusive of all the operations of discharge had not been made out.—THE RENSFJELL, THE ORNESFJELL, THE UPPLAND, THE FRITIOFF, THE SVEIN JARL (1924), 131 L. T. 764 ; 40 T. L. R. 458 ; 16 Asp. M. L. C. 438.

*Annotation :*—**Apld.** Akt. Dampskibs Steinstad *v.* Pearson (1927), 137 L. T. 533.

**4476. —— —— London.**]—SMITH, HOGG & CO., LTD. *v.* BAMBERGER (LOUIS) & SONS, No. 4470, *ante*.

**4477. Provision of suitable berth—London.**]—DAHL *v.* NELSON, DONKIN & CO., No. 3471, *ante*.

**4478. —— Hull.**]—A charterparty provided (*inter alia*) that the cargo was to be discharged as fast as the steamer could deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. A custom was proved which threw on the charterers & receivers of cargo a duty to provide or arrange for the steamship, on or before her arrival in dock, a vacant, available, & suitable berth to which she could forthwith proceed, & to supply & have ready a clear quay space the full length of the steamer, & for a sufficient & continuous supply of bogies :—*Held :* such a custom was not unreasonable nor inconsistent with the express terms of the charterparty.—AKT. HEKLA *v.* BRYSON, JAMESON & CO. (1908), 100 L. T. 155 ; 25 T. L. R. 168 ; 11 Asp. M. L. C. 186 ; 14 Com. Cas. 1.

*Annotation :*—**Refd.** Van Liewen *v.* Hollis Bros. & Co., Ltd. (1919), 89 L. J. P. 86.

**4479. —— ——.**]—VAN LIEWEN *v.* HOLLIS BROTHERS & CO., LTD., No. 3747, *ante*.

**4480. Provision of quay space—Hull.**]—AKT. HEKLA *v.* BRYSON, JAMESON & CO., No. 4478, *ante*.

**4481. —— ——.**]—VAN LIEWEN *v.* HOLLIS BROTHERS & CO., LTD., No. 3747, *ante*.

**4482. Provision of bogies—Hull.**]—BEATLEY *v.* BRYSON, JAMESON & CO. (1897), cited 25 T. L. R. at p. 168.

*Annotations :*—**Overd.** Van Liewen *v.* Hollis, [1920] A. C. 239. **Refd.** Akt. Hekla *v.* Bryson, Jameson (1908), 25 T. L. R. 168

*Sect. 15.—Customs and usages in relation to carriage of goods: Sub-sect. 4, D. (d) & (e), & E.; sub-sect. 5, A. & B. (a), (b), (c), (d), (e), (f) & (g); sub-sect. 6.]*

**4483.** —— ——.]—AKT. HEKLA *v.* BRYSON, JAMESON & Co., No. 4478, *ante.*

**4484.** —— ——.]—VAN LIEWEN *v.* HOLLIS BROTHERS & Co., LTD., No. 3747, *ante.*

**4485.** —— ——.]—A steamer was chartered to defts. to carry a cargo of timber from the Baltic to Hull. A clause in the charterparty provided that "The cargo to be loaded & discharged with customary steamship dispatch as fast as the steamer can receive & deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports . . . the cargo to be brought to & taken from alongside the steamer at the charterers' risk & expense as customary." The steamer discharged her cargo of timber at Hull, but defts. did not take any of the cargo from alongside the steamer, & pltfs., the shipowners, were obliged to remove the cargo from alongside the steamer & place it on bogies. They brought an action to recover from defts. the cost of doing so. Defts. relied on the above clause, & refused to pay on the ground that, by the custom of the port of Hull, the expense in question was borne by the shipowners. The shipowners contended that in spite of the custom the expenses in question were thrown on the charterers by the words of the charterparty:—*Held:* the custom of the port was inconsistent with the express terms of the charterparty, & therefore the expense of removing the cargo from alongside the steamer & placing it on bogies should be borne by the charterers.—REDERI AKT. ACOLUS *v.* HILLAS (W. N.) & Co. (1926), 96 L. J. K. B. 186; 136 L. T. 385; 17 Asp. M. L. C. 193; *sub nom.* HILLAS (W. N.) & Co., LTD. *v.* REDERI AKT. AEOLUS, 43 T. L. R. 67; 32 Com. Cas. 69, H. L.

**4486. Suspension of unloading on wet days & on Saturday afternoon—Newport.**]—LOVE & STEWART, LTD. *v.* ROWTOR S.S. Co., LTD., No. 1712, *ante.*

**4487. To erect staging—At expense of shipowners—Yarmouth.**]—THE NIFA, No. 3635, *ante.*

**4488.** —— —— ——.]—PALGRAVE, BROWN & SON, LTD. *v.* S.S. TURID, No. 4394, *ante.*

**4489. Usage to discharge ninety standards per day—Sharpness.**]—SEA S.S. Co., LTD. *v.* PRICE, WALKER & Co., LTD., No. 4343, *ante.*

*(e) Lightening Vessel.*

**4490. Lowestoft.**]—THE ALHAMBRA, No. 3514, *ante.*

**4491. Sharpness.**]—NIELSEN *v.* WAIT, No. 3555, *ante.*

**4492.** ——.]—REYNOLDS & Co. *v.* TOMLINSON, No. 3510, *ante.*

**4493. Dantzig.**]—HERRING *v.* WARD, No. 3894, *ante.*

**4494. Hamburg.**]—HAYTON *v.* IRWIN, No. 4393, *ante.*

*E. Other Usages.*

**4495. Coasting trade—Delivery of goods for carriage.**]—COBBAN *v.* DOWNE, No. 2967, *ante.*

**4496.** —— **Time for commencing discharge.**]—HOULDER *v.* GENERAL STEAM NAVIGATION Co., No. 3698, *ante.*

**4497. Ship consigned to charterer's agents in China—Right of agents to procure charter or cargo—Payment of brokerage.**]—PHILLIPPS *v.* BRIARD, No. 4383, *ante.*

**4498. Ship addressed to broker—Reporting ship.**]—BRADLEY *v.* GODDARD (1863), 3 F. & F. 638.

**4499. Lighterage—Limitation of liability—London.**]—Pltfs. received in London a quantity of lard from America. They employed defts. to store the lard for them in a warehouse & to lighter it from the ship to the warehouse. Defts. were not common carriers & had no lighters of their own, & could only convey the lard to the warehouse by employing lightermen. Pltfs. sued defts. for negligence whereby the lard had been damaged during the lighterage, & for negligence whereby it had been damaged during the storage:—*Held:* (1) on the facts, defts. had been negligent both in relation to the lighterage & the storage, but (2) the ct. must take judicial notice of the fact that in the Port of London lighterage is only undertaken subject to a clause which protects the lighterman from loss or damage to the goods from any cause whatever.—ARMOUR & Co., LTD. *v.* TARBARD (C.), LTD. (1920), 37 T. L. R. 208.

**Contract signed by agent.**]—*See* AGENCY, Vol. I., pp. 635–637, 662, Nos. 2576–2590, 2773.

**Lien—Liverpool.**]—*See* No. 4054, *ante.*

**General average—Jettison.**]—*See* Nos. 4213–4215, *ante.*

—— **Adjusters.**]—*See* No. 4332, *ante.*

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SUB-SECT. 5.—CUSTOM OF THE PORT.

*A. In General.*

**Effect of usage on contract.**]—*See* Nos. 4362, 4363, *ante.*

**Admissibility of evidence—Inconsistency with general law.**]—*See* No. 4367, *ante.*

—— **Where consistent with contract.**]—*See* Nos. 4368–4371, *ante.*

—— **To explain terms.**]—*See* Nos. 4373–4379, *ante.*

—— **Where inconsistent with contract.**]—*See* Nos. 4387–4391, *ante.*

*B. Customs of Particular Ports.*

*(a) London.*

**4500. As to unloading—Unloading steamers at Victoria Docks.**]—PETROCOCHINO *v.* BOTT, No. 3597, *ante.*

**4501.** —— **Steamer with general cargo—Using docks—Unloading on quay.**]—MARZETTI *v.* SMITH & Co., No. 3790, *ante.*

——.]—*See* Nos. 4442, 4414, 4445, *ante.*

**4502. Lighterman—Lighterman's receipts—Verifying marks & numbers.**]—There is no custom in the London docks requiring a lighterman, employed by consignees to take delivery of goods landed on quay in bulk, to give a receipt to the ship stating that the marks & numbers of the

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**PART VII. SECT. 15, SUB-SECT. 4.—D. (e).**

q. *Glasgow.*]—By charterparty it was provided that a vessel should "proceed to a safe port, or as near thereunto as she may safely get, & lay afloat at all times of tide." The master was directed to go to Glasgow, but on arriving at the Tail of the Bank, off Greenock, it was found that the vessel drew more water than she could get in Glasgow harbour at all times of the tide. The reference to the custom of the port was deleted in the charterparty:—*Held:* the master was bound to allow the consignees to lighten the vessel at the Tail of the Bank, this being reasonable & customary.—HILLSTROM *v.* GIBSON & CLARK (1870), 8 Macph. (Ct. of Sess.) 463; 22 L. T. 248.—**SCOT.**

**PART VII. SECT. 15, SUB-SECT. 4.—E.**

r. *Fruit trade.*]—HART *v.* PEARSON & BANK OF MONTREAL (1897), Q. R. 12 S. C. 540.—**CAN.**

t. *Opium trade.*]—According to custom the captain on delivering opium on board receiving ship at Cum-sing-moon should give notice to consignees. Shipowners are liable for the loss of the opium through master's neglect of this duty.—THE LANCEFIELD, SEUJEERAM *v.* JARDINE, MATHESON & Co. (1858), 6 L. T. 257.—**HONG KONG.**

goods delivered to him correspond with the marks & numbers in the bill of lading.—FRIEDLAENDER *v.* SHAW, SAVILL & ALBION CO., LTD. (1897), 13 T. L. R. 252 ; 2 Com. Cas. 124.

—— **Contribution towards overtime.**]—*See* No. 4453, *ante*.

—— **Limitation of liability.**]—*See* No. 4499, *ante*.

**As to freight.**]—*See* No. 4409, *ante*.

**As to grain cargo.**]—*See* Nos. 4461, 4462, *ante*.

**As to timber cargo.**]—*See* Nos. 4467–4469, 4472. 4473, 4476, *ante*.

**As to proof.**]—*See* No. 4359, *ante*.

(*b*) *Liverpool.*

**As to unloading at docks.**]—*See* No. 4446, *ante*.

**As to freight.**]—*See* Nos. 4412, 4413, *ante*.

**As to timber cargo.**]—*See* No. 4465, *ante*.

**As to incidence of charges.**]—*See* No. 4454, *ante*.

(*c*) *Humber Ports.*

**As to grain cargo.**]—*See* Nos. 4460, 4464, *ante*.

**As to incidence of charges.**]—*See* No. 4452, *ante*.

**As to loading.**]—*See* No. 4435, *ante*.

**As to timber cargo.**]—*See* Nos. 4348, 4474, 4478, 4479. 4484, 4485, *ante*.

(*d*) *Tyne Ports.*

**As to unloading.**]—*See* No. 4443, *ante*.

**As to timber cargo.**]—*See* No. 4475, *ante*.

**"In regular turn."**]—*See* Nos. 4419–4421, 4425, *ante*.

**As to incidence of charges.**]—*See* Nos. 4378, 4449, *ante*.

(*e*) *Bristol Channel Ports.*

**As to grain cargo.**]—*See* Nos. 4457, 4458, *ante*.

**As to timber cargo.**]—*See* Nos. 4486, 4489, *ante*.

**Lightening vessel.**]—*See* Nos. 4491, 4492, *ante*.

(*f*) *Other Ports in British Isles.*

**4503. West Hartlepool—Alleged custom not to use all facilities of port.**]—FAWCETT & CO. *v.* BAIRD & CO. (1900), 16 T. L. R. 198.

—— **Timber cargo.**]—*See* No. 4475, *ante*.

**Ipswich—As to unloading.**]—*See* No. 4447, *ante*.

**The Nob, River Exe—In regular turn.**]—*See* No. 4427, *ante*.

**Lowestoft—Lightening vessel.**]—*See* No. 4490, *ante*.

**Middlesbrough—Timber cargo.**]—*See* No. 4466, *ante*.

**Yarmouth—Timber cargo.**]—*See* Nos. 4487, 4488, *ante*.

**Sharpness—Timber cargo.**]—*See* No. 4489, *ante*.

(*g*) *Ports Outside British Isles.*

**Algiers—Regular turn.**]—*See* No. 4424, *ante*.

**Australian ports—Freight.**]—*See* No. 4408, *ante*.

**Bombay—Loading.**]—*See* No. 4429, *ante*.

**East London—Regular turn.**]—*See* No. 4426, *ante*.

**Dantzig—Lightening vessel.**]—*See* No. 4493, *ante*.

**Gulf of Bothnia—First open water.**]—*See* No. 4432, *ante*.

**Hamburg—Lightening vessel.**]—*See* No. 4494, *ante*.

**4504. Iquique—Surf days.**]—A charterparty, under which pltfs.' ship was chartered to carry a cargo of lumber from Vancouver to Iquique, provided that discharge was "to be given with dispatch according to the custom of the port of discharge, but not less than thirty '*mille*' per working day." In an action by pltfs. against the holders of a bill of lading for the cargo, which incorporated the conditions of the charterparty, for demurrage of the ship through default of defts. in not discharging at least thirty "*mille*" per working day, defts. in their statement of defence pleaded with regard to a certain number of days in respect of which demurrage was claimed, in substance, as follows: that pltfs. or their agents knew, or ought to have known, the customs of the port of Iquique when they signed the charterparty ; that the customary mode of discharge at Iquique is that ships lie in the bay, & are discharged by means of lighters, which carry the cargo from the ship to the beach ; that the same number of days as before mentioned, out of the period between the commencement of the lay days at Iquique & the completion of the discharge of the ship, were "surf days," *i.e.*, days on which the surf on the beach at Iquique is so heavy that "the operation of unloading vessels in the bay is not only dangerous to life & property, but is in fact commercially impracticable" ; that "by the established custom of the port of Iquique 'surf days' are not working days, & persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on 'surf days,' *i.e.*, days which appear as 'surf days' in the register book kept by the captain of the port at his office" ; & that, by the custom of the port of Iquique & of the trade of importing lumber to that port, such days are not within the meaning of the term "working days" as used in such a charterparty as that in question:—*Held:* on the assumption that the allegations of fact in the defence were true, the alleged custom was a valid custom, & the words "working day" in the charterparty must be interpreted in accordance with it, & defts. were therefore entitled to judgment.—BRITISH & MEXICAN SHIPPING CO., LTD. *v.* LOCKETT BROTHERS & CO., LTD., [1911] 1 K. B. 264 ; 80 L. J. K. B. 462 ; 103 L. T. 868 ; 11 Asp. M. L. C. 565 ; 16 Com. Cas. 75, C. A.

**4505. Mobile—Cargo at risk of merchant.**]—MOREWOOD *v.* POLLOK (1853), as reported in 7 L. T. 166.

**Newcastle, N.S.W.—Loading.**]—*See* Nos. 4436, 4437, *ante*.

**4506. Novorossisk—Lay days.**]—ANGLO-HELLENIC S.S. CO., LTD. *v.* DREYFUS (LOUIS) & CO., No. 4358, *ante*.

**Onega & White sea ports—Loading timber.**]—*See* No. 4438, *ante*.

**4507. Port Phillip—Pressing wool at cost of shipowner.**]—COCKBURN *v.* ALEXANDER, No. 1902, *ante*.

**Santos—Incidence of charge.**]—*See* No. 4456, *ante*.

**Sydney—Freight.**]—*See* No. 4406, *ante*.

**Trinidad—Loading.**]—*See* Nos. 4428, 4439, *ante*.

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SUB-SECT. 6.—USAGES OF PARTICULAR TRADES.

**Coal trade.**]—*See* Sub-sect. 4, B., *ante*, &, CUSTOM & USAGES, Vol. XVII., pp. 56, 57, Nos. 609–615.

**Corn trade.**]—*See* Sub-sect. 4, D. (*c*), *ante*, &, CUSTOM & USAGES, Vol. XVII., p. 58, Nos. 624–629.

**Cotton trade.**]—*See* Nos. 4374, 4407, *ante*.

**Fruit trade.**]—*See* No. 3697, *ante*.

**Grain trade.**]—*See* Sub-sect. 4, D. (*c*), *ante*, &, CUSTOM & USAGES, Vol. XVII., p. 58, Nos. 624–629.

**Iron & steel trade.**]—*See* CUSTOM & USAGES, Vol. XVII., pp. 63, 64, Nos. 673, 678, 679.

**Leather trade.**]—*See* CUSTOM & USAGES, Vol. XVII., p. 71, No. 734.

*Sect.* 15.—*Customs and usages in relation to carriage of goods: Sub-sect.* 6. *Part VIII. Sects.* 1 & 2.]

**Oil trade.**]—*See* CUSTOM & USAGES, Vol. XVII., pp. 64–66, Nos 684–690.

**Stone trade.**]—*See* CUSTOM & USAGES, Vol. XVII., p. 66, Nos. 697, 698.

**Sugar trade.**]—*See* CUSTOM & USAGES, Vol. XVII., pp. 66, 67, Nos. 700, 701.

**Tea & coffee trades.**]—*See* CUSTOM & USAGES, Vol. XVII., p. 67, Nos. 705, 706.

**Timber.**]—*See* Sub-sect. 4, D. (*d*), *ante.*

**Warehousemen & wharfingers.**]—*See* BAILMENT, Vol. III., pp. 78, 79, Nos. 169–171; CUSTOM & USAGES, Vol. XVII., p. 69, No. 715.

**Wine & spirit trade.**]—*See* CUSTOM & USAGES, Vol. XVII., p. 70, Nos. 718, 719, 722.

**Wool trade.**]—*See* CUSTOM & USAGES, Vol. XVII., p. 71, Nos. 727, 729.

# Part VIII.—Freight.

## SECT. 1.—IN GENERAL.

**4508. Freight defined.**]—(1) Freight is the reward which the law gives for carrying goods; it arises on a contract for the conveyance of merchandise; it is said to be in its nature an entire contract; so that, as a general rule, subject to some exceptions & to special agreement until the contract is completed by the delivery of the goods at the place of destination, nothing can be demanded for freight. When a ship at sea is sold, the seller is subject to an obligation as well as entitled to a profit in respect of freight accruing due, & the duty & profit may be well held to pass together with the ship, by means of which the duty is to be performed, & the profit to be acquired; nevertheless, the title to the freight & th title to the ship are, as I just said, often separate; & the argument founded on the analogy to the case of freight, does not rest on a sure foundation (LORD LANGDALE, M.R.).

(2) The cargo of a whale ship is an acquisition from time to time made by the employment of the ship & of the crew: but there is nothing in the nature of a contract for the conveyance of merchandise (LORD LANGDALE, M.R.).—LANGTON *v.* HORTON (1842), 5 Beav. 9; 11 L. J. Ch. 233; 6 Jur. 357; 49 E. R. 479.

*Annotations:—As to* (1) **Reld.** Gardner *v.* Cazenove (1856), 1 H. & N. 423. *Generally,* **Mentd.** Strong *v.* Foster (1855), 17 C. B. 201.

**4509.** ——.]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

**4510.** ——.]—DAKIN *v.* OXLEY, No. 4857, *post.*

**4511.** ——.]—Shipowner & charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid; & that such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner. A ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading & right delivery of the cargo at & after the rate of 42*s.* per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one half in cash on signing bills of lading less four months' interest at bank rate, but not less than 5 per cent. *per annum,* 5 per cent. for insurance, & 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, & the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for £500 "on freight valued at £2,000," the other for £700 on "freight payable abroad valued at £2,000." The ship was lost before entering Bombay harbour, but one half of the cargo was saved & delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:—*Held:* (1) on the proper construction of the policy the whole sum agreed upon constituted freight; half of the whole sum of that freight had been paid in England; it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; half of the whole remained to be paid abroad on right delivery of the cargo; that half had been lost through perils of the sea, & the shipowner was entitled on his policies on freight to recover as for the total loss of that half.

(2) Freight is the reward payable to the carrier for the safe carriage & delivery of goods; it is payable only on the safe carriage & delivery; if the goods are lost on the voyage, nothing is payable; & in cases where the freight is made payable at so much per ton of the goods, & part of the goods only are delivered, a proportionate part of the freight only is payable (BLACKBURN, L.J.).—ALLISON *v.* BRISTOL MARINE INSURANCE CO. (1876), 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. L. C. 178, H. L.

*Annotations:—As to* (1) **Reld.** Anderson *v.* Morice (1876), 1 App. Cas. 713; Smith, Hill *v.* Pyman, Bell, [1891] 1 Q. B. 742; Reliance Marine Insce. *v.* Duder, [1913] 1 K. B. 265. *As to* (2) **Apld.** Weir *v.* Girvin, [1900] 1 Q. B. 45.

**4512.** —— **Lump sum freight.**]—A charterparty from Riga to London provided that the ship should load a full & complete cargo of lathwood, & deliver the same on being paid freight as follows; a lump sum of £315. There was the usual exception of sea risks, & the freight was to be paid half on arrival, & the remainder on unloading & right delivery of cargo. Part of the cargo, loaded in accordance with the charterparty, was lost by perils of the sea, without any default of the master or crew:—*Held:* the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum.

The freight . . . is a stipulated gross sum to be paid for the use of the whole ship for the whole voyage. The rule is that in such a case the whole of the gross sum is payable, even although the freighter did not fully load the ship. In other

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**PART VIII. SECT. 1.**

**a.** *Deduction from freight for shortage—Recovery.*]—The master of deft.'s vessel, on the transhipment, at K., of a cargo of wheat, on its way from O. to Q., into pltf.'s vessel, gave a receipt to pltf. for the lake freight, stating that deft.'s vessel & her owner were thereby held responsible for the wheat, weighing 5,934 bushels, at Q. On arrival at Q. the cargo was found 68 bushels short. Pltf. allowed the value of that quantity to the consignee out of the river freight:—*Held:*

words, the shipowner puts his ship at the disposal of the freighter to load with a full cargo if the freighter pleases, but whether he pleases or not he is bound to pay the lump sum (BRETT, J.).—ROBINSON *v.* KNIGHTS (1873), L. R. 8 C. P. 465; 42 L. J. C. P. 211; 28 L. T. 820; 21 W. R. 683; 2 Asp. M. L. C. 19.

*Annotations:*—**Apprvd.** Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99. **Consd.** Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171. **Refd.** London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635.

**4513.** —— ——.]—WILLIAMS & CO. *v.* CANTON INSURANCE OFFICE, LTD., No. 1964, *ante*.

**4514. No provision in contract for freight—Equitable right of shipowners.**]—Though a charterparty is so formed that no freight can be recovered upon it at law, yet if the owners of the ship have a just demand equity will relieve.—EDWIN *v.* EAST INDIA CO. (1690) 2 Vern. 210; 23 E. R. 738.

**4515. Contract for cargo at fixed rate—Cargo provided at lower rate—& passage money of passengers — Total earnings exceeding stipulated freight.**]—LEWIS *v.* MARSHALL, No. 1897, *ante*.

**4516. Stop order on goods for freight — At what places to be put on.**]—When a shipbroker is instructed to put a stop order for freight upon the goods in a certain vessel not then arrived, but expected to arrive & discharge in certain docks then named, it is the duty of the broker not only to put a stop order at the docks named, but also at all places where it would be likely to be effectual.—PHILLIPS *v.* COOKES (1848), 12 L. T. O. S. 176.

**4517. Guarantee of sum as gross freight—Loss of ship & cargo—Estimated freight on cargo less than sum guaranteed—Amount of freight recoverable.**]—A. chartered a vessel from I. to L. with a full cargo of petroleum. A., being unable to supply the cargo, the owners of the vessel agreed to cancel the charterparty, & seek for another cargo, on A. guaranteeing the vessel a "sum of £900 gross freight home." The owners procured a cargo whose estimated freight would have amounted to £556 14*s*., but the vessel was lost on its way home:—*Held:* the owners were at any rate entitled to recover from A. the difference between the estimated & guaranteed freights, if not the whole freight of £900.—CARR *v.* WALLACHIAN PETROLEUM CO., LTD. (1867), L. R. 2 C. P. 468; 36 L. J. C. P. 236; 16 L. T. 460; 15 W. R. 874; 2 Mar. L. C. 517, Ex. Ch.

**4518. What amounts to freight—Sum payable on loading—Irrespective of ship's arrival.**]—The term freight in common parlance is ambiguous, & may be so applied as to mean a sum of money to be paid at all events upon the taking of goods on board to be carried on a voyage, in lieu of the expectation of earning freight upon the contingency of the ship's arrival.—ANDREW *v.* MOORHOUSE (1814), 5 Taunt. 435; 1 Marsh. 122; 128 E. R. 758.

*Annotations:*—**Folld.** Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361. **Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** How *v.* Kirchner (1857), 11 Moo. P. C. C. 21.

**4519.** —— **Cargo of whale vessel.**]—LANGTON *v.* HORTON, No. 4508, *ante*.

**4520.** —— **Sum payable on delivery—Forming part of purchase-money of cargo.**]—KEITH *v.* BURROWS, No. 4650, *post*.

**4521. Freight as incidental to ownership—Freight to be earned under charterparty.**]—Freight to be earned under a charterparty is not an incident to the ownership of the vessel; & therefore although an underwriter of a policy of insurance upon the vessel herself becomes, by abandonment to him upon a constructive total loss happening through the fault of another vessel, entitled after payment of the sum secured by the policy to every benefit accruing from the ownership of the insured vessel, he cannot claim any part of the damages recovered from the owners of the wrongdoing vessel on account of loss of freight intended to be earned by the insured vessel. Defts. being owners of a ship chartered her upon a voyage, & insured her with pltfs., & they insured the freight intended to be earned with other underwriters. Defts.' ship became a constructive total loss through a collision with the *C.* occasioned by negligence in navigating the latter vessel. Pltfs. settled with defts. for a total loss of the insured ship. No freight was earned under the charterparty. Afterwards defts. recovered from the owners of the *C.* damages for the loss of their ship & of her freight:—*Held:* pltfs. were not entitled to any part of the damages recovered from the owners of the *C.* on account of the loss of the freight intended to be earned by defts.' ship.—SEA INSURANCE CO. *v.* HADDEN (1884), 13 Q. B. D. 706; 53 L. J. Q. B. 252; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. L. C. 230, C. A.

*Annotation:*—**Apld.** The Red Sea (1895), 65 L. J. P. 9.

——.]—*Compare* Nos. 4603-4606, *post*.

**4522. Apportionment of freight—Sub-contract by shipowner.**]—OCEAN S.S. CO. *v.* NATIONAL STEAMSHIP LINE (1891), 7 T. L. R. 417, D. C.

**4523. Agreement for rebate on freight—Enforceability of agreement—Penalties attaching to payment of rebate—By law of foreign country.**]—An agreement made in British territory to allow rebates upon freights paid for the carriage of goods by sea to a foreign country cannot be repudiated, after the goods have been carried & the freights paid, on the ground that payment of the rebates would subject the shipowners to penalties under legislation of the foreign country.—TRINIDAD SHIPPING CO. *v.* ALSTON, [1920] A. C. 888; 89 L. J. P. C. 185; 123 L. T. 476; 36 T. L. R. 654; 15 Asp. M. L. C. 31, P. C.

**Tender of freight—What amounts to—Custom for payment partly by bill.**]—*See* Sect. 15, sub-sect. 4, A., *ante*.

**Hypothecation of freight.**]—*See* Part IV., Sect. 3, sub-sect. 14, *ante*.

**Lien for freight.**]—*See* Sect. 13, sub-sect. 3, *ante*.

**Usage as to freight.**]—*See* Part VII., Sect. 15, sub-sect. 4, A., *ante*

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## SECT. 2.—AUTHORITY OF MASTER TO BIND OWNERS.

**4524. General rule.**]—The master of a ship has no general authority from the owner to sign bills of lading for goods not received on board; & all persons taking a bill of lading by indorsement or otherwise have notice that his authority is limited to signing bills of lading for goods received on board.

The authority of the master of a ship is very large & extends to all acts that are usual & necessary for the use & enjoyment of the ship; but is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. . . . He may make contracts to carry goods on freight

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pltf. was not entitled to recover the amount deducted as money paid for deft., there being no request on deft.'s part express or implied.—WADDLE *v.* MCINTOSH (1857), 7 C. P. 49.—**CAN.**

**b.** *Conclusiveness of captain's receipt.*]—MCFATRIDGE *v.* CARVILL (1883), 16 N. S. R. (4 R. & G.) 286.—**CAN.**

*Sect.* 2.—*Authority of master to bind owners.* *Sect.* 3: *Sub-sect.* 1, *A.*]

but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, & acknowledge the nature & quality & condition of the goods (JERVIS, C.J.).—GRANT *v.* NORWAY (1851), 10 C. B. 665; 20 L. J. C. P. 93; 16 L. T. O. S. 504; 15 Jur. 296; 138 E. R. 263.

*Annotations:*—**Apld.** Coleman *v.* Riches (1855), 16 C. B. 104; Stagg *v.* Elliott (1862), 12 C. B. N. S. 373. **Consd.** Reynolds *v.* Jex (1865), 7 B. & S. 86; Gunn *v.* Roberts (1874), 43 L. J. C. P. 233. **Apld.** Cox *v.* Bruce (1886), 18 Q. B. D. 147; Thorman *v.* Burt, Boulton (1886), 54 L. T. 349. **Apprvd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117. **Consd.** Hambro *v.* Burnand, [1903] 2 K. B. 399; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Refd.** Udell *v.* Atherton (1861), 7 H. & N. 172; Pyman *v.* Burt (1884), Cab. & El. 207; Parsons *v.* New Zealand Shipping Co., [1901] 1 K. B. 548; Hambro *v.* Burnand (1904), 9 Com. Cas. 251; Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237; Russo-Chinese Bank *v.* Li Yau Sam, [1910] A. C. 174; Jones *v.* Oceanic Steam Navigation Co., [1924] 2 K. B. 730.

**4525. Limitation of authority—Carriage freight free.**]—Upon a contract to carry & deliver goods, the possession of the goods still remaining with deft., trover lies. *Qu.:* whether the captain of a vessel sent to earn freight has authority to contract to carry a cargo freight free.—DEWELL *v.* MOXON (1808), 1 Taunt. 391; 127 E. R. 885.

*Annotation:*—**Consd.** Reynolds *v.* Jex (1865), 7 B. & S. 86.

**4526.** —— ——.]—GRANT *v.* NORWAY, No. 4524, *ante.*

**4527.** —— **Lower freight.**]—The master of a ship has no authority to sign bills o lading for a lower rate of freight than the owner had contracted for.—PICKERNELL *v.* JAUBERRY (1862), 3 F. & F. 217, N. P.

**4528.** —— —— **As to goods actually on board.**]—M & co. of Porto Rico, chartered a ship of pltf. for a voyage from Glasgow to Porto Rico, & back, guaranteeing a full cargo home, freight to be at the rate of £4 10*s.* on the homeward cargo. The captain discharged his outward cargo, & was then ordered to proceed to another port in Porto Rico for the homeward cargo & address himself there to L. & co. After L. & co. had loaded 498 hogsheads of sugar M. & co. failed, & they refused to load any more & demanded back what was already on board. The captain thereupon entered under protest into a fresh charterparty with L. & co., by which freight at the rate of 30*s.* per ton was to be paid on the whole cargo & L. & co. then loaded 180 more hogsheads. In a special case stated by consent:—*Held:* L. & co., as agents for the charterers, had no right to take back the 498 hogsheads actually put on board under the first charterparty & the captain had no authority to vary the contract as to goods actually on board; but as the charterers had refused to ship any more goods, the captain had authority to enter into the second charterparty & the shipowner therefore had a lien on the 498 hogsheads for freight at the rate of £4 10*s.*, but on the rest of the cargo only at the rate of 30*s.* per ton.—PEARSON *v.* GÖSCHEN (1864), 17 C. B. N. S. 352; 4 New Rep. 404; 33 L. J. C. P. 265; 10 L. T. 758; 10 Jur. N. S. 903; 12 W. R. 1116; 2 Mar. L. C. 68; 144 E. R. 142.

*Annotations:*—**Consd.** Gray *v.* Carr (1871), L. R. 6 Q. B. 522. **Refd.** McLean & Hope *v.* Fleming (1871), L. R. 2 Sc. & Div. 128; *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K. B. 730.

**4529.** —— —— **As to goods to be shipped.**]—PEARSON *v.* GÖSCHEN, No. 4528, *ante.*

**4530.** —— **Assignment of freight.**] — Freight brought into the Registry was claimed, by A. & co., under a charterparty entered into at Malta between the master & them, & with a view of securing to them the payment of a debt from the shipowner; by certain mtgees. of the ship, under an assignment of freight by the master for advances on the ship's account; & by the assignees of the owner:—*Held:* (1) the master had no authority to bind his owner by the charterparty, or to make the assignment of freight; (2) consequently, the assignees were entitled to the fund in the Registry.—THE SIR HENRY WEBB (1849), 7 L. T. 224; 13 Jur. 639.

*Annotation:*—**Refd.** Reynolds *v.* Jex (1865), 7 B. & S. 86.

**4531.** —— ——.]—Pltfs. were owners of a ship, one of them being also a partner in the firm of H. & co. who acted as the ship's husband. Deft. was a merchant & ship agent at Quebec & had transactions in the way of trade with H. & co. The ship proceeded to Quebec, with instructions from H. & co. to the master to apply to deft. to charter it from thence to England. At that time H. & co. were indebted to deft. Deft. effected a charterparty in which he made the freight payable to himself at Quebec, & having received the money, retained it in liquidation of the debt due to him from H. & co. The voyage having been performed & the freight earned:—*Held:* pltfs., as owners of the ship to which the freight was incident, were entitled to recover the amount from deft. either under a special count for wrongfully making it payable to himself, or as money had & received by him to pltf.'s use.

Pltfs. are owners of the entire vessel, & it was not competent for deft. to produce the captain to execute a charterparty which excluded the right of the owners to freight, which is incident to the vessel (POLLOCK, C.B.).—WALSHE *v.* PROVAN (1853), 8 Exch. 843; 1 C. L. R. 823; 22 L. J. Ex. 355; 155 E. R. 1595.

*Annotation:*—**Apld.** Reynolds *v.* Jex (1865), 7 B. & S. 86.

**4532.** —— ——.]—The captain of a merchant ship borrowed in a foreign port a certain sum for the ship's use, in consideration of which he took home goods for the lenders, & signed bills of lading, making the freight payable to them or their assigns at the port of discharge:—*Held:* he had exceeded his authority, as improperly interfering with the shipowners' lien on the unpaid freight.—REYNOLDS *v.* JEX (1865), 7 B. & S. 86; 6 New Rep. 291; 34 L. J. Q. B. 251; 13 W. R. 968.

*Annotation:*—**Apld.** The Canada (1897), 13 T. L. R. 238.

**4533.** —— ——.]—THE CANADA (1897), 13 T. L. R. 238.

*Annotation:*—**Refd.** The Shillito (1897), 3 Com. Cas. 44.

**4534.** —— **Freight for more than quantity shipped.**]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante.*

**4535. Authority to receive payment.**]—Where a balance is due from a broker to the owner of a vessel, & is settled between the broker & the master, if the broker offers to pay it to the master by cash, but he prefers to take it by bill, such payment is good against the owner.

Upon a settlement of account between the brokers & the master, the brokers offer to pay the master the balance due to the owners by a cheque. He wishes to transmit the money to Jamaica & the brokers, at his request, establish a credit for him at a bank here having a branch bank as Jamaica, to enable him to do so. The money it paid to his order by the bank there, & the brokers accept a bill drawn by him upon them for the amount, which is paid in due course:—*Held:* the master was authorised to receive payment in that way, & the brokers were entitled to charge it against the owners.—ANDERSON *v.* HILLIES (1852), 12 C. B. 499; 21 L. J. C. P. 150; 19 L. T. O. S. 92; 16 Jur. 819; 138 E. R. 1002.

**4536. Power to sign bills of lading—At any rate of freight without prejudice to the charterparty—No reference to charterparty.**]—A time charterparty of a steamer at a monthly hire provided that the captain should sign bills of lading at any rate of freight, without prejudice to the charterparty. There was power to sublet, & a lien was given upon all cargoes & sub-freights for the charter hire. The vessel was sublet. The captain signed bills of lading as presented, showing freight paid in advance & containing no reference to the charterparty. The time charterer made default in payment of the hire:—*Held:* the captain was not negligent in signing bills of lading in such form, *semble*, he was bound to do so.—THE SHILLITO (1897), 3 Com. Cas. 44.

**4537. —— —— Different rates of freight.**]—TURNER *v.* HAJI GOOLAM MAHOMED AZAM, No. 2495, *ante*.

**4538. Institution of proceedings for freight.**]—Defts. chartered a ship to carry a cargo. The charterparty provided that the captain should sign bills of lading at any rate of freight without prejudice to the charterparty. A cargo was loaded, & bills of lading incorporating the terms of the charterparty were signed by the captain of the ship. Defts. were the shippers & also the consignees & receivers of the cargo:—*Held:* the captain had signed the bills of lading merely as agent for the owners, & was not entitled to sue defts. for freight.—REPETTO *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD., [1901] 2 K. B. 306; 70 L. J. K. B. 561; 84 L. T. 836; 49 W. R. 526; 17 T. L. R. 421; 9 Asp. M. L. C. 215; 6 Com. Cas. 129.

**4539. Authority to collect freight—Whether an assignment.**]—HARPER (H. G.) & CO. *v.* BLAND (J.) & CO., LTD., No. 4700, *post*.

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## SECT. 3.—PAYMENT OF FREIGHT.

### SUB-SECT. 1.—BY WHOM PAYABLE.

#### *A. Shipper.*

**4540. General rule.**]—GREEN *v.* DIROM (1848), 9 L. T. 302.

**4541. Goods shipped on bill of lading—Deliverable to consignee or assigns paying freight—Goods delivered without receiving freight.**]—If a ship freighted to H. is prevented by restraints of princes from arriving, & the consignees direct the master to deliver the cargo at G. & accept it there, he may maintain *assumpsit* upon an implied contract to pay freight *pro rata itineris*. If the master be prevented by the default of the consignees or restraints of princes from delivering the whole cargo there, he shall be entitled to freight *pro rata* for the part delivered. If a ship be freighted on a single voyage outwards, & be prevented from delivering her cargo: *Semble:* she shall be entitled to receive from the owner of the cargo, freight for bringing it back. Demurrage from the time of her arrival at the port of loading & notice, till the owner receives the cargo, or the master has had time to discharge it, if abandoned by the owner. The master would not be entitled, upon losing the delivery, to cast away the residue of the cargo. If the master signs a bill of lading, expressing that upon delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor:—*Semble:* the master's right to exact payment of any part of the freight from the consignee does not arise till the delivery is completed, or determined.—CHRISTY *v.* ROW (1808), 1 Taunt. 300; 127 E. R. 849.

*Annotations:*—**Consd.** Shepard *v.* De Bernales (1811), 13 East, 565. **Refd.** Domett *v.* Beckford (1833), 5 B. & Ad. 521; Argos (Cargo Ex), Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134; G. N. Ry. *v.* Swaffield (1874), L. R. 9 Exch. 132; Brunner *v.* Webster (1900), 5 Com. Cas. 167.

**4542. —— —— ——.**]—In *indebitatus assumpsit* for freight, it appeared that goods were laden in Jamaica on board pltfs.' ship, according to a bill of lading, which stated them to have been shipped by W. J. on a vessel bound for London on account of deft., & that they were to be delivered in London to the consignees, paying freight for same at the rate therein mentioned; the goods so shipped were the property of deft. The captain having delivered the goods to the consignees without receiving the freight:—*Held:* deft. was liable by law to pay the freight to the shipowners; & independently of any express contract by charterparty.—DOMETT *v.* BECKFORD (1833), 5 B. & Ad. 521; 2 Nev. & M. K. B. 374; 3 L. J. K. B. 10; 110 E. R. 883.

*Annotations:*—**Refd.** The Alan Ker, How *v.* Kirchner (1857), 30 L. T. O. S. 296; Cawthorn *v.* Trickett (1864), 12 W. R. 311; Smidt *v.* Tiden (1874), L. R. 9 Q. B. 446; Muller (London) *v.* Lethem, Same *v.* I. R. Comrs., [1927] 1 K. B. 780.

**4543. —— —— —— Effect of charterparty.**]—PENROSE *v.* WILKES (1790), cited in 13 East, at p. 570; 104 E. R. 492.

*Annotations:*—**Consd.** Shepard *v.* De Bernales (1811), 13 East, 565. **Refd.** Christy *v.* Row (1808), 1 Taunt. 300.

**4544. —— —— —— ——.**]—The usual clause in a bill of lading engaging the master of the ship to deliver the goods to the consignee or his assigns, he or they paying freight for the goods, is introduced for the benefit of the master only, & not for the benefit of the consignor; & therefore the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. Nor does it vary the case that the consignor was also the charterer of the ship.

Where the master covenanted in a charterparty to proceed with certain goods from London to Tangiers: there to apply "to the correspondents' factors, or agents of the charterer for orders, whether he was to proceed to St. Lucar or Cadiz; & that pursuant to the orders he would make a right & true delivery to the correspondents' factors, or agents of the charterer agreeably to bills of lading; & the charterer covenanted that he would pay to the master immediately on a right & true delivery of the cargo in full for the freight of the ship at a certain rate in sterling money: & afterwards bills of lading were signed & delivered, making the cargo deliverable at Tangiers & St. Lucar to J. P., the charterer's agent at Tangiers, or his assigns, he or they paying freight for the goods, so much in sterling money, at the current exchange at Cadiz on London; & the master was ordered by J. P. at Tangiers to deliver the cargo at Cadiz, by which it was averred that the master was prevented from delivering same to any of the correspondents, factors, or agents of the charterer at Tangiers or St. Lucar agreeably to the bills of lading; & did deliver it at Cadiz to

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**PART VIII. SECT. 3, SUB-SECT. 1.—A.**

*c. Goods shipped on bill of lading—Stipulation for payment of freight by consignee—Goods delivered on receipt of part payment.*]—Under a bill of lading, by which it was stipulated that freight should be paid by the consignee, the master of a general ship delivered the article to the consignee, & having received from him part payment of freight, afterwards sued the shipper for the balance of the freight still due to him:—*Held:* he was not entitled to recover it from the shipper.—WINSOR *v.* STABB (1827), 1 Nfld. L. R. 471.—**NFLD.**

*Sect. 3.—Payment of freight: Sub-sect. 1, A. & B.*]

B. P. the agent of deft. in that behalf, according to the charterparty: the master, who had not received the freight from B. P. on delivery of the cargo to him; was held entitled to recover it from the charterer, in an action of covenant upon the charterparty. For neither the fixing of the rate of exchange in the bills of lading varies this from the common rule above mentioned; nor the omission in the bill of lading of going to Cadiz, which was named in the charterparty together with Tangiers & St. Lucar; for such omission only relieved the master, who was to deliver agreeably to the bills of lading, from going to Cadiz, but did not take from him the power of going there under the charterparty. Again, B. P., who was only averred to be the agent of the charterer, is either to be considered as virtually the assign of J. P., to whom or to whose assigns the bill of lading required the delivery to be made; or J. P. must be taken, in default of making any appointment, as having refused to accept the cargo; & then the master properly delivered it to the agent of the charterer & consignor himself, so as to found the action of covenant on the charterparty.—SHEPARD *v.* DE BERNALES (1811), 13 East, 565; 104 E. R. 490.

*Annotations:*—**Apld.** Domett *v.* Beckford (1833), 5 B. & Ad. 521. **Reld.** Muller (London) *v.* Lethem, Same *v.* I. R. Comrs., [1927] 1 K. B. 780.

**4545.** —— —— —— ——.]—(1) On a bill of lading of goods "shipped by A. to be delivered to C. or his assigns, he or they paying freight"; if the goods are delivered without receiving freight, the shipper is not liable for the freight, there being no charterparty.

(2) In such a case, where the shipper afterwards promised, by writing to pay freight:—*Held:* it was a question for the jury, whether on the account between A. & C., A. was, as between them, to pay the freight; & if he had consented to do so, he was liable on the subsequent promise.—DREW *v.* BIRD (1828), Mood. & M. 156, N. P.

*Annotation:*—**Reld.** G. W. Ry. *v.* Bagge (1885), 54 L. J. Q. B. 599.

**4546.** —— —— —— **Mutual mistake as to charterparty referred to in bill.**]—Pltf., as master of a ship lying in London, entered into a charterparty with L., a shipbroker, to carry a quantity of iron at a tonnage freight. By the terms of the charterparty, freight was to be paid in London on signing bills of lading, the owner to have an absolute lien for freight. On the same day L. rechartered the ship to defts. to carry the same quantity of iron at an increased freight, with similar provisions as to the payment of & lien for freight, & with the following clause—"The brokerage of 5 per cent. is due on the execution of this charter to L., by whom the vessel is to be entered & cleared at the port of loading." L. had, however, no authority to act as broker for pltf., or to receive the freight. Neither pltf. nor defts. knew of the charterparty entered into by the other. The iron was shipped by defts., & the master signed & defts. received bills of lading, by which the iron, stated to be shipped by defts. was to be delivered to consignees or assigns, "paying freight for the goods as per charterparty." Pltf. did not claim the freight on signing the bills of lading, & delivered the cargo without insisting upon his lien. L. in the meantime obtained the freight due from defts., & having stopped payment, the freight due under his charter was not paid to pltf.:—*Held:* pltf. was not entitled to recover freight from defts. as shippers of the iron, inasmuch as both parties made a mistake as to the charterparty referred to in the bills of lading, & were consequently never *ad idem*. No contract could therefore be implied on the part of defts. to pay freight to pltf.—SMIDT *v.* TIDEN (1874), L. R. 9 Q. B. 446; 30 L. T. 891; 22 W. R. 913; 2 Asp. M. L. C. 307; *sub nom.* SCHMIDT *v.* TIDEN, 43 L. J. Q. B. 199.

*Annotations:*—**Reld.** Furness, Withy *v.* White, [1894] 1 Q. B. 483; The Canada (1897), 13 T. L. R. 238.

**4547.** —— —— —— **Goods shipped "as agent."**]—FOX *v.* NOTT, No. 2429, *ante*.

**4548.** —— —— **Shipper's subsequent promise to pay freight—Liability as between shipper & consignee.**]—DREW *v.* BIRD, No. 4545, *ante*.

**4549.** —— —— **Bill of lading made out in name of owners of goods—Owners of goods not known to shipowners.**]—Where goods of G. were shipped on board pltfs.' ship, on an agreement with defts., but the bills of lading were made out in the names of the owners of the goods, who were not known to pltfs. until after the goods were shipped, the freight being payable at the port of shipment:—*Held:* it was for the jury whether there was not a contract by defts. to pay the freight; whether or not the owners were not also liable.—LIDGETT *v.* PERRIN (1862), 2 F. & F. 763, N. P.; *previous proceedings* (1861), 11 C. B. N. S. 362.

**4550.** —— **Space engaged by broker—Bill of lading in shipper's name—Payment by shipper to broker.**]—T., a shipbroker, engaged shipping room in pltf.'s ship for goods. T. sent on pltfs.' usual advertising card for freight to deft., with a note of the quantity of freight he had engaged for. Deft. then shipped the goods & took the mate's receipts with deft.'s name as the shipper. Deft. sent these receipts to T. with a set of bills of lading in his usual form, in which his name appeared as shipper of the goods. Pltfs. then procured the captain's signature to the bills of lading & returned them with a freight note to T., debiting deft. as the shipper with freight. T. sent on the bills of lading to deft. without the freight note, but making out another freight note. Deft. afterwards paid T. the freight. By the custom of the port the shipowner may retain the bills of lading until payment of the freight, when the freight is made payable there, or may part with them, & then the shipper has two months' credit from the sailing of the ship. After the payment to T., & before the two months' credit had expired, T. stopped payment:—*Held:* the circumstances deft. was liable to pltfs. for the freight.—SOMES *v.* JENKINS (1866), 14 L. T. 519; 2 Mar. L. C. 330.

**4551.** —— **Freight in respect of goods carried in own ship.**]—WEGUELIN *v.* CELLIER, No. 2162, *ante*.

**4552. Goods shipped on shipping note—Shipper signing "as agent"—Evidence of custom as to payment.**]—DICKENSON *v.* LANO, No. 4365, *ante*.

**4553. Liability independent of express contract.**]—DOMETT *v.* BECKFORD, No. 4542, *ante*.

**4554.** ——.]—REDERI AKT. TRANSATLANTIC *v.* BOARD OF TRADE, No. 4813, *post*.

**4555. Discharge of shipper's liability—Master or owner looking to third persons for payment—Bill of exchange from consignee—Shipper having agreed to pay.**]—A. wishing to send goods to B. at X. employed C. to carry & deliver them to B., & engaged to pay C. for the freight; C. on delivering them according to the order took a bill of exchange from B. drawn on A., which bill was never paid:—*Held:* A. was liable to pay the amount of the freight to C., notwithstanding the bill of exchange.

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**4553** i. *Liability independent of express contract.*]—KELTING *v.* JAY (1823), 2 Sh. (Ct. of Sess.) 121.—SCOT.

TAPLEY *v.* MARTENS (1800), 8 Term Rep. 451 ; 101 E. R. 1483.

*Annotations :*—**Consd.** Shepard *v.* De Bernales (1811), 13 East, 565. **Apld.** Robinson *v.* Read (1829), 9 B. & C. 449. **Refd.** Strong *v.* Hart (1827), 9 Dow. & Ry. K. B. 189 ; Anderson *v.* Hillies (1852), 16 Jur. 819. **Mentd.** *Re* London, etc. Banking Co. (1865), 34 Beav. 332.

**4556. —— —— Bill of exchange from shipper's agent—Instead of payment in cash.**]—Where there is a charterparty covenanting for payment of freight on a right & true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted ; if the bill is not duly honoured, although the agent fail with the amount of the freight in his hands, unless the master had the offer of a cash payment & preferred the bill for his own convenience.—MARSH *v.* PEDDER (1815), 4 Camp. 257 ; Holt, N. P. 72 ; 171 E. R. 82, N. P.

*Annotations :*—**Distd.** Strong *v.* Hart (1827), 6 B. & C. 160. **Apld.** Robinson *v.* Read (1829), 9 B. & C. 449 ; Anderson *v.* Hillies (1852), 12 C. B. 499.

**4557.** —— —— —— ——.]—Although in general, the consignor is liable for the payment of freight ; yet if the master or owners deal with the consignee, or the agent of the consignor, in respect of the freight, & show by their conduct that they look to either of the latter for payment, the consignor will be discharged.

Where the master of a vessel took a bill from the agent of the consignors for the amount of the freight ; & the owners gave no notice of the dishonour of the bill to the consignors ; & it did not appear but that the master might, in the first instance, have had cash instead of the bill, if he pleased :—*Held :* the owners could not afterwards recover the amount of the freight from the consignors.—STRONG *v.* HART (1827), 6 B. & C. 160 ; 9 Dow. & Ry. K. B. 189 ; 5 L. J. O. S. K. B. 82 ; 108 E. R. 412 ; *previous proceedings* (1825), 2 C. & P. 55, N. P.

*Annotations :*—**Distd.** Robinson *v.* Read (1829), 9 B. & C. 449. **Apld.** Anderson *v.* Hillies (1852), 12 C. B. 499. **Refd.** Litchfield Union Grdns. *v.* Greene (1857), 1 H. & N. 884.

**4558. No evidence of agency sufficient to make consignee liable.**]—A. desires B. to engage a vessel for the carriage of spirits, upon the understanding that the freight was as usual to be paid by the purchaser. No evidence of any authority given by the purchaser to B., & therefore A., the seller, was held to be liable for the amount.—HAIG *v.* HANNAY (1813), 1 Dow, 259 ; 3 E. R. 693, H. L.

**4559. Refusal of consignee to pay freight.**]—THE BOLIVAR, GREATHEAD *v.* LIDIARD (1854), 9 L. T. 302.

*B. Consignees.*

**4560. General rule.**]—GREEN *v.* DIROM (1848), 9 L. T. 302.

**4561. Goods shipped on bill of lading—Liability by custom.**]—The consignee of a bill of lading is by custom liable for the freight.—ROBERTS *v.* HOLT (1685), 2 Show. 443 ; 89 E. R. 1031.

*Annotation :*—**Refd.** Scalfe *v.* Tobin (1832), 3 B. & Ad. 523.

**4562. —— Deliverable to consignee or assigns paying freight.**]—If a person receives goods from on board ship, which are shipped to the shipper's order or his assignees, paying freight with a certain allowance for demurrage, he makes himself by acceptance of goods liable to all the terms of the bill of lading, & of course to demurrage.—DOBBIN *v.* THORNTON (1806), 6 Esp. 16 ; 170 E. R. 816, N. P.

**4563. —— —— Shipper's subsequent promise to pay freight—Liability as between shipper & consignee.**]—DREW *v.* BIRD, No. 4545, *ante*.

**4564. —— Deliverable to consignee—Third party or assigns paying freight.**]—Under a bill of lading, by which goods were to be delivered "to J., net proceeds paid to H., as per advice, or to his assigns, he or they paying freight for said goods as per charterparty" :—*Held :* the freight was to be paid by J., & H. was only entitled to what remained after such payment.—THOMSON *v.* ADAM (1821), 2 Brod. & Bing. 450 ; 5 Moore, C. P. 280 ; 129 E. R. 1040.

**4565. —— —— Implied contract.**]—Where the indorsee of a bill of lading, or the consignee, other than the original character, becomes liable for freight, such liability results, not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods. Therefore, in an action of *assumpsit* for freight, brought within a limited jurisdiction & grounded on such liability, the declaration is sufficient if it state as consideration a delivery on request, averring such delivery to have taken place within the jurisdiction, though the goods are not alleged to have been carried within it. Where, in such an action, the declaration stated that deft. was indebted to pltf. for freight due to him for the carriage of certain goods by pltf. before that time carried in a ship called, etc. from M. to H. & then delivered to deft. within the jurisdiction at deft.'s request :—*Held :* the delivery & request, though not the carrying, appeared to have taken place within the jurisdiction, & the count was good.—KEMP *v.* CLARK (1848), 12 Q. B. 647 ; Cox, M. & H. 190 ; 17 L. J. Q. B. 305 ; 12 L. T. O. S. 122 ; 12 Jur. 676 ; 116 E. R. 1012.

*Annotation :*—**Refd.** Furness, Withy *v.* White, [1894] 1 Q. B. 483.

**4566. —— Consignee indorsing bill of lading—Goods delivered to indorsees—Indorsees debited with freight.**]—Goods were shipped at Bombay on board a ship of pltf., a shipowner in Liverpool & by the bill of lading were to be delivered "unto order, or to his & their assigns, on paying freight for the same." The bill of lading was indorsed by the shipper, & forwarded to defts., East India agents in London, who indorsed it in blank to C. & co., their factors in Liverpool. On the arrival of the goods at Liverpool, C. & co. presented the bill of lading to the pltf., & received the goods ; pltf. debiting C. & co. with the freight. Afterwards C. & co. became bkpt. without having paid the freight, whereupon defts. claimed the goods from them, & took possession of them :—*Held :* defts. were not liable to pltf. for the

**4556 i.** *Discharge of shipper's liability—Master or owner looking to third persons for payment—Bill of exchange from shipper's agent—Instead of payment in cash.*]—Where there is a charterparty covenanting for payment of freight on a "right & true delivery" of the cargo at a foreign port, the freighter is not discharged by the master taking from the freighter's agent a bill of exchange if the bill be not afterwards honoured. It is nothing more than an order on the freighters. Credit is not given the agent by receipt of that order. Unless the shipowner by his agent distinctly elects to accept a bill instead of cash, it will not operate as a payment which will relieve the freighter from liability.—MARCH *v.* THORBURN (1888), 7 Nfld. L. R. 357. —**NFLD.**

**PART VIII. SECT. 3, SUB-SECT. 1.—B.**

**d.** *Goods shipped on bill of lading—Stipulation for payment of freight by consignee.*]—The consignee of goods under a bill of lading which declares that the freight shall be payable by the consignee, cannot, after receipt of the goods, refuse to pay this freight to the shipmaster under the pretext that he who consigned these goods to him was his debtor & ought to pay it. —GOSSELIN *v.* PREFONTAINE (1892), Q. R. 2 S. C. 308.—**CAN.**

**e.** *Absence of bill of lading.*]—When goods are delivered to a consignee by a carrier, who has conveyed

*Sect. 3.—Payment of freight: Sub-sect. 1, B., C. & D.*]

unpaid freight.—TOBIN *v.* CRAWFORD (1842), 9 M. & W. 716; 12 L. J. Ex. 490; 152 E. R. 303, Ex. Ch.

**4567. —— Bill of lading indorsed "without recourse"—Master's assent to indorsement—Necessity for proof.**]—LEWIS *v.* M'KEE, No. 2449, *ante*.

**4568. —— Goods consigned to charterers' agents.**]—The captain produced his bill of lading to the charterers' agents as consignees & the cargo was landed at their request. It was clear, therefore, that they acted as consignees &, as the captain gave up his lien for freight & delivered the goods to them, they were liable for such freight (LORD ESHER, M.R.).—STEEL, YOUNG & CO. *v.* HOULDER BROTHERS & CO. (1887), 3 T. L. R. 300, C. A.

**4569. —— Consignee for sale—Goods deposited by shipowner in warehouse—Delivered to consignee on deposit of freight.**]—WHITE & CO. *v.* FURNESS, WITHY & CO., No. 3801, *ante*.

**4570. Goods entered on consignee's name at custom house.**]—When goods are shipped to the order of the shipper, the custom of charging the person in whose name goods are entered at the custom house, with freight, can only exist when the same person is consignee or where the consignee is unknown.—ARTAZA *v.* SMALLPIECE (1793), 1 Esp. 23; 170 E. R. 268.

*Annotation:*—**Dbtd.** Cock *v.* Taylor (1811), 13 East, 399.

**4571. Shipper described as "consignee & agent"—Signing agreement in own name.**]—The consignee & agent of a vessel chartered for a specific voyage, enters into an agreement with the captain, describing himself as "consignee & agent" of the above brig & cargo, on behalf of M. merchant, of L.," the agreement stating, that "it is witnessed, that said parties agree" that the vessel shall go to another port, there discharge the remainder of her cargo, & receive a full & complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charterparty, & then signs the agreement in his own name, without describing himself as agent:—*Held:* he made himself personally liable for the freight of the homeward voyage.—KENNEDY *v.* GOUVEIA (1823), 3 Dow. & Ry. K. B. 503.

*Annotation:*—**Mentd.** Thöl *v.* Leask (1855), 1 Jur. N. S. 117.

**4572. Absence of bill of lading—Evidence of former payments of freight.**]—The consignee of goods, where there is no bill of lading, is not in general liable for the freight; but prior dealings with him, & payments by him of the freight on former occasions of the same kind, are evidence to show that in the particular case he contracted, on the receipt of the goods, to pay the freight.—COLEMAN *v.* LAMBERT (1839), 5 M. & W. 502; 9 L. J. Ex. 43; 4 Jur. 249; 151 E. R. 212.

*Annotations:*—**Refd.** Tronson *v.* Dent (1853), 8 Moo. P. C. C. 419; The Alan Ker, How *v.* Kirchner (1857), 30 L. T. O. S. 296.

**4573. Liability by custom.**]—DICKENSON *v.* LANO, No. 4365, *ante*.

### *C. Holder of Bill of Lading.*

**4574. Goods shipped on bill of lading.**]—KEMP *v.* CLARK, No. 4565, *ante*.

**4575. —— Deliverable to consignee or assigns paying freight.**]—SODERGREN *v.* FLIGHT & JENNINGS (1796), cited in 6 East, at p. 622; 102 E. R. 1428.

*Annotations:*—**Consd.** Cock *v.* Taylor (1811), 13 East, 399; Moorsom *v.* Kymer (1814), 2 M. & S. 303. **Distd.** Birley *v.* Gladstone (1814), 3 M. & S. 205. **Refd.** Hanson *v.* Meyer (1805), 6 East, 614.

**4576. —— ——.**]—The master of a ship having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same; the demanding & taking of such goods from the master by a purchaser & assignee of the bill of lading, without the freight having been paid, is evidence of a new contract & promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight, & he is liable for the amount in an action of *indebitatus assumpsit* brought against him by the shipowner.—COCK *v.* TAYLOR (1811), 13 East, 399; 2 Camp. 587; 104 E. R. 424.

*Annotations:*—**Distd.** Wilson *v.* Kymer (1813), 1 M. & S. 157; Moorsom *v.* Kymer (1814), 2 M. & S. 303. **Foll.** Bell *v.* Kymer (1814), 5 Taunt. 477; Dougal *v.* Kemble (1826), 3 Bing. 383. **Distd.** Amos *v.* Temperley (1841), 8 M. & W. 798. **Expld.** Sanders *v.* Vanzeller (1843), 4 Q. B. 260; Allen *v.* Coltart (1883), 11 Q. B. D. 782. **Refd.** Pinder *v.* Wilks (1814), 5 Taunt. 612; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575.

**4577. —— ——.**]—STINDT *v.* ROBERTS, No. 2443, *ante*.

**4578. —— —— Cargo landed in name of consignees—Indorsees taking delivery under order of consignees.**]—WILSON *v.* KYMER, No. 4141, *ante*.

**4579. —— —— Goods landed before indorsement.**]—The indorsee of the bill of lading of goods shipped by a chartered vessel, deliverable to the consignee or his assigns, he or they paying freight according to the terms of the charterparty, is liable to the charterer in *assumpsit* for the freight, though the goods were landed at the West India docks before the bill of lading was indorsed; though no stop was put on the goods at the dock, & though the indorsee had paid over the proceeds before the freight was demanded of him.—BELL *v.* KYMER (1814), 5 Taunt. 477; 3 Camp. 545; 1 Marsh. 146; 128 E. R. 775.

*Annotations:*—**Distd.** Moorsom *v.* Kymer (1814), 2 M. & S. 303. **Consd.** Dougal *v.* Kemble (1826), 3 Bing. 383. **Refd.** Nockells *v.* Lingham (1838), 2 Jur. 438.

**4580. —— —— Implied contract.**]—Where a ship was chartered on a voyage out & home for a specified time at a certain rate of payment on the homeward cargo in full for the hire of the ship for the said time, to be paid in part by an advance on the ship's clearing for the outward voyage, & the rest on her return, by bills payable at a future day, & on the loading the homeward cargo a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the said goods as per charterparty:—*Held:* the indorsees of the bill of lading, for valuable consideration, were not liable to the ship owner upon an implied *assumpsit* to pay the freight arising out of the receipt of the goods under the bill of lading.—MOORSOM *v.* KYMER (1814), 2 M. & S. 303; 3 Camp. 549, n.; 105 E. R. 395.

*Annotations:*—**Distd.** Dougal *v.* Kemble (1826), 3 Bing. 383. **Refd.** Bell *v.* Kymer (1814), 5 Taunt. 477; Nockells *v.* Lingham (1838), 2 Jur. 438; Sanders *v.* Vanzeller (1843), 4 Q. B. 260.

**4581. —— —— ——.**]—*Indebitatus assumpsit* for freight for the carriage of goods in pltf.'s vessel, at deft.'s request, & for work & labour, etc. Pltfs., who were shipowners, by a charterparty, made with G. B. & co., agreed that their ship should

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them without a bill of lading, the consignee is not liable for the payment of the freight.—BAINE, JOHNSTON & CO. *v.* BOYD (1899), 8 Nfld. L. R. 286.—**NFLD.**

1. *Goods deliverable on payment of freight.*]—A consignee who has received goods shipped to be delivered on payment of freight may be sued for the amount of such freight.—OLDFIELD *v.* HUTTON, 2 R. de L. 77.—**CAN.**

proceed to I., & there load a cargo of wool from the factors of the charterers, & thence proceed to London, on being paid freight at a certain rate on unloading & delivery. The goods having been received on board, the bills of lading were forwarded to G. B. & co., & stated, that they had been shipped to "Messrs. G. B. & co., or to their assigns, he or they paying freight for the said goods, as per charterparty." G. B. & co. sold the wool in question to deft., under a written agreement whereby the latter stipulated to perform & fulfil all charterparties & agreements for freight for the wool theretofore made or to be made by the sellers; that the sellers should hand the bills of lading over to the buyer, properly assigned, & that the wool should vest absolutely in the buyer from the day of the agreement. The bills of lading were indorsed & delivered by G. B. & co. to deft. Deft. paid G. B. & co. for the wool before its arrival in this country, but afterwards, discovering it to be of inferior quality, refused to receive it as the wool contracted to be sold to him:—*Held:* (1) there was no contract implied by law for deft. to pay freight to pltfs., the shipowners; (2) the rule would have been the same, even if the goods had been received by the indorsee of a bill of lading, specifying, without reference to the charterparty, that the goods were to be delivered by the shipowner to the consignee or his assigns, he or they paying a certain sum for freight.—SANDERS *v.* VANZELLER (1843), 4 Q. B. 260; 3 Gal. & Dav. 580; 12 L. J. Ex. 497; 114 E. R. 897, Ex. Ch.

*Annotations:—As to* (1) **Refd.** Kemp *v.* Clark (1848), 12 Q. B. 647; Smith *v.* Sieveking (1855), 5 E. & B. 589; Young *v.* Moeller (1855), 5 E. & B. 755; Fry *v.* Chartered Mercantile Bank of India (1866), L. R. 1 C. P. 689; White *v.* Furness, Withy, [1895] A. C. 40; Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. *Generally*, **Consd.** Wegener *v.* Smith (1854), 15 C. B. 285. **Refd.** Thompson *v.* Dominy (1845), 14 M. & W. 403; Zwilchenbart, etc. *v.* Henderson (1854), 9 Exch. 722; Chappel *v.* Comfort (1861), 31 L. J. C. P. 58. **Mentd.** Prickett *v.* Badger (1856), 1 C. B. N. S. 296.

**4582.** —— —— ——.]—Declaration that, in consideration that pltf., at deft.'s request, would deliver wheat, then on board pltf.'s ship, having been conveyed therein for freight to be paid by the person who should receive it, to deft. with lighters provided by deft., deft. promised to receive it in a reasonable time: breach, that deft. made default in receiving in a reasonable time, whereby pltf. was detained an unreasonable time in discharging. Deft. traversed the promise & the default, & pleaded that pltf. was not ready to deliver. It was proved that, by charterparty, pltf., owner of a ship, agreed with the freighter to deliver a cargo at the port of discharge on payment of freight, conformably to the bills of lading; & a certain number of lay days were allowed, after which demurrage was be charged at a given rate per day: the bills of lading stipulated for delivery to the freighter, or his assigns, on paying freight as per charterparty. Deft. became assignee of the bill of lading, gave notice thereof to pltf., & demanded the goods, sending his lighters to receive them. Pltf. delivered a portion, & demanded payment for freight on so much: deft. refusing to pay, pltf. refused to deliver the residue, & the running days expired. Some time after, pltf. delivered the residue, & was paid the remaining freight:—*Held:* neither the contract nor the breach was proved.

Where a cargo is received under a bill of lading, that, though not necessarily raising a contract in law, is evidence from which a jury may infer a contract to pay freight, in consideration of the captain giving up his lien on the goods (PARKE, B.). —YOUNG *v.* MOELLER (1855), 5 E. & B. 755; 4 W. R. 149; 119 E. R. 662; *sub nom.* MÖLLER *v.* YOUNG, 25 L. J. Q. B. 94; 26 L. T. O. S. 183; 2 Jur. N. S. 393, Ex. Ch.

*Annotations:*—**Consd.** Brandt *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1924] 1 K. B. 575. **Refd.** Erichsen *v.* Barkworth (1858), 3 H. & N. 601; Chappel *v.* Comfort (1861), 10 C. B. N. S. 802; Brown *v.* Tanner (1868), 3 Ch. App. 597; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Furness, Withy *v.* White, [1894] 1 Q. B. 483; Smailes *v.* Hans Dessen (1905), 94 L. T. 492.

**4583.** —— —— **Shipowner's application to shipper for freight—In ignorance of shipper's bankruptcy.**]—Goods were consigned to L. C. & co. or their assigns, "he or they paying freight for the same." L. C. & co. indorsed the bill of lading to K., their broker, & then became bkpt.; the shipowner, in ignorance of these circumstances, applied to L. C. & co. for the freight, & then sued K. for it: —*Held:* K. was liable.—DOUGAL *v.* KEMBLE (1826), 3 Bing. 383; 11 Moore, C. P. 250; 4 L. J. O. S. C. P. 103; 130 E. R. 560.

*Annotation:*—**Refd.** Scaife *v.* Tobin (1832), 3 B. & Ad. 523.

**4584.** —— —— **Omission of words "or assigns" —Custom permitting indorsement.**]—An indorsee of a Spanish bill of lading to whom the goods have been delivered under it, is liable in *assumpsit* for the freight although the bill of lading is for delivery to the consignees, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by indorsement.—RENTERIA *v.* RUDING (1830), Mood. & M. 511; L. & Welsb. 274, N. P.

*Annotation:*—**Mentd.** Partridge *v.* Bank of England (1846), 9 Q. B. 396.

**4585.** —— **Bill stating freight to have been paid —Freight not paid through default of shipper.**]—HOWARD *v.* TUCKER, No. 4112, *ante*.

**4586.** —— **Effect of indorsement by indorsee.**]—SMURTHWAITE *v.* WILKINS, No. 2363, *ante*.

**4587.** —— **Indorsee by way of security.**]—ALLEN *v.* COLTART, No. 3542, *ante*.

**4588.** —— ——.]—SEWELL *v.* BURDICK, No. 2186, *ante*.

**4589.** —— ——.]—BRANDT *v.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD., No. 2257, *ante*.

*D. Other Persons.*

**4590. Person in whose name goods entered at custom house—Where consignee unknown.**]—ARTAZA *v.* SMALLPIECE, No. 4570, *ante*.

**4591.** —— **Entry to avoid seizure.**]—A. & B., merchants abroad, ship tobacco for Liverpool, consigned to A. himself there, to whose order the bills of lading are made. One of these bills is sent inclosed in a letter from the shippers to C. at Liverpool advising him of such consignment to A., & that A. intended to proceed to Liverpool, but in case he should not arrive in time desiring C. to do the best for them. The tobacco having arrived in a damaged state before A., is required to be landed, & is deposited in the King's warehouse pursuant to the statute; & afterwards C. acting as agent for A., within the knowledge of the captain, makes an entry of it in his own name in the custom house to avoid seizure:—*Held:* this was not such an acceptance of the cargo by C. as would make him liable to the captain for the freight.—WARD *v.* FELTON (1801), 1 East, 507; 102 E. R. 195.

*Sect. 3.—Payment of freight: Sub-sect. 1, D.; sub-sect. 2, A. & B.*]

**4592. Person accepting delivery—Though not in fact consignee.**]—If goods consigned from abroad, are delivered to a person who in fact is not the consignee, if he accepts the goods, he is liable for the freight.—SEGGART *v.* SCOTT (1806), 6 Esp. 22; 170 E. R. 818, N. P.

**4593. Persons for whom cargo purchased—Receiving goods on behalf of trustee for creditors.**]—An implied *assumpsit* for freight upon the delivery of goods without first receiving the freight, will not lie against three persons for whose use the cargo was purchased, but who are not the consignees or holders of the bills of lading, & who have assigned all their effects to a trustee for the benefit of their creditors & themselves, two of them only, without the third, receiving the goods as agents for that trustee.—PINDER *v.* WILKS (1814), 5 Taunt. 612; 1 Marsh. 248; 128 E. R. 829.

**4594. Owner of goods shipped—Shipment in name of owner—Name not known to shipowner.**]—DOMETT *v.* BECKFORD, No. 4542, *ante*.

**4595. Agent—Appearing as agent in bill of lading.**]—(1) *Indebitatus assumpsit* for freight payable by deft. to pltfs. for & in respect of the conveyance by them for deft., & at his request, of divers goods in & on board of a certain ship, from divers places to divers other places. At the trial it appeared that pltfs. had received on board their vessel a quantity of coals from the Burnt Island co., to be carried to London; that the captain signed a bill of lading, by which the coals were made deliverable "unto N., deft., for the London Gas co., or to his assigns, he or they paying freight for the said goods 10*s.* per ton in cash of true delivery." On the arrival of the vessel in London, deft. produced the bill of lading & received the goods under it, & afterwards offered to pay the freight by a bill at two months:—*Held:* deft. was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the co., the property vesting in them.

(2) *Qu.:* whether the declaration was sufficient, it not being in the usual form of a common count for freight, & not stating any delivery.—AMOS *v.* TEMPERLEY (1841), 8 M. & W. 798; 11 L. J. Ex. 183; 151 E. R. 1263

*Annotation:*—**Refd.** Sanders *v.* Vanzeller (1843), 4 Q. B. 260.

**4596.** ——.]—MERCER *v.* TEMPERLEY (1844), 3 L. T. O. S. 100.

**4597. Ship broker—Instructed to put stop order on freight—Stop order not taking effect—Consignees receiving goods without paying freight.**]—PHILLIPS *v.* COOKE (1848), 10 L. T. 242.

**4598. Charterer—Payment into court of amount due for freight—In suit by obligee of bottomry bond—Defence to action for freight.**]—In an action by a shipowner against the charterers for freight, the charterers pleaded that after the freight had been earned, & after the commencement of the suit, the obligee of a bottomry bond, by which ship & freight were hypothecated, instituted in the Ct. of Admiralty a suit against ship & freight, whereon a monition issued, commanding pltf. to bring into ct. the proceeds of the wreck & stores of the ship, & defts. to bring into ct. the money due for freight, to abide the judgment of the ct., & that defts. had done so:—*Held:* this was a good plea in bar to the action.—PLACE *v.* POTTS (1855), 5 H. L. Cas. 383; 24 L. J. Ex. 225; 25 L. T. O. S. 284; 3 W. R. 574; 10 E. R. 948, H. L.

**4599. —— Payment to ship broker—Bankruptcy of ship broker.**]—THE ASSYRIAN, NICOL *v.* GILMAN (1856), 6 L. T. 867.

**4600. —— Ship rechartered—Freight due on bill of lading less than freight due on charterparty—Effect of cesser clause.**]—By a charterparty for the carriage of a full & complete cargo of oats from New Zealand to London, a lump sum was to be paid for freight on delivery of the cargo, & liberty was given to the charterers to recharter the ship, the captain to sign bills of lading for the cargo according to the custom of the port at the current or any rate of freight required, without prejudice to the charterparty. The charterparty provided in the usual form: "The liabilities of the charterers to cease on the vessel being loaded the master & owners having a lien on the cargo for all freight & demurrage under this charterparty." The charterers rechartered the ship, & the captain signed a bill of lading for the cargo, by which freight was to be paid at a certain rate per ton on the weight of cargo delivered. Owing to loss of weight of the cargo during the voyage, the freight payable under the bill of lading on the cargo actually delivered was less than the agreed freight under the charterparty. In an action by the shipowner against the charterers to recover the balance:—*Held:* the cesser clause discharged the charterers from liability under the charterparty only to the extent to which the lien obtained by the shipowner was an equivalent, & as the bill of lading freight for which the shipowner obtained a lien on the cargo was less than the charterparty freight, the charterers were liable.—HANSEN *v.* HARROLD BROTHERS, [1894] 1 Q. B. 612; 63 L. J. Q. B. 744; 70 L. T. 475; 10 T. L. R. 327; 7 Asp. M. L. C. 464; 9 R. 315, C. A.

*Annotations:*—**Apld.** Jenneson, Taylor *v.* Secretary of State for India, [1916] 2 K. B. 702. **Refd.** Williams *v.* Canton Insurance Office, [1901] A. C. 462; Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826; Kruger *v.* Moel Tryvan Ship Co. (1907), 13 Com. Cas. 1.

**4601. Sub-charterer—Shipowner & sub-charterer ignorant of each other's contract—No implied contract to pay freight.**]—A charterparty was entered into in London on June 17, 1872, between pltf., as master of a ship lying at London, & R., a shipbroker, to carry 407 tons of iron from H. to G., at freight of 7*s.* 3*d.* per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for freight. On the following day L. chartered the ship to deft. at 8*s.* per ton for the same amount of iron. The charter contained similar clauses as to freight & lien, & the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to R., by whom the vessel is to be entered & cleared at the port of loading." Though deft. thought he was treating with L., as broker for the ship, L. had no authority in fact to act as broker for pltf., or to receive the freight; & neither pltf. nor deft. knew of the charter entered into by the other. The cargo having been put on board by deft., the master signed bills of lading making it deliverable to consignees or assigns, "they paying freight for said goods as per charterparty." Pltf. did not demand the freight on signing the bills of lading. The cargo was duly

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should withhold his consent to such payment, is liable for the freight.—ROSS *v.* HANRAHAN (1868), 5 Nfld. L. R. 242.—**NFLD.**

**k.** *Principal of holder of bill of lading.*]—If a shipowner give delivery of goods carried by him, to a party holding the indorsed bill of lading, without first getting payment of the freight, he cannot, on the bkpcy. of the holder of the bill of lading, demand payment of the freight from the holder's principal.—CALLENDAR *v.* CAVAN (1835), 16 Dunl. (Ct. of Sess.) 146.—**SCOT.**

delivered at the port of discharge ; & in the meantime L. obtained payment of the freight of 8*s.* per ton from deft., & afterwards stopped payment, leaving the 7*s.* 3*d.* per ton unpaid to pltf. Pltf. having sued deft. for the 7*s.* 3*d.* per ton for the carriage of the iron :—*Held :* pltf. could not recover ; for pltf. & deft. never were *ad idem*, & consequently, there was no express contract between them ; & under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods.—SMIDT *v.* TIDEN (1874), L. R. 9 Q. B. 446 ; 30 L. T. 891 ; 22 W. R. 913 ; 2 Asp. M. L. C. 307 ; *sub nom.* SCHMIDT *v.* TIDEN, 43 L. J. Q. B. 199.

*Annotations :*—**Refd.** Furness, Withy *v.* White, [1894] 1 Q. B. 483 ; The Canada (1897), 13 T. L. R. 238.

**4602. Party to bill of lading.**]—SEWELL *v.* BURDICK, No. 2186, *ante*.

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SUB-SECT. 2.—TO WHOM PAYABLE.

*A. Owner.*

**4603. General rule — Owner entitled.**] — Two partners purchased a ship, under a bill of sale conformable to 26 G. 3, c. 60 ; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others : —*Held :* the four partners had not any insurable interest in the freight of the ship. The right to freight results from the right of ownership ; & these four partners had neither a legal nor an equitable title to the ship.—CAMDEN *v.* ANDERSON (1794), 5 Term Rep. 709 ; 101 E. R. 394.

*Annotations :*—**Consd.** Curtis *v.* Perry (1802), 6 Ves. 739 ; *Ex p.* Yallop (1808), 15 Ves. 60 ; *Ex p.* Houghton, *Ex p.* Gribble (1810), 17 Ves. 251. **Refd.** Marsh *v.* Robinson (1802), 4 Esp. 98 ; Mestaer *v.* Gillespie (1805), 11 Ves. 621 ; Moss *v.* Smith (1850), 9 C. B. 94 ; Keith *v.* Burrows (1877), 37 L. T. 291.

**4604.** —— ——.]—The property in the ship determines the right to freight as an incident to the right of property in the ship. In other words, the freight belongs generally to the owner of the ship.—DAVIDSON *v.* CASE (1820), 8 Price, 542 ; 2 Brod. & Bing. 379 ; 5 Moore, C. P. 116 ; 146 E. R. 1290, Ex. Ch. ; *affg.* S. C. *sub nom.* CASE *v.* DAVIDSON (1816), 5 M. & S. 79.

*Annotations :*—**Consd.** Green *v.* Briggs (1848), 6 Hare, 395 ; The Red Sea, [1896] P. 20. **Refd.** Kerswill *v.* Bishop (1832), 2 Cr. & J. 529 ; Stewart *v.* Greenock Marine Insce. (1848), 2 H. L. Cas. 159 ; Knight *v.* Faith (1850), 15 Q. B. 649 ; Scottish Marine Insce. *v.* Turner (1853), 21 L. T. O. S. 10 ; Willis *v.* Palmer (1859), 7 C. B. N. S. 340 ; Keith *v.* Burrows (1877), 2 App. Cas. 636. **Mentd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561.

**4605.** —— ——.]—The owner has undoubtedly the primary right to receive the freight (LORD ELLENBOROUGH, C.J.).—SMITH *v.* PLUMMER (1818), 1 B. & Ald. 575 ; 106 E. R. 212.

*Annotations :*—**Apld.** Atkinson *v.* Cotesworth (1825), 3 B. & C. 647. **Distd.** Bristow *v.* Whitmore (1861), 9 H. L. Cas. 391. **Consd.** The Mary Ann (1865), L. R. 1 A. & E. 8 ; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38. **Refd.** Japp *v.* Campbell (1887), 57 L. J. Q. B. 79.

**4606.** —— ——.]—LINDSAY *v.* GIBBS, No. 4638, *post*.

**4607. Part owner — Objecting to particular voyage.**]—BOSON *v.* SANDFORD, No. 3249, *ante*.

**4608.** —— **Right to sue on behalf of himself & co-owners.**]—A writ was issued by pltf. "on behalf of himself & numerous parties having the same interest" under R. S. C., Ord. 16, r. 9. The claim was by pltf., on behalf of himself & the other owners of a ship, against defts., for freight & dues for the use of the ship. Defts. applied to add the names of the other owners as pltfs. under R. S. C., Ord. 16, r. 13, on the ground that the case was not within r. 9, & also in order that defts. might have the liability of the other owners, as pltfs., for costs : —*Held :* the action was rightly brought by a single pltf. under r. 9, & the case was not within r. 13.—DE HART *v.* STEVENSON (1876), 1 Q. B. D. 313 ; 45 L. J. Q. B. 575 ; 24 W. R. 367 ; 2 Char. Pr. Cas. 281.

*Annotation :*—**Apld.** Janson *v.* Property Insce. (1913), 30 T. L. R. 49.

**4609. Incoming partners—No transfer of ship jointly with existing partners.**]—CAMDEN *v.* ANDERSON, No. 4603, *ante*.

**4610. Freight due on charterparty—Made between master & charterer.**]—ATKINSON *v.* COTESWORTH, No. 4618, *post*.

**4611. Contract passing property in ship—Void for want of registration—Title to freight distinct from title to ship.**]—The ct. will entertain a suit for an account of the freight of a ship, grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, & which may not be capable of being recognised or enforced as a whole, for want of being registered ; provided the title to the freight is distinct from & does not necessarily depend upon a title to the ship claimed under such contract.—DAVENPORT *v.* WHITMORE (1836), 2 My. & Cr. 177 ; Donnelly, 166 ; 6 L. J. Ch. 58 ; 40 E. R. 608, L. C.

*Annotations :*—**Consd.** Hughes *v.* Morris (1852), 9 Hare, 636. **Mentd.** Macfadden *v.* Jenkins (1842), 11 L. J. Ch. 281.

**4612. Action for freight by owner—Availability of set-off.**]—JONES *v.* MOORE, No. 3446, *ante*.

**4613.** —— —— **Debt due by ship's husband & part owner.**]—WALSHE *v.* PROVAN, No. 4531, *ante*.

**Right of owner where ship chartered.**]—*See* Sub-sect. 2, C., *post*.

*B. Master.*

**4614. Right of master to payment.**]—BOSON *v.* SANDFORD, No. 3249, *ante*.

**4615.** ——.]—GUION *v.* TRASK, No. 4689, *post*.

**4616.** —— **Master entering into charterparty—Bankruptcy of owner—Notice by assignees to charterer.**]—Where the master of a ship on behalf of the owner lets the ship on charterparty to A., & the owner becomes bkpt., & his assignees give notice to A. not to pay any further sums of money on account thereof to the master, this notice will affect A. as to all sums paid afterwards by him to the master beyond what the master had actually paid or stood engaged for on account of the ship at the time of the notice ; but will not defeat payments made to that extent.—WILKINS *v.* MURE (1784), 1 Cox, Eq. Cas. 150 ; 29 E. R. 1103, L. C.

**4617.** —— —— **Goods deliverable to consignee or assigns paying freight—Freight not paid by consignee.**]—SHEPARD *v.* DE BERNALES, No. 4544, *ante*.

**4618.** —— —— **Owner receiving freight—Right of master to sue charterer.**]—Where the commander of a ship entered into a charterparty, not under seal, whereby the charterer agreed to pay freight generally, without saying to whom :—

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**PART VIII. SECT. 3, SUB-SECT. 2.—A.**

1. *Person in position of owner—Wharfinger—Authorised agent.*]—Declaration for work & labour by carriers by water. Plea, that a wharfinger, to whom the goods were delivered by pltfs. for defts., was agent of pltfs. to receive payment, & that they paid him accordingly :—*Held :* from the course of dealing between the parties, as set out in the evidence, the wharfinger was such an agent ; & after delivery of the goods without exacting freight, the wharfinger still continued pltfs.' agent to demand & receive the freight, till his authority was revoked.—TORRANCE & HILLIARD *v.* HAYES (1853), 3 C. P. 278.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 2.—B.**

**4614 1.** *Right of master to payment.*]—Freight is, *primâ facie*, payable to the master of a vessel.—MERCHANTS BANK *v.* GRAHAM (1880), 27 Gr. 524.—**CAN.**

*Sect. 3.—Payment of freight: Sub-sect. 2, B. & C.*]

*Held:* the owner having demanded & received the freight, the commander could not maintain an action for it against the charterer, although he had given him notice not to pay it to any one but himself.—ATKINSON *v.* COTESWORTH (1825), 3 B. & C. 647; 1 C. & P. 516; 5 Dow. & Ry. K. B. 552; 3 L. J. O. S. K. B. 104; 107 E. R. 873.

*Annotations:*—**Refd.** Bristow *v.* Whitmore (1861), 9 H. L. Cas. 391; Japp *v.* Campbell (1887), 57 L. J. Q. B. 79.

**4619. —— —— Availability of set-off—Debt due by owner.**]—To an action for freight due upon a charterparty, deft. pleaded that pltf. entered into the charterparty as the master of the vessel, & for & on behalf & as agent for the owner; that pltf. never had any beneficial interest in the charterparty, nor had he any lien whatever on the freight; & that he brought the action solely as agent & trustee for the owner. The plea then proceeded to state that the owner was indebted in a certain sum to deft. which he thereby offered to set-off against pltf.'s demand:—*Held:* such debt was not "a mutual debt between pltf. & deft.," within 2 Geo. 2, c. 22, s. 13, & 8 Geo. 2, c. 24; & therefore that the plea was bad.—ISBERG *v.* BOWDEN (1853), 8 Exch. 852; 1 C. L. R. 722; 22 L. J. Ex. 322; 155 E. R. 1599.

*Annotations:*—**Refd.** Wilson *v.* Gabriel (1863), 4 B. & S. 243. **Mentd.** Oulds *v.* Harrison (1854), 10 Exch. 572; Watkins *v.* Clark (1862), 12 C. B. N. S. 277; Stanger *v.* Miller (1865), L. R. 1 Exch. 58; Christie *v.* Taunton, Delmard, Lane, *Re* Taunton, Delmard, Lane, [1893] 2 Ch. 175; Manley *v.* Berkett, [1912] 2 K. B. 329.

**4620. —— —— Goods shipped for third party—Freight payable according to charterparty.**]—ZWILCHENBART *v.* HENDERSON, No. 4633, *post.*

**4621. —— —— Master part owner—Right to sue in own name.**]—SEEGER *v.* DUTHIE, No. 2804, *ante.*

**4622. —— Master entitled by virtue of special property in ship.**]—If the consignee of goods accepts any benefit by the carriage, he cannot defend himself from the payment of freight on the ground that the goods have been damaged by the master in carrying them, though the damage exceed the amount of the freight. The master has a special property in the vessel, & may declare for the freight of goods as carried in his vessel, though he be not owner.—SHIELDS *v.* DAVIS (1815), 6 Taunt. 65; 128 E. R. 957; *previous proceedings, sub nom.* SHEELS *v.* DAVIES (1814), 4 Camp. 119, N. P.

*Annotations:*—**Refd.** Seeger *v.* Duthie (1860), 8 C. B. N. S. 45; Dakin *v.* Oxley (1864), 15 C. B. N. S. 646. **Mentd.** Mondel *v.* Steel (1841), 1 Dowl. N. S. 1.

**4623. —— Master signing bills of lading—In pursuance of clause in charterparty—Master in position of agent.**]—MARQUAND *v.* BANNER, No. 4634, *post.*

**4624.** —— —— —— ——.]—REPETTO *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD., No. 4538, *ante.*

*C. Where Ship Chartered.*

**4625. Right of owner to freight—General ship.**]—KYMER *v.* LARKIN, No. 4713, *post.*

**4626. —— Goods carried on deck—Charterparty not applying to goods carried on deck.**]—NEILL *v.* RIDLEY, No. 1934, *ante.*

**4627. —— On bankruptcy of charterer.**]—A., having a contract with the Admlty. to deliver coals at certain foreign ports at stipulated prices, shipped coals, in performance of the contract; &, in pursuance of the terms of the contract, deposited three parts of the bills of lading with the Admlty., retaining a fourth part himself, which he deposited together with the policies on the ships, with B., to secure an advance. The deposit was accompanied by a letter, stating that it was made to secure the amount of the advance, & undertaking in case of default in repayment at maturity or demand to enable B. to receive the value of the cargoes. B., having given no notice to the Admlty. until after he, B., was aware of an act of bkpcy. by A., on which an adjudication was afterwards founded:—*Held:* the goods having been delivered the owners from whom the ships had been chartered had no claim against the said moneys for unpaid freight.—NORTH *v.* GURNEY (1861), 1 John. & H. 509; 5 L. T. 18; 9 W. R. 678; 70 E. R. 847.

*Annotation:*—**Apld.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

**4628. —— Out of bills of lading freight received by charterers—Where ship lost.**]—Defts. chartered a ship from pltf. By a clause in the charterparty it was provided that freight should be paid, "about one half" . . . on sailing . . . balance . . . on right delivery"; that the master should sign bills of lading "in the usual manner at any rate of freight"; & that charterers' liability should cease "on shipment of cargo & payment of advance." Defts. & others shipped goods on the vessel, defts. receiving freight from the other shippers of goods, & the captain received half the charter freight. Eleven out of the twelve bills of lading signed by the captain described the freight as "paid . . . in London . . . ship lost or not lost." The ship was lost:—*Held:* pltf. could not recover the balance of the charter freight from defts. out of the bills of lading freights received by defts.—JANENTZKY *v.* LANGRIDGE & Co. (1895), 11 T. L. R. 468; 1 Com. Cas. 90.

**4629. —— Charterparty not amounting to demise.**]—(1) The question whether shipowners are, when the bill of lading freight is paid to the masters, entitled as against the charterers to collect & receive it, is one of fact, depending upon the documents & circumstances in each case. The apparent conflict in the authorities seems to arise mainly from the fact that the documents & circumstances are different in different cases. There are certain more or less typical cases. For instance, there is the case, very often referred to, but in practice rather uncommon, where the charterparty amounts to what is called a demise of the vessel. In such a case it is reasonably clear that the contract with the shippers under the bill of lading is between them & the charterers, & not between them & the ownrs. Again, there is another class of cases in which the charterers by the charterparty do no more than undertake that a full cargo shall be shipped, & guarantee payment of a certain freight. In such cases it is very often stipulated that upon shipment of a full cargo, & upon the charterers paying or securing payment in the manner agreed upon of the excess, if any, of chartered freight over & above the bill of lading freight, the charterers' liability under the charterparty is to cease. In such cases the contract of carriage under the bill of lading would ordinarily be between the owners & shippers.

PART VIII. SECT. 3, SUB-SECT. 2.—C.

**4626 i.** *Right of owner to freight—Goods carried on deck—Charterparty not applying to goods carried on deck.*]—Where a charterparty binds the shipowners to carry a full & complete cargo for a lump sum, the charterer is not entitled to any freight which the ship may earn by goods stored on deck.—WILLS & Co. *v.* BURRELL & SON (1894), 21 R. (Ct. of Sess.) 527; 31 Sc. L. R. 417.—SCOT.

m. ——.]—On the arrival of a ship, the charterer's agent, to whom the ship was addressed, collected the freight from the consignees on delivery of the goods, &, without authority from the master & owner, he

But even in cases of this kind it is scarcely safe to lay down a hard & fast rule. The circumstances & terms of the documents may differ in different cases belonging to this class, & between the two types or classes there is a great variety of intermediate cases.

On Nov. 2, 1900, defts. chartered their steamship for a term of twenty-four calendar months at the rate of £1,550, less 2½ per cent. commission, a month payable in advance. The vessel came on hire on Mar. 18, 1901, & was employed by the charterer to carry a cargo from the United States to Japan. The charterparty provided that the owners should have a lien upon all cargoes & all sub-freights for any amounts due under the charterparty. The cargo was carried under a contract made between the shippers & the charterer. Under the bill of lading there was a lien as against the shippers for the bill of lading freight payable at Nagasaki, in Japan, & by the charterparty, the owners had a lien upon cargoes & sub-freights for amounts due under the charterparty. On arrival of the vessel at Colombo, in the course of the voyage, the master was obliged to pay for bunker coal to enable her to proceed to Japan, by drawing upon the owners a bill for £134 17*s.* 2*d.*, which was duly honoured. By Clause 2 of the charterparty all coals were to be supplied by the charterer. During the discharge the owners paid disbursements amounting to £250 which, under Clause 2 of the charterparty, should have been paid by the charterer. The vessel arrived at Nagasaki on June 9, 1901, & completed her discharge there on June 26.

On her arrival at Nagasaki there was due in respect of bill of lading freight £5,258 7*s.* 11*d.*, which the master, acting upon the owner's instructions, collected, & which was held by them. Of that amount it was admitted they were entitled to retain £3,523, made up of £3,100 for chartered freight due & unpaid upon the vessel's arrival, £390 for chartered hire due for the eight days June 18–26, & £33 for bunker coals taken over by the charterer at the beginning of the voyage.

On June 18, 1901, a further month's hire, amounting to £1,511 5*s.* became due. On June 26 the owners withdrew the vessel from the chartered service of the charterer, without prejudice to their claim against him for breach of the charterparty. It was agreed, for the purpose of an arbn. in respect of disputes as to freights arising out of the charterparty that the owners were entitled to £3,000 damages in respect of such breach. Upon a special case stated by the arbitrator:—*Held:* (2) the two sums of £134 17*s.* 2*d.* & £250 were amounts due under the charterparty, & the owners had a lien upon the £5,258 7*s.* 11*d.* for these two sums, making up £384 17*s.* 2*d.*; (3) if the bill of lading freight was actually received before June 18, there was no lien for that amount at the time the lien was exercised, & therefore no lien for the £1,511 5*s.*, but if the bill of lading freight was received after June 18 & before June 26, when the vessel was withdrawn by the shipowners, at the date it was received the lien existed; (4) there was no lien for the £3,000 damages; (5) if the shipowners were entitled under the charterparty to collect & receive the £5,258 7*s.* 11*d.*, then under the charterparty they had to account for it with the charterer, or claimants, as representing him, but as against claimants the shipowners would be entitled to set up any cross-claims they might have under the charterparty against the charterer.—SAMUEL, SAMUEL & CO. *v.* WEST HARTLEPOOL STEAM NAVIGATION CO. (1906), 11 Com. Cas. 115; *subsequent proceedings* (1907), 12 Com. Cas. 203.

*Annotations:—As to* (1) **Reid.** Calcutta S.S. Co. *v.* Weir, [1910] 1 K. B. 759; The Okehampton, [1913] P. 173.

**4630. —— —— Ship sub-chartered.**] — The owners of the *W.* chartered her to G. under a charterparty which provided that the master should sign bills of lading as presented, & that the charterers' liability should cease on shipment of the cargo, & gave the shipowners a lien for freight, dead freight, & demurrage. G. rechartered the vessel to M. L. under a charterparty which contained provisions similar to the original charterparty. M. L. who had no notice of the original charterparty, shipped a cargo in pursuance of the second charterparty, & bills of lading were signed by the master as presented by which the cargo was to be delivered to the order or assigns of the shippers on payment of freight without recourse to shippers as per the second charterparty:—*Held:* the bills of lading were signed by the master as agent of the shipowners & the shipowners were entitled to sue the indorsees of the bills of lading for the freight due thereon.—WASTWATER S.S. CO., LTD. *v.* NEALE (T. B.) & CO. (1902), 86 L. T. 266; 9 Asp. M. L. C. 282, D. C.

**4631. —— —— ——.**]—WEHNER *v.* DENE STEAM SHIPPING CO., No. 2496, *ante*.

**4632. —— —— —— Charterer's duty to account for freight received.**]—When a ship is chartered by a charterparty not amounting to a demise, & subsequently the ship is sub-chartered for a single voyage & bills of lading are signed by the master in respect of cargo carried on that voyage, the contract contained in the bills of lading is a contract with the shipowner, who, if there is unpaid hire due to him, is entitled to intervene & by notice to the charterer's agent require that the bill of lading freight be collected on his behalf. Thereupon the agent must account to the shipowner for the freight received without deduction of any disbursements already laid out by him on the charterer's behalf. *Qu.:* whether the agent in such a case is bound to account for freight actually received by him before receipt of such a notice from the shipowner.—MOLTHES REDERI AKT. *v.* ELLERMAN'S WILSON LINE, LTD., [1927] 1 K. B. 710; 96 L. J. K. B. 414; 136 L. T. 767; 32 Com. Cas. 106; 17 Asp. M. L. C. 219.

**4633. Right of charterer to freight — Goods shipped for third party—Master making freight payable according to charterparty.**]—Messrs. G., who were merchants of S., in Spain, entered into a charterparty with pltf., who was the master & captain of a certain vessel, being at that time at S.; & by the terms of the charterparty it was agreed, that the vessel should load a complete cargo of flour, the captain to sign bills of lading at more or less freight, without prejudice to the agreement; & the vessel, when loaded, was to proceed with her cargo to L. in England, & deliver the same on payment of the freight in a lump

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compromised by a money payment a claim by a consignee for damage done to a butt of wine:—*Held:* he acted as the owner's agent in collecting the freight, & he was bound to account for the full freight, having no authority from the owner to make the payment.—BROADHEAD *v.* YULE (1871), 9 Macph. (Ct. of Sess.) 921; 43 Sc. Jur. 509.—SCOT.

n. ——.]—The owners of a vessel entered into a charterparty by which they agreed that the vessel should take a cargo of coals from an English port to a port in Jamaica, as ordered, & bring a return cargo of sugar, etc., at certain rates of freight. The charterparty bore "master to sign bills of lading as required, without prejudice to this charterparty, & if the draft for payment of coal freight is drawn to his order, to indorse the same, payable to charterers' order." The charterers subsequently entered

*Sect. 3.—Payment of freight: Sub-sect. 2, C., D. & E. (a).*]

sum of £100 sterling. Messrs. G. loaded the vessel with 1,350 sacks of flour, & consigned the same to one L. B. in England. One P. put on board 500 sacks, for which pltf. gave a bill of lading, in which it was stated that pltf. would deliver them in the name of P. to defts., "paying him freight according to contract with Messrs. G." These 500 sacks of flour were shipped on the joint account of P. & defts., & the latter, whilst the flour was in the course of transit, became the sole owners thereof by purchase from P. of his interest therein. P. sent the bill of lading to defts., inclosed in a letter, in which he stated that the bill of lading did not express the freight, but that he had given a letter of order in favour of Messrs. G., that, on good delivery, defts. would pay Messrs. G. the freight upon the 500 sacks, at etc. The amount of freight mentioned in this latter exceeded that specified in the charterparty. In this latter of order, there was a request to defts. to deliver the amount of the freight to L. B. On the delivery of the cargo, L. B. paid the whole amount of the freight to pltf. & afterwards applied to defts. for payment of the freight of the 500 sacks; but he refused to pay the full amount of the freight claimed, on the ground that the flour had been damaged in the carriage. In an action by the master of the vessel against defts. for the freight of the 500 sacks of flour:—*Held:* there was no evidence of any contract between defts. & the master of the vessel with respect to this portion of the cargo; but, defts., if liable, were liable only to Messrs. G., upon a sub-contract with them. —ZWILCHENBART *v.* HENDERSON (1854), 9 Exch. 722; 23 L. J. Ex. 234; 18 J. P. 616; 156 E. R. 309.

**4634. —— Charterparty amounting to demise.**]—A charterparty of a ship as a general ship stipulated that the affreighters would pay for the hire of the ship a lump sum in full, to be ascertained before the sailing of the ship, payment to be made by the captain receiving such freight, not exceeding half, as the charterers might have payable abroad as per bills of lading as by the charterers' order payable at the port of discharge, & the balance to be paid by the acceptance of the charterers, at three months, payable in London, or in bills or cash, at charterer's option. It also stipulated that the charterers should have the option of naming the lumpers & stevedores, but they were to be under the direction of the master, & the owners of the ship were to be responsible for improper stowage, that only such goods should be received on board as the charterers might direct, that the master should, at the charterers' request, sign bills of lading in the usual manner at any freight the charterers might choose without prejudice to the charter; that the charterers should have the option of putting a full cargo in the fore cabin, & if used for passengers, the space to be allowed off the chartered freight, & that the ship should be kept by the owners during the voyage tight & staunch, & well provided with men, etc. The charterers elected to pay a lump sum, part to be paid abroad out of the freights reserved by the bill of lading, & the balance in England, as agreed in the charterparty. The bills of lading signed by the captain stipulated that freight was to be paid here one month after sailing, with average accustomed:—*Held:* under the terms of the charterparty, the contracts made by the signing of the bills of lading were to be considered as made by the captain as agent for the charterers & not for the shipowner, & the charterers & not the shipowner were entitled to claim the freight payable under the bills of lading.—MARQUAND *v.* BANNER (1856), 6 E. & B. 232; 25 L. J. Q. B. 313; 27 L. T. O. S. 66; 2 Jur. N. S. 708; 119 E. R. 850.

*Annotations:*—**Distd.** Gilkison *v.* Middleton (1857), 2 C. B. N. S. 134. **Dbtd.** Erichsen *v.* Barkworth (1858), 5 Jur. N. S. 517. **Apld.** Janentzky *v.* Langridge (1895), 1 Com. Cas. 90. **Expld.** Wehner *v.* Dene S.S. Co., [1905] 2 K. B. 92. **Refd.** Schuster *v.* McKellar (1857), 7 E. & B. 704; Wagstaff *v.* Anderson (1879), 4 C. P. D. 283. **Mentd.** Blakie *v.* Stainbridge (1859), 8 W. R. 24.

**4635. —— ——.**]—SAMUEL, SAMUEL & CO. *v.* WEST HARTLEPOOL STEAM NAVIGATION CO., No. 4629, *ante*.

**4636. —— Sub-charterparty by "chartered owners"—Insolvency of shipowner.**]—MORGAN, AKLEY & CO. *v.* POWLEY, THOMAS & CO. (1900), 45 Sol. Jo. 102.

**4637. —— Sub-charterers.**]—Pltfs. were the sub-charterers of the *Ruggiero de Flores* which was damaged in a collision due to the negligent navigation of defts.' ship. The owners of the *Ruggiero de Flores* recovered from defts. a sum which included an amount for chartered freight. The present pltfs., who were not parties to the collision action, now claimed to recover from deft. the difference between the charterparty freight & the bill of lading freight, which the *Ruggiero de Flores* was in course of earning at the time the collision took place. By the charterparty & sub-charterparty, which were practically in identical terms, the captain was to be under the orders of the charterers, or sub-charterers, as regards employment, agency, & other arrangements, but the charterers, or sub-charterers, were to indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading. The cargo was shipped by pltfs., & the mate's receipts were handed to pltfs. who signed the bills of lading & gave the captain orders to deliver the cargo at a particular port, where, if the collision had not occurred, it would have been taken delivery of by pltfs.' agents:—*Held:* pltfs. had sufficient interest in & possession of the cargo to enable them to bring the action.—THE OKEHAMPTON, [1913] P. 173; 83 L. J. P. 5; 110 L. T. 130; 29 T. L. R. 731; 12 Asp. M. L. C. 428; 18 Com. Cas. 320, C. A.

*Annotations:*—**Expld.** Elliott Steam Tug Co. *v.* Shipping Controller, [1922] 1 K. B. 127. **Apld.** The Zelo, [1922] P. 9. **Consd.** Wilston S.S. Co. *v.* Weir (1925), 31 Com. Cas. 111.

### *D. Where Ship Sold.*

**4638. Right of purchaser to receive freight.**]—(1) The right to freight is incidental to the ownership of the vessel which earns it, & therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charterparty, without the mention of the word "freight."

(2) In equity, an assignment of freight to be earned is valid.

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into contracts at different rates of freight with shippers to whom bills of lading were granted by the master at the request of the charterers:—*Held:* the owners of the vessel had no direct action against the shippers for the freight due by them.—MITCHELL, ETC. *v.* BURN, ETC. (1874), 1 R. (Ct. of Sess.) 900; 11 Sc. L. R. 518.—**SCOT.**

*o. Right of charterer to freight.*]—MITCHELL, ETC. *v.* BURN, ETC. (1874), 1 R. (Ct. of Sess.) 900; 11 Sc. L. R. 518.—**SCOT.**

**PART VIII. SECT. 3, SUB-SECT. 2.—D.**

**4638 i.** *Right of purchaser to receive freight.*]—DOBBYN *v.* COMERFORD (1860), 10 I. Ch. R. 327.—**IR.**

A ship was chartered by her owner. Afterwards, in June, 1854, he sold twenty-four shares of the ship to A., & the remaining forty shares to B., & in Dec. he assigned the freight to C. A. registered before, & B. after C.'s assignment; but C. gave the first notice to the charterers:—*Held:* C.'s right to the freight had priority over B., but not over A.

(3) One who is interested in the freight alone, severed from the ship, held liable to contribute his proportion of the expenses incurred by the ship in earning the freight.—LINDSAY *v.* GIBBS (1856), 22 Beav. 522; 28 L. T. O. S. 226; 2 Jur. N. S. 1039; 4 W. R. 788; 52 E. R. 1209; *subsequent proceedings* (1858), 26 Beav. 51; (1859), 3 De G. & J. 690, L. JJ.

*Annotations:*—*As to* (1) **Refd.** The Edmond (1860), Lush. 57. *As to* (2) **Apld.** Brown *v.* Tanner (1866), L. R. 2 Eq. 806. **Expld.** Wilson *v.* Wilson (1872), L. R. 14 Eq. 32. **Refd.** Keith *v.* Burrows (1876), 1 C. P. D. 722.

**4639. —— Sale during voyage—Covenant in charterparty to pay freight to owner—Right to freight as between purchaser & assignees of bankrupt owner.**]—A covenant in a charterparty of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage; & such owner afterwards becoming bkpt., his assignees, & not the vendee of the ship, have the legal right to receive the freight & demurrage due from the freighter upon the charterparty.—SPLIDT *v.* BOWLES (1808), 10 East, 279; 103 E. R. 781.

*Annotations:*—**Expld.** Morrison *v.* Parsons (1810), 2 Taunt. 407. **Distd.** Dean *v.* McGhie (1826), 4 Bing. 45. **Refd.** Kerswill *v.* Bishop (1832), 2 Cr. & J. 529; Gibson *v.* Ingo (1847), 6 Hare, 112; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

**4640. —— —— Goods shipped freight free on owners' account—Indorsement of bill of lading.**]—MERCANTILE BANK *v.* GLADSTONE, No. 2198, *ante*.

**4641. —— Assignment of chartered ship before voyage—Purchaser entitled to freight if earned.**]—If the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assign the charterparty to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship. But he cannot sue on the charterparty otherwise than in the name of the assignor.—MORRISON *v.* PARSONS (1810), 2 Taunt. 407; 127 E. R. 1136.

*Annotations:*—**Refd.** Case *v.* Davidson (1816), 5 M. & S. 79; Dean *v.* McGhie (1826), 4 Bing. 45; Moss *v.* Smith (1850), 9 C. B. 94; Bristow *v.* Whitmore (1858), John. 96; Willis *v.* Palmer (1859), 7 C. B. N. S. 340; Rusden *v.* Pope (1868), 37 L. J. Ex. 137; Keith *v.* Burrows (1877), 37 L. T. 291.

**4642. —— —— Charterparty assigned to another—Right to sue on charterparty in name of assignor.**]—MORRISON *v.* PARSONS, No. 4641, *ante*.

### *E. Where Ship Mortgaged.*

### *(a) In General.*

**4643. Right of mortgagee to freight—Mortgage of share of ship—Mortgagee's rights & liabilities same as mortgagor's.**]—GREEN *v.* BRIGGS (1848), 6 Hare, 395; 17 L. J. Ch. 323; 11 L. T. O. S. 412; 12 Jur. 326; 67 E. R. 1219; *subsequent proceedings* (1849), 6 Hare, 632.

*Annotations:*—**Apld.** Alexander *v.* Simms (1854), 5 De G. M. & G. 57. **Consd.** Lindsay *v.* Gibbs (1856), 22 Beav. 522. **Distd.** Japp *v.* Campbell (1887), 57 L. J. Q. B. 79. **Refd.** The Edmond (1860), 2 L. T. 192; Vanner *v.* Frost (1870), 39 L. J. Ch. 626.

**4644. —— —— No right to freight against owner of unmortgaged share.**]—A part owner of a ship, whose share was subject to a mtge., agreed with the other part owner, whose share was not subject to any mtge., but without the concurrence of the mtgee., to purchase guano on the joint account of the two part owners, & bring it in the ship to England. On the completion of the voyage, & when the cargo was about to be discharged, the mtgee. took possession:—*Held:* he had no claim against the owner of the unmortgaged share for freight, & could, at the utmost, only claim to adopt the mtgor.'s contract, & to stand in his place as to the profits of the adventure, after deducting all expenses.—ALEXANDER *v.* SIMMS (1854), 5 De G. M. & G. 57; 2 Eq. Rep. 861; 23 L. J. Ch. 721; 2 W. R. 329; 43 E. R. 791, L. JJ.; *subsequent proceedings* (1855), 20 Beav. 123.

*Annotations:*—**Distd.** Gumm *v.* Tyrie (1864), 4 B. & S. 680; The Harriet (1868), 18 L. T. 804; Japp *v.* Campbell (1887), 57 L. J. Q. B. 79.

**4645. —— As against indorsee of bill of lading.**]—GUMM *v.* TYRIE, No. 4701, *post*.

**4646. —— Mortgagor allowed to receive freight.**]—The mtge. of a ship carries with it a right to receive the freight earned by the ship; & although the mtgee. cannot recover back from the mtgor. freight which he has allowed the mtgor. to receive, yet he may at any time intercept the freight by giving notice to the mtgor. consignee, or charterer that he intends to exercise his right of property, & to require the freight to be paid to him. The owner of a ship assigned the freight not yet earned, &, three days afterwards, with the knowledge of the assignee, mortgaged the ship to defts., who registered their mtge. The assignee neglected to give notice of his claim upon the freight to the mtgees.:—*Held:* the assignee was not entitled to set up any right to such freight in opposition to the rights of the mtgees.—WILSON *v.* WILSON (1872), L. R. 14 Eq. 32; 41 L. J. Ch. 423; 26 L. T. 346; 20 W. R. 436; 1 Asp. M. L. C. 265.

*Annotations:*—**Expld.** The Benwell Tower (1895), 72 L. T. 664. **Consd.** Shillito *v.* Biggart, [1903] 1 K. B. 683.

**4647. —— —— Vessel worked by mortgagor.**]—A lighterman having a vessel, & being indebted to A. & B., agreed to assign it to them for the debt, & their names were painted on it; but it was further agreed, that he should work the vessel, paying one-third of the profits to A. & B. After his death his widow worked the vessel, & carried three freights of limestone for A., & now brought an action against him to recover the amount:—*Held:* the action could be maintained by her, for she ought to receive the whole freight, & then pay over the third to A. & B. jointly.—WELDRAKE *v.* HIRST (1823), 2 L. J. O. S. K. B. 2.

**4648. —— Right to intercept freight by notice—To mortgagor, consignee or charterer.**]—WILSON *v.* WILSON, No. 4646, *ante*.

**4649. —— Mortgage registered—Right as against prior assignee of freight—Mortgagee without notice.**]—WILSON *v.* WILSON, No. 4646, *ante*.

**4650. —— Right not transferred by virtue of mortgage alone.**]—(1) A mtgee. of a ship does not, ordinarily speaking, obtain by the mtge. alone, a transfer, by way of contract, or assignment, of the right to freight. The mtgor. remains the *dominus* of the ship with regard to everything

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**PART VIII. SECT. 3, SUB-SECT. 2.—E. (a).**

**p.** *Right of mortgagee to freight—Freight received by agents.*]—Before the mtgee. of a ship obtained possession, & after her arrival in port, the owner's agent, who was also agent for the charterers & consignees, arranged with them that the freight should be discharged by a sale to him of part of the cargo, instead of payment being made as the charterparty provided. Upon this arrangement the cargo was landed, & stored with wharfingers:—*Held:* the mtgee.'s lien for freight was ended.—BELFAST HARBOUR COMRS. *v.* LAWTHER & MARINE INVESTMENT SOCIETY, THE EDWARD CARDWELL (1865), 12 L. T. 677; 17 I. Ch. R. 54.—**IR.**

**q.** ——.]—Under the charterparty the freight of a ship was payable to the captain by the consignee of the cargo at V. On reaching that port

*Sect.* 3.—*Payment of freight: Sub-sect.* 2, *E.* (*a*) & (*b*).]

relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mtgee. takes possession. The mtgee. on taking possession becomes the owner, & it is by virtue of that ownership, & not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable.

(2) Goods which, by the terms of the bill of lading have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount.

(3) The owner of the ship cannot, by his subsequent acts, give to his mtgees., as against the holder of a bill of lading, rights different from those possessed by himself under it. M. was the owner of sixty shares in a ship. B., who acted as master, was the owner of the remaining four shares. As B. could not get at San Francisco, where he was, any employment for the ship, he determined to obtain a cargo of wheat & bring it to England "on ship's account." Not having money to purchase the wheat, he obtained the cargo on the credit of P. & co. To them he gave bills of lading, describing the wheat as "shipped on owner's account," deliverable to the order of P. & co. "at freight of 1*s.* per ton." Bills of exchange for the price of the wheat, afterwards duly accepted by M., were also given to P. & co. M., who carried on business in London, had obtained from K. & co., merchants in London, advances of money, &, by way of security, had given them a mtge. of his shares in the ship. While the ship was on its voyage M. arranged with B. & co., also of London, to make him advances to take up the bills of exchange; the advances were made, & for these advances he agreed that B. & co. should receive the bills of lading, & certain policies of insurance effected by him, & should sell the cargo for his account & their own. B. & co. sold the cargo of wheat to third persons. The sale-note described the wheat as "at the price of 43*s.* 6*d.* per quarter of 500 lbs., shipped . . . including freight & insurance, etc. . . . Vessel to discharge afloat. Payment, cash in London, within seven days," etc. The last sentence of the note was, "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton of 2,240 lbs., & invoice to be rendered accordingly." The invoice, made out by M., contained these words "6,179 qrs. @ 43*s.* 6*d.* per 500 lbs." "Freight on tons 1,379-7-1-3 @ 55*s.* per 2,240 lbs." M. obtained from B. & co. necessary advances, with which he took up the bills of exchange, which, with the bills of lading attached, were then handed to him. Both sets of bills were delivered to B. & co. with a memorandum indorsed on the bills of lading that they were "assigned to B. & co.," & "the freight assigned is at the rate of 55*s.* per ton, & not the nominal amount of 1*s.* per ton." The bills of lading & invoice were sent to the purchasers of the wheat. When the vessel arrived K. & co., as mtgees. of the ship, took possession of it. The purchasers of the wheat claimed delivery of it to them on payment of the freight stated in the bills of lading:—*Held:* they were entitled to the delivery of it on payment of that freight, for the bills of lading could not, under the circumstances of the case, be altered, & the 55*s.* per ton introduced into the bought-note, formed part of the whole purchase-money, being a payment to be made on delivery of the cargo, & though called "freight" did not properly bear that character.—KEITH *v.* BURROWS (1877), 2 App. Cas. 636; 46 L. J. Q. B. 801; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. L. C. 481, H. L.

*Annotations:—As to* (1) **Consd.** Swan *v.* Barber (1879), 5 Ex. D. 130. **Apld.** Cory *v.* Stewart (1886), 2 T. L. R. 508. **Consd.** Japp *v.* Campbell (1887), 57 L. J. Q. B. 79; The Benwell Tower (1895), 72 L. T. 664. **Apld.** The Heather Bell, [1901] P. 272. **Consd.** Law Guarantee & Trust Soc. *v.* Russian Bank for Foreign Trade, [1905] 1 K. B. 815. **Reld.** Simpson *v.* Thompson (1877), 3 App. Cas. 279; Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824; Shillito *v.* Biggart, [1903] 1 K. B. 683; The Manor, [1907] P. 339. *Generally,* **Reld.** The Red Sea, [1896] P. 20; Barque Robert S. Besnard Co. *v.* Murton (1909), 101 L. T. 285; Coker *v.* Bolton (1912), 82 L. J. K. B. 91. **Mentd.** Nähmaschinen Fabrik Act. *v.* Pickford & Lee & Harris (1888), 4 T. L. R. 617.

**4651. —— Appointment of receiver.**]—In an action *in personam* by pltf. claiming to be equitable mtgee. of the foreign ship *F.* & her freight to secure a liability incurred by him in accepting bills of exchange which had been drawn by the managing owner, it appeared that the alleged mtge. was given to pltf. by the managing owner; that pltf., when he accepted the bills, though the managing owner was sole owner, & that it was subsequently sworn on affidavit that the managing owner was only a part owner, but it did not appear whether the amount of the bills was in fact expended on the purposes of the ship.

The *F.* was in an English port under charter to carry cargo to a foreign port, when, on application by pltf., the judge made an order appointing a receiver & authorising him to proceed with the ship to the foreign port & there receive the ship & all the freight due upon the voyage. Defts. appealed:—*Held:* even assuming the managing owner to be only a part owner, yet, as it did not appear that the amount of the bills was not expended solely for the purposes of the ship, the ct. had authority to appoint a receiver to receive the whole of the freight, & in the circumstances, it was expedient that the order should stand.—BURN *v.* HERLOFSEN & SIEMENSEN, THE FAUST (1887), 56 L. T. 722; 3 T. L. R. 382; 6 Asp. M. L. C. 126, C. A.

*Annotation:*—**Reld.** Pringle Adam *v.* Dixon (1896), 2 Com. Cas. 38.

**4652. —— Freight received by agents—Agents making periodical distributions—Right to freight earned & received after notice to agents.**]—E. was the mtgee. of certain shares in two ships. The profits were received by B. A. & co., who made periodical distributions once a year in Mar., amongst the persons entitled. E. gave notice in Nov. of the mtge.:—*Held:* E. was only entitled to the freight earned & received by B. A. & co., after the notice, & before that date the mtgor. was entitled, as the fact that the agents only accounted to the persons entitled at stated periods made no difference.—ESSARTS *v.* WHINNEY (1903), 88 L. T. 191; 19 T. L. R. 235; 9 Asp. M. L. C. 363, C. A.

(*b*) *Mortgagee taking Possession.*

**4653. Right of mortgagee to freight.**] — The mtgee. of a ship cannot sue in his own name for

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the captain received a letter from a mtgee., stating that he took possession of the ship in that character & directing the freight to be remitted to him. The mtgee.'s agents at V. exhibited to the captain a notarial copy of the mtge., but did not in any way interfere with the ship. The captain received the freight & under the directions of the trustee for the creditors of the owner, who had become bkpt., remitted the freight to the trustee:—*Held:* the mtgee. had not taken possession of the ship before the cargo was discharged & therefore had not acquired right to the freight.—DUNCAN *v.* DON (1861), 23 Dunl. (Ct. of Sess.) 544; 33 Sc. Jur. 276.—SCOT.

the freight accruing after the mtge.—CHINNERY *v.* BLACKMAN (1784), 3 Doug. K. B. 391; 1 Hy. Bl. 117, n.; 99 E. R. 712.

*Annotations:*—**Apld.** Jackson *v.* Vernon (1789), 1 Hy. Bl. 114. **Distd.** Dean *v.* M'Ghie (1826), 12 Moore, C. P. 185. **Consd.** Briggs *v.* Wilkinson (1827), 7 B. & C. 30; Kerswill *v.* Bishop (1832), 2 Cr. & J. 529; Shillito *v.* Biggart, [1903] 1 K. B. 683. **Refd.** Myers *v.* Willis (1855), 17 C. B. 77; Willis *v.* Palmer (1860), 7 C. B. N. S. 340; Rusden *v.* Pope (1868), L. R. 3 Exch. 269.

**4654.** ——.]—Accruing freight passes to the mtgee. of a ship, who takes possession before the conclusion of the voyage, notwithstanding 6 Geo. 4, c. 110, s. 45, which enacts that the mtgee. shall not be deemed owner except so far as necessary for the purpose of rendering the ship, etc., available, etc., for the payment of the debt, for securing the payment of which the transfer shall have been made.—KERSWILL *v.* BISHOP (1832), 2 Cr. & J. 529; 2 Tyr. 602; 1 L. J. Ex. 227; 149 E. R. 224.

*Annotations:*—**Consd.** Alexander *v.* Simms (1853), 18 Beav. 80. **Apld.** Rusden *v.* Pope (1868), L. R. 3 Exch. 269. **Refd.** Woods *v.* Read (1850), 15 L. T. O. S. 90; Wilson *v.* Wilson (1872), L. R. 14 Eq. 32; Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824.

**4655.** ——.]—In July, 1853, pltf. being the owner of a ship sold it to D., of the firm of D. & co., for £4,725 & received in payment the draft of D. & co. on B. at twelve months date. In Sept. 1853, the ship sailed from London on a voyage to San Francisco & thence on a seeking voyage home. In June, 1854, the captain, who was sent out by D. to take charge of the vessel, chartered it to load a cargo of flour for Sydney. Some days before the bill of exchange became due D. & co. requested pltf. to renew it, & he consented to do so on having the vessel transferred to him as a security. The vessel was accordingly transferred to him by deed of assignment which was in the form of an absolute sale. In Oct. 1854, the captain, who had no knowledge of the assignment, received £1,000 on account of freight, & remitted it to D. & co. by a bill of exchange. In Nov. 1854, D. & co., who had acted as ship's husband, became bkpt.:—*Held:* (1) though the assignment was in form absolute, yet the ct. might look to the real nature of the transaction & see that it was by way of mtge. only; (2) pltf., being only a mtgee. & not having taken any step to obtain possession, was not entitled to the freight.—GARDNER *v.* CAZENOVE (1856), 1 H. & N. 423; 26 L. J. Ex. 17; 7 L. T. 339; 5 W. R. 195; 156 E. R. 1267.

*Annotations:*—*As to* (1) **Apld.** The Innisfallen (1866), L. R. 1 A. & E. 72. **Consd.** Ward *v.* Beck (1866), 13 C. B. N. S. 668. **Refd.** Gumm *v.* Tyrie (1864), 4 B. & S. 680. *As to* (2) **Apld.** Willis *v.* Palmer (1859), 7 C. B. N. S. 340. **Distd.** Rusden *v.* Pope (1868), L. R. 3 Exch. 269.

**4656.** ——.]—(1) The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer & not in the nature of a charge on the freight; & therefore if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners.

(2) When an entire ship is in mtge., in order to defeat the right of the mtgor. to receive the freight, the mtgee. must take possession of her before the completion of her voyage.

(3) Where the mtgor. of certain shares is ship's husband, if the mtgees. join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mtgor. loses all right as ship's husband to receive the freight. In Aug. 1876, R. was mtgor. of certain shares in a vessel, & also was acting as ship's husband, & defts. were charterers of the vessel for the voyage upon which she was then employed. R. obtained from pltfs. a loan of £200, & by a letter dated Aug. 30. requested defts. to pay to pltfs. the freight due on the charter. On Sept. 20, the mtgees of R.'s shares & the owners of the other shares appointed E. ship's husband in place of R. Upon Oct. 11, the vessel completed her voyage, & upon Oct. 14, began to discharge her cargo; upon Oct. 16, defts. sent to pltfs. a cheque for £200, which they afterwards dishonoured, E. having claimed the amount of the freight:—*Held:* pltfs. could not maintain an action to recover the amount of the cheque.—BEYNON *v.* GODDEN (1878), 3 Ex. D. 263; 39 L. T. 82; 26 W. R. 672; 4 Asp. M. L. C. 10, C. A.

*Annotation:*—*As to* (1) **Refd.** The Benwell Tower (1895), 72 L. T. 664.

**4657.** —— **As against assignees of bankrupt mortgagor—Provision by mortgagee for seamen's wages.**]—(1) The owner of a ship mtged. her whilst at sea, & afterwards became bkpt. The agents of the mtgee. took possession of her on her homeward voyage; &, after her arrival in port, received moneys on account of freight, & paid disbursements, viz. port charges & seamen's wages, exceeding the amount of the freight received:—*Held:* the assignees of bkpt. could not maintain an action for money had & received, to recover the amount of the freight from the agents of the mtgee., they having paid a larger sum on account of charges on the ship, & which bkpt. as owner was bound to discharge.

(2) 4 Geo. 4, c. 41 & 6 Geo. 4, c. 110, contain a proviso, that the mtgee. may take possession, for the purpose of sale, "or otherwise." From that it must be inferred, that he may use the ship as he pleases. A mtgee. is justified in entering the vessel before the freight becomes due, & has no right to part with the goods until the freight has been paid (*per* CUR.).—DEAN *v.* M'GHIE (1826), 4 Bing. 45; 2 C. & P. 387; 12 Moore, C. P. 185; 5 L. J. O. S. C. P. 44; 130 E. R. 685.

*Annotations:*—*As to* (2) **Consd.** European & Australian Royal Mail Co. *v.* Royal Mail Steamer-Packet Co. (1858), 4 K. & J. 676. *Generally*, **Refd.** Kerswill *v.* Bishop (1832), 2 Tyr. 602.

**4658.** —— ——.]—A mtgr. of a vessel carries with it the freight & the mtgee. intervening by taking possession or by an act equivalent to taking possession, before the freight becomes payable is entitled as against the mtgor. or his assignees in bkpcy. to receive it. The owners of a ship having mtged. it to pltf. chartered it to S. & D., for a voyage to Brass river, two-thirds of the freight being payable five days after sailing from Liverpool the remaining one-third on receipt of the captain's advice of delivery at Brass river. Pltf. demanded the two-thirds freight from the owners both before & after it was payable but did not obtain it. After the complete discharge of the vessel at Brass river but before receipt of the captain's advice of delivery, pltf. gave notice of his mtge. to the charterers & on the return of the vessel to Liverpool took possession of her outside the port:—*Held:* (1) although the mtgee. could not sue upon the charterparty, yet he was by virtue of his mtge. entitled as against the owners to claim & to receive the freight; (2) his right to receive the freight might be perfected by his taking possession or doing an act equivalent to taking possession at

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—A mtgee. who has taken possession of a vessel under his mtge. is entitled to the freight accruing due, subject to the claim for necessary supplies for the last voyage, which is privileged & ranks before him.—PICKFORD *v.* DART & CANADA SUGAR REFINING CO. (1888), M. L. R. 4 Q. B. 70.—CAN.

*Sect.* 3.—*Payment of freight: Sub-sect.* 2, *E.* (*b*) & (*c*).]

any time before the freight was payable, although after it had been actually earned; (3) actual possession being impossible, notice to the mtgors. & to the charterers was an act equivalent to taking possession & pltf. having done all that was possible to manifest his right was entitled to be paid the freight.—RUSDEN *v.* POPE (1868), L. R. 3 Exch. 269; 37 L. J. Ex. 137; 18 L. T. 651; 16 W. R. 1122; 3 Mar. L. C. 91.

*Annotations*:—*As to* (1) **Consd.** Wilson *v.* Wilson (1872), L. R. 14 Eq. 32. *As to* (2) **Refd.** Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824. *As to* (3) **Consd.** The Benwell Tower (1895), 72 L. T. 664. **Refd.** Liverpool Marine Credit Co. *v.* Wilson (1872), 26 L. T. 717. *Generally*, **Mentd.** Duncan *v.* Cashin (1875), L. R. 10 C. P. 554; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645; Jennings *v.* Mather, [1901] 1 K. B. 108.

**4659. —— As against ship's brokers — Advancing money for ship's use.**]—Ship brokers advancing moneys to the owner of a ship for the ship's use, having at the same time notice, & by an indorsement on the certificate of registry, of a prior mtge. on the ship, are not entitled to be repaid their advances out of the freight in priority to the mtgee., although the mtgee. does not take possession of the ship until after she has entered the docks from her homeward voyage.—GIBSON *v.* INGO (1847), 6 Hare, 112; 67 E. R. 1103.

*Annotations*:—**Refd.** The Celtic King, [1894] P. 175. **Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421.

**4660. —— As against purchaser without notice.**]—(1) The registered owner of forty eight shares in a ship belonging to the port of Liverpool authorised the captain, who was the owner of the other shares, by a power of attorney, to sell his forty-eight shares in the ship. The captain sailed with the ship on her voyage to Sydney, with her certificate of registry on board; &, whilst the ship was at sea, the owner of the forty eight shares mtged. them to pltfs. A memorandum of the mtge. was registered at the custom house at Liverpool, & a note thereof was indorsed on the mtge. On arriving at Sydney subsequently to the date of the mtge., the captain, acting in his own right & on the power of attorney, sold the entirety of the ship to deft., who was resident at Sydney, & who registered the ship *de novo* at that port, & subsequently, at his own expense, freighted the ship with a cargo for London direct. She arrived in the London Docks. Pltfs. had no notice of the power of attorney given to the captain, & neither the captain nor deft. had any notice of the previous mtge. to pltfs. Pltfs. & deft. both took possession of the ship on her arrival at the London Docks, & pltfs. as mtgees., & deft. as purchaser, claimed the forty eight shares of the ship & of the freight: —*Held*: pltfs. were entitled to the shares both of the ship & of the freight paramount to deft., but subject to allowing him in account the proportion of the outfit of the ship & of the voyage to London.

(2) The mtgee. of a ship, who takes possession before the conclusion of the voyage, is entitled to the then accruing freight (PARKER, V.-C.).

(3) A mtgee. who takes possession of the ship at any time before the cargo is discharged comes with the rule. The right to the freight does not accrue until the goods are not only conveyed to their destination, but are also delivered (PARKER, V.-C.).

(4) When the mtge. is of the entirety, the mtgee. can take exclusive possession, so as to entitle himself to the freight. But when the mtge. is of a share only, he cannot effectually take possession, so as to entitle himself singly to receive the freight. In such a case, I consider that the mtgee., even without formally taking possession, if he gives notice of his mtge. to the part owners in possession of the ship, & requires payment to himself of the share of freight belonging to his mtged. share of the ship, would at least entitle himself to receive such share of all freight accruing & not actually due at the time of the notice (PARKER, V.-C.).—CATO *v.* IRVING (1852), 5 De G. & Sm. 210; 21 L. J. Ch. 675; 18 L. T. O. S. 345; 16 Jur. 161; 64 E. R. 1084.

*Annotations*:—*As to* (1) **Refd.** Japp *v.* Campbell (1887), 57 L. J. Q. B. 79. *As to* (3) **Consd.** Shillito *v.* Biggart, [1903] 1 K. B. 683. **Refd.** Brown *v.* Tanner (1868), 3 Ch. App. 597. *As to* (4) **Refd.** Alexander *v.* Simms (1853), 18 Beav. 80.

**4661. —— Freight received by mortgagor after execution of mortgage—Before possession taken.**]—A mere mtge. of the ship does not give the mtgee. a right to the earnings of the ship received by the mtgor. after the execution of the mtge., but before the mtgee. takes possession.—WILLIS *v.* PALMER (1860), 7 C. B. N. S. 340; 29 L. J. C. P. 194; 2 L. T. 626; 6 Jur. N. S. 732; 8 W. R. 295; 141 E. R. 847.

*Annotation*:—**Refd.** Essarts *v.* Whinney (1903), 88 L. T. 191.

**4662. —— As against assignee of freight.**]—BROWN *v.* TANNER, No. 4721, *post*.

**4663. —— —— Mortgagee giving notice to consignees.**]—WILSON *v.* WILSON, No. 4646, *ante*.

**4664. —— As against equitable charges—Right of mortgagee to tack.**]—The first registered mtgee. of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, & to retain thereout not only what is due on his first mtge., but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; & it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight.—LIVERPOOL MARINE CREDIT CO. *v.* WILSON (1872), 7 Ch. App. 507; 41 L. J. Ch. 798; 26 L. T. 717; 20 W. R. 665; 1 Asp. M. L. C. 323, L. JJ.

*Annotations*:—**Consd.** The Benwell Tower (1895), 72 L. T. 664; Shillito *v.* Biggart, [1903] 1 K. B. 683. **Refd.** Keith *v.* Burrows (1876), 1 C. P. D. 722; Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824.

**4665. —— Right by virtue of ownership.**]—KEITH *v.* BURROWS, No. 4650, *ante*.

**4666. —— As against creditors obtaining garnishee order.**]—In Oct. 1883, W. mtged. to pltfs. certain shares in a ship. Subsequently W., who was captain & ship's husband of the ship, incurred liabilities to defts. for goods supplied to & disbursements made for the ship. In Mar. 1886, the ship was chartered for a voyage from Montreal to Liverpool, the freight being payable one third at Quebec & two thirds on right delivery of the cargo in Liverpool. Immediately upon arrival of the ship in Liverpool, pltfs. took possession & gave notice to the owners of the cargo to pay the freight to them. Defts. afterwards obtained judgment against W., & obtained garnishee orders upon the receivers of the cargo attaching the freight due from them:—*Held*: defts. had no right to the freight as against pltfs.—JAPP *v.* CAMPBELL (1887), 57 L. J. Q. B. 79; 4 T. L. R. 53.

**4667. —— Prior unregistered mortgagee receiving freight as assignee—Right as against subsequent registered mortgagee—Freight assigned after notice of subsequent mortgage.**]—On Oct. 28, 1892, S. being the registered owner of the *B.*, executed a mtge. to the M. co., which recited that they had accepted drafts of S.'s firm for £20,000, & might make further advances from time to time to S. or on account or to order of him or his firm, & in order to secure the M. co. payment in cash upon

demand of said advances, & any renewals of same, & any further or other payments or claims of any description which might be due or growing due. by S. or his firm to them on any account. S. covenanted to pay them the sums for the time being due on the mtge. whether by way of principal or interest; for the purpose of better securing to them "the payment of such sums as last aforesaid," he mtged. the ship *B.* This mtge. was registered as a mtge. to secure an account current on the day it was executed. On same day S., by letter, requested the M. co. to make him advances by acceptances, &, as security for same & any other advances whatsoever present or future, said he had mtged. or would mtge. the *B.* It was part of the arrangement that the amount covered by the bills should be reduced at the end of every six months. On Apr. 20, 1893, S. failed to make the due reduction. On May 15, he granted a second mtge. on the *B.* to T. Bros., which was registered on May 30. On Sept. 1, he, in consideration of a further advance, hypothecated to the M. co. an equal amount of the freight of the ship, which was then chartered to load a general cargo. He directed his agents at the port of discharge to pay that proportion of freight to the M. co., notice being given to T. Bros. He subsequently executed an assignment of the freight to the M. co. to secure advances for necessary disbursements. T. Bros. transferred their mtge. to pltf., on whose behalf an attachment was placed upon the freight. The ship was sold by the M. co., under their power of sale, & they paid themselves their advances under the first mtge. They further claimed out of the proceeds of the sale the subsequent advances secured by the assignment. Before making the further advances the M. co. had notice of the second mtge.:—*Held:* the last advances were covered by the first mtge., but the M. co. were not entitled to payment out of proceeds of the ship in priority to the claim of pltf. as assignee of T. Bros.—THE BENWELL TOWER (1895), 72 L. T. 664; 8 Asp. M. L. C. 13.

**4668. —— Coal supplied for voyage on which freight earned—Right of mortgagees as against vendors of coal.**]—Resps. sold in this country coal to the owners of the *A.* for a voyage to Monte Video & back, payment to be at thirty days. Subsequently, applts., as mtgees., took constructive possession of the *A.* By an order of ct. the freight of the *A.* was ordered to be collected, the necessary disbursements paid, & the balance brought into ct. Resps. not having been paid for the coal supplied, claimed to be entitled to payment out of the freight which had been earned on the voyage to Monte Video & back:—*Held:* although the coal was used for the purpose of earning freight on that voyage, it was supplied to the mtgors., & not to applts., & therefore resps. were not entitled to payment out of the freight, which must be paid to applts. as mtgees.—EL ARGENTINO, [1909] P. 236; 78 L. J. P. 102; 101 L. T. 80; 25 T. L. R. 518; 11 Asp. M. L. C. 280.

**4669. When possession may be taken—Before conclusion of voyage.**]—KERSWILL *v.* BISHOP, No. 4654, *ante.*

**4670.** —— —— .]—CATO *v.* IRVING, No. 4660, *ante.*

**4671. —— Before cargo delivered.**]—CATO *v.* IRVING, No. 4660, *ante.*

**4672.** —— ——.]—BEYNON *v.* GODDEN No. 4656, *ante.*

**4673. —— Before freight payable—Although actually earned.**]—RUSDEN *v.* POPE, No. 4658, *ante.*

**4674. How possession may be taken—By giving notice—& requiring payment of shares—Mortgagee of shares.**]—CATO *v.* IRVING, No. 4660, *ante.*

**4675.** —— —— **To mortgagors & charterers.**]—RUSDEN *v.* POPE, No. 4658, *ante.*

**4676. —— Ship's husband mortgagor of shares—Mortgagees & owners of other shares appointing new ship's husband.**]—BEYNON *v.* GODDEN, No. 4656, *ante.*

**What freight passes to mortgagee.**]—*See* Subsect. 2, E. (*c*), *post.*

(*c*) *What Freight passes to Mortgagee.*

**4677. Freight accruing due.**]—DEAN *v.* M'GHIE, No. 4657, *ante.*

**4678.** ——.]—KERSWILL *v.* BISHOP, No. 4654, *ante.*

**4679.** ——.]—CATO *v.* IRVING, No. 4660, *ante.*

**4680.** ——.]—GARDNER *v.* CAZENOVE, No. 4655, *ante.*

**4681. —— Right of mortgagee to sue in own name—Freight accruing due after mortgage.**]—CHINNERY *v.* BLACKMAN, No. 4653, *ante.*

**4682. —— & actually contracted for—Before possession taken.**]—KEITH *v.* BURROWS, No. 4650, *ante.*

**4683. Freight previously earned but unpaid.**]—A mtgee. of a ship is not entitled to unpaid freight which became due previously to the date of his taking possession of the ship.—SHILLITO *v.* BIGGART, [1903] 1 K. B. 683; 72 L. J. K. B. 294; 88 L. T. 426; 51 W. R. 479; 19 T. L. R. 313; 47 Sol. Jo. 354; 9 Asp. M. L. C. 396; 8 Com. Cas. 137.

**4684. Amount of freight payable—Bill of lading freight.**]—KEITH *v.* BURROWS, No. 4650, *ante.*

**4685.** —— —— **Nominal freight.**]—S., a partner in a firm at Liverpool, & sole owner of the ship *Ellen*, entered into an arrangement, by which the *Ellen* was in 1850, & 1851, consigned during several voyages to H., a partner in the firm of H. & C. H., at New Orleans with general instructions to do the best he could, either in loading the vessel on freight, or shipping cotton, on the joint account of S. & H. On those occasions as is usual when cotton is shipped on account of the shipowner, a nominal freight, or "no freight, being owner's property," was inserted in the bills of lading; but in stating the partnership accounts in respect of the sale of the cotton, the current rate of freight was charged in favour of S., & to the debit of the joint adventure. On Apr. 4, 1851, S. wrote to H. in these terms: "We hope you have bought cotton, & that the *Ellen* has arrived. What you do, we will confirm." Again on Apr. 26: "Whatever you do for the *Ellen* will be confirmed by us." On May 8, 1851, H. & C. H. shipped on board the *Ellen* 447 bales of cotton; & the master signed a bill of lading, by which the cotton was "to be delivered unto order or to assigns, he or they paying freight for the cotton 1*s.* per bale, being owner's property, when draft against same is paid, say £3,590 9*s.* 8*d.*, with primage & average accustomed." On May 15, H. & C. H. again shipped 381 bales of cotton & a similar bill of lading was signed by the master. The draft for £3,590 9*s.* 8*d.* dated May 8, 1851, was for the invoice price of the cotton, & was on the firm, of which S. was a partner, & was purchased on the day of its date, by pltfs., merchants at New Orleans, who took at

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**PART VIII. SECT. 3, SUB-SECT. 2.—E. (*c*).**

*r. Portion of cargo shipped on account of owner.*]—Where a portion of the cargo of a vessel is shipped on account of the owner, a mtgee. who takes possession under his mtge. cannot claim freight with respect to that portion.—BELFAST HARBOUR COMRS. *v.* LAWTHER & MARINE INVESTMENT SOCIETY, THE EDWARD CARDWELL (1865), 12 L. T. 677; 17 I. Ch. R. 54.—IR.

*Sect. 3.—Payment of freight: Sub-sect. 2, G. & H.; sub-sect. 3, A.*]

Co. *v.* BLAND (J.) & Co., LTD. (1914), 84 L. J. K. B. 738; 112 L. T. 724; 31 T. L. R. 116; 13 Asp. M. L. C. 49; 20 Com. Cas. 143.

**4701. —— Right as against holder of bills of lading—Bankruptcy of shipowners.**]—In Dec. 1856, S. & F., of London, owners of the ship *S.*, mortgaged it to pltf. to secure the repayment of £2,500, & assigned to him all the freights, earnings, gains, profits, & advantages to be made, earned & gotten by the ship, & authorised him to demand & recover all sums due for freight & earnings of the ship. At this time the *S.* was under charterparty to sail to Cuba & back, which voyage she performed, & on her arrival in England in 1857, default having been made in payment of the £2,500, pltf. put a stop order on the freight, whereupon S. & F. agreed that the future freight should be paid to him, & the captain was informed of this arrangement. In Oct. 1857, the *S.* was under charter to carry a cargo of coals to the West Indies, & S. & F. arranged with I. & co., of London, merchants, for a purchase of timber at M., in Cuba, to be supplied by T. & co. & to be sent home in the *S.*, & for payment of which I. & co. had given a letter of credit on M. & co., of Havannah, undertaking to accept their drafts for the cost of the cargo, upon presentation against the shipping documents to be forwarded to I. & co. Owing to delay in the outward voyage, T. & co. disposed of the timber they had appropriated as the *S.'s* cargo, & when she reached M. there was no cargo ready. The captain, however, purchased through T. & co. a cargo on account of his owners, & on its being received on board gave to T. & co. a bill of lading, in part printed, by which he bound himself to deliver " in the like good order in the said port, or in such other my manifest may appoint, to order . . . who . . . on faithful delivery thereof being shown shall pay me for freight & conveyance. . . ." T. & co. sent an invoice to M. & co., which stated that the goods were shipped " by order of M. & co., of Havannah, & for account of risk of whom it may concern." M. & co. paid the amount of the invoice in their account with T. & co., & drew on I. & co. for the amount, & sent the bill of lading to them. I. & co. refused to honour the bills, & in consequence M. & co. arranged with deft. to accept & take them up for the honour of the drawer, which he did, receiving at the same time from I. & co. the bill of lading indorsed in blank by T. & co. S. & F. became bkpts. Upon an interpleader issue, which raised the question whether pltf. was legally or equitably entitled to any freight as against deft.:—*Held:* pltf. was entitled to freight under the assignment. —GUMM *v.* TYRIE (1865), 6 B. & S. 298; 5 New Rep. 413; 34 L. J. Q. B. 124; 13 W. R. 436; 122 E. R. 1206, Ex. Ch.

*Annotations:*—**Apld.** Cellier *v.* Hinde (1867), 17 L. T. 341. **Refd.** Mercantile & Exchange Bank *v.* Gladstone (1868), 37 L. J. Ex. 130; Keith *v.* Burrows (1877), 2 App. Cas. 636; Rhymney S.S. Co. *v.* Iberian Iron Ore Co., Forest S.S. Co. *v.* Same (1898), 79 L. T. 240.

**4702. —— Right as against debenture holders.**]—The directors of a shipping co. passed a resolution authorising its brokers to hypothecate the freight of two ships during their present voyages, to secure a present advance of sums not exceeding £5,000. Shortly afterwards the brokers transferred the freight of one of the ships to H. & co. to secure an advance of £3,000. The transfer was signed by the brokers as managers of the co., who also gave an undertaking to collect the freight as agents to H. & co. An action having been brought by the debenture holders of the co. for the enforcement of their securities, & the co. having gone into liquidation, H. & co. applied for an order that the liquidator of the co. should pay to appcts. out of moneys representing the freight of the ship in question the sum of £3,000:—*Held:* the co. had power under its arts. of assocn., & the resolutions passed pursuant thereto, notwithstanding the debenture debt, to specifically charge a particular asset for the purpose of carrying on the co.'s business; & H. & co.'s security was prior to that of the debenture holders.—WARD *v.* ROYAL EXCHANGE SHIPPING CO., *Ex p.* HARRISON (1887), 58 L. T. 174; 6 Asp. M. L. C. 239.

*Annotation:*—**Apld.** *Re* Inde, Coope & Co., Fisher *v.* The Co., Knox *v.* The Co., Arnold *v.* The Co., [1911] 2 Ch. 223.

**—— Right as against mortgagee.**]—*See* Nos. 4662, 4663, *ante.*

**4703. Necessity for notice—To subsequent mortgagee—Constructive notice.**]—A. mortgaged a ship & freight to B., but the mtge. of the ship alone, as is usual, was indorsed on the ship's register. The ship & freight were subsequently mortgaged to C., whose deed recited the mtge. of the ship alone to B. This mtge. was also indorsed on the same register. C. positively denied all notice of the mtge. of the freight:—*Held:* nevertheless, he had constructive notice thereof.—DOBSON *v.* LYALL (1837), 3 My. & Cr. 453, n.; 2 Ph. 323, n.; 6 L. J. Ch. 115; 40 E. R. 1003.

*Annotations:*—**Refd.** Glascott *v.* Lang (1847), 2 Ph. 310; The Don Francisco (1861), 31 L. J. P. M. & A. 14.

**4704. —— To charterer—Effect of bankruptcy of owner.**]—Under a charterparty, entered into by a broker, on behalf of the owner of a vessel, whose name did not appear on the charterparty, the freight was to be paid to the broker, on behalf of the owner. The owner assigned the freight to A., who gave notice of the assignment to the broker, but not to the Lords of the Treasury, by whom the freight was to be paid:—*Held:* after such assignment & notice, the freight was no longer in the order & disposition of the owner, & did not, on his subsequently becoming bkpt., pass to his assignees. —GARDNER *v.* LACHLAN (1838), 4 My. & Cr. 129; 8 L. J. Ch. 82; 3 L. T. 341; 2 Jur. 1056; 41 E. R. 51, L. C.

*Annotation:*—**Mentd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

**4705. —— —— Sufficiency of notice to ship broker.**]—GARDNER *v.* LACHLAN, No. 4704, *ante.*

**4706. —— —— Effect of delay—Payment of freight to owner by sub-charterer.**]—A shipowner, on Mar. 20, 1857, chartered his ship to A. for a voyage to Hong Kong. The freight was payable " by approved bill on London at three months' date, or cash under discount, following the delivery of a certificate to the charterers, signed by the consignees " of the delivery of the cargo. On Mar. 24, the shipowner assigned the freight to C., who gave no notice to A. until Nov. following. It turned out that, on Mar. 23, A. had sub-chartered the ship to B., whose agent at Hong Kong had paid the freight to the agent there of the shipowner:—*Held:* A. was still liable to C. for the freight, & C.'s laches in giving notice had not deprived him of his rights.—YOUNG *v.* LINDSAY (1859), 27 Beav. 405; 54 E. R. 159.

*H. Other Persons.*

**4707. Freight payable on bill of lading to third party—Payment to master—Right of third party**



*t. Agent—Employed by captain.*]—DUNFORD *v.* WEBSTER (1894), Q. R. 6 S. C. 362.—CAN.

**to sue in name of owner.**]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

**4708. Obligee of bottomry bond—Receipt of obligee is receipt of owner.**]—BENSON *v.* CHAPMAN, No. 3132, *ante.*

**4709. Holder of bottomry bond.**]—The holder of a bottomry bond on ship, freight, & cargo is, upon the conclusion of proceedings by default against ship & freight, entitled as of course to have the full freight due upon delivery of the cargo paid to him, to satisfy the sum secured by the bond with costs; & the owner of the cargo who has paid the freight into ct. is not entitled to a reference of the amount due on the bond, notwithstanding that before the execution of the bond part of his cargo was sold by the master, & the proceeds applied to ship's expenses.—THE GEM OF THE NITH (1863), Brown. & Lush. 72; 167 E. R. 304.

**4710. Ship's husband—Right to receive freight & deduct disbursements—Advances exceeding money received under charterparty.**]—A ship's husband, who had advanced for outfits & disbursements of the ship sums considerably exceeding the money received under the charterparty at the commencement of the voyage, had, before the freight was delivered, obtained a loan by deposit of the charterparty to relieve himself from his advances on account of the ship. Motion by one of the part owners to restrain the ship's husband from receiving or dealing with the freight, refused with costs, the ship's husband being entitled to receive the freight & deduct his disbursements, & his conduct not having been so improper as to justify the restraint of this right.—HARRIS *v.* REYNOLDS (1856), 4 W. R. 278.

**4711. Agent—Employed by ship's husband & part owner to obtain freight—Agent making freight payable to himself.**]—WALSHE *v.* PROVAN, No. 4531, *ante.*

**4712. —— Signing charterparty "as agents for owners"—Agents in fact principals.**]—By a contract in charterparty form, dated Feb. 3, 1908, between pltfs., who were shipbrokers, & defts., who were timber merchants, in which pltfs. were described as agents for owners of a steamship to be named later, & defts. as charterers, it was agreed that the steamship should load at a foreign port, about the latter half of June, a cargo of timber from the agents of the charterers, & should deliver the same in London on being paid freight at a certain rate. The contract was signed by pltfs. "by authority of & as agents for owners." Pltfs. were not in fact acting for principals, nor had they made a contract for a steamship to carry the cargo, but were themselves principals in the transaction. This was, however, not known to defts. On May 22 pltfs. entered into a charterparty with shipowners for the charter of a steamship to carry the cargo, pltfs. being described therein as agents for charterers, at a rate of freight less than that specified in the contract of Feb. 3. Defts.' names were inserted by pltfs. in the charterparty as the charterers, & the charterparty was signed by pltfs. "as agents for merchants." In making the charter pltfs. were not in fact acting as agents for defts., but were themselves principals. The cargo was shipped under bills of lading reserving freight at the rate specified in the charter of May 22, & was duly delivered at the port of discharge, & the bills of lading freight was paid. In an action by pltfs. to recover the difference between the freight so paid & that reserved by the contract of Feb. 3, defts. contended that, as pltfs. had made that contract as agents, they were not entitled to sue upon it as principals:—*Held:* as pltfs. in making the contract of Feb. 3 had in fact no principals, but were themselves the principals, they were entitled to sue upon it & to recover the freight reserved thereby.—HARPER & CO. *v.* VIGERS BROTHERS, [1909] 2 K. B. 549; 78 L. J. K. B. 867; 100 L. T. 887; 25 T. L. R. 627; 53 Sol. Jo. 780; 11 Asp. M. L. C. 275; 14 Com. Cas. 213.

**4713. Assignees of bankrupt charterer.**]—(1) Action for money had & received by the assignees of a bkpt. charterer against the owners, as the proceeds of a cargo shipped outward, & attached by the master in a foreign state:—*Held:* not maintainable, the bkpt. having previously assigned the goods to others, as a security for advances.

(2) Freight earned by a chartered vessel put up as a general ship on the homeward voyage, cannot be recovered by the charterer from the owner, in an action for money had & received.—KYMER *v.* LARKIN (1828), 5 Bing. 71; Dan. & Ll. 74; 2 Moo. & P. 183; 6 L. J. O. S. C. P. 237; 130 E. R. 987.

**4714. Broker—Broker subsequently absconding—Custom for payment after two months from report—Payment within two months.**]—GRAHAM *v.* KENSINGTON (1842), 6 L. T. 867.

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SUB-SECT. 3.—WHEN RIGHT TO PAYMENT ARISES.

*A. In General.*

**4715. General rule—On delivery of cargo.**]—HUNTER *v.* PRINSEP, No. 3441, *ante.*

**4716.** —— ——.]—CHRISTY *v.* ROW, No. 4541, *ante.*

**4717.** —— ——.]—Where by charterparty between the shipowner & freighters, the shipowner covenanted to proceed from L. to Naples, & there make a right & true delivery of the outward cargo, & having so done receive on board a return cargo, restraint of princes, etc., excepted, & the freighters covenanted in consideration of the premises that at N. they would find & provide, as they did warrant & assure to the shipowner, a full & complete return cargo, etc., & that £1,750 should be paid on delivery of the outward cargo, which should be considered as earned for outward freight:—*Held:* in covenant against the freighters for not providing a return cargo at N., they could not plead in excuse of performance that the outward cargo was seized by the Govt. at N. & never delivered to them; for the delivery of the outward cargo was not a condition precedent to the providing a return cargo; but the delivery of the outward cargo was a condition precedent to the payment of the £1,750, & a breach assigned for non-payment thereof was under these circumstances not sustainable.—STORER *v.* GORDON (1814), 4 M. & S. 308; 105 E. R. 627.

*Annotations:*—**Apld.** Fothergill *v.* Walton (1818), 8 Taunt. 576. **Mentd.** Barford *v.* Stuckey (1820), 2 Brod. & Bing. 333.

**4718.** —— ——.]—FENWICK *v.* BOYD, No. 4887, *post.*

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**PART VIII. SECT. 3, SUB-SECT. 3.—A.**

**4715 i.** *General rule—On delivery of cargo.*]—If goods are delivered to a carrier to be carried to a certain place he is not entitled to freight until delivery at that place; but if the consignee demand & take delivery at an intermediate place the carrier is then entitled to the full freight.—HUNT *v.* BARBOUR (1877), 3 V. L. R. (L.) 189. —AUS.

**4715 ii.** —— ——.]—The master of a vessel cannot exact payment of freight before delivery of the goods upon the wharf.—BEARD *v.* BROWN (1873), 17 L. C. J. 15.—CAN.

*Sect. 3.—Payment of freight: Sub-sect. 3, A. & B.; sub-sect. 4, A.*]

**4719.** —— ——.]—KIRCHNER *v.* VENUS, No. 4054, *ante.*

**4720.** —— ——.]—Freight, therefore, is not properly earned, except under circumstances implying a new contract, until the cargo is delivered at the port of destination (DR. LUSHINGTON).—THE NORMA (1860), 1 Lush. 124; 3 L. T. 340; 1 Mar. L. C. 7; 167 E. R. 58.

*Annotation:*—**Refd.** The James Armstrong (1875), L. R. 4 A. & E. 380.

**4721.** —— —— **Whole cargo.**]—(1) A vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, & return direct to London. After the ship's arrival in the port of London, & whilst the cargo was in course of delivery, a mtgee., under an ordinary statutory mtge., made prior to the date of the charterparty, took possession:—*Held:* he thereby acquired a right to the freight in priority over an assignee of the freight by a deed executed subsequently to the charterparty, notice of which had been given to the charterers.

(2) The freight upon a charterparty is not earned until the unloading & delivery of the whole cargo has been completed.—BROWN *v.* TANNER (1868), 3 Ch. App. 597; 37 L. J. Ch. 923; 18 L. T. 624; 3 Mar. L. C. 94; 16 W. R. 882, L. JJ.

*Annotations:*—*As to* (1) **Consd.** Rushden *v.* Pope (1868), L. R. 3 Exch. 269; Wilson *v.* Wilson (1872), L. R. 14 Eq. 32; Japp *v.* Campbell (1887), 57 L. J. Q. B. 79; The Heather Bell, [1901] P. 143. **Refd.** Anderson *v.* Butler's Wharf Co. (1879), 48 L. J. Ch. 824; The Benwell Tower (1895), 72 L. T. 664. *As to* (2) **Consd.** Shillito *v.* Biggart, [1903] 1 K. B. 683.

**4722.** —— ——.]—ALLISON *v.* BRISTOL MARINE INSURANCE CO., No. 4511, *ante.*

**4723.** —— ——.]—LONDON TRANSPORT CO. *v.* TRECHMANN BROTHERS, No. 4829, *post.*

**4724. Arrival at port of delivery.**]—THE WILHELMINA ELEONORA (1801), 3 Ch. Rob. 234; 165 E. R. 448.

**4725.** ——.]—Applts., consignees of a cargo of timber shipped at P. in Florida on the sailing vessel *L.* under a charterparty for delivery at Cardiff, claimed that they were under no liability for freight. Resp., master & owner of the *L.*, & the crew had on May 3, 1917, under compulsion of an attack by a German submarine, left the *L.* in circumstances which, as held in *Bradley* v. *Newsom*, No. 4809, *post*, did not amount to abandonment without any intention of resuming possession, but the vessel was salved, & on June 16, 1917, towed to Queenstown, when possession for resp. was resumed. She was to have been towed to Cardiff, but on Aug. 14 she was, through the negligence of the resp., seriously damaged by collision. Applts. desired to have delivery of the timber, & before & after the date of the collision interviews & correspondence took place between the ship's agents, the Salvage Assocn. & solrs. acting on behalf of applts., & surveys of the ship were made as to dealing with the cargo & vessel. On Aug. 31, 1917, resp.'s agent asked (*inter alia*), whether applts. would approve discharging the cargo at Queenstown for the purpose of effecting possibly necessary repairs. The master made additional inquiries as to the cost of discharging the cargo, but took no further steps, & by their action commenced on Oct. 29, 1917, applts., the cargo owners, claimed delivery of the cargo without liability to pay freight:—*Held:* it was for the captain & owner of the ship to arrange for the carriage of the cargo to Cardiff if he wished to earn freight, & he had no right to ask for freight *pro rata itineris* on delivery at Queenstown; having failed to act with reasonable promptitude, his inaction was equivalent to a refusal to deliver, & as the voyage was never completed, no freight was payable.—DENNY, MOTT & DICKSON, LTD. *v.* BENVENUTO (1921), 55 I. L. T. 129, H. L.

**4726. Payment of freight & delivery of cargo must be concurrent.**]—YATES *v.* RAILSTON, No. 4065, *ante.*

**4727.** ——.]—TATE *v.* MEEK, No. 4090, *ante.*

**4728.** ——.]—PAYNTER *v.* JAMES, No. 4150, *ante.*

**4729.** ——.]—MIEDBRODT *v.* FITZSIMON, THE ENERGIE, No. 4146, *ante.*

**4730.** ——.]—Where the consignee of goods is bound to pay freight on "right & final delivery," but "in case of short delivery" is entitled to an extended protest, etc., "before balance of freight becomes due or payable, the payment of freight & delivery of goods are concurrent acts, but the consignee is entitled before payment, to ascertain the quantity of goods deliverable to him.—VOGEMANN *v.* BISLEY (1897), 13 T. L. R. 172; 2 Com. Cas. 81.

**4731. Right of shipowner to detain cargo—Until payment of freight.**]—SHEPARD *v.* DE BERNALES, No. 4544, *ante.*

**4732.** —— ——.]—YATES *v.* MEYNELL, No. 4097, *ante.*

**4733.** —— ——.]—PAYNTER *v.* JAMES, No. 4150, *ante.*

**4734.** —— —— **Where tender of smaller amount refused.**]—NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante.*

**4735. Right to freight each day—In respect of quantity delivered.**]—BLACK *v.* ROSE, No. 4149, *ante.*

**4736. Master ready & able to deliver—Goods kept for reasonable time.**]—THE ARGOS (CARGO EX), GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, No. 3236, *ante.*

*B. Where Special Stipulation in Contract.*

**4737. Validity of special stipulation.**]—Although by the general policy of the law freight is not due until the voyage is accomplished, it is competent to parties, by charterparty or otherwise, to covenant by express stipulation in such a manner as to control the general policy of the law.—THE JOHN (1849), 3 Wm. Rob. 170; 7 Notes of Cases, 61; 13 Jur. 754; 166 E. R. 926.

*Annotation:*—**Refd.** Droege *v.* Suart, The Karnak (1869), L. R. 2 P. C. 505.

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**4726 i.** *Payment of freight & delivery of cargo must be concurrent.*]—The payment of the freight & the delivery of the cargo are concomitant acts which neither party is bound to perform unless the other is ready to perform the correlative act, & the master of a vessel therefore cannot insist on payment in full of his freight on a cargo of coal before delivering any portion thereof.—BEARD *v.* BROWN (1871), 15 L. C. J. 136.—**CAN.**

**4731 i.** *Right of shipowner to detain cargo—Until payment of freight.*]—A cargo of coal was consigned to B. & the master of the vessel refused to deliver it unless the freight was prepaid, which B. refused but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel & stored, whereupon B. tendered the amount of the freight & demanded it, but the agent still refused to deliver unless the cost of storage was paid. In trover against the master:—*Held:* the refusal of the agent after tender of the full freight was a conversion of the cargo for which trover would lie.—WINCHESTER *v.* BUSBY (1889), 16 S. C. R. 336.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 3.—B.**

**a.** *Freight payable on return of bill of lading receipted by consignee—Delivery at intermediate port—Unqualified receipt endorsed.*]—Goods having been shipped to a certain port, freight being payable by the consignor on return of the bill of lading receipted by the consignee, the vessel was unable to deliver at that port, & the consignee took delivery at an intermediate port,

**4738. Freight payable on delivery of bill of lading.**]—Declaration "that in consideration that pltf. has taken deft.'s goods on board his ship to be carried to A., deft. promised "to pay the money due for freight & carriage of the same on the delivery of the bill of lading"; that the bill of lading was delivered, by reason whereof deft. became liable to pay a large sum, to wit, £20 for freight & carriage of the said goods":—*Held:* bad on demurrer, because it did not appear that anything became due for freight on the delivery of the bill of lading.—BLAKEY *v.* DIXON (1800), 2 Bos. & P. 321; 126 E. R. 1304.

*Annotations:*—**Consd.** Andrew *v.* Moorhouse (1814), 5 Taunt. 435; Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361; Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** Andrews *v.* Whitehead (1810), 13 East, 102; The Alan Ker, How *v.* Kirchner (1857), 30 L. T. O. S. 296; Tamvaco *v.* Simpson (1865), 19 C. B. N. S. 453.

**4739. Freight payable at specified periods—What is condition precedent to right to any freight—Arrival of ship at first destined port.**]—GIBBON *v.* MENDEZ, No. 2076, *ante*.

**4740. Freight payable two months after right delivery.**]—A memorandum of charter provided that a vessel should ship goods for Kingston, or any other port in Jamaica, & having discharged the same, should receive on board a cargo from thence or from a portion the Spanish main if required, & deliver the same at a port in the United Kingdom on being paid freight £250 in ten days after sailing from Gravesend, & £750 more in two months after a right delivery of the homeward cargo, provided she should be required to proceed to one port only in Jamaica, & £25 more should she be required to go to two or more ports in that island; & in case the vessel should be ordered to the Spanish main, £4 per day was to be paid for every day after the twenty-fifth, after her arrival at Jamaica, until dispatched from her loading port; demurrage £100 per month, or in proportion for a less period, payable on settlement of the hire of the vessel.

In *assumpsit* on the memorandum of charter, the declaration averred that the vessel after discharging a portion of her outward cargo at Kingston, & the rest at another port in Jamaica, sailed thence to a port on the Spanish main, to receive a homeward cargo, & was detained there one hundred & thirty-nine days after the twenty-fifth day of her arrival at Jamaica, & alleged for breach the non-payment of the £4 per day, for the one hundred & thirty-nine days.

The plea stated, that the vessel never delivered her homeward cargo at any port of discharge in the United Kingdom:—*Held:* the £4 per day was not payable until two months after the delivery of the homeward cargo.—CROZIER *v.* SMITH (1840), 1 Man. & G. 407; 1 Scott, N. R. 338; 4 Jur. 581; 133 E. R. 392.

**4741. Freight "payable in London"—Whether on ship's arrival or on receipt of goods—Question for jury.**]—Goods were put on board a ship consigned for Calcutta, at 39*s.* per ton, "payable in London":—*Held:* it was for the jury to say from the surrounding circumstances whether the contract was a contract for "freight," contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her.—LIDGETT *v.* PERRIN (1861), 11 C. B. N. S. 362; 142 E. R. 837; *subsequent proceedings* (1862), 2 F. & F. 763, N. P.

**4742. Freight payable within three days of arrival—Cargo destroyed after arrival but before delivery.**]—Defts. shipped cement under a bill of lading which stipulated that freight should be paid "within three days after arrival of ship, & before delivery of any portion of the goods." The ship arrived in port with the cement on board, but was within the three days, in consequence of an accidental fire, scuttled with a view to the saving of ship & cargo; & on her being raised, the cement was found to be useless, having ceased to exist as cement, & the consignees refused to accept it, or to pay freight:—*Held:* the shipowners, not being ready to perform their part of the contract, were not entitled to sue for freight.—DUTHIE *v.* HILTON (1868), L. R. 4 C. P. 138; 38 L. J. C. P. 93; 19 L. T. 285; 17 W. R. 55; 3 Mar. L. C. 166.

*Annotation:*—**Consd.** Asfar *v.* Blundell, [1896] 1 Q. B. 123.

**4743. Freight payable "per ton net delivered"—Delivery conditional on payment of freight.**]—WEGUELIN *v.* CELLIER, No. 2162, *ante*.

**4744. Freight payable on "right & true delivery"—Excepted perils excluded.**]—WILLIAMS & Co. *v.* CANTON INSURANCE OFFICE, LTD., No. 1964, *ante*.

**4745. Freight payable on "right & final delivery"—Amount due must first be ascertained.**]—OLSEN *v.* DOBELL & Co. (1901), 17 T. L. R. 245.

**4746. Freight payable on weight at port of discharge—Ship or cargo lost or not lost.**]—A bill of lading provided—"freight . . . to be paid as per margin, & to be collected on the gross weights, measurements, or number taken at the port of discharge, & according to the conditions stated in the co.'s tariff, it being expressly agreed that freight is to be considered as earned, & must be paid ship &/or cargo lost or not lost." Owing to a collision sea water entered the hold & dissolved a portion of the cargo, which was nitrate. The shipowners sued for the freight on the amount, agreed between parties, of the cargo so lost:—*Held:* such freight was due.—PACIFIC STEAM NAVIGATION CO. *v.* THOMSON, AIKMAN & CO., LTD., [1920] S. C. (H. L.) 159.

**Stipulations as to payment in advance.**]—*See* Sect. 4, *post*.

### SUB-SECT. 4.—AMOUNT PAYABLE.

#### *A. In General.*

**4747. Where no provision in charterparty—Right to reasonable amount—Damaged goods** & endorsed an unqualified receipt on the bill of lading:—*Held:* the shipowner was entitled to full freight, as against the consignor.—HUNT *v.* BARBOUR (1877), 3 V. L. R. (L.) 189.—**AUS.**

**b.** *Freight payable at port of shipment—"Ship lost or not lost."*]—Goods were shipped at G. upon bills of lading which stated that freight was payable at G. & contained a stipulation that "freight when payable by the shipper is to be considered as earned, ship or goods lost or not lost," & the vessel in which the goods were shipped stranded within half an hour of leaving G., & became a total wreck:—*Held:* the freight became payable by the shipper immediately the ship was lost.—UNION S.S. CO., LTD. *v.* WICKES, LTD. (1909), 28 N. Z. L. R. 584.—**N.Z.**

**c.** *Freight payable on delivery of certificate of quantity of goods shipped.*]—By charterparty it was stipulated that two-thirds of the freight should be paid by a firm in G. (not the shippers) on production to them by the master of the vessel of a certificate from a firm in N. of the quantity of goods shipped. The firm in G., by letter addressed to the owners, bound themselves to make such payment on production of such certificate:—*Held:* it was no ground for withholding payment that the firm in G. had been interpelled doing so by the shippers, in respect of an alleged breach of the charterparty on the part of the owners, but the obligation to pay became a liquid obligation the moment the certificate was produced.—STEWART & Co. *v.* DENNISTOUN (1854), 16 Dunl. (Ct. of Sess.) 1062; 26 Sc. Jur. 578.—**SCOT.**

**d.** *Freight payable one month after sailing.*]—LEITCH *v.* WILSON (1868), 7 Macph. (Ct. of Sess.) 150; 41 Sc. Jur. 83.—**SCOT.**

**PART VIII. SECT. 3, SUB-SECT. 4.—A.**

**e.** *Substituted voyage.*]—Deft. agreed to employ pltfs.' vessel in carrying

*Sect. 3.—Payment of freight: Sub-sect. 4, A. & B. (a).*]

**shipped on deck.**]—URSULA BRIGHT S.S. CO. *v.* RIPLEY, No. 1935, *ante.*

**4748. Refusal of master to accept cargo at lower rate—Right to dead freight.**]—Where the charterer of a ship to Jamaica & back, covenanted to load her there with a complete cargo of sugar, & to pay freight for the same at the rate of 10*s.* 6*d.* per cwt., & his agent at Jamaica tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at 10*s.* per cwt., which the captain refused to do:—*Held:* the charterer was liable for dead freight.—HYDE *v.* WILLIS (1812), 3 Camp. 202; 170 E. R. 1355, N. P.

**4749. Substituted voyage — Stipulated lump freight not recoverable.**]—THOMPSON *v.* BROWN, No. 1694, *ante.*

**4750. Provision for alternative lump freight—If ship compelled to unload outside harbour—Part of cargo only discharged outside harbour — Right to larger freight.**]—Pltfs. agreed with defts. to convey a cargo to Oporto, & if the river was in possession of an enemy, to unload at F., outside the harbour. The freight was to be £475; or, if the vessel could enter Oporto, discharge, & reload there £300 only: twenty-five days were allowed for unloading. Pltfs. arrived at F. June 2, & an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of defts., & partly by bad weather, till Aug. 25, & by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered Oporto, where she discharged the remaining eighth of her cargo. In July, defts.' agent at Oporto gave pltfs. a bill for the larger freight. In Sept. the vessel obtained, at Oporto, a full cargo for England:—*Held:* pltfs. were entitled to the larger freight, & to demurrage from June 28.—GIBBENS *v.* BUISSON (1834), 1 Bing. N. C. 283; 1 Scott, 133; 4 L. J. C. P. 11; 131 E. R. 1125.

**4751. Failure to provide cargo—Right to full freight—Allowance for other freight earned.**]—WOOLLEY *v.* SMITH (1845), 4 L. T. 180; *subsequent proceedings* (1846), 3 C. B. 610.

**4752. —— Part of original cargo burnt—Other cargo obtained by shipowner.**]—AITKEN, LILBURN & CO. *v.* ERNSTHAUSEN & CO., No. 2945, *ante.*

**4753. Refusal of master to deliver—Refusal justified—Right to full freight.**]—THE PANIC, BATES *v.* JOHNSON (1855), 4 L. T. 589.

**4754. Stipulations for dead freight & freight for carriage—Charterparty & bills of lading—Tender of freight for carriage.**]—KERFORD *v.* MONDEL, No. 4108, *ante.*

**4755. Stipulation as to fodder for cargo of animals—Right to freight in respect of fodder stolen on voyage.**]—HOLLAND & CO. *v.* PRITCHARD & CO. (1896), 12 T. L. R. 480; 40 Sol. Jo. 603, D. C.

**4756. —— Meaning of "necessary."**] — BRITISH & SOUTH AMERICAN S.S. CO., LTD. *v.* ANGLO-ARGENTINE LIVE STOCK & PRODUCE AGENCY, LTD. (1902), 18 T. L. R. 382.

**4757. Stipulation for freight to be "in full of all port charges"—What charges included—Tonnage dues.**]—ROWLAND & MARWOODS S.S. CO., LTD. *v.* WILLS & CO., LTD. (1898), 14 T. L. R. 183.

**4758. —— —— Charges for use of quay.**]—FIELD LINE (CARDIFF), LTD. *v.* SAN PAULO GAS CO. (1908), cited 106 L. T. 957.

*Annotation:*—**Folld.** Soc. Anon. Ungherese di Armamenti Marittimo *v.* Hamburg South American S.S. Co. (1912), 106 L. T. 957.

**4759. What may be deducted—Advances made by agent abroad—When made in accordance with charterparty.**]—T. chartered a ship, then on an outward voyage, to load a cargo at a port of Cuba for London, agreeing that his agent should make such advances at Cuba as he might think the ship required. The master gave a bottomry bond on ship & freight before she reached Cuba. Certain sums were advanced by charterer's agent at Cuba. Ship was arrested at suit of bondholder in London. T. brought in freight less the sum so advanced at Cuba:—*Held:* such sums having been paid in pursuance of a contract, the payment was a good one, & the charterer was entitled to deduct the amount from the gross freight.—THE STANDARD (1857), Sw. 267; 30 L. T. O. S. 219; 6 W. R. 222; 166 E. R. 1130.

*Annotation:*—**Apld.** The Salacia (1862), Lush. 578.

**4760.** —— —— ——.]—A ship was chartered to go to a port of loading, there to load & return; freight payable, as per tale. On the voyage out, the master hypothecated the ship & the cargo to be shipped, & the freight as per charter. Subsequently, at the port of loading, advances for ship's expenses were made to the master by the charterers' agent, with notice of the bond; & on the voyage home the master sold part of the charterers' goods to pay other expenses of the ship:—*Held:* in computing the amount of freight to be paid into ct. by the charterers, to answer the bond, (*a*) the charterers might deduct advances made abroad by their agent according to the charter, & by the charter to be deducted on settlement of the freight; (*b*) they should not be required to pay the sum which would have been payable as freight upon the goods sold, had the goods arrived; (*c*) the charterers should not deduct from the freight, as per tale, advances by their agent, which were not authorised by the

lumber from B. to M., until the close of navigation. After some correspondence between pltfs. & deft.'s agent, she was sent for the last trip to C., & there took in a load of corn for M., which brought £170 less freight than a cargo of timber from B. would have done:—*Held:* the letters, set out in the case, contained no agreement on deft.'s part to pay such difference; but pltfs.' remedy was on the original contract.—MCPHERSON *v.* CAMERON (1857), 15 U. C. R. 48.—**CAN.**

*f. Failure to provide cargo — Right to full freight—Allowance for proportionate part of expenses of carriage saved.*]—Deft. agreed to ship goods for a certain port, in a ship of which pltfs. were the sub-charterers, but failed to ship any portion of the goods, & pltfs. were unable to obtain any freight. In an action to recover the whole amount of the freight which would have been payable to pltfs. if the contract had been carried out:—*Held:* pltfs. were entitled to recover as damages a sum equivalent to the freight agreed to be paid by deft. for the goods in question, after deducting therefrom a proportionate part of the expenses of carriage which had been saved by reason of the service not having been rendered; & the sum payable by pltfs. to the original charterers of the vessel for the intended voyage ought not to be deducted from the sum payable by deft., as the damages payable by deft. must depend upon his own contract with pltfs., & not upon the terms of the bargain between pltfs. & the original charterers.—DE ANGLIS & CO. *v.* MAYAPPA SETTY (1879), I. L. R. 5 Calc. 578; 5 C. L. R. 57.—**IND.**

*g. What may be deducted—Sum payable by sub-charterers to charterers.*]—DE ANGLIS & CO. *v.* MAYAPPA SETTY (1879), I. L. R. 5 Calc. 578; 5 C. L. R. 57.—**IND.**

*h. Vessel wrecked—Freight for carriage of goods to safe port paid by consignor—Liability of consignee.*]—Dutch merchants sold & shipped goods from Rotterdam to a merchant in Leith. The vessel being wrecked off the Texel, part of the goods saved were carried to Amsterdam, & thence to Rotterdam; & freight was paid *pro rata itineris* by the Dutch merchants who then sent them to Leith:—*Held:* the Leith merchant was bound to relieve them of the freight so paid.—HAVELLAAR & VAN DULKEN *v.* HODGE (1821), 1 Sh. (Ct. of Sess.) 128.—**SCOT.**

*k. Governed by amount of goods delivered.*]—BEYNON, ETC. *v.* KENNETH (1881), 8 R. (Ct. of Sess.) 594; 18 Sc. L. R. 394.—**SCOT.**

*l.* ——.]—In an action brought by

charter to be made & deducted; (*d*) they should not deduct the value of their goods sold by the master.—THE SALACIA (1862), Lush. 578; 1 New Rep. 194; 32 L. J. P. M. & A. 43; 1 Mar. L. C. 322; 167 E. R. 263.

*Annotations:*—**Consd.** The Gem of the Nith (1863), Brown. & Lush. 72; The Norway (1864), Brown. & Lush. 226, 377; The Karnak (1868), L. R. 2 A. & E. 289.

**4761. —— Charterparty providing for advances for disbursements at port of loading—Deduction of disbursements on voyage.**]—A ship was abandoned to underwriters as a total loss. By the charterparty it was agreed that cash for the ship's disbursements at her port of loading should be advanced by the charterers, "ship paying 2½ per cent. commission including insurance": —*Held:* the cost of coals bought during the voyage for the purpose of the voyage, & paid for by the master's draft maturing after the date of abandonment, was not to be deducted from the gross freight.—THE RED SEA, [1895] P. 293; 64 L. J. P. 89; 73 L. T. 462; 8 Asp. M. L. C. 102; 11 R. 801; *on appeal*, [1896] P. 20, C. A.

*Annotation:*—**Refd.** Barraclough *v.* Brown (1896), 65 L. J. Q. B. 333.

**4762. —— Discount—Loss of right—Freight not paid within reasonable time.**]—OLSEN *v.* DOBELL & Co. (1901), 17 T. L. R. 245.

**4763. —— —— How calculated—Where advances for disbursements.**]—Pltfs., as owners, chartered a steamer of defts. by a charterparty which, after providing for the rate of freight, contained the clause: "The freight, less advances, if any, to be paid on unloading & right delivery of th cargo in cash, but if ordered outside the United Kingdom to discharge, in London concurrent with discharge, but, in any case, subject to two months' discount at 5 per cent. *per annum*." A further clause provided: "Money for steamer's ordinary disbursements, not exceeding one-fourth of estimated freight, to be advanced, if required by the captain, at the port of loading by the charterers . . . to be indorsed on bills of lading, if required, & deducted from the freight at settlement":—*Held:* the 5 per cent. discount was to be calculated not on the whole amount of the freight but on that amount less advances for disbursements.—KOKUSAI KISEN KAISHA *v.* DREYFUS (LOUIS) & Co. (1926), 43 T. L. R. 131, C. A.

**4764. Excess cargo shipped by charterers under protest—Over amount specified in charterparty—No right to freight in respect of excess.**]—A charterparty provided that a ship should proceed to the port of loading & there load "a cargo of beans, not less than 6,500 tons, but not exceeding 7,000 tons net intake weight of beans in bags, as usual, which the charterers bind themselves to ship not exceeding what she can reasonably stow & carry over & above her cabin bunkers, tackle, apparel, provisions & furniture." It also contained the following clause, "Charterers to have the option of underletting the whole or part of the steamer":—*Held:* (1) the words "not less than 6,500 tons" constituted a warranty by the shipowners to the charterers that the vessel could carry that quantity, & the words "not exceeding 7,000 tons" was a term binding the shipowners not to ask for more than 7,000 tons but entitling them to receive that quantity if within the capacity of the vessel; (2) having in fact shipped under duress & protest a larger quantity of cargo than that required by the terms of the charterparty, the charterers were entitled to have the excess quantity carried freight free.—JARDINE, MATHESON & Co. *v.* CLYDE SHIPPING CO., [1910] 1 K. B. 627; 79 L. J. K. B. 634; 102 L. T. 462; 26 T. L. R. 301; 11 Asp. M. L. C. 384; 15 Com. Cas. 193.

### *B. Voyage Not Completed.*

#### (*a*) *In General.*

**4765. General rule—No freight payable.**]—In an action of covenant in a charterparty of affreightment, in which deft. covenanted to pay so much for freight for "goods delivered at A." freight cannot be recovered *pro rata itineris* if the ship be wrecked at B. before her arrival at A., though deft. accept his goods at B.

When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another, & having performed the voyage he is then entitled to his freight: but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata* unless under a new agreement (LAWRENCE, J.).—COOK *v.* JENNINGS (1797), 7 Term Rep. 381; 101 E. R. 1032.

*Annotations:*—**Distd.** Cock *v.* Taylor (1811), 13 East, 399. **Consd.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613. **Refd.** Mulloy *v.* Backer (1804), 1 Smith, K. B. 447; Smith *v.* Wilson (1807), 8 East, 437; Ritchie *v.* Atkinson (1808), 10 East, 295; Liddard *v.* Lopes (1809), 10 East, 526; Thomson *v.* Brown (1817), 1 Moore, C. P. 358; Jesse *v.* Roy (1831), 1 Cr. M. & R. 316; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171. **Mentd.** Grimmann *v.* Legge (1828), 2 Man. & Ry. K. B. 438.

**4766. —— ——.**]—A. shipped goods on board the ship of B. on a voyage to India, & also went by the same ship as a passenger. The ship was wrecked near the Cape of Good Hope; the goods were spoiled, & A. returned to England. A., before he left England, gave B. a receipt for £250 as money advanced, including a sum of £95 as passage money paid to the captain, & another sum of £10 for freight of the goods, & B. afterwards received the amount of the insurance:—*Held:* in an action for money had & received, brought by A. against B. to recover the insurance money,

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the owners of a Danish ship against the indorsees of the bill of lading for freight on the cargo delivered to them at the port of discharge in Scotland, defenders averred that they had not received the full cargo specified in the bill of lading granted by the master at Riga, the port of shipment, & pleaded that they were entitled to retain from freight the value of the deficiency, alleging that by Danish law (the law of the flag) the bill of lading was conclusive against the owners. After a proof, which showed that the indorsees of the bill of lading had only agreed to pay for so much of the cargo as was delivered to them:—*Held:* defenders had only become indorsees of the bill of lading to the extent of the cargo actually on board the vessel, & were not entitled to retain any part of the freight.—IMMANUEL (OWNERS) *v.* DENHOLM & Co. (1887), 15 R. (Ct. of Sess.) 152; 25 Sc. L. R. 112.—**SCOT.**

m. *Stipulation as to charges for collection.*]—By the bill of lading of a cargo of granite from Genoa, it was provided that "the freight, primage, & other charges as stated in the margin," were to be paid by the consignees on arrival of the goods at the port of discharge. The words "charges for collection at L., £141 8*s.* 9*d.*" were written on the margin of the bill of lading by the shipowners' agent at G., on the instruction of the shipper. In an action on the bill of lading by the shipowners against the consignees for payment of the unpaid balance of the sum on the margin of the bill:—*Held:* as in a question between the shipowners & the consignees, the consignees were liable for the whole sum stated on the margin, any question as to the validity of the shipper's charges being a matter between the shipper & the consignees with which the shipowners had no concern.—MOSSGIEL S.S. CO., LTD. *v.* DELLA CASA GRANITE QUARRIES OF ITALY, LTD. (1899), 1 F. (Ct. of Sess.) 385; 36 Sc. L. R. 286.—**SCOT.**

n. *Expenses — Interest on expenses —Interest on process outlays.*]—CRAIG LINE S.S. CO. *v.* NORTH BRITISH STORAGE & TRANSIT CO. S.S. CRAIGFORTH, [1921] S. C. 114.—**SCOT.**

o. *Lost cargo.*]—Freight not payable in a lump sum as a general rule cannot be recovered for carriage of cargo lost during the voyage.—THE TERESA *v.* PURCELL, YALLOP & EVERETT (1902), 19 S. C. 213; 12 C. T. R. 358.—**S. AF.**

*Sect. 3.—Payment of freight: Sub-sect. 4, B. (a).*

B. was entitled to set off the £95 unless it was shown that the passage money belonged to the shipowners, but B. could not set off the £10 for freight, as the ship did not complete her voyage to India.—LEMAN *v.* GORDON (1838), 8 C. & P. 392, N. P.

**4767.** —— ——.]—CULBERTSON *v.* HUTCHINSON (1850), 6 L. T. 868.

**4768.** —— —— **Master declining to repair ship or tranship cargo.**]—If a bill of lading is given by the master of a foreign vessel, the agreements to be implied as to the duty of the master to carry on, tranship or deliver the goods at an intermediate port of refuge, will be ascertained by reference to the law of the flag which the vessel carried, & not by reference to the *lex loci contractus*, or the *lex fori* or the law of the place where the breach of contract by the master is alleged to have been committed.

If a vessel during her voyage suffers sea damage, & is compelled to put into a port of refuge, then by the law of England the master is not bound to tranship. He is allowed a reasonable time either to repair & carry on or to tranship. If he absolutely declines to do either, he may be called upon to deliver without payment of any freight; but before a reasonable time has elapsed, he cannot be required to deliver, except on payment of full freight or waiver thereof.

In estimating what is reasonable time, the ct. will take all circumstances into consideration, including any delay caused by the *vis. major* of competent authority, whether administrative or judicial.

A bill of lading in English was given by the master of the French vessel *Bahia*, lying in New York, by which the goods were made deliverable at Dunkirk in France. The vessel during her voyage suffered sea damage, & put into the port of Ramsgate in England, Jan. 7, 1863. The cargo was there unladen, & the ship surveyed. The surveyors reported that the cost of repairs would exceed the value of the ship repaired. The master executed a deed of abandonment of the ship to the French Vice-Consul granted, as in ordinary course the certificate of innavigability required by French law as sanctioning the abandonment, the French underwriters instituted proceedings in the tribunal of commerce at Marseilles, & obtained an order for the ship to be taken to Dunkirk to be repaired, & the Vice-Consul was then ordered by the Consul-General to withhold the certificate of innavigability. The owner of the ship appealed from the decree of the tribunal of commerce to a higher ct. The owners of the cargo offered the master full freight, less expenses of carrying on the cargo to Dunkirk, & demanded delivery at Ramsgate. This was refused, & they then, Mar. 13, 1863, arrested the ship. Subsequently the cargo was obtained from the master's possession without his consent, & carried to Dunkirk. Proceedings were then taken in France by the owner of the *Bahia* against the cargo to recover the original freight, & the ct. there pronounced that the owners of the cargo "having withdrawn their goods in consequence of being unwilling to wait the solution of the question whether the vessel could or could not be put into a proper condition, owed the whole freight":—*Held:* in these circumstances the reasonable time allowed to the master had not elapsed at the time of action brought; he had committed no breach of contract, & the suit was dismissed with costs.—THE BAHIA (1864), Brown. & Lush. 292; 5 New Rep. 221; 12 L. T. 145; 11 Jur. N. S. 90; 2 Mar. L. C. 174; 167 E. R. 368

**4769.** —— —— **Voyage becoming illegal.**]—Pltfs., owners of a British ship, agreed with charterers to carry goods from Tampa, in Florida, to Hamburg. On Aug. 3, 1914, the ship, on sighting the Lizard, was warned by the Admlty. to take the goods to an English port, & on the next day war was declared between Gt. Britain & Germany. The continuation of the voyage to Hamburg having become illegal & impossible, the cargo was discharged at Runcorn & deposited with warehousemen, subject to a lien for freight. Defts., owners of the cargo, discharged the lien under protest, & took their goods away. In a claim by pltfs. for freight to Hamburg, or, alternatively, freight *pro rata itineris*:—*Held:* they were not entitled to the former because they had not completed the voyage, nor to the latter because no new agreement between pltfs. & defts. to give & take delivery at Runcorn instead of Hamburg could be inferred from the fact that defts. had taken the goods at Runcorn.—ST. ENOCH SHIPPING CO., LTD. *v.* PHOSPHATE MINING CO., [1916] 2 K. B. 624; 86 L. J. K. B. 74; 21 Com. Cas. 192.

*Annotations:*—**Refd.** The Iolo, [1916] P. 206; Akt. Geysir *v.* Dansk Svovlsyre & Superphosphate Fabrick, Akt. Springbank *v.* Same (1919), 24 Com. Cas. 178.

**4770. When right to freight pro rata arises—Necessity for new contract express or implied.**]—COOK *v.* JENNINGS, No. 4765, *ante*.

**4771.** —— ——.]—THE KATHLEEN, No. 4804, *post*.

**4772.** —— ——.]—METCALFE *v.* BRITANNIA IRONWORKS CO., No. 3477, *ante*.

**4773.** —— ——.]—CASTEL & LATTA *v.* TRECHMAN, No. 3483, *ante*.

**4774.** —— **Delivery at intermediate port.**]—DENNY, MOTT & DICKSON, LTD. *v.* BENVENUTO, No. 4725, *ante*.

**4775. When contract to pay pro rata freight implied—Voluntary acceptance of cargo at intermediate port.**]—CHRISTY *v.* ROW, No. 4541, *ante*.

**4776.** —— ——.]—There is no implied promise to pay a compensation for carrying goods on part of the voyage unless they are voluntarily accepted at a place short of the port of destination.—OSGOOD *v.* GRONING (1810), 2 Camp. 466; 170 E. R. 1220, N. P.

*Annotations:*—**Consd.** The Teutonia (1871), L. R. 3 A. & E. 394. **Refd.** Thornton *v.* Fairlie (1814), 8 Taunt. 354.

**4777.** —— ——.]—A cargo of rice, shipped at Batavia, was, by the bill of lading, to be delivered at Rotterdam to pltf., he paying freight for the

**PART VIII. SECT. 3, SUB-SECT. 4.—B. (a).**

**4770 i.** *When right to freight pro rata arises—Necessity for new contract express or implied.*]—The right to freight *pro rata itineris* must arise out of some new contract between the master & the merchant, either expressly made by them or to be inferred from their contract.—THOMAS *v.* ST. JOHN'S MARINE INSURANCE CO. (1857), 4 Nfld. L. R. 130.—**NFLD.**

**4775 i.** *When contract to pay pro rata freight implied—Voluntary acceptance of cargo at intermediate port.*]—TOURVILLE *v.* RUCHLE (1871), 15 L. C. J. 29.—**CAN.**

**4775 ii.** —— ——.]—Where there was evidence to show an acceptance by shippers of a cargo at an intermediate port, & that they dispensed with the further carriage of it:—*Held:* the shipowner was entitled to recover freight *pro rata itineris*.—WRIGHT *v.* CLUXTON & DUNDAS (1871), 31 U. C. R. 246.—**CAN.**

**4775 iii.** —— ——.]—In order to establish a claim for freight *pro rata* there must be a voluntary acceptance of the cargo at an intermediate port in such a mode as to raise a fair inference that its further carriage was intentionally dispensed with.—THOMAS *v.* ST. JOHN'S MARINE INSURANCE CO. (1857), 4 Nfld. L. R. 130.—**NFLD.**

same. The vessel having encountered a hurricane, was compelled to put into the Mauritius, where the rice, having been found to be damaged, & in a state of rapid putrefaction, was, of necessity, sold by the master, who acted *bonâ fide*, but without the knowledge of either the shipper or shipowner:—*Held:* under the above circumstances, no freight was due, either for the whole voyage or *pro ratâ itineris*.

To justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference, that the further carriage of the goods was intentionally dispensed with (PARKE, B.).—VLIERBOOM *v.* CHAPMAN (1844), 13 M. & W. 230; 13 L. J. Ex. 384; 8 Jur. 811; 153 E. R. 96.

*Annotations:*—**Consd.** Notara *v.* Henderson (1870), L. R. 5 Q. B. 346. **Refd.** Duncan *v.* Benson (1847), 1 Exch. 537; Tronson *v.* Dent (1853), 8 Moo. P. C. C. 419; The Soblomsten (1866), L. R. 1 A. & E. 293; Hopper *v.* Burness (1876), 45 L. J. Q. B. 377; Metcalfe *v.* Britannia Ironworks Co. (1877), 2 Q. B. D. 423; St. Enoch Shipping Co. *v.* Phosphate Mining Co., [1916] 2 K. B. 624; Bradley *v.* Newsom, [1919] A. C. 16.

**4778.** —— ——.]—A shipowner has no claim to freight *pro rata itineris peracti*, except there be an acceptance of the goods by the shipper at the shorter destination, such that the law will imply a new agreement for freight *pro rata*.—THE NEWPORT (1858), Sw. 335; 166 E. R. 1155.

**4779.** —— ——.]—BLASCO *v.* FLETCHER, No. 4820, *post*.

**4780.** —— ——.]—Where a vessel is disabled at an intermediate port, the master is allowed a reasonable time to reship & tranship, so as to earn his freight. The whole freight is payable if, by default of the owner of the cargo, the master is prevented forwarding the cargo from an intermediate port to its destination. No freight is payable if the owner of a cargo is compelled against his will to take the cargo at an intermediate port. To sustain a claim for *pro rata* freight, there must be such a voluntary acceptance of the goods by their owner at an intermediate port as to raise a fair inference that further carriage of the goods was dispensed with.

A vessel was chartered at a port in Sweden to carry a cargo of deals to Bordeaux, freight being payable on delivery. She became disabled, & on Oct. 2, 1865, was towed by three smacks into an English port; a salvage suit was instituted, Oct. 7, & the vessel was arrested by order of the ct. The master employed shipbrokers at the port as agents for the owners of the vessel; & through the agent for the Norwegian Lloyd's Assocn. instructed proctors to enter an appearance in the salvage suit for the owners of the ship & the cargo. Notice was sent by the agents & by the proctors to the owners of the cargo, informing them of the condition of the ship, & that the cargo would be sold, but no instructions were received from them. The cargo was discharged, &, the vessel being found not worth repairing, the master & crew, Oct. 24, abandoned her. The cargo was sold, Dec. 16, by order of this ct., & out of the proceeds a sum was awarded to the salvors. The ship had been abandoned to the proprietors of the graving dock. On a motion by the owners of the vessel for payment of freight *pro rata* out of the balance remaining in the registry:—*Held:* the owners of the cargo having had notice that their cargo would be sold, had waived their right to have their cargo carried to Bordeaux, & thereby impliedly promised to pay a *pro rata* freight; the proctors' costs were the first charge upon the fund in ct.; the agents employed at the port were entitled to such part of their charges as consisted of necessaries supplied to the ship, but not to such disbursements as were in the nature of general average expenses.

The master has a possessory lien on the cargo for its share of general average expenses, but a ship agent has no such lien upon ship, freight or cargo, nor a right of action *in rem* against any of them.—THE SOBLOMSTEN (1866), L. R. 1 A. & E. 293; 36 L. J. Adm. 5; 15 L. T. 393; 15 W. R. 591; 2 Mar. L. C. 436.

*Annotations:*—**Consd.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613. **Refd.** The Teutonia (1871), L. R. 3 A. & E. 394; The Livietta (1883), 8 P. D. 209; The Mogileff, [1921] P. 236.

**4781.** —— ——.]—ST. ENOCH SHIPPING CO., LTD. *v.* PHOSPHATE MINING CO., No. 4769, *ante*.

**4782. Ship captured.**]—BYRNE *v.* PATTINSON (1797), cited in Abbott's Merchant Shipping, 14th ed. p. 745.

**4783.** ——.]—A ship bound for London after taking in her cargo, but before breaking ground, was cut out of her port of lading in Jamaica by a French privateer, but was afterwards re-captured & carried into another port in the same island, where the cargo was sold by order of the Ct. of Admlty. for the benefit of the freighters:—*Held:* the owners of the ship were not entitled to any part of the freight. Though by the usage of the trade the ship was loaded at their expense.—CURLING *v.* LONG (1797), 1 Bos. & P. 634; 126 E. R. 1104.

*Annotations:*—**Refd.** Beale *v.* Thompson (1804), 4 East, 546; Roelandts *v.* Harrison (1854), 23 L. J. Ex. 169; Pearson *v.* Goschen (1864), 17 C. B. N. S. 352.

**4784.** ——.]—THE HAMILTON (1793), cited in 3 Ch. Rob. at p. 107. n.; 165 E. R. 402.

*Annotations:*—**Apld.** The Martha (1801), 3 Ch. Rob. 106, n. **Refd.** The Hoffnung (1805), 6 Ch. Rob. 231.

**4785.** ——.]—THE MARTHA (1801), 3 Ch. Rob. 106, n.; 165 E. R. 402.

*Annotation:*—**Refd.** The Hoffnung (1805), 6 Ch. Rob. 231.

**4786.** ——.]—Carrying to a remote port for adjudication in most cases unjustifiable. Costs & damages decreed against the captor for misconduct. Freight pronounced to be due in consequence of the interruption of a voyage by the capture & subsequent condemnation of the vessel in a remote port. Specie restored, "being to the consignment of several British merchants" though from an enemy's port. Freight due thereon. Privileges of a master, chartering his vessel for a particular purpose. Capture considered delivery, so as to entitle the owners of the vessel to freight.—THE CATHARINA ELIZABETH (1810), 1 Act. 309; 12 E. R. 120.

**4787.** —— **Recapture—Return to port of departure.**]—Freight *pro rata* on capture & recapture not given to a ship brought back to the port or quasi port of her departure.—THE HIRAM (1800), 3 Ch. Rob. 180; 165 E. R. 428.

—— *See* PRIZE LAW, Vol. XXXVII., pp. 660, 661, Nos. 1192–1201.

**4788. Port of delivery inaccessible—Embargo—Voyage undertaken after embargo taken off.**]—If a British merchant charter a Swedish ship on a voyage to St. Michael's for a cargo of fruit, & the charter party contain the usual exception against the restraint of princes, & the ship be prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British Govt., the Swedish owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the British merchant.—TOUTENG *v.* HUBBARD (1802), 3 Bos. & P. 291; 127 E. R. 161.

*Annotations:*—**Consd.** Conway *v.* Gray, Conway *v.* Forbes, Maury *v.* Shedden (1809), 10 East, 536; Esposito *v.* Bowden (1857), 7 E. & B. 763; Geipel *v.* Smith (1872),

*Sect. 3.—Payment of freight: Sub-sect. 4, B. (a), (b), (c) & (d).*]

L. R. 7 Q. B. 404; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; Harrie *v.* Peruvian Corpn. (1896), 13 T. L. R. 101. **Refd.** Mennett *v.* Bonham (1812), 15 East, 477; Simeon *v.* Bazett (1813), 2 M. & S. 94; Flindt *v.* Scott (1814), 5 Taunt. 674; Driefontein Consolidated Mines *v.* Janson (1901), 17 T. L. R. 604; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781; Ralli *v.* Compania Naviera Sota y Aznar (1920), 123 L. T. 375; Akt. General Gordon *v.* Cape Copper Co. (1921), 91 L. J. K. B. 112.

-.]—*See* PRIZE LAW, Vol. XXXVII., p. 662, Nos. 1216–1218.

**4789 —— Occupied by enemy.**]—Under an agreement in the nature of a charterparty, whereby pltf. let his ship to freight to defts. on a voyage from Shields to Lisbon, with convoy; the freight to be paid on right delivery of the cargo; the ship having sailed from Shields with her cargo & joined convoy at Portsmouth, & after being detained near a month off Lymington, her sailing orders being recalled by the convoy, in consequence of the occupation of Portugal by the enemy; & defts. having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by pltf., after notice to defts., & then was sold by consent of both parties without prejudice:—*Held:* pltf. could not recover freight *pro rata* or demurrage.—LIDDARD *v.* LOPES (1809), 10 East, 526; 103 E. R. 875.

*Annotation:*—**Refd.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613.

**4790 —— Blockade.**]—This was the case of a British vessel, which had been chartered at Campeachy for the purpose of delivering a cargo at Lisbon. The ship had successfully prosecuted her voyage to the very entrance of the Tagus, when she was warned off by the blockading squadron. Upon receiving this intimation she continued for some days with the fleet, but a gale of wind coming on which blew her out to sea, she was picked up by a Spanish privateer, & was soon afterwards retaken by a British cruiser, & carried to Madeira, where the ship & cargo were sold by the recaptors, to pay the salvage. A claim has since been given for the ship & cargo, which was decreed to be restored, & the ct. has now to consider what freight is due under the circumstances of the case (SIR WILLIAM SCOTT).—THE FRIENDS (1810), Edw. 246; 2 Eng. Pr. Cas. 48; 165 E. R. 1098.

*Annotations:*—**Consd.** The Teutonia (1871), L. R. 3 A. & E. 394; The Jolo, [1916] P. 206; The Juno, [1916] P. 169. **Distd.** The St. Helena, [1916] 2 A. C. 625. **Refd.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613.

**4791. —— Declaration of war—Delivery within terms of charterparty.**]—DUNCAN *v.* KÖSTER, THE TEUTONIA, No. 3165, *ante*.

**4792. —— On account of ice.**]—METCALFE *v.* BRITANNIA IRONWORKS CO., No. 3477, *ante*.

**4793. Authority given to cargo owners—To act on behalf of shipowner.**]—BLASCO *v.* FLETCHER, No. 4820, *post*.

*(b) Ship Lost.*

**4794. General rule—No freight payable.**]—No freight due if the ship be lost.—ANON. (1682), 2 Show. 283; 89 E. R. 941.

*Annotations:*—**Apld.** Saunders *v.* Drew (1832), 3 B. & Ad. 445. **Consd.** Allison *v.* British Marine Insce. (1876), 1 App. Cas. 209. **Refd.** Thompson *v.* Gillespy (1855), 5 E. & B. 209; Byrne *v.* Schiller (1871), L. R. 6 Exch. 319.

**4795. —— —— Ship lost on outward voyage.**]—GIBBON *v.* MENDEZ, No. 2076, *ante*.

**4796. —— ——.**]—The charterer of a ship at 60*s.* freight per ton wrote to his agent that he was to recharter her from Taganrog to this country "upon the best terms obtainable, . . . but if, unfortunately, there should be a loss, your draft upon us for the difference will meet due honour. The current rate of freight at Taganrog when the ship arrived there was 40*s.* The agent, not finding any one willing to recharter her, put a cargo of his own on board, & drew a bill on his principal for the difference between the current rate of freight & the charter rate of freight:—*Held:* though the ship was lost on the voyage home, & therefore no freight became actually payable, a loss had accrued to the agent the moment he put his goods on board & so rendered them liable to a rate of freight exceeding the current rate, & therefore the principal was bound under the terms of his letter to accept the bill.—YEAMES *v.* LINDSAY (1861), 3 L. T. 855; 9 W. R. 313.

**4797. —— —— Loss before reaching port of loading.**]—THE KAIKOURA (1885), 2 Pritchard's Admiralty Dig. 1762, n.

*Annotation:*—**Expld.** The Kate, [1899] P. 165.

**4798. —— ——.**]—JANENTZKY *v.* LANGRIDGE & Co., No. 4628, *ante*.

**4799. Freight payable from last port of loading.**]—CULLEN & ANDREWS *v.* MICO (1665), 1 Keb. 831; 83 E. R. 1269.

**4800. ——.**]—ANON. (1665), 1 Sid. 236; 82 E. R. 1079.

**4801. Pro rata freight—Part of cargo saved—Part saved abandoned to insurers—Full freight payable on part abandoned.**]—LUTWIDGE *v.* GREY (1736), cited in 2 Burr. at p. 885; 97 E. R. 616, H. L.

*Annotation:*—**Consd.** Luke *v.* Lyde (1759), 2 Burr. 882.

**4802. —— —— Freight on part of voyage performed.**]—LUKE *v.* LYDE (OR LLOYD), No. 4824, *post*.

**4803. —— Ship lost on homeward voyage—Freight for outward voyage.**]—MACKRELL *v.* SIMOND, No. 2074, *ante*.

*(c) Ship Abandoned.*

**4804. General rule — No freight payable.**] — Where a ship, injured by collision without fault of her master & crew, is abandoned by them, & is afterwards taken possession of & brought in safety into port by salvors, who institute a suit against ship & cargo, the shipowner, having by the abandonment put an end to his contract, loses all claim to have the cargo put into his possession to enable him to carry it on, & so earn his freight, & all claim to be paid full freight out of the proceeds of the cargo if sold by order of the ct. Nor can the shipowner have any claim for *pro rata* freight unless there be a new contract express or implied to pay the same, & if the shipowner refuses to consent to a sale of the cargo by the ct. when applied for by the salvors & owner of cargo, unless he be paid full freight, no such contract can be implied.—THE KATHLEEN (1874), L. R. 4 A. & E. 269; 43 L. J. Adm. 39; 31 L. T. 204; 23 W. R. 350; 2 Asp. M. L. C. 367.

*Annotations:*—**Apprvd.** The Cito (1881), 7 P. D. 5. **Distd.** Bradley *v.* Newsom, [1919] A. C. 16.

**4805. —— ——.**]—By the abandonment of a ship by its crew during a voyage, without any intention to retake possession, a right is given to the owner of cargo on board to treat the contract of affreightment as at an end. A ship with a cargo of resin in barrels, on a voyage from America to Rotterdam, was, owing to the perils

**PART VIII. SECT. 3, SUB-SECT. 4.—B. (b).**

**4794 i.** *General rule—No freight payable.*]—LEVATTE *v.* SALTER & TWINING (1858), 3 N. S. R. (2 Thom.) 387.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 4.—B. (c).**

**4804 i.** *General rule—No freight payable.*]—The contract of affreightment is abrogated by the abandonment of the ship & consequently no freight is recoverable.—THE ANNIE M. ALLEN, 3 C. L. T. 108.—**CAN.**

of the sea, abandoned by her crew off the American coast. She was afterwards saved by another vessel, & brought with her cargo by the salvors into a port in England, & there arrested in an action for salvage by her salvors. Before the shipowner had released the ship or cargo, the owners of the cargo applied for & obtained from the Admlty. Ct. an order for the release of the cargo to them without payment of any freight, upon their giving bail to the salvors:—*Held:* the cargo owners were entitled to treat the contract of affreightment as at an end, & therefore the order of the Admlty. Ct. was rightly made.—THE CITO (1881), 7 P. D. 5; 51 L. J. P. 1; 45 L. T. 663; 30 W. R. 836; 4 Asp. M. L. C. 468, C. A.

*Annotations:*—**Distd.** The Leptir (1885), 52 L. T. 768. **Apld.** The Arno (1895), 72 L. T. 621. **Distd.** Bradley *v.* Newsom, [1919] A. C. 16. **Refd.** The Norham Castle (1895), 11 T. L. R. 321; Guthrie *v.* North China Insce. (1902), 18 T. L. R. 412.

**4806.** ——— ———.]—THE ARGONAUT (1883), cited in Kennedy's Civil Salvage, 2nd ed. at p. 222, C. A.

*Annotation:*—**Refd.** The Anna Helena (1883), 49 L. T. 204.

**4807.** ——— ———.]—If a ship is abandoned by her master & crew during a voyage, & the cargo owner exercises his right of treating the abandonment as a determination of the contract of affreightment, the subsequent recovery of the vessel by the shipowner from salvors at the port of discharge will not revive the contract, & the owner of the cargo will be entitled to have it returned to him without payment of freight.—THE ARNO (1895), 72 L. T. 621; 11 T. L. R. 453; 8 Asp. M. L. C. 5, C. A.

*Annotations:*—**Distd.** Bradley *v.* Newsom, [1919] A. C. 16. **Refd.** Guthrie *v.* North China Insce. (1902), 18 T. L. R. 412.

**4808. What constitutes abandonment—Return to ship prevented by salving ship.**]—Where a salving ship takes a crew off a vessel in distress & puts men on board of her, refusing to allow her own crew to return, & the two vessels are in company navigated into port, there is no such abandonment of the ship as to put an end to the contract of carriage, & consequently there will be freight due upon the consignees requiring delivery of the cargo, such freight being *pro rata*, assuming the port not to be the port to which the cargo ought to have been taken under the contract of carriage.—THE LEPTIR (1885), 52 L. T. 768; 5 Asp. M. L. C. 411.

*Annotation:*—**Refd.** Bradley *v.* Newsom, [1919] A. C. 16.

**4809.** —— **Ship presumed sunk by enemy submarine—Subsequent recovery.**]—Pltfs. were the indorsees of a bill of lading signed on behalf of defts., the owners of the ship *J.*, for the voyage of a cargo of wood to be delivered at Hull on payment of freight as per charterparty. The *J.*, while off the coast of Scotland, was on Oct. 7, 1916, torpedoed by a German submarine, & the crew were compelled to take to their boats under threat of being shot. The enemy placed bombs on board the *J.*, & the last the crew saw of the vessel led them to believe that she was sinking. The crew were picked up & landed at Aberdeen on Oct. 8, & the master at once telegraphed to the owners: "Ship sunk yesterday. Submarine." On Oct. 9 the owner's agents wrote to pltfs., quoting the following letter from the owner: ". . . I advise you of the loss of my steamship *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. . . ." The vessel was subsequently found a waterlogged derelict & towed into Leith, where she was on Oct. 11 taken possession of by the Receiver of Wrecks. On the same day pltfs. claimed to elect to take possession of their cargo where the steamer was, & asserted that no freight was payable by them. In an action to recover the freight:—*Held:* the master & crew had not abandoned the ship in such circumstances as to indicate an intention not to perform the contract, & the owner's agents' letter of Oct. 9 was not a notice of the abandonment of the contract such as entitled the cargo owners to receive the cargo free of freight.—BRADLEY *v.* NEWSOM (H.) SONS & Co., [1919] A. C. 16; 88 L. J. K. B. 35; 119 L. T. 239; 34 T. L. R. 613; 14 Asp. M. L. C. 340; 24 Com. Cas. 1, H. L.; *revsg.* S. C. *sub nom.* NEWSUM (H.) & Co. *v.* BRADLEY, [1918] 1 K. B. 271, C. A.

*Annotation:*—**Refd.** Consorzio Veneziano di Armamento e Navigazione *v.* Northumberland Shipbuilding Co. (1919), 88 L. J. K. B. 1194.

*(d) Cargo Transhipped.*

**4810. Whole cargo delivered—Right to full freight.**]—COOK *v.* JENNINGS, No. 4765, *ante*.

**4811.** ——— ———.]—SHIPTON *v.* THORNTON, No. 3131, *ante*.

**4812.** ——— ———.]—GIBBS *v.* GREY, GREY *v.* GIBBS, No. 1925, *ante*.

**4813.** ——— ———.] — Pltfs. as shipowners chartered a steamer, the *Siljan*, to charterers now represented by the Board of Trade for a voyage from New York to certain ports in South Africa including Beira. The steamer's own tackle was not able to deal with weight of more than 5 tons, at New York certain railway machinery destined for Beira was put on board, individual consignments of the machinery weighing much more than 5 tons. On arrival at Beira the steamer was not able to discharge those heavy consignments with her own tackle, & there were no appliances at the port by which discharge could be effected. In these circumstances, the steamer was sent, without prejudice to the right of the parties, to Durban to be unloaded, & the goods were subsequently forwarded to Beira by another steamer. Pltfs. claimed the outstanding balance of freight, & the charterers, having paid the extra expenses entailed by having the goods unloaded at Durban, claimed the right to set off the amount of the expense so incurred. The matter was referred to arbn. & the umpire awarded in favour of pltfs., subject to the decision of a special case:—*Held:* (1) on the evidence, the charterers had waived any right they might have had under the cesser clause, & it was the charterers themselves who arranged for the steamer to be sent to Durban; (2) the charterers were the shippers under the bill of lading, & as such were liable for the freight independently of the charterparty; (3) the shipowners had under the charterparty ample powers of transhipment & as the goods did reach their destination in the end freight had become payable: (4) by express provisions of the charterparty the charterers were liable for the freight.—REDERI AKT. TRANSATLANTIC *v.* BOARD OF TRADE (1925), 30 Com. Cas. 117; 69 Sol. Jo. 807.

**4814. Part of cargo only delivered—Right to freight pro rata.**]—LUTWIDGE *v.* GREY (1736), cited in 2 Burr. at p. 885; 97 E. R. 616, H. L.

*Annotation:*—**Apld.** Luke *v.* Lyde (1759), 2 Burr. 882.

**4815.** ——— ———.]—THE COPENHAGEN, No. 3326, *ante*.

**4816.** ——— ———.]—MITCHELL *v.* DARTHEZ, No. 3322, *ante*.

**4817. Right to extra freight.**] — ROSETTO *v.* GURNEY, No. 3300, *ante*.

**PART VIII. SECT. 3, SUB-SECT. 4.—B. (d).**

**4817 i.** *Right to extra freight.*]—The freight of goods by a general ship having been paid at their shipment, & such payment admitted in the bill of lading, the vessel being totally lost, & the goods transhipped by the master at the same rate of freight:—*Held:* the

*Sect.* 3.—*Payment of freight: Sub-sect.* 4, *B.* (*e*), & *C.* (*a*) & (*b*).]

(*e*) *Transhipment of Cargo Prevented.*

**4818. Transhipment prevented by cargo owner—Right to full freight.**]—COOK *v.* JENNINGS, No. 4765, *ante*.

**4819.** —— ——.]—SHIPTON *v.* THORNTON, No. 3131, *ante*.

**4820.** —— ——.]—A ship was chartered by defts. for a voyage from Liverpool to the Havana, & loaded by them as a general ship, the freight being payable to the master. She went aground on the coast of Ireland. Subsequently she was got off with her cargo, both being damaged. S., one of defts., & who represented the freighters, visited the vessel, & was requested by the master "to act on behalf of the owners to the best of his judgment & ability." S. caused the cargo to be taken out, & sent back to Liverpool in another ship, which he himself engaged for that purpose. The ship herself went to Dublin, & was there repaired. When the goods arrived at Liverpool they were inspected by various persons, & the result was, that defts. on account of their damaged condition, determined to sell them. Before the sale took place, however, the master claimed the entire freight on the goods to the port of destination, or that they should be detained to proceed in his vessel, when she was repaired. Defts. refused to accede to this, & proceeded to sell the goods. In an action by the master against defts. for wrongfully preventing him from carrying the goods & earning freight, the jury found, in effect, that the course taken by defts. was the reasonable one to take, having regard to the interests of all parties concerned:—*Held:* on this finding defts. were entitled to the verdict; the authority to S. to act for the owners as well as for the shippers gave him authority to sell the cargo, under the circumstances which the jury had found to exist; & this authority, having been partially acted on & expenses incurred under it, could not be countermanded.

It [right of shipowner to full freight] is inapplicable to a case where the goods are taken back absolutely & unconditionally by consent of both sides, the further carriage of the goods being intentionally dispensed with; & ordinarily in such a case the shipowner becomes entitled to freight *pro rata itineris* (WILLIAMS, J.).—BLASCO *v.* FLETCHER (1863), 14 C. B. N. S. 147; 3 New Rep. 38; 32 L. J. C. P. 284; 9 L. T. 169; 9 Jur. N. S. 1105; 11 W. R. 997; 1 Mar. L. C. 380; 143 E. R. 401.

*Annotations:*—**Consd.** The Bahia (1864), Brown. & Lush. 292; Willson *v.* London, Italian & Adriatic Steam Navigation Co. (1865), Har. & Ruth. 29; Jackson *v.* Union Marine Insce. (1873), L. R. 8 C. P. 572. **Refd.** Dakin *v.* Oxley (1864), 15 C. B. N. S. 646; Pearson *v.* Göschen (1864), 4 New Rep. 404; Lloyd *v.* Gulbert (1865), L. R. 1 Q. B. 115. Lee *v.* Southern Insce. (1870), 39 L. J. C. P. 218; The Kathleen (1874), L. R. 4 A. & E. 269; Assicurazioni Generali & Schenker *v.* S.S. Bessie Morris & Browne, [1892] 1 Q. B. 571.

**4821.** —— ——.]—THE GALAM (CARGO EX), No. 4075, *ante*.

**4822.** —— ——.]—THE SOBLOMSTEN, No. 4780, *ante*.

**4823. Transhipment prevented by order of court.**]—THE GALAM (CARGO EX), No. 4075, *ante*.

*C. Delivery of Part of Cargo.*

(*a*) *In General.*

**4824. General rule—Amount proportionate to goods delivered.**]—In case of loss at sea, freight must be paid only in proportion to the goods saved, & the part of the voyage which was performed.—LUKE *v.* LYDE (OR LLOYD) (1759), 2 Burr. 882; 1 Wm. Bl. 190; 97 E. R. 614.

*Annotations:*—**Consd.** Cook *v.* Jennings (1797), 7 Term Rep. 381. **N.F.** The Hiram (1800), 3 Ch. Rob. 180. **Apld.** Beale *v.* Thompson (1803), 3 Bos. & P. 405. **Distd.** Mulloy *v.* Backer (1804), 5 East, 316. **Expld.** Liddard *v.* Lopes (1809), 10 East, 526. **Dbtd.** Evans *v.* Forster (1830), 8 L. J. O. S. K. B. 348. **Consd.** Dakin *v.* Oxley (1864), 15 C. B. N. S. 646. **N.F.** Castel & Latta *v.* Trechman (1884), Cab. & El. 276. **Refd.** Thompson *v.* Rowcroft (1803), 4 East, 34; Metcalfe *v.* Brittania Ironworks Co. (1877), 2 Q. B. D. 423.

**4825.** —— ——.]—Where the master & the freighter of a vessel of 400 tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, & there load from the freightor's factors a complete cargo of hemp & iron, & proceed therewith to London, & deliver the same on being paid freight for hemp £5 per ton, for iron 5*s.* a ton, etc., one-half to be paid on right delivery, the other at three months, held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery.—RITCHIE *v.* ATKINSON (1808), 10 East, 295; 103 E. R. 787.

*Annotations:*—**Consd.** Garrett *v.* Melhuish (1859), 33 L. T. O. S. 25. **Refd.** Davidson *v.* Gwynne (1810), 12 East, 380; Fothergill *v.* Walton (1818), 8 Taunt. 576; Carpenter *v.* Cresswell (1827), 1 Moo. & P. 66; Glaholm *v.* Hays (1841), 2 Man. & G. 257; Seeger *v.* Duthie (1860), 8 C. B. N. S. 45; MacAndrew *v.* Chapple (1866), L. R. 1 C. P. 643; Merchant Shipping Co. *v.* Armitage (1873), 29 L. T. 809; The Europa, [1908] P. 84. **Mentd.** Whitcher *v.* Hall (1826), 5 B. & C. 269; Stavers *v.* Curling (1836), 3 Bing. N. C. 355; Chanter *v.* Leese (1838), 4 M. & W. 295; Fishmonger's Co. *v.* Robertson (1843), 5 Man. & G. 131; Ellen *v.* Topp (1851), 20 L. J. Ex. 241; Hoare *v.* Rennie (1859), 5 H. & N. 19; White *v.* Beeton (1861), 7 H. & N. 42.

**4826.** —— —— **Animals dying on voyage.**]—Where freight is contracted for the transporting of animals & some die during the voyage, the freight is payable only for those which arrive safe (ALDERSON, B.).—GIBSON *v.* STURGE (1855), 10 Exch. 622; 3 C. L. R. 421; 24 L. J. Ex. 121; 24 L. T. O. S. 241; 1 Jur. N. S. 259; 3 W. R. 165; 156 E. R. 588.

*Annotations:*—**Consd.** Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649. **Apld.** Buckle *v.* Knoop (1867), L. R. 2 Exch. 333. **Refd.** Bradley *v.* Dunnipace (1861), 7 H & N. 200;

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consignees were not liable to pay the freight by the new ship.—THE ALMEIDA FAMILY, KIRK *v.* LIM ENG TUAN (1856), 6 L. T. 789.—**STRAITS SETTLEMENTS.**

**PART VIII. SECT. 3, SUB SECT. 4.—B. (e).**

p. *Refusal of master to tranship or deliver without payment of distance freight.*]—By a charterparty on an ordinary English printed form, made in London, between the London broker of deft., a Norwegian shipowner, & an English trading co., it was agreed that deft.'s ship A., of Norway, should proceed to Rangoon & there load a cargo of teak, & from there proceed to Queenstown or Falmouth for orders, the freight to be paid "by one-third in cash on ship's arrival at port of discharge & the remainder on unloading & right delivery of cargo in cash." The ship duly proceeded to Rangoon & there loaded a cargo of teak, but in the course of her voyage from Rangoon was wrecked on the shores of Table Bay, & became totally lost. The greater part of the cargo having been salved, pltfs., as holders of bills of lading for the cargo, were willing that the master should tranship the cargo to its destination, but the master refused to tranship the cargo or to deliver it to pltfs. without payment of distance freight according to Norwegian law:—*Held:* pltfs. were not liable for distance freight, as the intention of the parties was to make an English contract, & the payment of freight being expressly dealt with in the charterparty, none was payable on the cargo landed in Cape Town.—SEARIGHT & Co. *v.* MARCHÜSSEN (1897), 14 S. C. 94; 7 C. T. R. 107.—**S. AF.**

**PART VIII. SECT. 3, SUB-SECT. 4.—C. (a).**

**4824 i.** *General rule—Amount proportionate to goods delivered.*]—GUAY *v.* HUNTER, 2 R. de L. 77.—**CAN.**

**4824 ii.** —— ——.]—If a part of a cargo have been delivered & accepted, an action for freight *pro tanto* will lie.—OLDFIELD *v.* HUTTON, 3 R. de L. 200.—**CAN.**

**4824 iii.** —— ——.]—TOURVILLE *v.* RUCHLE (1871), 15 L. C. J. 29.—**CAN.**

Dakin *v.* Oxley (1864), 15 C. N. B. S. 646; Tully *v.* Terry (1873), L. R. 8 C. P. 679; The Skandinav (1881), 50 L. J. P. 46.

**4827.** —— ——.]—DAKIN *v.* OXLEY, No. 4857, *post*.

**4828.** —— ——.]—ALLISON *v.* BRISTOL MARINE INSURANCE CO., No. 4511, *ante*.

**4829.** —— ——.]—By a charterparty a cargo of sugar in bags was to be loaded at a named port, & the ship so loaded was to proceed to another named port & there deliver the cargo "agreeably to bills of lading on being paid freight in full of all port charges . . . at the rate of 10*s.* 6*d.* per ton of 20 cwt. gross weight shipped payable on right & true delivery of the cargo." Charterers' liability was to cease "when cargo is shipped & bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight & demurrage." Any difference between the charterparty & bills of lading freight was to be settled at the port of loading on clearance of the vessel if required by the master. The amount due under this clause was ascertained at the port of loading, & paid by the charterers to the shipowners. The vessel loaded a full cargo, but on the voyage she grounded & a portion of the cargo was lost. The remainder was delivered at the port of discharge & the bills of lading freight on the whole cargo shipped was collected by the shipowners. In an action by the charterers to recover, as money received to their use, the difference between the freight so collected by the shipowners & the amount due to them under the charterparty in respect of the cargo delivered:—*Held:* under the charterparty the shipowners were not entitled to a lump sum freight, & the balance of freight in their hands could be recovered from them by the charterers.

Freight is not payable except upon delivery of the cargo (COLLINS, M.R.).—LONDON TRANSPORT CO. *v.* TRECHMANN BROTHERS, [1904] 1 K. B. 635; 73 L. J. K. B. 253; 90 L. T. 132; 9 Asp. M. L. C. 518; 9 Com. Cas. 133, C. A.

**4830. Right to sue on covenant.**]—BRIGHT *v.* COWPER (1611), 1 Brownl. 21; 123 E. R. 640.

*Annotations:*—**Apld.** Cook *v.* Jennings (1797), 7 Term Rep. 381. **Consd.** Smith *v.* Wilson (1807), 8 East. 437. **Refd.** Ritchie *v.* Atkinson (1808), 10 East, 295; The Norway (1864), Brown. & Lush. 377; Merchant Shipping Co. *v.* Armitage (1873), 43 L. J. Q. B. 24; Robinson *v.* Knight (1873), 28 L. T. 820; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171.

**4831. Right to deduct value of goods missing.**]—A consignee of goods under a bill of lading has no right to deduct from the freight the value of goods contained in the bill of lading, but not delivered to him; his remedy is by cross-action.—MEYER *v.* DRESSER (1864), 16 C. B. N. S. 646; 33 L. J. C. P. 289; 10 L. T. 612; 2 Mar. L. C. 27; 143 E. R. 1280; *sub nom.* MAYER *v.* DRESSER, 12 W. R. 983.

*Annotations:*—**Refd.** The Norway (1864), Brown. & Lush. 377; Maspons y Hermano *v.* Mildred (1882), 9 Q. B. D. 530. **Mentd.** Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112; Produce Brokers Co. *v.* Olympia Oil & Cake Co., [1916] 1 A. C. 314.

**4832.** ——.]—SANDEMAN & SONS *v.* TYZACK & BRANFOOT S.S. CO., LTD., No. 3644, *ante*.

**4833.** ——.]—A charterparty provided that the ship should load a cargo of coal & deliver the same at the port of discharge at a freight of so much per ton on the quantity delivered (the act of God, etc., & all & every other dangers & accidents of the seas, rivers, & navigation always excepted), the freight to be paid two-thirds in cash ten days after the vessel's sailing & the remainder in cash on the right & true delivery of the cargo agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity:—*Held:* (1) a collision attributable solely to the negligence of those in charge of the other vessel was a "danger or accident of navigation" within the meaning of the charterparty, & therefore the shipowners were not liable in respect of non-delivery of part of the cargo shipped caused by such a collision; (2) the charterers were entitled nevertheless under the charterparty to set off the cost of the coal so undelivered against the balance of freight payable on delivery of the remainder of the cargo at the port of discharge.—GARSTON SAILING SHIP CO., LTD. *v.* HICKIE, BORMAN & CO. (1886), 18 Q. B. D. 17; 56 L. J. Q. B. 38; 55 L. T. 879; 35 W. R. 33; 3 T. L. R. 23; 6 Asp. M. L. C. 71, C. A.

**Ship lost.**]—*See* Nos. 4801, 4802, *ante*.

**Cargo transhipped.**]—*See* Nos. 4814–4816, *ante*.

*(b) Where Provision for Lump Freight.*

**4834. Right to whole lump freight—Part of cargo lost by peril of sea—Where master not negligent.**]—NORWAY (OWNERS) *v.* ASHBURNER, THE NORWAY, No. 1673, *ante*.

**4835.** —— ——.]—ROBINSON *v.* KNIGHTS, No. 4512, *ante*.

**4836.** —— ——.]—Pltfs. chartered their ship to defts. to load a cargo of timber & carry it to a named port for a specified lump sum as freight, payable on right delivery of the cargo. The charterparty contained the usual exception of perils of the seas. The ship arrived with her cargo on board outside the port of discharge, when owing to heavy weather she was driven ashore & became a total loss. Part of the cargo was washed ashore & was afterwards collected on the beach by the directions of the master & deposited on the dock premises, the residue being lost by the perils of the seas. In an action to recover payment of the lump sum freight:—*Held:* pltfs., having delivered so much of the cargo as they were not excused by the excepted perils for not delivering, had performed their contract & earned their freight, notwithstanding that the ship had not completed her voyage & that the portion of the cargo delivered had been so delivered otherwise than by the ship stipulated for.—THOMAS (WILLIAM) & SONS *v.* HARROWING S.S. CO., [1915] A. C. 58; 83 L. J. K. B. 1662; 111 L. T. 653; 30 T. L. R. 611; 12 Asp. M. L. C. 532; 19 Com. Cas. 454, H. L.; *affg.* S. C. *sub nom.* HARROWING S.S. CO. *v.* THOMAS, [1913] 2 K. B. 171.

**4837.** —— **Part of cargo lost by fire—Without default of master or crew.**]—(1) By charterparty a ship was to load at Colombo, or Cochin, from the charterer's agents, a full & complete lading, & proceed to London, & discharge there, fire & other dangers of the sea excepted, a lump sum freight of £5,000 to be paid after entire discharge & right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the custom house. Part of the cargo loaded in accordance with the charterparty was lost by fire, without any default of the master or crew, & the remainder was delivered in London:—*Held:* the shipowner was entitled under the charterparty to the full sum of £5,000.

(2) We are of opinion that pltfs. are not entitled

**4831 i.** *Right to deduct value of goods missing.*]—SHANKLAND *v.* ATHYA & CO. (1865), 3 Macph. (Ct. of Sess.) 810; 37 Sc. Jur. 413.—**SCOT.**

**PART VIII. SECT. 3, SUB-SECT. 4.—C. (b).**

**4834 i.** *Right to whole lump freight—Whole cargo not loaded.*]—CLEMENTS *v.* RUSSELL (1854), 4 I. C. L. R. 318.—**IR.**

*Sect. 3.—Payment of freight: Sub-sect. 4, C. (b), D.*

to judgment for the interest (COLERIDGE, C.J.).—MERCHANT SHIPPING CO. *v.* ARMITAGE (1873), L. R. 9 Q. B. 99; 43 L. J. Q. B. 24; 29 L. T. 809; 2 Asp. M. L. C. 185, Ex. Ch.

*Annotations:—As to* (1) **Apld.** Williams *v.* Canton Insce. Office, [1901] A. C. 462. **Consd.** London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635. **Foll'd.** Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171. **Apld.** Muller, Maclean *v.* Leslie & Anderson, [1921] W. N. 235. *As to* (2) **Refd.** L. C. & D. Ry. *v.* S. E. Ry., [1893] A. C. 429. *Re* Horner, Fooks *v.* Horner, [1896] 2 Ch. 188; Thakier Ganesh Bakhsh *v.* Thakeer Harihar Bakhsh (1904), 20 T. L. R. 401.

**4838. —— Whole cargo not loaded.**]—ROBINSON *v.* KNIGHTS, No. 4512, *ante*.

**4839. —— Cargo shipped less than stated in bill of lading.**]—To an action for a lump sum for freight by the master of a ship against the indorsee of a bill of lading defts. pleaded, except as to 217 tons of cargo, that by the bill of lading pltf. acknowledged himself to have received a number of tons exceeding 217 tons, & that he did not carry or deliver the goods in the bill of lading mentioned, but only a portion, to wit, 217 tons (not alleging in terms that he did not carry all the goods delivered). Pltf. replied that he carried all the goods delivered to him under the bill of lading, & that the goods so delivered & described in the bill of lading as weighing more than 217 tons in fact weighed 217 tons only, & that the weight mentioned in the bill of lading was a mere misdescription, inserted without fraud or default; that the bill of lading was made in France, & that, according to the law of France, the whole freight was payable, although part only of the goods was carried & delivered:—*Held:* in an action for freight, the master is at liberty (notwithstanding Bills of Lading Act, 1855 (c. 111), s. 3), to show that the cargo actually received by him differs in weight from that signed for in the bill of lading, at all events where the weight mentioned in the bill of lading is mere matter of measurement; & the freight being a lump sum pltf. was entitled to recover the whole.—BLANCHET *v.* POWELL'S LLANTIVIT COLLIERIES CO., LTD. (1874), L. R. 9 Exch. 74; 43 L. J. Ex. 50; 30 L. T. 28; 22 W. R. 490; 2 Asp. M. L. C. 224.

*Annotation:—***Consd.** Parsons *v.* New Zealand Shipping Co., [1901] 1 K. B. 548.

**4840. —— Where non-delivery wrongful.**]—WILLIAMS & CO. *v.* CANTON INSURANCE OFFICE, LTD., No. 1964, *ante*.

*D. Cargo Sold during Voyage.*

**4841. General rule—No freight payable.**] —LIDDARD *v.* LOPES, No. 4789, *ante*.

**4842. —— —— Sale without consent of owner.**] —VLIERBOOM *v.* CHAPMAN, No. 4777, *ante*.

**4843. —— —— ——.**]—ACATOS *v.* BURNS, No. 2841, *ante*.

**4844. —— ——.**]—THE SALACIA, No. 4760, *ante*.

**4845. —— —— Sale treated as loan.**]—HOPPER *v.* BURNESS, No. 3436, *ante*.

**4846. —— —— Freight payable "on right delivery."**]—By a charterparty, on an ordinary English printed form, negotiated & made in London between the London broker of pltf., a German shipowner domiciled in Germany, & defts., merchants in London, it was agreed that pltf.'s ship, which was under German colours, with a German master, & then in a French port, should proceed to Akyab, Rangoon or Bassein, according to orders, & there load, from defts.' agents, a cargo of rice, & being so loaded proceed to Scilly, Falmouth, Plymouth, or Cowes for orders to discharge in the United Kingdom or on the Continent between Havre & Hamburg, "freight being payable at & after the rate of 35*s.* sterling per ton of 20 cwt. net delivered. . . . The act of God, the Queen's enemies, restraints of princes & rulers, fire & all & every other dangers & accidents of the seas, rivers & navigation of whatever nature & kind soever, during said voyage always excepted. . . . The freight to be paid on right delivery of cargo if discharged in the United Kingdom; in cash or as customary . . . & if on the Continent, in cash at the exchange of the day of final discharge without discount." The vessel proceeded to Bassein, & there loaded a cargo of rice belonging to defts., the master signing a bill of lading making the rice deliverable to defts.' order, freight & all other conditions as per charterparty. On the voyage the vessel met with heavy weather, & her master for the safety of ship & cargo put into Port Elizabeth, where a portion of the cargo was found to be so much damaged by sea water that, on survey, it was condemned as unfit for reshipment & sold by the master. Pltf. sued defts. for full freight on the portion of the cargo so sold at the port of distress:—*Held:* defts. were not liable as the intention of the parties was to make an English contract, &, the payment of freight being expressly dealt with in the charterparty, none was payable on the portion of the cargo sold in the port of distress.—THE INDUSTRIE, [1894] P. 58; 63 L. J. P. 84; 70 L. T. 791; 42 W. R. 280; 7 Asp. M. L. C. 457; 6 R. 681, C. A.

**4847. Recovery of pro rata freight—From holders of bills of lading—Where special agreement to pay.**]—P. was the owner of a ship which took in a cargo at Calcutta, to be carried thence to St. Petersburg, where P. resided. This cargo was purchased on account of P. by E., his supercargo & agent, but the house of F. & Co. of Calcutta advanced £26,000 towards the purchase thereof & of the cargo of another ship belonging to P., &, for their security, bills of lading of the first-mentioned cargo were signed by the captain, as shipped by F. & co. on account of P., to be delivered at St. Petersburg, to the order of F. & co., or their assigns. The words, "he or they paying freight," which, in the bills of lading, immediately followed the direction for delivering to the order of F. & co., were struck out. These bills were delivered to F. & co., & indorsed & transmitted by them to defts., their correspondents in London. Before the ship sailed from Calcutta, a memorandum for charter was entered into between E. & the captain, whereby it was agreed that the ship should be dispatched with a complete cargo, should proceed to St. Petersburg, & there deliver the same to the order of the freighter on payment of freight at a specified rate. The ship, in the course of her voyage, was lost, but there was a salvage of part of the cargo, which was sold with the assent of the captain, & produced the net sum of £13,300. In Apr. 1816, defts., as holders of the bills of lading, applied for the proceeds of the salvage, but pltfs. had put a stop thereon on the part of P., & the captain, as agent of P., claimed a lien thereupon for *pro rata* freight. On July 12, 1816, the memorandum for charter not being then forthcoming, & defts. being then in possession of the bills of lading, by letter to pltfs. agreed that, in consideration of pltfs. handing to defts. the captain's order in defts.' favour for the proceeds of the cargo of his late ship, & a letter from pltfs. to those who had sold the cargo, withdrawing any claim on account of P., defts. would hold themselves accountable for pltfs., as the agents of P., for whatever might appear to be due for the *pro rata* freight, according to the charterparty entered into at Calcutta

between E. & the captain. Pltfs. performed their part of the agreement, & defts., in consequence, received the proceeds of the salvage, but refused to pay the *pro rata* freight:—*Held:* pltfs. were entitled to recover in *assumpsit* on the agreement of July, 1816, the amount of the *pro rata* freight.—THORNTON *v.* FAIRLIE (1818), 8 Taunt. 354; 2 Moore, C. P. 397; 129 E. R. 419.

**4848. —— What must be proved—Option of cargo owner to accept cargo at place of sale.**]—The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the shipowner & the owner of cargo, warrant an average adjustment at the intermediate port. To entitle a shipowner, in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port, being so much damaged as not to be worth forwarding, it must be shown that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port. A ship sailed from Riga for Hull with a general cargo & was stranded, but was afterwards got off, part of the cargo having been washed out of her & part jettisoned, & towed into Copenhagen, where her cargo was discharged, & the ship having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. Pltfs.' goods were so much damaged as not to be worth sending on, & were, properly, but without pltfs. having an opportunity of exercising an option, sold at Copenhagen, & an average adjustment took place there according to Danish law, under which pltfs. were charged with *pro rata* freight from Riga to Copenhagen. In an action for the price realised by the sale at Copenhagen:—*Held:* (1) the shipowners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor *pro rata* freight.

(2) The duty of the shipowner is to complete the voyage if he can. If owing to perils of the seas he is compelled to put into an intermediate port for repair, his duty is, to refit, & carry on such part of the original cargo as is fit to be carried on (LINDLEY, J.).

(3) If the shipowner, being unable to repair his ship, tranships the cargo & sends it home in some other ship, which he may do, still, as between him & the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary (LINDLEY, J.).—HILL *v.* WILSON (1879), 4 C. P. D. 329; 48 L. J. C. P. 764; 41 L. T. 412; 4 Asp. M. L. C. 198.

*Annotation:—As to* (2) **Apld.** Assicurazioni Generali & Schenker *v.* S.S. Bessie Morris Co. & Browne (1892), 61 L. J. Q. B. 754.

**4849. What deductions to be allowed—Advances made by agent abroad—Only if authorised by charter.**]—THE SALACIA, No. 4760, *ante*.

**4850. Sum payable as freight if goods had arrived.**]—THE SALACIA, No. 4760, *ante*.

**4851. —— Value of goods sold.**]—CAMPBELL *v.* THOMPSON, No. 3400, *ante*.

**4852.** —— ——.]—THE SALACIA, No. 4760, *ante*.

**4853. Ship abandoned—Sale by order of court.**]—THE KATHLEEN, No. 4804, *ante*.

*E. Cargo Delivered Damaged.*

**4854. Right to whole freight—Damage by perils of sea.**]—The principal question is whether the owners are to pay for the damage occasioned by the storm . . . & this must be determined by the intention of the parties & the nature of the contract. It is a charter of freight. The owners let their ships to hire & there never was an idea that they insure the cargo against the perils of the sea (LORD MANSFIELD).—HOTHAM *v.* EAST-INDIA CO. (1779), 1 Doug. K. B. 272; 99 E. R. 178.

*Annotations:*—**Distd.** Beatson *v.* Schank (1803), 3 East, 233. **Consd.** Thomson *v.* Brown (1817), 1 Moore, C. P. 358. **Refd.** Cordwent *v.* Hunt (1818), 8 Taunt. 596.

**4855. —— —— Merchantable character under original description not lost.**]—PALACE SHIPPING CO. *v.* SPILLERS & BAKERS, LTD. (1908), *Times*, May 18.

**4856. —— Damage by negligence of master or crew—Effect of offer of abandonment to shipowner.**]—MILLS *v.* BAINBRIDGE (1804), cited in Abbott's Merchant Shipping, 14th ed. at p. 702, n.

**4857.** ——— ——— ———.]—(1) It is no answer to an action by a shipowner against the charterer to recover freight that, by the fault of the master & crew, & their negligent & unskilful navigation of the vessel, the cargo, coal, was damaged so as upon arrival at the port of discharge to be then there of less value than the freight, & that the charterer abandoned it to the shipowner.

(2) The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed (WILLES, C.J.).

(3) If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried, & freight is payable in respect of the part carried, unless the charterparty make the carriage of the whole a condition precedent to the earning of any freight (WILLES, C.J.).—DAKIN *v.* OXLEY (1864), 15 C. B. N. S. 646; 33 L. J. C. P. 115; 10 L. T. 268; 10 Jur. N. S. 655; 12 W. R. 557; 2 Mar. L. C. 6; 143 E. R. 938.

*Annotations:—As to* (1) **Refd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; Robinson *v.* Knight (1873), 28 L. T. 820; Asfar *v.* Blundell, [1896] 1 Q. B. 123 *As to* (2) **Apld.** The Argos, Gaudet *v.* Brown, The Hewsons, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134. **Consd.** Kish *v.* Taylor, [1912] A. C. 604. *As to* (3) **Consd.** London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635. *Generally*, **Refd.** Meyer *v.* Dresser (1864), 16 C. B. N. S. 646; The Norway (1864), Brown. & Lush. 377.

**4858.** —— ——.]—DAVIDSON *v.* GWYNNE, No. 1882, *ante*.

**4859.** —— ——.]—SHIELDS *v.* DAVIS, No. 4622, *ante*.

**4860.** —— ——.]—Defts., M., contracted with his co-owners for the use of their ship on a voyage to S., & he shipped in her some thousands of bricks, which on the arrival of the ship at S. were reduced to dust. No freight was paid at S., nor was the dust removed, but the agent of other defts. at S. used it as ballast on a voyage by the same ship from S. to C., where it was sold for a small sum. In taking the accounts between pltfs. & defts., the ship's husbands, the chief clerk charged them with the freight of the bricks, although they had received no part of it; & a motion by those defts. to vary was dismissed, with costs.

If a shipper of goods sustain a loss by reason of the misconduct or negligence of the shipowner or his agents, his remedy is by action at law, & he cannot resist payment of freight on the ground that the goods were unfit for use when they arrived at the port of destination.—GARRETT *v.* MELHUISH (1858), 33 L. T. O. S. 25; 4 Jur. N. S. 943.

**PART VIII. SECT. 3, SUB-SECT. 4.—E. q. *Right to whole freight—Damage in unloading.***]—In an action for freight:—*Held:* the captain had a right to recover freight for the cargo delivered, although part of the goods may have been damaged in unloading, & the consignee has a right to his recourse by plea or cross demand.—

*Sect. 3.—Payment of freight: Sub-sect. 4, F. (a) & (b).]*

**4881.** —— ——.]—By a charterparty, made between deft. & H., a ship was chartered to proceed to Madras & load a cargo there from the agents of H., & being so loaded proceed to London & deliver the same on being paid freight at £3 15*s.* a ton, etc.; "the captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to this charterparty." C. S., who acted as agent of H. at Madras in respect of the charterparty, by his directions purchased sugars & loaded them on board. The captain, at the request of C. S., signed a bill of lading, deliverable to the order of C. S. at £1 per ton freight. H. stopped payment & never paid for the sugar. The sugar having arrived in London:—*Held:* C. S., or the parties in London who represented him, were entitled to the sugar on payment of the bill of lading freight.

Here C. S. & co. [the agent of the charterer] . . . bought goods, intending them for him, but declined to deliver or transfer the possession of them, until they should have been reimbursed the cost price. The question is whether, as between themselves & the shipowner, they had a right to make a bargain that the goods should be carried for less than the charterparty freight. I think they had. They were in the same position as any third party would have been. The possession of the goods by C. S. & co. was, as it were, adverse to H. [the charterer] (MARTIN, B.).—SHAND *v.* SANDERSON (1859), 4 H. & N. 381; 28 L. J. Ex 278; 6 L. T. 836; 7 W. R. 416; 157 E. R. 888.

*Annotations:*—**Refd.** Pearson *v.* Goschen (1864), 17 C. B. N. S. 352; Hansen *v.* Harrold, [1894] 1 Q. B. 612; Krüger *v.* Moel Tryvan Ship Co. (1907), 13 Com. Cas. 1.

**4882.** —— ——.]—A charterparty provided, clause (3), that the chartered vessel should load a full & complete cargo of wheat &/or maize &/or linseed &/or rapeseed in bags &/or bulk . . . & deliver the cargo . . . on being paid freight at & after the following rates, viz.: Freight, (6) 12*s.* 6*d.* per ton . . . (13) 6*d.* per ton less if ordered to a direct port of discharge. . . . (14) For linseed &/or rapeseed the rate of freight shall be 7 per cent. per ton more than the rate for wheat &/or maize. (15) All per ton of 2,240 lbs. English gross weight delivered. Other cargo. (16) Charterers have the option of shipping other lawful merchandise, Quebracho wood & sugar excluded, in which case freight to be paid on steamer's deadweight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain; but steamer not to earn more freight than she would if loaded with a full cargo of wheat &/or maize in bags. . . . (31) The master to sign bills of lading as presented at any rate of freight that the charterers or their agents may require, but any difference in amount between the bill of lading freight & the total gross chartered freight as above shall be settled at port of loading before the steamer sails; if in steamer's favour to be paid in cash on signing bills of lading. . . . Charterers' liability to cease upon shipment of cargo, provided such cargo be worth the bill of lading freight, dead freight, & demurrage at port of shipment. Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage, & all other charges whatsoever. Only oats & barley were loaded, & the vessel, which was ordered to a direct port of discharge, had to leave when only about half loaded owing to the charterers' liability to buy any further cargo. By the bills of lading that were signed it was provided that the cargo was "to be delivered . . . unto order, he or they paying freight for the goods & performing all other conditions & exceptions as per charterparty . . . at the rate of freight as per charterparty per ton of 2,240 lbs. gross weight delivered in full, 6*d.* less if ordered to a direct port on signing last bill of lading":—*Held:* the freight payable by defts. as receivers of the cargo was at the rate of 12*s.* per ton of 2,240 lbs. gross weight delivered.—RED "R." S.S. Co. *v.* ALLATINI BROTHERS (1910), 103 L. T. 86; 26 T. L. R. 621; 11 Asp. M. L. C. 434; 15 Com. Cas. 290, H. L.

**4883.** —— —— **Where express stipulation—"Not under chartered rates."**]—Payments made in advance on account of freight cannot be recovered back, although the vessel is lost. Pltf. chartered a vessel to defts. for a homeward voyage from Calcutta, with an option to defts. to send the vessel on an intermediate voyage at a freight therein mentioned, "such freight to be paid as follows: £1,200 in rupees to be advanced the master by the freighters' agents at Calcutta against his receipt, & so be deducted, together with 1½ per cent. commission on the amount advanced & cost of insurance from freight on settlement thereof, & the remainder on right delivery of the cargo at port of discharge, in cash as customary." By another clause the master was to "sign bills of lading at any current rate of freight required, without prejudice to the charterparty; but not under chartered rates, except the difference be paid in cash." Defts. elected to send the vessel on the intermediate voyage & paid the £1,200, but induced the master, whom they required to sign bills of lading below the chartered rates, to postpone payment of the difference till the cargo was complete. The difference was not paid, & the vessel was lost on her way out to sea. In an action for the difference:—*Held:* pltf. was entitled to recover.—BYRNE *v.* SCHILLER (1871), L. R. 6 Exch. 319; 40 L. J. Ex. 177; 25 L. T. 211; 19 W. R. 1114; 1 Asp. M. L. C. 111, Ex. Ch.

*Annotations:*—**Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** Watson *v.* Shankland (1873), L. R. 2 Sc. & Div. 304; Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373.

**4884.** —— **Part of cargo burnt—Assessment of damages.**]—AITKEN, LILBURN & Co. *v.* ERNSTHAUSEN & Co., No. 2945, *ante*.

**4885. Discrepancy between freight contract & charterparty—Effect of agreement between cargo owners & shipowners.**]—Pltfs. entered into a freight contract to carry a cargo from the Sea of Azoff to one of several ports, including Copenhagen, the freight payable to them for Copenhagen being 12*s.* 3*d.* per unit. To fulfil the contract they chartered a steamer from defts. to carry a cargo to "a safe port on the Continent, between Havre & Hamburg . . . or to Copenhagen," the freight payable to defts. being 12*s.* per unit for Copenhagen & 11*s.* for a port "between Havre & Hamburg." The cargo was shipped & the steamer was ordered to Copenhagen; but the buyers of the cargo agreed with defts. that the ship should go to Amsterdam, a port "between Havre & Hamburg," at a freight of 12*s.* 6*d.* per unit. Pltfs. sought to recover from defts. the

the master against the consignees:—*Held:* the effect of the body of the note was not controlled by the words in the margin, & pltf. was entitled only to freight at the lower rates in terms of the charterparty.—BACHE *v.* SOUTH AFRICAN MILLING CO. (1893), 10 S. C. 343.—**S. AF.**

**b.** *Construction of contract.*]—PACIFIC COLD STORAGE CO. *v.* TROUGHTON (Y. T.) (1905), 1 W. L. R. 529.—**CAN.**

difference between 11*s.* & 12*s.* 6*d.* per unit :—*Held :* the cargo was not carried to Amsterdam under the charterparty, pltfs. were not parties to, or affected by the new contract between the buyers of the cargo, & defts., & they were only entitled to 3*d.* per unit, the difference between the Copenhagen freights as fixed by the freight contract & the charterparty respectively.—HOYLAND & Co. *v.* GRAHAM & Co. (1896), 12 T. L. R. 166 ; 1 Com. Cas. 274.

**4886. —— Right to freight at charterparty rate.**]—By a forward freight contract, contained in a shipping order, C. D. & co. agreed to provide tonnage at 16*s.* 6*d.* a ton for the carriage of 3,000 tons of wheat of pltfs. from Bombay to Liverpool. C. D. & co. declared for the shipment of the wheat a steamer of defts., which had been chartered by M. & co. to carry a cargo from Bombay to Liverpool at a freight of 30*s.* per ton, & half the space of which had been sub-let by M. & co. to C. D. & co. Pltfs. knew that there was a charterparty, but not its terms. After 2,100 tons of the wheat had been loaded, pltfs. tendered to the captain for his signature bills of lading in which the freight was 16*s.* 6*d.* The captain refused to sign the bills of lading unless the difference between 30*s.* & 16*s.* 6*d.* was paid to him, in accordance with the terms of the charterparty. Pltfs. declined to pay this, & demanded the return of their wheat. The captain retained the wheat, & sailed without signing any bills of lading for it. In order to get delivery pltfs. under protest, took bills of lading in which the freight was 30*s.* At the time of the loading the captain had an opportunity of seeing the shipping order, but did not, in fact, do so :—*Held :* there was no contract by defts. to carry the wheat at 16*s.* 6*d.* ; defts. were not bound to return the wheat to pltfs. ; & pltfs. were not entitled to recover from defts. the excess of freight above 16*s.* 6*d.*—RALLI BROTHERS *v.* PADDINGTON S.S. Co., LTD., MACKINTOSH & Co., THIRD PARTIES (1900), 5 Com. Cas. 124.

*(b) Construction of Special Stipulations.*

**4887. Provision for alternate rates — Time freight.**]—(1) A charterparty provided that the ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, & there load, from the factors of the charterers, a full cargo of guano or other lawful produce, which the charterers bound themselves to provide ; & being so loaded should proceed therewith to a safe port in the United Kingdom, & deliver the same on being paid freight at £3 18*s.* per ton, the freight to be paid on unloading & right delivery of the cargo, one-third in cash on arrival at port of destination, & the remainder by approved acceptances at three months, or cash equal thereto, etc., & it was further agreed, that, in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the vessel to any other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods, etc., in which case they were to pay for such service, as hire for the said vessel, after the rate of 15*s.* 6*d.* per ton per month, such pay or hire to commence from the day of the vessel's clearing outwards at the Custom house, London, & to terminate upon the vessel's return to her port of delivery as thereinbefore provided for, & the discharge of the cargo. If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner, in cash on account, three months' pay for the hire of the vessel, & the balance to be paid on the vessel's return as aforesaid. The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, & that, in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The vessel sailed, pursuant to the charterers' directions, to an island on the south-west coast of Africa, where the agent met her, & informed the captain that there was no guano to be had there, & that she must procure a cargo in Saldanha Bay, another place on the same coast, & must proceed to the Cape for a licence to load a cargo there. The vessel accordingly sailed for the Cape, but, being there required to enter into an engagement to sign & hand over bills of lading for the cargo, as a security for the charges of the licence, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo ; & the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charterparty :—*Held :* in such circumstances, this clause had come into operation, & the time freight was recoverable.

(2) The vessel, having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, &, under the charterers' instructions, went to Southampton, to discharge her cargo. The charterers wrote to the captain there, stating that, without prejudice to the charterparty, or any dispute connected with the vessel, their wishes were that it should be landed & warehoused in the Southampton docks in bulk, which was accordingly done :—*Held :* upon such landing of the cargo the balance of the freight became payable.—FENWICK *v.* BOYD (1846), 15 M. & W. 632 ; 153 E. R. 1003.

**4888. Rate specified to be "in full for the voyage"—Application to carriage of goods between intermediate ports.**]—SWEETING *v.* DARTHEZ, No. 3696, *ante.*

**4889. Provision to pay highest freight payable on same voyage.**]—GETHER *v.* CAPPER, No. 1724, *ante.*

**4890. Condition for payment of higher rate—If ship sail within certain time—Return to port on account of insubordination of crew.**]—SHARP *v.* GIBBS, No. 1878, *ante.*

**4891. Provision for reduction in rate—On fall in price of bunker coal.**]—CHARLTON S.S. Co., LTD. *v.* ALLEN (T. W.) & SONS, LTD., No. 4034, *ante.*

**4892. —— ——.**]—A charterparty provided for freight at a certain rate, & also contained the following words : "if & when the price of good class bunker coals ordinarily used in this trade is reduced to 80*s.* per ton the freight is to be 10*s.* per standard less" :—*Held :* the price referred to meant the price actually paid by the shipowner for coals, including middleman's charges & the cost of carriage to the port of loading, & not the price at

**PART VIII. SECT. 3, SUB-SECT. 4.—F. (b).**

c. *Provision for reduction in rate.*]—A schooner carrying coal late in the autumn of 1883, from S to K., was damaged by stress of weather. The cargo was unloaded to repair the vessel, & the coal could not be delivered before the spring of 1884. The bill of lading stated the rate of freight to be $1.50 per ton, but, if the coal were not delivered in the season of 1883, the freight was to be at the going rates when the coal was delivered, "the dangers of navigation, fire, & collision excepted". —*Held :* freight was payable only at the reduced rate.—CANADIAN LOCO-

*Sect. 3.—Payment of freight: Sub-sect. 4, F. (b), G. (a), (b) & (c).]*

the pit's mouth, & in any case that the clause could only refer to a reduction which took place after the date of the charter.—HANSEN *v.* WADE & ENGLISH (1924), 93 L. J. K. B. 1089; 132 L. T. 129; 40 T. L. R. 881; 16 Asp. M. L. C. 398; 30 Com. Cas. 46, H. L.

*G. Weighing and Measuring Cargo.*

*(a) In General.*

**4893. What included in weight—Where covenant to pay on net weight—Outside skins containing packages of skins.**]—MOORSOM *v.* PAGE, No. 1901, *ante.*

**4894. Freight payable on invoice quantity taken on board—Bill of lading stating certain quantity shipped—Master adding words "quantity & quality unknown"—Freight on invoice quantity.**] —TULLY *v.* TERRY, No. 2282, *ante.*

**4895. Freight payable on "gross invoice weight" —& on "gross landing weight"—Construction of bill of lading.**]—LEECH *v.* GLYNN & SON (1890), 6 T. L. R. 306, D. C.

**4896. Option to dispense with weighing.**] —DILLON & ALDGATE S.S. Co., LTD. *v.* LIVINGSTON, BRIGGS & Co. & PENINSULAR & ORIENTAL STEAM NAVIGATION Co. (1895), 11 T. L. R. 312.

**4897.** ——.]—By a clause in a charterparty it was agreed that freight on a cargo of coals shipped by the defts. on pltfs.' steamship from Sunderland to Port de Bouc should be paid "at the rate of 9*s.* per ton of 20 cwts. . . . delivered, or on bill of lading quantity, less 2 per cent. at receiver's option, to be declared in writing before bulk is broken"; & by another clause the consignees were "to effect the discharge of the cargo, steamer paying 1 franc per ton of 20 cwts." The bill of lading stated that the quantity of coal shipped was 1,184 tons. On arrival at Port de Bouc the consignees exercised their option by accepting the cargo at the bill of lading quantity, less 2 per cent., but charged the ship with 1 franc per ton on the bill of lading quantity without deducting the 2 per cent.:—*Held:* the clauses of the charterparty must be read together, & as the consignees had elected to pay freight on the bill of lading quantity, less 2 per cent., the same deduction of 2 per cent. must be allowed by defts. in respect of the payment of 1 franc per ton by the shipowner for the discharge.—THE HOLLINSIDE, [1898] P. 131; 67 L. J. P. 45; 46 W. R. 639; 14 T. L. R. 258; 3 Com. Cas. 100, D. C.

**4898.** ——.]—By the terms of a charterparty cargo was to be delivered "on payment of freight at the rate of 6*s.* 3*d.* per ton delivered or intake weight less 2 per cent. at charterers' option." The shipowners not having required the charterers to declare their option as soon as the cargo was delivered, the latter elected to pay on the intake weight less 2 per cent.:—*Held:* the charterers could elect to pay the lesser, *i.e.* the intake freight, as they were not bound to exercise their option until the time for payment of the freight had arrived, the shipowners having waived their right to require the charterers to declare their option as soon as the cargo had been delivered.—THE DOWLAIS (1902), 51 W. R. 88; 18 T. L. R. 683; 46 Sol. Jo. 724, C. A.

**4899.** —— **When exercisable.**]—Pltfs. chartered from defts. a steamer for the carriage of a cargo of coal for delivery abroad. Clause 1 of the charterparty provided that the freight should be at the rate of 150*s.* per ton delivered or on bills of lading quantity, less 2 per cent. in lieu of weighing, at receiver's option, to be declared in writing before bulk was broken. Clause 9 of the printed form of the charterparty was altered by arrangement for the payment of the full amount instead of on a certain proportion of the freight, & a cheque for the full amount calculated upon 8,788 tons, the quantity shown by the bill of lading, was given, & the charterers' agents rendered the shipowners a debit note of £1,318 4*s.* The vessel was lost on the voyage, & the charterers claimed they were entitled to exercise their option & sought to recover the 2 per cent. off the full freight they had paid. Defts. denied that in the circumstances the option could be exercised, & claimed on the true construction of the claim in the charterparty to be entitled to retain the full sum paid on the basis of the bill of lading quantity:—*Held:* pltfs. were entitled to a repayment of the sum claimed.

It has been argued by applts. that, on the true construction of the printed form, the option could only be exercised by the receiver after the ship had arrived at the port of discharge. I can see no ground for such a contention. Undoubtedly this option was frequently exercised while the vessel was at sea, & it would astonish the shipping community to know they could not exercise the option unless & until the ship had arrived (SCRUTTON, L.J.).—ENGLISH COALING Co., LTD. *v.* TATEM (W. J.), LTD. (1919), 63 Sol. Jo. 336, C. A.

**4900. Compressed cotton.**] — BOTTOMLEY *v.* FORBES, No. 4407, *ante.*

*(b) Place of Weighing and Measuring.*

**4901. Port of loading—Effect of increase in bulk during voyage.**]—A vessel was chartered to carry a cargo of corn from Odessa to Gloucester, for freight payable at a certain rate per quarter. 2,664 quarters were shipped at Odessa & the master signed bills of lading in the usual form & which contained a memorandum, "quantity & quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was measured at the Queen's Beam, & found to contain 2,785½ quarters. In the course of the voyage a portion of the corn, from some unknown cause, had become heated & damaged, whereby its bulk was increased:—*Held:* freight was payable on the quantity of corn shipped, & not on its measurement at the port of discharge.—GIBSON *v.* STURGE (1855), 10 Exch. 622; 3 C. L. R. 421; 24 L. J. Ex. 121; 24 L. T. O. S. 241; 1 Jur. N. S. 259; 3 W. R. 165; 156 E. R. 588.

*Annotations:*—**Consd.** Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649. **Apld.** Buckle *v.* Knoop (1867), L. R. 2 Exch. 333. **Refd.** Bradley *v.* Dunipace (1861), 7 H. & N. 200; Dakin *v.* Oxley (1864), 15 C. B. N. S. 646; Tully *v.* Terry (1873), L. R. 8 C. P. 679; The Skandinav (1881), 50 L. J. P. 46.

**4902.** —— ——.]—BUCKLE *v.* KNOOP, No. 4374, *ante.*

**4903.** —— **Where freight payable on intake—Right to deduction for quantity lost.**]—A cargo of deals & battens consigned to defts., was shipped on board pltf.'s vessel under a charterparty by which freight was to be paid on deals, battens,

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MOTIVE Co. *v.* COPELAND (1889), 16 A. R. 322.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 4.—G. (b).**

**d.** *Port of discharge.*]—Freight ought only to be paid on fish (even where it has been properly taken care of & faithfully delivered) according to its weight at the time of delivery, & not according to its weight at the time of shipment.—WINSOR *v.* STABB (1827), 1 Nfld. L. R. 471.—**NFLD.**

**e.** —— *No proof of weighing at port of loading.*]—A charterparty of a steamer to carry a cargo of short props from R. to G. provided that freight should be payable "for short props 19*s.* per Gothenburg standard intaken." A cargo was loaded at R. & the master granted a bill of lading which bore that

etc., at the rate of £3 5*s.* per St. Petersburg standard hundred of 1,980 superficial feet, & on deal ends at the rate of £2 1*s.* 1*d.*, per the like hundred, 8 feet & under. "Freight payable on deals & sawn lumber on the intake measure of quantity delivered." A bill of lading was signed for a specified number of pieces, deals battens, & scantling, making freight payable "as per charter-party." The various pieces were, in the ordinary course of business, measured by the shipper at the port of shipment & their dimensions entered in a specification; the figures representing such dimensions being, before shipment, chalked on each piece respectively. During the voyage a number of the pieces were lost. The remainder was delivered at the port of destination, but the measurement figures put on some of the pieces delivered had become obliterated. The dimensions of the pieces lost were unknown; but there was some evidence that they were of average size compared with the rest of the cargo:—*Held:* under the charterparty freight was payable on the measurement figures as ascertained at the port of shipment, & not on the quantity delivered measured at the port of discharge, according to the intake mode of measurement; & that, having regard to the particular circumstances, the amount might be calculated by assuming that the pieces lost were of average size as compared with the remainder, & making a proportionate reduction from the sum total of the measurements in the specification.—SPAIGHT *v.* FARNWORTH (1880), 5 Q. B. D. 115; 49 L. J. Q. B. 346; 42 L. T. 296; 28 W. R. 508; 4 Asp. M. L. C. 251.

*Annotations:*—**Apld.** Mediterranean & New York S.S. Co. *v.* Mackay, [1903] 1 K. B. 297. **Consd.** London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635.

**4904.** —— —— ——.]—A cargo of timber was consigned to defts. under a charterparty, by which freight was to be paid on deals, battens, etc., at the rate of £2 12*s.* 6*d.* per St. Petersburg standard hundred of 1,980 superficial feet, & on deal ends at the rate of £1 15*s.* per the like hundred, nine feet & under. Freight was payable on the intake measure of quantity delivered as ascertained at port of discharge, less value of cargo short delivered if any. It was also provided by the charter-party that the bill of lading should be conclusive against the owners as establishing the quantity delivered to the ship. The bill of lading described the four classes of timber, of which the cargo consisted as deals, scantlings, deal ends, & boards, specified the number of pieces in, & the measurement in superficial feet of, each class, besides giving the total number of pieces & the measurement of the cargo over all. At the port of discharge it was found that there was a shortage in the number of deals & deal ends, while there was an over-delivery of scantlings & boards:—*Held:* the bill of lading was conclusive as to the number of pieces in, & the measurement of each class of, timber, & therefore defts. were entitled to damages in respect of the pieces short delivered, & also to deduct from the freight payable by the charter-party an amount proportionate to the freight attributable to the shortage.—MEDITERRANEAN & NEW YORK S.S. Co. *v.* MACKAY, [1903] 1 K. B. 297; 72 L. J. K. B. 147, C. A.

*Annotations:*—**Distd.** Hogarth Shipping Co. *v.* Blyth, Greene, Jourdain, [1917] 2 K. B. 534. **Reld.** Crossfield *v.* Kyle Shipping Co. (1916), 85 L. J. K. B. 1310.

**4905.** —— —— **Bill of lading conclusive as to quantity shipped.**]—MEDITERRANEAN & NEW YORK S.S. Co. *v.* MACKAY, No. 4904, *ante.*

**4906.** —— —— ——.]—THE EMMY (1905), *Times*, Aug. 12, D. C.

*Annotation:*—**Folld.** Oostzee Stoomvart Maats *v.* Bell & Harrison (1906), 22 T. L. R. 643.

**4907.** —— —— ——.]—OOSTZEE STOOMVART MAATS *v.* BELL & HARRISON, No. 2268, *ante.*

**4908.** —— **Where freight payable on guaranteed dead weight capacity.**]—In a document known as a "berth note" defts. were described as agents who had engaged "for owners' account" for the steamer *R.* on customary Odessa terms a "full cargo" of grain, & were also described as charterers having the option to load the steamer at one or both of two ports. The berth note also provided that freight was to be payable at so much "per ton on the guaranteed dead weight capacity of 4,250 tons":—*Held:* defts. had undertaken the responsibilities of charterers, & freight was payable on the quantity of cargo actually shipped.—ROTHERFIELD S.S. Co., LTD. *v.* TWEEDIE, REID & Co. (1897), 13 T. L. R. 183; 2 Com. Cas. 84.

*(c) Method of Weighing and Measuring.*

**4909. General rule — Customary method.**]—Timber was consigned to the Surrey Commercial Docks under a charterparty, by which freight was made payable "for deals &/or battens per St. Petersburg standard hundred £2 5*s.*":—*Held:* freight was payable only upon the number of St. Petersburg standard hundred, as ascertained by the customary mode of measurement adopted by the dock co. for timber cargoes.—NIELSEN & SON *v.* NEAME & Co. (1884), Cab. & El. 288.

**4910.** —— ——.]—YOUNG *v.* CANNING JARRAH TIMBER Co., LTD., No. 2947, *ante.*

**4911. Where measure specified in bill of lading.**]—The bill of lading of a cargo, shipped at Dantzig on board a Prussian, expressed it to be 100 lasts in 2,092 bags. The consignee had purchased it for that quantity, English measure, but it did not amount to that quantity by the Dantzig measure, which is larger:—*Held:* the master was entitled to freight according to the measure in the bill of lading, & exceeding the freight computed by Dantzig measure.—MOLLER *v.* LIVING (1811), 4 Taunt. 102; 128 E. R. 267.

**4912. Where weight expressed in bill of lading —Goods consigned from abroad.**]—(1) Goods shipped from abroad, & consigned to a merchant in this country, are to be paid for, upon a demand for freight, according to their net weight as ascertained at the King's landing scales, & not according to the weights expressed in the bill of lading, unless there be a special contract so to pay for them.

(2) If the consignee, to get his goods delivered

the cargo shipped measured 642·093 standards. In an action for freight at the instance of the shipowner against the indorsee of the bill of lading, it was not proved that the cargo was measured at R. The cargo was measured at G. & was found to measure 534·36 standards. It was not averred that any part of the cargo was lost on the voyage:—*Held:* under the charterparty freight was payable on the cargo shipped, & in accordance with the measurement at the port of loading if the cargo were in fact measured there; but as it was not proved that the cargo was measured at R., freight was payable in accordance with the measurement at G.—NEW LINE S.S. Co., LTD. *v.* BRYSON & Co., [1910] S. C. 409; 47 Sc. L. R. 346; [1910] 1 S. L. T. 150.—**SCOT.**

**PART VIII. SECT. 3, SUB-SECT. 4.—G. (c).**

**4911 i.** *Where measure specified in bill of lading.*]—Where the effect of a clause in the bill of lading was to incorporate into that document the clause of the charterparty which provided that freight should be payable on the intake measurement:—*Held:* the burden of proving what the intake measurement actually was lay upon pltf., who sought to recover back money which he alleged he had paid in excess of what was due; &, in the absence of such evidence on behalf of pltf., the statement of quantity contained in the bill of lading was *primâ facie* evidence of the intake measurement of the timber.—CURSETJI RUSTOMJI SETNA *v.* WILLIAMS (1880), I. L. R. 5 Bom. 313.—**IND.**

*Sect.* 3.—*Payment of freight: Sub-sect.* 4, *G.* (*c*) & (*d*); *sub-sects.* 5 & 6. *Sect.* 4: *Sub-sect.* 1.]

to him, pay more than the net weight amounts to, he may recover back the surplus in an action for money had & received.—GERALDES *v.* DONISON (1816), Holt, N. P. 346, N. P.

**4913. —— Stipulation to pay on "nett weight delivered."**]—Bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, & making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. "nett weight delivered." On arrival in London, the agent appointed by the managing owner demanded freight on the weight mentioned in the bill of lading & refused to deliver the bark unless the consignee would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, & brought an action against deft.—one of the joint owners—to recover back the excess. The jury having negatived the alleged custom :—*Held :* deft. was liable, notwithstanding that he had not interfered or in any way assented to the appointment of the agent by the managing owner, & that no part of the money had come to his hands.

In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble & expense of weighing (WILLES, J.).—COULTHURST *v.* SWEET (1866), L. R. 1 C. P. 649.

*Annotations :*—**Consd.** Buckle *v.* Knoop (1867), L. R. 2 Exch. 125. **Foll.** The Skandinav (1881), 50 L. J. P. 46. (*See* 51 L. J. P. 93.) **Consd.** Gulf Line *v.* Laycock (1901), 7 Com. Cas. 1. **Refd.** The Freedom (187 ·), 22 L. T. 17. **Mentd.** Frazer *v.* Cuthbertson (1880), 6 Q. B. D. 93.

**4914. Where different methods at ports of loading & discharge.**]—PUST *v.* DOWIE, No. 1820, *ante.*

**4915. Where method specified in charterparty.**]—By a charterparty it was agreed that "a ship should load a cargo & proceed to a port in Great Britain & deliver the same on being paid freight at & after the rate of 35*s.* per 180 English cubic feet taken on board, as per Gothenburg custom" : —*Held :* the freight was to be ascertained by measuring the cargo according to the method used at Gothenburg & not according to the method used at the port of discharge.—THE SKANDINAV (1881), 51 L. J. P. 93, C. A.

**4916.** ——.]—Goods were shipped from Wilmington in the United States, for Liverpool, under a charterparty which provided that freight was to be paid on the "Wilmington gross intake weight" : —*Held :* this meant that the freight was to be paid according to the method of weighing adopted at Wilmington.—FULLAGSEN *v.* WALFORD (1883), Cab. & El. 198.

**4917.** ——.]—A charterparty provided for the loading & delivery of a full & complete cargo of pit props, freight being payable at a rate "per intaken piled fathom." It also provided that bills of lading should be prepared on the form indorsed on the charterparty & should be signed by the master "measure unknown." The bill of lading presented by the shippers to the master for signature showed that a certain quantity of fathoms, measured on a different basis to that required by the charterparty, had been shipped. The master signed the bill of lading, under protest, "measure unknown." The shipowners, on the discharge of the cargo in this country, had the timber piled, checked, & measured by independent persons according to the basis required by the charterparty, & then brought this action against the charterers to recover the expenses incurred by them in so doing :—*Held :* the charterers were under an implied if not express obligation to have the timber measured according to the basis required by the charterparty, & to tender bills of lading to the master for signature containing a statement of such measurement, & as the charterers had failed to fulfil that obligation they were liable to pay the reasonable expenses incurred by the shipowners in having the timber remeasured according to the basis required by the charterparty.—MERRYWEATHER (JOS.) & CO., LTD. *v.* PEARSON (WM.) & CO., [1914] 3 K. B. 587 : 83 L. J. K. B. 1678 ; 111 L. T. 584 ; 12 Asp. M. L. C. 540 : 19 Com. Cas. 402.

**Particular usages.**]—*See* Part VII., Sect. 15, *ante.*

*(d) Liability for Expenses.*

**4918. General rule—Party desiring to ascertain measurement.**]—COULTHURST *v.* SWEET, No. 4913, *ante.*

**4919. Liability of ship owner—Where contract for payment of freight without deduction.**]—GULF LINE, LTD. *v.* LAYCOCK & CO., SAME *v.* SAME, No. 4405, *ante.*

**4920. Liability of charterers—Where breach of obligation to measure in accordance with charterparty.**]—MERRYWEATHER (JOS.) & CO., LTD. *v.* PEARSON (WM.) & CO., No. 4917, *ante.*

**4921. —— Cargo measured by charterer's agents.**]—Pltfs., as owner, chartered a vessel to defts. to take a cargo of firewood from Sweden to London, the charterparty providing that "The freight . . . shall be paid in cash less advance freight (if any) as follows : Seventy-five per cent. shall be paid upon vessel's arrival in dock or at wharf. The balance shall be paid upon completion of discharge, except that in respect of any cargo landed on to quay a further 15 per cent. shall be paid upon completion of discharge & the remainder upon final output being ascertained. . . . These percentages shall be calculated upon the quantity of cargo on board the vessel upon arrival at destination." The bills of lading were filled up at the port of loading by defts.' agents. On the arrival of the cargo in London defts., by their agents, stacked the cargo & had it measured. In an action for balance of freight pltf. put in a certificate by the captain that no cargo had been lost on the voyage. Defts. counterclaimed to set off against the freight the cost of measurement & of the stacking which was necessary for the purpose of measurement :—*Held :* there was no implied undertaking in the

**4914 i.** *Where different methods at ports of loading & discharge.*]—An agreement was completed in Canada with an American steamship co. to carry oats from a port in Ontario to one in the United States, "at the rate of 2½ cents per bushel," & the master of the vessel, as agent of the steamship co., accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, & so indicated on the bills of lading signed by him at the port, which stated "rate of freight as per agreement" :—*Held :* the Canadian standard & not the American standard of 32 pounds to the bushel was to be applied to the contract.—MELADY *v.* JENKINS S.S. Co., (1909), 18 O. L. R. 251 ; 13 O. W. R. 439.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 4.—G. (d).**

*1. Liability of consignee — Custom of shipping trade.*]—A cargo of grain was shipped from Sevastopol to Aberdeen under a charterparty known as the 1878 Black Sea Charterparty, which provided for the payment of freight according to cubic measurement. The cargo was consigned by weight & not by measurement, the bill of lading setting forth the weight in Russian "poods." The shipowners having weighed the cargo, & also measured samples thereof, in order to ascertain the whole measurement, sued the consignees for the expense of the operation, alleging a general custom of the British shipping trade in the carrying of grain cargoes that these expenses fell to be borne by the consignee. Defenders alleged a contrary custom in the port of Aberdeen known to pursuers :—*Held :* defenders were liable, it being established that by the universal custom of the shipping trade

charterparty that pltf would pay the cost of stacking & measurement, & defts. were not entitled to the set-off.—PETERSEN *v.* RONAASEN & SON (1926), 42 T. L. R. 608; 31 Com. Cas. 347.

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SUB-SECT. 5.—RECOVERY OF FREIGHT ON ILLEGAL VOYAGE.

**4922. General rule—Freight not recoverable.**]—Where pltf., by a charterparty, dated Mar. 1, let to deft., a ship to freight, & by the terms of the charterparty pltf. was to carry an outbound cargo of goods, not prohibited by restraint of princes, from Liverpool to Carolina in America, & to bring back from thence a cargo of rice for deft., deft. paying freight for the same; & pltf. cleared out on Mar. 22 from Liverpool, with a cargo of salt, & on May 22 following arrived at Carolina, where the importation of British goods was prohibited by an order issued Mar. 1, the very day the charterparty was dated; & also a further order, prohibiting the exportation of goods to England, so that pltf. could not unload the salt, or bring back a cargo of rice:—*Held:* pltf. could not recover for freight homewards, if it could be established in evidence, that he knew of the prohibition at the time of the ship's clearance from Liverpool. The fact of pltf. having such knowledge, must necessarily depend upon the circumstances of the case.—HESLOP *v.* JONES (1787), 2 Chit. 550.

**4923.** —— ——.]—A ship freighted with timber, etc., by the agents of defts. at Dantzig, & consigned to their house in London, was, on her arrival, & after part of the cargo had been delivered, seized by the revenue officers on suspicion that she was not Prussian built. The Treasury, on petition, ordered the ship to be restored, on condition that the cargo should be exported, & on payment of a sum as a satisfaction to the seizing officers. This sum the master, pltf., paid, & defts. accepted & exported the cargo:—*Held:* this conduct of the master sufficiently showed the voyage to be illegal, & he had admitted such illegality so as to preclude him from recovering the freight.—BLANCK *v.* SOLLY (1817), 8 Taunt. 89; 1 Moore, C. P. 531; 129 E. R. 316.

**4924.** —— —— **Conveyance of gold or silver in ship of Royal Navy.**]—59 Geo. 3, c. 25, has made illegal the payment of freight for the conveyance of gold, silver, jewels & other articles therein referred to, in any ship of the Royal Navy either by the custom of the navy which still existed at the time of the passing of the Act or under any contract except in so far as the payment is ordered & directed by a Proclamation or Order in Council issued under the Act.

It follows that, since the issuing of the Order in Council of Oct. 26, 1914, which annulled the only then existing Order in Council making provision for the payment of freight of that description without itself making any corresponding provision, the payment of such freight is illegal & cannot be enforced.—KING-HALL *v.* STANDARD BANK OF SOUTH AFRICA, LTD., [1919] 2 K. B. 52; 88 L. J. K. B. 1058; 120 L. T. 638; 35 T. L. R. 324; 14 Asp. M. L. C. 415.

**4925. Effect of Order in Council—Permitting landing of goods without licence—Voyage not legalised.**]—An Order of Council permitting the consignee of goods coming from an enemy's country without a licence to land them here, on condition of immediately re-exporting them, does not so legalise the voyage as to enable the master of the ship to recover his freight.—MULLER *v.* GERNON (1811), 3 Taunt. 394; 128 E. R. 157.

*Annotations:*—**Apld.** Blanck *v.* Solly (1817), 1 Moore, C. P. 531. **Reld.** Waugh *v.* Morris (1873), 28 L. T. 265.

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SUB-SECT. 6.—UNDER TIME CHARTER.

*See* Part VII., Sect. 2, sub-sect. 22, B., *ante*.

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SECT. 4.—**ADVANCE FREIGHT.**

SUB-SECT. 1.—IN GENERAL.

**4926. Validity of agreement to pay.**]—ALLISON *v.* BRISTOL MARINE INSURANCE CO., No. 4511, *ante*.

**4927. What amounts to contract for advance freight—Freight payable at port of loading.**]—Although freight should be made payable by the shipper on the shipment of the goods, it is not merely on that account earned without a performance of the voyage.—MASHITER *v.* BULLER (1807), 1 Camp. 84; 170 E. R. 885, N. P.

*Annotations:*—**Distd.** Andrew *v.* Moorhouse (1814), 5 Taunt. 435. **Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209.

**4928.** —— **Freight payable on delivery of bill of lading.**]—ANDREW *v.* MOORHOUSE, No. 4518, *ante*.

**4929. Cargo sold during voyage.**]—THE MARGERY, ANDERSON *v.* GELDART (1854), 4 L. T. 622.

**4930.** —— **Owner's failure to fulfil stipulation in charterparty.**]—SEEGER *v.* DUTHIE, No. 2804, *ante*.

**4931.** —— **Frustration of adventure—Ship detained.**]—Defts.' steamer was chartered by pltfs. as from Nov. 30, 1916, for a voyage to New York & back to a French Atlantic port. Hire was to be paid monthly in advance at a fixed monthly rate. The charterparty provided that if the steamer was lost or missing hire paid in advance & not earned should be returned to charterers & that charterers should have a lien on the steamer for all moneys paid in advance & not earned. There was an exceptions clause, which included arrests & restraints of princes, rulers, & peoples. The steamer was to be delivered to the charterers at Gibraltar. On Dec. 2, the steamer was detained at Gibraltar by the British authorities because she was a Greek ship, & she was not released till Feb. 10, 1917. On Dec. 12, the charterers gave notice to the owners that the charterparty was at an end. The charterers in this action claimed a declaration that the charterparty had been avoided; they also claimed to recover the month's hire paid in advance. Deft. counterclaimed for the amount of freight due if the charter was still in existence:—*Held:* the detention of the ship by the British Govt. amounted to a frustration of the commercial adventure, & the contract was dissolved either on Dec. 2, when the detention began, or on Dec. 12, when the charterers gave notice that the charter was dissolved, but the charterers were not entitled to recover back the hire paid in advance.—

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such expenses fell to be borne by the consignee.—WATTS, WARD & CO. *v.* GRANT & CO. (1889), 26 Sc. L. R. 660.—**SCOT.**

**PART VIII. SECT. 4, SUB-SECT. 1.**

*g. Right to advance freight—Frustration of adventure—Ship requisitioned.*]—Where a shipper pays freight in advance to the shipowner but the voyage of the ship is interrupted by its requisition by the Govt. of India, the shipper is not entitled to refund of the advance freight, nor is the shipowner bound to send the goods to their destination by another vessel at his expense.—KRISHNA NAIK & SONS *v.* CAYZER, IRWINE & CO., LTD. (1920), 1. L. R. 44 Mad. 145.—**IND.**

*h.* —— —— *Government order prohibiting import of cargo.*]—BOGGIANO

*Sect.* 4.—*Advance freight: Sub-sects.* 1, 2 & 3.]

LLOYD ROYAL BELGE SOCIÉTÉ ANONYME *v.* STATHATOS (1917), 34 T. L. R. 70, C. A.

*Annotations:*—**Consd.** French Marine *v.* Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz, [1921] 2 A. C. 494. **Refd.** Chinese Mining & Engineering Co. *v.* Sale, [1917] 2 K. B. 599; Blackburn Bobbin Co. *v.* Allen (1918), 87 L. J. K. B. 1085; Bank Line *v.* Capel, [1919] A. C. 435.

**4932. —— —— Ship requisitioned.**]—FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ, No. 2140, *ante.*

**—— Where cargo lost.**]—*See* Sub-sect. 3, *post.*

**4933. Who may sue—Master part-owner.**]—SEEGER *v.* DUTHIE, No. 2804, *ante.*

**4934. Agent authorised to receive payment—Payment to sub-agent—Liability of charterers.**]—DUNLOP & SONS *v.* DE MURRIETA & CO. (1886), 3 T. L. R. 166.

**4935. Charterparty providing for advances for ship's disbursements—Master or owner not obliged to accept advances.**]—Pltfs.' steamer was, on two occasions, chartered by defts. for the homeward voyage from a Spanish port to Liverpool. The charterparties provided for the payment of certain lump sum freights, & both contained the following clause: "Cash for steamer's ordinary disbursements at port or ports of loading; not exceeding £150 in all, to be advanced at exchange of 50*d.* to the dollar on account of freight subject to 3 per cent. to cover cost of insurance, etc., captain's receipts to be conclusive evidence of the amount of such advances, & of their having been properly made, & balance of freight, on right & true delivery of the cargo, in cash." On the first voyage the master, having part of his outward freight in hand, partly disbursed the vessel therewith, & defts. advanced cash for the balance, amounting at the stipulated rate of exchange to £90 16*s.* 6*d.* On the second voyage the master, having a sufficient balance of his outward freight, fully disbursed the vessel to an amount exceeding £150, & did not obtain any advance freight from defts. Defts. deducted from the freight, due to pltfs. on the delivery of the homeward cargo on the first voyage, the profit they would have made by the difference of exchange on the amount required to make up £150, &, on the second voyage, the profit which they would have made by the difference of exchange on the whole £150 if they had advanced that sum on account of freight at the loading port. In an action by pltfs. against defts. for balance of freight so deducted:—*Held:* pltfs. were entitled to succeed as the clause was optional, not obligatory, on pltfs., so that if they provided their master with money to disburse the ship, he was not bound to apply to defts. for cash up to the limited amount by way of advance freight.—THE PRIMULA, [1894] P. 128; 63 L. J. P. 118; 70 L. T. 253; 42 W. R. 527; 7 Asp. M. L. C. 429; 6 R. 749.

**4936. Provision for periodical payments—Amount of advance freight payable—Withdrawal of ship on default of payment.**]—WEHNER *v.* DENE STEAM SHIPPING CO., No. 2496, *ante.*

**4937.** —— —— ——.]—ITALIAN STATE RYS. *v.* MAVROGORDATOS, No. 2029, *ante.*

**4938. —— —— Extention of charter beyond term.**]—FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ, No. 2140, *ante.*

**Advance freight as part of damages for non-delivery.**]—*See* Part VII., Sect. 7, sub-sect. 9, B., (*b*), *ante.*

**Lien for advance freight.**]—*See* Part VII., Sect. 13, sub-sect. 3, *ante.*

**Insurance of advance freight.**]—*See* INSURANCE, Vol. XXIX., pp. 97, 106, 107, Nos. 552–554, 628–638.

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SUB-SECT. 2.—WHAT AMOUNTS TO.

**4939. Cash advanced for ship's expenses.**]—DE SILVALE *v.* KENDALL, No. 4952, *post.*

**4940.** ——.]—Where the memorandum for charter stated one half of the freight to be paid in cash on unloading & right delivery, & the remainder by bill on London at four months' date; & then, after containing stipulations for unloading, discharging, demurrage, etc., added: "the captain to be supplied with cash for the ship's use"; &, in pursuance of the last stipulation, the master drew a bill on the freighters, which was duly accepted & paid:—*Held:* this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, &, the ship having been lost on her homeward voyage, the freighters had no insurable interest in such bill.—MANFIELD *v.* MAITLAND (1821), 4 B. & Ald. 582; 106 E. R. 1049.

*Annotations:*—**Apld.** The Salacia (1862), Lush. 578. **Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** The Karnak (1868), L. R. 2 A. & E. 289.

**4941.** ——.]—It is doubtful whether the captain has authority to bind the owner by stipulations in a charterparty with respect to advances to be made to the captain by the charterer against the freight. *Semble:* however, if the owner accepts the freight under such charterparty, he may be bound by the stipulation, even if it makes the captain's receipts conclusive. But where the owner, a mtgee., had received payment of freight from the charterer, under protest on the part of the charterer that there was a certain sum to be deducted on account of advances to the captain pursuant to stipulation in the charter, & the owner gave an undertaking to refund such sum as might appear on the charterer's account to be due by reason of such advances, & afterwards to be at liberty to dispute any of the items in the account:—*Held:* the charterer was entitled to recover the sum, at all events in the first instance, in an action for money had & received, it appearing that the sum had, in fact, been *bonâ fide* advanced to the captain, leaving the shipowner to raise the question of his liability for such advances in a separate action.—GIBBS *v.* CHARLETON (1857), 26 L. J. Ex. 321.

**4942.** ——.]—HICKS *v.* SHIELD, No. 4948, *post.*

**4943.** ——.]—In an action for a balance of freight by the owner against the charterers of a ship, put up as a general ship on a voyage from London to San Francisco & Victoria, Vancouver's Island, it appeared that by the terms of the charter the cargo was "to be brought to & taken from alongside at merchants' risk & expense." The freight was to be a lump sum of £1,650, which was

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& CO. *v.* ARAB STEAMERS CO., LTD. (1915), I. L. R. 40 Bom. 529.—**IND.**

**k.** —— ——.]—Advance freight paid by a shipper to a shipowner under a charterparty can under the Indian Contract Act be recovered back on the frustration of the venture, owing to circumstances which were beyond the control of the parties, & which they had not warranted not to exist.—GANDHA KORLIAH *v.* JANOO HASSAN (1925), I. L. R. 49 Mad. 200.—**IND.**

**l.** *Charterparty providing for advances for ship's disbursements.*]—NORTH WESTERN BANK *v.* BJORNSTROM (1866), 5 Macph. (Ct. of Sess.) 24.—**SCOT.**

**PART VIII. SECT. 4, SUB-SECT. 2.**

**m.** *Necessity for commencement of voyage.*]—Advance freight does not arise until the voyage has actually

to be paid £1,000 on sailing, & the remainder on right delivery of the cargo; "say, if the captain should so require, one moiety at each of the ports of discharge": the ship was to be consigned to charterers' agents at port of discharge, paying the usual commission of not exceeding 2 per cent. on amount of freight of £1,650; the stevedore recommended by charterers to be "employed at ship's expense at usual charge." Owing to the fault of the stevedore in stowing the cargo in London, an expense of £78 9*s*. 4*d*. was incurred at San Francisco in getting at the goods for that place. W. & co., defts.' agents at San Francisco, paid this sum, amongst other disbursements, together amounting to more than the freight payable at San Francisco, & claimed to settle it in account with the captain, & threatened to arrest the ship unless he would sign an account between them & pltf., in which the debt due to them for the disbursement in question was brought to the debit of pltf. & the freight to a greater amount than was payable at San Francisco was put to his credit: the captain, owing to this threat, & in order to be at liberty to proceed on the voyage, signed the account under protest:—*Held:* (1) the £78 9*s*. 4*d*. was a ship's disbursement which pltf. was bound to incur; W. & co. advanced the money as agents for pltf., & therefore he was liable to them for the amount. (2) the captain's signing the account between W. & co. & pltf. did not operate as a payment by defts. to pltf. of the balance of the freight.—ROBERTS *v.* SHAW (1863), 4 B. & S. 44; 2 New Rep. 237; 32 L. J. Q. B. 308; 8 L. T. 634; 10 Jur. N. S. 147; 11 W. R. 829; 1 Mar. L. C. 351; 122 E. R. 376.

**4944.** ——.]—DROEGE *v.* SUART, THE KARNAK, No. 3329, *ante*.

**4945.** ——.]—Pltfs. were insurers of the hull & machinery of defts.' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour, & was abandoned by defts. to pltfs. as a constructive total loss, but the cargo of timber was subsequently delivered. At Pensacola the sum of £1,677 19*s*. 10*d*. had been advanced to the master by the charterers, under a clause in the charterparty, by which "Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by the charterers or their agents at the (agreed) exchange, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required & customary to cover same, which shall be paid out of the first freight collected." Defts. accepted from the consignees of the cargo, who held the master's draft for value, the freight less the above sum; but pltfs. claimed the gross freight as a benefit incident to the ship:—*Held:* defts., in accounting to pltfs. for the freight, were entitled to deduct the sum of £1,677 19*s*. 10*d*. as, by the terms of the charterparty, the cash advanced at Pensacola was equivalent to prepaid freight, &, as such, did not pass to pltfs. on the abandonment of the vessel & subsequent delivery of the cargo.—THE RED SEA, [1896] P. 20; 65 L. J. P. 9; 73 L. T. 462; 44 W. R. 306; 12 T. L. R. 40; 40 Sol. Jo. 64; 8 Asp. M. L. C. 102; 11 R. 801, C. A.

*Annotation:*—**Mentd.** Barraclough *v.* Brown (1896), 65 L. J. Q. B. 333.

**4946. Difference between chartered freight & bill of lading freight—Lower rate payable in advance.**]—A charterparty stipulated that the ship should load a cargo of coal at Cardiff & proceed to Pernambuco & there deliver the same, & afterwards receive a full cargo of sugar & other merchandise, & therewith proceed to a safe port in the United Kingdom, & deliver the same on being paid freight, at the rate of 60*s*. per ton, of 20 cwt. nett for sugar, & for other produce at a rate proportionate thereto, being in full for the round.

"The freight to be paid in the following manner: £150, on signing bills of lading at Cardiff, cash for disbursements abroad at the current rate of exchange, & the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight & demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterers, at usance, which they agreed to accept & pay on consignee at loading port agreeing amount":—*Held:* the two clauses were not inconsistent, their meaning being that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery.—SANTOS *v.* BRICE (1861), 6 H. & N. 290; 30 L. J. Ex. 108; 158 E. R. 119.

**4947.** —— ——.]—BYRNE *v.* SCHILLER, No. 4883, *ante*.

SUB-SECT. 3.—LOSS OF CARGO.

**4948. Right to advance freight.**]—By charterparty between deft., owner of a ship, & pltf., it was agreed that the ship should proceed from London to B., & there load a cargo from pltf.'s factors, & therewith proceed to London, & deliver the same, on being paid freight at a specified rate: "cash, for ship's disbursements, to be advanced to the extent of £300, free of interest, but subject to insurance": "the freight to be paid, on unloading & right deliver of the cargo, as follows: say, in cash, less two months' interest at" etc., "& if required, £300 to be paid in cash on arrival, less two months' interest." £300 was advanced by pltf.'s agents at B. for ship's disbursements. Neither pltf. nor defts. insured in respect of this £300. The ship left B. with a cargo for London, but was lost before reaching London. Pltf. claimed the payment of the £300, as a loan made to defts.; defts. tendered the amount at which the £300 might have been insured, but refused to pay more:—*Held:* pltf.'s claim could not be supported, as it appeared from the charterparty that the advance was not a loan, but was an advance of freight.

The only question is whether this was a mere loan or an advance of freight. . . . If it is to be insured, it must be for freight in advance; for a mere loan could not be insured (LORD CAMPBELL, C.J.).—HICKS *v.* SHIELD (1857), 7 E. & B. 633; 26 L. J. Q. B. 205; 29 L. T. O. S. 106; 3 Jur. N. S. 715; 5 W. R. 536; 119 E. R. 1380.

*Annotations:*—**Distd.** The Newport (1858), Sw. 335. **Consd.** Frayes *v.* Worms (1865), 19 C. B. N. S. 159; Droege *v.* Suart, The Karnak (1869), L. R. 2 P. C. 505. **Apld.** begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading.—SIVANANDAM CHETTIAR *v.* BATCHU SURAYYA (1924), I. L. R. 48 Mad. 459.—**IND.**

**PART VIII. SECT. 4, SUB-SECT. 3.**

**4948 i.** *Right to advance freight.*]—Where a portion of a cargo is destroyed by shipwreck the shipper cannot recover for freight advanced, though there be a total abandonment of the cargo.—TOURVILLE *v.* RUCHLE (1871), 15 L. C. J. 29.—**CAN.**

**4948 ii.** ——.]—THE TERESA *v.* PURCELL, YALLOP & EVERETT (1902), 19 S. C. 213; 12 C. T. R. 358.—**S. AF.**

*Sect.* 4.—*Advance freight: Sub-sect.* 3. *Sects.* 5, 6, 7 & 8.]

Byrne *v.* Schiller (1870), L. R. 6 Exch. 20. **Expld.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373; Rodocanachi *v.* Milburn (1886), 17 Q. B. D. 316.

**4949.** ——.]—Deft. chartered a vessel, freight to be paid in bills at six months' date from date of sailing or in cash, less discount equal thereto, less, in either case, the cost of insurance, to be effected by charterers at ship's expense, & also £800 to be paid on delivery of cargo:—*Held:* such advanced freight was not to be returned, & deft. was liable to contribute to general average in respect thereof. —FRAYES *v.* WORMS (1865), 19 C. B. N. S. 159; 144 E. R. 747; *sub nom.* TRAYES *v.* WORMS, 6 New Rep. 295; 34 L. J. C. P. 274; 12 L. T. 547; 11 Jur. N. S. 639; 13 W. R. 898; 2 Mar. L. C. 209.

*Annotations:*—**Apld.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Consd.** Rodoconachi *v.* Milburn (1886), 17 Q. B. D. 316. **Refd.** Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373.

**4950.** ——.]—BYRNE *v.* SCHILLER, No. 4883, *ante*.

**4951.** ——.]—By a charterparty it was provided that freight should be payable in advance "on signing bills of lading." Cargo had been shipped under different bills of lading, & a sum had been paid in advance on account of freight, but before the loading was completed the ship sank in the dock, & the voyage was not proceeded with. Bills of lading had been signed in respect of the cargo loaded:—*Held:* as & when each bill of lading was signed a proportionate part of the freight became payable in respect of the goods covered by such bill of lading, & the shipowners were entitled to freight in respect of such goods.—COKER (A.) & CO., LTD. *v.* LIMERICK S.S. CO., LTD. (1918), 87 L. J. K. B. 767; 118 L. T. 726; 34 T. L. R. 296; 14 Asp. M. L. C. 287, H. L.; *affg.* S. C. *sub nom.* LIMERICK S.S. CO., LTD. *v.* COKER (A.) & CO., LTD., 33 T. L. R. 103. C. A.

**4952.** —— **Capture of ship.**]—Covenant by charterparty made between the master of the ship & the freighter, upon a voyage from L. to M., & thence back to L., that the freighter should pay for the freight from L. to M. £120, & from M. to L. at the rate of 2½*d.* per lb. for cotton, which should be delivered at L. such freight to be paid as follows, viz. £120 for freight of the outward cargo to M., & as much cash as might be found necessary for the vessel's disbursements in M., to be advanced by the freighter, his agents or assigns, to the master, when required, free from interest & commission, at the current exchange of the place, & the residue of such freight to be paid on delivery of the cargo in L. The ship arrived at M., where the £120 outward freight, & also £192 for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; & the ship received her homeward cargo & sailed for L., but was lost by capture:—*Held:* the freighter was not entitled to recover back the £192.—DE SILVALE *v.* KENDALL (1815), 4 M. & S. 37; 105 E. R. 749.

*Annotations:*—**Distd.** Manfield *v.* Maitland (1821), 4 B. & Ald. 582. **Apld.** Saunders *v.* Drew (1832), 3 B. & Ad. 445; The John (1849), 7 Notes of Cases, 61. **Distd.** The Newport (1858), Sw. 335. **Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** Jackson *v.* Isaacs (1858), 3 H. & N. 405; Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373; Rodoconachi *v.* Milburn (1886), 17 Q. B. D. 316; Elliott *v.* Crutchley, [1903] 2 K. B. 476.

**4953.** —— **Clause making freight payable up to time ship lost.**]—By a charterparty of affreightment for a voyage from the port of London to Calcutta, & back, on the usual terms, it was further agreed, that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, & the complement of men should be kept up, & all necessaries provided, in consideration of which the freighter agreed to pay the owner for such voyage at the rate of £1 a ton per month on the ship's tonnage, & to pay four months of such hire in advance, & at the end of six months two further months' pay, & so in every succeeding two months; & the balance due at the termination of such hiring, in cash or approved bills. It was further stipulated, that if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of:—*Held:* under the former clauses of this agreement, the freighter could not claim a return of any part of the four months' advance, on the vessel being lost within that period; but the advance, being in respect of freight, was absolute, & the stipulation on this head was not qualified by the subsequent clause.—SAUNDERS *v.* DREW (1832), 3 B. & Ad. 445; 110 E. R. 160.

*Annotation:*—**Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209.

**4954.** —— **Freight payable one month after sailing—Cargo lost before expiration of month.**]—THE SAN JOAQUIM, PORRAL *v.* JONES (1847), 6 L. T. 754.

**4955.** —— **Ship unseaworthy at commencement of voyage.**]—THOMPSON *v.* GILLESPY, No. 1835, *ante*.

**4956.** —— **Advance freight payable on ship sailing—Meaning of sailing.**]—ROELANDTS *v.* HARRISON, No. 3147, *ante*.

**4957.** —— —— ——.] — THOMPSON *v.* GILLESPY, No. 1835, *ante*.

**4958.** —— —— ——.]—PRICE *v.* LIVINGSTONE, No. 1732, *ante*.

**4959.** —— **Freight payable subject to insurance —Failure to insure.**]—Deft. chartered a ship to load a full cargo "on being paid freight, payable by charterer's acceptance, on ship clearing the custom house at L., subject to insurance." The ship, having sailed, was lost, being at that time uninsured. In an action by the shipowner for the non-payment of the agreed freight:—*Held:* it was no defence that the shipowner had not insured the freight. *Semble:* the shipowner was not bound to insure, but was to receive the freight in advance less the amount of premium on a policy of insurance to be effected by the charterer.—JACKSON *v.* ISAACS (1858), 3 H. & N. 405; 27 L. J. Ex. 392; 157 E. R. 528.

*Annotations:*—**Consd.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209; Rodoconachi *v.* Milburn (1886), 17 Q. B. D. 316. **Refd.** Dufourcet *v.* Bishop (1886), 56 L. J. Q. B. 497.

**4960.** —— —— ——.]—Where the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, & where they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment.—WATSON & CO. *v.* SHANKLAND (1873), L. R. 2 Sc. & Div. 304; 29 L. T. 349; 2 Asp. M. L. C. 115, H. L.

*Annotations:*—**Expld.** Allison *v.* Bristol Marine Insce. (1876), 1 App. Cas. 209. **Refd.** Cantiare San Rocco S. A. *v.* Clyde Shipbuilding & Engineering Co., [1924] A. C. 226.

**4961.** —— **Through freight.**] — GREEVES *v.* WEST INDIA & PACIFIC S.S. CO., LTD., No. 2213, *ante*.

**4962.** —— **Clause stipulating for advance freight "if required"—Loss of ship before time of making requirement.**]—A cargo was shipped under a charterparty which contained the following clause

" one-third freight, if required, to be advanced, less 3 per cent. for interest & insurance." Shortly after the commencement of the voyage the vessel was wrecked & the cargo lost. Subsequently to the loss, & not before, the shipowner required payment of advance freight under the above clause : —*Held :* the requirement by the shipowner was a condition precedent to the liability of the charterer to pay advance freight ; the requirement was made too late, & the charterer was not liable. —SMITH, HILL & Co. *v.* PYMAN, BELL & Co., [1891] 1 Q. B. 742 ; 60 L. J. Q. B. 621 ; 64 L. T. 436 ; 39 W. R. 466 ; 7 T. L. R. 417 ; 7 Asp. M. L. C. 7, C. A.

*Annotation :*—**Distd.** Oriental S.S. Co. *v.* Tylor, [1893] 2 Q. B. 518.

**4963. —— Freight payable on signing bills of lading—Loss of ship before bills signed.**]—A cargo was shipped under a charterparty which contained the following clause " the freight to be paid as follows, one-third on signing bills of lading . . . & the remainder on unloading in cash." Bills of lading were to be signed within twenty four hours after the cargo was on board. After the commencement of the voyage & before bills of lading were signed the vessel sank & the cargo was lost. The charterers thereupon refused to present the bills of lading for signature & the shipowner sued them for breach of the charterparty in so refusing :—*Held :* the loss of the cargo did not relieve the charterers from their liability to present bills of lading, & the shipowner was entitled to recover damages equal to the amount of the advance freight.—ORIENTAL S.S. Co. *v.* TYLOR, [1893] 2 Q. B. 518 ; 63 L. J. Q. B. 128 ; 69 L. T. 577 ; 9 T. L. R. 591 ; 42 W. R. 89 ; 7 Asp. M. L. C. 377 ; 4 R. 554, C. A.

*Annotations :*—**Consd.** Kruger *v.* Moel Tryvan Ship Co. (1907), 13 Com. Cas. 1 ; Nollisement Owners *v.* Bunge & Born, [1917] 1 K. B. 160. **Mentd.** Hawes *v.* Scott (1896), 40 Sol. Jo. 373 ; Holford *v.* Acton U. C., [1898] 2 Ch. 210 ; Foster & Dicksee *v.* Hastings Corpn. (1903), 87 L. T. 736.

**4964. —— Freight payable three days after sailing—Destruction of part of cargo before sailing —Excepted perils.**]—By a contract of charterparty defts. contracted to load on board pltfs.' ship a full & complete cargo at a certain rate of freight per ton " on the quantity to be delivered to the consignees." " The freight to be due & paid as follows, two-thirds in cash three days after sailing, ship lost or not lost, the balance on unloading & right delivery of the cargo." After defts. had loaded a part of the cargo a fire broke out on board & destroyed the goods so loaded. Fire was one of the perils mutually excepted by the charterparty. Defts. subsequently loaded the balance of the cargo, & the ship sailed. Three days after sailing pltfs. claimed payment of advance freight on two-thirds of the full cargo shipped :—*Held :* pltfs. were not entitled to payment of advance freight on the part of the cargo destroyed.—WEIR & Co. *v.* GIRVIN & Co., [1900] 1 Q. B. 45 ; 69 L. J. Q. B. 168 ; 81 L. T. 687 ; 48 W. R. 179 ; 16 T. L. R. 31 ; 9 Asp. M. L. C. 7 ; 5 Com. Cas. 40, C. A.

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### SECT. 5.—LUMP FREIGHT.

**4965. Dead freight excluded.**]—LONDON & NORTHERN S.S. Co. *v.* DREYFUS (LOUIS) & Co. (1908), cited in 100 L. T. at p. 270.

*Annotation :*—**Apld.** Red " R " S.S. Co. *v.* Allatini (1909), 100 L. T. 268.

**4966. ——.**]—BRIGHTMAN *v.* MILLER (1908), cited in 100 L. T. at p. 270.

*Annotation :*—**Apld.** Red " R " S.S. Co. *v.* Allatini (1909), 100 L. T. 268.

**4967. Provision for reduction of lump freight—Construction.**]—*Re* THOMSON & Co. & BROCKLEBANK, No. 1825, *ante.*

**When payable—Part of cargo only delivered.**]—*See* Sect. 3, sub-sect. 4, C. (*b*), *ante.*

**—— Other voyage substituted.**]—*See* Sect. 3, sub-sect. 4, A., *ante.*

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### SECT. 6.—PRO RATA FREIGHT.

**Right to pro rata freight—Where voyage not completed.**]—*See* Nos. 4765–4769, *ante.*

**—— Where ship lost.**]—*See* Nos. 4801–4803, *ante.*

**—— Where cargo transhipped.**]—*See* Nos. 4814–4816, *ante.*

**Recovery of pro rata freight—Where cargo sold during voyage.**]—*See* Nos. 4847, 4848, *ante.*

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### SECT. 7.—DEAD FREIGHT.

**4968. Meaning of dead freight—Compensation for loss by shipowner—Where failure to provide full cargo.**]—MCLEAN & HOPE *v.* FLEMING, No. 2949, *ante.*

**4969. —— —— ——.**]—GRAY *v.* CARR, No. 1958, *ante.*

**4970. —— Not freight properly so called—Damages for breach of contract.**] — KISH *v.* TAYLOR, No. 3170, *ante.*

**Right to dead freight.**]—*See* Sect. 3, sub-sect. 4, A., *ante.*

**Lien for dead freight.**]—*See* Part VII., Sect. 13, sub-sect. 3, D., *ante.*

**Dead freight as measure of damages—Where failure to provide cargo.**]—*See* Part VII., Sect. 5, sub-sect. 3, D. (*b*), *ante.*

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### SECT. 8.—LEGAL PROCEEDINGS.

**4971. Recovery of extra freight—Action for work & labour.**]—HEDLEY *v.* LAPAGE, No. 4876, *ante.*

**4972. Recovery of excess freight paid—Action for money had & received.**]—GERALDES *v.* DONISON, No. 4912, *ante.*

**4973. —— Effect of mistake of fact.**]—Certain bales of cotton were consigned by merchants at Madras to London for the account of their correspondents pltfs., who were merchants at Liverpool, under bills of lading having in the margin, pursuant to the course of business at Madras, a note of the measurement & the amount of freight. On the ship's arrival, pltfs.' brokers sent the cotton to a wharf with a copy of the bills of lading, another copy of the bills of lading being forwarded to pltfs. According to the ordinary practice, the wharfinger, on receiving the cotton, measured it, & sent a note of the measurement to defts., who were the ship's brokers, one of them also being the owner. Defts. as brokers made out a freight note, adopting the measurement from the wharfinger's note, which in consequence of the swelling of the bales on the voyage was considerably more than the Madras measurement in the margin of the bills of lading. The freight note



n. *Recovery of excess freight—Effect of misrepresentation.*]—HAMMOND *v.* CONGER (1876), 37 U. C. R. 547.—**CAN.**

*Sect.* 8.—*Legal proceedings. Part IX. Sect.* 1: *Sub-sects.* 1 & 2.]

so made out was sent by defts. to pltfs.' brokers, who, assuming it to be correct, paid the amount, & received credit for it in their account with their principals; & defts. settled the ship's accounts upon the supposition that all was right. Pltfs., on balancing their accounts with the Madras house at the end of the following year, discovered for the first time that they had over paid defts. to the extent of £88 8*s.* 3*d.*, & brought an action to recover it back:—*Held:* the money having been paid under a mistake of fact, pltfs. were entitled to recover it back from the owner of the ship, but not as against the two defts. as ship's brokers, who had settled accounts with the owner in the *bonâ fide* belief that the payment had been rightly made.—SHAND *v.* GRANT (1863), 15 C. B. N. S. 324; 9 L. T. 390; 1 Mar. L. C. 396; 143 E. R. 809.

*Annotation:*—**Distd.** Newall *v.* Tomlinson (1871), L. R. 6 C. P. 405.

**4974.** —— ——.]—KITTS *v.* ATLANTIC TRANSPORT CO., LTD., No. 2215, *ante.*

**4975. Action by master or shipowner against shipper—Bill for account—Freight payable according to quantity of cargo—Quantity alleged incorrect in bill of lading.**]—The ct. will not entertain a bill by a shipowner against a freighter for an account of what is due in respect of freight, though the charterparty expressed that the freight was to be paid according to the quantity of the cargo, & it was charged, that in the bill of lading that quantity was stated untruly.—LONG *v.* YOUNG (1824), 2 L. J. O. S. Ch. 139.

—— **Defence to action—Payment into court in suit by obligee of bottomry bond.**]—*See* No. 4598, *ante.*

**Availability of set off—As against shipowner.**]—*See* Nos. 4612, 4613, *ante.*

—— **As against master.**]—*See* No. 4619, *ante.*

—— **As against assignees of freight.**]—*See* Nos. 4697, 4698, *ante.*

# Part IX.—Carriage of Passengers.

## SECT. 1.—THE CONTRACT OF CARRIAGE.

### SUB-SECT. 1.—PASSAGE MONEY.

**4976. Equivalent to freight.**]—A., a captain of a Dutch ship, took B. on board, at the Island of Demerara, together with his luggage & family, to carry him to Flushing, in Holland; the ship was captured as prize to a British ship of war, & libelled with the cargo in the British Ct. of Admlty.; B. the passenger was released & his luggage, *de facto*, restored to him, but not by adjudication of the ct.; such part of the cargo as was British property was restored to the owners, & the rest condemned as prize. The vessel was claimed by a British subject. Pending the suit in the Admlty., A. brought *assumpsit* against B. for the passage money, with a *quantum meruit pro rata itineris:*—*Held:* pltf. could not recover; at least, not until the Ct. of Admlty. had decided on the question of prize. Pltf. was therefore nonsuited. *Semble:* passage money is the same as freight.—MULLOY *v.* BACKER (1804), 5 East, 316; 1 Smith, K. B. 447; 102 E. R. 1091.

*Annotations:*—**Reld.** Liddard *v.* Lopes (1809), 10 East, 526; Denoon *v.* Home & Colonial Assce. (1872), L. R. 7 C. P. 341.

**4977. Recovery of unpaid passage money—Pending proceedings in prize—Ship captured.**]—MULLOY *v.* BACKER, No. 4976, *ante.*

**4978.** —— **Lien on luggage of passenger.**]—The master of a ship has a lien on the luggage of a passenger for his passage money.—WOLF *v.* SUMMERS (1811), 2 Camp. 631; 170 E. R. 1275, N. P.

*Annotation:*—**Reld.** Chase *v.* Westmore (1816), 5 M. & S. 180.

**4979. Payment in advance—Right to recovery back on loss of ship—Only where ship lost before commencement of voyage.**]—There is an agreement to carry a passenger on board a ship from London to the West Indies, the passage money to be paid in London before the commencement of the voyage. The passenger puts his baggage on board in the Thames, meaning himself to embark at Portsmouth. The ship is lost in going round to that place. The passage money cannot be recovered back.

*Aliter* if the agreement had been to carry the passenger from Portsmouth to the West Indies.—GILLAN *v.* SIMPKIN (1815), 4 Camp. 241; 171 E. R. 77, N. P.

### SUB-SECT. 2.—LIABILITY FOR PERSONAL INJURIES.

**Liability of carriers, generally.**]—*See* CARRIERS, Vol. VIII., pp. 70–108, Nos. 479–727.

**Rights & remedies of parties injured by collisions.**]—*See* Part XII., Sect. 7, *post.*

**4980. Concealed danger—Casting off rope—Duty to warn passenger.**]—THE DRYAD, WILLIAMS *v.* LONG (1853), 7 L. T. 534.

**4981.** —— **Unprotected opening—In floor of saloon.**]—In an action for injuries caused to pltf. by his falling down an opening in the saloon of a steamer in which he was a passenger, & which was unguarded:—*Held:* as he was there lawfully, & in the ordinary course of things would not expect any opening in the floor of a saloon, the co.,

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**PART IX. SECT. 1, SUB-SECT. 1.**

o. *Recovery of unpaid passage money—Overcrowding of passengers.*]—Owing to the overcrowding of the ship & lack of accommodation:—*Held:* pltfs. were not entitled to full passenger rates for that portion of the passage where the overcrowding existed.—NEWFOUNDLAND COASTAL CO. *v.* HENNESSEY (1893), 7 Nfld. L. R. 752.—**NFLD.**

p. *Passenger availing himself of extra passenger accommodation—Informed of increase fare—Acquiescence.*]—Where a party avails of extra passenger accommodation on board ship for which he is informed he must pay increased fare, he cannot afterwards escape from liability when he has not repudiated the proposed charge, even though it may not be clear that he had acquiesced in the same.—MCKAY *v.* WOOD (1866), 5 Nfld. L. R. 157.—**NFLD.**

**PART IX. SECT. 1, SUB-SECT. 2.**

q. *Concealed danger—Gangway insecurely fastened.*]—MCADAM *v.* ROSS (1890), 22 N. S. R. (10 R. & G.) 264.—**CAN.**

r. —— *Barrel insecurely fastened.*]—GRACIE *v.* CANADA SHIPPING CO. (1895), Q. R. 8 S. C. 472.—**CAN.**

t. —— *Defective elevator.*]—MCBEATH *v.* EASTERN S.S. CO. (1908), 39 N. B. R. 77; 6 E. L. R. 543.—**CAN.**

a. *Liability to invitee—Person going on board to visit seaman.*]—HANSON *v.* NEWCASTLE STEAM NAVIGATION CO. (1884), 5 N. S. W. L. R. (L.) 453; 1 N. S. W. W. N. 86.—**AUS.**

b. —— *Person going on board to purchase tickets for friends.*]—WHELAN *v.* CITY OF CORK STEAM PACKET CO. (1874), I. R. 8 C. L. 383.—**IR.**

c. *Negligence in embarking or landing—Plank breaking.*]—When pltf. was embarking on deft.'s steamer a plank broke, & she fell into the water:

owners of the steamer, were liable for the negligence implied in the absence of any protection or precaution.—TAYLOR *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1869), 21 L. T. 442, N. P.

**4982. —— —— Hatchway.**]—A. agreed to carry B. from M. to L.; the mode of transit provided was that B. should come on to a hulk lying in the harbour at M., & wait till a steamer came & took him to L. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded & improperly lighted, & B. fell through & was injured. The hulk belonged to a third party, & A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained:—*Held:* (1) A. was answerable for all injury occurring through the means of transit being improper, whether it arose from the negligence of his own servants or of other parties who helped to provide the means of transit; (2) A. having invited B. on the hulk, was bound to protect him from concealed dangers, & was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others & not his own servants.—JOHN *v.* BACON (1870), L. R. 5 C. P. 437; 39 L. J. C. P. 365; 22 L. T. 477; 18 W. R. 894; 3 Mar. L. C. 403.

*Annotation:*—**Refd.** Wright *v.* Mid. Ry. (1873), L. R. 8 Exch. 137.

——.] — *See, generally,* NEGLIGENCE, Vol. XXXVI., pp. 35–53.

**4983. —— Improper means of transit—Liability for acts of servants & others.**]—JOHN *v.* BACON. No. 4982, *ante.*

**4984. Limitation of liability—"Loss or damage"—"Arising from perils of sea"—Loss of life due to negligence.**]—Defts., a steamship co., issued a passenger's ticket, which contained, amongst others, the following condition: "The co. will not be responsible for any loss, damage, or detention of luggage under any circumstances. . . . The co. will not be responsible for the maintenance of passengers or for their loss of time or any consequence arising therefrom . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master or mariner":—*Held:* the words "loss or damage arising from the perils of the sea," etc., as contained in the above conditions, exempted defts. from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defts.' servants.—HAIGH *v.* ROYAL MAIL STEAM PACKET CO., LTD. (1883), 52 L. J. Q. B. 640; 49 L. T. 802; 48 J. P. 230; 5 Asp. M. L. C. 189, C. A.

*Annotations:*—**Consd.** Travers *v.* Cooper, [1915] 1 K. B. 73. **Apld.** Fagan *v.* Green & Edwards, [1926] 1 K. B. 102. **Refd.** Woodgate *v.* G. W. Ry. (1884), 51 L. T. 826; McCartan *v.* N. E. Ry. (1885), 54 L. J. Q. B. 441. **Mentd.** Nunan *v.* Southern Ry., [1924] 1 K. B. 223.

**4985. —— —— "However caused"—Loss of life on sea portion of journey.**]—A free pass, obtained by an official of another railway co., for himself & wife, from the London & South Western Ry. co., for the journey from London to Jersey, referred, on the face of it, to the following condition printed on the back: "That it shall be taken as evidence of an agreement that the co. are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass." Through the negligence of the servants of the railway co., & during the transit from Southampton to the Channel Islands, the steamer stranded, & the official was drowned. His own & his wife's luggage were also lost. The widow on behalf of herself & infant children claimed, against the fund paid by the railway co. into ct. in a limitation suit, for the loss of her husband & father of the children:—*Held:* (1) in respect of the loss of life, as the widow & children could only claim under Fatal Accidents Act, 1846 (c. 93), where, if death had not ensued, the party injured would have been entitled to maintain an action for damages, the conditions on which the free pass was granted, & which the deceased must, from his official position, be taken to have known, included the sea passage as well as the land transit & barred the claim; (2) in respect of the claim by the widow, as administratrix of her husband, for the loss of his personal effects, & in her own right, for the loss of her luggage, the condition attaching to the pass equally precluded any claim, for the London & South Western Ry. special Act of 1848, under ss. 47, 48, 49 of which, made perpetual by an Act of 1860, the co. is empowered to maintain steamers is not controlled by Railways Clauses Act, 1863 (c. 92), s. 31, extending to steamers Railway & Canal Traffic Act, 1854 (c. 31), s. 7; (3) the words "or other things whatsoever on board the ship" in 1894 Act, s. 503 (1) (*b*), include passengers' luggage.—THE STELLA, [1900] P. 161; 69 L. J. P. 70; 82 L. T. 390; 16 T. L. R. 306; 9 Asp. M. L. C. 66.

*Annotations:*—*As to* (1) **Refd.** Nunan *v.* Southern Ry., [1924] 1 K. B. 223. *As to* (2) **Refd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; Travers *v.* Cooper, [1915] 1 K. B. 73.

**4986. —— Contract made abroad—Not enforceable by lex loci—Provision for construction by English law.**]—Pltf. was received by defts., a British co., under a contract made in Detroit, to be carried in one of their steamships from New York to Southampton. The contract contained a clause that the shipowners should not be liable for loss, damage or delay to a passenger or his baggage arising from the act of God, or from causes of any kind beyond the carrier's control, even though the loss, damage or delay might have been caused by the neglect or default of the shipowners' servants. It was further provided that all questions arising under the clause should be decided according to English law. A subsequent clause provided that no claim under the contract should be enforceable against the shipowners unless a written notice thereof was delivered to them within three days after the passenger should be landed from the steamer at the termination of her voyage. In the course of the voyage one of

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—*Held:* whether the plank was under deft.'s control or not, if it was held forth by him, or use by him, or pointed out, either expressly or by implication, to his passengers as a proper mode of getting to his steamer from the shore, he was liable for any accident to passengers using the plank.—TIMBRELL *v.* WATERHOUSE (1885), 6 N. S. W. L. R. (L.) 77; 1 N. S. W. W. N. 139.—**AUS.**

**d.** —— *Extraordinary method.*]—A steamboat owner who departs from the ordinary & proper method of landing passengers is responsible for the increased danger of the method he adopts.—CAMERON *v.* MILLOY (1864), 14 C. P. 340.—**CAN.**

**e.** —— *Insufficient light.*]—A steamboat co. carrying passengers is liable for an accident occurring on the wharf where passengers are landed to one of its passengers, owing to want of due precaution in not placing lights at night to show where there is danger.—ST. LAWRENCE STEAM NAVIGATION CO. *v.* BORLASE (1877), 3 Q. L. R. 329; 1 L. N. 32.—**CAN.**

**f.** —— *Acts showing invitation to land—Letting down guard chain.*]—MACDONALD *v.* ST. JOHN CORPN. (1885), 25 N. B. R. 318.—**CAN.**

**g.** —— *Negligent landing of enfeebled passenger to steam tender.*]—UNION S.S. CO. *v.* CLARKE (1884), 2 N. Z. L. R. 282.—**N.Z.**

**h.** —— *Casting off bow rope before gangway completely withdrawn.*]—

*Sect.* 1.—*The contract of carriage: Sub-sects.* 2, 3, 4 & 5.]

pltf.'s hands was injured by reason of the negligence of deft.'s servants, but no written notice of any claim was given by pltf. within the time limited by the contract:—*Held:* (1) the language of the contract showed that it was the intention of the parties that it should be wholly governed by English law; (2) the clause relieving defts. from liability for the negligence of their servants, though void by the law in force in Detroit, was valid & enforceable by English law; (3) applying the *ejusdem generis* rule, the clause did not absolve defts. from liability for pltf.'s injury; (4) as pltf. had failed to give any written notice of his claim within the time prescribed by the contract, he was not entitled to recover.—JONES *v.* OCEANIC STEAM NAVIGATION CO., [1924] 2 K. B. 730; 93 L. J. K. B. 1053; 132 L. T. 207; 40 T. L. R. 847; 69 Sol. Jo. 106; 16 Asp. M. L. C. 432.

—— ——.]—*See, generally,* CONFLICT OF LAWS, Vol. VIII., pp. 387–407.

—— **Special terms of carriers contract.**]—*See* CARRIERS, Vol. VIII., pp. 97–105, Nos. 651–697.

**4987. Contributory negligence—Passenger not identified with negligence of navigators.**] — A collision having occurred between the steamships *Bushire* & *Bernina* through the fault or default of the masters & crews of both, two persons on board the *Bushire*, one of the crew & a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of deceased having brought in the Admlty. Div. actions *in personam* against the owners of the *Bernina* for negligence under Fatal Accidents Act, 1846 (c. 93):—*Held:* deceased persons were not identified in respect of the negligence with those navigating the *Bushire;* their representatives could maintain the actions; & could recover the whole of the damages, the Admlty. rule as to half damages not being applicable to actions under Fatal Accidents Act, 1846 (c. 93).—MILLS *v.* ARMSTRONG, THE BERNINA (1888), 13 App. Cas. 1; 57 L. J. P. 65; 58 L. T. 423; 52 J. P. 212; 36 W. R. 870; 4 T. L. R. 360; 6 Asp. M. L. C. 257, H. L.

*Annotations:*—**Consd.** The Circe, [1906] P. 1; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Apld.** Anchor Line (Henderson) *v.* Dundee Harbour Trustees, Ellerman Lines *v.* Same, Thomson, Shepherd *v.* Same (1922), 38 T. L. R. 299. **Consd.** The Koursk, [1924] P. 140. **Reld.** Page *v.* Met. Ry., Heard *v.* Same (1887), 4 T. L. R. 103; The Sara (1887), 12 P. D. 158; Mathews *v.* London Street Tram. Co. (1888), 58 L. J. Q. B. 12; The Orwell (1888), 13 P. D. 80; The Englishman & The Australia, [1894] P. 239; Davidsson *v.* Hill, [1901] 2 K. B. 606; The Frankland, [1901] P. 161; Reynolds *v.* Tilling (1903), 19 T. L. R. 539; The Duc d'Aumale (No. 2), [1904] P. 60; The Harvest Home, [1904] P. 409; The General Havelock (1905), [1906] P. 3, n.; The Hero, [1911] P. 128; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514; The Molière, [1925] P. 27. **Mentd.** *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

——.]—*See* NEGLIGENCE, Vol. XXXVI., pp. 111, 120–121, Nos. 733, 803–809.

—— **Collisions.**]—*See* Part XII., Sect. 5, subsect. 6, C., *post.*

**4988. Failure to give notice of claim within prescribed time—Loss of right to recover.**]—JONES *v.* OCEANIC STEAM NAVIGATION CO., No. 4986, *ante.*

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SUB-SECT. 3.—LIABILITY FOR LOSS OR DAMAGE OF PASSENGERS' PROPERTY.

*See, generally,* CARRIERS, Vol. VIII., pp. 118–135, Nos. 784–893.

**4989. Limitation of liability—Right of shipowner.**]—A shipowner is entitled to limit his liability in respect of the loss of passengers' personal effects.—THE STELLA (1899), 81 L. T. 235; 8 Asp. M. L. C. 605.

—— **Special conditions in contract.**] — *See* CARRIERS, Vol. VIII., pp. 126–128, Nos. 849–858.

—— **Statutory limitations.**]—*See* Part XVIII., Sect. 5, *post.*

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SUB-SECT. 4.—LIABILITY FOR DELAY OR FAILURE TO COMPLETE VOYAGE.

*See, generally,* CARRIERS, Vol. VIII., pp. 99–102. Nos. 659–679.

**4990. When time essence of contract.**]—Where a vessel, bound for the East Indies, is advertised to sail by a certain day, & does not, the shipowner will be entitled to recover half the passage money of a person who refused to go, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable.—YATES *v.* DUFF (1832), 5 C. & P. 369; 172 E. R. 1014, N. P.

*Annotation:*—**Distd.** Cranston *v.* Marshall (1850), 5 Exch. 395.

**4991.** ——.]—Pltf., who resided in Ireland, having applied to defts., emigration agents in London, respecting a passage for himself & family on board their ships to Australia, received in answer a letter in which they agreed to convey him & his family for £65. This letter was written on the fly-sheet of a printed circular, headed "Emigration to Australia," & which stated that ships "will be dispatched on the appointed days

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MONAGHAN *v.* BUCHANAN (1886), 13 R. (Ct. of Sess.) 860; 23 Sc. L. R. 580.—**SCOT.**

**k.** *Defective appliances in ship—Proximate cause act of third party.*]—CORMIER *v.* DOMINION ATLANTIC RY. CO. (1902), 36 N. B. R. 10.—**CAN.**

**l.** *Inevitable accident.*]—GRACIE *v.* CANADA SHIPPING CO. (1895), Q. R. 8 S. C. 472.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 3.**

**m.** *Limitation of liability — Valuables.*]—GORE *v.* AUSTRALASIAN STEAM NAVIGATION CO. (1873), 12 N. S. W. S. C. R. (L.) 14.—**AUS.**

**n.** —— ——.] — MCDOUGALL *v.* ALLAN (1861), 6 L. C. J. 233; 12 L. C. R. 321.—**CAN.**

**o.** —— ——.]—SENECAL *v.* RICHELIEU CO. (1871), 15 L. C. J. 1.—**CAN.**

**p.** —— ——.]—WARD *v.* MCNEIL (1897), Q. R. 11 S. C. 501.—**CAN.**

**q.** —— *"Peril of navigation."*]—DUNNING *v.* RICHELIEU & ONTARIO NAVIGATION CO. (1894), Q. R. 6 S. C. 129.—**CAN.**

**r.** *Luggage left on deck—Owner assured of safety.*]—BANKIER *v.* WILSON (1855), 5 L. C. R. 203.—**CAN.**

**t.** *Luggage delivered to mate with notice of its value.*]—MACDOUGALL *v.* TORRANCE (1860), 4 L. C. J. 132.—**CAN.**

**a.** *Luggage left in dining saloon.*]—TERRANCE *v.* RICHELIEU CO. (1866), 10 L. C. J. 335; 2 L. C. L. J. 133.—**CAN.**

**b.** *Damage caused by fire.*]—CANADIAN NAVIGATION CO. & HAYES (1875), 19 L. C. J. 269.—**CAN.**

**c.** *How far liability extends—Until removed by Customs officers.*]—CANADA SHIPPING CO. *v.* DAVIDSON (1892), Q. R. 1 Q. B. 298.—**CAN.**

**d.** *Sale of wreck & cargo—Passengers' baggage—Conversion.*]—STOKES *v.* BEGG (1874), 2 N. Z. Jur. 9.—**N.Z.**

**e.** *Luggage sent to shipping office to await arrival of passenger.*]—OGILVIE CRICHTON & WALKER *v.* TAYLOR (1828), 6 Sh. (Ct. of Sess.) 691.—**SCOT.**

**f.** *Evidence of shipment.*]—UNION S.S. CO. *v.* MORTON (1890), 8 N. Z. L. R. 747.—**N.Z.**

**PART IX. SECT. 1, SUB-SECT. 4.**

**g.** *Passenger compelled to return to port of embarkation—Defect in rudder incapable of discovery.*]—Pltf. was a passenger on defts.' steamer to Liverpool. On the voyage the rudder post was carried away, disabling the steamer, & pltf. returned to Halifax & was carried to England by another of defts.' steamers. The defect in the rudder post was incapable of discovery before leaving port:—*Held:* pltf. could not recover damages for delay on the ground of negligence.—NEAL

(wind & weather permitting) for which written guarantees will be given." Then followed a list of ships, amongst which the *Asiatic* was named as to sail from London on Aug. 15, & from Plymouth Aug. 25. In another part of the circular it was stated: "Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." Pltf. engaged a berth on board the *Asiatic*, & paid defts. £32 10*s.* as a deposit, but no written guarantee was given. The *Asiatic* did not arrive at Plymouth until Sept. 3, although not prevented by wind or weather. Pltf.'s berth was kept vacant from London to Plymouth:—*Held:* the statement in the circular was not a mere representation, but a warranty that the *Asiatic* would sail on the days appointed, & as she did not, pltf. was justified in taking a passage on board another vessel, & was entitled to recover from defts. the amount of the deposit, & the expenses he had been put to by the delay at Plymouth.

Where parties by advertisement hold out that they are ready to give a written guarantee that a vessel shall sail on a particular day, & a contract is entered into specifically on that footing, in substance that is a warranty to sail on the day named (POLLOCK, C.B.).

It seems to me that, in this case, time was of the essence of the contract; that the contract was broken by defts., &, being broken, that pltf. had the option of rescinding it by entering another vessel, & therefore entitled to recover back his money (ALDERSON, B.).—CRANSTON *v.* MARSHALL (1850), 5 Exch. 395; 19 L. J. Ex. 340; 15 L. T. O. S. 208; 155 E. R. 172.

*Annotations:*—**Refd.** Crookewit *v.* Fletcher (1857), 26 L. J. Ex. 153. **Mentd.** Kingston-upon-Hull Governor, etc., of Poor *v.* Petch (1854), 10 Exch. 610.

**4992.** ——.]—CRANE *v.* TYNE SHIPPING CO., LTD. (1897), 13 T. L. R. 172, D. C.

**4993. Advertisement offering guarantee as to date of sailing—Warranty to sail on day named.**]—An advertisement in a colonial newspaper, announcing the time at which a vessel would sail for England & specifying the accommodation provided for passengers held to be evidence of the terms of the contract between the owner of the vessel & a passenger.—MILLARD *v.* BROOKS (1846), 7 L. T. O. S. 62.

**4994.** —— ——.]—CRANSTON *v.* MARSHALL, No. 4991, *ante*.

**4995. Unreasonable delay in starting.**]—YATES *v.* DUFF, No. 4990, *ante*.

**4996. Misrepresentation as to time of starting—Ship advertised as loading—Whilst unloading before going into dry dock.**]—THE EMILY, HANN *v.* HODGKINSON (1853), 7 L. T. 533.

**4997. Delay on voyage—Ship in bad repair—Putting into ports.**]—THE MELBOURNE, ROBINSON *v.* AUSTRALIAN ROYAL MAIL STEAM SHIPPING CO. (1853), 7 L. T. 533.

**4998. Failure to complete voyage—Negligence—Evidence of.**]—In action for negligently steering a ship, whereby she was wrecked, & pltf. lost his passage in her, no evidence can be given of a specific act of negligence, which is not the foundation of the action. You may give evidence, that the captain had often expressed his conviction, that the officer to whom he gave charge of the ship was incompetent for that situation. You may call experienced nautical men, & ask them, whether in their judgment, particular facts, which have been proved, amount to gross negligence. —MALTON *v.* NESBIT (1824), 1 C. & P. 70; 171 E. R. 1107, N. P.

**4999. Arrangements by master to complete voyage—Master as agent of passengers—Where owners not liable for non-completion.**]—Where a passenger ship is wrecked, & by the terms of the contract with the passengers the owners are under no liability to forward them to their destination, the master, who makes arrangements with another vessel to carry on the passengers, does so as the agent of the passengers, & not of his owners.—THE MARIPOSA, [1896] P. 273; 65 L. J. P. 104; 75 L. T. 54; 45 W. R. 191; 12 T. L. R. 518; 8 Asp. M. L. C. 159.

**5000. Measure of damages—Failure to complete voyage—Travelling expenses of passengers.**]—THE RHINE, PROBYN *v.* GENERAL STEAM NAVIGATION CO. (1853), 7 L. T. 533.

**5001.** —— —— ——.]—THE EAGLE, SHUTHERS *v.* GENERAL STEAM NAVIGATION CO. (1856), 7 L. T. 533.

**5002.** —— **Delay—Out-of-pocket expenses—& deposit already paid.**]—CRANSTON *v.* MARSHALL, No. 4991, *ante*.

**5003.** —— —— **Cost of special train—When recoverable.**]—Where a passenger, having missed a train, hires a special train & seeks to recover the cost of such train from the co. which has contracted to carry him, he must show that the expenditure was one which he would have incurred if he had missed the train through his own fault & not through fault of the co.—BRIGHT *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1897), 2 Com. Cas. 106.

——.]—*See, generally*, CARRIERS, Vol. VIII., pp. 106–108, Nos. 708–727.

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SUB-SECT. 5.—AUTHORITY OF MASTER OVER PASSENGERS.

**Master, officers & crew.**]—*See* Part III., *ante*.

**Authority of master as custodian of ship & cargo.**]—*See* Part IV., *ante*.

**5004. Extent of captain's powers—Absolute control—To ensure safe & proper conduct of vessel—Exercise of powers limited to necessity of case.**]—The captain of a ship has absolute control over the passengers in all that is necessary to the safe & proper conduct of the vessel, but the exercise of such power in each instance is defined & limited by the necessity of the case.

The contract with the passenger is to carry, board & lodge him, & the passenger is to obey all the captain's reasonable orders, in an emergency even to work the ship when necessary. If a passenger misconduct himself at table, the captain may remove him, or may even imprison him for a short period, if imprisonment be necessary for the enforcement of his lawful commands. The rule of law is simple; the power of the captain is limited to the necessity of the case. . . . He

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*v.* ALLAN (1885), 18 N. S. R. (6 R. & G.) 449; 6 C. L. T. 536.—**CAN.**

h. *Ship condemned at intermediate port—Liability for forwarding passenger—Passage money prepaid.*]—*Held:* a cabin passenger, whose passage money had been prepaid, could not compel the master of a vessel to forward him to destination when the ship was condemned at an intermediate port.—THE BROXBOURNEBURY (1843), 7 L. T. 509. —**MAURITIUS.**

**PART IX. SECT. 1, SUB-SECT. 5.**

k. *Extent of captain's powers—Power to compel passengers to keep watch.*]—Unless in cases of necessity masters cannot compel passengers to keep watch.—*Re* THE FRIENDS (1837), 1 S. V. A. R. 118.—**CAN.**

l. —— *Power to apprehend passenger for refusing to pay fare.*]—LUNDIE *v.* MACBRAYNE (1891), 21 R. (Ct. of Sess.) 1085; 31 Sc. L. R. 872; 2 S. L. T. 186.—**SCOT.**

*Sect.* 1.—*The contract of carriage: Sub-sects.* 5, 6 & 7. *Sect.* 2: *Sub-sect.* 1.]

[captain] certainly would not be justified in imprisoning a person for having called him "the landlord of an hotel" (WATSON, B.).—KING *v.* FRANKLIN (1858), 1 F. & F. 360, N. P.

**5005. —— Power to order passengers to work ship—When necessary.**]—KING *v.* FRANKLIN, No. 5004, *ante*.

**5006. —— Exclusion of passenger from table—What conduct justifies.**]—Conduct unbecoming a gentleman, in the strict sense of the word, will, it seems, justify a captain of a ship in excluding a passenger from the cuddy table whom he has engaged by contract to provide for there; but it is difficult to say in what degree want of polish would, in point of law, warrant such exclusion: but it is clear that if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, & require him to take his meals in his own private apartment.

If the husband be excluded from the cuddy table, & the wife, not from compulsion, but from a wish to be with her husband, take her meals with him in private, this will not amount to a breach of contract on the part of the captain so far as regards the wife.—PRENDERGAST *v.* COMPTON (1837), 8 C. & P. 454; 7 L. T. 224, N. P.

**5007. —— —— ——.**]—KING *v.* FRANKLIN, No. 5004, *ante*.

**5008. —— —— —— Exclusion instead of imprisonment.**]—In an action for assaulting & imprisoning a passenger on board a passenger ship, the justification being that it was necessary for the due preservation of discipline: the jury were directed that they must be satisfied, in order to find for deft., that there was such real appearance of danger to the discipline of the crew, from the language or conduct of pltf., as might induce a reasonable man to believe in the existence of such danger.

Deft. [the captain] is not responsible for any deficiencies in the provisions or stores, which vested with the ship brokers, or agents, or owners of the ship (CHANNELL, B.).—ALDWORTH *v.* STEWART (1866), 4 F. & F. 957; 14 L. T. 862; 2 Mar. L. C. 383, N. P.

**5009. —— Putting on shore—Passenger of bad character—No impropriety on board.**]—A declaration in *assumpsit* on an agreement to carry pltf. in a ship to a particular place, alleged as a breach, that defts., by their agent, caused him to be disembarked at an intermediate point, &, by their agent, caused the disembarkation to be conducted in a scandalous, disgraceful, & improper manner, whereby, & also by contemptuous usage & insulting language addressed to pltf. by the agent in effecting said disembarkation, pltf. sustained damage:—*Held:* (1) the declaration was good on motion in arrest of judgment; (2) that the judge at *Nisi Prius* had rightly received evidence of the language of the captain of defts.' ship in putting pltf. on shore, in which he described pltf. as being a pickpocket, & belonging to the swell mob; (3) the judge had rightly directed the jury that defts. were responsible for any injury naturally resulting from the acts of the captain, when acting as their servant, & pltf. was entitled to fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore. *Semble:* supposing pltf. had been a pickpocket, or belonged to the swell mob, it would be no excuse for turning him out of a ship in which he had paid his passage, so long as he was not guilty of any impropriety on board.—COPPIN *v.* BRAITHWAITE (1844), 7 L. T. 509; 8 Jur. 875.

**5010. —— Forcible coercion—Passenger fighting mate.**]—In trespass, the count alleging that deft., on, etc., assaulted, beat & ill-treated pltf., & then knocked him down on the deck of a ship, deft. pleaded, as to the assaulting, beating & ill-treating, that deft. was captain of a vessel conveying passengers, of whom pltf. was one; that pltf. made a noise, disturbance & affray on board the vessel, & "was then fighting with a certain other person then also being a passenger," "& whose name is to deft. unknown" & was striving to beat such person, & also deft., so being the captain, etc., whereupon deft. so being the captain, etc., for the preservation of the peace, & of order & discipline on the vessel, & to separate pltf. & the other person, & to prevent pltf. from beating the person & deft., as he otherwise would have done, *molliter manus*, etc. It appeared on the trial that the person with whom pltf. had been fighting was not unknown by name, & was not a passenger, but the mate of the vessel:—*Held:* the justification was sufficiently maintained notwithstanding the variance, the name & description of the party not being material. But pltf. must recover for the knocking down, that being alleged as a distinct trespass from the assaulting, beating & ill-treating, & not covered by the justification.—NODEN *v.* JOHNSON (1850), 16 Q. B. 218; 20 L. J. Q. B. 95; 15 Jur. 424; 117 E. R. 862; *sub nom.* NODIN *v.* JOHNSON, 16 L. T. O. S. 281.

**5011. —— —— Danger to discipline & crew.**]—ALDWORTH *v.* STEWART, No. 5008, *ante*.

**5012. —— Imprisonment—What conduct justifies.**]—KING *v.* FRANKLIN, No. 5004, *ante*.

**5013. —— —— ——.**]—ALDWORTH *v.* STEWART, No. 5008, *ante*.

**5014. —— —— Disobedience on approach of enemy—Refusal to take station.**]—In an action for false imprisonment on board a ship pltf. cannot recover as special damages the expense he incurred in leaving the ship, & taking his passage on board another unless the injury continued to the moment of his transhipment. *Qu.:* as to the authority of the captain of a merchantman when a passenger refuses on the approach of an enemy to take the station assigned him.—BOYCE *v.* BAYLIFFE (1807), 1 Camp. 58; 170 E. R. 875, N. P.

*Annotations:*—**Refd.** Hodgkinson *v.* Fernie (1857), 2 C. B. N. S. 415. **Mentd.** Henry *v.* Goldney (1846), 7 L. T. O. S. 211; Hoey *v.* Felton (1861), 11 C. B. N. S. 142.

**—— Refusal of passengers by carrier.**]—*See* CARRIERS, Vol. VIII., p. 71, Nos. 474–477.

**5015. Exclusion of husband from table—Wife voluntarily taking meals with husband—Whether breach of contract in respect to wife.**]—PRENDERGAST *v.* COMPTON, No. 5006, *ante*.

**5016. Duty of passengers to obey all reasonable orders.**]—KING *v.* FRANKLIN, No. 5004, *ante*.

**5017. Remedy of passenger—Action for false imprisonment—Measure of damages—Expenses of leaving ship & cost of other conveyance.**]—BOYCE *v.* BAYLIFFE, No. 5014, *ante*.

**5018. —— —— Wrongful removal from ship——Measure of damages.**]—COPPIN *v.* BRAITHWAITE, No. 5009, *ante*.

SUB-SECT. 6.—PROVISIONS, WATER, AND STORES.

**5019. Covenant to supply water—Temporary deficiency—Unusual length of voyage.**]—(1) In an agreement under seal for the hire of the cabins &

accommodations for passengers in a ship, there was a stipulation, that, if it should be necessary for the convenience, & at the request, of the hirer, to put into an intermediate port for stock or otherwise, he, the hirer, would pay all port & necessary charges consequent thereon:—*Held:* this raised an implied covenant, on the part of the captain who let the cabins, etc., to put into any such port, if required.

(2) There was also a covenant on the part of the latter, to permit & suffer the hirer to stow away the baggage of the passengers in a part of the hold:—*Held:* this fairly imported that there should be some demand or request made by the hirer for the clearing of the space agreed on.

(3) A covenant to keep up a supply of the necessary & usual quantity of water, for the use of passengers, etc., is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage.—CORBYN *v.* LEADER (1833), 6 C. & P. 32; 172 E. R. 1134, N. P.; *subsequent proceedings*, 10 Bing. 275.

**5020. Bad or insufficient provisions—Liability of captain.**]—YOUNG *v.* FEWSON (1837), 8 C. & P. 55; 7 L. T. 509, N. P.

**5021.** —— ——.]—ALDWORTH *v.* STEWART, No. 5008, *ante*.

**5022.** —— **Liability of owners.**]—YOUNG *v.* FEWSON (1837), 8 C. & P. 55; 7 L. T. 509, N. P.

**5023.** —— ——.]—THE SHALIMAR, PARROTT *v.* PILKINGTON (1856), 8 L. T. 30.

**5024.** —— ——.]—ALDWORTH *v.* STEWART, No. 5008, *ante*.

**5025.** —— **Liability of brokers.**]—ALDWORTH *v.* STEWART, No. 5008, *ante*.

**5026. Provisions provided by master since deceased—Rights of representatives.**]—If the captain of an East Indiaman dies at the outward port after having contracted to bring home certain passengers, & laid in a certain quantity of stores for the homeward voyage; & the chief mate succeeding to the command brings home these & other passengers, & provides further stores for their subsistence during the voyage; the captain's representatives are entitled to the passage money of the passengers with whom he had contracted, & the mate to that of the others; the representatives being liable to him for the portion of the stores laid in by him consumed by the former class of passengers, & he being liable to the representatives for the portion of the captain's stores consumed by the latter class of passengers.—SIORDET *v.* BRODIE (1812), 3 Camp. 253; 170 E. R. 1373, N. P.

**Provisions on emigrant ship.**]—*See* 1894 Act, s. 295.

SUB-SECT. 7.—OTHER CASES.

**5027. Covenant to provide passage—For soldiers to be enrolled by plaintiff—Enrolment not condition precedent.**]—WARE *v.* CHAPPELL (1649), Sty. 186; 82 E. R. 633.

*Annotations:*—**Mentd.** Smith *v.* Shelberry (1675), 2 Mod. Rep. 33; Samways *v.* Eldsly (1676), 2 Mod. Rep. 73; Thorp *v.* Thorp (1701), 12 Mod. Rep. 455.

**5028. Intermediate ports—Implied covenant to put in as required—Covenant by hirer of cabins to pay charges.**]—CORBYN *v.* LEADER, No. 5019, *ante*.

**5029. Stowage of passenger's luggage—Covenant to permit—Request for accommodation necessary.**]—CORBYN *v.* LEADER, No. 5019, *ante*.

**5030. Refusal to carry passengers—Pleading.**]—A declaration in case against a steam boat co. for refusing to receive pltf. as a passenger, stated that defts. were common carriers of passengers for hire from Southampton to a place beyond the seas, to wit, etc. Plea, that defts. were not common carriers of passengers for hire, *modo et formâ*:—*Held:* this plea put in issue only the fact of defts. being common carriers of passengers from & to the places named, without reference to the question whether the custom of the realm extended to a carrying beyond the seas.—BENETT *v.* PENINSULAR STEAM-BOAT CO. (1848), 6 C. B. 775; 18 L. J. C. P. 85; 13 Jur. 347; 136 E. R. 1453.

*Annotations:*—**Refd.** Pianciani *v.* L. & S. W. Ry. (1856), 18 C. B. 226; Wilton *v.* Atlantic Royal Mail Steam-Navigation Co. (1861), 10 C. B. N. S. 453. **Mentd.** Morgan *v.* Ravey (1861), 30 L. J. Ex. 131; Martin *v.* Great Indian Peninsular Ry. (1867), L. R. 3 Exch. 9; Readhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858.

**5031. Provision of first class cabin—What amounts to offer.**]—In an action against a shipowner for not assigning to pltf. a first class cabin according to contract; Pleas, that deft. was ready & willing, & that pltf. was not, to perform the contract; evidence that after twice depriving pltf. of cabins he had approved of, & then offering him one which he declined, there being no evidence that after that there was any offer of another:—*Held:* the question for the jury was, whether the one last offered was a first class cabin.—LLOYD *v.* SHAW (1860), 2 F. & F. 413.

## SECT. 2.—STATUTORY PROVISIONS.

### SUB-SECT. 1.—DEFINITIONS—"PASSENGER," "PASSENGER STEAMER."

*See* 1894 Act, ss. 267-270.

**"Passengers."**]—*See* 1894 Act, s. 267.

**5032.** —— **Cabin passenger—Person without contract ticket.**]—Under 18 & 19 Vict. c. 119, ss. 3,

**PART IX. SECT. 1, SUB-SECT. 7.**

m. *Refusal to carry passengers—Person "dangerously ill."*]—One of the conditions of a contract for the carriage of passengers by sea provided that no person "dangerously ill" could be received on board:—*Held:* pregnancy might amount to illness within the condition, so as to give the carrier a discretionary power to decline to receive a passenger.—DE PLEDGE *v.* AUSTRALASIAN UNITED STEAM NAVIGATION CO., LTD., [1904] S. A. L. R. 61. —**AUS.**

n. *Unlawful detention for refusal to pay poll tax—Carrier liable for such tax—Breach of contract.*]—JONES *v.* NIAGARA NAVIGATION CO. (1906), 12 O. L. R. 481; 8 O. W. R. 342.—**CAN.**

o. *Breach of contract to carry passengers—Action in rem.*]—Pltf., for an alleged breach of a contract to carry him from L. to S., took proceedings against the ship & obtained a warrant for her arrest:—*Held:* even if the breach alleged were established, pltf. was not entitled to a lien on the ship.—COOK *v.* THE MANAUENCE (1898), 6 Exch. C. R. 193.—**CAN.**

p. *Passengers infected with disease—Excuse for non-performance—Performance become illegal.*]—BOMBAY & PERSIA STEAM NAVIGATION CO. *v.* RUBATTINO CO. (1889), I. L. R. 14 Bom. 147.—**IND.**

q. *Failure to produce season ticket.*]—Applt., who was travelling on a steamer under a season ticket, failed to produce his ticket or the pass issued to him thereunder when requested by the proper officer so to do, & he refused to pay his fare on the ground that the ticket exempted him from so doing. Applt. was convicted of an offence under Shipping & Seamen Act, 1908, s. 168 (1) (i):—*Held:* affirming the conviction, a person going on board a ship contracts to pay a fare for that voyage when demanded; whether he has purchased a ticket for the voyage or has purchased exoneration in some other form, he remains under the same obligation to produce when asked the appropriate evidence; & the obligation is not affected by the fact that the officer knows that applt. holds an unexpired season ticket.—FINDLAY *v.* GRIFFIN, [1919] N. Z. L. R. 524.—**N.Z.**

r. *Loss of passage—Passenger left behind—Failure of shipowners to take reasonable steps to ensure passage.*]—SMITH & WATERMEYER *v.* UNION S.S. CO. (1867), 5 S. 311.—**S. AF.**

**PART IX. SECT. 2, SUB-SECT. 1.**

t. *Passengers—Passage money not charged.*]—Resps., owners of the steamship *R.*, were charged before the magistrate at St. John's with carrying passengers coastwise without having the certificate required by C. S., c. 115, s. 4. Those on board were men who had been engaged in dismantling a whale factory at St. Lawrence, & who had induced the captain to take them

*Sect.* 2.—*Statutory provisions: Sub-sects.* 1, 2, 3 & 4.]

71, a sailing ship is not a passenger ship because she carries more than thirty passengers, or more than one statute adult passenger to every fifty tons, if that number or proportion is not made up without reckoning cabin passengers; &, where persons are cabin passengers in all respects except that of having received contract tickets in the form in 18 & 19 Vict. c. 119, sched. K., which in its terms applies to passenger ships only, such persons, for the purpose of estimating the number or proportion, are to be reckoned as cabin passengers; & unless, without including them, the number or proportion is not made up, the ship is not a passenger ship.—ELLIS *v.* PEARCE (1858), E. B. & E. 431; 27 L. J. M. C. 257; 31 L. T. O. S. 231; 22 J. P. 432; 4 Jur. N. S. 1275; 6 W. R. 683; 120 E. R. 570.

*See* 1894 Act, ss. 267, 268 (3).

**5033. —— Passage money not charged—Friends of master.**]—On her voyage from Mediterranean ports to Aarhuus, in Denmark, the *Chelona*, laden with barley, put into Malta for bunker coals. The master there took three persons on board who desired to go to England. He charged them no passage money, but made a substantial charge per head for their food, for which he did not account to the owners. The *Chelona* touched at Portland for bunker coals, & the three persons were there landed. The collector for the general lighthouse authority at Portland demanded light dues, which he alleged had been incurred by the owners of the ship in consequence of such landing:—*Held:* the ship was exempt from light dues; the case was analogous to that of the master taking a friend on board & landing him & did not fall within the proviso to the exemption in the Order in Council of May 16, 1893.—HAY *v.* TRINITY HOUSE CORPN. (1895), 65 L. J. Q. B. 90; 73 L. T. 471; 44 W. R. 188; 40 Sol. Jo. 148; 8 Asp. M. L. C. 77; 1 Com. Cas. 193.

**—— Meaning for purposes of compulsory pilotage.**]—*See* Nos. 8004, 8005, *post.*

**Passenger steamer.**]—*See* 1894 Act, ss. 267, 742, 743; 1096 Act, s. 13.

**5034. —— Gratuitous pleasure trip—Workmen's excursion.**]—Resps. were charged that they, being the owners of the British steamship *Era*, did ply on the river O. with certain passengers on board without having one of the duplicates of a certificate issued by the Board of Trade put up in some conspicuous part of the ship so as to be visible to all persons on board same. More than twelve persons were taken on board the steamer for an excursion from I. down the river O. to F. & back. No charge was made by resps. for the use of the steamer, but a gratuity was given to the master & crew:—*Held:* the steamship was not a passenger steamship within the meaning of 17 & 18 Vict. c. 104, ss. 303, 318.—HEDGES *v.* HOOKER (1889), 60 L. T. 822; 53 J. P. 613; 37 W. R. 491; 6 Asp. M. L. C. 386; *sub nom.* R. *v.* IPSWICH JJ., 5 T. L. R. 405, D. C.

*Annotations:*—**Refd.** The Clymene (1897), 76 L. T. 811; Genochio *v.* Steward (1909), 100 L. T. 525.

**5035. —— "Vessel used in navigation"—Electric launch used on artificial lake—Fitted to carry passengers.**]—A small electric launch on an artificial lake fitted to carry passengers:—*Held:* not to be a vessel used in navigation within 17 & 18 Vict. c. 104, s. 2, now 1894 Act, s. 742, & therefore not to be a passenger steamer within 17 & 18 Vict. c. 104, s. 318, now 1894 Act, s. 281, so as to require a duplicate of her Board of Trade certificate "to be put up in some conspicuous part of the ship."

A launch was used for the purpose of carrying passengers on pleasure trips round an artificial lake half a mile long by 180 yards wide, without having any duplicate of a Board of Trade certificate put up in her:—*Held:* the launch, while so used on a sheet of water of that size, was not a vessel used in navigation, &, therefore, not a passenger steamer within 17 & 18 Vict. c. 104, s. 318.—SOUTHPORT CORPN. *v.* MORRISS, [1893] 1 Q. B. 359; 68 L. T. 221; 57 J. P. 231; 41 W. R. 382; 7 Asp. M. L. C. 279; 5 R. 201; *sub nom.* R. *v.* SOUTHPORT CORPN. & MORRIS, 62 L. J. M. C. 47, D. C.

*Annotations:*—**Distd.** Weeks *v.* Ross, [1913] 2 K. B. 229. **Refd.** The Gas Float Whitton No. 2, [1895] P. 301.

**5036. —— —— Motor boat plying for hire—On canal.**]—A launch, which carried more than twelve passengers & was not propelled by oars, plied for hire along a river & a canal up to, but not beyond, some lock gates, & back again. Along the same water seagoing vessels were taken to points beyond the lock gates:—*Held:* as the launch was used in waters upon which, in ordinary parlance, navigation could reasonably be said to take place, it was a "vessel used in navigation" & a "ship" within 1894 Act, s. 742, & therefore was subject to the provisions requiring a certificate under 1894 Act, s. 271 (1) (*b*).—WEEKS *v.* ROSS, [1913] 2 K. B. 229; 82 L. J. K. B. 925; 108 L. T. 423; 77 J. P. 182; 29 T. L. R. 369; 12 Asp. M. L. C. 307; 23 Cox, C. C. 337, D. C.

SUB-SECT. 2.—PASSENGER'S CONTRACT.

*See* 1894 Act, ss. 320–323.

**5037. Contract ticket—Whether money must have been paid for specified passage—Commencing at fixed**

to St. John's without charge:—*Held:* the *R.* was not a passenger ship & those on board were not passengers.—BYRNE *v.* REGULUS S.S. CO. (1909), 9 Nfld. L. R. 413.—**NFLD.**

a. —— ——.]—The *F.*, a British steamship, ordinarily employed only as a steam tug, having, at the instance of, or by the invitation of the owner, received on board a number of persons exceeding twelve, in addition to the master & crew, the owner, his family, & servants, & having carried them gratuitously, & not under a contract for hire, on a pleasure excursion across the Bay of Dublin, without her having the certificate required for passenger ships under Merchant Shipping Act, 1854:—*Held:* she constituted a passenger ship, & as such carried passengers, within the statute; & the owner was liable to the penalty imposed by sect. 318, by reason of not having had a certificate accordingly.—KIDDLE *v.* KIDSTON (1884), 14 L. R. Ir. 1; 18 I. L. T. 9.—**IR.**

b. —— ——.]—*Qu.:* whether a person carried gratuitously is a "passenger" within Merchant Shipping Act, 1894.—YEUDALL *v.* SWEENEY; YEUDALL *v.* LYNN, [1922] S. C. (J.) 32; 59 Sc. L. R. 299; [1922] S. L. T. 278.—**SCOT.**

c. *Passenger steamer — Gratuitous pleasure trip.*]—KIDDLE *v.* KIDSTON (1884), 14 L. R. Ir. 1; 18 I. L. T. 9.—**IR.**

d. ——.]—BYRNE *v.* REGULUS S.S. CO. (1909), 9 Nfld. L. R. 413.—**NFLD.**

e. ——.]—A steamer carrying passengers, which sails from & returns to the same place in the United Kingdom, is a "passenger steamer" "carrying passengers to, from, or between any places in the United Kingdom," within Merchant Shipping Act, 1894, s. 267; &, if she carries more than twelve passengers without having obtained the necessary certificate, her master or owner is liable to a fine for every passenger so carried, as being a passenger "carried from or to any place in the United Kingdom," within Merchant Shipping Act, 1906, s. 21.—YEUDALL *v.* SWEENEY, YEUDALL *v.* LYNN, [1922] S. C. (J.) 32; 59 Sc. L. R. 299; [1922] S. L. T. 278.—**SCOT.**

f. "*Carries.*"]—The word "carries" in Merchant Shipping Act, 1894, s. 271 (1), does not mean "is fitted to carry" but "in fact carries"; & a complaint which merely sets forth that a passenger steamer, for which no certificate has been obtained, has, on a specified occasion, carried more than twelve passengers, the number being stated, is relevant.—YEUDALL *v.*

time—**In named ship.**]—(1) By 1894 Act, s. 341, a "passage broker" is defined as "any person who sells or lets, or agrees to sell or let, or is anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea"; & by sect. 342, "a person shall not act directly or indirectly as a passage broker" unless he holds the prescribed licence:—*Held:* the selling or letting intended by sect. 341 was a selling or letting in a named ship of a passage to commence at a definite time for a specified voyage, &, therefore, a person who agreed to procure a passage for another, no ship or time of sailing being named or specified, had not "acted as a passage broker" within sect. 342.

(2) Resp., on consideration of £22 paid by him to C., agreed to place C.'s son as a farm pupil in Canada, & out of the £22 to procure him a steamship passage from Liverpool to Quebec. Subsequently resp. obtained for about £9 from shipowners a contract ticket for a voyage from Liverpool to Quebec, & sent it to the son. Resp. made no profit or commission out of the latter transaction:—*Held:* he had not been "concerned in the sale or letting of a passage" within sect. 341.

(3) By sect. 320, "if any person, except the Board of Trade & persons acting for them & under their direct authority, receives money from any person for or in respect of" a passage by ship of one of the specified kinds, "he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, master, or charterer of the ship":—*Held:* in order to bring a case within this sect. there must be a receipt of money paid for a specified passage, commencing at a fixed time in a named ship.—MORRIS *v.* HOWDEN, [1897] 1 Q. B. 378; 66 L. J. Q. B. 264; 76 L. T. 156; 61 J. P. 246; 45 W. R. 221; 41 Sol. Jo. 211; 8 Asp. M. L. C. 249; 18 Cox, C. C. 501, D. C.

**5038. —— Form of—Clause not approved by Board of Trade—Limitation of liability.**]—The form approved by the Board of Trade under 1894 Act, s. 320 (2), contained a "direction" that "a contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The contract ticket issued by defts. for a passage for a steerage passenger in their steamship from the United Kingdom to New York contained all that was in the approved form, but in addition it contained on the front thereof the words "See back," & on the back thereof there were a number of conditions which had not been approved by the Board of Trade, one of which exempted defts. from loss, damage or delay to the passenger or his luggage arising from (*inter alia*), the negligence of the shipowner's servants. During the voyage the steamship, owing to the negligence of defts.' servants, collided with an iceberg & sank, & the passenger was drowned:—*Held:* the above condition, not having been approved by the Board of Trade, was invalid, & therefore defts. were not entitled by reason of 1894 Act, s. 320 (2), to rely upon it to protect themselves from liability.—RYAN *v.* OCEANIC STEAM NAVIGATION CO., LTD., O'CONNELL *v.* SAME, SCANLON *v.* SAME, O'BRIEN *v.* SAME, [1914] 3 K. B. 731; 83 L. J. K. B. 1553; 110 L. T. 641; 30 T. L. R. 302; 58 Sol. Jo. 303; 12 Asp. M. L. C. 466, C. A.

*Annotation:*—**Distd.** Jones *v.* Oceanic Steam Navigation Co., [1924] 2 K. B. 730.

**Passage brokers.**] - *See* Sub-sect. 5, *post.*

SUB-SECT. 3.—DANGEROUS GOODS AND CARRIAGE OF CATTLE.

*See* 1894 Act, ss. 301, 302; 1906 Act, ss. 17, 85, sched. II.

**5039. Dangerous goods—What are—Emigration officer sole judge.**]—Passengers Act, 1852 (c. 44), s. 26, enacts that "no passenger ship shall clear out or proceed to sea if there shall be on board as cargo any horses, cattle, gun-powder, vitriol, lucifer matches, guano, green hides, or any other article, whether as cargo or ballast, which, by reason of its nature or quantity, shall be deemed by the emigration officer at the port of clearance likely to endanger the health or lives of the passengers, or the safety of the ship:—*Held:* the emigration officer was the sole judge of whether there was danger from the nature or quantity of the cargo; & the sect. was not limited to the articles specified, but extended to any articles taken as ballast or cargo.—STEEL *v.* SCHOMBERG (1855), 4 E. & B. 620; 3 C. L. R. 302; 24 L. J. Q. B. 87; 24 L. T. O. S. 252; 1 Jur. N. S. 679; 19 J. P. 500; 3 W. R. 204; 119 E. R. 227.

**5040. —— Any article taken as ballast or cargo—Prohibition not limited to articles specified.**]—STEEL *v.* SCHOMBERG, No. 5039, *ante.*

SUB-SECT. 4.—PROVISIONS IN CASE OF WRECK.

*See* 1894 Act, ss. 331–335.

**5041. Duty of master to forward passengers to destination—Ship lost off British possession.**]—Policy of insurance on "passage money, against all costs, charges & liabilities to which the owner or charterer might be subject under" Passenger Act, 1852 (c. 44), ss. 46–51. The ship was lost by perils of the sea: the passengers were saved in a British colony, not being their place of destination; the master within six weeks forwarded them to their place of destination:—*Held:* the expenses so incurred were charges to which the owner was subject under Passenger Act, 1852 (c. 44), ss. 49, 50, & might be recovered under the policy. Passenger Act, 1852 (c. 44), s. 49, does not merely provide that if the master does not forward the passengers within six weeks the governor may do so, but makes it the duty of the master to forward them.—GIBSON *v.* BRADFORD (1855), 4 E. & B. 586; 3 C. L. R. 1192; 24 L. J. Q. B. 159; 7 L. T. 533; 1 Jur. N. S. 520; 3 W. R. 183; 119 E. R. 215.

*Annotation:*—**Distd.** Willis *v.* Cooke (1855), 5 E. & B. 641.

**Insurance against loss caused by statutory liabilities—Validity of.**]—*See* 1894 Act, s. 335.

**5042. —— What recoverable under—Expenses of forwarding passengers to destination.**]—GIBSON *v.* BRADFORD, No. 5041, *ante.*

**5043.** ——————.]—Pltfs., the owners of a ship, effected an insurance by a Lloyd's policy on

SWEENEY, YEUDALL *v.* LYNN, [1922] S. C. (J.) 32; 59 Sc. L. R. 299; [1922] S. L. T. 278.—**SCOT.**

**PART IX. SECT. 2, SUB-SECT. 2.**

*g. Contract ticket—Whether money must have been paid for specified passage—Commencing at fixed time—In named ship.*]—A complaint set forth that resp. had been guilty of offences against Merchant Shipping Act, 1894, s. 320, by receiving money for steerage passages from Glasgow, or some other British port to ports in America without giving in return therefor the required contract tickets. It did not state that the money was received for a specified passage at a given time on a specified ship, & an objection to the relevancy was taken on that ground:—*Held:* the complaint was relevant.—HART *v.* HUNTER (1906), 5 Adam, 1; 8 F. (Ct. of Sess.) (J.) 34; 43 Sc. L. R. 294; 13 S. L. T. 710.—**SCOT.**

*Sect.* 2.—*Statutory provisions: Sub-sects.* 4 *&* 5. *Parts X & XI. Sects.* 1 *&* 2: *Sub-sect.* 1.]

passage money of a specified amount plus 50 per cent. to Australia & New Zealand "against Passenger Act, 1852 (c. 44) . . . to cover any disbursements that may be made by the assured arising from accident or loss on account of passengers for conveyance to intended destination." The ship after starting on the voyage with a number of emigrant passengers on board who had paid the passage money referred to in the policy, met with an accident, & in consequence the passengers were transferred to other ships, in accordance with the provisions of 1894 Act, in which they were conveyed at pltfs.' expense to their destination. Pltfs.' ship was repaired & subsequently proceeded on the voyage with a fresh lot of passengers on board. Pltfs. claimed to recover as a loss under the policy the money paid by them for the conveyance of the passengers on the other ships:—*Held:* the policy was an insurance of disbursements which might be made in respect of the passengers whose passage money was referred to in the policy; the passage money paid by the second lot of passengers could not be treated as salvage; & pltfs. were entitled to recover the sum claimed as a loss under the policy.—NEW ZEALAND SHIPPING CO., LTD. *v.* DUKE, [1914] 2 K. B. 682; 83 L. J. K. B. 1300; 111 L. T. 37; 30 T. L. R. 385; 12 Asp. M. L. C. 507; 19 Com. Cas. 223.

**5044. —— —— Expenses of maintaining passengers during repairs.**]—A policy of insurance was made at & from Liverpool to Boston on passage money valued at £700. The policy was in the usual printed form, with this memorandum: "On passage money of emigrants, subject to pay a loss *pro rata*, & subject to the clauses & conditions made under Passenger Act, 1852 (c. 44), ss. 47–51, compensation clause excepted, & against these risks only." The ship, being a passenger ship within the Act, sailed, & by a peril of the sea was driven into F., a foreign port, where she necessarily remained repairing damages for more than six weeks, after which she proceeded with the passengers to Boston & arrived there. During the detention at F. the passengers were maintained by the insured at a cost exceeding the passage money:—*Held:* this was not a loss incurred under the enumerated sects., & the underwriters were not liable to make it good.—WILLIS *v.* COOKE (1855), 5 E. & B. 641; 25 L. J. Q. B. 16; 26 L. T. O. S. 121; 1 Jur. N. S. 1164; 4 W. R. 54; 119 E. R. 619.

**5045. —— —— ——.**]—Pltfs., shipowners, effected with defts. a policy "against all costs, charges, & liabilities to which the owners or charterers of the ship *M.P.* might be subject under Passenger Act, 1852 (c. 44), ss. 46–49, 150. The ship struck on a bank about sixty miles from her port of discharge on the voyage insured; & the captain incurred a large expense in hiring steamers, into which after vain endeavours to haul the vessel off the bank, he transferred her passengers, who were taken on board such steamers to their destination:—*Held:* assuming the expense was within the policy, in estimating it such part of the expenditure as had reference to the attempts to get the vessel off so that she might prosecute her voyage, ought not to be taken into account, but only so much of the hire of the steamers as was paid for the carrying the passengers to the place where the voyage ought to have terminated.

*Qu.:* whether pltfs. were entitled to recover anything.—BAINES *v.* ROYAL EXCHANGE ASSURANCE ASSOCN. (1858), 30 L. T. O. S. 277; 6 W. R. 247.

SUB-SECT. 5.—PASSAGE BROKERS.

*See* 1894 Act, ss. 341–346; 1906 Act, c. 48, s. 23.

**5046. "Sale or letting of steerage passages"—Passage must be in named ship—For specified voyage—At definite time.**]—MORRIS *v.* HOWDEN, No. 5037, *ante*.

**5047. "Concerned" in sale or letting of steerage passages—Agreement to provide passage—Out of lump sum payable by emigrant.**]—MORRIS *v.* HOWDEN, No. 5037, *ante*.

# Part X.—Carriage of Mails.

*See* Mail Ships Acts, 1891 (c. 31), & 1902 (c. 36); Post Office Act, 1908 (c. 48), ss. 26–32; POST OFFICE, Vol. XXXVII., p. 373, Nos. 38–42.

# Part XI.—Contract of Towage.

SECT. 1.—IN GENERAL.

**5048. Duty of tow to disclose all facts material to service.**]—The master of a brig, which had suffered considerable damage, without mentioning this fact, agreed with the master of a steam tug for ordinary towage to London for £40. During the service the master of the tug discovered the fact of such previous damage, repudiated the agreement, & brought a suit for salvage:—*Held:* (1) additional salvage cannot be engrafted on an agreement for extraordinary though it may upon one for ordinary towage; (2) the mere concealment of a fact which might operate on the service & therefore on the agreement, vitiates it; (3) in this case the facts concealed might operate on the service by rendering

**PART IX. SECT. 2, SUB-SECT. 5.**

h. *"Sale or letting of steerage passages"—Whether passage must be in named ship—For specified voyage—At definite time.*]—HART *v.* HUNTER (1906), 8 F. (Ct. of Sess.) (J.) 34; 43 Sc. L. R. 294; 13 S. L. T. 710; 5 Adam, 1.—SCOT.

**PART XI. SECT. 1.**

5048 i. *Duty of tow to disclose all facts material to service.*]—When after the making of a contract to render for an agreed sum service, expected to include towage, to a ship in distress the circumstances incident to the performance of the contract prove to be of a nature substantially different from those supposed to exist when the contract was made, being such that, if then known, they should have been disclosed, & it turns out that the services required to be rendered & actually rendered are of so much more onerous a nature than those expected that they cannot fairly

it longer & more arduous, & the agreement was invalid.—THE KINGALOCK (1854), 1 Ecc. & Ad. 263; 8 L. T. 334; 18 Jur. 400; 164 E. R. 153.

*Annotation:—As to* (3) **Apld.** The Albion (1861), Lush. 282.

**Towage distinguished from salvage.**]—*See* Part XV., Sect. 4, *post.*

**Extent of Admiralty jurisdiction.**]—*See* ADMIRALTY, Vol. I., p. 130, Nos. 358–362.

**Jurisdiction of county court.**]—*See* ADMIRALTY, Vol. I., p. 245, No. 1720.

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## SECT. 2.—RELATION BETWEEN TUG AND TOW.

### SUB-SECT. 1.—IN GENERAL.

**5049. Tow controls tug.**]—THE KINGSTON-BY-SEA, No. 5985, *post.*

**5050.** ——.]—THE EMPEROR (1849), 5 L. T. 525.

**5051.** ——.]—A steam tug towing a sailing ship directs the course of both vessels so long as no directions are given by the person in charge of the ship in tow. The steam tug is the moving power, but it is under the control of the master or pilot on board the ship in tow.

Where a ship in tow of a steam tug, & in charge of a licenced pilot who has the control over & directs the course of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, & those on board the tug & ship in tow do not know in what direction they are going, it is negligence on the part of both vessels to proceed; but as it is the duty of the pilot in charge to give orders to the tug to stop so as to enable the ship in tow to come to an anchor, the neglect on the part of the pilot to give such orders is contributory negligence, which will preclude the owners of the sailing ship from recovering against the owner of the steam tug in an action for negligently running the sailing ship ashore by proceeding during the fog.—SMITH *v.* ST. LAWRENCE TOW-BOAT CO. (1873), L. R. 5 P. C. 308; 28 L. T. 885; 21 W. R. 569; 2 Asp. M. L. C. 41, P. C.

*Annotations:*—**Apld.** The Altair, [1897] P. 105. **Refd.** Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Adam W. Spies (1901), 70 L. J. P. 25.

**5052.** ——.]—(1) A tug agreed to tow a ship from Liverpool to the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, &, the weather becoming worse during the performance of the agreed towage service, the hawser parted, & the ship was placed in a position of danger, & was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors & chains, which were lost:—*Held:* the tug was not entitled to claim salvage remuneration, & her owners were liable to pay for the loss of the anchors & chains.

(2) *Semble:* if a tug receives positive directions from the ship she is towing as to the course she is to steer, she is bound to obey them; & if the ship gets into danger in consequence of such directions the tug is not liable.

(3) Where the tug is familiar with the navigation & the tow a foreigner, it is the duty of the tug to tow in a safe direction, without waiting for directions from the vessel in tow.—THE ROBERT DIXON (1879), 5 P. D. 54; 42 L. T. 344; 28 W. R. 716; 4 Asp. M. L. C. 246, C. A.

*Annotations:—As to* (1) **Consd.** The Altair, [1897] P. 105. **Refd.** The Marechal Suchet, [1911] P. 1. *As to* (2) **Consd.** The Duc D'Aumale, [1904] P. 60.

**5053.** ——.]—A tug with a vessel in tow came into collision with another vessel, which was seriously injured by the tug, but not injured by the vessel in tow. The collision might have been avoided had there been a good look-out on the vessel in tow, & had she warned the tug that the latter was in danger of collision by continuing on her course:—*Held:* the owners of the vessel in tow were liable.

Under an ordinary contract of towage, the vessel in tow has control over the tug, & is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them.—THE NIOBE (1888), 13 P. D. 55; 59 L. T. 257; 6 Asp. M. L. C. 300; *sub nom.* THE FLYING SERPENT, THE NIOBE, 57 L. J. P. 33; 36 W. R. 812.

*Annotations:*—**Consd.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Refd.** McCowan *v.* Baine, The Niobe (1891), 65 L. T. 502; The Englishman & The Australia, [1894] P. 239; The Morgengry & The Blackcock, [1900] P. 1; The Devonian, [1901] P. 221.

**5054. Mutual obligations—Reasonable skill & diligence.**]—BLAND *v.* ROSS, THE JULIA, No. 5114, *post.*

*See, also,* Nos. 5067, 5068, 5071, *post.*

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be considered as within the contemplation of the parties when the contract was made, additional remuneration may be claimed under the Maritime law as against the ship.—THE CARTELA *v.* THE INVERNESS-SHIRE (1916), 21 C. L. R. 387.—**AUS.**

**5048 ii.** ——.]—The concealment by the owners of a ship, through the officer in charge, of the fact that the ship is in a leaky & dangerous condition, avoids a contract to tow her to port for a specified sum, made with him by the captain of a tug, in ignorance of her true condition.—DUNSMUIR *v.* THE HAROLD (1893), 3 B. C. R. 128; 4 Exch. C. R. 222.—**CAN.**

**k.** *Expenses of mooring—Towage for stated price covering whole trip.*]—ST. LAWRENCE TOW BOAT CO. *v.* JOLY (1864), 15 L. C. R. 20.—**CAN.**

**l.** *Coasting trade—By foreign steamer.*]—*G.*, an American tug, with a clearance from Port Townsend for Victoria, picked up on the high seas, ship *A.*, bound for Port Moody, & contracted to tow her to that port. *G.* towed *A.* to mouth of Victoria harbour, & there left her while tug went into Victoria for coal & a clearance for Port Townsend. On coming out, *G.* resumed towing, & carried *A.* to within 14 miles of Port Townsend, & then cast off & ran into that port for a clearance for Port Moody. In an action for penalty under 38 Vict. c. 2 (Can.):—*Held:* this was a "towage from one port or place in Canada to another" & deft. was liable.—HAMLEY *v.* LIBBY (1884), 1 B. C. R. pt. 2, 44.—**CAN.**

**m.** *Charter of tug—Demise or hiring.*]—Deft. hired a tug from plff. by a contract signed by both parties in these words, "I agree to charter tug . . . to tow two barges from . . . for which I agree to pay . . . owner to supply engineer & captain. . . ." The tug on the voyage was run on a rock through the negligence of the captain:—*Held:* not a demise of the tug, but a contract of hiring, & deft. was not liable for the damage.—THOMPSON *v.* FOWLER (1893), 23 O. R. 644.—**CAN.**

**n.** *Failure to sail at appointed time—Liability for loss caused by breach of contract.*]—MACKENZIE *v.* LIDDELL (1883), 10 R. (Ct. of Sess.) 705; 20 Sc. L. R. 451.—**SCOT.**

**PART XI. SECT. 2, SUB-SECT. 1.**

**5054 i.** *Mutual obligations—Reasonable skill & diligence.*]—Where a towage contract is made, it implies an undertaking that each party will duly perform his share of it; that proper skill & diligence will be used on board both tug & tow; & that neither party by neglect or mismanagement will create unnecessary risks to the other, or increase any risk which might be incidental to the service undertaken. READ *v.* THE LILLIE (1907), 11 Exch. C. R. 274.—**CAN.**

**o.** *Transfer of contract before completion.*]—Where an engagement was made on the Lower St. Lawrence with a tug to tow a ship to Quebec, Montreal & back to Quebec:—*Held:* the tug having towed the ship to Quebec & Montreal her owner could not transfer the contract to another to complete it, nor could he substitute an inferior tug with additional tow for the purpose.—*Re* EUCLID (1881), 7 Q. L. R. 351.—**CAN.**

**p.** *Demurrage.*]—NEW STEAM TUG CO. *v.* M'CLEW (1869), 7 Macph. (Ct. of Sess.) 733.—**SCOT.**

*Sect.* 2.—*Relation between tug and tow: Sub-sects.* 2, 3 & 4.]

SUB-SECT. 2.—IMPLIED WARRANTY OF FITNESS.

**5055. Whether warranty implied in contract of towage.**]—Whilst defts.' tug was towing pltfs.' vessel from Birkenhead to the Canada Dock, Liverpool, the towing gear of the tug carried away, with the result that pltfs.' vessel fell against the pierhead at the entrance to the dock & sustained damage.

In an action for breach of the contract of towage, defts. relied on a condition in the contract by which they were "not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear, including consequence of defect therein or damage thereto, & whether the perils or things above-mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners":—*Held:* defts. were liable, whether there was a warranty of fitness implied in the contract of towage, as the President in the ct. below had found, or whether the duty of deft. tug owners was restricted to the supply of a tug as reasonably fit for service as care & skill could make it, for the cause of the damage sustained by pltfs.' vessel was the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect was not covered by the contract, the conditions of which only applied to circumstances occurring after the commencement of, & during, the towage, & not to the state of things existing before the towage began; the words "towing gear" did not include rivets, or attachments, between the gear & the bulkhead, &, therefore, the defect which caused the accident was not within the words of the condition.—THE WEST COCK, [1911] P. 208; 80 L. J. P. 97; 104 L. T. 736; 27 T. L. R. 301; 55 Sol. Jo. 329; 12 Asp. M. L. C. 57, C. A.

*Annotations:*—**Refd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1915] 2 K. B. 729; The Cap Palos (1920), 90 L. J. P. 184; Point Anne Quarries *v.* The M. F. Whalen (1922), 39 T. L. R. 37.

**5056. As to equipment—Must be in condition reasonable under the circumstances.**]—(1) A contract to tow is not a warranty to tow to destination, but an engagement to use best endeavours & competent skill for that purpose, with a vessel properly equipped.

(2) If performance of the stipulated service is rendered impossible by a *vis major*, the obligation is terminated.

(3) If unforeseen danger unavoidable by the steam tug supervenes to the ship in tow, as by breaking of the hawser, the steam tug is bound to complete the service, if still possible; & the steam tug, if thereby incurring risk & performing duties not within the scope of the original engagement, is entitled to salvage reward.

(4) The conversion of towage into salvage depends on the circumstances of each case.

(5) A tug under contract to tow, by misconduct or negligence, or want of reasonable equipments, occasioning or materially contributing to occasion danger to the ship in tow, is not entitled to salvage reward for rescuing the ship from such danger.

(6) A steam tug engaged in towing or performing salvage services is generally bound to follow the directions of the pilot in charge of the ship.

(7) Under a simple traverse of salvage services, wilful misconduct of salvors cannot, but negligence may, be proved.—THE MINNEHAHA (1861), 1 Lush. 335; 167 E. R. 149; *sub nom.* WARD *v.* M'CORKILL, THE MINNEHAHA, 15 Moo. P. C. C. 133; 4 L. T. 810; 7 Jur. N. S. 1257; 9 W. R. 925; 1 Mar. L. C. 111; *sub nom.* THE STORM KING & THE UNITED KINGDOM (OWNERS) *v.* THE MINNEHAHA (OWNERS), 30 L. J. P. M. & A. 211, P. C.

*Annotations:*—*As to* (1) **Refd.** The West Cock, [1911] P. 208. *As to* (2) **Folld.** The Westbourne (1889), 58 L. J. P. 78. **Consd.** The Leon Blum, [1915] P. 90. **Refd.** The Waverley (1871), L. R. 3 A. & E. 369; The Aboukir (1905), 21 T. L. R. 200. *As to* (3) **Apld.** The Lady Egidia (1862), Lush. 513. **Folld.** The White Star (1866), L. R. 1 A. & E. 68. **Consd.** The I. C. Potter (1870), L. R. 3 A. & E. 292. **Apld.** The Liverpool, [1893] P. 154. **Consd.** The Leon Blum, [1915] P. 90. **Refd.** The Waverley (1871), L. R. 3 A. & E. 369; The Refrigerant, [1925] P. 130. *As to* (4) **Refd.** General Steam Navigation Co. *v.* De Jersey, The Edward Hawkins (1862), 15 Moo. P. C. C. 486. *As to* (5) **Folld.** The Robert Dixon (1879), 5 P. D. 54. **Consd.** The Duc d'Aumale, [1904] P. 60. **Refd.** The Annapolis, The Golden Light, The H.M. Hayes (1861), Lush. 355. *As to* (7) **Consd.** Yeo *v.* Tatem, The Orient (1871), L. R. 3 P. C. 696. **Refd.** The Maréchal Suchet, [1911] P. 1. *Generally,* **Refd.** Grindley *v.* Stevens, The Falkland & The Navigator (1863), 1 Moo. P. C. C. N. S. 379; The Philadelphia (1863), Brown, & Lush. 28.

**5057.** ——— ———.]—Tug owners contracted with the agents of the owners of a large French sailing ship to provide a tug to tow her from Falmouth to London. After passing the Prince's Channel lightship, a strong south-westerly wind was encountered, & tug & tow drifted to leeward, the tow taking the ground on the West Shingles Sand. There she remained for several days, during which time the tug engaged to tow, & three other tugs belonging to the same owners, besides other tugs, lifeboats, & a number of boatmen, came to her assistance, & on the fourth day the vessel came off.

In consolidated actions of salvage, the claims of the owners of the tug engaged to tow, & of the three other tugs belonging to them, & also those of the masters & crews of the respective tugs, were separately considered. Some were allowed & some were disallowed. Other claims for "engaged" services in the nature of salvage were also allowed, although the services did not result in the ultimate salving of the vessel. As to the various claims:—*Held:* the claims of the owners, master, & crew of the tug towing under the contract must be rejected as her owners had failed to prove, the burden of proof being upon them, that they had supplied a tug efficient for the purpose, or that the change from towage to salvage became necessary by reason of special circumstances in the nature of *vis major* or inevitable accident, & not by reason of the inefficiency of the tug, or want of skill & care on the part of the master & crew.

The contract was for the towage of the *Maréchal Suchet* by a tug to be supplied by pltfs. This being so, the owners of the tug must be taken to have contracted that the tug should be efficient, & that her crew, tackle & equipment should be equal to the work to be accomplished in weather & circumstances reasonably to be expected; & that reasonable skill care & energy & diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances & at all hazards, & the failure to accomplish it would be excused if it were due to *vis*



q. *As to equipment.*]—*Re* THE WILLIAM (1878), 4 Q. L. R. 306.—CAN.

*major* or to accidents not contemplated, & which rendered the doing of the work impossible (EVANS, P.).—THE MARÉCHAL SUCHET, [1911] P. 1; 80 L. J. P. 51; 103 L. T. 848; 26 T. L. R. 660; 11 Asp. M. L. C. 553.

*Annotation:*—**Apprvd.** The West Cock, [1911] P. 208.

**5058. —— Sufficient supply of coal.**]—(1) In a towage contract there is an implied undertaking on the part of the tug owners to supply an efficient tug with sufficient equipments, including a proper supply of coal; & hence, a term in the contract by which the tug owners are exempted from liability for loss or damage occasioned by the negligence of their servants is no defence to an action for damages occasioned to the owners of the tow in consequence of the towage being discontinued owing to the tug having started with an insufficient supply of coals.

(2) Where in the course of towage the tug, owing to her having started with an insufficient supply of coal, is obliged to cast off to go to the nearest port to ship more coal, & then returns & completes the towage, the tug owners are entitled to be paid the price agreed upon in the towage contract if the owners of the tow do not prove any damage to gave been occasioned to them by the temporary discontinuance of the towage.—THE UNDAUNTED (1886), 11 P. D. 46; 55 L. J. P. 24; 54 L. T. 542; 34 W. R. 686; 5 Asp. M. L. C. 580.

*Annotation:*—**Refd.** The West Cock, [1911] P. 23.

**5059. As to tug.**]—THE MARÉCHAL SUCHET, No. 5057, *ante*.

**5060. As to crew.**]—THE MARÉCHAL SUCHET, No. 5057, *ante*.

**5061. Burden of proof.**] — THE MARÉCHAL SUCHET, No. 5057, *ante*.

**5062. Exclusion of warranty—Contract for specified vessel.**]—Pltf. contracted with defts. to navigate for a lump sum a tug, which was named, towing several barges on a sea voyage. The tug was, unknown to defendants, out of repair, & the voyage consequently occupied longer than it would otherwise have done. In an action by pltf. to recover as damages the loss of profit thus caused:—*Held:* he could not recover for there was no implied warranty that the named tug should be fit to perform the voyage.—ROBERTSON *v.* AMAZON TUG & LIGHTERAGE CO., LTD. (1881), 7 Q. B. D. 598; 51 L. J. Q. B. 68; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. L. C. 496, C. A.

*Annotations:*—**Consd.** The West Cock, [1911] P. 208. **Apld.** Point Anne Quarries *v.* The M. F. Whalen (1922), 39 T. L. R. 37. **Refd.** The Glenmorven, [1913] P. 141.

**5063. —— ——.**]—Resps.' tug, the *Whalen*, was employed under a contract to tow applts.' barges on Lake Ontario. Among the craft given her to tow was a scow, not a barge, laden with stone. Bad weather was experienced & the tug had to cast the scow adrift, causing her to strand & damaging both vessel & cargo. Applts. alleged negligence in the navigation of the tug. Resps. asserted that the contract covered barges only & not scows, & alternatively that if they were responsible their liability was limited to $38.92 per ton of their tonnage:—*Held:* the *Whalen* was liable for damages to the statutory limit of $38.92 per ton.

"It was a contract for a named vessel, which . . . excludes any implied warranty" (PHILLIMORE, J.).—POINT ANNE QUARRIES, LTD. *v.* THE M. F. WHALEN (1922), 39 T. L. R. 37, P. C.

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SUB-SECT. 3.—IMPLIED UNDERTAKING AS TO SKILL.

**5064. Whether undertaking as to skill implied.**]—THE WEST COCK, No. 5055, *ante*.

**5065. Obligation to use best endeavours.**]—THE MINNEHAHA, No. 5056, *ante*.

**5066. Obligation to use reasonable care & skill.**]—BLAND *v.* ROSS, THE JULIA, No. 5114, *post*.

**5067.** ——.]—Applts. undertook for payment to tow resp.'s vessel with others by hired tugs up a tidal river, to lighten resp.'s vessel if necessary, & to conduct the whole operation of the towage upon a certain tide, including the arrangement of the time & order of procession, the river being too narrow for two vessels to go abreast or pass one another. The tug towing the leading vessel was so slow & inefficient that resp.'s vessel, which was the last in the line, was stranded on the ebb tide & damaged:—*Held:* applts. were bound to exercise reasonable care & skill in the conduct of the towage, & there being evidence of failure in that respect, resps. were entitled to sue applts. for damages.—PRESTON CORPN. *v.* BIORNSTAD, THE RATATA, [1898] A. C. 513; 78 L. T. 797; 47 W. R. 156; 14 T. L. R. 500; 8 Asp. M. L. C. 427, H. L.

*Annotations:*—**Distd.** Lohne, etc. (Owners of Barque Ydun) & Skibo Assurance Forening Protector *v.* Preston Corpn., The Ydun (1899), 81 L. T. 10. **Refd.** The Maréchal Suchet, [1911] P. 1; The West Cock, [1911] P. 23.

**5068.** ——.] — THE MARÉCHAL SUCHET, No. 5057, *ante*.

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SUB-SECT. 4.—REMUNERATION.

**5069. When right arises—Failure to obey pilot on tow.**]—(1) Where a steam tug, being employed under an agreement, to tow a vessel having a pilot on board, did not promptly obey the orders of the pilot, & a collision ensued with another vessel:—*Held:* the disobedience was not justifiable, & the towage was forfeited.

*Qu.:* whether, notwithstanding, the claim was maintainable under the contract.—PETLEY *v.* CATTO, THE CHRISTINA (1848), 6 Moo. P. C. C. 371; 6 Notes of Cases, 361; 13 E. R. 726, P. C.

*Annotations:*—**Consd.** The Energy (1870), L. R. 3 A. & E. 48. **Refd.** The Mary (1879), 5 P. D. 14.

**5070. —— Towage not completed.**]—A steamer, employed under an agreement for a specified sum to tow a partially disabled steam vessel to a specific destination, towed the vessel for some hours, but in consequence of a gale causing the breaking of the hawser, left the vessel in a position of considerable danger, from which she was only saved by her own exertions:—*Held:* as it did not appear that the towing had contributed to her

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**5060 i.** *As to crew.*]—*Re* THE WILLIAM (1878), 4 Q. L. R. 306.—**CAN.**

**PART XI. SECT. 2, SUB-SECT. 3.**

**5066 i.** *Obligation to use reasonable care & skill.*]—If a tug for a stipulated price promises to tow a vessel from one place to another, her engagement is that she will employ competent skill with a crew & equipment reasonably adequate to the object.—*Re* THE WILLIAM (1878), 4 Q. L. R. 306.—**CAN.**

**PART XI. SECT. 2, SUB-SECT. 4.**

**5070 i.** *When right arises—Towage not completed.*]—JEWELL *v.* CONNOLLY (1897), Q. R. 11 S. C. 265.—**CAN.**

**5070 ii.** — — ——.]—Under a contract to tow logs the tug is entitled to be paid only for the logs delivered & where the special term that the tug is to be paid for logs "lost or not lost" is relied on it must be proved specifically.—PACIFIC TOWING CO. *v.* MORRIS (1904), 11 B. C. R. 173.—**CAN.**

**5070 iii.** —— ——.]—Under the terms of a charter of a tug for towing three rafts:—*Held:* the charter money was payable although owing to weather conditions & in the exercise of proper judgment by the master of the tug the rafts were never towed.—BRITISH COLUMBIA MILLS, TUG & BARGE CO., LTD. *v.* KELLEY, [1923] 1 D. L. R.

*Sect. 2.—Relation between tug and tow: Sub-sects.*

safety, the steamer was not entitled to towage, as she had not performed her contract.—GENERAL STEAM NAVIGATION CO. *v.* DE JERSEY, THE EDWARD HAWKINS (1862), 15 Moo. P. C. C. 486; 1 Lush. 515; 15 E. R. 578, P. C.

*Annotations:*—**Distd.** The Aztecs (1870), 21 L. T. 797. **Consd.** The Camellia (1883), 9 P. D. 27. **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**5071.** —— ——.]—The masters of pltf.'s tugs hailed defts.' ship, which had grounded on rocks & received damage, &, for £300 & £150 respectively, agreed to beach her. In the course of the operation the servants of deft. shipowners on board the ship negligently failed to slip their cable, with the result that the ship grounded again in no better position than she was when the tugs took hold of her:—*Held:* (1) as pltfs. had not completed the work they contracted to perform they were not entitled to recover the sum stipulated for under the agreement; (2) in such an agreement there was an implied obligation on the part of those in charge of the ship to use ordinary care & skill in carrying out their part of the work; (3) as deft. shipowners by their negligence had deprived pltfs. of the opportunity of earning the stipulated sums pltfs. were entitled to damages; (4), as in substance the tugs had completed the whole of what they had to do the damages were the sums of £300 & £150 respectively; (5), as deft. shipowners had appeared to the writ *in rem* pltfs. were entitled to a judgment *in personam* against them for these amounts.—THE VALSESIA, [1927] P. 115; 96 L. J. P. 38; 136 L. T. 544; 43 T. L. R. 144; 17 Asp. M. L. C. 207.

**5072.** —— —— **No quantum meruit.**]—Pltfs., tug owners, contracted to tow defts.' vessel from Kingroad in the river Severn to Sharpness Dock for a fixed sum, but when near their destination, owing to a fog & without anybody being in fault, the vessel stranded on a rock, & could not be got off:—*Held:* the contract was indivisible, & not having been fulfilled, pltfs. were not entitled to recover on a *quantum meruit* for any portion of the towage.—THE MADRAS, [1898] P. 90; 67 L. J. P. 53; 78 L. T. 325; 8 Asp. M. L. C. 397.

**5073.** —— **Insufficient supply of coal—Completion when coal obtained.**]—THE UNDAUNTED, No. 5058, *ante*.

**5074.** —— **Contract performed—After abandonment of way originally contemplated.**]—Pltfs. contracted to tow defts.' steamship *R.* from L'Orient to Liverpool for £400, "no cure, no pay, no salvage." The contract contained the following terms:—During the towage service the master & crew of the tugboat become the servants of the owners of the vessel in tow, & are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The co. will not be liable for any damage or loss to or occasioned by the vessel in tow . . . or any damage or loss to any person or property whatsoever, although such damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat, or by any defect in or breakdown of or accident to the . . . equipment or towing gear of the tugboat." It was also provided that pltfs. should supply a towing hawser sufficient for the purpose, & that the *R.* should have steam available if possible for steering & anchor use. In fact the *R.* did not raise steam until after the events in question. In bad weather off the Lizard the hawser, which was good & sufficient, parted, but instead of standing by the *R.* the tug went into Falmouth to try to get a new rope. In Falmouth her master asked the master of the tug *D.* to go out & see if the *R.* wanted assistance, & the *D.* proceeded out. She found the *R.*, but her services were declined, as the master of the *D.* refused to make any agreement. Eventually, however, the *R.* had to take take the services of a steam trawler, & paid her £2,000 to tow her into Plymouth, where pltfs. picked her up & resumed the towage to Liverpool. Pltfs. claimed the £400. Defts. counterclaimed for the £2,000 subject to a deduction of £350 on the basis of a *quantum meruit* for the towage:—*Held:* (1) whether regarded as a performance of the contract or on the basis of a *quantum meruit* pltfs. were entitled to the £400; (2) the tug master ought to have stood by the *R.*, & having improperly left her the tug owners were not protected under the terms of the contract, which covered defaults during the performance of the duties of the contract, but did not apply to a case where the tug master had given up trying to perform the contract in the way in which it was contemplated by the parties that it should be performed.—THE REFRIGERANT, [1925] P. 130; 95 L. J. P. 11; 134 L. T. 26; 16 Asp. M. L. C. 559.

**5075.** —— **Extra remuneration—Occurrence of unforeseen accidents—Duty to assist tow.**]—(1) Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind & weather & the time of performing the service will be what are ordinary at the time of the year.

(2) If an unexpected change of weather or other unforeseen accidents occur, he is bound to adhere to the vessel, & to do all in his power to rescue her from danger; & he will be entitled to reasonable extra remuneration for the extra service.—THE WHITE STAR (1866), L. R. 1 A. & E. 68.

*Annotations:*—*As to* (2) **Consd.** The Leon Blum, [1915] P. 90. **Refd.** The I. C. Potter (1870), L. R. 3 A. & E. 292; The Waverley (1871), L. R. 3 A. & E. 369.

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1015; 32 B. C. R. 1; [1923] 1 W. W. R. 597.—**CAN.**

r. —— *Personal credit—Waiver by taking security.*]—Towing was on the personal credit of the owner of a scow:—*Held:* not sufficient to relieve the scow for the work done; & taking an order for the amount of the claim on a third person who did not accept or pay was not a waiver of petitioner's lien.—THE OSCAR WILDE, 5 C. L. T. 335.—**CAN.**

t. —— *Quantum meruit.*]—CANADIAN PACIFIC RY. CO. *v.* NEELON, CANADIAN PACIFIC RY. CO. *v.* HELLIWELL, THE ATHABASCA, Cass. Dig. 2nd ed. 522.—**CAN.**

s. —— *Extraordinary services.*]—Where towage services cannot, on the facts, be said to have saved the ship from being lost, but were of extraordinary service owing to her condition, & involved more than ordinary trouble & risk, they should be allowed for, not as salvage but as extraordinary towage services.—DUNSMUIR *v.* THE HAROLD (1894), 3 B. C. R. 128; 4 Exch. C. R. 222.—**CAN.**

b. —— *Agreement providing for payment per diem.*]—A towage agreement providing for payment *per diem* is a divisible contract as to each day's services performed, but there can be no recovery under the contract in the event of a prolongation of the voyage through pltf.'s unjustifiable delay.—NEVILLE CANNERIES, LTD. *v.* THE SANTA MARIA (P. E. I.) (1917), 16 Exch. C. R. 481; 36 D. L. R. 619.—**CAN.**

c. *Reasonable remuneration—What amounts to.*]—Where the captain of a steamship, carrying passengers & a valuable cargo from Liverpool to Montreal, had lost her screw & had been six days under sail & was in the Gulf of St. Lawrence near a dangerous coast, entered into an agreement to pay £800 for towage into Gaspe Harbour:—*Held:* it was reasonable & might be enforced.—STEWART *v.* BREWIS (1881), 26 L. C. J. 14; 4 L. N. 203.—**CAN.**

d. *Rate—Volunteer.*]—*Semble:* while the ct. is disposed to confine the claims of professional pilots & tugs to the tariff scale for professional services, a volunteer ought to be allowed a more liberal rate of compensation.—CANADIAN PACIFIC NAVIGATION CO. *v.* THE C. F. SARGENT (1893), 3 Exch. C. R. 332; 3 B. C. R. 5.—**CAN.**

e. *Damages for detention at quarantine—Disease on vessel towed—Non-disclosure by master.*]—The owner of a towboat is entitled to compensation

**5076. —— —— Delay—Tow injured by collision.**]—A tug having entered into a contract to tow a ship from A. to B. for a specified sum, the ship, during the performance of the agreed towage, was injured by collision, & the tug was detained nearly three days in attendance on the ship. In an action of towage instituted by the owner of the tug in a county ct. & transferred to this ct. this ct. held that it had no jurisdiction to award, in addition to the sum agreed to be paid for towage, any remuneration for the delay.—THE HJEMMETT (1880), 5 P. D. 227; 49 L. J. P. 66; 42 L. T. 514; 4 Asp. M. L. C. 274.

**5077. "No cure no pay"—Not repugnant to contract of towage.**]—BUGSIER REEDEREI UND BERGUNGS AKT. OF HAMBURG *v.* THE MARGHA (OWNERS) (1924), 20 Lloyd, L. R. 14.

**new tug from same company—Continuance of contract.**]—Where an agreement has been made with a steam tug belonging to a steam tug towing co. to tow a vessel from Dover to Gravesend for £40, & the steam tug breaking down in the progress of the service, the towage was completed by other steam tugs belonging to the same co., the defence of the owners of the vessel in tow, that the contract was annulled by the nonfulfilment of the original agreement, not sustained. *Semble:* the acceptance of the services of the other steam tugs by the master of the vessel in tow is a continuance of the original contract.—THE LADY FLORA HASTINGS (1848), 3 Wm. Rob. 118; 6 Notes of Cases, 550; 166 E. R. 907.

—— **Effect on right to remuneration.**]—*See* Nos. 5070–5072, *ante*.

SUB-SECT. 5.—IMPOSSIBILITY OF PERFORMANCE.

*See, generally,* CONTRACT, Vol. XII., pp. 368–407.

**5078. General rule—No warranty to tow to destination.**]—THE MINNEHAHA, No. 5056, *ante*.

**5079.** —— ——.]—THE MARÉCHAL SUCHET, No. 5057, *ante*.

**5080. Impossibility from unforeseen circumstances—Right to rescind.**]—An agreement to perform either salvage or towage service for a stated remuneration, entered into *bonâ fide* by parties competent to contract may be rescinded, by the occurrence, during the performance of the service of, circumstances which at the time of entering into the agreement, were not, & reasonably would not be, in the contemplation of the contracting parties; but where no such unforeseen circumstances occur, such an agreement will be held binding by this court.—THE BETSEY (1843), 2 Wm. Rob. 167; 2 Notes of Cases, 409; 1 L. T. O. S. 410; 7 Jur. 755; 166 E. R. 717.

*Annotation:*—**Refd.** The Waverley (1871), 24 L. T. 713.

**5081.** —— **What amounts to—Vis major.**]—THE MINNEHAHA, No. 5056, *ante*.

**5082.** —— —— ——.] — THE MARÉCHAL SUCHET, No. 5057, *ante*.

**5083.** —— —— **Inevitable accident.**]—THE MINNEHAHA, No. 5056, *ante*.

**5084.** —— —— ——.] — THE MARÉCHAL SUCHET, No. 5057, *ante*.

**5085.** —— —— **Mistake of fact—Tug incapable of performing contract.**]—Deft. contracted with pltfs. to take a tug & two lighters in tow from this country to Rio de Janeiro for £570, payable as to £350 two days before sailing. Pltfs. paid the £350, & deft. then proceeded, but had to abandon the voyage as the tug was in fact incapable of performing it. Both parties believed at the time the contract was entered into that it was capable of performance, that is, that the tug was of sufficient strength & power to perform the voyage:—*Held:* there was no contract, the £350 had been paid under a mistake of fact, & consequently pltfs. were entitled to recover it back.—THE SALVADOR (1909), 26 T. L. R. 149; *previous proceedings*, 25 T. L. R. 727, C. A.

**5086. Impossibility after part performance—Breakdown of tug during towage—Acceptance of**

SUB-SECT. 6.—DUTY OF TUG.

**5087. To obey pilot of tow.**]—(1) Where a vessel, the last of three vessels in tow of a steamer, the vessel towed being in charge of a duly licenced pilot, came in contact with & damaged another vessel riding at single anchor in the river Clyde, in the deep channel, the Trinity Masters being of opinion that there was plenty of room for the three vessels to pass the vessel at anchor, & that this vessel had not her anchor improperly laid:—*Held:* although the vessel towed was to blame, the collision being attributable to the swinging of the string of vessels out of the straight line, which was owing to the improper steering of the last vessel, this was the fault of the pilot alone & the owners were exonerated.

A ship in charge of a pilot, & also in tow, is to be considered, *primâ facie* at least, still in the charge of that pilot, under ordinary circumstances. If the course pursued by the steam tug is in conformity with the directions of the pilot, or not against his directions, & a collision takes place, the pilot is responsible, & not the owners, or the steam tug, which ought to obey the pilot. If, however, the steamer disregarded the directions of the pilot, then the owners of the ship would be responsible, as for the acts of their servant, & the owners of the steam tug might be responsible over to them in another form of action (DR. LUSHINGTON).

(2) The vessel . . . was lying at anchor . . . if under these circumstances any other vessel runs against such a vessel, & does her damage, the burden of proof lies on the vessel doing the damage to exonerate herself, by showing that it was not her fault, & for this obvious & plain reason, a vessel at anchor cannot take measures to prevent a collision (DR. LUSHINGTON).—THE GIPSEY KING (1847), 2 Wm. Rob. 537; 5 Notes of Cases, 282; 9 L. T. O. S. 131; 11 Jur. 357; 166 E. R. 858.

*Annotations:*—*As to* (1) **Consd.** Hammond *v.* Rogers, The Christiania (1850), 7 Moo. P. C. C. 160; The Rigborgs Minde (1883), 8 P. D. 132; The Monte Rosa, [1893] P. 23. **Refd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451; The Margaret (1880), 5 P. D. 238.

**5088.** ——.]—PETLEY *v.* CATTO. THE CHRISTINA, No. 5069, *ante*.

for her detention at quarantine by reason of disease on the vessel towed, which existed at the time of making the contract & was not disclosed by her master; but he cannot make an extra charge for providing another tug to complete the towage after the expiration of the period of quarantine.—KAINE *v.* SORENSEN (1892), Q. R. 1 S. C. 184.—CAN.

**PART XI. SECT. 2, SUB-SECT. 5.**

*f. Impossibility after part performance—Effect on right to remuneration.*]—JEWELL *v.* CONNOLLY (1897), Q. R. 11 S. C. 265.—CAN.

*g. Tug frozen in.*]—*Semble:* it is no defence to an action against the commander of a steamboat for not towing, etc., that he could not perform his contract by reason of his towboat being unavoidably frozen in the ice.—DORLAND *v.* BONTER (1849), 5 U. C. R. 583.—CAN.

**PART XI. SECT. 2, SUB-SECT. 6.**

*h. To complete service.*]—*Held:* pltf.'s vessel with a fixed & known destination having been taken in tow

*Sect.* 2.—*Relation between tug and tow: Sub-sects.* 6, 7, 8 & 9. *Sect.* 3: *Sub-sect.* 1, *A.* (*a*).]

**5089.** ——.]—THE GLENBURN *v.* THE HOPE (1854), 10 L. T. 242.

**5090.** ——.]—THE MINNEHAHA, No. 5056, *ante*.

**5091.** —— **Compulsory pilotage.**]—(1) Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, & is, at the same time, in tow of a steam tug, the latter is bound to obey the orders of the pilot.

(2) In case of a mischief occurring to the vessel occasioned directly by the conduct of the steam tug, the tug, which had not noticed the pilot's signal, cannot in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the ground that if the pilot, when the mischief was about to happen, had himself done a certain thing, the mischief might possibly have been avoided.

(2) Great injustice might be done, if, in applying the doctrine of contributory negligence to a case of this sort, the maxim, *causa proxima, non remota, spectatur*, were lost sight of (LORD SELBORNE, C.).

(3) When the direct & immediate cause of damage is clearly proved to be the fault of deft.; contributory negligence by pltfs. cannot be established merely by showing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred (LORD SELBORNE, C.).

(4) Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for deft.'s fault, & if it had no proper connection as a cause with the damage which followed as its effect (LORD SELBORNE, C.).—SPAIGHT *v.* TEDCASTLE (1881), 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. L. C. 406, H. L.

*Annotations:*—*As to* (1) **Reld.** The Niobe (1888), 13 P. D. 55. *As to* (2) **Consd.** The Bernina (1887), 12 P. D. 58; The Altair, [1897] P. 105; The Adam W. Spies (1901), 70 L. J. P. 25. *As to* (3) **Consd.** Cayzer *v.* Carron Co. (1884), 9 App. Cas. 873; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. *As to* (4) **Reld.** Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129.

**5092. To obey positive directions of tow.**]—THE ROBERT DIXON, No. 5052, *ante*.

**5093.** —— **Admiralty regulations as to lights.**]—THE GLENBURN *v.* THE HOPE (1854), 10 L. T. 242.

**5094.** —— **One steamer meeting another with tow.**]—THE GLENBURN *v.* THE HOPE (1854), 10 L. T. 242.

**5095.** —— **No directions from tow.**]—SMITH *v.* ST. LAWRENCE TOW-BOAT CO., No. 5051, *ante*.

**5096.** —— **Tow a foreigner—Tug familiar with navigation.**]—THE ROBERT DIXON, No. 5052, *ante*.

**5097.** —— **Special circumstances—Tug better able to form opinion.**]—THE ISCA, No. 5107, *post*.

**5098.** —— **Whether tug in control a question of fact.**]—THE ISCA, No. 5107, *post*.

**5099. To complete service — Notwithstanding supervening danger to tow.**]—THE MINNEHAHA, No. 5056, *ante*.

**5100.** —— ——.]—If, in the performance of a contract to tow, an unforeseen & extraordinary peril arise to the vessel towed, the steam tug is not at liberty to abandon the vessel, but is bound to render her the necessary assistance, & thereupon becomes entitled to salvage reward.

These rights & obligations incident to a contract of towage are implied by law, & the law thereby secures equity to both parties & the true interests of the owners of ships.

A steam tug under contract to tow into dock was lashed alongside a vessel; in rounding to enter the dock basin the tide forced the vessel & the steam tug close to a landing stage, the steam tug next to the stage; the pilot of the vessel hailed the tug to hold on & go ahead, which the tug did, but was forced against the stage & injured:—*Held:* the steam tug was bound to endeavour to save the vessel from the impending peril, especially upon the order of the pilot, & so doing was entitled to salvage reward, including repayment of all damage & losses thereby incurred.—THE SARATOGA (1861), Lush. 318; 167 E. R. 140.

*Annotations:*—**Distd.** The England (1868), L. R. 2 P. C. 253. **Consd.** The City of Chester (1884), 9 P. D. 182; The Leon Blum, [1915] P. 90. **Reld.** Akerblom *v.* Price (1881), 7 Q. B. D. 129; Bird *v.* Gibb, The De Bay (1883), 8 App. Cas. 559.

**5101.** ——.]—THE WHITE STAR, No. 5075, *ante*.

**5102.** —— **Though compelled to cast off—Duty to resume tow with due speed.**]—The S. steam tug having been engaged to tow the ship A. other two ships came into collision with A. & other dangers were incurred in course of which the tug, to save herself let A. go, & afterwards, with another tug, resumed towing A., & finally assisted the other ships, & in the end claimed salvage from all three:—*Held:* though the tug, to save herself was entitled to let the ship A. go, yet she was bound to return with due speed to resume the towage of A. & in this case the tug did no more than her towage contract bound her to do. But as regards the other ships, she was entitled to salvage.—THE ANNAPOLIS, THE GOLDEN LIGHT, THE H.M. HAYES (1861), 1 Lush. 355; 5 L. T. 37; 1 Mar. L. C. 127; 167 E. R. 150, P. C.

*Annotations:*—**Apld.** The Vandyck (1882), 47 L. T. 694. **Distd.** The Emilie Galline, [1903] P. 106. **Consd.** The Leon Blum, [1915] P. 90. **Reld.** The Liverpool, [1893] P. 154.

**5103. To keep look out—For tug & tow.**]—THE JANE BACON, No. 5110, *post*.

**5104. Contract to take ship to dock—Ship unable to be docked—Duty to return ship to anchorage.**]—THE ABOUKIR (1905), 21 T. L. R. 200.

by a tug of defts., the inference must be that she was to be towed through to her place of destination with due & reasonable diligence, & that without a special agreement on the subject she should not be dropped or deserted at the pleasure of the owner of the tug.—GASKIN *v.* CALVIN & COOK (1853), 2 C. P. 527.—**CAN.**

**k.** ——.]—A party having two tugs, *A.* & *B.*, undertakes to supply tugs to two vessels *P.* & *Q.*, in the order of their engagements as soon as the tugs are free. *A.* is first free, & tows *P.*, which has the prior claim, to D., where she becomes disabled. *B.* subsequently tows *Q.* &, finding *A.* disabled at D., leaves *Q.* & tows *P.* out to sea, returning subsequently for *Q.*:—*Held:* *B.* was not justified in leaving *Q.* but that she ought to have towed her out to sea without interruption.—NOWRJEE NUSSERWANJEE *v.* JOHANNES (1862), 1 Hyde, 293.—**IND.**

**5103 l.** *To keep look out—For tug & tow.*]—WALDIE BROTHERS, LTD. *v.* FULLUM & FITZGERALD (1909), 12 Exch. C. R. 325.—**CAN.**

**l.** *In case of accident to tow.*]—It is the duty of a tug when engaged in towing to stand by in case of accident & also to return to part of the tow which is disabled or adrift, after leaving the remainder in safety. When supervening circumstances, stress of weather or other emergency are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel & its cargo, for the purpose of rendering assistance, but this duty is subject to the condition that the safety of the tug or its crew is not thereby endangered. The ct. must be satisfied that the attendant circumstances warrant such a conclusion.—RUSSELL *v.* THE GLORIA (Ont.), [1927] Exch. C. R. 162.—**CAN.**

SUB-SECT. 7.—DUTY OF TOW.

**5105. To direct course of tug.**]—A bargue in charge of a pilot who was on board her was being towed by a steam tug in waters where the employment of a pilot was compulsory. The tug ported her helm, & passed across the bows of a brig under way, there was no room for the barque to follow in her wake, & the barque came into collision with the brig. The pilot gave no orders to the tug before or after she ported, if he had given proper orders, even after the tug had ported, the collision might have been avoided:—*Held:* the tug was to blame for attempting to tow the barque across the bows of the brig; but the owners of the barque could not on account of the neglect of the pilot to give proper orders, recover against the tug damages in respect of the collision.—THE ENERGY (1870), L. R. 3 A. & E. 48; 39 L. J. Adm. 25; 23 L. T. 601; 18 W. R. 1009; 3 Mar. L. C. 503.

*Annotations:*—**Consd.** Spaight *v.* Tedcastle (1881), 6 App. Cas. 217. **Expld.** The Adam W. Spies (1901), 70 L. J. P. 25. **Refd.** The Englishman & The Australia, [1894] P. 239.

**5106. —— Tow at night with long hawser.**]—(1) The schooner *J. M. S.* having come into collision with a tug & her tow, a damage action *in rem* was instituted by the owners of the schooner against the tug to recover all the damages occasioned by the collision. Subsequently to the collision pltfs. received from the owners of the tow a sum of money, described in an agreement entered into between these parties "as an advance on account of the damages to be recovered from the owners of the tug." By the agreement it was agreed that the owners of the tow should give pltfs. all information & assistance necessary to bring the action to a successful issue; that if the schooner & the tug should both be held to blame, pltfs. should repay any sum by which the money already paid exceeded the moiety of damages recoverable against the tug, &, that, as a basis of the arrangement, it was understood that the schooner should be found blameless for the collision.

The ct. having found the tug alone to blame, held that the above payment was not such a payment by the tow in satisfaction of the damages occasioned by the collision as amounted to a settlement in discharge of the action, & was consequently no bar to the action & that, notwithstanding the advance paid by the tow, pltfs. were entitled to recover from the defts. all the damages occasioned by the collision.

(2) It is not the duty of those in charge of a tow which is being towed with a long scope of hawser by night at sea to direct the movements of the tug, the circumstances being different to towing by day in a river.—THE STORMCOCK (1885), 53 L. T. 53; 5 Asp. M. L. C. 470.

*Annotations:*—*As to* (1) **Consd.** The Seacombe, The Devonshire, [1912] P. 21. **Refd.** The Niobe (1888), 13 P. D. 55; The Devonian, [1901] P. 221.

**5107. —— Extent of supervision necessary.**]—(1) A county ct. has under County Courts Admiralty Jurisdiction (Amendment) Act, 1869 (c. 51), s. 2 (1), jurisdiction to entertain a claim for damage for breach of a contract of towage.

(2) It is the duty of those on board the vessel in tow to give general directions to the master of the tug as to the towage. But the master of the tug should exercise his discretion as to the proper manœuvres to be employed, especially where he is more competent to form an opinion on this point than the master of the vessel in tow.

(3) It would be a question of fact whether the master of the tug had not taken upon himself the responsibility of managing both the tug & the vessel in tow (HANNEN, J.).

(4) It does not follow that the vessel in tow is to be constantly interfering with the tug, it must depend on the place & on the circumstances, as whether there are numerous small vessels about (HANNEN, J.).—THE ISCA (1886), 12 P. D. 34; 56 L. J. P. 47; 55 L. T. 779; 35 W. R. 382; 6 Asp. M. L. C. 63.

**5108.** ——.]—THE NIOBE, No. 5053, *ante.*

**5109.** ——.]—THE ALTAIR, No. 5123, *post.*

—— **When duty of tug to direct course.**]—*See* Nos. 5088, 5095–5097, *ante.*

**5110. To follow manœuvres of tug.**]—(1) It is the duty of a ship towed by another to follow exactly all her manœuvres.

(2) When a ship is being towed in a sea where other vessels are likely to be met, it is her duty to have the means of immediately slipping or cutting the tow-rope.

(3) It is the duty of a ship towing another to keep a look out for both.

(4) A sailing vessel in danger from a steamship towing another vessel should do what she can to prevent an accident, though the fault is entirely that of the other ships.—THE JANE BACON (1878), 27 W. R. 35, C. A.

**5111. To be ready to slip tow-rope.**]—THE JANE BACON, No. 5110, *ante.*

**5112. To keep look-out.**]—THE NIOBE, No. 5053, *ante.*

**5113. To use ordinary care & skill—Implied obligation.**]—THE VALSESIA, No. 5071, *ante.*

SUB-SECT. 8.—LIABILITY FOR LOSS OR DAMAGE.

*See* Sect. 3, sub-sect. 1, *post.*

SUB-SECT. 9.—CONVERSION OF TOWAGE INTO SALVAGE.

*See* Part XV., Sect. 4, *post.*

## SECT. 3.—LIABILITY FOR LOSS OR DAMAGE.

SUB-SECT. 1.—LIABILITIES INTER SE.

*A. Liability of Tug.*

*(a) In General.*

**5114. General rule—Liability for wrongful acts.**]—Exposition of the principles of law in cases of damage, where the master of a vessel hires a steam tug to tow her to a certain destination, & the towed ship runs into the tug.

When such a contract is made, it in law implies an engagement that each party to the contract will perform his duty in completing it; that proper skill & diligence will be used on board both the vessel & tug; & that neither party, by neglect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happens to the one, without

**PART XI. SECT. 2, SUB-SECT. 7.**

**5105 1.** *To direct course of tug.*]—In an ordinary contract of towage the vessel in tow has control over the tug.—THE PRINCE ARTHUR *v.* THE FLORENCE (1891), 5 Exch. C. R. 151.—CAN.

**m.** *To keep rear end lighted & guarded.*]—KEARNEY *v.* DANSEREAU (1915), Q. R. 24 K. B. 401.—CAN.

*Sect.* 3.—*Liability for loss or damage: Sub-sect.* 1, *A.* (*a*) & (*b*).]

any default on the part of the other, no cause of action arises, as such accident is one of the necessary risks of the engagement to which each party was subject. But, on the other hand, if the wrongful act of either occasions any damage to the other, such wrongful act creates a responsibility on the party committing it, if the other party has not by any misconduct or unskilfulness on his part contributed to the accident.

A steam tug entered into an engagement to tow a vessel. By the misconduct of the master & crew of the vessel in tow, who acted contrary to the directions of the pilot on board the vessel, a collision occurred whereby the tug received damage :—*Held:* the owner of the tug was entitled to recover for damages, the collision being solely occasioned by the negligent acts of the master & crew of the towed vessel, as in a contract of towage each party contracts to use proper skill & diligence. —BLAND *v.* ROSS, THE JULIA (1860), 14 Moo. P. C. C. 210 ; Lush. 224 ; 15 E. R. 284, P. C.

*Annotations :*—**Consd.** The Energy (1870), L. R. 3 A. & E. 48. **Apld.** Smith *v.* St. Lawrence Tow Boat Co. (1873), L. R. 5 P. C. 308. **Apprvd.** Spaight *v.* Tedcastle (1881), 6 App. Cas. 217. **Apld.** The Altair, [1897] P. 105. **Refd.** Ward *v.* M'Corkill, The Minnehaha (1861), 15 Moo. P. C. C. 133 ; The Nightwatch (1862), Lush. 542. **Mentd.** North German Lloyd S.S. Co. *v.* Elder (1860), 14 Moo. P. C. C. 241 ; General Iron Screw Co. *v.* Moss, The Araxes, The Black Prince (1861), 15 Moo. P. C. C. 122 ; Grindley *v.* Stevens, The Falkland, The Navigator (1863), 1 Moo. P. C. C. N. S. 379 ; Trask *v.* The Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 213 ; Dean *v.* Mark, The Constitution (1864), 2 Moo. P. C. C. N. S. 453 ; The Alice & The Princess Alice (1868), L. R. 2 P. C. 245 ; The Esk & The Niord (1870), L. R. 3 P. C. 436 ; The Giannibanta (1876), 1 P. D. 283 ; The Transit (1876), 34 L. T. 934 ; Johnson *v.* Lindsay (1889), 23 Q. B. D. 508 ; The Ophelia, [1916] 2 A. C. 206 ; S.S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37.

**5115. Negligent towage — Taking additional vessels.**]—STAITE *v.* WEBB (1838), 100 L. T. 790.

**5116. —— Tow rope improperly dropped.**]—KINCAID *v.* WILLIS (1850), 14 L. T. O. S. 505.

**5117. —— Tow rope breaking.**]—THE ROBERT DIXON, No. 5052, *ante*.

**5118. —— Failure to obey pilot.**]—SPAIGHT *v.* TEDCASTLE, No. 5091, *ante*.

**5119. —— Slow speed — Turn of tide.**]—PRESTON CORPN. *v.* BIORNSTAD, THE RATATA, No. 5067, *ante*.

**5120. —— Effect of contributory negligence.**]—BLAND *v.* ROSS, THE JULIA, No. 5114, *ante*.

**5121. —— —— Navigation left to tug—During fog.**]—SMITH *v.* ST. LAWRENCE TOW-BOAT CO., No. 5051, *ante*.

**5122. —— —— Negligence of pilot—Omission to give directions.**] SPAIGHT *v.* TEDCASTLE, No. 5091, *ante*.

**5123.** —— —— —— ——.]—A barque, with a cargo of wheat from San Francisco put into Falmouth for orders & left that port for Hull in tow under a contract to pay the tug a fixed sum. The tug set the courses without interference from the tow but the latter regularly took soundings. When nearing the entrance to the Humber the

**PART XI. SECT. 3, SUB-SECT. 1.—A. (a).**

**5118 i.** *Negligent towage—Failure to obey pilot.*]—Where a tug deviated from an order of her tow, & was afterwards so deficient in skill as to allow the tow to collide with another vessel : —*Held:* the tug was liable for the consequence of the collision.—*Re* THE WILLIAM (1878), 4 Q. L. R. 306.—**CAN.**

**n.** —— *Failure to observe proper & reasonable precautions.*]—In an action for damages for negligently towing a ship, & so causing her destruction : —*Held:* as the tugs had not observed those proper & reasonable precautions in adopting & keeping the courses to be steered which a prudent navigator would have observed, & the accident was the result of their omission to do so, the owners of the tugs were liable.—SEWELL *v.* BRITISH COLUMBIA TOWING & TRANSPORTATION CO. (1883), 9 S. C. R. 527.—**CAN.**

**o.** —— *Master warned by owners not to undertake towage.*]—Defts.' steamer, which had previously been employed carrying freight & passengers, had gone out of commission, & while on her way to winter quarters, she took in tow pltfs.' scow, loaded with goods. After proceeding some way the weather became bad, & in endeavouring to get into shelter the scow foundered, & the whole cargo was lost. In an action for damages against the owners of the steamer, evidence was tendered by the owners that those in charge of the steamer had been practically warned not to do any towing, but this evidence (being objected to by pltfs.) was rejected. At the trial it was held that defts. were common carriers & therefore liable. On appeal :—*Held:* the appeal should be allowed with costs, & pltfs. could have a new trial upon payment of the costs of the first trial. —COURTNEY *v.* CANADIAN DEVELOPMENT CO. (1901), 8 B. C. R. 53.—**CAN.**

**p.** ——.]—In cases of towage where the tow is damaged by the unskilful navigation of the tug, quite apart from the contract of towage the duty is imposed on the part of the tug to observe such ordinary care & skill in the towage as will avoid any possible damage or injury.—MONTREAL TRANSPORTATION CO., LTD. *v.* THE BUCKEYE STATE (1908), 12 Exch. C. R. 419.—**CAN.**

**q.** —— *Faulty steering of tug—Failure to direct steering of tow—Absence of proper look-out.*]—A barge while being towed by a steam tug was stranded by the careless navigation of the tug, such carelessness subsisting in the faulty steering of the tug & failure to give proper directions as to the steering of the tow, coupled with the absence of a proper look-out on the tug :—*Held:* the tug was liable in damages to the owners of the barge.—WALDIE BROTHERS, LTD. *v.* FULLUM & FITZGERALD (1909), 12 Exch. C. R. 325.—**CAN.**

**r.** —— ——.]—LANNON *v.* THE LLOYD S. PORTER (1914), 15 Exch. C. R. 126.—**CAN.**

**t.** —— *Tug towing raft of logs—Failure to prevent drifting against shoal.*]—It is negligence on the part of a tug towing for hire a raft of logs to fail to navigate so as to prevent the logs from drifting against a shoal ; & it is contributory negligence on the part of those in charge of the raft to neglect to have the rear end of the tow lighted & leave the rear end unguarded.—KEARNEY *v.* DANSEREAU (1915), Q. R. 24 K. B. 401.—**CAN.**

**a.** —— *Failure to lash tow.*]—The tug *S.*, with a scow in tow, lashed diagonally to her port bow, was floating down a river with the tide & while going through a drawbridge, 85 feet in width, the scow struck a projecting boom stick, tearing off a stern plank. Scow & cargo were lost. The *S.* was properly navigated :—*Held:* the master of the *S.*, being thoroughly familiar with the situation, & the set of the tides & currents, & knowing that these would inevitably bring his port against the bridge, creating a dangerous, if not a necessarily fatal situation, was guilty of negligence in not lashing the tow to the starboard side & thus avoiding the possibility of accident ; where, even if the scow in such a case had been wholly sound, the direct consequences of the accident could not have been avoided, the fact of the scow being unseaworthy would not constitute contributory negligence on her part, & would not relieve the tug of any responsibility for damage due to her own negligence.—PATTERSON, CHANDLER & STEPHEN, LTD. *v.* THE SENATOR JANSON, [1919] 3 W. W. R. 458 ; 19 Exch. C. R. 105 ; 49 D. L. R. 166.—**CAN.**

**b.** ——.]—A tug & the vessel towed are to be considered as one ; & the tug is bound to use sufficient care to prevent the vessel towed meeting with an accident ; otherwise, the tug will be liable.—THE BRUNEL (1870), 4 I. L. T. Jo. 602.—**IR.**

**5120 i.** —— *Effect of contributory negligence.*]—Where negligence was charged against a tug for running her tow aground in an intricate channel : —*Held:* the accident was owing to the increased danger of the navigation at the beginning of winter ; the immediate cause was the shutting out of lights & the buoys of the channel being invisible ; & the tow was to blame for navigating without a pilot. —*Re* THE GUELPH (1883), 9 Q. L. R. 58.—**CAN.**

**5120 ii.** —— ——.]—The pilot of the tow & the pilot of the tug were both at fault in not having the course changed after passing a certain point in the river. The pilot of the tow discovered the mistake & gave notice to the tug, by executing the proper manœuvre in that behalf, but not until it was too late to avoid an accident which befell the tow :—*Held:* the owners of the tow could not recover from the owners of the tug.—THE PRINCE ARTHUR *v.* THE FLORENCE (1896), 5 Exch. C. R. 218.—**CAN.**

**c.** *What amounts to contributory negligence—Leaving rear end unlighted & unguarded.*]—KEARNEY *v.* DANSEREAU (1915), Q. R. 24 K. B. 401.—**CAN.**

**d.** —— *Unseaworthiness of tow.*]—PATTERSON, CHANDLER & STEPHEN,

weather became thick & a sounding indicating shallower water, the master of the barque was about to signal to the tug, when its vessel took the ground, the wind at the time being light & the sea smooth. A second tug then came up & as her master would not take less, the master of the barque agreed to pay £500 if she would assist the first tug in an endeavour to tow the vessel off that tide. The efforts of the two tugs proved unsuccessful & the second tug, having been sent to Grimsby for more tugs, returned with two others, whilst men from the shore assisted the crew in jettisoning some of the cargo. The four tugs then took hold of the vessel & she came off, & was subsequently safely docked at Hull. The owners, masters & crews of all four tugs claimed salvage.

Defts., the owners of ship, cargo, & freight, alleged that the stranding was due to the negligence of the first tug, & counterclaimed against her for the loss of cargo & for any salvage they might have to pay the other salvors. They further submitted that the agreement with the second tug should be set aside as unreasonable & made under duress: —*Held:* (1) the first tug was responsible for the direction of the course, & having been negligent in respect of it & in not taking soundings, her claim for salvage must be dismissed; (2) on the authority of *Smith* v. *St Lawrence Tow-Boat Co.*, No. 5051, *ante*, the counterclaim of defts. must also be dismissed as their master was guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather.—THE ALTAIR, [1897] P. 105; 66 L. J. P. 42; 76 L. T. 263; 45 W. R. 622; 13 T. L. R. 286; 8 Asp. M. L. C. 224.

*Annotations:—As to* (1) **Consd.** The Duc D'Aumale (No. 2), [1904] P. 60; The Harvest Home, [1904] P. 409. *Generally,* **Refd.** The Forfarshire (1908), 78 L. J. P. 44.

**5124.** —— —— —— **Compulsory pilotage.**]—Where a ship in tow of a steam tug suffers damage by reason of the negligence of those on board the tug, her owners are entitled to recover in respect of that damage from the owners of the tug, notwithstanding the fact that the negligence of a pilot in charge of the ship by compulsion of law contributed to the mischief.—THE ADAM W. SPIES (1901), 70 L. J. P. 25.

**Effect of special condition.**]—*See* Sub-sect. 1, A. (*b*), *post.*

**Liability for collision.**]—*See* Part XII., Sect. 6, sub-sect. 1, C. (*b*), *post.*

(*b*) *Special Conditions Relieving Tug.*

**5125. "Negligence or default"—Effect on implied warranty of fitness.**]—THE UNDAUNTED, No. 5058, *ante.*

**5126.** —— **Applies only to defaults in performing contract—Not to abandonment of tow.**]—Deft. contracted to tow pltfs.' schooner *C. P.* on a round voyage of which the first stage was Immingham to Hartlepool. Through the negligence of deft.'s tug masters the vessels got into Robin Hood's Bay on the night of Oct. 23. The tugs got aground & lost their hawsers & the *C. P.* came to anchor. The tugs got afloat on the early morning of Oct. 24 & proceeded to Hartlepool, leaving the *C. P.* in the bay with a rising N.E. wind. The *C. P.* remained in the bay making vain attempts to get out until Oct. 26, when about 3 p.m. she drifted on to the rocks & became a constructive total loss. It appeared that deft. had ordered another tug to go to the *C. P.*, but cancelled the order, as he thought, erroneously, that the Salvage Assocn. had sent tugs to her assistance. In an action by pltfs. for the loss of their vessel by reason of deft.'s breach of contract or duty deft. pleaded the exception clause in the towage contract whereby the tug owner was not responsible (*inter alia*) for "any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, . . . whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owner, or any of his servants or employees":—*Held:* as deft. had at any rate temporarily given up any attempt to continue the towage & had left the performance of his duty to others, he could not avail himself of the words "default of the steam tug owner," which only extended to cover defaults during the actual performance of the duties of the contract.—THE CAP PALOS, [1921] P. 458; 91 L. J. P. 11; 126 L. T. 82; 37 T. L. R. 921; 15 Asp. M. L. C. 403, C. A.

*Annotations:*—**Consd.** The Refrigerant, [1925] P. 130. **Mentd.** L. & N. W. Ry. *v.* Neilson, [1922] 2 A. C. 263; Buerger *v.* Cunard S.S. Co., [1925] 2 K. B. 616.

**5127.** —— —— ——.]—THE REFRIGERANT, No. 5074, *ante.*

**5128.** —— **Breach of harbour regulation.**]—The master of a steam tug who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants after the towage had been in part performed, took in tow in addition to the smack six other vessels, & in consequence was unable to keep the fishing smack in her course, so that she went aground & was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour master of Great Yarmouth under statutory authority:—

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LTD. *v.* THE SENATOR JANSON, [1919] 3 W. W. R. 458; 19 Exch. C. R. 105; 49 D. L. R. 166.—**CAN.**

e. *Effect of inevitable accident.*]—In an action against the owners of a tug, claiming damages for negligence in towing pltf.'s schooner, whereby she was injured, it appeared that the schooner in tow, going up a river, arrived at a narrow part of the river, &, having to make a sudden turn at a critical point in the river, was struck by a sudden squall of wind & forced on shore:—*Held:* the injury was due to inevitable accident, the tug being sufficiently powerful, & having been properly managed by those on board it; & the action should be dismissed. —ATWOOD *v.* CANN (1893), 40 N. S. R. 136.—**CAN.**

f. ——.]—If, in the course of the performance of the contract of towage any inevitable accident happens to the one, without any default on the part of the other, no cause of action will arise.—READ *v.* THE LILLIE (1907), 11 Exch. C. R. 274.—**CAN.**

g. ——.]—MCCORMICK *v.* SINCENNES-MCNAUGHTON LINE, LTD., UNION LUMBER CO., LTD. *v.* SINCENNES-MCNAUGHTON LINE, LTD. (Ont.) (1919), 18 Exch. C. R. 357; 45 D. L. R. 392.—**CAN.**

h. —— *What amounts to inevitable accident.*]—In attempting to avoid a collision with a black gas buoy in a channel, which became invisible owing to a snowstorm, the master of a tug, after passing an upbound steamer, starboarded his vessel & ran his tow, composed of several barges, into shallow water, thereby bringing about a collision between them:—*Held:* it was not an inevitable accident & could have been avoided by the exercise of ordinary caution & maritime skill; the collision was caused by the improper starboarding of the tug, its failure to take soundings, & the failure to anchor.—GIFF *v.* SINCENNES-MCNAUGHTON LINE, LTD. (Que.) (1919), 18 Exch. C. R. 366; 45 D. L. R. 402.—**CAN.**

k. *Jurisdiction of maritime court.*]—The maritime ct. cannot entertain a cause of damage to a tow, arising from the negligence of the towing vessel where no collision between vessels occurs.—THE SIR S. L. TILLEY, 8 C. L. T. Occ. N. 156.—**CAN.**

l. *Damages—Right to include freight—Cargo forwarded by tug owners.*]—Pltfs. had undertaken to carry a cargo of stone in their schooner from C. to P., & had got as far as K., where she was injured by the negligence of defts.' servants in towing her. The stone was forwarded by defts. to P. In an action brought by pltfs. for the injury:—*Held:* they could not recover as damages any part of the freight, for they might adopt defts.' act, & recover the whole from the consignees.—STEVENSON *v.* CALVIN (1865), 25 U. C. R. 102.—**CAN.**

*Sect. 3.—Liability for loss or damage: Sub-sect. 1, A. (b), & B.; sub-sect. 2. Part XII. Sect. 1.]*

*Held:* the loss of the smack was occasioned by the negligence of the master of the tug, but the owners were protected from liability by the terms of the towage contract.—THE UNITED SERVICE (1883), 9 P. D. 3; 53 L. J. P. 1; 49 L. T. 701; 32 W. R. 565; 5 Asp. M. L. C. 170, C. A.

*Annotation:*—**Refd.** The Westcock (1911), 104 L. T. 736.

**5129. —— Insufficient supply of coal.**]—THE UNDAUNTED, No. 5058, *ante*.

**5130. ——.**]—F. & co., a firm of river carriers, hired a barge from J. for a period of twelve months. While on hire, the barge, which was being towed with five others belonging to various owners by a tug owned by defts., through the negligent navigation of the tug came into collision with pltfs.' barge & damaged her. Defts. admitted liability, but claimed to be indemnified either by H. or F. & co., or by both of them, under the conditions of the terms of towage.

The first term was "that on the hiring or employment of the steam tug the master & crew thereof shall be held to become the servants of & identified with the vessel or craft being towed, & under the control of the person in charge of such vessel or craft during the performance of the contract."

The next sentence, a long one, was in two parts; the first, an exception clause relieving the tug owners from responsibility for various acts, neglects & defaults, ended with a semicolon, & continued as follows "& the owners or persons interested in the vessels or craft so being towed . . . shall & do undertake to bear, satisfy & indemnify the steam tug owners against all liability for the above-mentioned matters & against all costs & charges in respect of any law expenses or actions that may arise or be brought against the said tug owners in relation to any such loss or damage, actual or alleged."

On the facts, the ct. found that the contract with defts. to tow the barge was made on behalf of F. & co. only:—*Held:* although the first sentence of the conditions of towage might be inapplicable to a case where more than one barge was in tow, it did not follow that the remainder was inapplicable; F. & co. were "persons interested" in the craft being towed, & the conditions imposed upon them an obligation to indemnify defts.; under the indemnity for costs, defts., so far as their own costs against pltfs. were concerned, were entitled to costs as between solr. & client.—THE RIVERMAN, [1928] P. 33; 97 L. J. P. 39; 138 L. T. 303.

**5131. "Perils of the sea"—Master of tug exercising honest judgment.**]—Where the owner of a steam tug contracts to tow a hull into a port, subject to a condition that he is not to be liable for the breaking of hawsers or perils of the sea, & the master, exercising an honest judgment, does what eventually leads to the loss of the hull by reason of perils of the sea, the owner is not liable for negligence.—ORGE *v.* NEW STEAM-TUG CO. (1858), 31 L. T. O. S. 85.

**5132. "All transporting to be at owner's risk"—No protection against negligence.**]—By a tender in writing, accepted by pltfs., defts. undertook to carry out certain repairs to pltfs.' vessel, &, for that purpose, to "transport vessel from berth to dry dock, finding all tugs, pilots, watermen & boats, sufficient hands for managing ship . . . & all items of transportation to loading berth." In the margin were printed the words "all transporting to be at owners' risk."

During the transportation of the vessel at night, with the aid of one tug, from dry dock to loading berth, she got adrift from the tug, & sustained damage, owing to the parting of an alleged defective rope belonging to the ship, & to the delay caused by the thimble eye of a wire hawser, also belonging to the ship, not fitting the towing hook:—*Held:* defts. were liable, for, after undertaking to find "all items of transportation," they had omitted to ascertain that the necessary items, whether belonging to the ship or not, were efficient for the purpose, & owing to this neglect on their part, two tugs were, in the particular case, required for the safe handling of the vessel. Defts., therefore, could not avail themselves of the marginal note as a protection against their own negligence, for the meaning of the contract, in respect of the transportation, was that, if defts. exercised reasonable care & skill in carrying it out, pltfs. would incur the risks incidental to navigation.—THE FORFARSHIRE, [1908] P. 339; 78 L. J. P. 44; 99 L. T. 587; 11 Asp. M. L. C. 158.

*Annotation:*—**Consd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry. (1914), 111 L. T. 41.

**5133. —— "Tug finding all items of transportation"—Failure to ascertain necessary items.**]—THE FORFARSHIRE, No. 5132, *ante*.

**5134. Damage arising from "towing gear"—Limited to defects arising during towage—Defective rivets at commencement.**]—THE WEST COCK, No. 5055, *ante*.

**5135. —— Meaning of "towing gear"—Rivets attached to bulkhead.**]—THE WEST COCK, No. 5055, *ante*.

**5136. Notice of condition—Question of fact.**]—The master of a steam tug, of which defts. were owners, was employed by pltf. to tow his smack out of a harbour. In so doing the smack was stranded through the alleged negligence of the master. Pltf. had on previous occasions hired defts.' steam tug, & on paying the charge had received a receipt, upon the back of which was printed a notice that defts. would not be answerable for damage occasioned by any supposed negligence of their servants:—*Held:* it was a question for the jury whether the contract was made on the terms printed on the back of the receipts.—SYMONDS *v.* PAIN (1861), 6 H. & N. 709; 30 L. J. Ex. 256; 158 E. R. 293.

*Annotation:*—**Mentd.** R. *v.* Dennis, [1894] 2 Q. B. 458.

**5137. Acceptance of condition—Condition applicable to specified tugs—Damage by unspecified tug—Owner of tow director of tug company.**]—A tug while towing pltf.'s vessel came into collision with & sank her. The tug was chartered by defts., a co., to work with their own tugs, & one of the terms on which the co. towed vessels was that they would not be answerable for loss or damage to any vessel in tow of their tugs, which were specified by name, whether occasioned by the negligence of their servants or otherwise. The tug in question was not one of those specified, but pltf. was a director of deft. co., & was aware of the chartering of the tug:—*Held:* pltf. must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the co., & his claim was therefore barred by the condition.

By the terms of the above charterparty defts. were to appoint a captain as pilot, & all damages were to be for charterer's account. The collision was occasioned solely by the negligence of defts.' captain:—*Held:* an action *in rem* would not lie against the tug, for the maritime lien arising from collision is not absolute, & the owners not being personally liable for this collision, & the charterers being exempted by the terms of their contract with pltf., the *primâ facie* liability of the vessel was rebutted.—THE

TASMANIA (1888), 13 P. D. 110; 57 L. J. P. 49; 59 L. T. 263; 6 Asp. M. L. C. 305.
*Annotations:*—**Mentd.** The Ripon City, [1897] P. 226; The Hopper No. 66, [1906] P. 34; The Sylvan Arrow, [1923] P. 220.

**5138. Method of raising issue—Reply to defence of tow—Equivalent to new claim.**]—THE HIGHLAND GLEN (1927), 164 L. T. Jo. 480, C. A.

**Contract of indemnity—Effect on liability for collision.**]—*See* Part XII., Sect. 6, sub-sect. 1, C. (*b*), *post*.

*B. Liability of Tow.*

**5139. Liability for wrongful acts—Effect of contributory negligence.**]—BLAND *v.* ROSS, THE JULIA, No. 5114, *ante*.

**5140. —— Negligence—Tug prevented from completing agreement.**]—THE VALSESIA, No. 5071, *ante*.

**—— Collision.**]—*See* Part XII., *post*.

**Salvage.**]—*See* Part XV., *post*.

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SUB-SECT. 2.—LIABILITY TO THIRD PARTIES.

**5141. Whether tow responsible for acts of tug.**]—THE KINGSTON-BY-SEA, No. 5985, *post*.

**5142.** ——.]—THE NIOBE, No. 5053, *ante*.

**5143. —— Failure to carry light.**]—THE HESTER *v.* THE GIRAFFE (1853), 10 L. T. 242.

**5144. —— Dependent on facts.**]—A tow is not liable in law for the wrongful act of her tug merely because of the relation of tug & tow. Whether a tow is liable or not depends on the facts in each case.

A barge in tow of a tug collided with a steamship. The control of the navigation of the tug & barge was in the hands of those on the tug:—*Held:* on the evidence given the steamship was to blame for not keeping her course & speed, &, as the tug was also to blame, & the cargo was not to blame, pltfs. were entitled to recover the whole of their damage from the owners of the steamship.—THE SEACOMBE, [1912] P. 21; 81 L. J. P. 36; 106 L. T. 246; 28 T. L. R. 107; 56 Sol. Jo. 140; 12 Asp. M. L. C. 142, C. A.

**5145.** —— ——.] DEVONSHIRE (OWNERS) *v.* BARGE LESLIE (OWNERS), No. 5326, *post*.

**5146. Liability for negligence—Although no actual damage by tow.**]—THE NIOBE, No. 5053, *ante*.

**5147. —— Unless due to sudden manœuvre of tug.**]—THE NIOBE, No. 5053, *ante*.

**Liability for collision.**]—*See* Part XII., Sect. 6, sub-sect. 1, C. (*a*), *post*.

# Part XII.—Collisions.

SECT. 1.—**DEFINITION.**

**5148. Striking together of navigable objects.**]—Pltf. underwrote a time policy on a steamer, containing a clause that if the steamer should come into collision with any other vessel & the insured should have to pay damages the insurers would pay. Deft. underwrote a policy of re-insurance on the same steamer for same period, subject to same clauses & conditions as the original policy & to pay as might be paid thereon, but only to pay all claims for loss or damage done or received through collision. During the period covered the steamer struck a barge, which had just been sunk by collision with another vessel & the steamer was damaged. The barge was raised next day, & sailed to her home port & was repaired:—*Held:* although at the moment when the steamer struck her, the barge could not have been navigated, yet, as she became navigable as soon as she was raised there was a collision between two navigable vessels, in respect of which pltf. was entitled to recover on the policy of re-insurance.

"Collision," when used alone, without other words, means two navigable things coming into contact (BIGHAM, J.).—CHANDLER *v.* BLOGG, [1898] 1 Q. B. 32; 67 L. J. Q. B. 336; 77 L. T. 524; 14 T. L. R. 66; 8 Asp. M. L. C. 349; 3 Com. Cas. 18.
*Annotation:*—**Refd.** Mancomunidad Del Vapor Frumiz *v.* Royal Exchange Assce., [1927] 1 K. B. 567.

**5149.** ——.]—The true meaning of collision is not a mere striking against, but a striking together (GORELL BARNES, J.).—THE NORMANDY, [1904] P. 187; 73 L. J. P. 55; 90 L. T. 351; 52 W. R. 634; 20 T. L. R. 239; 9 Asp. M. L. C. 568, D. C.
*Annotations:*—**Consd.** The Upcerne, [1912] P. 160. **Refd.** Mancomunidad Del Vapor Frumiz *v.* Royal Exchange Assce., [1927] 1 K. B. 567.

**5150. Collision between two "ships"—Meaning of "ship."**]—A collision took place between a steamship & a fishing coble. The coble sank, & three men on board were lost. The coble was of ten tons burthen, twenty four feet in length, decked forward only, with two movable masts, & a sail for each. She was accustomed to go twenty miles out to sea, & to remain out for some hours at a time, & was usually under sail, but was sometimes propelled by oars when convenient. An inquest was held on the body of one of the men who was lost, & a solr. appointed by the Board of Trade took notes of the evidence, & forwarded them to the Board, who applied to two justices to hold an inquiry into the collision. The justices held the inquiry, decided that the coble was a seagoing ship, that there was a collision between two ships, & that the master & mate of the steamer did not duly render assistance to save life, & ordered that the certificates of the master & mate of the steamer should be suspended for three months:—*Held:* (1) if the coble were a ship, one ship had caused loss to another, & even if she were not, there was a casualty to the steamship, & therefore there was a case for investigation by the magistrates under 17 & 18 Vict. c. 104, s. 433; (2) the word "ship" applied to all craft

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**PART XI. SECT. 3, SUB-SECT. 1.—B.**

m. *Liability for wrongful acts—Negligence—Navigating without pilot in intricate channel.*]—*Re* THE GUELPH (1883), 9 Q. L. R. 58.—**CAN.**

**PART XI. SECT. 3, SUB-SECT. 2.**

**5141 i.** *Whether tow responsible for acts of tug.*]—Defts. placed their own scow & a hired tug, of which the master was the owner, alongside pltf.'s scow, by order of the foreman of defts.' scow, to whose orders the master of the tug was bound to conform. Pltf.'s scow caught fire from sparks emanating from the smoke stack of the tug, & was destroyed:—*Held:* defts. were bound to omit no reasonable precautions to avoid injuring pltf.'s property; & they were liable for the negligence of the master of the tug in so placing it as to communicate fire to pltf.'s scow, as in so doing he was obeying the order of defts.' foreman, & was under his direct & personal control.—CRAM *v.* RYAN (1894), 25 O. R. 524.—**CAN.**

**5141 ii.** ——.]—Tow held liable for negligence in the navigation of the tug.—THE WANDRIAN *v.* HATFIELD (1907), 38 S. C. R. 431.—**CAN.**

which substantially went to sea & only used oars as an auxiliary power, & there had been a collision between two ships within 25 & 26 Vict. c. 63, s. 33, & therefore the order was good.—*Ex p.* FERGUSON (1871), L. R. 6 Q. B. 280; 40 L. J. Q. B. 105; 24 L. T. 96; 19 W. R. 746; 1 Asp. M. L. C. 8; *sub nom. Re* THAMES STEAMER, *Ex p.* FERGUSON, 35 J. P. 468.

*Annotations:*—*As to* (2) **Consd.** The C. S. Butler (1874), L. R. 4 A. & E. 238; The Mac (1882), 7 P. D. 126. **Refd.** The Gas Float Whitton No. 2, [1896] P. 42. *Generally,* **Mentd.** The Gauntlet (1871), L. R. 3 A. & E. 381.

**For purposes of Admiralty jurisdiction.**]—*See* ADMIRALTY, Vol. I., pp. 139–143, Nos. 467–509.

**For purposes of county court jurisdiction in Admiralty.**]—*See* ADMIRALTY, Vol. I., pp. 245, 246, Nos. 1722–1733.

**For purposes of marine insurance.**]—*See* INSURANCE, Vol. XXIX., pp. 213–215, Nos. 1702–1716.

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## SECT. 2.—RULES OF GOOD SEAMANSHIP.

### SUB-SECT. 1.—LAUNCHING A VESSEL.

**5151. Duty to give notice of launch—Customary or reasonable notice.**]—(1) When a launch is about to take place in a river, reasonable notice of the intended launch should be given; & such notice must be sufficiently specific, with respect to the time when the launch is to take place, as to prevent vessels navigating in the river from unknowingly incurring risk or loss.

(2) It is further necessary that a good look out should be kept, & great care should be taken to prevent the launch from coming into collision with any other vessel.—THE BLENHEIM (1846), 2 Wm. Rob. 421; 4 Notes of Cases, 393; 10 Jur. 79; 166 E. R. 814.

*Annotations:*—*As to* (1) **Folld.** The Vianna (1858), Sw. 405. **Refd.** The Glengarry (1874), 2 P. D. 235; The Highland Loch, [1911] P. 261. *As to* (2) **Refd.** The Highland Loch, [1911] P. 261.

**5152.** —— ——.]—(1) On the occasion of a ship's launch, those in charge of the launch are bound to give the customary notice; if there is no custom, then reasonable notice.

As to what is adequate notice, if one custom is universally observed, it is sufficient to show that that custom was followed, because . . . no one is bound to do more than the custom of the place requires. . . . You will have to consider whether, in the circumstances, those in charge of the launch ought not to have obtained the assistance of the harbour-master to keep the way clear, or at least whether they ought not to have had boats in attendance to give timely warning to vessels (DR. LUSHINGTON).

(2) The party launching must prove that such notice was given.

(3) Vessels navigating the river are bound to observe reasonable signals of an intended launch.—THE VIANNA (1858), Sw. 405; 166 E. R. 1187.

*Annotations:*—*As to* (1) **Refd.** The Glengarry (1874), 2 P. D. 235; The Highland Loch, [1911] P. 261. *As to* (3) **Refd.** The Highland Loch, [1911] P. 261. *Generally,* **Mentd.** The Milan (1861), Lush. 388.

**5153.** —— ——.]—(1) Before a launch takes place, it is the duty of those conducting it to give a sufficient notice according to the usages of the place.

(2) If in the course of a launch a collision takes place, the burden of proof is upon those engaged in the launch to show that sufficient notice had been given of the intended launch.

(3) In a cause of damage by collision with a launch, sufficient notice having been given of the intended launch, the other ship was held to blame for not having kept out of the way.

(4) In the river Mersey to give notice of a launch taking place it is customary to have the ship dressed in flags for an hour or more before high water, about which time the launch takes place; to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying; & there are usually a number of small boats lying off ready to pick up timber when the ship comes away.—THE GLENGARRY (1874), 2 P. D. 235, n.; 43 L. J. Adm. 37; 30 L. T. 341; 23 W. R. 110; 2 Asp. M. L. C. 230.

*Annotations:*—*As to* (3) **Apld.** The Cachapool (1881), 7 P. D. 217. *Generally,* **Refd.** The Andalusian (1877), 2 P. D. 231; The Highland Loch, [1911] P. 261.

**5154.** —— ——.]—When a vessel is launched in a river the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions & of giving such notice as is reasonable & sufficient to prevent any injury to passing vessels.—THE ANDALUSIAN (1877), 2 P. D. 231; 46 L. J. P. 77.

*Annotations:*—**Folld.** The George Roper (1883), 8 P. D. 119. **Refd.** The Highland Loch, [1911] P. 261; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129. **Mentd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**5155.** —— **Rules of the Mersey.**]—THE GLENGARRY, No. 5153, *ante.*

**5156.** —— ——.]—THE GEORGE ROPER, No. 5162, *post.*

**Local navigation rules of the Mersey.**]—*See* Sect. 4, sub-sect. 7, *post.*

**5157. Evidence of notice—Onus of proof.**]—THE VIANNA, No. 5152, *ante.*

**5158.** —— ——.]—THE GLENGARRY, No. 5153, *ante.*

**5159. Precautions to prevent collision.**]—ALCOCK *v.* DOXFORD (1850), 7 L. T. 102.

**5160.** —— **Look out.**]—THE BLENHEIM, No. 5151, *ante.*

**5161.** —— **Signal.**]—The *U.*, a tug steamer, when being launched in the river Tyne, ran stern foremost into the starboard side of the steamer *Otter*, then passing down the river, & negligently being at that place:—*Held:* notwithstanding the *Otter's* negligence, the *U.* might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, & therefore, both being to blame, half the damage only was payable by *U.*—THE UNITED STATES (1865), 12 L. T. 33; 2 Mar. L. C. 166, P. C.

*Annotations:*—**Refd.** The Glengarry (1874), 2 P. D. 235; The Highland Loch, [1911] P. 261.

**5162.** —— **Attendance of tug bearing requisite warning.**]—Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being in the circumstances no more than reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, &, if necessary, to warn approaching vessels.—THE GEORGE ROPER (1883), 8 P. D. 119; 52 L. J. P. 69; 49 L. T. 185; 31 W. R. 953; 5 Asp. M. L. C. 134.

*Annotations:*—**Refd.** The Highland Loch, [1911] P. 261; Admiralty Comrs. *v.* S.S. Voluto, [1922] 1 A. C. 129.

**5163.** —— **Duty of vessels in vicinity.**]—THE BLENHEIM, No. 5151, *ante.*

**5164.** —— ——.]—THE VIANNA, No. 5152, *ante.*

**5165.** —— ——.]—THE UNITED STATES, No. 5161, *ante.*

**5166.** —— ——.]—THE GLENGARRY, No. 5153, *ante.*

**5167.** —— ——.]—*Semble:* a vessel at anchor in the track of a vessel about to be launched is bound to get out of the way of the launch if she

has had warning of the launch in due time & facilities for moving out of the way in time, such as a tug offering & being ready to tow her, are afforded those in charge of the launch.—THE CACHAPOOL (1881), 7 P. D. 217; 46 L. T. 171; 4 Asp. M. L. C. 502.

*Annotations:*—**Refd.** The Highland Loch, [1911] P. 261. **Mentd.** Mersey Docks & Harbour Board, Gore & Durrant *v.* Cunard S.S. Co., The Servia, The Carinthia (1898), 78 L. T. 54; Sea Insce. *v.* Blogg (1898), 78 L. T. 785; The Servia, The Carinthia, [1898] P. 36.

**5168. —— —— Request to slip anchor—Unreasonable refusal to comply.**]—Defts., being about to launch a steamship which they had built in their shipbuilding yard on the Mersey, arranged with the owners of a buoy which was thought to be in the line of the launch for its removal. The buoy was removed, but its mooring chains were left unmarked at the bottom of the river. Pltf.'s ketch, which was sailing up the river on the flood tide on the morning of the intended launch, finding the wind falling light, let go her starboard anchor & drifted up the river dragging her anchor, which fouled the mooring chains. The master being unable to free the anchor, defts. sent messages to him warning him that his ketch was in a dangerous position & advising him to slip his anchor & clear away, but the master refused to slip unless defts would make themselves answerable for the anchor. Defts., deeming it dangerous to life & property to postpone the launch & believing the risk of a collision with the ketch to be slight, launched the steamship, & a collision occurred. In an action of damage by collision brought by the owners of the ketch:—*Held:* the ketch acted unreasonably in refusing to slip her anchor & was alone to blame, inasmuch as defts., in the dilemma in which they were placed by the action of the ketch, rightly chose the lesser of two risks.—FRANCES (OWNERS) *v.* HIGHLAND LOCH (OWNERS), THE HIGHLAND LOCH, [1912] A. C. 312; 81 L. J. P. 30; 106 L. T. 81; 28 T. L. R. 213; 12 Asp. M. L. C. 106, H. L.

SUB-SECT. 2.—GETTING UNDER WAY.

**5169. Want of due caution—Towing vessel from dock to dock at night.**]—*Held:* to be a want of due caution to move, by means of a steam tug, a ship from one dock to another, at night time. Under such circumstances, a pilot on board the ship being towed has no such charge or control over her movements as to exculpate the owners.—THE BORUSSIA (1856), Sw. 94; 27 L. T. O. S. 72; 4 W. R. 502; 166 E. R. 1037.

**5170. —— Endangering other vessels.**]—Where the improper navigation of deft.'s vessel consisted in getting under way for the purpose of docking, under circumstances which rendered that proceeding dangerous to other vessels, & deft. only proved that the pilot, as well as the captain, was on deck giving general orders, but did not prove the particular order, nor produce the pilot as a witness:—*Held:* deft. remained liable for the damage.—THE CARRIER DOVE (1863), Brown. & Lush. 113; 2 Moo. P. C. C. N. S. 260; 167 E. R. 321, P. C.

*Annotations:*—**Mentd.** The Livia (1872), 25 L. T. 887; Oakley *v.* Speedy (1879), 40 L. T. 881.

**5171. —— Inadequate lights.**]—When a vessel casting off from moorings in a navigable river places herself at night partly athwart the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river, she is bound to make use of some conspicuous signal to warn them of her position.—THE JOHN FENWICK (1872), L. R. 3 A. & E. 500; 41 L. J. Adm. 38; 26 L. T. 322; 1 Asp. M. L. C. 249.

SUB-SECT. 3.—CARRYING AND DROPPING ANCHOR.

**5172. Steamer grounding in front of overtaken schooner—Duty of schooner to drop anchor—To avoid collision.**]—Where a steamer coming up a river during a high spring tide, & late at night, after passing a schooner also coming up the river, took the ground, & whilst aground was subsequently run into by the schooner:—*Held:* even assuming the steamer to have been 300 yds. ahead when she grounded, it was not the duty of the schooner, under the circumstances, to have dropped her anchor, with the view of avoiding the collision & the steamer was solely to blame.—THE ELIZABETH, THE ADALIA (1870), 22 L. T. 74; 3 Mar. L. C. 345.

**5173. Vessel prevented from dropping anchor—Inevitable accident.**]—(1) A vessel in port was moored to a buoy, the use of which was sanctioned by the authorities, & a storm being expected, she also had her anchor ready to drop. The mooring buoy broke & the vessel drifted. She attempted to cast anchor, but was prevented by inevitable accident. She came into collision with another vessel which was properly moored:—*Held:* the first vessel had not contributed by negligence to the collision.

(2) Where the master of a ship takes all such precautions as a man of ordinary prudence & skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible precaution which the event suggests that he might have resorted to.

(3) When the authorities of a port permit vessels to moor & take in & discharge cargo at a certain buoy, it must be assumed that they sanction the use of the buoy & treat it as a proper & sufficient mooring place.—DOWARD *v.* LINDSAY, THE WILLIAM LINDSAY (1873), L. R. 5 P. C. 338; 29 L. T. 355; 22 W. R. 6; 2 Asp. M. L. C. 118, P. C.

*Annotations:*—*As to* (1) **Foll.** The Virgo (1876), 35 L. T. 519. *As to* (2) **Refd.** The Pladda (1876), 2 P. D. 34.

**5174. Second anchor—Duty to ensure efficiency of.**]—The steamship *J.*, riding to her port anchor in the Downs, where a number of vessels were brought up, was run into & broken adrift by the steamship *Z.* There was an ebb tide of the force of three or four knots, & the *J.*, drifted down & collided with the steamship *C.*, which was anchored about 500 yards away. The starboard anchor of the *J.* was on the forecastle head & could only be let go by means of the crane & catfall. Two of the blocks of the catfall were broken by the first collision. There was evidence that if the catfall had been uninjured it would have taken eight to ten minutes to let go the anchor. The engines of the *J.* were put full speed ahead when it was found that the second anchor could not be used. In an action by the owners of the *C.* against the

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n. *Duty of master to test his helm.*]—Careful navigation requires that the master of a ship, in a narrow channel in leaving the bank, with another vessel oncoming, should first test his helm, & if he decides to trust his engines & steering gear, he should make provision for a possible breakdown or the unanticipated force or effect of the current from the oncoming ship, & his crew should be so placed as to be prepared to meet the consequences of such a contingency.—POPLAR BAY S.S. Co. *v.* THE CHARLES DICK, [1926] Exch. C. R. 46.—CAN.

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owners of the *J.* & the owners of the *Z.* :—*Held:* both the *J.* & the *Z.* were to blame. The *Z.* was to blame for her negligence in breaking the *J.* adrift, & the *J.* was also in fault inasmuch as in a place like the Downs ordinary careful seamanship required that, whether steam was being kept up or not, the second anchor should be so placed that it could be let go at once if necessity arose.—THE JESSIE & THE ZAANLAND, [1917] P. 138; 86 L. J. P. 108; 117 L. T. 342; 33 T. L. R. 367; 14 Asp. M. L. C. 139.

**Local rule in Thames.**]—*See* Sect. 4, sub-sect. 12, C., *post.*

SUB-SECT. 4.—STEERING GEAR.

**5175. Breakdown of steam steering gear—Failure to have hand gear available.**]—In an action of damage by collision, it appeared that pltf.'s vessel was at anchor in the Mersey when deft.'s steamer ran into her in broad daylight. The defence was that the steam steering gear of deft.'s vessel failed to act in consequence of some latent defect, or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of defts. & that the collision & damage were caused by inevitable accident. The steam steering gear in question was good of its kind; it had never previously failed to act, & the cause of the defect in the machine, or of the obstruction in the working, could not be discovered by competent persons. Part of the gear, including some portion of the chain, running between the wheel & the rudder, had been recently renewed, & it was admitted that new chain is liable to stretch, but it was proved that before the vessel left her anchorage to proceed on her voyage, the whole of the gear had been tested & found in good order, & that the chain had been tightened up as occasion seemed to require:—*Held:* defts. were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, & disprove the *primâ facie* evidence of negligence, it was necessary for them to show that the cause of the accident was one not produced by them, & the result of which they could not avoid, but defts. knew of the tendency of new chain to stretch, & therefore that an accumulation of links at the leading wheels might possibly cause jamming, & considering the crowded condition of the river where the accident occurred, the use—or readiness for immediate use—of hand, instead of steam, steering gear, was a means by which the result could have been avoided.—THE MERCHANT PRINCE, [1892] P. 179; 67 L. T. 251; 8 T. L. R. 430; 7 Asp. M. L. C. 208, C. A.

*Annotations:*—**Refd.** The Turret Court (1900), 69 L. J. P. 117; The Calderon (1912), *Times*, Mar. 26; The Olympic & H.M.S. Hawke, [1913] P. 214.

**5176.** —— ——.]—It is the duty of those in charge of a steamship steered by steam gear in a narrow river, where the navigation is difficult & other vessels are likely to be met, to have the hand gear available for use in case of the failure of the steam steering gear, even where there is no reason to apprehend the failure of the steam gear.—THE TURRET COURT (1900), 69 L. J. P. 117.

SUB-SECT. 5.—TAKING TUG ASSISTANCE.

**5177. Failure to obtain tug assistance—Steamship taking up anchor in gale.**]—A steamship whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manœuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway & the full force of a strong gale, the towing hawser parted, & she was driven ashore, doing damage to pltf.'s property. There was no negligence on the part of the ship after she took the assistance of the tug. The Trinity Masters having advised the ct. that the breaking of the tow rope was a thing that would "very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided with the pier, & considering the wind & weather she would meet whilst being towed:—*Held:* the damage following upon such breaking of the tow rope was a natural consequence of deft.'s original negligence, & the owners of the ship were liable for such damage.—THE GERTOR (1894), 70 L. T. 703; 7 Asp. M. L. C. 472.

SUB-SECT. 6.—LOOK OUT.

**5178. Necessity for look out.**]—(1) The rule is, that when two vessels approach each other on opposite tacks, especially when one is close-hauled & the other has the wind free, the latter must give way; & if both have the wind against them, the one on the larboard tack must give way, & the one on the starboard tack keep her course (DR. LUSHINGTON).

(2) It is the duty of the officers & crew to take care that a look out is kept (*per* CUR.).—THE SERINGAPATAM (1846), 2 Wm. Rob. 506; 5 Notes of Cases, 61; 166 E. R. 847.

**5179.** ——.]—A steamer with sails up, running through a roadstead, ought even by daytime & in fine weather to have a man on the look out besides the captain on the bridge.—THE GLANNIBANTA (1876), 1 P. D. 283; 24 W. R. 1033; *sub nom.* THE TRANSIT, 34 L. T. 934; 3 Asp. M. L. C. 233; 2 Char. Pr. Cas. 18, C. A.

*Annotations:*—**Refd.** The Olympic & H.M.S. Hawke (1913), 83 L. J. P. 113; S.S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37. **Mentd.** Bigsby *v.* Dickinson (1876), 4 Ch. D. 24.

**5180.** ——.]—THE CRAIGELLACHIE, No. 5951, *post.*

**5181. Sufficiency of look out.**]—(1) Where a vessel at anchor is run down by another, the *onus* lies upon the latter to prove that the collision arose from some cause which would exempt her from liability.

**PART XII. SECT. 2, SUB-SECT. 6.**

**5178 i.** *Necessity for look out.*]—MONTREAL HARBOUR COMRS. *v.* THE UNIVERSE (1906), 10 Exch. C. R. 352.—**CAN.**

**5178 ii.** ——.]—The absence of a good look out in hazy weather on board a vessel will go far to induce the ct. to hold her liable in a suit of collision.—THE SEMAPHORE (1863), 11 L. T. 163.—**IR.**

**5178 iii.** ——.]—A steamer is bound both by British & United States law, to keep out of the way of a sailing vessel, & to keep a look out. The duty to keep a good look out is especially incumbent upon a steamer going at a rapid pace in hazy weather, in an ordinary track of vessels trading from one port to another.—THE NEVADA (1872), 27 L. T. 720.—**AUS.**

**o.** *Sufficiency of look out—Pilot or man at the wheel as look out.*]—RICHELIEU & ONTARIO NAVIGATION CO. *v.* THE CAPE BRETON, [1907] A. C. 112.—**CAN.**

**p.** *Bad look out—Liability for consequent damage.*]—Where it appears by

(2) The mere circumstance of having a pilot on board will not discharge the master & crew from doing their duty, or relieve them or their owners from responsibility.

(3) To constitute a good look out, there must be a sufficient number of persons stationed for the purpose, & these persons must know & be able to discharge that duty.

(4) The manner in which a ship should be brought into a roadstead is entirely part of the province of the pilot in charge, & the master of the ship must be governed by his, the pilot's, judgment; therefore, where an accident by collision occurs in consequence of the pilot's error in this respect, the statute will intervene, & the owners of the ship will not be responsible for the damage caused by the pilot's want of judgment.—THE GEORGE (1845), 2 Wm. Rob. 386; 4 Notes of Cases, 161; 9 Jur. 670.

*Annotations:—As to* (4) **Refd.** The Velasquez (1867), L. R. 1 P. C. 494. *Generally,* **Refd.** The Ripon (1848), 6 Notes of Cases, 245; Netherlands Steam Boat Co. *v.* Styles (1854), 9 Moo. P. C. C. 286.

**5182.** ——.]—THE EUROPA, No. 5220, *post.*

**5183. Duty of crew—Assistance of pilot.**]—*Semble:* where the look out has once reported to the pilot or officer of the watch a light on board another ship, & the report has been answered, there is no further duty on the look out to report that light a second time on nearing the ship.

It is unquestionable that as a rule it is the duty of the crew of the ship to keep a look out & to assist in that way the pilot in charge (*per* CUR.).—WOOD *v.* SMITH, THE CITY OF CAMBRIDGE (1874), L. R. 5 P. C. 451; 43 L. J. Adm. 11; 30 L. T. 439; 22 W. R. 578; 2 Asp. M. L. C. 239, P. C.

*Annotations:—***Refd.** The Princeton (1878), 3 P. D. 90; The Condor, Perkins & Homer *v.* S.S. Condor (1879), 48 L. J. P. 33; Sea Insce. *v.* Blogg, [1898] 2 Q. B. 398; The Servia, The Carinthia, [1898] P. 36; Cory *v.* France, Fenwick (1910), 80 L. J. K. B. 341.

**5184. Duty of look out—To observe vessels & obstacles in channel.**]—[Look out men] are stationed to see what vessels or obstacles are in the Channel; & their attention is directed rather to such objects than to what is taking place on the shore. We are not prepared to impute negligence to the look out . . . because it is not shown that the existence of this vessel in the basin, with its blue peter flying, was made known by them to the pilot (SIR JAMES COLVILLE).—MOSS *v.* AFRICAN S.S. Co., THE CALABAR (1868), L. R. 2 P. C. 238; 5 Moo. P. C. C. N. S. 291; 19 L. T. 768; 3 Mar. L. C. 195; 16 E. R. 525, P. C.

*Annotation:—***Refd.** The Alice & The Princess Alice (1868), L. R. 2 P. C. 245.

**5185.** —— ——.]—THE SHAKKEBORG, [1911] P. 245, n.

**5186. —— Superior officer relinquishing charge to inferior.**]—(1) The "Regulations for Preventing Collisions at Sea," made under the authority of Merchant Shipping Acts, 1854 to 1873, must, under 36 & 37 Vict. c. 85, s. 17, be strictly followed. Actual necessity, not considerations of discretion & expediency, even though skilfully acted on, can alone excuse their non-observance. The *K.* & the *V.*, two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The *K.* alleged that when the two vessels were fast approaching each other, the *V.* improperly changed its course; that the master of the *K.* could not rely on the *V.* taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, & almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, & then stopped & reversed the engines. This was not exactly the order required by the Regulations, which directed that in such a case the engines should be stopped & reversed:—*Held:* the statutes & Regulations had not left the master of the *K.* a discretion in the matter; he was bound to stop & reverse the engines, & as he had not done so at the first moment of danger, he had disregarded the Regulations, & consequently that the *K.* must be held in part responsible.

(2) The gentlemen of skill in the Admlty. Ct. appear to have been of opinion that the conduct of the second officer in relinquishing his charge to one of inferior rank, at a time when his vessel was actually manœuvring in order to keep clear of an approaching steamer was very reprehensible (LORD WATSON).

(3) A man may not do the right thing, nay may even do the wrong thing, & yet not be guilty of neglect of his duty, which is not absolutely to do right at all events but only to take reasonable care & use reasonable skill; & I agree that when a man is suddenly & without warning thrown into a critical position, due allowance should be made for this, but not too much (LORD BLACKBURN).

(4) [The statutory rule] was enacted with a view to obviate the risk & minimise the results of collision; & the more imminent the risk the more imperative is the necessity for implicit obedience to the rule (LORD WATSON).

(5) [The general rules] are laid down to govern any person who has charge of a vessel, both for the sake of the safety of his own vessel & for the sake of the safety of the vessels approaching him (LORD HATHERLEY).—STOOMVAART MAATSCHAPPY NAVIGATION CO., T. (1880), 5 App. Cas. 876; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. L. C. 360, H. L.

*Annotations:—As to* (1) **Consd.** The Benares (1883), 9 P. D. 16. **Distd.** Scicluna *v.* Stevenson, The Rhondda (1883), 8 App. Cas. 549. **Consd.** Cayzer *v.* Carron Co. (1884), 9 App. Cas. 873. **Apld.** The Vallejo (1887), 4 T. L. R. 169. **Consd.** The Memnon (1888), 4 T. L. R. 501. **Refd.** Woodley *v.* Michell (1883), 11 Q. B. D. 47; The Beryl (1884), 9 P. D. 137; The Main (1886), 11 P. D. 132; The City of Berlin (1907), 98 L. T. 298. *As to* (3) **Refd.** Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129. *As to* (4) **Refd.** The Boynton (1898), 14 T. L. R. 173. *Generally,* **Refd.** The Harton (1884), 50 L. T. 370; S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

**5187. Look-out's post—On bridge.**]—In a collision in the river Mersey between a steam tug & a ferry boat, held by the Trinity Masters that the proper station for the master or look-out man in such steamer is the bridge between the paddle boxes.—THE WIRRALL (1848), 3 Wm. Rob. 56; 6 Notes of Cases, 199; 166 E. R. 884.

**5188.** —— ——.]—(1) I do not know whether the words "stationed at the bow" point to anything different from being stationed on the bridge; but in this case the evidence makes it quite clear that the proper place for the look out was the bridge (LORD SELBORNE).

(2) Upon the trial trip of a vessel, although she cannot be officered & manned like a ship on a voyage, every precaution must be made to navigate safely. . . . All that was necessary was that the pilot should be assisted by a sufficient crew to obey his

the evidence that there was not sufficient look-out on board of a ship, & a collision occurs between such ship & another towed by a steamer, because the steamer was not seen by such vessel in time to enable her to take the necessary measures to avoid a collision, the want of such proper look-out on board of such vessel is sufficient neglect or misconduct to make her liable for such damages, although she adopted the most seamanlike & proper course when a collision was all but inevitable.—*Re* THE NIAGARA, *Re* THE ELIZABETH (1854), 4 L. C. R. 264.—CAN.

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orders & carry them out promptly & efficiently (LORD CHELMSFORD).—CLYDE NAVIGATION CO. *v.* BARCLAY (1876), 1 App. Cas. 790; 36 L. T. 379; 3 Asp. M. L. C. 390, H. L.

*Annotations:—Generally.* **Refd.** The Daloz (1877), 47 L. J. P. 1; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Indus (1886), 12 P. D. 46; The Adam W. Spies (1901), 70 L. J. P. 25; Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364; The Benue, [1916] P. 88; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216.

**5189. —— In crow's nest—Beachy Head.**]—THE BETHANIA (1910), cited in Halsbury's Laws of England, Vol. XXVI., at p. 486, C. A.

**5190. Bad look-out—Liability for consequent damage—Though pilot on board.**]—THE EOLIDES, No. 5259, *post.*

**5191.** —— —— ——.]—NETHERLANDS STEAM BOAT CO. *v.* STYLES, THE BATAVIER, No. 5231, *post.*

**5192.** —— ——.]—THE IBERIA (1839), 9 L. T. 811.

**5193.** —— ——.]—(1) A steam vessel, proceeding at her full speed, & running down a sailing vessel, held to be responsible for the damage, not having kept the good look out required in such circumstances, & the sailing vessel having exhibited a light as soon as there was reason to believe it was required.

(2) The law respecting the exhibition of lights by sailing vessels: under common circumstances, they need not show a light; but when there is risk of collision, if it is the duty of a steamer to steer clear of a sailing vessel, it is reasonable that the latter should give notice of her position.

(3) It would nevertheless be an answer to an action at common law for damages, if the consequences of that negligence could have been obviated by the suffering party; for then the negligence of the actor would not have been a cause of the damage, but the want of due care in the sufferer. . . . In the Ct. of Admlty. the neglect to use proper care would be a reason for dividing the loss (PARKE, B.).—WILLIAMS *v.* CHAPMAN (1846), 4 Notes of Cases, 585, n.; *affg.* S. C. *sub nom.* THE IRON DUKE (1845), 2 Wm. Rob. 377.

*Annotations:—As to* (2) **Refd.** S.S. Londonderry *v.* Dolbadarn Castle (Owners) (1845), 4 Notes of Cases Supp. xxxi; The Victoria (1848), 6 Notes of Cases, 176. *Generally,* **Refd.** The Juliet Erskine (1819), 6 Notes of Cases, 633; The Europa (1850), 14 Jur. 627.

**5194.** —— ——.]—(1) Where the place was one in which there was a chance of meeting with other ships, the weather was thick & the night dark, with snow falling, the master of one of the vessels which came in contact having left the deck at the moment to two seamen; such vessel held to be responsible for the collision, on the ground of want of a sufficient look out, there being a possibility, had a better look out been kept, that the collision might have been prevented.

(2) A party, in such a case, cannot plead inevitable accident, but is liable for the consequences which, by possibility, he might have prevented. Inevitable accident is that which no skill & no vigilance could possibly have avoided.

(3) Where a vessel having been run down subsequently becomes unmanageable, & gets upon a sand bank & is lost the presumption of law is that her eventual loss is attributable to the effects of the collision, & not to the mismanagement of the persons on board.—THE MELLONA (1847), 3 Wm. Rob. 7; 5 Notes of Cases, 450; 9 L. T. O. S. 474; 11 Jur. 783; 166 E. R. 865.

*Annotations:—As to* (3) **Refd.** The San Onofre, [1922] P. 243; The Paludina, [1925] P. 40.

**5195.** —— ——.]—NETHERLANDS STEAM BOAT CO. *v.* STYLES, THE BATAVIER, No. 5231, *post.*

**5196.** —— ——.]—A steamer going ten knots on a clear dark night, held to blame on her own statement, for if there had been a proper look out she must have seen the other vessel in time.—THE ERICSSON (1856), Sw. 38; 26 L. T. O. S. 263; 166 E. R. 1006.

*Annotation:*—**Refd.** The Mangerton (1856), 27 L. T. O. S. 207.

**5197.** —— ——.]—THE ROBERT BURRELL *v.* THE TELEGRAPH (1856), 7 L. T. 166.

**5198.** —— ——.]—THE WALTER HOOD *v.* THE EMIGRANT (1857), 5 L. T. 366.

**5199.** —— ——.]—THE HAARBURG *v.* THE LINDA FLOR (1857), 7 L. T. 166.

**5200.** —— ——.]—THE LADY SALE *v.* H.M.S. PEMBROKE (1858), 5 L. T. 186.

**5201.** —— ——.]—Where there was neglect on the part of the master & crew to keep a good look out, & such neglect conduced to a collision, the owners were held liable for the damage.

The duty of the pilot is to attend to the navigation of the ship & the master & crew to keep a good look out.—THE IONA (1867), L. R. 1 P. C. 426; 4 Moo. P. C. C. N. S. 336; 16 L. T. 158; 2 Mar. L. C. 479; 16 E. R. 344, P. C.

*Annotations:*—**Refd.** The Velasquez (1867), L. R. 1 P. C. 494; The Minna (1868), L. R. 2 A. & E. 97; Moss *v.* African S.S. Co., The Calabar (1868), L. R. 2 P. C. 238; Clyde Navigation Co. *v.* Barclay (1876), 1 App. Cas. 790; The Cynthia (1876), 2 P. D. 52; The Benue, [1916] P. 88; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216.

**5202.** —— ——.]—The *Esk* was going down the Thames while the *Niord* was coming up. The *Esk* was coming round a point on a port helm. As the vessels approached each other, the *Niord* first ported her helm, & then put it hard a-port, till she had paid off about five points. The *Esk*, on seeing this manœuvre of the *Niord*, stopped, & reversed her engines, & put her helm hard a-starboard. The result was a collision:—*Held:* the *Esk* was to blame for the collision; since, dealing with the question as one of general navigation, the *Esk* was in fault, either in not discovering, from insufficiency of the outlook, the course that the *Niord* was taking, or in failing, from some other cause, to port her helm as she ought to have done.—THE ESK & THE NIORD (1870), L. R. 3 P. C. 436; 7 Moo. P. C. C. N. S. 276; 24 L. T. 167; 1 Asp. M. L. C. 1; 17 E. R. 105, P. C.

*Annotations:*—**Refd.** The Franconia (1876), 2 P. D. 8; The Bywell Castle (1879), 41 L. T. 747.

**5203.** —— ——.]—The *S.* & *J. D.* came into collision. On behalf of the *S.* it was alleged that the red & white lights of the *J. D.* were seen on the port-bow, & that the *S.* was ported, but that the *J. D.* was starboarded:—*Held:* the story on behalf of the *S.* was inconsistent, that the evidence showed there was not a good look out on board the *S.*, & that therefore the *S.* was alone to blame.—THE JULIA DAVID (1876), 46 L. J. P. 54.

**5204.** —— ——.]— A French trawler & a schooner came into collision in the English Channel in the morning before sunrise. The trawler was proceeding at a speed of from two to three knots an hour. She had her trawl on deck, & was about to let it go. A white light was exhibited at her

q. —— ——.]—HEMINGER *v.* THE PORTER (1898), 6 Exch. C. R. 154; *affd.*, 6 Exch. C. R. 208.—CAN.

r. ——.—— *Though damaged ship in default.*]—THE A. H. BADGER (1872), 11 N. S. W. S. C. R. (L.) 156.—AUS.

s. —— *Look-out called down to assist in working vessel.*]—THE CLEMENTINE (1875), Y. A. D. 186.—CAN.

t. ——.]—THE ALHAMBRA (1880), Y. A. D. 249.—CAN.

masthead, but no side lights were exhibited. At the hearing of an action of damage to recover for the damages sustained in the collision, the ct. found that the collision was caused by the absence of any look out on board the schooner. It was then submitted that the trawler had infringed the Regulations for Preventing Collisions at Sea by not exhibiting the regulation side-lights, & by reason of such infringement was in fault, within Merchant Shipping (Amendment) Act, 1873 (c. 85), s. 17 :—*Held :* (1) the trawler had infringed the Regulations by not exhibiting the regulation side-lights: (2) as in the absence of a look out on the part of the schooner, the neglect of the trawler to observe the Regulations as to lights could not by any possibility have contributed to the collision, the sect. had no application, & the schooner was alone to blame for the collision.—THE ENGLISHMAN (1877), 3 P. D. 18 ; 47 L. J. P. 9 ; 37 L. T. 412 ; 3 Asp. M. L. C. 506.

*Annotations :—As to* (1) **Refd.** The Argo (1900), 82 L. T. 602. *As to* (2) **Refd.** The Reginald (1907), 97 L. T. 608 ; The Pitgaveney, [1910] P. 215. *Generally,* **Refd.** China Merchants' Steam Navigation Co. *v.* Bignold, The Hochung, The Lapwing (1882), 7 App. Cas. 512.

**5205.** —— ——.]—THE HERMOD No. 6156, *post.*

**5206.** —— ——.]—THE VADERLAND (1907), Shipping Gazette, Nov. 28th, H. L.

**5207.** —— ——.]—THE ETNA, No. 5978, *post.*

**5208.** —— —— **Though damaged ship in default.**]—THE RENOWN *v.* THE RATTLER (1865), 2 Mar. L. C. 243.

**5209.** —— **Look out men engaged in clearing anchor.**]—THE WILLIAM *v.* THE BOLD BUCCLEUGH (1853), 7 L. T. 166.

**5210.** —— **Evidence of—Failure to hear fog signals.**]—THE ROSETTA, No. 5733, *post.*

**5211.** —— ——.]—Notwithstanding the alleged unwillingness of the ct. to infer negligence from the fact that fog signals proved to have been sounded in the vicinity were not heard, failure to hear such signals may be sufficient, by itself, to justify a finding that those in charge of the vessel concerned were not keeping a good look out.—THE CURRAN, [1910] P. 184 ; 79 L. J. P. 83 ; 102 L. T. 640 ; 11 Asp. M. L. C. 449, C. A.

**5212. Inadequate look out—Vessel proceeding at high speed.**]—WILLIAMS *v.* CHAPMAN, No. 5193, *ante.*

**5213.** —— ——.]—THE EUROPA, No. 5220, *post.*

**5214.** —— ——.]—A collision occurred at night in the English Channel between two foreign vessels, a steamship & a barque, by which the former was slightly & the latter badly damaged. At the time the barque was carrying lights, but these were not seen on board the steamship till after the collision, because, being placed in the mizzen rigging, from their position & the peculiar form & rig of the barque, a vessel coming end-on was unable to see them. In a cause of damage instituted by the owners of the barque against the owners of the steamship :—*Held :* (1) the damages, losses, & costs, must be borne equally between the two vessels, for the barque was in fault in carrying lights not so placed as to comply with the regulations ; & the steamship was in fault in going at an improper rate, 11 knots an hour, on a hazy night in a crowded channel ; &, after the collision, in pursuing her course without affording or tendering any help to the barque.

(2) There ought to be two look outs at the bowsprit.

(3) A steamship proceeding at an improper rate in a channel crowded with ships, incurs the responsibility of damage occasioned by her being unable to obey the direction that, on risk of a collision, it is the duty of the steamship to keep out of the way of the sailing vessel.

(4) The first duty of any vessel that by collision injures another, is to wait to ascertain the extent of that injury, & to tender what assistance it may be able to protect life & property.—PAULINE CONSTANCE ELEONORE (OWNERS, ETC.) *v.* HAMBURGH AMERICAN STEAM PACKET CO., THE GERMANIA (OWNERS), THE GERMANIA (1869), 21 L. T. 44 ; 3 Mar. L. C. 269, P. C.

*Annotation :—Generally,* **Refd.** The Carlotta (1899), 80 L. T. 664.

**5215.** ——.]—THE GENERAL GORDON (1892), 68 L. T. 469 ; 7 Asp. M. L. C. 317, H. L.

**5216. Look out on towing ship.**]—THE JANE BACON, No. 5110, *ante.*

**5217.** ——.]—Two tugs were towing a sailing vessel, in charge of a pilot, down the Bristol Channel, with a pilot cutter made fast to the sailing vessel, when, owing to the negligence of the tow & her tugs, the pilot cutter was sunk by collision with a schooner, which was also damaged :—*Held :* though the pilot cutter was lashed alongside the tow, those in charge of her were nevertheless bound to take reasonable care to avoid danger, & had they kept a good look out, they would have seen the schooner in time to have slipped the rope & gone clear. The pilot cutter was, therefore, also to blame, & the liability of the owners of the tugs thereby reduced to a moiety of the claim of the owners of the pilot cutter, without reference to the liability of the tugs in respect of the damage to the schooner, & in accordance with the Admlty. rule, each party must pay their own costs in the ct. below & of the appeal.—THE HARVEST HOME, [1905] P. 177 ; 74 L. J. P. 65 ; 93 L. T. 395 ; 10 Asp. M. L. C. 118, C. A.

*Annotation :—***Refd.** The Seacombe, The Devonshire, [1912] P. 21.

**5218. Extra look out—When necessary.**]—THE MILANESE (1881), as reported in Pritchard's Admiralty Dig. 3rd ed. 222, H. L.

*Annotations :—***Refd.** The Hector (1883), 8 P. D. 218 ; The St. Paul (1908), 100 L. T. 184.

**5219. Vessel dropping up Thames stern first—Necessity for up river look out.**]—THE JUNO, No. 5384, *post.*

SUB-SECT. 7.—SPEED.

**5220. Rate of sailing—Factors determining.**]—There is no fixed rule as to the rate of sailing, which depends upon the locality, & other circumstances ; but where a ship is sailing at a rapid rate, her master & crew are bound to exercise greater caution :—*Held :* (1) where a steamship was going at the rate of 12½ knots an hour in a dense fog, & seven hundred miles from land, & the evidence showed that she had only the ordinary

5212 i. *Inadequate look out—Vessel proceeding at high speed.*]—Where a large steamer, proceeding, during a dark night, in the Firth of Clyde (a very thronged thoroughfare of traffic), at the rate of from twelve to fourteen miles an hour, came in collision with a small schooner, deeply laden, which (the tide being ebb & the wind very light) was incapable of altering her position by helm or sails, &, not being seen by the steamer (the schooner not having or exhibiting any lights), was run down & sunk :—*Held :* the steamer was responsible for the damage done, her watch & look out, though sufficient under ordinary circumstances, not being proper under the circumstances of the darkness of the night & the steamer's rate of going.—LONDONDERRY (OWNERS) *v.* DOLBADARN CASTLE (OWNERS) (1845), 4 Notes of Cases, Supp. xxxi.—IR.

look out, that no arrangements were made for reporting orders to the engineers, & that one man only was at the wheel, her owners could not avail themselves of the plea of inevitable accident in a cause of damage.

(2) No rate of sailing by steamers or other vessels can be said absolutely to be dangerous, but whether any given rate is dangerous or not must depend upon the circumstances of each individual case, as the state of the weather, locality, & other similar facts (DR. LUSHINGTON).

(3) Inevitable accident is where one vessel doing a lawful act without any intention of harm & using proper precaution to prevent danger unfortunately happens to run into another vessel (DR. LUSHINGTON).—THE EUROPA (1850), 14 Jur. 627.

*Annotations:—As to* (3) **Apld.** The Secret (1872), 26 L. T. 670. **Reld.** The Uhla (1868), 19 L. T. 89. *Generally,* **Reld.** The Campania (1901), 70 L. J. P. 101.

**5221.** —— ——.]—In the Ct. of Admlty., where there has been misconduct on the part of both vessels in a collision, the sum total of the joint damage is payable by the two in equal shares. There is an exception to this rule where a want of proper look out on the part of one of the vessels occasioned the accident.

17 & 18 Vict. c. 104, s. 298, disentitles the owner of a ship guilty of a breach of the Admlty. regulations from recovering in the Ct. of Admlty.

Upon the question arising, whether the owners of cargo lost by the collision is in *eadem conditione* with the owner of the vessel as to the right to recover, the ct. held, that though both ships are to blame, the owner of the cargo not having any control over the blameworthy master & mariners of the vessel upon which his goods were carried, is not to be considered as having any share in the *delictum*, so as to be thereby disentitled to recover either under the old law of the Admlty. or under 17 & 18 Vict. c. 104, s. 298. He has a claim, therefore, upon the other vessel for the one-half of his loss.

In considering what is a justifiable rate of speed, reference must be had to the state of the atmosphere, to the locality, & the sea room.—THE MILAN (1861), Lush. 388; 31 L. J. P. M. & A. 105; 5 L. T. 590; 1 Mar. L. C. 185; 167 E. R. 167.

*Annotations:—* **Consd.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157. **Apld.** The Vera Cruz (No. 1) (1884), 9 P. D. 88; The Karo (1887), 13 P. D. 24. **Consd.** The Englishman & The Australia, [1894] P. 239. **Dbtd.** The Frankland, [1901] P. 161. **Consd.** The Circe, [1906] P. 1. **Apprvd.** S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16. **Expld.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Reld.** The City of Manchester (1880), 5 P. D. 221; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; The Umona, [1914] P. 141.

**5222. Duty to slacken speed—Steamer meeting sailing ship.**]—GREAT SHIP CO. *v.* SHARPLES, THE GREAT EASTERN, No. 6006, *post.*

**5223.** —— **Preceding vessel obscured by smoke.**]—It is negligence on the part of a steamer to go at full speed under steam & sail before the wind whilst her smoke is blown over her bows so as to obscure her lights, & to prevent her from seeing & from being seen by other ships approaching from an opposite direction.

Where a steam ship is approaching another, whose exact course cannot be at once ascertained by reason of her lights being obscured by her own smoke, it is the duty of the former to slacken speed & to wait till that course is ascertained before taking any decided step to avoid the other vessel; if before having ascertained the exact course of the other, she, without slackening speed, executes a manœuvre, which, although appearing to be right at the time, contributes to the collision, she will be to blame.

It is clear that two vessels so steering could not be considered as vessels each having the other not more than a point on her bow, or as meeting end on within the meaning of the rule (SIR B. PEACOCK).—THE RONA, THE AVA (1873), 29 L. T. 781; 2 Asp. M. L. C. 182, P. C.

**5224.** —— **In fishing ground—Near trawler.**]—THE PICTON, No. 5574, *post.*

**5225.** —— **In fogbound channel.**]—Where a collision has taken place between two vessels in a fog, the nature & extent of the damage caused thereby is not a reliable test as to whether one of the vessels which was sounding the two long blast signal, indicating that she was stopped in the water, was doing so without being in fact so stopped, & therefore, in breach of Article 15 (*b*) of the Regulations for Preventing Collisions at Sea.

In a collision action a vessel may be held to blame when the damage resulting from the collision has been occasioned by & is attributable to improper conduct on her part, although the other vessel may be solely to blame for the collision owing to her negligent navigation.

On June 17, 1914, at 2.40 p.m. a collision took place in the English Channel in a dense fog between the *I.*, a screw steamship of 3,000 tons gross & 1,973 tons net register, which was on a course E. by S. heavily loaded with a cargo of grain, & the *K.*, a twin screw liner of 19,360 tons gross & 6,352 tons net register, which was on a course S.S.W., the stem of the *I.* coming in contact with the starboard side of the *K.* & both vessels being damaged. The owners of the *I.* brought an action of damage against the owners of the *K.* The evidence for the *I.* was that at 2.35 p.m., when her speed was slow & her one long blast fog signal was being sounded, those on board of her first heard the whistle of the *K.*, four points on the port bow; that the engines of the *I.* were at once stopped, that a minute & a half afterwards she lost steering way; that at 2.38 she lost all headway, as the second officer inferred from the fact that he could see no ripple from the edges of her overlapping plates; & that she then sounded the two long blast signal indicating that she had lost all headway. The evidence for the *K.* was that until 2.32 she had been travelling at half speed or 18 knots; that then her speed was reduced to dead slow, & her one blast signal was sounded; that in these circumstances those on board of her first heard the one long blast signal of the *I.*, four points on the starboard bow; that thereupon the engines of the *K.* were stopped, that the *I.* then sounded the two long blast signal, indicating that she was making no headway, & repeated it; that thereupon one minute after the *K.*'s engines had been stopped they were put slow ahead, & after another minute they were put at half speed or 18 knots & that the *I.* then came into view & the collision took place. The ct. were advised by their Nautical Assessors that the *I.* would have lost steerage way when her speed was still about one

(1901), 21 C. L. T. 429; 7 Exch. C. R. 181.—CAN.

c. —— ——.]—MURPHY *v.* PALGREAVE (1869), 21 L. T. 209.—IR.

d. —— *When passing anchored vessel in narrow channel.*]—VANVERT *v.* ARROTEGUI, THE SANTANDERINO (1893), 3 Exch. C. R. 378; *affd.* (1894), 23 S. C. R. 145.—CAN.

knot per hour through the water:—*Held:* having regard to the weight of the *I.* & her cargo, the interval of time between her losing steerage way, when she still had a speed of a knot through the water, & her first sounding the two blast signal was not sufficiently great for her to have stopped completely when she sounded that signal, that those on board of her were mistaken on this point; she therefore sounded the two blast signal before she had in fact lost all her headway, thus committing a breach of Article 15 (*b*) of the Regulations for Preventing Collisions at Sea & deceiving the *K.*, & she must therefore be held to blame; but it was unseamanlike, & dangerous navigation on the part of those in charge of the *K.*, & a breach of Article 16 of the Regulations to put a vessel of her size, power, & speed at half speed or eighteen knots in a dense fog, in so crowded an area as the English Channel; the *K.*, by her excessive speed, had contributed to the collision & increased the damage & that she also must be held to blame.—THE KAISER WILHELM II. (1915), 85 L. J. P. 26; 31 T. L. R. 615, C. A.

**5226. Craft sunk by swell—Wherry.**]—In an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for pltf., must be satisfied that the mischief was occasioned by the swell alone; & if they think it doubtful whether it was or not, or think that pltf. contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for deft.—LUXFORD *v.* LARGE (1832), 5 C. & P. 421; 172 E. R. 1036, N. P.

**5227. —— Punt.**]—SMITH *v.* JONES (1839), 9 L. T. 811.

**5228. —— Barge.**]—POPE *v.* CRAIG (1839), 9 L. T. 811.

**5229.** ——.]— In an action for improperly navigating a steam boat, whereby pltfs.' was sunk, it appeared that a large steam vessel preceded defts.' steam boat, & partly occasioned the swell which caused the injury, & also that pltfs.' barge was improperly trimmed & insufficiently manned. The jury found a verdict for a fourth part of the damage actually sustained, alleging as a ground for so doing, that blame was not attributable to defts. alone, the barge not being properly trimmed:—*Held:* although this allegation might have been a reason for directing the jury to reconsider their verdict, it furnished no ground for granting a new trial.—SMITH *v.* DOBSON (1841), 3 Man. & G. 59; 3 Scott, N. R. 336; 3 L. T. 419; 133 E. R. 1057.

**5230.** ——.]—THE PRINCE OF WALES, THE DENMARK, NEAL *v.* GENERAL STEAM NAVIGATION CO. (1853), 3 L. T. 419.

**5231.** ——.]—A large steamer in the charge of a licenced pilot, in proceeding up the pool a nearly high tide, & at a speed dangerous to small craft caused such a swell that a barge laden with coals was sunk:—*Held:* (1) upon the evidence no blame or negligence was attributable to the barge; (2) the steamer was to blame, as the swell which sunk the barge was attributable to the speed at which she was going; (3) the steamer was to blame, (*a*) in not having kept a good look out, as she might & ought to have seen the swell & the barge in time to have avoided the accident: & (*b*) that the pilot was solely to blame in not checking the speed, or stopping the steamer; (4) as there was joint blame on the master & crew, & the pilot, the owners were not exempted from liability by 6 Geo. 4, c. 125, s. 55, by reason of having a licenced pilot on board.—NETHERLANDS STEAM BOAT CO. *v.* STYLES, THE BATAVIER (1854), 9 Moo. P. C. C. 286; 28 L. T. O. S. 129; 14 E. R. 305, P. C.

**5232.** —— ——.]—ROSS *v.* DOUST (1856), 5 L. T. 213.

**5233.** —— ——.]—THE DUKE OF CORNWALL (1862), Pritchard's Admiralty Dig. 3rd ed. p. 226.

**5234. Speed on dark nights.**]—(1) The rule of the Trinity House to port the helm to be observed invariably in cases of steamships or other vessels meeting each other on adverse courses when there is a probable chance of collision.

(2) The expression "giving way," means not crossing a vessel's bows, but going under her stern. A steam vessel putting her helm astarboard condemned in the damage under the circumstances of the case.

(3) *Semble:* steam vessels not justified in going at the rate of 10 knots per hour in a dark night; if a steam vessel going at that rate comes into collision with another vessel, without either party seeing each other, the steamer will be responsible for the damage.—THE ROSE (1843), 2 Wm. Rob. 1; 2 Notes of Cases, 101; 7 Jur. 381; 166 E. R. 656.

*Annotations:—As to* (2) **Consd.** The Norma (1876), 35 L. T. 418. *Generally,* **Refd.** The Iron Duke (1845), 2 Wm. Rob. 377; Londonderry (Owners) *v.* Dolbadarn Castle (Owners) (1845), 4 Notes of Cases Supp. xxxi; The Victoria (1848), 6 Notes of Cases, 176.

**5235.** ——.]—In case of collision between a cutter with her trawl down, & a ship under sail, the presumption is against the latter sailing at 6½ knots on a very dark night, & aware that she was crossing a fishing ground.—THE PEPPERELL (1855), Sw. 12; 166 E. R. 992.

**5236.** ——.]—THE CORINTHIAN *v.* THE PACIFIC (1855), 9 L. T. 811.

**5237.** ——.]—(1) Neglect of the Admlty. Regulations, as to placing light at mast head, will not prevent a vessel from recovering, unless it appears that the collision was occasioned by such neglect.

(2) It is no excuse for a vessel steaming at the rate of 12 knots, on a dark night, through a fairway, where vessels are accustomed to anchor, that she was under contract to carry govt. mails at the rate of 13 knots.—THE VIVID (1856), Sw. 88; 4 W. R. 504; 166 E. R. 1034; *affd., sub nom.* CHURCHWARD *v.* PALMER, THE VIVID, 10 Moo. P. C. C. 472, P. C.

*Annotation: As to* (1) **Refd.** The Ljubica (1870), 23 L. T. 474.

**5238.** ——.]—THE CITY OF BROOKLYN, No. 5593, *post.*

**5239.** —— **Weather fine & clear.**]—(1) A smack with her trawl down had a globular white light exhibited from her weather cross-tree partially hidden from overtaking vessels by her sails, & did not exhibit any other white light or flare up to an overtaking steamer:—*Held:* this was an infringement of Article 11. (2) The steamer being in the North Sea, & the weather fine & clear, though the night was dark, was proceeding at the rate of 8 to 9 knots an hour:—*Held:* she was not, under the circumstances, going at too high a rate of speed.—THE PACIFIC (1884), 9 P. D. 124; 53 L. J. P. 67; 51 L. T. 127; 33 W. R. 124; 5 Asp. M. L. C. 263.

**5240. Speed where vessels likely to be met.**]—WILLIAMS *v.* CHAPMAN, No. 5193, *ante.*

**5240 i.** *Speed where vessels likely to be met.*]—THE SARDINIAN (1881), 14 N. S. R. (2 R. & G.) 499.—CAN.

*Sect. 2.—Rules of good seamanship: Sub-sects. 7, 8 & 9.]*

**5241.** ——.]—THE PRIMROSE *v.* THE DIANA (1853), 9 L. T. 811.

**5242.** ——.]—THE CITY OF BROOKLYN, No. 5593, *post.*

**5243. Negligent speeding — Smoke obscuring lights.]**—THE RONA, THE AVA, No. 5223, *ante.*

SUB-SECT. 8.—LIGHTS.

**5244. Duty to show light—Danger of collision.]**—WILLIAMS *v.* CHAPMAN, No. 5193, *ante.*

**5245.** —— ——.]—THE SIR FRANCIS DRAKE (1849), 5 L. T. 146.

**5246.** —— —— **Although bright night.]**—(1) The fact of its being a clear bright moonlight night does not relieve a sailing vessel hove to from compliance with the Admiralty Regulations, made in pursuance of 14 & 15 Vict. c. 79, s. 295, for exhibiting a light.

(2) The omission to show a light being the cause of the collision, as it was probable that if a light had been shown the collision would not have occurred, & there being no default of a look out by the steamer, the owners of the sailing vessel were held concluded by 17 & 18 Vict. c. 104, s. 298, from recovering damage against the steamer.

(3) The *onus probandi* lies on a party seeking to recover compensation for damage occasioned by a collision, & that party must establish that the loss was attributable to the neglect or default of the other party, or else he cannot recover.—MORGAN *v.* SIM, THE LONDON (1857), 11 Moo. P. C. C. 307; 14 E. R. 712; *sub nom.* THE CITY OF LONDON, MORGAN *v.* SIM, Sw. 300; 30 L. T. O. S. 236, P. C.

**5247.** —— ——.]—(1) By the law maritime, a vessel sailing free, or a steamship, is bound to give way to a vessel close hauled.

(2) The vessel close hauled is not bound to alter her course, but at night is bound to exhibit a sufficient light in time to enable the other to avoid collision.

(3) The above rules applied to the circumstances of the case; both the steamship & the vessel sailing close hauled found to blame; damages ordered to be divided.

(4) Action & cross-action in the Ct. of Admlty.; judgment, both ships to blame & damages to be divided; appeal by one party in both actions, & adherence to the appeal by the other party; the judgment being affirmed, each party was sentenced to pay his own costs.—THE SAXONIA, THE ECLIPSE (1862), 1 Lush. 410; 31 L. J. P. M. & A. 201; 6 L. T. 6; 8 Jur. N. S. 315; 10 W. R. 431; 1 Mar. L. C. 192; 167 E. R. 179; *sub nom.* HAMBURGH AMERICAN STEAM NAVIGATION CO. *v.* NORTH OF SCOTLAND BANKING CO., THE ECLIPSE, THE SAXONIA, 15 Moo. P. C. C. 262, P. C.

*Annotations:—Generally,* **Reid.** The Wild Ranger (1862), Lush. 553; The Amalia (1863), Brown. & Lush. 151; The Industrie (1871), L. R. 3 A. & E. 303; The Fanny M. Carvill *v.* The Peru, The Fanny M. Carvill (1875), 44 L. J. Adm. 34. **Mentd.** R. *v.* Keyn (1876), 13 Cox, C. C. 403.

**5248.** —— —— **Steamer coming to anchor.]**—A steamer manœuvring to come to an anchor in a place & manner such, that her regulation lights cannot be seen by an approaching vessel, is bound to give timely notice of her presence by showing a light or some other sufficient means.—THE PHILOTAXE (1877), 37 L. T. 540; 3 Asp. M. L. C. 512.

**5249.** —— —— **Effect of war risks.]**—A vessel which, to avoid danger from enemy submarines, is navigating without lights under Admiralty directions is not bound to exhibit her under way lights to an approaching vessel at whatever distance that vessel is first seen; but the lights must be exhibited in ample time to enable the other vessel to take action, if the duty of action lies on her, or to warn her of the presence of the hitherto unlighted vessel, if the duty of action lies on the latter.—H.M.S. HYDRA, [1918] P. 78; 87 L. J. P. 117; 119 L. T. 160; 14 Asp. M. L. C. 333.

**5250. Sufficiency of light—No rule as to degree of intensity.]**—THE TRIDENT & THE HAREWOOD, DOWELL *v.* GENERAL STEAM NAVIGATION CO. (1853), 5 L. T. 146; *subsequent proceedings, sub nom.* DOWELL *v.* GENERAL STEAM NAVIGATION CO., 26 L. T. O. S. 109.

**5251.** —— **Lifting lid of skylight.]**—THE SIR FRANCIS DRAKE (1849), 5 L. T. 146.

**5252.** —— **Binnacle light—Signal lantern.]**—THE MARGARET ROBERTS *v.* THE FORTUNE (1854), 5 L. T. 146, P. C.

**5253.** —— **Lantern with three lights.]**—(1) A steamer & a sailing vessel are approaching each other at night; the latter has a lantern with three lights in it, white, red, & green:—*Held:* such light did not conform to the Admiralty Regulations.

(2) Under ordinary circumstances it is incumbent on vessels to port their helms when approaching, should there be danger of collision, & vessels must act towards each other upon the presumption that that rule will be acted on.

A sailing vessel, not having ported her helm in sufficient time, & not having a light in accordance with the Admiralty Regulations, was run into by a steamer:—*Held:* the steamer was not to blame.—THE MANGERTON (1856), Sw. 120; 27 L. T. O. S. 207; 2 Jur. N. S. 620.

**5254.** —— —— **At bowsprit.]**—A barque, close hauled on the starboard tack, with a lantern with three glasses of different colours at her bowsprit end, saw the red light of a steamer to windward & nearly abeam; she kept her course, &, as she alleged, on the steamer nearing her, showed a bright light over the starboard quarter, but a collision ensued:—*Held:* (1) the barque's light at her bowsprit end was not a sufficient light in accordance with the Admiralty Regulations; (2) it was not proved that she showed the other light in sufficient time; (3) on the other hand, the steamer had not a sufficient look out.—THE URANIA (1857), Sw. 253.

**5255.** —— **Side lights necessary.]**—THE ALMA *v.* THE MOSCOW (1858), 5 L. T. 185.

**5256.** —— **White globe light—On vessel dredging stern first.]**—A sailing barge at night dredging down the Thames stern first on the ebb tide with her anchor touching the ground, & her mast lowered, is neither a "sailing vessel under way," nor a vessel at anchor within the meaning of Articles 6 & 7 of the Rules & Bye-laws for the Navigation of the River Thames, & is therefore neither bound to carry side lights nor anchor light, & if she shows a white globe light she does all that prudence requires.—THE INDIAN CHIEF (1888), 14 P. D. 24; 58 L. J. P. 25; 60 L. T. 240; 6 Asp. M. L. C. 362.

*Annotation:*—**Reid.** The Faedrelandet (1895), 72 L. T. 650.

**5257. Lights not to be obscured—Side lights.]**—THE GERMANIA (1875), 1 Maude & Pollock's Law of Merchant Shipping, 4th ed. p. 606, n.

*Annotation:*—**Reid.** The Carlotta, [1899] P. 223.

SUB-SECT. 9.—KEEPING CLEAR OF VESSELS AT ANCHOR, ETC.

**5258. General rule.**]—(1) A vessel in motion is bound, if possible, to steer clear of & avoid a vessel at her moorings, & nothing can in such a case excuse her from making compensation but unavoidable accident; nothing but that *vis major* which no human skill or precaution could have guarded against or prevented (SIR JOHN NICHOLL).

(2) It seems to be admitted that if the fog had come on before the Girolamo left the docks, she ought not to have commenced going down the river; but it came on soon after passing Blackwall—that is, some miles above the place of collision; it was then her duty when the fog came on, to have brought up (SIR JOHN NICHOLL).—THE GIROLAMO (1834), 3 Hag. Adm. 169; 166 E. R. 368.

*Annotations :—Generally.* **Refd.** Stuart *v.* Isemonger, The Diana (1842), 4 Moo. P. C. C. 12; The Lochlibo (1850), 3 Wm. Rob. 310; The Mary (1879), 5 P. D. 14. **Mentd.** General Iron Screw Collier Co. *v.* Schurmanns (1861), 4 L. T. 138; The Wild Ranger (1862), Lush. 553; The Halley (1867), L. R. 2 A. & E. 3; The Scotia (1869), 20 L. T. 375; R. *v.* Keyn (1876), 2 Ex. D. 63.

**5259.** ——.]—(1) Protest, in a suit for damages to a vessel at anchor, by a foreign ship in charge of a pilot, between Woolwich & Blackwall, waived; &, upon the facts, payment of the amount of damage to the vessel decreed; but a claim for consequential damage to the cargo, after the vessel had been run ashore, rejected.

(2) Of two vessels, one under sail, & the other at anchor, it is the duty of the former to avoid the latter (SIR JOHN NICHOLL).

(3) The captain was not to blame, because his ship was in charge of a pilot, nor was the injury here the fault of the pilot, but of the crew, in not keeping a good look out & apprising the pilot (SIR JOHN NICHOLL).—THE EOLIDES (1837), 3 Hag. Adm. 367; 166 E. R. 441.

*Annotation :—As to* (1) **Refd.** The Maid of Kent (1881), 6 P. D. 178.

**5260.** ——.]—Where a vessel at anchor is run down by another vessel under weigh, the *onus probandi* lies with the vessel doing the damage, & she is bound to show that the accident was not occasioned by any fault or negligence on her part.

It is, I apprehend, the bounden duty of the vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid if it be possible, with safety to herself, any collision whatever (DR. LUSHINGTON).—THE BATAVIER (1845), 2 Wm. Rob. 407; 4 Notes of Cases, 356; 10 Jur. 19.

*Annotation :—As to* (2) **Refd.** Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759.

**5261.** ——.]—THE SARAH, LAWSON *v.* DUMBLER (1849), 4 L. T. 839.

**5262.** ——.]—THE ACCOMMODATION *v.* THE HARLEQUIN (1856), 4 L. T. 839.

**5263.** ——.]—THE MARY *v.* THE CYRUS (1857), 5 L. T. 186.

**5264.** ——.]—A steam ferry-boat started in a dense fog, to cross a navigable river, those in charge of her having been informed that vessels were anchored in or near her track. The ferry-boat, although navigated with all ordinary care, ran into & damaged a ship at anchor :—*Held :* the ferry-boat was to blame.

She [The Levant] certainly was not in a place where it was unlawful for her to be; nor can I say . . . that she was in a place in which it was improper for her to be (SIR ROBERT PHILLIMORE).—THE LANCASHIRE (1874), L. R. 4 A. & E. 198; 29 L. T. 927; 2 Asp. M. L. C. 202.

*Annotation :—***Consd.** The Tranmere, [1920] P. 451.

**5265. To what vessels rule applies—Vessel in stays.**]—(1) A vessel proceeding in a cause of collision, & alleging herself to have been in stays at the time of the collision, & therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, & the other side must show that the collision was occasioned by the vessel proceeding being improperly put in stays, or was an inevitable accident.

(2) A vessel in stays is almost in the same predicament as a vessel at anchor.—THE SEA NYMPH (1860), 1 Lush. 23; 167 E. R. 12.

**5266. —— Vessel almost motionless on water—While reefing.**]—CALCUTTA (OWNERS) *v.* (OWNERS), THE CALCUTTA, No. 6306, *post*.

**5267. —— Vessel going about.**]—THE PRISCILLA, No. 6133, *post*.

**5268. When liability does not exist—Unavoidable accident.**]—THE GIROLAMO, No. 5258, *ante*.

**5269. — — —— Vessel extricating herself from danger.**]—THE THORNLEY (1843), 1 L. T. O. S. 293; 7 Jur. 659.

*Annotations :—***Refd.** The London (1863), Brown. & Lush. 82; The Marpesia (1872), 8 Moo. P. C. C. N. S. 168.

**5270. — —— —— Unmanageable condition of vessel not perceived.**]—Where two vessels were

**PART XII. SECT. 2, SUB-SECT. 9.**

**5258 i.** *General rule.*]—If a vessel runs into another vessel at anchor it is guilty of negligence, unless it can show that the collision occurred by an accident inevitable by it.—BROWN *v.* LIGHTER NO. 6 & THE BRITANNIAR TUG-BOAT (OWNER) (1910), 10 S. R. N. S. W. 905; 27 N. S. W. W. N. 219.—**AUS.**

**5258 ii.** ——.]—It is the duty of a vessel in motion to keep out of the way of one at anchor, &, if a collision occur, the former vessel cannot escape liability to answer for the damage, unless she can show that the collision was caused by inevitable accident.—CHARLES NELSON CO. *v.* THE KEISHIN MARU (1921), 22 S. R. N. S. W. 102.—**AUS.**

**5258 iii.** ——.]—*Re* THE LOTUS (1861), 11 L. C. R. 342; 2 S. V. A. R. 58.—**CAN.**

**5258 iv.** ——.]—A vessel in motion is bound to steer clear of one at anchor, & nothing can excuse her doing so save inevitable accident.—*Re* THE ORIENTAL (1869), 2 S. V. A. R. 144.—**CAN.**

**5258 v.** ——.]—It is the bounden duty of a vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever.—Ross *v.* THE HENRY IV. (1887), 13 Q. L. R. 379.—**CAN.**

**5258 vi.** ——.]—OWEN *v.* ODETTE, THE MINNIE MORTON, Cass. Dig. 2nd ed. 519.—**CAN.**

**5258 vii.** ——.]—THE CITY OF SEATTLE (1903), 9 Canadian Exchequer Reports, 146.—**CAN.**

**5258 viii.** ——.]—The duty of avoiding a vessel moored at a dock is upon the vessel entering, & when there is doubt as to whether there is sufficient room for dockage for the incoming vessel, the docked vessel or the harbour-master should be notified in order that sufficient space may be provided for the incoming vessel if such is possible, & the onus of showing that a collision could have been avoided is on the moving vessel.—GIBSON *v.* BAY OF FUNDY S.S. CO. (1914), 14 E. L. R. 406.—**CAN.**

**5258 ix.** ——.]—Where a ship under way comes into collision with another at anchor in a proper place, & showing at night an anchor light, it is obvious that the burden of justifying is heavily cast on the ship under way.—MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGATION CO., THE MEANATCHY, [1897] A. C. 351; 1. L. R. 24 Calc., 627; L. R. 24 Ind. App. 129; 1 C. W. N. 329.—**IND.**

**5258 x.** ——.]—It is the duty of every vessel seeing another at anchor, whether in a proper or improper place, or whether properly or improperly anchored, to avoid, if it be practicable or consistent with her own safety, a collision.—THE DUNA (1860), 12 Ir. Jur. 381.—**IR.**

**5258 xi.** ——.]—A vessel in motion is bound to steer clear of a vessel at her moorings, & if a collision takes place, & damage ensues, nothing can excuse her from making compensation but unavoidable accident, which no human skill or precaution could have guarded against.—THE ANNE (1860), 12 Ir. Jur. 360.—**IR.**

*e. To what vessels rule applies—Vessel in unmanageable state.*]—If a vessel is in such an unmanageable state as to render collision with another probably inevitable, the latter should endeavour to get out of her way.—TRAVERSE *v.* WHITE (1837), 5 L. T. 241.—**IR.**

*f. Duty to stop engines when passing anchored vessel in narrow channel.*]—PINEBAY S.S. CO., LTD. *v.* THE STEELMOTOR, [1925] Exch. C. R. 147.—**CAN.**

*Sect.* 2.—*Rules of good seamanship: Sub-sects.* 9, 10 & 11, *A., B. & C.*]

closely approaching each other, on a dark night, & the vessel on the larboard tack was unmanageable, & could not, therefore, give way, & the vessel on the starboard tack did not perceive her unmanageable state, & kept her course:—*Held:* their collision was purely accidental. If the *John Buddle* was so unmanageable that it was quite impossible to take the course directed by the rule, it was her duty to do the best she could to avoid the collision, & if she could not avoid it, then she must do that which is the next best, namely, render it as light as possible. It is not a question of putting the helm one way or the other; she must do the best the circumstances allowed, always presuming that she kept a good look out; because, if the accident arose from her own neglect in not keeping a good look out, her defence fails, & she ought to be responsible (DR. LUSHINGTON).—THE JOHN BUDDLE (1847), 5 Notes of Cases, 387.

**5271. Duties of ship at anchor.**]—THE SARAH, LAWSON *v.* DUMBLER (1849), 4 L. T. 839.

**5272. —— Not to alter position—Unless ship under way clearly cannot avoid collision.**]—A ship at anchor is not entirely free from duties towards a ship under way, but she must not do anything to alter her position or heading at any time short of the time when it becomes apparent that the situation is such that the ship under way cannot by her own action alone avoid a collision.—THE VIPER, [1926] P. 37; 95 L. J. P. 38; 135 L. T. 60; 42 T. L. R. 314; 17 Asp. M. L. C. 20, D. C.

**Duty not to run foul of lightship or buoy.**]—*See* 1894 Act, s. 666.

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SUB-SECT. 10.—STANDING TOO CLOSE AND SPEAKING.

**5273. When vessel may approach to speak—When running before the wind.**]—THE THAMES (1805), 5 Ch. Rob. 345; 165 E. R. 799.

**5274. Duty not to pass too close—Vessels coming up with tide—Drifting vessel caught by squall as other vessel passes.**]—Where two vessels were coming up the Thames, with the tide, & one of them endeavoured to pass the other, which was drifting, & which was at the moment caught by a squall, & a collision followed:—*Held:* the vessel endeavouring to pass the other was bound to take measures to enable her to do so safely, & not having done so, was liable for the damage.—THE GLOBE (1848), 6 Notes of Cases, 275.

**5275. —— In tempestuous weather—Vessel driven on to vesse [at anchor.**]—THE PLATO *v.* THE PERSEVERANCE (1865), Holt. Adm. 262.

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SUB-SECT. 11.—COMING TO ANCHOR.

*A. What Steps Must Be Taken.*

**5276. Choosing proper place.**]—THE SHANNON (1842), 1 Wm. Rob. 463; 166 E. R. 645; *sub nom.* THE SHANNON, THE PLACIDIA, 7 Jur. 380.

**5277. Choosing proper time.**]—The proximate cause of a collision was the breaking of a steamer's port cable while mooring:—*Held:* the steamer was to blame, (1) in having placed herself at single anchor in a position where, if the slightest accident arose to interrupt or embarrass the manœuvres the master was engaged in conducting, it was all but impossible to avoid a collision with a vessel at anchor; (2) if she had not delayed taking measures for mooring till so late at night the collision would not have been inevitable.

*Qu.:* whether if the steamer had taken every precaution in mooring, & the cable broke from an unknown imperfection, the steamer would be liable for the damage.—BIBBY *v.* BOISSEVAIN, THE EGYPTIAN (1863), 1 Moo. P. C. C. N. S. 373; 8 L. T. 776; 9 Jur. N. S. 1159; 1 Mar. L. C. 358; 15 E. R. 742, P. C.

**5278. Rounding to against tide.**]—THE SHANNON, No. 5402, *post.*

**5279. Head-rope to be moored to shore.**]—THE ATLAS (1846), 7 L. T. 286.

**5280. When anchoring near another vessel—Leaving space for swinging to anchor.**]—THE NORTHAMPTON, No. 5290, *post.*

**—— —— Foul berth.**]—*See* Sub-sect. 11, C., *post.*

**5281. Seeing that all is clear.**]—A barge going down the river saw the red light of a steamer broad on her port bow, & took no steps; shortly after the steamer's green light suddenly opened, showing that the steamer had starboarded her helm & was coming direct towards her; the master of the barge instantly showed a light & ported:—*Held:* the vessels were not approaching, in the first instance, within the meaning of the Admlty. Rules, & the barge was not to blame.

The steamer starboarded to come to anchor because the night was very dark:—*Held:* she should have eased her engines, & proceeded with more caution in so doing.

As to the conduct of the steamer. . . . The night being so very dark she deemed it prudent to come to anchor, & for that purpose she starboarded her helm to bring her to the southward of mid-channel; . . . it seems clear, that before adopting such a measure, & thus deviating from her course, she ought to have taken the greatest possible precaution to have seen that all was clear around her (DR. LUSHINGTON).—THE CERES (1857), Sw. 250; 166 E. R. 1121.

**5282. Giving necessary warning—When manœuvring for position.**]—THE PHILOTAXE, No. 5248, *ante.*

**5283. —— ——.**]—Where a steamship under way at night in the Firth of Clyde stops her way & puts herself across the line of navigation for the purpose of coming to an anchor, she is to blame for not warning vessels coming up behind her of her manœuvres, even though she is carrying a fixed stern light.—THE QUEEN VICTORIA (1891), 64 L. T. 520; 7 Asp. M. L. C. 9, C. A.

*Annotation:*—**Consd.** The Juno (1894), 71 L. T. 341.

*B. Liability for Not Taking Proper Precautions.*

**5284. Improper dropping of anchor—While vessel has too much way.**]—THE NEPTUNE THE SECOND (1814), 1 Dods. 467; 165 E. R. 1380.

*Annotations:*—**Consd.** The Girolamo (1834), 3 Hag. Adm. 169; The Eden (1846), 4 Notes of Cases, 460. **Refd.**

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PART XII. SECT. 2, SUB-SECT. 11.—A.

*g. Vessel "hove-to."*]—A schooner "hove-to," with her wheel made fast by a becket which could be removed instantly, her look-out & wheelsman properly stationed & maintaining a steady course, is not, with reference to such circumstances, open to the charge of being negligently navigated.—MAGDALEN ISLANDS S.S. Co. *v.* THE DIANA (1907), 11 Exch. C. R. 40; 3 E. L. R. 158.—**CAN.**

PART XII. SECT. 2, SUB-SECT. 11.—B.

*h. Vessel inadequately moored.*]—THE WE'RE HERE (1873), Y. A. D. 138.—**CAN.**

*k. Vessel steaming up to its anchor—To change berth to avoid collision.*]—THE BANNERET, THE HORTON, THE ALHAMBRA (1881), 14 N. S. R. (2 R. & G.) 512.—**CAN.**

*l. Vessel insufficiently anchored.*]—When a collision takes place in consequence of the impugnant vessel not having been sufficiently anchored, her

The Protector (1839), 1 Wm. Rob. 45; Stuart *v.* Ismonger, The Diana (1842), 4 Moo. P. C. C. 12; The Wild Ranger (1862), Lush. 553; The Halley (1867), L. R. 2 A. & E. 3.

**5285. Anchor in improper position—Buoy placed over anchor—Whether ship relieved from liability.**]—In an action on a case for an injury done to pltf.'s ship by her striking on the anchor of deft.'s:—*Held:* it was no ground of defence that one of the crew of pltf.'s ship, before she took up the position in which she received the injury, was warned by a person on board another ship which had occupied the same position, that she was leaving it because there was an anchor somewhere near; & if the anchor was in an improper place it was no defence that a buoy was placed over it.

There would be no negligence in the pltf. in not looking for a buoy where he had no right to expect one (PARKE, J.).—VENUS *v.* PEARSON (1830), L. & Welsb. 160; 8 L. J. O. S. K. B. 263.

**5286. —— Close to hawser pipes—Damage to ship's boat.**]—THE ANNANDALE & THE LUCK'S ALL, PAXTON *v.* BARKER (1857), 3 L. T. 217.

**5287. —— Carried stock above water.**]—A dumb barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring buoy in the river Thames. The schooner had her anchor hanging over her bow with the stock above water, contrary to the Thames bye-laws. The anchor made a hole in the barge & caused damage to her cargo, but for the improper position of the anchor neither the barge nor her cargo would have received any damage. In an action of damage by the owners of the barge against the schooner:—*Held:* both vessels were to blame, & therefore the owners of the barge were entitled to half the damage sustained.

In order to establish a cause of action, the ct. must find not only that there was a collision, & that it was the result of the negligence of defts., but that some damage was done (BRETT, L.J.).—THE MARGARET (1881), 6 P. D. 76; 50 L. J. P. 67; 44 L. T. 291; 29 W. R. 533; 4 Asp. M. L. C. 375, C. A.

*Annotations:*—**Consd.** The Monte Rosa, [1893] P. 23. **Refd.** The Dunstanborough, [1892] P. 363, n.; The Kaiser Wilhelm II. (1915), 85 L. J. P. 26.

**5288. Head-rope attached to another ship's head—In stormy weather—Harbour full of shipping.**]—THE ATLAS (1846), 7 L. T. 286.

**5289. Improper catting of anchor.**] — THE GIPSEY KING, No. 5087, *ante*.

**5290. Dragging anchor—Failure to drop another anchor.**]—A vessel dragging her anchor & coming into collision with another held to blame for not having let go another anchor.

If one vessel anchors there, & another here, there should be that space left for the swinging to the anchor, that, in ordinary circumstances, the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth (DR. LUSHINGTON).—THE NORTHAMPTON (1853), 1 Ecc. & Ad. 152; 3 L. T. 448; 164 E. R. 89.

*Annotation:*—**Refd.** The Woburn Abbey (1869), 38 L. J. Adm. 28.

**5291. Anchor not clear & ready to let go.**]—THE GENERAL PARKHILL *v.* THE CENTURION (1854), 4 L. T. 839.

**5292. Bad choice of berth—In position where damage likely to be caused—When tide falls—Vessel heeling over on to another vessel.**]—*B.* took up a berth in the Tyne, with the view of discharging cargo; *C.* took up a berth close alongside, &, as the tide fell, heeled over upon *B.* & damaged her:—*Held: C.* was responsible for the damage so received by *B.*

I apprehend that when a vessel is lying on the shore, & another vessel is placed voluntarily by her owners, or those who are acting on their behalf, in such a position that damage will happen if some event arises which it is not possible to control, the owners of the second vessel must be responsible for the damage (DR. LUSHINGTON).—THE LIDSKJALF (1856), Sw. 117; 3 L. T. 448; 166 E. R. 1050.

**5293.** —— —— —— ——.]—A clipper built ship has no right to place herself in such a berth as would make it inevitable that she must take the ground on an ebb tide, to the probable risk of other vessels moored in the vicinity.

A clipper built ship not being able to get up to her discharging berth at a wharf, owing to the number of ships before her, moored herself in an anchorage ground outside, in a berth where there was not sufficient draught of water for her to lie afloat at low tide, in consequence of which she listed over on a vessel anchored alongside:—*Held:* the clipper ship so mooring herself was answerable in damages for the injuries sustained by the vessel anchored alongside of & berthed previously to the time of the clipper ship taking up her moorings where she did.—THE INDIAN *v.* THE JESSIE (1865), 12 L. T. 586; 2 Mar. L. C. 217.

**Foul berth.**]—*See* Nos. 5295-5305, *post*.

*C. Foul Berth.*

**5294. What constitutes a foul berth.**]—THE NORTHAMPTON, No. 5290, *ante*.

**5295. Liability for giving foul berth.**]—THE LADY ANN *v.* THE HIGHLAND CHIEF (1853), 6 L. T. 754.

**5296.** *S. P.* THE BETSEY *v.* THE COUNTESS OF MORLEY (1853), 6 L. T. 754.

**5297.** *S. P.* THE DOLPHIN *v.* THE ECONOMY (1855), 6 L. T. 751.

**5298.** *S. P.* THE DIANE *v.* THE CHRISTINE (1856), 6 L. T. 754.

**5299.** *S. P.* THE EXPRESS *v.* THE RIVAL (1857), 6 L. T. 754.

**5300.** *S. P.* THE JAMAICA *v.* THE SEPHORA (1857), 6 L. T. 754.

**5301.** ——.]—THE COURIER *v.* THE DAHLIA (1858), 4 L. T. 774.

**5302.** ——.]—THE PATRIOTTO *v.* THE RIVAL (1860), 2 L. T. 301.

**5303. —— Riding at single anchor.**]—One ship brought up during a gale in a fair berth in the Downs, & another ship coming up, anchored within a cable's length of her, riding at one anchor. The gale increasing, drove both ships from their anchors, when the last ship came into collision with the first ship, so that the first ship had to be taken to the Roads in a sinking state & beached:—*Held:* the ship last coming up was solely liable for the collision, from having given

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owner will be obliged to pay the damage sustained, & the costs, if it appear that the vessel injured was securely anchored, & properly managed by her crew.—THE ALESSANDRO (1851), 3 Ir. Jur. 383.—**IR.**

**m.** *Vessel moored by ropes across neighbouring vessel—Whether master justified in cutting ropes in bad weather after due warning.*]—CURRIE *v.* ALLAN (1894), 21 R. (Ct. of Sess.) 1004; 31 Sc. L. R. 814; 2 S. L. T. 150.—**SCOT.**

**PART XII. SECT. 2, SUB-SECT. 11.—C.**

**5295 i.** *Liability for giving foul berth.*]—A vessel giving a foul berth to another vessel is liable in damages caused by collision to the vessel to which such foul berth was given by her, although the immediate cause of the collision was a *vis major*, & no unskilfulness or misconduct was imputable to the offending vessel after giving such foul berth.—*Re* THE LORD JOHN RUSSELL (1838), 1 S. V. A. R. 190.—**CAN.**

**n.** *Duty to change foul berth.*]—Where two ships in the harbour of Quebec from the violence of the wind & force of the tide, were accidentally

*Sect.* 2.—*Rules of good seamanship: Sub-sect.* 11, *C.; sub-sects.* 12 & 13, *A.* (*a*).]

the first ship a foul berth in riding so close to her at single anchor.—THE MAGGIE ARMSTRONG *v.* THE BLUE BELL (1865), 14 L. T. 340; 2 Mar. L. C. 318.

**5304.** —— —— **In tempestuous weather.**]—Commander of a Queen's ship condemned in a cause of damage, the collision having been occasioned by his anchorage too near the damaged vessel; & having anchored with only one anchor down, the weather being squally & tempestuous at the time.—THE VOLCANO (1844), 2 Wm. Rob. 337; 3 Notes of Cases, 210; 166 E. R. 782.

*Annotation:*—**Consd.** Doward *v.* Lindsay, The William Lindsay (1873), L. R. 5 P. C. 338.

**5305.** —— —— **In bad position.**]—BIBBY *v.* BOISSEVAIN, THE EGYPTIAN, No. 5277, *ante*.

**5306. Duty of master to change foul berth—Although vessel placed in berth by pilot.**]—The *W. A.* in charge of a pilot came to anchor in the Mersey & gave the *B. T.* a foul berth. Various remonstrances were from time to time made by those on board the *B. T.* & after a few days the vessels in swinging to the tide came into collision:—*Held:* the owners of the *W. A.* were responsible for the damage, because while the vessel was at anchor, the employment of the pilot was not compulsory, even if the pilot had not properly moored the *W. A.* her master was not relieved from responsibility, & therefore her owners were liable for the damage.

The argument which in these ircumstances would still continue the responsibility of the pilot & the consequent immunity of the master is to this effect, that a pilot because he has improperly moored a vessel remains on that account in charge of her, & that the master, though aware that she has been improperly moored, has authority to shift her berth. I am glad to say that, in my opinion, this proposition has no legal authority, because I think it would be fraught with mischief to the interests of navigation & to the discipline of ships (SIR R. PHILLIMORE).—THE WOBURN ABBEY (1869), 38 L. J. Adm. 28; 20 L. T. 621; 3 Mar. L. C. 240.

*Annotations:*—**Refd.** The Princeton (1878), 3 P. D. 90; The Servia, The Carinthia, [1898] P. 36.

**5307. Whether other ship must take extraordinary precautions.**]—If one ship has given another a foul berth, the owners of the ship giving the foul berth have no right to demand that extraordinary precautions should be taken on board the other ship to avoid a collision. The *Victor* gave the *Vivid* a foul berth, & the *Vivid* in swinging, came into collision with & damaged the *Victor*. It having been proved that the usual & ordinary precautions had been taken on board the *Vivid*:—*Held:* the *Vivid* was not responsible for the collision.—THE VIVID (1873), 42 L. J. Adm. 57; 28 L. T. 375; 1 Asp. M. L. C. 601.

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SUB-SECT. 12.—ANCHOR WATCH.

**5308. When top gear must be struck—In bad weather.**]—A ship, having a licenced pilot on board, whilst at anchor in the Downs, the weather being bad, was run into by another vessel, & made to start from her anchorage, & was driven into a vessel at anchor:—*Held:* she was to blame & liable to damages, because (1) the ship, notwithstanding the bad weather, & a large number of vessels lying windbound in the Downs, had neglected to send down her topgallant & main royal yards, & also her short fore & mizzen topgallant masts; (2) she did not set her staysail & jib, & so drag her anchor off shore.—HAMMOND *v.* ROGERS, THE CHRISTIANA (1850), 7 Moo. P. C. C. 160; 7 Notes of Cases, Supp. xli; 7 L. T. 648; 13 E. R. 841, P. C.

*Annotations:*—*As to* (1) **Refd.** The Northampton (1853), 1 Ecc. & Ad. 152; The Velasquez (1867), L. R. 1 P. C. 494. *As to* (2) **Refd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451. *Generally*, **Refd.** Pollok *v.* M'Alpin, The Lochlibo (1851), 7 Moo. P. C. C. 427; Rodrigues *v.* Melhuish (1854), 10 Exch. 110; The Mobile (1856), Sw. 127; The Argo (1859), Sw. 462; North German Lloyd S.S. Co. *v.* Elder, The Schwalbe (1860), 14 Moo. P. C. C. 241; The Iona (1867), L. R. 1 P. C. 426; Marshall *v.* Moran, The Ocean Wave (1870), L. R. 3 P. C. 205; The Tactician (1907), 76 L. J. P. 80; Cory *v.* France, Fenwick (1910), 80 L. J. K. B. 341; The Benue, [1916] P. 88.

**5309.** —— **In winter season.**]—The yacht of deft. was entrusted for reward to yachting agents for sale, &, by their servants, moored in the winter season without striking her top gear, whereby, on a gale occurring, the yacht drifted & fouled another yacht:—*Held:* deft.'s yacht was liable in a proceeding *in rem* in the Ct. of Admiralty.—THE RUBY QUEEN (1861), Lush. 266; 167 E. R. 119.

*Annotations:*—**Refd.** The Dictator, [1892] P. 304; The Jacob Christensen, [1895] P. 281; The Ripon City, [1897] P. 226.

**5310.** —— **Order of dock master.**]—THE EXCELSIOR, No. 5404, *post*.

**5311. Sufficient crew to be kept on board—To protect ship against ordinary perils.**]—THE EXCELSIOR, No. 5404, *post*.

**5312. Duty to keep look out.**]—(1) When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, the *onus* is on her to justify her conduct. She cannot be excused when it is shown that she had not a sufficient look out.

(2) The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited, & to do everything in his power to avert or minimise a collision.

(3) If that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration, & it must be shown that any alternative course would have prevented or mitigated the collision.

Being thus placed, entirely by the erroneous conduct of the *Meanatchy*, in a position of difficulty in which an instant step was imperative, he became entitled, as this & other tribunals have often held, to claim a favourable consideration for the action which he decided to take, even if it should afterwards appear that such action was not the best possible (SIR FRANCIS JEUNE).—MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGA-

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brought into such proximity that each had a foul berth:—*Held:* both were in fault for not adopting the proper course to relieve themselves from their perilous positions, & thereby avoid a collision.—*Re* THE ARRAN (1883), 9 Q. L. R. 278.—**CAN.**

**PART XII. SECT. 2, SUB-SECT. 12.**

*o. Duty to maintain anchor watch—Where sufficient lights maintained.*]—HEMINGER *v.* THE PORTER (1898), 6 Exch. C. R. 154; *affd.*, 6 Exch. C. R. 208.—**CAN.**

*p.* —— *When not in roadstead or fairway.*]—When a vessel is lying at anchor not in a roadstead or fairway, & out of the course of ordinary vessels, she is not bound to keep an anchor watch.—THE JOHN OWEN, 5 C. L. T. 565.—**CAN.**

*q.* —— *When anchored in narrow channel where vessels are passing.*]—In a narrow channel where vessels are passing or are expected to pass, standing by is necessary on the part of the moored ship, unless she intends to rely entirely on the sufficiency of her fixed moorings or on a warning to approaching vessels.—PINE BAY S.S. CO. *v.* THE

TION CO., THE MEANATCHY, [1897] A. C. 351; 66 L. J. P. C. 92, P. C.

*Annotation :—As to* (3) **Refd.** The Olympic & H.M.S. Hawke, [1913] P. 214.

**5313. —— Whether one man sufficient.**]—THE EXCELSIOR, No. 5404, *post*.

**5314. —— When weather known to be getting worse.**]—During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to moorings buoys placed there by the harbour authorities. On the brig striking the steamer, the ring of one of the buoys carried away, & the steamer got adrift, & drove down the river, & ultimately came in contact with & did damage to a barque, whose owners instituted a cause of damage against the steamer in the county ct. of Northumberland, to recover for the damage done to their vessel by the steamer. At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, & that no look out had previously been kept on deck, though it was known that the weather was getting worse :—*Held :* a defence of inevitable accident, set up by the owners of the steamer, was not sustained, & the steamer was alone to blame for the collision.—THE PLADDA (1876), 2 P. D. 34; 46 J. P. 61.

**5315. —— At tide time—When ropes obstructing waterway.**]—A vessel lying moored in a dock, with ropes out to the opposite side of the dock obstructing the waterway, owes a duty at tide time, when other vessels may be entering or leaving the dock, to have an efficient look out, so that if necessary the ropes may be slacked away immediately.—THE THEODOROS, THE BLIDENSOL, [1923] P. 26; 92 L. J. P. 30; 39 T. L. R. 86.

**5316. Duty of person on watch—To do everything to avert or minimise collision.**]—MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGATION CO., THE MEANATCHY, No. 5312, *ante*.

**5317. —— To see that lights are properly exhibited.**]—MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGATION CO., THE MEANATCHY, No. 5312, *ante*.

**—— Pilot.**]—*See* No. 5183, *ante*.

**5318. Duty to ship cable to avoid damage.**]—(1) Inevitable accident is that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution, & maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is what previous measures have been adopted to render the occurrence of it less probable.

(2) Where damage might have been avoided by slipping cable & setting sail :—*Held :* it was not an inevitable accident, but the result either of negligence or the absence of proper nautical skill.

(3) Tempestuous weather is an excuse for the failure to exercise proper nautical skill which should be received with the greatest possible caution.—THE UHLA (1867), as reported in 19 L. T. 89; 3 Mar. L. C. 148.

*Annotations :—Generally,* **Refd.** The Sylph (1867), L. R. 2 A. & E. 24; Smith *v.* Brown (1871), L. R. 6 Q. B. 729; Mersey Docks & Harbour Board *v.* Turner, The Zeta, [1893] A. C. 468; The Veritas, [1901] P. 304; The Normandy (1904), 73 L. J. P. 55.

**5319. Necessity for having chains bent—During gale.**]—THE PLADDA, No. 5314, *ante*.

**5320. Preventing ship from drifting—In bad weather—Tying rope fast to pier head.**]—THE LYN (1883), *Times*, May 1.

**5321. Duty to slacken ropes—When ropes obstructing waterway—Vessels entering & leaving dock.**]—THE THEODOROS, THE BLIDENSOL, No. 5315, *ante*.

**5322. Mooring appliances—Permission to use them given by port authorities—Whether warranty implied as to fitness.**]—DOWARD *v.* LINDSAY, THE WILLIAM LINDSAY, No. 5173, *ante*.

**5323. —— —— ——.**]—Whether it be called a warranty or not, there can be no doubt that inasmuch as resps. gave applts. for valuable consideration the use of their mooring appliances to moor applts.' vessel it was an essential part of that contract that the mooring appliances, taking them altogether were fit & proper for ordinary use by prudent persons, & were not in such a condition that if properly used the vessel which moored to them would suffer from reliance being placed upon them (LORD HERSCHELL).—ALLEN *v.* QUEBEC WAREHOUSE CO. (1886), 12 App. Cas. 101; 56 L. J. P. C. 6; 56 L. T. 30, P. C.

*Annotation :*—**Mentd.** Whitney *v.* Joyce (1906), 75 L. J. P. C. 89.

**Necessity for lights.**]—*See* Sub-sect. 5, B. (*l*), *ante*.

**Duty of sailing vessel to keep herself under command—When lying to in track of other vessels.**]—*See* No. 5342, *post*.

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SUB-SECT. 13.—SPECIAL VESSELS.

*A. Tug and Tow.*

*(a) In General.*

**5324. Whether tug & tow considered as one vessel.**]—STEVENS *v.* GOURLEY, THE CLEADON, No. 5986, *post*.

**5325. —— Question of fact.**]—THE SEACOMBE, No. 5144, *ante*.

**5326. —— ——.**]—There is no principle of Admlty. law which precludes an innocent ship damaged by collision through the fault of two other ships from recovering the whole damage from either of the delinquent ships.

In cases of collision the question of the identity of a tow with its tug is a question of fact, & where a collision occurs through the faulty navigation of the tug, & the tow is, as regards navigation, completely under the control of the tug & does not stand to the latter in the relation of master & servant, the tow is to be regarded as an innocent ship in no sense identified with the delinquent tug.

Where a dumb barge in tow of a tug, which had the sole control & management of the navigation, was damaged by collision with a third vessel owing to the faulty navigation of the tug & the third vessel, & the owners of the tow brought an action *in rem* against the owners of the third vessel only :—*Held :* defts. were liable for the whole damage.

Applts. have wholly failed to show that there ever was any principle of law administered in the Ct. of Admlty. according to which the owners of the vessels in default were in such circumstances not treated in the same way as joint tortfeasors are treated at common law & each made liable for all the damage he helps to inflict (LORD ATKINSON).—DEVONSHIRE (OWNERS) *v.*

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CHARLES DICK, [1925] Exch. C. R. 203.—**CAN.**

r. —— *On scow or barge.*]—The necessity for having a watchman on a scow or barge & the degree of vigilance to be exercised by him must depend on the danger to be anticipated & guarded against.—HALL COAL & SHIPPING CORPN. *v.* CANADIAN PACIFIC RY. CO., [1925] Exch. C. R. 70.—**CAN.**

*Sect.* 2.—*Rules of good seamanship: Sub-sect.* 13, *A.* (*a*), (*b*), (*c*), (*d*) & (*e*), *B., C., D. & E.*]

BARGE LESLIE (OWNERS), [1912] A. C. 634; 107 L. T. 179; 28 T. L. R. 551; 12 Asp. M. L. C. 210; *sub nom.* THE DEVONSHIRE, 81 L. J. P. 94; 57 Sol. Jo. 10, H. L.

*Annotations:*—**Consd.** The Ran, The Graygarth, [1922] P. 80; The Koursk, [1924] P. 140. **Refd.** The Devonshire & St. Winifred, [1913] P. 13; The Cairnbahn, [1914] P. 25; The Umona, [1914] P. 141; The Harlow, [1922] P. 175.

**5327. —— Tow disabled.**]—UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA, No. 5989, *post.*

**5328. —— Tow completely under control of tug.**]—THE SEACOMBE, No. 5144, *ante.*

**5329. —— ——.**]—DEVONSHIRE (OWNERS) *v.* BARGE LESLIE (OWNERS), No. 5326, *ante.*

**5330. Liability for collision as between tug & tow—Whether irrespective of relationship of master & servant.**]—As against third parties, the legal relationship, in respect of master & servant, subsisting by virtue of contract between those in charge of tug & tow, is not material to the inquiry whether either or both tug & tow are to blame for a collision between the tow & a third vessel. —THE W. H. No. 1 & THE KNIGHT ERRANT, [1910] P. 199; 79 L. J. P. 61; 102 L. T. 643; 11 Asp. M. L. C. 407, C. A.; *on appeal, sub nom.* COMET (OWNERS) *v.* THE W. H. No. 1 (OWNERS), THE W. H. No. 1 & THE KNIGHT ERRANT, [1911] A. C. 30, H. L.

*Annotations:*—**Refd.** S.S. Devonshire *v* Barge Leslie, [1912] A. C. 634; The Koursk, [1924] P. 140.

——.]—*See, generally,* Sect. 6, sub-sect. 1, C., *post.*

**5331. Whether tow may expect tug to be reasonably well navigated—Question of fact.**]—A tug was towing a barge at the entrance to the river Mersey on a dark night & was navigated in such a manner that the barge came into collision with a lightship: —*Held:* as a pure question of fact in the circumstances the barge was entitled to expect that the tug would be reasonably well navigated & to act upon that belief, & the barge was not to blame. —COMET (OWNERS) *v.* THE W. H. No. 1 (OWNERS), THE W. H. No. 1 & THE KNIGHT ERRANT, [1911] A. C. 30; 80 L. J. P. 22; 103 L. T. 677; 11 Asp. M. L. C. 497, H. L.

*Annotations:*—**Apld.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Refd.** The Koursk, [1924] P. 140.

### (*b*) *Duties of Tug.*

**5332. To avoid other vessels—Towage at night.**]—STEVENS *v.* GOURLEY, THE CLEADON, No. 5986, *post.*

**Duties of tug, generally.**]—*See* Part XI., Sect. 2, sub-sect. 6, *ante.*

### (*c*) *Liabilities of Tug.*

**5333. When tow has pilot on board—Whether liability depends on negligence of tug.**]—THE DUKE OF SUSSEX, No. 6535, *post.*

**5334. —— ——.**]—Where a steam tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly licensed pilot by compulsion of law whose default solely occasioned the collision.—THE MARY (1879), 5 P. D. 14; 48 L. J. P. 66; 41 L. T. 351; 28 W. R. 95; 4 Asp. M. L. C. 183.

*Annotations:*—**Consd.** The Englishman & The Australia, [1894] P. 239; The Seacombe, The Devonshire, [1912] P. 21.

**5335. When collision due entirely to negligence of tug.**]—UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA, No. 5989, *post.*

**5336. When tug has full power of control—Tow disabled.**]—UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA, No. 5989, *post.*

**Liabilities of tug, generally.**]—*See* Part XI., Sect. 3, sub-sect. 1, A., *ante.*

### (*d*) *Duties of Tow.*

**5337. To give signals—No steam on tow's main engines—Tug blowing regulation towing signals—Tow not commencing to turn.**]—The steamship *M.*, in tow of two tugs, & with no steam on her main engines, was proceeding up the Humber & was about to turn in the river when she was run into by the steamship *A.* It was a dark night & the weather was hazy. The *M.*'s head tug was blowing the regulation towing signals, but no whistle signals were being sounded on the *M.* herself, who had only got steam on her donkey boiler to work the winches:—*Held:* the rules of good seamanship did not require the *M.* to sound her whistle, as to do so would be misleading to other vessels, as it might lead them into the belief that she had steam on her main engines; &, further, as she & her tugs had not commenced to turn, although they were preparing to do so, it would have been wrong for the turning signal to have been given.—THE MARMION (1913), 29 T. L. R. 646.

**Duties of tow, generally.**]—*See* Part XI., Sect. 2, sub-sect. 7, *ante.*

### (*e*) *Liabilities of Tow.*

**Liabilities of tow, generally.**]—*See* Part XI., Sect. 3, sub-sect. 1, B., *ante.*

### *B. Sailing Vessels.*

**5338. Duty to avoid collision—Duty of vessel hailing another to keep her luff.**]—THE CAROLUS (1837), 3 Hag. Adm. 343, n.; 166 E. R. 433.

**5339. —— Duty of unmanageable ship.**]—THE JOHN BUDDLE, No. 5270, *ante.*

**5340. —— Duty of starboard tacked vessel—When apprised of helpess condition of port tacked vessel.**]—When a port tacked vessel has thrown

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**PART XII. SECT. 2, SUB-SECT. 13.—A. (b).**

t. *To avoid other vessels.*]—UNITED STATES STEEL PRODUCTS CO. *v.* SINCENNES MCNAUGHTON LINES, LTD., [1925] Exch. C. R. 154.—**CAN.**

**PART XII. SECT. 2, SUB-SECT. 13.—A. (c).**

a. *When tug has full power of control—Steam barge towing two barges.*]—The rule that where a vessel is being towed "the tug is servant of the tow" does not apply to the case of a steam-barge towing two other barges, the whole under the control of those on board the steam-barge.—MONTREAL HARBOUR COMRS. *v.* THE BAY STATE (1906), Q. R. 31 S. C. 10.—**CAN.**

b. ——.]—THE A. L. SMITH & THE CHINOOK *v.* ONTARIO GRAVEL FREIGHTING CO. (1915), 51 S. C. R. 39.—**CAN.**

c. —— *Tow nevertheless responsible for own lighting & watching.*]—Though barges, each in charge of a crew, are bound to obey the orders of the master of the tug, the crew remains responsible for the lighting & watching on their particular barge.—KEYSTONE TRANSPORTS, LTD. *v.* OTTAWA TRANSPORTATION CO., LTD., [1927] Exch. C. R. 123.—**CAN.**

d. *Tug casting off tow in stress of weather.*]—A tug has the right to cast off her tow, in stress of weather, when the latter is over-running her, &, in such a case, will not be liable for subsequent damage by collision of the tow with another vessel, all the precautions required of a ship under sail not having been taken by the tow.—*Re* THE RATTRAY & THE CHALLENGER (1888), 14 Q. L. R. 135.—**CAN.**

**PART XII. SECT. 2, SUB-SECT. 13.—A. (d).**

e. *To give signals.*]—THE WANDRIAN *v.* HATFIELD (1907), 38 S. C. R. 431.—**CAN.**

**PART XII. SECT. 2, SUB-SECT. 13.—A. (e).**

f. *Liability of tug condition precedent to liability of tow.*]—THE COMMODORE (1878), 4 Q. L. R. 329.—**CAN.**

herself into stays & becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard tacked vessel. A starboard tacked vessel when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision. Both vessels were held to blame for the collision.—WILSON (UNDERWRITER (OWNER)) *v.* CANADA SHIPPING CO. (LAKE ST. CLAIR (OWNER)) (1877), 2 App. Cas. 389, P. C.

**5341. —— Duty of vessel in danger from tug & tow—Although other vessels entirely in fault.**]—THE JANE BACON, No. 5110, *ante*.

**5342. Vessel lying to—In immediate tack of vessels—Duty to keep herself under command.**]—THE STIRLINGSHIRE *v.* THE AFRIKA (1856), 7 L. T. 195.

**5343. Vessel in stays—In same position as vessel at anchor.**]—THE SEA NYMPH, No. 5265, *ante*.

**5344. —— Duty to pay off after missing stays—By squaring main yard.**]—THE KINGSTON-BY-SEA, No. 5985, *post*.

**5345. —— Port tacked vessel—Must endeavour to get out of way of starboard tacked vessel.**]—WILSON *v.* CANADA SHIPPING CO., No. 5340, *ante*.

**5346. Vessel going about—Duty to tack.**]—When a vessel is sailing upon a wind, & passes from one tack to another, the usual & ordinary mode of effecting this change is by tacking, & not by wearing; as vessels which are navigating near the one which is changing her tack naturally expect that the ordinary method of going about will be pursued, the unusual, &, therefore, unexpected operation of wearing ought not to be resorted to, unless for some good reason, nor without sufficient sea room for the purpose.—GRINDLEY *v.* STEVENS, THE FALKLAND, THE NAVIGATOR (1863), 1 Moo. P. C. C. N. S. 379; Brown. & Lush. 204; 9 L. T. 1; 9 Jur. N. S. 1113; 1 Mar. L. C. 367; 15 E. R. 744, P. C.

**5347. —— Whether vessel may wear—When good reason for wearing.**]—GRINDLEY *v.* STEVENS, THE FALKLAND, THE NAVIGATOR, No. 5346, *ante*.

**5348. —— —— When she has sufficient sea room.**]—GRINDLEY *v.* STEVENS, THE FALKLAND, THE NAVIGATOR, No. 5346, *ante*.

**5349. —— Necessity for giving warning—Vessel going as near shore of river as she can safely go.**]—THE PALATINE, No. 6212, *post*.

**5350. Following vessel—Must go about when leading vessel goes about.**]—THE PRISCILLA, No. 6133, *post*.

**Duty not to stand too close—In tempestuous weather.**]—*See* No. 5275, *ante*.

**Sailing & steering rules generally.**]—*See* Sect. 2, sub-sects. 1–12, *ante*.

*C. Dangerous Vessels.*

**5351. Duty to give warning of danger—Ram projecting under water.**]—The *B.*, an armour plated ship with a ram projecting under water about fourteen feet from her stem, was lying hove to when the *F.*, in trying to speak her, came in contact with the ram & was sunk:—*Held:* there was no obligation on those on board the *B.* to give notice of the ram or that she was a leewardly ship.—H.M.S. BELLEROPHON (1874), 44 L. J. Adm. 7; 33 L. T. 412; 23 W. R. 248; 3 Asp. M. L. C. 58; *affd.* (1875), 33 L. T. at p. 413, P. C.

**5352. —— Ship being leewardly ship.**]—H.M.S. BELLEROPHON, No. 5351, *ante*.

*D. Small Vessels.*

**5353. Duty to avoid large vessels—In narrow channel.**]—The rule for navigating a river or narrow channel laid down in 17 & 18 Vict. c. 104, s. 297, is applicable to vessels in tow. *Semble:* in a narrow channel small vessels should avoid large ones in time.—THE LA PLATA (1857), Sw. 298; 30 L. T. O. S. 214; 166 E. R. 1147, P. C.

*E. Dumb Barges.*

**Definition of dumb barge.**]—*See* No. 30, *ante*.

**5354. Whether barge must have man in attendance when not under way.**]—Between 6 & 7 o'clock on an October evening, the man in charge of a laden barge left her moored in a dock lighted by the electric light.

Between 7 p.m. & 8 p.m. a steam tug used in shifting craft, in the dock ran into her, & when the man returned at 9 p.m. he found the barge sunk.

In an action of damage by collision, brought in the City of London Ct., by the owners of the barge against the owners of the tug the judge held that in law, there was no duty on the owner of a barge, to have a man on board of her when moored in a dock, & on the facts, the tug must be pronounced alone to blame. On appeal, on the ground (*inter alia*) that there was contributory negligence on the part of the owners of the barge in leaving her without any one in charge of her, who might have averted the collision, or beached the barge afterwards:—*Held:* the appeal must be dismissed, for the absence of a person on the barge had nothing to do with the collision, & it would have been impracticable to have beached the barge afterwards.—THE HORNET, [1892] P. 361; 68 L. T. 236; 7 Asp. M. L. C. 262; 1 R. 549, D. C.

**5355. —— Question of fact.**]—A ketch negligently caused a barge moored in the barge roads in the river Thames near Greenwich Pier to get adrift. She was unattended, & ultimately caught under a dolphin, & some of her cargo was lost & some damaged. In an action for damage to cargo:—*Held:* the question whether it was negligent to leave a barge unattended was a question of fact, but it was not negligent to leave a barge unattended in a river or a dock if there was no reasonable ground to anticipate danger to the barge.—THE WESTERN BELLE (1906), 95 L. T. 364; 10 Asp. M. L. C. 279.

**5356. —— Effect of situation of barge—In dangerous position.**]—LACK *v.* SEWARD, No. 6258, *post*.

**5357. —— —— In place where persons using ordinary care would collide with it.**]—LACK *v.* SEWARD, No. 6258, *post*.

**5358. —— —— Close astern of steamship.**]—Whilst a barge was by night lying astern of a steamship in a dock the latter moved her propeller & cut a hole in the barge. It appeared that there was no one on board the barge at the time of the accident. In a collision action:—*Held:* although the steamer was to blame, the barge was also to blame for not having any one on board of her, as, had there been, the collision might have been avoided, & in any event the barge might have been beached before she sank, & therefore pltfs. could only recover half their damages.—THE SCOTIA (1890), 63 L. T. 324; 6 Asp. M. L. C. 541.

*Annotations:*—**Distd.** The Hornet, [1892] P. 361. **Refd.** The Dunstanborough, [1892] P. 363, n.

PART XII. SECT. 2, SUB-SECT. 13.—C.

**g.** *Rafts—Duty to avoid obstruction of navigation—Duty of steam vessels to give way.*]—ADAMS *v.* BRITISH YUKON NAVIGATION CO. (Y.T.) (1905), 2 W. L. R. 476, 478.—CAN.

*Sect. 2.—Rules of good seamanship: Sub-sect. 13, E.; sub-sects. 14 & 15, A., B. & C.]*

**5359. —— When man in attendance might have prevented damage.**]—During the hour in which the man on the *Arthur* was away he might have done a great deal to avoid the collision. If he had been there, there were many things which he might have done. There was, in the opinion of the Trinity Masters, nothing to prevent him from veering, & so getting away (JEUNE, P.).—THE DUNSTANBOROUGH (1891), [1892] P. 363, n.

*Annotation:*—**Distd.** The Hornet, [1892] P. 361.

**5360. —— Collision unavoidable even when man in attendance—Barge unable to be beached.**]—THE HORNET, No. 5354, *ante*.

**5361. —— No reasonable ground to anticipate danger.**]—THE WESTERN BELLE, No. 5355, *ante*.

**5362. —— Barge swinging with tide—Necessity for showing position of barge.**]—THE ST. AUBIN, No. 5517, *post*.

**5363. Right to navigate on either side of river.**]—A screw steamship had just come out of the Regent's Canal Dock in the river Thames, about 2 a.m. on a December morning, when she came into collision with a dumb barge which was drifting up the river with the flood tide, & without having any light exhibited:—*Held:* the steamship might, under the circumstances, have kept out of the way of the barge, & she ought to have done so, & that she was alone to blame for the collision.

It has been laid down in recent decisions that vessels may navigate on either side of the river. . .

It is further said that the barge is to blame because she carried no light. But there is no regulation requiring dumb barges to carry any light, & there is a great difficulty in imposing a duty beyond the letter of the regulations. What light ought a dumb barge to carry? The ordinary lights would tend to mislead, & no provision has been made authorising a dumb barge to carry any special light. I cannot, therefore, hold that the barge was to blame for not having carried a light.

There is no duty imposed by statute upon a barge to get out of the way of a steamer; nor do I consider there was any such duty imposed upon the *Lord Clarendon* [the dumb barge] in the special circumstances of the case. On the contrary, it was the duty of the steamer to get out of the way of the barge (SIR ROBERT PHILLIMORE).—THE OWEN WALLIS (1874), L. R. 4 A. & E. 175; 43 L. J. Adm. 36; 30 L. T. 41; 22 W. R. 695; 2 Asp. M. L. C. 206.

*Annotation:*—**Consd.** The Swallow (1877), 36 L. T. 231.

**5364. Necessity for carrying light.**]—THE OWEN WALLIS, No. 5363, *ante*.

**5365. Whether barge must get out of way of steamer.**]—THE OWEN WALLIS, No. 5363, *ante*.

**5366. Duty of steamer to get out of way of barge.**]—THE OWEN WALLIS, No. 5363, *ante*.

**5367. Whether barge must keep out of deep water navigation—Effect of obstruction of deep water navigation.**]—(1) Where a steamer is navigating a reach in which there is a risk of her smelling the ground, it is her duty to be under such control by occasionally stopping her engines or otherwise, so that she may be able to avoid collisions with other craft in case she does smell the ground & fails to answer her helm.

(2) In the absence of any rule of the road, regulation, or custom, there is no duty on the part of a keel or barge drifting up a river to keep out of the deep water navigation & navigate in the shallow water, even though by remaining in the deep water she obstructs the passage of steamships which can only navigate in the deep water.

(3) A keel with her mast lowered may drive up on a flood tide in any part of a river lashed to another keel, but it is her duty in such circumstances to go up dredging with her anchor down, in order that she may thereby have the means in an emergency of bringing herself up if necessary & whilst two keels may drive up lashed together there is no less duty imposed on them to dredge.—THE RALPH CREYKE (1886), 55 L. T. 155; 6 Asp. M. L. C. 19.

**5368. Barge having no means of stopping—Collision with vessel moored in water—Whether barge negligent.**]—Dumb barges in the Thames do not carry anchors, & have no means of bringing themselves up except by going ashore or fastening on to anything they may come in contact with, & hence a dumb barge starting on her voyage in clear weather & getting into a fog, is not guilty of negligence if she comes into contact with a vessel moored in the river, & if that vessel in breach of the Rules & Bye-laws for the Navigation of the River Thames has her anchor not stock-a-wash, & the barge is thereby injured, the vessel so moored is solely responsible for such damage.—THE ROSE OF ENGLAND (1888), 59 L. T. 262; 6 Asp. M. L. C. 304, D. C.

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SUB-SECT. 14.—SPECIAL WEATHER.

**5369. Defence of bad weather to be received with caution.**]—THE UHLA, No. 5318, *ante*.

**5370. Necessity for keeping sufficient crew on board—When master has warning of bad weather.**]—THE KEPLER (1875), 2 P. D. 40.

*Annotation:*—**Consd.** The Pladda (1876), 2 P. D. 34.

**Duty not to stand too close.**]—*See* No. 5275, *ante*.

**Duties of ship at anchor.**]—*See* Nos. 5308, 5314, 5320, *ante*; No. 5404, *post*.

**Rules in fog.**]—*See* Sect. 3, sub-sect. 5, C., *post*.

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SUB-SECT. 15.—NAVIGATION IN RIVERS AND NARROW WATERS.

*A. Tide and Current.*

**5371. Steamer entering narrow cut at too early period of tide—Liability for damage to sailing vessel.**]—Where a steam tug was run down by a sailing vessel, in a narrow cut, leading to a dock, navigable only at a particular period of the tide, at which period the collision occurred, the tug, proceeding in an opposite direction, held to be to blame.—THE EFFORT (1847), 5 Notes of Cases, 279.

**5372. Flood tide—Duty to navigate carefully.**]—The tide being little more than threequarters flood . . . & the night not particularly clear, it is perfectly manifest . . . that it was the duty of those on board the steamer to navigate with great care & great caution . . . because, being a flood tide, vessels would be met (DR. LUSHINGTON).—THE TRIDENT (1854), 1 Ecc. & Ad. 217; 164 E. R. 126.

**5373. Exceptional current—Necessity for keeping anchor in readiness.**]—The fact of a vessel under steam colliding with a ship at her moorings in daylight is *primâ facie* evidence of fault; & her



h. *Duty of vessel going against current—To slacken speed & wait.*]—MADDEN *v.* S.S. VINMOUNT, [1927] Exch. C. R. 212.—CAN.

owners cannot escape liability except by proving that a competent officer could not have averted the collision by the exercise of ordinary care & skill.

Where a steamship under way collided with a vessel at her morrings in daylight in consequence of an exceptional current, known to be a possible though improbable occurrence, & it was proved that there was delay in dropping her anchor, & that the other anchor was not in readiness, she was found to have neglected ordinary precautions, & her owners were held liable.—THE CITY OF PEKING *v.* COMPAGNIE DES MESSAGERIES MARITIMES, THE CITY OF PEKING (1888), 14 App. Cas. 40; 58 L. J. P. C. 64; 61 L. T. 136; 6 Asp. M. L. C. 396, P. C.; *subsequent proceedings* (1890), 15 App. Cas. 438, P. C.

*Annotations:*—**Apld.** The Polynésien, [1910] P. 28. **Mentd.** Barnes U. D. C. *v.* London General Omnibus Co. (1908), 7 L. G. R. 359.

**5374. —— Must be such that competent seaman could not avert collision—By exercise of ordinary care & skill.**]—Defts.' steamship, whilst proceeding, in daylight, out of the harbour of Singapore, ran into & sank pltfs.' vessel at her moorings. The defence set up was inevitable accident due to an abnormal current, &, in the alternative, compulsory pilotage:—*Held:* defts. were liable, for they had not succeeded in establishing the existence of the abnormal current relied on, &, therefore, the *onus* of proof being on them, they had failed to show that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care & skill.—THE POLYNÉSIEN, [1910] P. 28; 79 L. J. P. 45; 101 L. T. 749; 11 Asp. M. L. C. 354.

**5375. —— Causing failure of helm to answer—Whether vessel ought to avoid current—Current known to be variable.**]—The Strait of Messina is a narrow channel within Article 21 of the Admlty. Regulations for preventing Collisions at Sea:—*Held:* (1) the *A. L.* by infringing the said article occasioned the collision which afterwards happened & failed to establish that the *R.* by anything which she did contributed to it or could in any way have avoided it; the *R.'s* helm having been put hard aport in a way which if successful would have put her on such a course as would have determined the risk of collision, the duty of reversing her engines did not arise till it was discovered that the vessel, owing to the action of a current, was not obeying her helm.

It is further contended that precautions ought to have been taken by the *Rhondda* to avoid this current, or whatever it is to be called, because it is found noted in the charts, & must be taken to be a thing that persons navigating this channel ought to have in their contemplation. But there is nothing to show that, under ordinary circumstances, there would be any risk in a vessel coming round there. The current & the eddy are variable. Nobody can tell for certain that they will be felt at a particular place; &, above all, the *Rhondda* had no reason to anticipate that the operation of the current or eddy would have any bearing upon her duty with reference to the *Alsace Lorraine*, because she had a right to expect that the coast would be clear from steamers coming out in the direction in which the *Alsace Lorraine* was (HANNEN, P.).

(3) *Qu.:* as to what particular width or length will constitute a narrow channel.—SCICLUNA *v.* STEVENSON, THE RHONDDA (1883), 8 App. Cas. 549; 49 L. T. 210; 5 Asp. M. L. C. 114, P. C.

*Annotation:*—*As to* (1) **Consd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

*B. Rounding Bends.*

**5376. Duty of vessel going against tide—To proceed cautiously—Thames—Baldwin Point.**]—Where vessels are approaching each other at Baldwin Point in Bow Creek, which is a blind corner & a difficult bend to navigate, good seamanship requires that a vessel going up with the tide shall give such warning as will enable vessels which may be coming down against the tide to approach the bend in such a way as to prevent any collision.

It is the duty of vessels coming down against the tide to proceed cautiously, &, if necessary, stop above the bend altogether.

In the City of London Ct. the judge held that a vessel going up with the tide approaching this bend was alone to blame for a collision with a down comer for failing to warn her. The Div. Ct. varied this order on appeal, holding that both vessels were to blame, the one going up for not giving sufficient warning & the one coming down for proceeding carelessly at such a speed that she could not have avoided a collision with an innocent vessel if she met one at the bend.—THE KENNET, [1912] P. 114; 81 L. J. P. 82; 12 Asp. M. L. C. 120, D. C.

**5377. —— To wait at bend—Scheldt.**]—In an action for collision between two vessels under steam in the River Scheldt, it appeared that the vessels were proceeding in opposite directions, the one up & the other down the river, & that the vessel going up the river had the tide against her. The collision took place at a strong bend of the river. It did not appear that any positive rule had been printed & circulated with regard to the navigation of the river; but, by the practice of navigation there, it was the duty of a vessel navigating against the tide to wait until a vessel coming in the opposite direction had cleared her at the bend:—*Held:* upon proof that the vessel navigating against the tide had disregarded this practice she must be taken to have been to blame for the collision.—THE TALABOT (1890), 15 P. D. 194; 63 L. T. 812; 6 Asp. M. L. C. 602.

**5378. —— —— Upper Humber—Whitton gas float No. 3.**]—Although there is no positive rule with regard to the navigation of the narrow deep water channel in the neighbourhood of Whitton gas float No. 3 in the Upper Humber, the practice, based on good seamanship, requires that those in charge of a steamship, proceeding against the flood tide, should avoid meeting another vessel at the gas float, & should, therefore, wait until the vessel proceeding with the tide has rounded the bend.—THE EZARDIAN, [1911] P. 92; 80 L. J. P. 81; 104 L. T. 400; 11 Asp. M. L. C. 602.

**5379. —— —— Thames—Baldwin Point.**]—THE KENNET, No. 5376, *ante*.

**5380. Duty of vessel going with tide—To give sufficient warning—Thames—Baldwin Point.**]—THE KENNET, No. 5376, *ante*.

*C. Dredging Stern First.*

**5381. When duty arises.**]—Pltf.'s steamship, proceeding up the river Ouse with a strong flood tide, neglected, on approaching the bend in Goole

**PART XII. SECT. 2, SUB-SECT. 15.—B.**

**k. *Duty of vessel going against tide—To wait at bend.*]**—Where if two steamers keep their speed they would meet at a bend in a narrow channel, it would be bad seamanship for the one navigating against the stream not to wait until the other has passed clear.—HALL COAL & SHIPPING CORPN. *v.* THE BEECHBAY, [1925] Exch. C. R. 23,—CAN.

*Sect. 2.—Rules of good seamanship: Sub-sect. 15, C., D., E., F. & G.]*

Reach, to swing & dredge up stern first, with the result that, not being under proper control, she was carried, at an excessive speed, into collision with deft.'s steamship, which was coming down the reach, & which contributed to the collision by starboarding after giving a port helm signal:—*Held:* both vessels were to blame, pltfs.' vessel for excessive speed due to failing to observe the seamanlike precaution of swinging in the reach, in accordance with the local practice; defts.' vessel for wrongly starboarding, & failing to obey Article 28 of the Regulations for Preventing Collisions at Sea by indicating her helm movement with the appropriate whistle signal.—THE FRANKFORT, [1910] P. 50; 79 L. J. P. 49; 101 L. T. 664; 11 Asp. M. L. C. 326, C. A.

**5382. —— Two keels lashed to each other.**]—THE RALPH CREYKE, No. 5367, *ante*.

**5383. —— Vessel overtaken by fog.**]—(1) Although a vessel may be justified in anchoring in the fairway of the Thames through being overtaken by a dense fog, such a place is not a proper anchorage ground under Articles 10 & 12 of the Thames Rules & Bye-laws, 1872, & the duty lies on those in charge of her to move her as soon as they reasonably can, & if a collision occurs whilst she is so anchored, the question will be whether between the time of her anchoring & the collision, the weather was such that she could reasonably have been removed.

(2) A steamship bound up the Thames on a flood tide ought not to leave a wharf & get under way in a dense fog.

(3) *Semble:* if a vessel is overtaken by dense fog, in such circumstances, the proper mode for her to go up is dredging up stern first with her anchor down, so that she can be brought up at any moment.—THE AGUADILLANA (1889), 60 L. T. 897; 6 Asp. M. L. C. 390.

**5384. Necessity for keeping look out.**]—(1) A steamer dropping up the Thames stern first on a dark night for the purpose of going into dock & exhibiting only her stern light to down-coming vessels is bound to keep a look out up river, & ought, when she sees a vessel coming down, to give such sufficient signal as will enable the down-coming steamer to avoid her.

(2) *Semble:* a proper signal under such circumstances would be a prolonged blast of the steam whistle of not less than five seconds' duration.—THE JUNO (1894), 71 L. T. 341; 7 Asp. M. L. C. 506; 11 R. 679.

**5385. Duty to give warning—What is sufficent warning—One long blast.**]—THE JUNO, No. 5384, *ante*.

**5386. —— —— Three short blasts.**]—THE BATTERSEA (1912), cited in Halsbury's Laws of England, Vol. XXVI, at p. 477, n.

**Duty to show light—Sufficiency of light.**]—*See* No. 5256, *ante*.

*D. Difficulties of Warping or Smelling the Ground.*

**5387. Vessel warped down river—Liability for collision due to difficulties involved in warping.**]—If a vessel chooses to avail herself of a particular mode of going down the river at a particular time, which renders it difficult to escape a collision, she must bear the consequences of the contingency to which she has exposed herself.

Plea, in a cause of damages, that the ship causing the collision was being warped down the river at the time, & in consequence could not get out of the way, overruled.—THE HOPE (1843), 2 Wm. Rob. 8; 4 L. T. 774; 166 E. R. 659.

**5388. Duty where risk of smelling ground—To keep full control—By occasionally stopping engines.**]—THE RALPH CREYKE, No. 5367, *ante*.

*E. Anchoring or Aground in Fairway.*

**5389. What is fairway of river.**]—The fairway of a river is not necessarily confined to that part of the channel which is marked by buoys, but includes all that part of the river inshore of the buoys which is navigable for vessels of moderate draught.—THE BLUE BELL, [1895] P. 242; 64 L. J. P. 71; 72 L. T. 540; 7 Asp. M. L. C. 601; 11 R. 790, D. C.

*Annotation:*—**Apld.** The Clutha Boat 147, [1909] P. 36.

**5390. ——.**]—Pltfs.' sailing barge, whilst at anchor to the northward & westward of the Upper Mussel buoy in Long Reach of the river Medway, was run into by a steam tender, in charge of deft., conveying liberty mean from Chatham Dockyard to two of H.M. vessels moored further down the river. The weather was thick with fog, & though daylight, the barge was exhibiting her riding light; but her bell was not being rung. The barge was suddenly seen a few yards ahead, & the stem of the tender struck the port side amidships of the barge a heavy blow & sank her:—*Held:* the negligence of those in charge of both vessels had contributed to the collision, & both were to blame, for the barge was in the "fairway" as defined in *The Blue Bell*, [1895] P. 242, & therefore, on account of the fog, bound to ring her bell under Medway Conservancy by-laws, Article 43 (c); but if not coming under that art. she was, in the circumstances, & in the opinion of the nautical assessors, bound to indicate her position by sound signals as a seamanlike precaution within the meaning of Article 48.—THE CLUTHA BOAT 147, [1909] P. 36; 78 L. J. P. 41 100 L. T. 198; 11 Asp. M. L. C. 199.

**5391. ——.**]—Although barges moored at barge roads to some extent obstruct the navigable channel they cannot be said to be lying "in the fairway."—THE LAKE FARRAGUT, [1921] P. 305; 90 L. J. P. 369.

**5392. Whether vessel may anchor in fairway.**]—THE LANCASHIRE, No. 5264, *ante*.

**5393. —— When compelled by damage in collision—Due to ship excusing itself.**]—THE KJOBENHAVN (1874), 30 L. T. 136; 2 Asp. M. L. C. 213, P. C.

**5394. —— When overtaken by dense fog.**]—THE AGUADILLANA, No. 5383, *ante*.

**5395. Duty of vessel aground in fairway—To apprise other vessels of her position—By lights.**]—The petition in a damage suit alleged that pltf.'s vessel, in the early morning when it was dark, was proceeding under sail in the channel leading to the harbour at H., when the vessel *I.*, which had not any light exhibited, was made out ahead; the helm of pltf.'s vessel was then ported, but as soon as this had been done it was discovered that the *I.* was across the channel, & that pltf.'s vessel was

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**PART XII. SECT. 2, SUB-SECT. 15.—E.**

l. *Duty of vessel at anchor in fairway—To exhibit lights.*]—A vessel anchoring upon the known track pursued by river steamers, or within a few yards of the channel, & without exhibiting a light, will be deemed open to the charge of wilful neglect & gross negligence. 'At any time, whether required by the harbour regulations or not, in a close river, where there is a number of vessels passing & repassing, it is only an act of proper seamanlike precaution to exhibit a light.—THE VICTORIA (1854), 7 Ir. Jur. 94.—**IR.**

m. *Joint liability for negligence of vessel avoiding her.*]—ELLERMAN LINES *v.* CLYDE NAVIGATION TRUSTEES, [1911] S. C. 122; 48 Sc. L. R. 44; [1910] 2 S. L. T. 323.—**SCOT.**

in imminent danger of running into her; the helm of pltf.'s vessel was put hard aport to avoid running into the *I.*, & thereby pltf.'s vessel was compelled to go out of the fairway of the channel, & in consequence thereof she took the ground & drove against the town wall of H. & sustained damage, & also did damage to the wall; that the damage to pltf.'s ship & the losses of pltf. by reason thereof was occasioned by negligence of those on board or in charge of the *I.*, in having got the *I.* across the fairway, & in leaving her there without any light exhibited or other measures taken to warn other vessels of her position; that the measures taken by pltf.'s vessel to avoid coming into collision with the *I.* were proper & necessary for that purpose; & after taking such measures those on board pltf.'s vessel were unable to prevent their vessel taking the ground & suffering the damage aforesaid:—*Held:* the petition disclosed a good cause of action.

Independently altogether of the "Regulations for Preventing Collisions at Sea," those in charge of a vessel aground at night in the fairway of a navigable channel are bound by the general maritime law . . . to take proper means to apprise other vessels of her position (SIR R. PHILLIMORE).—THE INDUSTRIE (1871), L. R. 3 A. & E. 303; 40 L. J. Adm. 26; 24 L. T. 446; 19 W. R. 728; 1 Asp. M. L. C. 17.

*Annotations:*—**Mentd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; The Normandy, [1901] P. 187.

**5396.** ——— ———.]—A vessel proceeding up the Thames grounded. She sounded four short blasts on her whistle to signify that she was not under command, but, before she could put up the lights required by Thames Rules, Article 30, she was run into by a steamship which had been coming up the river about a quarter of a mile astern of her. In a damage action:—*Held:* the steamship which got aground was not to blame for not putting up the lights required by Article 30, as that rule was not applicable & there was not sufficient time in which to put them up before the collision, & she had sounded a four-blast signal signifying that she was not under command.—THE BROMSGROVE, [1912] P. 182; 82 L. J. P. 2; 106 L. T. 815; 12 Asp. M. L. C. 196.

**5397.** ——— **By giving sound signals.**]—THE BROMSGROVE, No. 5396, *ante.*

**5398. Duty of vessel at anchor in fairway—To apprise other vessels of her position—By lights.**]—RITSON *v.* CRAIG (1838), 9. L. T. 811.

**5399.** —— **To take in side lights—When held by anchor.**]—THE WEGA, No. 5617, *post.*

**5400. Duty of vessel leaving anchor in fairway—To apprise other vessels of position of anchor.**]—CLARKE *v.* SCATTERGOOD (1663), Burrell, 243; 167 E. R. 556.

*Annotation:*—**Consd.** Mersey Docks & Harbour Board *v.* Turner, The Zeta, [1893] A. C. 468.

**Duties of vessels under particular local rules.**]—*See* Sect. 4, *post.*

**Obstruction to navigation—In navigable waters.**]—*See* WATERS & WATERCOURSES.

*F. Incoming and Outgoing Vessels.*

**5401. Duty of outgoing vessel—When turning up or down river—Right of other vessels to expect proper measures to be taken.**]—Where two vessels, one the *U.*, going down a river, the other the *I.*, crossing it, sighted each other half a mile off, & the *T.* having intended to turn her head down the river, was baffled by the flood tide, but neglected thereupon to run up her outer jib so as to aid the operation:—*Held:* the *U.* acted rightly in not altering the course she had properly upon observing the *T.*'s intention having a right to assume that the *T.* would have taken all the means proper for carrying out that intention.—LAIRD *v.* BROWNLIE, THE ULSTER (1862), 1 Moo. P. C. C. N. S. 31; 1 Mar. L. C. 234; 15 E. R. 614, P. C.

*Annotation:*—**Mentd.** The Maender (1862), 1 Moo. P. C. C. N. S. 42.

**5402. Duty of incoming vessel.**] — A vessel coming up the Thames on a dark night, with the wind at south, & preparing to anchor, if she descries another vessel approaching her in a straight line, ought to port her helm, & pass the approaching vessel on the larboard side, before rounding to & anchoring; but if she has starboarded her helm, before seeing the other vessel, she will not be held to blame for a collision ensuing, although the approaching vessel, not aware of the intention of the other vessel to anchor, has herself observed the Trinity House rule, & taken her own measures, on the supposition that the other vessel would pass to leeward of her.

A steam vessel was carrying a common light on the starboard bow, & a red light on the larboard; a question arose in a case of collision, whether at a particular time, the steamer's head was to the south; the evidence on behalf of the opposing vessel stated, that a light was seen, but not a red light. The Trinity Masters being of opinion that if the steamer's head was to the south, according to the relative positions of the two vessels the red light would not be visible to the other vessel, the fact that such light was not seen held to be decisive on the question of the position of the steamer's head.—THE SHANNON (1842), 1 Wm. Rob. 463; 166 E. R. 645; *sub nom.* THE SHANNON, THE PLACIDIA, 7 Jur. 380.

**5403.** —— **To give way to outgoing vessel.**] — The *T.*, a screw steamer, was approaching a lock leading from a basin into a dock at the time when two paddle tugs were coming out. The first tug passed out safely. The master of the second thought that there was not room to pass between the *T.* & the lock wall, & stopped. The harbour master, whose orders he was bound to obey, ordered him to go ahead, & at the same time ordered the *T.* to go astern. The *T.* reversed her engines, but only sufficiently to keep her stationary, as the wind & tide were drifting her towards the lock. A collision took place between the port sponson of the tug & the port bow of the *T.*:—*Held:* the tug was not to blame, because (1) an incoming ship should give way to an outgoing ship; (2) the master of the tug was bound to obey the order of the harbour master to go ahead; (3) the *T.* had disobeyed the order to go astern.—TAYLOR *v.* BURGER (1898), 78 L. T. 93; 14 T. L. R. 228; 8 Asp. M. L. C. 364, H. L.

*Annotation:*—*As to* (1) **Distd.** The Kaiser Wilhelm der Grosse, [1907] P. 259.

*G. Obeying Orders of Dock or Harbour Master.*

**5404. General rule.**] — By the regulations relating to Falmouth harbour, "masters & persons

**PART XII. SECT. 2, SUB-SECT. 15.—F.**

**5403 i.** *Duty of incoming vessel—To give way to outgoing vessel.*]—THE PRESCOTT *v.* THE HAVANA, TAYLOR *v.* RICHELIEU & ONTARIO NAVIGATION CO., C. R. [1910] A. C. 90; 7 E. L. R. 337.—**CAN.**

**5403 ii.** —— ———.]—A vessel has no right to manœuvre her entry into the basin of a harbour while another vessel is leaving her moorings ready to come out; under such circumstances it is the duty of the former to remain below the canal entrance, in order to give way to the outgoing vessel, & her failure to do so will render her liable in case of collision.—CANADA SHIPPING CO., LTD. *v.* THE TUNISIE, THE DEPPE *v.* THE CABOTIA (Que.) (1919), 18 Exch. C. R. 348; 45 D. L. R. 386.—**CAN.**

**5403 iii.** ——— ———.]—HALL COAL & SHIPPING CORPN. *v.* THE BEECHBAY, [1925] Exch. C. R. 23.—**CAN.**

*Sect. 2.—Rules of good seamanship: Sub-sect. 15, G. & H. Sect. 3: Sub-sects. 1, 2 & 3, A. & B. (a).]*

in charge of vessels are to cast off & remove them whenever required, & in the event of neglect or refusal to do so, they will be removed by the dock master. Vessels are to strike their yards & masts, if required." The master of a vessel which had been moored at the eastern pier was desired by the dock master to remove her to the western pier, & to strike his top gallant masts, etc. On the master's refusal to obey the order, he having left the vessel with only three persons on board, the dock master removed her to the western pier, where during a gale she broke from her moorings & did considerable damage to the wharf:—*Held:* (1) by the regulations the dock master had a discretion to exercise for the welfare of all ships entering the harbour, & the master was bound to obey the order & assist in the removal of his ship, even though if the interests of the ship alone were to be considered, such removal was injudicious; (2) it was the duty of the master to have kept a sufficient crew on board to protect his ship against ordinary perils; (3) as a matter of fact, the damage was caused by the negligence of the master, & his refusal to obey the orders of the dock master; &, consequently, the vessel was liable for such damage.

(4) It may possibly be that in the West or East India Docks . . . or in some of the Liverpool docks, or in some dock from its situation & construction perfectly secure in all weather, that a single watchman may suffice for the protection of the ship (SIR ROBERT PHILLIMORE).—THE EXCELSIOR (1868), L. R. 2 A. & E. 268; 37 L. J. Adm. 54; 19 L. T. 87; 3 Mar. L. C. 151.

*Annotations:—Generally,* **Refd.** Turner *v.* Mersey Docks & Harbour Board, The Zeta, [1892] P. 285; The Normandy, [1904] P. 187.

**5405.** ——.]—TAYLOR *v.* BURGER, No. 5403, *ante*.

**Authority of dockmasters & harbour masters, generally.**]—*See* Part XXI., Sect. 8, *post*.

*H. Rules in Particular Rivers.*

*See* Sect. 4, *post*.

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## SECT. 3.—THE SEA REGULATIONS.

### SUB-SECT. 1.—IN GENERAL.

**5406. To what ships applicable—H.M. ships—Questions arising between Admiralty & private persons.**] — (1) Neither the sailing regulations issued in pursuance of Merchant Shipping Act, 1854 (c. 104), nor those published under the authority of Merchant Shipping (Amendment) Act, 1862 (c. 63), are applicable to H.M. vessels.

(2) Questions of navigation as between ships belonging to Her Majesty & those of private persons must be tried by the general rules of the sea.

(3) The powers, if any, of the Lords of the Admlty. under Harbours Act, 1814 (c. 159), s. 2, to vary by notice the general sailing regulations, must, to have any effect whatever, be exercised in strict conformity with the Act.—THE PROMISE *v.* H.M.S. TOPAZE (1864), Holt, Adm. 165; *sub nom.* H.M.S. TOPAZE, 10 L. T. 659; 12 W. R. 923; 2 Mar. L. C. 38.

**5407.** —— ——.]—THE BRUCKENHOLME *v.* H.M.S. SUPPLY (1865), Holt, Adm. 189; *sub nom.* H.M.S. SUPPLY, 12 L. T. 799; 2 Mar. L. C. 262.

—— ——.]—*Compare* No. 5977, *post*.

**5408.** —— **Foreign ships—Acceding to regulations.**]—THE NEW ED *v.* THE GUSTAV (1863), Holt, Adm. 28; *sub nom.* THE GUSTAV, THE NEW ED, 9 L. T. 547; 1 Mar. L. C. 407.

**5409.** —— —— **Warships.**]—THE LORD BYRON (1879), 1 Maude & Pollock's Law of Merchant Shipping, 4th ed., p. 607, n.

**Power to make regulations.**]—*See* 1894 Act, s. 418.

**5410. Power to vary regulations—By Lords of the Admiralty.**]—THE PROMISE *v.* H.M.S. TOPAZE, No. 5406, *ante*.

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### SUB-SECT. 2.—CONSTRUCTION.

*See, generally,* STATUTES.

**5411. Whether construed literally.**] — THE LIBRA, No. 6172, *post*.

**5412.** —— **Reasonable business interpretation.**]—THE DUNELM, No. 5576, *post*.

**5413. To be read as a whole.**]—In accordance with Admlty. directions, two neutral steamships which came into collision in the English Channel were, owing to the danger of German submarines, navigating without exhibiting any under-way lights. Both ships had their side lights lighted & ready to be exhibited, & neither was guilty of any delay in exhibiting a side light after becoming aware of the presence of the other ship.

Pltfs., the owners of the cargo laden on one of the ships which sank in consequence of the collision, alleged that to navigate without lights, even under Admlty. directions, constituted negligence & a breach of Articles 1 & 2 of the Regulations for Preventing Collisions at Sea:—*Held:* the regulations must be read as a whole; the complete disregard by the Germans of all rules of international law & of the practice of civilised people in the conduct of war had brought into existence a new danger of navigation in an area of the high seas in which the vessels were navigating; & in navigating with their lights screened, both vessels were doing what was justified & required by Article 27 under which they were bound to have "due regard to all dangers of navigation & collision."—THE ALGOL, [1918] P. 7; 87 L. J. P. 7; 119 L. T. 151; 34 T. L. R. 85; 14 Asp. M. L. C. 323.

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### SUB-SECT. 3. OBSERVANCE OF SEA REGULATIONS.

*A. In General.*

*See* 1894 Act, s. 419.

**5414. Application of rules—What circumstances considered—Knowledge of person in charge.**]—THE BERYL, No. 5941, *post*.

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**PART XII. SECT. 3, SUB-SECT. 1.**

n. *To what ships applicable—Foreign ships.*]—In a collision upon the high seas between a British & a foreign ship Merchant Shipping Act, 1894, s. 419 (4), does not apply to the foreign vessel in the absence of an order in council made under either sect. 424 or 734 of the Act directing that Part V. apply to such foreign vessel.—FORTUNATO FIGARI (OWNERS) *v.* S.S. COOGEE (1904), 29 V. L. R. 874.—AUS.

o. —— ——.]—Norwegian ship held to be liable in damages & costs for having come into collision with a British ship through breach of Admiralty Regulations, Art. 11, as to rule of the road, such regulations being binding by convention on Norwegian ships, whether the collision take place outside or within British jurisdiction.—THE REPEATER *v.* THE BRAGA OF KRAGEROE (1866), 14 L. T. 258.—IR.

p. —— *All British ships.*]—Imperial Merchant Shipping Acts, 1854 & 1873, as to the prevention of collisions at sea, now Part V. of 57 & 58 Vict. c. 60, & the regulations thereunder, apply to British ships in all parts of the world, & the provisions of the local Navigation Act so far as they are repugnant to the Imperial Acts & the regulations thereunder, are void & inoperative. — AUSTRALASIAN STEAM NAVIGATION CO. *v.* SMITH, SMITH *v.* AUSTRALASIAN STEAM NAVIGATION CO. (1886), 7 N. S. W. L. R. 207.—AUS.

**5415.** —— ——.]—A ship failing to obey one of the Regulations for preventing collisions whereby a collision occurs is not to be deemed to be in fault within Merchant Shipping Act, 1873 (c. 85), s. 17, if the circumstances were such that a competent seaman exercising reasonable care could not have discovered that the regulation was in fact applicable.

Of two sailing ships approaching one another the *S.* was running free & the *T.* was closehauled on the port tack. It was therefore the duty of the *T.* to keep her course in accordance with Arts. 14, 22 of the Regulations for Preventing Collisions at Sea (1884), but those navigating the *T.*, in the belief that the *S.* was closehauled on the starboard tack, ported, whereby a collision occurred:—*Held:* since with ordinary skill & by the exercise of reasonable care those navigating the *T.* could not have ascertained that the *S.* was running free, the *T.* was not to be deemed to be in fault within Merchant Shipping Act, 1873 (c. 85), s. 17.—BAKER *v.* THEODORE H. RAND (OWNERS), THE THEODORE H. RAND (1887), 12 App. Cas. 247; 56 L. J. P. 65; 56 L. T. 343; 35 W. R. 781; 6 Asp. M. L. C. 122, H. L.

*Annotations:*—**Consd.** S.S. Lebanon, S.S. Ceto, The Ceto (1889), 14 App. Cas. 670. **Reld.** S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556.

**5416.** —— **Time for—When risk can be avoided.**]—THE BERYL, No. 5941, *post.*

**5417.** —— —— ——.]—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante.*

**5418. Necessity for obedience — Prompt obedience.**]—A vessel, bound by the rules of navigation to port her helm, not doing so in sufficient time, held responsible for the damage caused by the consequent collision.

If you adopted a measure at an improper time, it does not take away the culpability of not having done it before, & preventing the accident (DR. LUSHINGTON).—THE STADACONA (1847), 5 Notes of Cases, 371.

**5419.** —— **Departure at peril.**]—THE TELEGRAPH, VALENTINE *v.* CLEUGH, No. 5529, *post.*

**5420.** —— **Presumption of obedience by both parties.**]—THE MANGERTON, No. 5253, *ante.*

**5421.** —— ——.]—GENERAL IRON & SCREW CO. *v.* MOSS, THE ARAXES & THE BLACK PRINCE, No. 5422, *post.*

**5422.** —— **Strict compliance.**]—17 & 18 Vict. c. 104, s. 296, directing the course ships meeting each other are to follow, though in the opinion of many nautical men of experience capable of being modified with advantage, must, while it continues law, be strictly complied with.

A vessel which obeys the rule has a right to trust that the vessel which he meets, if a British vessel, will obey it too, & she acts accordingly (LORD KINGSDOWN).—GENERAL IRON SCREW CO. *v.* MOSS, THE ARAXES & THE BLACK PRINCE (1861), 15 Moo. P. C. C. 122; 5 L. T. 39; 1 Mar. L. C. 130; 15 E. R. 439, P. C.; *subsequent proceedings* (1862), Lush. 568.

**5423.** —— ——.]—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante.*

**5424.** —— **No individual discretion.**]—Custom of the river pleaded in defence, that all steamers coming up the river against the wind & tide should keep to the south shore.

Damage pronounced for upon the ground that the steamer was in the wrong in not porting her helm, in compliance with the Trinity House regulations. Absolute necessity can alone justify a departure from the Trinity House regulations.

I am by no means prepared to deny that there may exist so peculiar a combination of circumstances as to render the adoption of this rule no longer fitting or expedient. These circumstances, however, should be of a strong & stringent nature; because it is obvious that if every man is to engraft upon it his own exceptions, according to his own views of convenience or advantage, the rule would soon degenerate into no rule at all (DR. LUSHINGTON).—THE GAZELLE (1842), 1 Wm. Rob. 471; 2 Notes of Cases, 39; 7 Jur. 497; 166 E. R. 648; *subsequent proceedings* (1844), 2 Wm. Rob. 279.

*Annotations:*—**Reld.** The Superior (1849), 6 Notes of Cases, 607; The Kirby Hall (1883), 8 P. D. 71.

**5425.** —— ——.]—It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from the Sailing Rules; & accordingly such a discretion need not be exercised except in cases of very clear necessity. Where a collision has occurred owing to one colliding vessel having failed to observe, as its duty was, the rule of the road, by keeping out of the way:—*Held:* in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *primâ facie* bound to observe r. 18 by keeping on its course, would not have been justified in departing therefrom.—THE WILLIAM FREDERICK, THE BYFOGED CHRISTENSEN (1879), 4 App. Cas. 669; 41 L. T. 535; 28 W. R. 233; 4 Asp. M. L. C. 201, P. C.

*Annotations:*—**Consd.** The Olympic & H.M.S. Hawke, [1913] P. 214. **Reld.** The Beryl (1883), 9 P. D. 4.

**5426.** —— ——.]—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante.*

**5427.** —— **To govern all persons in charge of vessel.**]—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante.*

**5428.** —— **Effect of non-observance—Violation of rule not cause of collision.**]—THE MARGARET ROBERTS *v.* THE FORTUNE (1854), 5 L. T. 146, P. C.

—— **Justification for non-observance.**] — *See* Sub-sect. 3, B., *post.*

**5429. Qualities expected of master—Ordinary nerve & judgment.**]—THE BYWELL CASTLE, No. 6267, *post.*

### *B. Justification of Non-Observance.*

#### *(a) In General.*

**5430. Obedience to rules of good seamanship—Paramount obligation.**]—THE GROVEHURST, No. 5952, *post.*

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**PART XII. SECT. 3, SUB-SECT. 3.—B. (a).**

**5430 i.** *Obedience to rules of good seamanship — Paramount obligation.*]—Where prudent seamanship precludes a tug, in charge of a laden scow, from following certain of the regulations, she will be exonerated from blame in departing therefrom.—CANADIAN PACIFIC RY. CO. *v.* THE BERMUDA (1910), 13 Exch. C. R. 389.—**CAN.**

**5430 ii.** —— ——.]—THE CHARLES DICK *v.* PINE BAY S.S. CO., LTD., [1926] Exch. C. R. 83.—**CAN.**

**5430 iii.** —— ——.]—It is a general rule in the navigation of the seas that there is nothing in the Admiralty rules of the road, as laid down, which will exonerate any ship or her officers or crew from the consequences of any neglect or want of precaution required by the ordinary practice of seamen, or by special circumstances of the case, & the Ct. of Admiralty will hold any ship to blame which, insisting on her right under any Admiralty rule of not giving way, makes no effort to prevent a collision, where she could have done so had she given way.—THE IDA *v.* THE WASA OF NICOLAISTADT (1866), 15 L. T. 103.—**IR.**

*Sect.* 3.—*The sea regulations: Sub-sect.* 3, *B.* (*a*) *& (b).*]

**5431.** —— ——.]—THE EZARDIAN, No. 5378, *ante.*

**5432. Only absolute necessity.**]—THE GAZELLE, No. 5424, *ante.*

**5433.** ——.]—An exception claimed, on account of the darkness & the relative position of the vessels, but not sustained.

If a defence is set up on behalf of the vessel proceeded against, to establish that defence she is equally bound to prove the facts upon which she relies for her defence. . . . The *Undaunted* was going down the river, close hauled; the steamer was coming up the river, with the wind free behind her. . . . The general rule under these circumstances would be, that the steamer should give way, & for this reason: the *Undaunted* was close hauled, & the *Columbine* was not only a steamer, but had the wind free or large. . . . If vessels are so approaching each other that there is a chance of collision, it is to be avoided by an adherence to the rule. . . . The *Columbine* has not made out any justification of her own conduct; neither the haziness of the night, nor the point from which the *Undaunted* was seen, was sufficient to justify the violation of the rule; & I repeat what I have said before that to these general rules & principles I am reluctant to admit of exceptions unless necessity calls for it (DR. LUSHINGTON).—THE COLUMBINE (1843), 2 Wm. Rob. 27; 2 Notes of Cases, 144; 166 E. R. 666.

*Annotation:*—**Refd.** The Norden (1846), 7 L. T. O. S. 491.

**5434.** ——.]—THE EDEN (1845), 6 L. T. O. S. 238.

**5435.** ——.]—A vessel is not justified in departing from the rules of navigation, although it might have happened, under extraordinary circumstances, that, by so doing, a collision would have been avoided. An exception to a general rule must be most satisfactorily proved.—THE SUPERIOR (1849), 6 Notes of Cases, 607; 5 L. T. 241.

**5436.** ——.]—THE WILLIAM FREDERICK, THE BYFOGED CHRISTENSEN, No. 5425, *ante.*

**5437.** ——.]—THE MARY LOHDEN, No. 6167, *post.*

**5438. Admitted with reluctance.**]—THE COLUMBINE, No. 5433, *ante.*

**5439.** ——.]—Where, by neglect of the Trinity House rule, on the part of a vessel bound to give way to another vessel, the latter was run down, it cannot be set up in defence that this vessel might have avoided the collision by disobeying the rule.

A principle of law that you are not to adhere to strict rules of navigation, but avoid an accident if possible, is a doctrine, however, to be carefully watched. I do not mean to say that any vessel is justified in coming into collision with another if she can escape it, because common sense & common regard to property & life establish a universal principle, that no persons must wilfully come into collision with another vessel. It would be a dangerous doctrine to hold, without evidence, that [a vessel] whose duty it is to keep her course, ought to have deviated from that rule, & given way, where there are no circumstances established by evidence to show that she ought so to have done. I cannot conceive that anything would be more likely to lead to mischievous consequences, than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, & so give way herself (DR. LUSHINGTON).—THE TEST (1847), 5 Notes of Cases, 276; 5 L. T. 241; 11 Jur. 998.

*Annotation:*—**Refd.** The George (1847), 5 Notes of Cases, 368.

**5440.** ——.]—THE ORION (1849), 5 L. T. 462.

**5441. Whether justification must be specifically pleaded.**]—DRYDEN *v.* ALLIX, THE MODERATION, No. 5458, *post.*

**5442. Evidence—Exception must be clearly proved.**]—THE SUPERIOR, No. 5435, *ante.*

**5443.** —— **Burden of proof—On party setting up defence.**]—THE EDEN (1845), 6 L. T. O. S. 238.

**5444.** —— —— ——.]—No man is bound by a technical rule to submit to the destruction of life & property; but the *onus probandi* is upon the party so deviating from the general rule.—THE IMMAGANDA SARA CLASINA (1850), 7 Notes of Cases, 582; *on appeal, sub nom.* VAUX *v.* SHEFFER (1852), 8 Moo. P. C. C. 75, P. C.

**5445.** —— —— ——.]—Article 13 of the Sailing Rules under Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 25, provides that "if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Article 14: "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." Article 19: "In obeying & construing these rules, due regard must be had to all dangers of navigation; & due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger." In a cause of collision between two steam vessels meeting nearly end on in the river Thames, it was alleged by defts. that the helm of their vessel was put astarboard to avoid a barge:—*Held:* the *onus* of proving that a departure from the 13th rule was "necessary," in order to avoid immediate danger, lay upon defts.; & in the absence of sufficient evidence to show what became of the barge, defts. had failed in their proof, & were to blame for the collision, the result of not porting their helm.

If the *Esther* was aware that the *Concordia* was dead in the water, or nearly dead in the water, & unable to help herself, & if the *Esther* was capable of observing what the *Concordia* was doing & the position she was in, then, notwithstanding the rule was to port her helm . . . she would not be justified . . . in porting her helm & running in upon the *Concordia* (DR. LUSHINGTON).—THE CONCORDIA (1866), L. R. 1 A. & E. 93; 12 Jur. N. S. 771.

*Annotations:*—**Refd.** The Carlotta, [1899] P. 223; The Anselm, [1907] P. 151.

**5446. Sudden difficulty—Through wrongful act of other ship—Allowances to be made to officer in charge.**]—Very great allowances should be made for an officer in charge of a ship suddenly placed in difficult circumstances by the wrongful act of another ship.—TASMANIA (SHIP OWNERS & FREIGHT OWNERS) *v.* SMITH, ETC., CITY OF CORINTH (OWNERS), THE TASMANIA (1890), 15 App. Cas. 223; 63 L. T. 1; 6 Asp. M. L. C. 517, H. L.; *revsg.* (1889), 14 P. D. 53, C. A.

*Annotations:*—**Refd.** The Highgate (1890), 62 L. T. 841; S.S. Pleiades & Page *v.* Page (Master) & S.S. Jane,

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**5441 1.** ***Whether justification must be specifically pleaded.***]—In a collision suit, the ct. is not only bound to consider the rule of the sea as prescribed by Merchant Shipping Act, 17 & 18 Vict. c. 104, but also, such circumstances as might have occurred in the particular case, which might justify a departure from it.—THE IRISHMAN (1858), 11 Ir. Jur. 24, 26.—IR.

[1891] A. C. 259; Wilson *v.* Currie, [1894] A. C. 116; The Ripon City, [1897] P. 226; The Hopper No. 66, [1906] P. 34; The Sylvan Arrow, [1923] P. 220. **Mentd.** Karunaratne *v.* Ferdinandus, [1902] A. C. 405; Banbury *v.* Bank of Montreal, [1918] A. C. 626; North Staffordshire Ry. *v.* Edge, [1920] A. C. 254.

**Under Sea Regulations, 1910, Article 27.**]—*See* Sub-sect. 3, B. (*d*), *post.*

(*b*) *Avoidance of Danger.*

**5447. Duty to avoid injury—Collision.**]—If a vessel at sea is going close hauled to the wind, & another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; & although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position.

Although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course. But if the matter comes into any doubt, as for instance in the case of a dark night, then we ought to look to the practice, as that which is to regulate the parties (BEST, C.J.).—HANDAYSYDE *v.* WILSON (1828), 3 C. & P. 528; 172 E. R. 532, N. P.

**5448.** ——.]—As a proposition of law, I admit it to be true, that no vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the strict rule of navigation (*per* CUR.).—THE HOPE (1840), 1 Wm. Rob. 154; 166 E. R. 531.

*Annotations*:—**Refd.** The Volant (1842), 1 Notes of Cases, 503; The Nostra Senora Del Carmine (1854), 1 Spinks Ecc. & Ad. 303; Nelson *v.* Couch (1863), 15 C. B. N. S. 99; The Bowesfield (1881), 51 L. T. 128; The Dictator, [1892] P. 304; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; The Joannis Vatis (No. 2), [1922] P. 213.

**5449.** ——.]—Two vessels being close hauled, one on the larboard, & the other on the starboard tack, the former must give way. If she does not, she must prove particular circumstances to justify a deviation from so general a rule.—THE MARY STEWART (1844), 2 Wm. Rob. 244; 2 L. T. O. S. 375; 166 E. R. 746.

**5450.** ——.]—THE TEST, No. 5439, *ante.*

**5451.** —— **Vessel unmanageable.**]—THE JOHN BUDDLE, No. 5270, *ante.*

**5452.** —— **Only if avoidance can be carried out with safety.**]—A steamer deviating from the Trinity House Rules, in order, as alleged, to avoid the collision, held solely to blame.

It is a matter of the greatest importance to the safety of the great commercial interests of this country, having ships at sea with valuable cargoes, & still more valuable lives, to maintain, as far as I can, those rules & regulations which hitherto have been recognised in this ct., & upheld by superior jurisdiction. . . . Where you can with perfect safety escape an accident by any manœuvre whatsoever, it is your duty to do it, but I wholly deny the danger would be averted or that infinitely greater danger would not occur if a vessel closely hauled on the larboard tack or descrying a steamer were to take upon herself to deviate from her course for the purpose of getting out of the way, because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than take place at present (DR. LUSHINGTON).—THE VIVID (1849), 7 Notes of Cases, 127; 5 L. T. 462.

**5453.** ——.]—THE CITY OF LONDON (1850), 5 L. T. 241.

**5454.** ——.]—The general rule of navigation, where two vessels are closehauled & nearing one another, is, that the one on the port tack should give way, & the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision, if circumstances render them necessary.—THE LADY ANN (1850), 7 Notes of Cases, 364; 15 Jur. 18; *sub nom.* THE HOPE *v.* THE LADY ANNE, 5 L. T. 241.

**5455.** ——.]—THE IMMAGANDA SARA CLASINA (1850), 7 Notes of Cases, 582; *on appeal, sub nom.* VAUX *v.* SHEFFER (1852), 8 Moo. P. C. C. 75, P. C.

**5456.** —— **Danger must be real & bonâ fide.**]—(1) Two steamers came into collision in Halfway Reach in the Thames. Both to blame; one for not being on the side of the river directed by the statute, notwithstanding it appeared there was a usage for vessels to follow the course she took, the other for having one of her lights out, & for not having stopped & reversed her engines when she saw the other vessel, notwithstanding she had a right to expect that no steamer would be in that part of the river, & that if there should be one she would port her helm.

(2) The plea of usage, in opposition to the statute, can only be admitted so far as it goes to show that the usage leads to the safety of vessels. If the usage leads to the safety of vessels, it may be a ground for disobeying the statute under certain circumstances. But the danger must be real *bonâ fide* to justify a departure from the regulations of the statute.

If there is danger in following, in particular cases, the directions of the Legislature, that would be an adequate reason for not complying with them. But of what kind must the danger be if the safety consists in this, that you are safer in violating the law of the land than obeying it, because a great many other persons do it, & therefore it will avoid the chance of collision? Why, it is an argument that never can be listened to . . . in a Ct. of Justice, namely, that because other people violate the law, therefore, those who navigate the river Thames are at liberty so to do (DR. LUSHINGTON).

Supposing for want of means sufficient to navigate with safety,—suppose from the vicinity of shoals,—suppose from the state of the vessel, being disabled, she then seeks to take that course which the Legislature has prohibited—under such circumstances she would unquestionably be relieved from the punishment affixed by the Legislature (DR. LUSHINGTON).

(3) I do not think there is sufficient evidence to enable you to say that the light never was lit

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**PART XII. SECT. 3, SUB-SECT. 3.—B. (b).**

**5447 i.** *Duty to avoid injury—Collision.*]—STRATTON *v.* CHAFFEY (1868), 27 U. C. R. 515.—**CAN.**

**5447 ii.** ——.]—Where there were two sailing ships, the one on the starboard & the other on the port tack, & the former by a rule of navigation having the right to keep her course:—*Held*: the former was, nevertheless, in case of imminent danger, bound to give way, & for not doing so was condemned in damages & costs.—THE UNDERWRITER, THE LAKE ST. CLAIR (1875), 1 Q. L. R. 323; *revsd.* (1877), 2 App. Cas. 389, P. C.—**CAN.**

**5447 iii.** ——.]—THE CHARMER *v.* THE BERMUDA (1910), 15 B. C. R. 506; 15 W. L. R. 132.—**CAN.**

**q.** —— *Danger clear almost to certainty.*]—The only exception to a rigid compliance with the rules for navigation of Canadian waters & canals is when it appears with perfect clearness amounting almost to a certainty, that adhering to the rule would have brought on a collision & violating the rule would have avoided it.—CANADIAN SAND & GRAVEL CO., LTD. *v.* THE KEYWEST (Ont.) (1917), 16 Exch. C. R. 294; 38 D. L. R. 682.—**CAN.**

**r.** —— *Circumstances justifying skilled seaman believing collision otherwise inevitable.*]—In order to justify a departure from Sea Regulations, 1910, art. 21, it is not necessary for the holding-on vessel to prove that by no possibility could a collision have

*Sect.* 3.—*The sea regulations: Sub-sect.* 3, *B.* (*b*), (*c*) & (*d*); *sub-sect.* 4.]

but quite enough to say—it is an admitted fact—that the light at the bowsprit had gone out. What might have been the consequence of that? . . . Though the *Meteor* may not be in any degree to blame for the light going out—for I apprehend lights will go out at sea as well as elsewhere; it might be an accident, yet it is the same as regards the other party as if it had arisen from negligence—she must suffer the consequences of the light going out if she misled the *Sylph* (DR. LUSHINGTON).—THE SYLPH (1854), 2 Ecc. & Ad. 75; 164 E. R. 315; *sub nom.* THE METEOR *v.* THE SYLPH, 5 L. T. 462.

**5457.** —— ——.]—The *Glanmire* was sailing on the starboard tack; the *Joseph Somes* was going free, & omitted to port her helm until she had got too near to the *Glanmire*; the *Glanmire* starboarded her helm to avoid immediate danger: —*Held:* the *Glanmire* was justified under the circumstances in starboarding her helm, & the *Joseph Somes* ought to have ported sooner.—THE JOSEPH SOMES (1857), Sw. 185; 166 E. R. 1086; *sub nom.* THE GLANMIRE *v.* THE JOSEPH SOMES, 5 L. T. 367.

**5458.** —— ——.]—Departure from the rule provided by Merchant Shipping Act, 1854 (c. 104), s. 296, for ships meeting each other to port their helms allowed; the circumstances of the case being such as to render such departure necessary to avoid immediate danger: though such circumstances were not specifically pleaded, but were to be inferred from the pleadings & the evidence; the cause of collision being sufficiently proved to have arisen from the facts pleaded, & the proofs given in support of them.

Where two English vessels, the *D.* & the *M.*, were approaching in opposite directions nearly end-on, & a collision occurred in a dark night off Sicily:—*Held:* whether the *D.* had seen the course of the *M.* or not, in other words, whether the *M.* carried lights or not, it was the duty of the *D.*, seeing the *M.* on her starboard bow, not to port her helm, but to keep her course; & the *M.*, seeing the *D.* on her starboard bow, *D.* having her green light visible, ought not to have ported; but, having done so, the *M.* was alone to blame.—DRYDEN *v.* ALLIX, THE MODERATION (1863), 1 Moo. P. C. C. N. S. 528; 9 L. T. 586; 1 Mar. L. C. 413; 15 E. R. 799, P. C.

**5459.** —— ——.]—Whatever be the rules or regulations which govern ships generally, in cases of immediate danger it is the duty of every ship to seek to avoid a collision (DR. LUSHINGTON).—THE GREAT CONQUEST & THE NORTH EAST *v.* THE DAVID CANNON (1865) Holt, Adm. 235.

**5460.** —— ——.]—THE BOANERGES & THE ANGLO-INDIAN, No. 5972, *post.*

**5461.** —— ——.]—You have no right to stand in a difficulty upon a right though it may be a perfectly good right obstinately recklessly & regardlessly of the safety of others (DR. LUSHINGTON).—THE LEGATUS *v.* THE EMILY (1865), Holt, Adm. 217.

**5462.** —— —— **Though danger due to other ship.**]—THE JANE BACON, No. 5110, *ante.*

**5463.** —— ——.]—LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO. *v.* CAMPANHIA BAHIANA DE NAVEGACIO A VAPOR, THE MEMNON, No. 6038, *post.*

**5464. Right to avoid injury—Own destruction.**]—In cases of collision, the rule of the Trinity House, that "where steam-vessels, on different courses, must unavoidably cross so near, that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other," is applicable only when the vessels, by continuing their respective courses, are likely to come into collision, & when, by putting their helms to port, the collision may be avoided: but the rule is not applicable when either vessel, by unskilful management, is so near the shore, that by porting her helm there would be danger of collision: in such case, the vessel on her right course is justified, in spite of the rule, in putting her helm to starboard.—GENERAL STEAM NAVIGATION CO. *v.* TONKIN, THE FRIENDS (1844), 4 Moo. P. C. C. 314; 13 E. R. 324, P. C.

*Annotations:*—**Refd.** Chadwick *v.* City of Dublin Steam Packet Co. (1856), 3 Jur. N. S. 207. **Mentd.** The Sylph (1854), 2 Ecc. & Ad. 75.

**5465.** —— ——.]—THE SUPERIOR (1849), 6 Notes of Cases, 607; 5 L. T. 241.

**5466.** —— ——.]—THE SYLPH, No. 5456, *ante.*

**5467.** —— ——.]—It would be sufficient excuse for the vessel proceeded against not having ported her helm if she was in so narrow a part of the river that by porting she would have run herself aground (DR. LUSHINGTON).—THE LUCIA JANTINA *v.* THE MEXICAN (1864), Holt, Adm. 130.

**Under Sea Regulations, 1910, Article 27.**]—*See* Sub-sect. 5, *post.*

(*c*) *Custom.*

**5468. Whether justification for deviation from Regulations.**]—THE ORION (1851), 5 L. T. 212, P. C.

**5469.** ——.]—No local custom can prevail to justify a deviation from the Act.

A brig, in ballast, coming up the Tyne, along the south shore, came into collision with smack being tugged down along the same shore. She pleaded in defence a custom of that river, that vessels in ballast should come up along the south shore:—*Held:* no such custom could be maintained against the express provisions of the Merchant Shipping Act.—THE HAND OF PROVIDENCE (1856), Sw. 107; 166 E. R. 1044.

**5470.** ——.]—THE UNITY, No. 6083, *post.*

**5471.** —— **Custom of river.**]—Rule of navigation with regard to steam vessels approaching each other on different courses.

Where two steam vessels must unavoidably & necessarily cross so near, that by continuing their respective courses there would be a reasonable probability of a collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other. This rule of binding authority upon the owner of steam vessels. A steamer neglecting the rule condemned in the damage occasioned to a govt. steam vessel in the river Thames.

The custom that is alleged by the owners of the Duke of Sussex in their defence is this: that when

been avoided if she had maintained her course & speed, but only such facts & circumstances as would justify a skilled seaman in believing that a collision could not be avoided by the action of the giving-way vessel alone.—COMPAGNIE DES FORGES, ETC., D'HORNECOURT *v.* GIBSON & CO., THE EIDSVAAG *v.* THE GALA, [1920] S. C. 247.—**SCOT.**

t. *Right to avoid injury.*]—When a collision is inevitable, the vessel not in fault is justified in changing her proper course, with the object of avoiding or lessening the effect of the collision.—RUDOLPH *v.* THE ARRANMORE (1906), 11 Exch. C. R. 21.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 3.—B. (c).**

5471 i. *Whether justification for deviation from Regulations—Custom of river.*]—Where an ocean steamer descending the river St. Lawrence, opposite to a buoy designating a bend in the channel for her to turn, instead of doing so crossed over & sank a

the tide is running down the river & a steam vessel is proceeding with the tide, the tide sets so strongly towards the north shore that it is the practice for such vessel to keep towards the Essex Shore as much as possible, whilst a vessel coming up would adhere to the Kentish shore or south side of the river. This is said to be an established practice or custom, but in point of fact it only amounts to this, that according to common sense the one vessel steers her course where the tide is strongest in her favour, the other where the adverse tide is weakest. But supposing the custom to exist as stated, it can only be acknowledged where there is an open way for each vessel to pass without any risk of collision.

. . . If there be any risk, convenience must give way to the rule (DR. LUSHINGTON).—THE DUKE OF SUSSEX (1841), 1 Wm. Rob. 274; 1 Notes of Cases, 165; 166 E. R. 575; *sub nom.* R. *v.* THE DUKE OF SUSSEX, 5 Jur. 986.

*Annotations:*—**Consd.** The Hand of Providence (1856), Sw. 107. **Refd.** The Friends (1843), 2 Notes of Cases, 92. **Mentd.** The Leda (1863), Brown. & Lush. 19.

**5472.** —— - ——.]—THE GAZELLE, No. 5124, *ante*.

**5473.** —— ——.]—THE FRIENDS (1843), 1 Wm. Rob. 478; 2 Notes of Cases, 92; 7 Jur. 307; 166 E. R. 651; *affd. sub nom.* GENERAL STEAM NAVIGATION CO. *v.* TONKIN, THE FRIENDS (1844), 4 Moo. P. C. C. 314, P. C.

*Annotations:*—**Consd.** The Sylph (1854), 2 Ecc. & Ad. 75. **Mentd.** Chadwick *v.* City of Dublin Steam Packet Co. (1856), 3 Jur. N. S. 207.

**5474.** —— ——.]—THE NIMROD (1851), 15 Jur. 1201.

*Annotations:*—**Consd.** The Hand of Providence (1856), Sw. 107. **Refd.** The Sylph (1854), 2 Ecc. & Ad. 75.

**5475.** ——— ——.]—THE HAND OF PROVIDENCE, No. 5469, *ante*.

**5476.** —— **Unless leading to safety—Danger in following regulations.**]—THE SYLPH, No. 5456, *ante*.

**5477.** - — **Custom to leave deep water channel for H.M. ships.**]—THE PROMISE *v.* H.M.S. TOPAZE (1864), Holt, Adm. 165; *sub nom.* H.M.S. TOPAZE, 10 L. T. 659; 12 W. R. 923; 2 Mar. L. C. 38.

**5478.** —— **Custom in the trades—To treat sailing ships as closehauled—When sailing a point or two from closehauled.**] THE EARL WEMYS, No. 5829, *post*.

(*d*) *Under Sea Regulations*, 1910, *Article* 27.

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 27.

**5479. Circumstances conducive to peril.**]—THE ELIZA *v.* THE ORINOCO (1865), Holt, Adm. 98.

*Annotation:*—**Refd.** The Agra & The Elizabeth Jenkins (1867), L. R. 1 P. C. 501.

**5480. "Special circumstances."**] —A sailing vessel came into collision on a clear night with a steam trawler which had her trawl down & was making about one & a half mile an hour & was exhibiting her proper lights:—*Held:* (1) there were "special circumstances" within Article 27 of the Regulations for Preventing Collisions at Sea, & the sailing vessel ought to have kept out of the way; (2) on the facts, both vessels were to blame.—THE KING'S COUNTY (1904), 20 T. L. R. 202.

*Annotation:*—**Refd.** The Pitgaveney, [1910] P. 215.

**5481. "Danger of navigation"—Risk of attack in wartime.**]—THE ALGOL, No. 5413, *ante*.

SUB-SECT. 4.—DUTY AFTER COLLISION.

*See* 1894 Act, s. 422; Maritime Conventions Act, 1911 (c. 57), s. 6 (1).

**5482. General rule—To stand by & assist.**]—PAULINE CONSTANCE ELEONORE (OWNERS, ETC.) *v.* HAMBURGH AMERICAN STEAM PACKET CO., THE GERMANIA (OWNERS), THE GERMANIA, No. 5214, *ante*.

**5483.** —— ——.]—When a collision takes place which might probably endanger life, it is the duty of the vessel to stay by until the extent of the danger is ascertained.—THE QUEEN OF THE ORWELL (1863), 7 L. T. 839; 11 W. R. 499; 1 Mar. L. C. 300.

**5484. Extent of obligation—Risk to own vessel—Danger of capture by enemy.**]—(1) The master & crew of a vessel injured by collision are bound to show ordinary courage & nautical skill in endeavouring to save their vessel from total loss, & defts. will not, on a reference to the registrar & merchants to assess the damages, be held liable for any loss which might have been avoided by the exercise of such ordinary skill & courage.

(2) *Semble:* in the Admlty. Ct. the burden of proving that the total loss resulted immediately from want of ordinary nautical skill & courage, & not directly from the collision, lies upon the original wrongdoers.

(3) Although it is the duty of every vessel, whether British or foreign, to render assistance to another which she has injured in collision, the rule will not compel a ship to remain alongside another so injured, so as to run risk of capture by an enemy's fleet.

(4) Where a collision takes place between two vessels by the negligence of the crew of defts.' vessel, whereby pltf.'s vessel is injured, & afterwards & before any effort has been made to save pltf.'s vessel her master & crew unjustifiably abandon her, & she is consequently totally lost, defts. will not be liable for such total loss of pltf.'s ship, but only for the expense which would have been incurred in making good the actual damage occasioned by the collision.

The *T.*, a North German steamer, ran into the *W.*, a British steamer, eighteen miles off the coast of Heligoland. The crew of the *W.* immediately got on board the *T.*, but some of them returned & found that the *W.* was injured, & was making water. The *W.* was built in watertight compartments, & the water did not reach her engines or fires. The *T.* lay by her for an hour, & then observing a French man of war approaching, hailed those on board the *W.*, & they at once abandoned her, & the *T.* steamed away. The *W.* was approached by the French ship, & was seen by her afloat for three or four hours after the collision; the *T.* was found to blame for the collision, & the usual reference was made to the registrar & merchants to assess the damages, & they found that pltfs., the *W.*, were only entitled to such sum as would have been required to repair the vessel if she had been taken to a place of safety, & to compensation for loss of contracts during the time of repair:—*Held:* the abandonment of the vessel was unjustifiable, & the master & crew had shown a want of ordinary nautical skill & courage in not attempting to save the *W.*, & her owners were therefore only entitled to recover as for a partial loss.—THE THURINGIA (1872), 41 L. J. Adm. 44; 26 L. T. 446; 1 Asp. M. L. C. 283.

*Annotation:*—*As to* (4) **Refd.** The Kingsway, [1918] P. 344.

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barge in tow of a tug steamer on the opposite side:—*Held:* the tug steamer & her tow were not to blame by reason of an alleged custom for ascending vessels to stop below the buoy for descending vessels to pass it first, & if there were such a custom it would afford no excuse for a descending steamer coming into collision if she could avoid it.—*Re* THE THAMES (1874), 2 S. V. A. R. 222.—CAN.

*Sect. 3.—The sea regulations: Sub-sects. 4 & 5, A. & B. (a).*]

**5485. —— —— Effect of assisting in spite of danger—Subsequent damage not connected with collision.**]—Two steam vessels, the *S. O.* & the *M.*, came into collision in a dense fog. The *M.* received very serious damage, the *S. O.* was damaged to a slight extent. The *S. O.* took off the crew of the *M.* & then endeavoured to save the *M.* by lashing herself alongside & towing towards shallower water inshore. While so proceeding the vessels grounded in the fog, whereby the *S. O.* received damage:—*Held:* (1) on the facts assistance could not be rendered "without danger" to the *S. O.*, & accordingly the stranding damage could not be connected with the collision negligence on the ground that there was a statutory duty under 1894 Act, s. 422, on the master of the *S. O.* to render assistance to the *M.*; (2) the stranding damage was not the direct result of the negligence causing the collision; (3) the damage was too remote.—THE SAN ONOFRE, [1922] P. 243; 92 L. J. P. 17; 127 L. T. 540; 38 T. L. R. 707; 16 Asp. M. L. C. 1, C. A.

**5486. —— Duty to lower boats—Possible risk in standing by—Signals to other vessels insufficient.**]—36 & 37 Vict., c. 85, s. 16, having imposed upon the master of every ship, in case of collision with another ship, a duty, "if & so far as he can do so without danger to his own vessel, crew, & passengers, if any, to stay by the other vessel until he has ascertained that she has no need of further assistance, & to render to the other vessel, her master, crew, & passengers, if any, such assistance as may be practicable & as may be necessary to save them from any danger caused by such collision," this duty is not discharged by a steamship, where, it being practicable & safe to lower a boat to render assistance, although possibly dangerous to stay by the injured ship, she continues her voyage without lowering her boat, & merely hails & signals for other vessels to go to the assistance of the injured ship.—THE ADRIATIC (1875), 33 L. T. 102; 3 Asp. M. L. C. 16.

**5487. —— To reply to signals of distress.**]—(1) A vessel which has been in collision with another is bound, in order to comply with 36 & 37 Vict., c. 85, s. 16, to answer signals made by the vessel with which she has been in collision, even where she is unable, owing to the damage she has herself sustained, to stand by the other ship.

(2) The officer in charge of a steamship which is approaching another so as to involve risk of collision is not required to stop & reverse his engines instantaneously, but some short time must be allowed him in which to judge what course he ought to adopt in the circumstances.—THE EMMY HAASE (1884), 9 P. D. 81; 53 L. J. P. 43; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. L. C. 216.

*Annotations:—As to* (2) **Apprvd.** S.S. Kwang Tung *v.* S.S. Ngapoota, The Ngapoota, [1897] A. C. 391. **Apld.** U.S. Shipping Board *v.* Laird Line Ltd., [1924] A. C. 286.

**5488. To what ships applicable—Tug—Tow in collision.**]—(1) A collision occurred between two vessels, *A.* & *B.* *A.* was in tow of a steam tug; the tug afterwards rendered assistance to *B.* *B.* was found solely to blame for the collision:—*Held:* the tug's right of salvage remuneration was not affected by Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 33, which makes it the duty of ships mutually to assist each other after a collision.

(2) In this case, indeed, the tug itself did not come into collision, but the ship which it towed; & it has been argued that the case of a towing ship is a *casus omissus* from the statute, but I am not of this opinion (SIR ROBERT PHILLIMORE).—THE HANNIBAL, THE QUEEN (1867), L. R. 2 A. & E. 53; 37 L. J. Adm. 12.

*Annotations:—As to* (1) **Consd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246. **Refd.** The Solway Prince, [1896] P. 120.

**5489. —— Coble.**]—An English steamer ran down a fishing coble off the coast; no injury ensued to the steamer or to any one on board of her, but the coble sank, & three of her crew were drowned. The master of the steamer was below, & the mate was in charge of the deck. The master came up soon after the collision, but neither the mate nor the master took any steps to save the men. An inquest was held on one of the bodies, & the Board of Trade instructed an attorney to attend & report upon it. He reported the result of the inquest, & sent the notes he had taken of the evidence given before the coroner. The Board of Trade directed that an investigation should be instituted, &, on the requisition of the solr. to the Board, two justices, assisted by two nautical assessors, held an inquiry. Before the inquiry notice was served on the master & mate of the steamer, that in pursuance of Merchant Shipping Act, 1854 (c. 104), & Merchant Shipping (Amendment) Act, 1862 (c. 63), the Board of Trade had directed an official inquiry into the collision (describing it), whereby loss of life ensued, & that the written paper annexed was the statement on which the Board had ordered the inquiry. The "statement" was a copy of the notes of some of the depositions taken at the inquest. The justices proceeded with the inquiry, after protest by the master & mate, & stated in open ct. that the ct. found that neither the mate, before the master came up, nor the master afterwards, rendered such assistance to the crew of the coble as was practicable without danger to their own ship or crew, & ordered their respective certificates to be suspended for three months. On a motion for a *certiorari* to bring up this order, the above facts were disclosed on affidavits; & it was further shown that the "coble" was a vessel employed in the herring fishery; it was twenty four feet long, seven feet beam, ten tons burthen, drawing about eighteen inches; it had about eight feet of deck forward, with a main & mizzen mast & a bowsprit to ship & unship, & a jib, mainsail, & mizzen sail. The masts were easily removable, & the vessel was fitted with four oars, to be used when occasion required, viz., in harbour or in shoal water, when the rudder, which projected several feet below the keel, had to be removed. Such vessels often went twenty miles out to sea, & were too heavy, when filled with wet nets & fish, to be moved by oars:—*Held:* (1) the coble was a "ship" within Merchant Shipping Act, 1854 (c. 104), & Merchant Shipping (Amendment) Act, 1862 (c. 63); (2) the proceedings were valid & the justices had power to suspend the certificates under Merchant Shipping Act, 1854 (c. 104), ss. 241, 242, 432, 433, & Merchant Shipping (Amendment) Act, 1862 (c. 63), ss. 23, 33; (3) the copy of the depositions was a sufficient statement or report within Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 23; & (4) the mate before, & the master after he came on deck, were "in charge" within Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 33, which, in case of collision between two ships, makes it the duty of the person in charge of each ship to render such assistance as is practicable, without danger to his own ship & crew, to the crew of the other ship, & makes failure to do so a ground for cancelling or suspending his certificate; (5) "in

charge" means not merely at the time of the collision, but at any time when life could have been saved (BLACKBURN, J.).—*Ex p.* FERGUSON (1871), L. R. 6 Q. B. 280; 40 L. J. Q. B. 105; 24 L. T. 96; 19 W. R. 746; 1 Asp. M. L. C. 8; *sub nom. Re* THAMES STEAMER, *Ex p.* FERGUSON, 35 J. P. 468.

*Annotations:—As to* (1) **Consd.** The Mac (1882), 7 P. D. 126; The Gas Float Whitton No. 2, [1896] P. 42. **Refd.** The Gauntlet (1871), L. R. 3 A. & E. 381; The C. S. Butler (1874), L. R. 4 A. & E. 238.

**5490. Effect of statutory duty on salvage claim.**]—THE HANNIBAL, THE QUEEN, No. 5488, *ante.*

——.]—*See* Part XV., Sect. 6, sub-sect. 3, *post.*

**5491. "Person in charge"—Master.**]—(1) By 25 & 26 Vict., c. 63, s. 33, in case of collision between two ships, it is the duty of the "person in charge" of each ship to render assistance to the other, & in case he fails to do so without reasonable excuse the collision shall, in absence of proof to the contrary, be deemed to have been caused by his wrongful act:—*Held:* the "person in charge" intended by Merchant Shipping (Amendment) Act, 1862 (c. 63), s. 33, is the master.

(2) Two steamships, the *Q.* & the *R.*, each under the charge of a compulsory pilot, came into collision in the Thames. The *Q.* was solely to blame, & after the collision she rendered no assistance to the *R.*, & showed no excuse for having failed to do so:—*Held:* the mere fact of her having a pilot on board did not exempt her owners from liability. (3) *Semble:* if the collision had been caused solely by the neglect of the pilot on board the *Q.*, the subsequent misconduct of the master in not rendering assistance would not have made her owners liable for the collision.—THE QUEEN (1869), L. R. 2 A. & E. 354; 38 L. J. Adm. 39; 20 L. T. 855; 3 Mar. L. C. 242.

*Annotations:—As to* (1) **Apld.** The Sussex, [1904] P. 236. *As to* (3) **Consd.** The Sussex, [1904] P. 236.

**5492. —— —— Below at time of collision.**]—*Ex p.* FERGUSON, No. 5489, *ante.*

**5493. —— Mate.**]—*Ex p.* FERGUSON, No. 5489, *ante.*

**5494. —— Liability when pilot in charge—Compulsory pilotage.**]—THE QUEEN, No. 5491, *ante.*

**5495.** —— —— ——.]—The pilot of defts.' vessel outward bound from Liverpool was found alone to blame for a collision with pltfs.' vessel at anchor one mile S. ½ E. of the Mersey Bar Lightship, & the "person in charge" of defts.' vessel was also found to have committed a breach of 1894 Act, s. 422, by failing to stand by pltfs.' vessel:—*Held:* defts. were not liable for the damage sustained by pltfs., (1) because the pilot was compulsorily in charge, the place where the collision occurred being inside the Bar Lightship, which, though farther out to the westward, represents the Fairway Buoy of the Queen's Channel, now removed, but, at the time of the passing of the Mersey Dock Acts Consolidation Act, 1858 (c. xcii), marking the spot, inside the place of collision, where a vessel passing out through the channel would be clear of danger, &, therefore, at that time, made the westernmost limit, for pilotage purposes, of the port of Liverpool; (2) because, on the authority of *The Queen*, No. 5491, *ante*, the pilot being alone to blame for the collision, & being compulsorily in charge, "proof to the contrary" had been given rebutting the presumption that the collision had been caused by the wrongful neglect of the master.—THE SUSSEX, [1904] P. 236; 73 L. J. P. 73; 90 L. T. 519; 20 T. L. R. 381; 9 Asp. M. L. C. 578.

*See, further,* Part XVI., Sect. 7, sub-sect. 4, *post.*

**5496. —— At any time when life could be saved—Not only at time of collision.**]—*Ex p.* FERGUSON, No. 5489, *ante.*

**5497. Effect of failure to assist—Cancellation or suspension of certificate.**]—*Ex p.* FERGUSON, No. 5489, *ante.*

—— **Presumption of fault.**]—*See* Sect. 6, sub-sect. 2, B., *post.*

**Entry in official log.**]—*See* 1894 Act, s. 423.

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SUB-SECT. 5.—THE SEA REGULATIONS, 1910, AND CORRESPONDING COLONIAL REGULATIONS.

*A. In General.*

*See* 1894 Act, s. 418; Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457.

**5498. Whether equivalent to Act of Parliament.**]—THE DUNELM, No. 5576, *post.*

**5499. In what waters applicable—Inland waters—Thames.**]—THE CARLOTTA, No. 5563, *post.*

**5500. —— —— Manchester Ship Canal.**]—THE HARE, No. 6150, *post.*

**5501. —— —— River Amazon.**]—THE ANSELM, No. 6094, *post.*

**5502. To what ships applicable—Not to His Majesty's ships.**]—H.M.S. SANS PAREIL, No. 5977, *post.*

—— ——.]—*See* 1894 Act, s. 741; & *compare* Nos. 5406, 5407, *ante.*

*B. Lights, etc.*

*(a) In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 475, Articles 1–14.

**5503. Purpose of regulations to be considered.**]—THE NEW ED *v.* THE GUSTAV (1863), Holt, Adm. 28; *sub nom.* THE GUSTAV, THE NEW ED, 9 L. T. 547; 1 Mar. L. C. 407.

**5504. Strict obedience to regulations—Equivalent not accepted.**]—THE EMPEROR *v.* THE LADY OF THE LAKE (1865), Holt, Adm. 37, P. C.

**5505. Obedience must be in time to prevent collision.**]—In a case of collision between a steamship & sailing vessel, occasioned by the fault of the steamship, it was proved that the sailing vessel had failed to comply with the Admlty. regulations regarding lights, having either shown no lights, as she was bound, or if she had any lights, that the lights could not be seen till the collision was too imminent for prevention. The Judicial Committee reversed the decision of the Admlty Ct., being of opinion that the collision might have been avoided if the sailing vessel had obeyed the Admlty. Regulations, & that though the omission to exhibit proper lights might be immaterial where it is clearly shown that the absence of such lights was not the cause of the collision, & did not conduce to it, yet that where it is proved that a vessel has not shown proper lights, the *onus* lies on such vessel to show that the non-compliance with the Regulation was not the cause of the collision, which the sailing vessel failed to do; the general rule being, that a vessel must not only obey the Admlty. Regulations as regards lights, but must obey them in time to prevent an impending collision.—THE FENHAM (1870), L. R. 3 P. C. 212; 6 Moo. P. C. C. N. S. 501; 23 L. T. 329; 3 Mar. L. C. 484; 16 E. R. 815, P. C.

*Annotations:*—**Consd.** Stoomvaart Maatschappij Nederland *v.* P. & O. Steam Navigation Co. (1880), 5 App. Cas. 876; Cayzer *v.* Carron Co. (1884), 9 App. Cas. 873.

**5506. Instructions by Board of Trade—To surveyors—No binding effect.**]—THE MAGNET, THE DUKE OF SUTHERLAND, THE FANNY M. CARVILL, No. 5536, *post.*

*Sect. 3.—The sea regulations: Sub-sect. 5, B. (d), (e) & (f).*]

course which of itself would suffice to produce the collision.

(3) A manœuvre made too late to affect the collision, does not make the ship liable as having contributed to the collision, even if the manœuvre was erroneous.

(4) Where a steamship is approaching a sailing ship, & does not know what course the other ship is pursuing, it is her duty, whether the lights of the other vessel are visible or not, to take no decisive movement until she can ascertain it.

(5) The law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible. *Semble:* the fact that the lights of one ship are invisible to the other does not make the former ship contributory when the course pursued by the latter is not in itself prudent & judicious. —BEAL *v.* MARCHAIS, THE BOUGAINVILLE & THE JAMES C. STEVENSON (1873), L. R. 5 P. C. 316; 28 L. T. 822; 21 W. R. 653; 2 Asp. M. L. C. 1, P. C.

**5531. —— —— Lights carried in board.**]—The Admlty. regulations provide "that all sea-going sailing vessels when under way or being towed shall, between sunset & sunrise, exhibit a green light on the starboard side, & a red light on the port side of the vessel":—*Held:* the lights need not be fixed on the actual sides of the ship itself, but the green light shall be exhibited on the right hand, & the red light on the left hand, so as to be visible, as the regulations prescribe.—FORSTER *v.* BREWER, THE CITY OF CARLISLE (1864), 2 Moo. P. C. C. N. S. 366; Brown. & Lush. 363; 11 L. T. 33; 10 Jur. N. S. 964; 2 Mar. L. C. 91; 15 E. R. 940, P. C.

**5532. On stands secured to paul bitts of windlass.**]—Lamps duly screened & fixed on stands secured to the paul bitts of the windlass:—*Held:* not to be placed in a proper position, as required by the new regulations respecting lights.—THE NEW ED *v.* THE GUSTAV (1863), Holt, Adm. 28; *sub nom.* THE GUSTAV, THE NEW ED, 9 L. T. 547; 1 Mar. L. C. 407.

**5533. In mizzen rigging.**]—THE TELEGRAPH, VALENTINE *v.* CLEUGH, No. 5529, *ante*.

**5534. ——.**]—PAULINE CONSTANCE ELEONORE (OWNERS, ETC.) *v* HAMBURGH AMERICAN STEAM PACKET CO., THE GERMANIA (OWNERS), THE GERMANIA, No. 5214, *ante*.

**5535. On deck abaft house.**]—(1) At the trial of an action for damage by collision, it appeared that the starboard light of pltfs.' vessel was obscured by the cathead to an extent of from 2½ to 3 degrees; but that with this exception her side lights showed an unbroken light over 10 points of the horizon:—*Held:* there was no such infringement of article 3 of the Regulations for Preventing Collisions at Sea as to oblige the ct., under 36 & 37 Vict. c. 85, s. 17, to hold the vessel to blame for the collision.

(2) It also appeared that the stern light of pltfs.' vessel was placed on deck abaft a house on the after part of the deck:—*Held:* this was an infringement of rule 5 of the Mersey Rules, but the ct. having regard to the position of pltfs.' & defts.' vessels, held that the infringement could not have contributed to the collision.—THE FIRE QUEEN (1887), 12 P. D. 147; 56 L. J. P. 90; 57 L. T. 312; 36 W. R. 15; 6 Asp. M. L. C. 146.

(*e*) *Visibility.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Articles 2–7.

**5536. Necessity for—Lights visible at one mile only.**]—(1) A ship carrying side lights which are visible only at the distance of about a mile, instead of at a distance of two miles, as required by the regulations, infringed those regulations so as to make her liable to be deemed in fault under the statute. *Semble:* a ship carrying such lights must be deemed in fault, whether the deficiency of the light did or did not contribute to the collision.

(2) *Semble:* where lights are so fixed that they are partly obscured from a particular point right ahead by the catheads of a ship carrying them, but are visible both above & below the catheads, there is no such infringement within the statute as will render the ship liable in a collision with another ship approaching broad on the starboard bow of the former.

(3) The regulation as to the length of the screens of the ship's side lights, being for the purpose of preventing those lights from being seen across the bows of the ship carrying them, & being merely subsidiary for the purpose of securing the visibility of each distinct light, a ship carrying screens shorter than these required by the regulations, is not guilty of any infringement within Merchant Shipping Act, 1913 (c. 85), if the lights are not in fact seen across her bows, & it is shown that by reason of the construction of the ship, she could not have carried larger screens with safety.

(4) A steamer seeing lights close ahead of her, carried by some ship, & being unable to make out those lights, or the course of the ship carrying them, should slacken speed until she is able to ascertain the meaning of the lights, & so be able to avoid the vessel carrying them.

(5) It may be convenient to say a word on the legal effect of instructions given by the Board of Trade to their surveyors. . . . Such instructions . . . except in so far as they are authorised by statute can have no binding effect upon English much less upon foreign vessels (SIR ROBERT PHILLIMORE).—THE MAGNET, THE DUKE OF SUTHERLAND, THE FANNY M. CARVILL (1875), L. R. 4 A. & E. 417; 32 L. T. 129; 23 W. R. 598; 2 Asp. M. L. C. 478; *sub nom.* THE EUGENIE, THE MAGNET, THE DUKE OF SUTHERLAND, THE MAGGIE TRIMBLE, THE FANNY M'CARVILL, 44 L. J. Adm. 1; *on appeal, sub nom.* THE FANNY M. CARVILL (OWNERS) *v.* THE PERU (OWNERS), THE FANNY M. CARVILL, 13 App. Cas. 455, n., P. C.

*Annotations:—As to* (1) **Apld.** The Huchung, The Lapwing (1882), 47 L. T. 485. **Refd.** The Englishman (1877), 3 P. D. 18. *Generally,* **Refd.** The Mary Hounsell (1879), 4 P. D. 204; Stormvart Maatschappy Nederland *v.* Peninsular & Oriental Co., The Voorvarts, The Khedive (1881), 43 L. T. 610; The Glamorganshire (1888), 13 App. Cas. 454; The Hermod (1890), 62 L. T. 670; Eastern S.S. Co. *v.* Smith, The Duke of Buccleuch, [1891] A. C. 310; The Argo (1900), 82 L. T. 602; The Sansparcil (1900), 82 L. T. 356; The Devonian, [1901] P. 221; The Anselm, [1907] P. 151; The Corinthian, [1909] P. 260; The Pitgaveney, [1910] P. 215.

**5537. —— Lights partially obscured.**]—In an action of collision it was proved that the lights

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PART XII. SECT. 3, SUB-SECT. 5.—B. (e).

d. *Necessity for—Crib light with visibility of two & one half to three miles.*]—An ordinary cold blast lantern with a visibility of about two & one half to three miles was held not to be a sufficient crib light, as such would not convey that "reasonable intimation of the true state of affairs" necessary as a matter of good seamanship & safe navigation. A crib light should be at least of the same visibility as a ship's white light.—PEERS *v.* THE TYNDAREUS, [1921] 2 W. W. R. 385 —CAN.

carried by one of the vessels were so fixed as to be partially obscured, & that there was therefore an infringement of Article 6 of the Regulations:—*Held:* in the circumstances, it was the duty of the ct. to inquire into the facts in order to ascertain whether the infringement of the Regulations could possibly have contributed to the collision, &, inasmuch as it appeared from inquiry into the relative positions of the two vessels that the obscuration of the lights could not possibly have caused the accident, the vessel carrying such lights was not to blame.

A vessel coming end on to another vessel has a right to have the whole value of the light continuously in sight during the time she is called upon to act, & if therefore a vessel were coming end on, or anything like end on, towards this ship, the *Vandalia*, the question would not be whether the partial obscuration of the light, even for that time, & to that extent, would prevent her from seeing it. The question would be whether it might not prevent her seeing it during some of the time during which she would act, & so have an effect on her conduct (LORD ESHER, M.R.).—THE DUKE OF BUCCLEUCH (1889), 15 P. D. 86; 62 L. T. 94; 6 T. L. R. 99; 36 Sol. Jo. 394; 6 Asp. M. L. C. 471, C. A.; *affd. sub nom.* EASTERN S.S. CO., LTD. *v.* SMITH, THE DUKE OF BUCCLEUCH, [1891] A. C. 310, H. L.

*Annotations:*—**Consd.** The Argo (1900), 82 L. T. 602. **Reld.** The Hermod (1890), 62 L. T. 670; The Sanspareil (1900), 82 L. T. 356; The Devonian, [1901] P. 221; The Anselm (1906), 94 L. T. 853; Canning (Owners) *v.* Bellanoch (Owners), The Bellanoch (1907), 97 L. T. 315; The Aristocrat, [1908] P. 9; The Corinthian, [1909] P. 260; The Pitgaveney, [1910] P. 215. **Mentd.** The Duke of Buccleuch, [1892] P. 201; Paquin *v.* Beauclerk, [1906] A. C. 148.

**5538. —— —— By cathead.**]—THE MAGNET, THE DUKE OF SUTHERLAND, THE FANNY M. CARVILL, No. 5536, *ante*.

**5539. —— —— ——.**]—THE FIRE QUEEN, No. 5535, *ante*.

**5540. —— —— Position altered owing to rough weather.**]—Where in a case of collision between ships, it is proved that the Regulations for Preventing Collisions at Sea have been infringed by one of the ships, & that such infringement might possibly have caused or contributed to the collision, the ship guilty of such infringement will be held to blame, unless it is shown to the satisfaction of the ct. that the circumstances of the case made a departure from the regulations necessary.

A brig of 239 tons, beating to windward on the starboard tack at night, encountered such rough weather as to render it justifiable in the opinion of the ct. that her side lights should be removed from the place where they were usually carried in the fore part of the vessel to the after part near the traffrail, & the lights were so removed. In this latter position the lights were obscured to the extent of a point, or a point & a half, on either bow. The brig came into collision with a barque on the opposite tack:—*Held:* the circumstances of the case did not justify the brig in carrying the lights so as to be obscured as above-mentioned & the brig must be deemed to be in fault under 36 & 37 Vict. c. 85, s. 17.—THE TIRZAH (1878), 4 P. D. 33; 48 L. J. P. 15; 39 L. T. 547; 27 W. R. 584; 4 Asp. M. L. C. 55.

*Annotation:*—**Reld.** The Aristocrat, [1908] P. 9.

**5541. —— Lights occasionally obscured—By sail.**]—Where a ship carried a bright light of such a character as to be visible at 3 miles distance, which though fixed in the rigging was not shown to have been intercepted by the clew of the fore-sail or otherwise:—*Held:* there was no breach of Maritime Regulations, Articles 3 (*b*) & 5 of sect. 3, & therefore no presumption of culpability on the part of such ship, as contributing to the collision in respect of which she sued.

Even if it could be held that an occasional obscuration of light by the sail under exceptional circumstances was a breach of the regulation, the evidence in this case is to the effect that there never could be any interference at all by the sail with the lamp; that therefore there was no breach of the Regulation (LORD HOBHOUSE).—THE GLAMORGANSHIRE (1888), 13 App. Cas. 454; 59 L. T. 572; 6 Asp. M. L. C. 344, P. C.

*Annotation:*—**Mentd.** The Joannis Vatis, [1922] P. 92.

**5542. —— Improper lights.**]—A steamer, the *S. G.*, making 16 knots, collided with a sailing vessel, the *C. Q.*, at night. The night was "fine, clear, dark & overcast." The lighting of *C. Q.* was a gross infringement of the Regulations for Preventing Collisions at Sea. Those on board the *S. G.* did not see the loom of the *C. Q.* until they were within about 300 feet of her. The Assessors expressed the opinion that in the circumstances it was very doubtful whether the loom of the *C. Q.* could have been seen at a distance of a quarter of a mile, or at a distance appreciably greater than that at which it was first seen by the *S. G.*:—*Held:* the *C. Q.* was to blame for carrying improper light, & she was alone to blame for the collision. It had not been proved that the lookout on the *S. G.* was in any way defective.—THE CUMBERLAND QUEEN (1921), 126 L. T. 679; 15 Asp. M. L. C. 483, C. A.

**——.**]—*See, also,* Nos. 5530, 5531, *ante*.

**5543. Screening—Object of regulation—Invisibility on carrying ship.**]—THE MAGNET, THE DUKE OF SUTHERLAND, THE FANNY M. CARVILL, No. 5536, *ante*.

**5544. —— Screen shorter than required by regulation—Projecting one foot only.**]—THE EMPEROR *v.* THE LADY OF THE LAKE (1865), Holt, Adm. 37, 202, P. C.

**5545. —— —— But invisible on carrying ship—Ship unable to carry larger screens with safety.**]—THE MAGNET, THE DUKE OF SUTHERLAND, THE FANNY M. CARVILL, No. 5536, *ante*.

### (*f*) *Tug and Tow.*

*See* Sea Regulations, 1910: Statutory Rules & Orders, 1910, p. 457, Articles 3, 5.

**5546. Necessity for lights.**] — THE ZEPHYR (1864), 2 Asp. M. L. C. 352, n.; *sub nom.* THE EMPEROR *v.* THE ZEPHYR, Holt, Adm. 24; 12 W. R. 890.

**5547. —— Sailing vessel.**]—(1) A sailing vessel of any description when in tow is bound to carry at night the two coloured side lights prescribed by Articles 3 & 5. The white mast head light prescribed by Article 8 for sailing pilot vessels is only to be carried by those boats when independent, & not in tow of any other vessel.

(2) A sailing vessel, &, *semble*, any other vessel, towing another vessel, is responsible for the lights carried by both vessels being in accordance with

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**PART XII. SECT. 3, SUB-SECT. 5.—B. (f).**

**5546 i.** *Necessity for lights.*]—MONTREAL HARBOUR COMRS. *v.* THE UNIVERSE (1906), 10 Exch. C. R. 352. —CAN.

**5546 ii. ——.**]—PATERSON TIMBER CO. *v.* THE BRITISH COLUMBIA (1917), 16 Exch. C. R. 305; 18 B. C. R. 86. —CAN.

**5546 iii. ——.**]—THE MAPLEHURST *v.* HALL COAL CO. OF CANADA, [1923] 1 D. L. R. 1089; [1923] S. C. R. 507. —CAN.

*Sect. 3.—The sea regulations: Sub-sect. 5, B. (f), (g), (h) & (i).*]

the regulations.—THE MARY HOUNSELL (1879), 4 P. D. 204; 48 L. J. P. 54; 40 L. T. 368; 28 W. R. 140; 4 Asp. M. L. C. 101.

**5548. —— Mersey Rules, 1900, Article 4 (a).**]—Pltfs.' steam vessel was lying at anchor in the river Mersey waiting to dock, &, as her engines were broken down, she had a tug fast alongside to hold her up against the flood tide in the event of her anchor dragging. Defts.' steam vessel coming up the river ran into pltfs.' vessel, & was found to blame for bad look out; but pltfs.' vessel was also found to blame on the ground that the tug was, at the material time, exhibiting misleading, namely, under way, instead of towing, lights:—*Held:* (1) as the tug was "attached for the purpose of towing or manœuvring" pltfs.' vessel within the meaning of Article 4 (*a*) of the Mersey Rules, 1900, she should have exhibited the towing lights prescribed by Article 3 of the Regulations for Preventing Collisions at Sea, 1897. (2) As the misleading lights exhibited by the tug might by possibility have contributed to the collision, pltfs.' vessel was to "be deemed to be in fault," for the word "ship" in the clause "the ship by which the regulation has been infringed," in 1894 Act, s. 419 (4), must be construed to mean pltfs.' vessel, the master of which, though in a position to exercise control, had improperly neglected to prevent the tug infringing the regulation.—THE DEVONIAN, [1901] P. 221; 70 L. J. P. 66; 84 L. T. 675; 49 W. R. 665; 17 T. L. R. 532; 9 Asp. M. L. C. 179, C. A.

*Annotation:*—**Mentd.** The Veritas, [1901] P. 304.

**5549. Meaning of "towing."**]—THE ROMANCE, No. 5528, *ante*.

**5550. Meaning of "being towed."**] — THE ROMANCE, No. 5528, *ante*.

### (*g*) "*Not under Command.*"

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 4.

**5551. What amounts to—Altogether unable "to get out of the way."**]—(1) By Article 5 of the Regulations of 1884 for Preventing Collisions at Sea, sub-sect. (*a*), a steamship, "which from any accident is not under command shall at night carry," in place of the white light, "three red lights in globular lanterns." By sub-sect. (*c*) such a steamship, "when making way" through the water, shall carry the side lights. By sub-sect. (*d*) the lights "required to be shown by this Article are to be taken by other ships as signals that the ship showing them is not under command, & cannot therefore get out of the way."

Owing to an accident to her machinery, the speed of a steamship was reduced from 11 knots to between 4 & 5 knots. She was able to steer, but could not reverse & go astern as quickly as before. She hoisted three red lights in place of the white light & went ahead; but it was found as a fact both in the Admlty. Div. & in the Ct. of Appeal that she did not exhibit her red side light till the moment when she came into collision with another vessel. The cts. below held that she thus misled the other vessel into the belief that she was stationary, & so caused the collision:—*Held:* as it could not be clearly shown that the finding of fact as to the red side light was erroneous, this House would not disturb it.

(2) This ship being able to make way at between 4 & 5 knots, to steer, & to stop & reverse, though less quickly than before, & the danger of the machinery ceasing to work at any moment not bring imminent, the ship could not properly be said to be "not under command" within the meaning of the regulations.

Construing the Article as a whole, it is certain that a vessel may not be under command within the meaning of those words as used in the Article, & yet the making way through the water; for it is provided that, if making way through the water, a vessel shall carry the ordinary side lights as well as the three red lights at her masthead (LORD HERSCHELL, C.).

I desire to say that I do not think that because the rule contemplates that a vessel not under command may be justified in making way through the water, it therefore implies that a vessel in so disabled a condition is always justified in continuing so to make way (LORD HERSCHELL, C.).

Suppose the vessel, though having steerage way on her & capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that if an occasion for doing so should arise she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. Suppose, though she can stop & reverse, she can only do so after great & unusual delay, I am not satisfied that in either of these cases she might not be properly described as not under command. . . . Again, suppose that, owing to a breakdown of the machinery, its ceasing to be capable of propelling the vessel is reasonably regarded as imminent & likely to occur at any moment, I am not satisfied that in this case a vessel may not properly be said, within the meaning of the rule, not to be under command (LORD HERSCHELL, C.).—P. CALAND & FREIGHT (OWNERS) *v.* GLAMORGAN S.S. CO., THE P. CALAND, [1893] A. C. 207; 62 L. J. P. 41; 68 L. T. 469; 9 T. L. R. 309; 7 Asp. M. L. C. 317; 1 R. 138, H. L.

*Annotations:*—*As to* (1) **Refd.** Montgomerie *v.* Wallace-James, [1904] A. C. 73; Hatfield (Owners) *v.* Glasgow (Owners), The Glasgow (1914), 84 L. J. P. 161; Willmot *v.* Anglo American Oil Co. (1923), 67 Sol. Jo. 678. *As to* (2) **Consd.** H.M.S. Drake, [1919] P. 362; S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556. **Refd.** The Calyx (1910), 27 T. L. R. 166. *Generally*, **Mentd.** McIntyre *v.* McGavin, [1893] A. C. 268; Johnston *v.* O'Neill, [1911] A. C. 552.

**5552. —— Vessel having steerage way—Moving with difficulty.**]—P. CALAND & FREIGHT (OWNERS) *v.* GLAMORGAN S.S. CO., THE P. CALAND, No. 5551, *ante*.

**5553. —— —— —— —— Avoidance of traffic.**]—THE HAWTHORNBANK, No. 5820, *post*.

**5554. —— —— —— —— On the ground.**]—THE BELLANOCH, No. 5627, *post*.

**5555. —— —— —— Not entirely helpless.**]—When a vessel has been seriously damaged, & is, in consequence, in such a condition that she cannot take the ordinary prompt action which might reasonably be expected in order to avoid a collision, the captain is justified in hoisting the "not under command" signal under Article 4 of the Regulations for Preventing Collisions at Sea, 1897, if he believes, on reasonable grounds, that she is not under command, although she may not be absolutely helpless, & may in fact be capable of going ahead or astern, & of answering her helm slowly, & she is not, by having hoisted such signal, thereby converted into the "keep her course & speed"

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**PART XII. SECT. 3, SUB-SECT. 5.—B. (g).**

*e. What amounts to—"Vessel hove to."*]—A vessel "hove to" with her helm lashed is not obliged to carry the lights mentioned in Regulations for Preventing Collisions at Sea, art. 4, as she is not "a vessel which from any accident is not under command."—THE BIRGITTE *v.* FORWARD, THE BIRGITTE *v.* MOULTON (1904), 9 Exch. C. R. 339.—CAN.

vessel under Article 21 of the Regulations.—S.S. MENDIP RANGE *v.* RADCLIFFE, [1921] 1 A. C. 556; 90 L. J. P. 209; 124 L. T. 706; 37 T. L. R. 474; 15 Asp. M. L. C. 242, H. L.; *affg.* S. C. *sub nom.* H.M.S. DRAKE, [1919] P. 362, C. A.

**5556. —— —— Ship being towed.**]—THE MATFEN (1913), *Times*, May 23.

**5557. —— Able to make way through water—Reduced speed.**]—P. CALAND & FREIGHT (OWNERS) *v.* GLAMORGAN S.S. CO., THE P. CALAND, No. 5551, *ante*.

**5558. —— —— Imminent danger of breakdown.**]—P. CALAND & FREIGHT (OWNERS) *v.* GLAMORGAN S.S. CO., THE P. CALAND, No. 5551, *ante*.

**5559. —— —— Dragging through mud.**]—THE BELLANOCH, No. 5627, *post*.

**5560. —— —— Vessel seriously damaged.**]—S.S. MENDIP RANGE *v.* RADCLIFFE, No. 5555, *ante*.

**5561. —— Vessel unmanageable—Riding by chains—Anchors unshackled.**]—A steamship, when near the Goodwin Sands in the English Channel, finding herself unable to make headway against a S.W. gale, unshackled her anchors, banked her fires, shut off steam, & rode head to wind, by her chains. At sunset she took down the three black balls she had hoisted, & exhibited an anchor light forward, & a globular white light aft. A sailing vessel also proceeding down channel, & heading about S.S.E., closehauled on the starboard tack, mistook the lights for the masthead & green of a steamer in motion, &, expecting the steamer to give way, kept on her course. A collision occurred: —*Held:* the steamer was alone to blame, as the lights she exhibited were calculated to mislead, so that the mistake on the part of the sailing vessel was excusable. The steamer, having rendered herself unmanageable, should have exhibited three red lights, & should have kept steam readily available so as to bring herself promptly under command in case required.—THE FAEDRELANDET, [1895] P. 205; 64 L. J. P. 122; 72 L. T. 650; 8 Asp. M. L. C. 1, C. A

*See, also*, Nos. 5525, 5526, *ante*.

**5562. —— Vessel thrown athwart narrow channel.**]—THE WEGA, No. 5617, *post*.

**5563. —— Vessel must be afloat — Not fast aground.**]—But whether the sea rules apply in the Thames or not, it seems to me that Article 4 (*a*) of those rules does not apply to a case like the present. That Article is applicable in its terms to "a vessel which from any accident is not under command," &, in my opinion those words do not apply to a vessel which is fast aground. They apply to a vessel which is afloat. They might apply to a vessel touching & moving, but I do not think they apply to a vessel which is hard & fast aground (GORELL BARNES, J.).—THE CARLOTTA, [1899] P. 223; 68 L. J. P. 87; 80 L. T. 664; 47 W. R. 702; 15 T. L. R. 362; 8 Asp. M. L. C. 544.

*Annotations:*—**Refd.** The Lighter No. 3 (1902), 18 T. L. R. 322; The Hare, [1904] P. 331; The Anselm, [1907] P. 151; The Bitinia, [1912] P. 186; The Ceylon, [1920] P. 187.

**5564. —— Condition must arise "from any accident."**]—THE BELLANOCH, No. 5627, *post*.

### (*h*) *Pilotage Duty.*

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457. Article 8.

**5565. "On their station on pilotage duty"—Must be in own pilotage district—& on look out for vessels.**]—A pilot vessel which had been cruising with a pilot on board put him on to a vessel, & was then rowed up the river Avon in charge of two men. She was exhibiting a white light at her masthead, & had a flash light on her deck ready for use. A steamship going down the river ran into & sank the pilot vessel. Those on the steamship charged the pilot vessel with exhibiting improper lights:—*Held:* (1) the pilot vessel was carrying improper lights as pilot vessels are only on their stations on pilotage duty within the meaning of Article 8 of the Collision Regulations, 1897, when in their pilotage district & on the look out for vessels to pilot, & they are only allowed to exhibit the special lights mentioned in that article in those circumstances; (2) the steamship was alone to blame for the collision as it was caused by the absence of look out & excessive speed on her part. —THE REGINALD (1907), 97 L. T. 608; 10 Asp. M. L. C. 519.

*Annotation:*—*As to* (1) **Apprvd.** The Hassel, [1919] P. 355.

**5566. —— Cutter proceeding from dock to vessel.**]—A pilot cutter, coming out of Barry dock to put a pilot on board a vessel which had signalled for a pilot, was carrying at her masthead the "all-round" white light provided by Article 8 of the Regulations for Preventing Collisions at Sea for pilot vessels "engaged on their station on pilotage duty":—*Held:* she was not engaged on her station on pilotage duty within this Regulation, & her duty therefore, when under way, was to carry the lights similar to those of other vessels of her tonnage.—THE HASSEL, [1919] P. 355; 89 L. J. P. 1; 122 L. T. 501; 14 Asp. M. L. C. 551, C. A.

**5567. Pilot cutter in tow.**]—THE MARY HOUNSELL, No. 5547, *ante*.

**5568. Exhibition of misleading light—When not on station.**]—THE HASSEL, No. 5566, *ante*.

**Pilotage.**]—*See* Part XVI., *post*.

### (*i*) *Fishing Vessels.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 9.

**5569. Duty to show light to approaching vessel.**]—A fishing sloop was run down at night about ten miles off the Eddystone light, & sunk:—*Held:* she could not recover in an action for damage, for she saw the other vessel at some distance, but showed no light herself, as directed by the Admlty. Regulations (a), issued in pursuance of Merchant Shipping Act, 1854 (c. 104), s. 295; the opinion of the ct. being that if she had shown a light the collision would not have taken place.—THE JULIANA (1855), Sw. 20; 166 E. R. 996.

*Annotation:*—**Refd.** The Margaret *v.* The Tuscar (1866), 15 L. T. 86.

**5570. —** .]—THE GOOD INTENT *v.* THE NAPOLEON THIRD (1856), 6 L. T. 615.

**5571. ——.**]—MORGAN *v.* SIM, THE LONDON, No. 5246, *ante*.

**5572. ——.**]—A fishing vessel is bound to show a light in reasonable time to an approaching vessel; but this obligation is not statutory, but an obligation of maritime law.—THE OLIVIA (1862), Lush. 497; 6 L. T. 398; 1 Mar. L. C. 219; 167 E. R. 226.

**5573. —— "In sufficient time to prevent collision"—What amounts to sufficient time.**]—By the Regulations for Preventing Collisions at Sea, Article 10, Sched. Part II., as modified by Order

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**PART XII. SECT. 3, SUB-SECT. 5.—B. (i).**

*1. Duty to show light to approaching vessel—"In sufficient time to prevent collision."*]—THE MARGARET *v.* THE TUSCAR (1866), Holt, Adm. 44; 15 L. T. 86,—IR.

*g. Engaged in trawling—Stationary—Going quarter of a knot with trawl down.*]—The word "stationary" in art. 9 of Rules concerning Lights

*Sect. 3.—The sea regulations: Sub-sect. 5, B. (i) & (k).]*

in Council of June 24, 1885, a British sailing trawler in the North Sea, having her trawl in the water, & carrying the prescribed white light, is to be supplied with red pyrotechnic lights, & shall show "one of the red pyrotechnic lights . . . on being approached by another . . . vessel in sufficient time to prevent collision."

A British sailing trawler in the North Sea, with her trawl in the water, & carrying the prescribed white light, did not show a red pyrotechnic light to an approaching vessel until there was risk of collision by that vessel suddenly shutting in her red, & showing her green light, on the trawler's port bow at the distance of one-third of a mile:—*Held:* the trawler had complied with the regulations for the rule did not mean that it was necessary to show the pyrotechnic light under all circumstances when a trawler was being approached by another vessel, but that the duty was thrown upon the trawler of showing the pyrotechnic light in time to prevent collision when a vessel was approaching under such circumstances that there exists a risk of collision.—THE ORION, [1891] P. 307; 60 L. J. P. 90; 65 L. T. 500; 7 Asp. M. L. C. 88.

**5574.** —— —— ——.]—A steamship proceeding about midnight, at a speed of nearly 9 knots, through a fleet of vessels fishing off the north coast of Cornwall, ran down & sank one of them, which had her regulation white fishing light up, & was, at the material time, lying hove to, engaged in hauling in her trawl. The lights of the steamship were first observed at some considerable distance, & when it was noticed by those on board the trawler that the steamship was heading for them, a white flare up light was shown where it could best be seen, the distance between the two vessels being than about 300 yards:—*Held:* (1) the steamship was alone to blame for not keeping out of the way; (2) the flare was shown "in sufficient time to prevent collision" within Article 9, 1906 (d), sub-sect. 2, of the regulations for preventing collisions at sea.—THE PICTON, [1910] P. 46; 79 L. J. P. 53; 101 L. T. 917; 11 Asp. M. L. C. 358.

**5575. Engaged in trawling—Trawl down—Position similar to that of anchored vessel.**]—THE GOOD INTENT *v.* THE NAPOLEON THIRD (1856), 6 L. T. 615.

**5576.** —— —— ——.]—(1) A steam trawler, whilst engaged in trawling at the rate of 2½ knots an hour through the water & 4½ knots an hour over the ground, carrying a single white light, was run down by the *D.*; it being admitted that the *D.* was to blame, the question arose whether the trawler was not also to blame, for not carrying side lights:—*Held:* though the trawler was one of a class of vessels within Article 9 of the Regulations of 1863, she, in order to be "stationary" within the meaning of that article, was bound not to go faster than was necessary to keep herself under command whilst fishing, & as her speed was greater than was necessary for so doing, she was, at the time of the collision, within Article 3 of the Regulations of 1880.

(2) That leads me to the construction of this rule. My view of an Act of Parliament—& this article is equivalent to an Act of Parliament—which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest & nicest interpretation of language, but according to a reasonable & business interpretation of it (BRETT, M.R.).

(3) To my mind the phrase "fishing vessels attached to their nets & stationary" is meant to be applicable to a time when the vessels are fishing, because everybody knows when vessels are fishing they are attached to their nets; still they are not under way . . . they are much more like vessels which are at anchor than they are like vessels which are under way . . . they are in an extremely helpless state; & if they attempt any manœuvres cannot properly execute them (BRETT, M.R.).

(4) We are bound to give the fullest effect to so strong a word as "stationary" (BRETT, M.R.).

(5) "Being at anchor" is a nautical phrase which everybody understands. It is not necessary that an anchor should be down; for instance, a vessel made fast to moorings has no anchor of her own, & those moorings may not be fastened by an anchor but by something else equivalent to an anchor; yet every one would say she was at anchor; or fishing boats—I have known fishing boats brought up by dropping overboard an exceedingly heavy stone (BRETT, M.R.).—THE DUNELM (1884), 9 P. D. 164; 53 L. J. P. 81; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. L. C. 304, C. A.

*Annotations:—As to* (1) **Refd.** The Tweedsdale (1889), 14 P. D. 164; The Sophia Rebecca (1902), *Times*, Feb. 6. *As to* (2) **Refd.** The Grovehurst, [1910] P. 316. *Generally*, **Refd.** The Chusan (1885), 53 L. T. 50.

**5577.** —— **"Stationary"—Full effect given to expression.**]—THE DUNELM, No. 5576, *ante*.

**5578.** —— —— **Going about one knot.**]—THE ROBERT & ANN *v.* THE LLOYDS (1864), Holt, Adm. 55.

*Annotation:*—**Refd.** The Dunelm (1884), 9 P. D. 164.

**5579.** —— —— **Preparing to put down net.**]—THE ENGLISHMAN, No. 5204, *ante*.

**5580.** —— —— **Helpless state while attached to nets.**]—THE DUNELM, No. 5576, *ante*.

**5581.** —— —— **While hauling in trawl.**]—A collision occurred at night between a sailing vessel & a steam trawler, which was carrying not the ordinary lights for a steam vessel under way, but the alternative lights permitted to her under Article 10 of the Sea Regulations, 1884, & certain Orders in Council, if engaged in trawling & having her trawl in the water. The trawler had been getting her trawl in, &, having got it in just before the collision & not keeping a good look out, went full speed across the bows of the sailing vessel, which kept her course:—*Held:* the trawler was to blame, not only for a bad look out, but also because when she went full speed ahead she was under command, & it was her duty to keep out of the way of the sailing vessel, & because, when she was under command & in a position to go full speed ahead, she ought to have shifted her lights & put up the ordinary lights for a steam vessel under way; & the sailing vrssel was right in keeping her course.—THE UPTON CASTLE, [1906] P. 147; 75 L. J. P. 77; 93 L. T. 814; 10 Asp. M. L. C. 153.

*Annotations:*—**Consd.** The Grovehurst, [1910] P. 316. **Refd.** The Cockatrice, [1908] P. 182; The Craigellachie, [1909] P. 1; The Pitgaveney, [1910] P. 215.

**5582.** —— —— ——.]—THE PICTON, No. 5574, *ante*.

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made under Merchant Shipping Act Amendment Act, 1862, does not denote absolute immobility, but involves a question of degree in each particular case:—*Held:* accordingly a trawler proceeding at the rate of about a quarter of a knot an hour, with her trawl down, conformed to the Rules by exhibiting only a bright white light.—THE EDITH (1876), 10 I. R. Eq. 345.—IR.

**5583. —— In motion—Under way.]** — Article 10 (*a*) of the Regulations for Preventing Collisions at Sea, 1884, requiring all fishing vessels of twenty tons net & upwards " when under way " to carry the ordinary lights of a vessel under way, unless required by other regulations to carry the lights therein prescribed, is applicable to trawlers whilst engaged in trawling & in motion.

Where a steamship having come into collision with a trawler, which, in violation of the Regulations for Preventing Collisions at Sea, was carrying a white masthead light in addition to side lights, & it appeared that those on board the steamship had not seen the white light, the ct. refused to hold the trawler to blame for the breach of the regulations, on the ground that it could not possibly have contributed to the collision.—THE CHUSAN (1885), 53 L. T. 60 ; 5 Asp. M. L. C. 476.

**5584. —— After getting in gear.]** — THE UPTON CASTLE, No. 5581, *ante*.

**5585. ———— Preparatory to reshooting trawl.]** —A steam drifter was fishing in the North Sea with over 2,000 yards of gear out, & was exhibiting the two white lights prescribed by Article 9 (*b*), of the Regulations for Preventing Collisions at Sea, for vessels " fishing with drift nets," when those in charge observed, upwards of a mile away a vessel which they thought was entangle in their gear. They thereupon cast off & buoyed the nets, & steamed up to the other vessel, but so negligently manœuvred their own vessel that she was sunk in collision. The other vessel, which proved to be a steam trawler, had, prior to the collision, been trawling in one direction for an hour, then in the opposite direction for an hour, & then turned again, shooting, & hauling in her trawl in the usual way, & all the time carrying the tri-coloured lantern required by (*d*) of the same Article, for steam vessels " when engaged in trawling." On the question of lights :—*Held :* the drifter had infringed the regulations, for, when she left her nets, she should have taken in her fishing lights & exhibited the lights indicated by the first paragraph of Article 9 for vessels " under way " ; whilst the steam trawler had rightly exhibited the triplex light the whole time, for she was to be deemed to be trawling, not only when she had her trawl down, but during the interval between hauling it up & shooting it again, though if she hauled up her trawl, & instead of shooting it at once, steamed off to trawl over some other ground, it would then become necessary for her to exhibit " under way " lights.—THE COCKATRICE, [1908] P. 182 ; 77 L. J. P. 74 ; 98 L. T. 728 ; 24 T. L. R. 339 ; 11 Asp. M. L. C. 50.

*Annotations :*—**Refd.** The Pitgaveney, [1910] P. 215 ; Bennett S.S. Co. *v.* Hull Mutual S.S. Protecting Soc., [1913] 3 K. B. 372.

**5586. —— —— Going ahead.]**—Pltfs.' trawling smack was carrying the proper lights for a sailing trawler with her trawl down, & having got her trawl up she hoisted her foresail, with the result that before again shooting her trawl she was making 1½ to 2 knots. A collision took place during this interval, between the trawler & defts.' steamer :—*Held :* both vessels were to blame, as the trawler ought to have had her sailing lights up & the steamer ought to have kept out of the way in view of the lights which the trawler was exhibiting.—THE SKRIM (1914), 30 T. L. R. 555.

**5587. " Fishing with drift nets "—After leaving nets—" Under way."]**—THE COCKATRICE, No. 5585, *ante*.

**5588. " Gear fast to rock "—Application of rule in clear weather.]**—By Article 10 (*d*) of the Regulations for Preventing Collisions at Sea, " if a vessel when fishing becomes stationary, in consequence of her gear getting fast to a rock or other obstruction, she shall show the light & make the fog signal for a vessel at anchor " :—*Held :* the rule was applicable although the weather, when the vessel became stationary, was clear.—THE WARWICK (1890), 15 P. D. 189 ; 63 L. T. 561 ; 6 Asp. M. L. C. 545, D. C.

*Annotations :*—**Consd.** *Re* Margetts & Ocean Accident & Guarantee Corpn., [1901] 2 K. B. 792. **Refd.** Bennett S.S. Co. *v.* Hull Mutual S.S. Protecting Soc., [1914] 3 K. B. 57.

**Light to be shown to approaching ship.]**—*See* No. 5600, *post*.

(*k*) *Lights to be Shown on Overtaken Ship.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 10.

**5589. Object of article—Indication of position of overtaken vessel.]**—THE PATROCLUS, No. 5599, *post*.

**5590. Meaning of " being overtaken "—Vessel hove to.]**—THE NOSTRE PADRE (1880), Pritchard's Admiralty Dig. 3rd ed. p. 244.

**5591. ——.]**—(1) A ship is " being overtaken " within the meaning of Article 11 when another is going faster than, & is coming nearer to, her on a course which may ultimately lead to a position of danger, & where the following ship is within the space not covered by the lights of the first ship, & is thus in a position in which these lights cannot be seen by those on board the following ship.

(2) The light prescribed in Article 11 must be shown within a reasonable time before the overtaking ship gets into a position of danger, & after the overtaken ship has become aware that the overtaking ship is approaching in the manner before stated.

(3) The definition in *The Franconia*, No. 6118, *post*, that if the ships are in such a position, on such a course, & at such a distance, that if it were night the hinder ship could not see any part of the side lights of, & is going faster than, the forward ship, they cannot be said to be crossing ships, but that the hinder one is an overtaking ship, is though not exhaustive, yet a good working definition (LORD HERSCHELL, C.).

(4) The object of this rule is, that where a vessel was able to see, & ought to have seen, that another vessel was approaching her, going faster than she was, coming nearer to her, & being on such a course as might ultimately lead to a position of danger, & yet not being in a position to see the lights of the vessel ahead of her, that then the obligation is on the vessel being overtaken in this sense to show from her stern a white light or a flare-up (LORD HERSCHELL, C.).—THE MAIN (1886), 11 P. D. 132 ; 55 L. J. P. 70 ; 55 L. T. 15 ; 34 W. R. 678 ; 2 T. L. R. 689 ; 6 Asp. M. L. C. 37, C. A.

*Annotations :*—*As to* (1) **Refd.** The Molière, [1893] P. 217. *As to* (2) **Consd.** The Essequibo (1888), 57 L. J. P. 29. **Apld.** The Imbro (1889), 14 P. D. 73. *As to* (4) **Refd.** S.S. Olympic *v.* Brunt, S.S. Olympic *v.* Lord High Admiral of United Kingdom Comrs., etc. (1914), 112 L. T. 49.

**5592. ——.]**—(1) By the Regulations for Preventing Collisions at Sea, Article 2, " the lights mentioned in the following articles which include Article 11 shall be carried in all weathers, from sunset to sunrise." By Article 11 " a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light " :—*Held :* it is a breach of the above Regulations for a vessel when no other vessel overtaking it is in sight to carry a white light permanently fixed upon its stern.

(2) *Semble :* Article 11 only contemplates the holding up or flashing of a light to an overtaking ship.

(3) An overtaking vessel within Article 11 is one

*Sect. 3.—The sea regulations: Sub-sect. 5, B. (k) & (l) i., ii. & iii.*]

which is approaching another from aft, & is more than two points abaft that beam of the foremost ship.—THE IMBRO (1889), 14 P. D. 73; 58 L. J. P. 49; 60 L. T. 936; 37 W. R. 559; 6 Asp. M. L. C. 392.

*Annotations:—Generally,* **Refd.** The Stakesby (1890), 59 L. J. P. 72; The Molière, [1893] P. 217.

**5593. Necessity for—No apprehension of danger.**] (1) In a case of collision a steamer will be held not justified in running at full speed on a dark night & not far from a coast where other vessels are likely to be.

(2) A vessel, unless there be apparent danger, is not guilty of negligence in not showing a light to a vessel following her.—THE CITY OF BROOKLYN (1876), 1 P. D. 276; 34 L. T. 932; 24 W. R. 1056; 3 Asp. M. L. C. 230, C. A.

*Annotation:—As to* (1) **Refd.** The Campania, [1901] P. 289.

**5594.** —— ——.]—A vessel is not bound by Article 11, of the Regulations to show from her stern a white light or a flare-up light to a vessel overtaking her, unless there is ground for the apprehension of danger from the overtaking vessel.—THE REIHER (1881), 45 L. T. 767; 4 Asp. M. L. C. 478.

*Annotation:—***Dbtd.** The Main (1886), 11 P. D. 132.

**5595. Sufficiency of light—Must be shown from time to time—One short display "insufficient."**]—By Article 11 a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light:—*Held:* such light must be shown not once & for a short time only, but from time to time while the ship is "being overtaken" within the Article.—THE ESSEQUIBO (1888), 13 P. D. 51; 57 L. J. P. 29; 58 L. T. 596; 6 Asp. M. L. C. 276.

*Annotation:—***Folld.** The Bassett Hound (1894), 71 L. T. 12.

**5596.** —— —— ——.]—One exhibition of a flare-up light by a vessel which is being overtaken by another is not a sufficient compliance with Article 11 of the Regulations for Preventing Collisions at Sea, but the light should be exhibited from time to time so long as there continues to be an overtaking vessel.—THE BASSETT HOUND (1894), 71 L. T. 12; 10 T. L. R. 609; 7 Asp. M. L. C. 467; 6 R. 764, C. A.

**5597.** —— **Must be held up or flashed.**]—THE IMBRO, No. 5592, *ante.*

**5598.** —— **Binnacle light—Reflected astern.**]—(1) A ship does not, by carrying a fixed white binnacle light in such a position as to be reflected astern, comply with Article 11 of the Regulations for Preventing Collisions at Sea, which provides that a ship which is being overtaken by another, shall show from her stern to such last mentioned ship a white light or a flare-up light.

(2) *Semble:* where two ships are on converging courses, with the difference of a point & a half, the one having the other on her quarter four or five points abaft the beam, they are crossing ships, & not within the overtaking rules.—THE BREADALBANE (1881), 7 P. D. 186; 46 L. T. 204; 4 Asp. M. L. C. 505.

*Annotations:—As to* (1) **Consd.** The Argo (1900), 82 L. T. 602; The Devonian, [1901] P. 221.

**5599.** —— —— **Used as stern light**].—(1) In an action for collision it appeared that one of a pair of ordinary binnacle lamps in pltf.'s vessel was temporarily removed from its place & used as a stern light:—*Held:* in the absence of affirmative evidence of its efficiency on the particular occasion it could not be deemed to be such a light as is required by Article 11 of the Regulations for Preventing Collisions at Sea.

(2) The white light required by Article 11 of the Regulations for Preventing Collisions at Sea to be shown from the stern of a vessel overtaken by another vessel must be such as will secure the object of that article, *i.e.*, as will indicate to the overtaking vessel the position of the overtaken vessel on which it is exhibited.—THE PATROCLUS (1888), 13 P. D. 54; 58 L. T. 774; 36 W. R. 928; 6 Asp. M. L. C. 285.

**5600.** —— **Lantern from crosstree.**]—THE PACIFIC, No. 5239, *ante.*

**5601. Time for showing light—Reasonable time before overtaking ship in danger.**]—THE MAIN, No. 5591, *ante.*

**5602. How carried—Visible over area of side light.**]—(1) Article 11 of the Regulations for Preventing Collisions at Sea, which directs that a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light, is infringed if such light is carried in any other way than is necessary to warn overtaking vessels.

(2) Where therefore such light is so placed or carried as to be visible over part of the area of a side light it must be taken that there is a breach of Article 11.—THE PALINURUS (1887), 13 P. D. 14; 57 L. J. P. 21; 58 L. T. 533; 36 W. R. 768; 4 T. L. R. 178; 6 Asp. M. L. C. 271; *on appeal* (1888), 37 W. R. 266, C. A.

*Annotations:—As to* (1) **Apld.** The Imbro (1889), 14 P. D. 73. **Refd.** The Stakesby (1890), 15 P. D. 166.

**5603.** —— **Fixed stern light—Whether breach of regulations.**]—THE IMBRO, No. 5592, *ante*

**5604.** —— —— ——.]—By Article 11 of the Regulations for Preventing Collisions at Sea, "A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light." Pltf.'s barque was proceeding in tow of a tug in the North Sea, about eleven miles off Whitby, &, in addition to the regulation side lights, had a light fixed to her stern. While so proceeding, she was struck by an overtaking vessel:—*Held:* having regard to the circumstances at the time of the collision, the barque had not infringed Article 11 by carrying a fixed stern light.—THE STAKESBY (1890), 15 P. D. 166; 59 L. J. P. 72; 63 L. T. 115; 39 W. R. 80; 6 Asp. M. L. C. 532.

*(l) Vessels at Anchor.*

i. *Meaning of "At Anchor."*

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 11.

**5605. General rule.**]—THE DUNELM, No. 5576, *post.*

**5606. Vessel at moorings.**]—THE DUNELM, No. 5576, *ante.*

**5607.** —— **Fishing vessel moored to dolphins.**]—THE SOPHIA REBECCA (1902), *Times*, Feb. 6, D. C.

**5608.** —— **Moored outside another vessel.**]—A vessel lying moored at night, outside another vessel, at the customary place for trawlers loading ice, namely, the Fish Wharf on the east side of the New Cut, Swansea Harbour, is not "at anchor" within Article 11 (1) of the Regulations for Preventing Collisions at Sea, &, therefore, need not carry a white light; nor, at low water, is she

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**PART XII. SECT. 3, SUB-SECT. 5.—B. (l) i.**

**5606 i.** *Vessel at moorings.*]—Collision Regulations of 1897, Arts. 11 & 15 (*d*), do not apply in the case of a ship made fast to a lawful wharf in a harbour:—*Held:* on the facts, that a vessel which ran into another so moored was guilty of negligence.—BANK SHIPPING CO. *v.* THE CITY OF SEATTLE (1903), 10 B. C. R. 513; 9 Exch. C. R. 146.—CAN.

"aground in or near a fairway" within same Regulations, &, therefore, need not carry the two red lights mentioned in the last paragraph of those Regulations.—THE TURQUOISE, [1908] P. 148; 77 L. J. P. 97; 98 L. T. 588; 11 Asp. M. L. C. 28.

**5609. Vessel fast to steam tug—Being moored to anchor—Anchor in ground.**]—THE ROMANCE, No. 5528, *ante*.

**Fishing boats engaged in trawling.**] — *See* Sub-sect. 5, B. (*i*), *ante*.

**Meaning of "under way."**]—*See* Sub-sect. 5, B. (*c*), *ante*.

ii. *Necessity for Lights.*

*See* Sea Regulations, 1920, Statutory Rules & Orders, 1910, p. 457, Article 11.

**5610. Whether necessary—Frequented track.**]—(1) A vessel lying at anchor in a track frequented by other ships, is bound at night to exhibit an efficient light.

The owners of a vessel so lying at anchor, & run into by a vessel under sail, held to have been in fault in omitting to exhibit such light.

(2) When a vessel at anchor is run down by a vessel under sail, the *onus probandi* lies with the vessel that is in motion, & she is *primâ facie* bound to show a sufficient cause why she came in contact with the vessel which was stationary & which was consequently comparatively helpless (*per* CUR.).—THE VICTORIA (1848), 3 Wm. Rob. 49; 6 Notes of Cases, 176; 4 L. T. 839; 166 E. R. 881.

**5611.** ——.]—THE FAIRY (1850), 5 L. T. 146.

*Annotation*:—**Reid.** The Osmanli (1850), 7 Notes of Cases, 507.

**5612.** ——.]—THE WILLIAM *v.* THE HARRIETT (1855), 5 L. T. 146.

**5613. —— Bright moonlight night.**]—MORGAN *v.* SIM, THE LONDON, No. 5246, *ante*.

**5614.** ——.]—THE PARA (1886), 3 T. L. R. 235, C. A.

**5615. Temporary absence of light — Twenty minutes.**—THE IDE *v.* THE KRON PRINS ERNST AUGUSTE (1856), 5 L. T. 146.

**5616. —— Lamp being trimmed.**]—A ship lying at anchor on a dark night is bound to keep a light always visible, & it is no excuse to free her from liability that the lamp had been temporarily taken down to be trimmed.—THE C. M. PALMER, THE LARNAX (1873), 29 L. T. 120; 21 W. R. 702; 2 Asp. M. L. C. 94, P. C.

**5617. Duty to extinguish side light—Immediately ship brought up.**]—The master of pltfs.' steamship proceeding, about 7 p.m. in Nov., up Barking Reach, in the Thames, with a flood tide of about half a knot, decided to anchor on account of fog. He stopped his engines, put his helm hard-a-port, &, having given the vessel an angle across the river to the northward, set his engines slow ahead, & then full speed astern. When the way was taken off his ship he let go to the anchor, &, on a hail from the mate that the anchor was holding ordered the two side lights & the masthead light to be taken in, & the riding light to be put up, leaving a stern light, showing twenty points still exhibited. The fog during this time had lifted, & defts.' steamship coming down the river seeing the masthead & red light of pltf.'s ship a little on the port bow, ported. The red light then disappeared & pltfs.' steamship was seen to be lying across the river, whereupon the engines of defts.' ship were reversed full speed, but a collision occurred:—*Held:* pltfs.' steamship was alone to blame, as, when throwing herself athwart the navigable channel & stopping her way she was within Thames Bye-Laws, 1887, Article 18, & was bound to give four or more blasts of the steam whistle in rapid succession, so long as the danger lasted, that is, until she had swung to her anchor. The side lights ought also to have been taken in as soon as the vessel was held by her anchor, &, being over 150 feet in length, the second riding light prescribed by Thames Bye-Laws, 1892, Article 7 (*c*), should have been duly exhibited at or near the stern.—THE WEGA, [1895] P. 156; 64 L. J. P. 68; 72 L. T. 332; 11 T. L. R. 251; 7 Asp. M. L. C. 597; 11 R. 726.

**5618. Effect of local regulations.**]—MORRISON *v.* GENERAL STEAM NAVIGATION CO., No. 6424, *post*.

iii. *Sufficiency of Lights.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 11.

**5619. Position of light—Mizzen rigging.**]—THE TELEGRAPH, VALENTINE *v.* CLEUGH, No. 5529, *ante*.

**5620. —— Fourteen feet above deck—Brigantine of two hundred & eighteen tons.**]—THE BUTE *v.* THE ARGO (1854), 5 L. T. 146.

**5621. —— Foreboom—Twenty-two feet from deck.**]—THE EXETER & THE NORTHUMBRIA'S DAUGHTER, WHITTLE *v.* CRAWFORD (1855), 5 L. T. 146.

**5622. —— Under boom of foresail—Twenty feet above bulwarks—Brigantine of eighty tons.**]—CHURCHWARD *v.* PALMER, THE VIVID (1856), 10 Moo. P. C. C. 472; 4 W. R. 755; 14 E. R. 570; *sub nom.* THE HENRY *v.* THE VIVID, 5 L. T. 146, P. C.

**5623. —— Foreshroud of starboard fore-rigging—Seventy-two feet abaft stem—Vessel three hundred & thirteen feet long.**]—By Article 11 of the Regulations for Preventing Collisions at Sea "a vessel of 150 feet or upwards in length, when at anchor, shall carry" two anchor lights, one "in the forward part of the vessel. . . .":—*Held:* a vessel 313 feet in length, at anchor, with the forward light hanging from the foreshroud of the starboard forerigging, 72 feet abaft the stem, was, on the true construction of the wording of the Article, carrying it "in the forward part of the vessel."—THE PHILADELPHIAN, [1900] P. 262; 69 L. J. P. 101; 82 L. T. 601; 48 W. R. 514; 16 T. L. R. 383; 44 Sol. Jo. 466; 9 Asp. M. L. C. 72, C. A.

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**PART XII. SECT. 3, SUB-SECT. 5.—B. (1) ii.**

**5611 i.** *Whether necessary.*]—DOMINION COAL CO. *v.* THE LAKE ONTARIO (1902), 32 S. C. R. 507.—**CAN.**

**5611 ii.** ——.]—A vessel at anchor in mid-channel is bound by the Admiralty regulations to exhibit a light, & if a collision takes place, & damage ensues to a vessel in motion, who is herself in no default, by neglecting to obey these rules, the Ct. of Admiralty will decree for the full amount of the damage & costs.—THE ANNE (1860), 12 Ir. Jur. 360.—**IR.**

**h.** —— *Dark night.*]—Vessels are required upon a dark night to show their position by a fixed light while at anchor in the harbour of Quebec, & the want of such light will amount to neglect, so as to bar a claim for any injury received by other vessels running foul of them.—*Re* THE MARY CAMPBELL (1841), 1 S. V. A. R. 222.—**CAN.**

**k.** —— *Where vessel visible.*]—*Re* THE CLARA KILLAM (1875), 2 Q. L. R. 56.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—B. (1) iii.**

**l.** *Position of light—Fore & aft—Lights not regulation but equal in power.*]—In the case of a steam vessel lying at anchor upon anchorage ground while using her bell & showing two white lights, one upon her foremast & the other at the gaff aft, against each in an oblong lantern:—*Held:* the lights, although not in globular lanterns as directed by the "Act respecting the navigation of Canadian waters," being equal in power were a substantial compliance with the Act.—THE GENERAL BIRCH (1880), 6 Q. L. R. 300.—**CAN.**

**m.** —— *Over taffrail or stern—Ten feet above high-water level.*]—KIDSTON

*Sect. 3.—The sea regulations: Sub-sect. 5, B. (l) iii., (m) & (n), & C. (a), (b), (c) & (d) i.*]

**5624. —— " At or near stern "—One hundred & twenty feet from stern.**]—(1) It is not a compliance with Article 11 of the Regulations for Preventing Collisions at Sea, 1897, which provides that a ship of 150 feet or upwards in length shall, when at anchor, carry a second anchor light " at or near the stern of the vessel," to exhibit a light at a distance of 120 feet from the stern where the lights of a vessel are not exhibited in the position required by the collision regulations it is necessary for her to establish beyond all doubt that the light was in such a position that it ought to have been seen by the other vessel before the court will find the other vessel in fault for bad look out.

(2) I think it is a canon, which any one who is familiar with cts. of justice will recognise as a just one, that instead of assuming that people are perjuring themselves you should, if there is a view by which you can reconcile all the testimony, prefer that to the view which places people in the position of contradicting each other so that they must necessarily be swearing what is false (LORD HALSBURY, C.).—GANNET (OWNERS) *v.* ALGOA (OWNERS), THE GANNET, [1900] A. C. 234; 69 L. J. P. 49; 82 L. T. 329; 9 Asp. M. L. C. 43, H. L.

*Annotations:—As to* (1) **Reld.** The Pitgaveney, [1910] P. 215. *Generally,* **Mentd.** S.S. Australia v. S.S. Nautilus, [1927] A. C. 145.

**5625. —— Jackstaff six feet above deck—Ensign staff five feet above deck—Torpedo boat destroyer.**]—A torpedo boat destroyer, over 150 feet in length, was lying at anchor in a harbour at night with her forward riding light on the jackstaff 6 feet above the deck, & her after light on the ensign staff 5 feet above the deck. There were no masts in the vessel upon which lights could be placed in the positions prescribed by Article 1,069 of the King's Regulations, which was the same as Article 11 of the Regulations for Preventing Collisions at Sea, 1897. She had an awning up, which was about 3 feet higher than the after light. Another vessel coming down the harbour saw only one light, & thinking that the vessel carrying the light was less than 150 feet in length, she came into collision with her. If the destroyer had not exceeded 150 feet in length, the other vessel would have passed clear. In an action by the Admlty. to recover the amount of the damage, the judge found that the awning of the *Haughty* obscured the after light, & that this was the cause of the collision, & that therefore the other vessel was not to blame for the collision, & he gave judgment for defts.:—*Held:* there was evidence upon which the judge could so find, & as pltfs. had not proved that the collision was caused by the negligence of defts., the judgment must be affirmed.—THE HIRONDELLE (1905), 22 T. L. R. 146, C. A.

**Temporary absence of light.**]—*See* Nos. 5615, 5616, *ante.*

*(m) Vessel Aground.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 11.

**5626. Ordinary riding light indistinguishable—Duty to show elevated light.**]—When a vessel is aground in a place where her ordinary riding light cannot be distinguished by approaching vessels, & where vessels are not expected to lie, it is her duty to exhibit a light on a mast or some elevated position, & to have a look out to give warning to approaching vessels of her position by the best means in her power.—THE THOMAS LEA (1876), 35 L. T. 406; 3 Asp. M. L. C. 260.

**5627. " Aground in or near fairway "—Vessel dragging through mud.**]—Just before sunrise, but in daylight, & in the shallow water of Monte Video Roads, pltfs.' & defts.' steamships were, at the material time, crossing vessels within the meaning of article 19 of the Regulations for Preventing Collisions at Sea. Pltfs.' vessel was pursuing a southerly course at about three knots, & had defts.' vessel on her starboard bow at about right angles. As the giving way vessel, pltfs.' vessel ported to pass under the stern of defts.' vessel, but struck her on the port quarter, & was held to blame for not taking sufficient or timely steps to avoid collision. Defts.' vessel, of deeper draught, was slowly dragging through the mud on an easterly course at about one mile per hour, & to assist in her progress, she was, from time to time, putting her engines full speed astern, the last occasion being for the first three out of the eight minutes preceding the collision:—*Held:* (1) defts.' vessel was free from blame, as she was not bound to exhibit two red lights under articles 4 or 11, being neither " not under command " nor " aground " within the meaning of those articles; (2) she was not under any obligation to give the three short blast signal on putting her engines full speed astern, as she was so manœuvring with her engines, from time to time, in the ordinary course of navigation to enable her to go ahead as fast as the condition of the mud would permit, & was not, within the meaning of article 28, taking a course " authorised or required by these rules," with reference to the other vessel in sight.

It is true that Article 28 refers to the signals being given when vessels are in sight of one another, but the words immediately following, " in taking any course authorised or required by these rules," show that it does not mean in sight at any distance, but in sight with reference to the manœuvres which a vessel is authorised or required to take, having regard to the other vessel approaching, for the purpose of avoiding collision (LORD ALVERSTONE, C.J.).

I think, as a matter of fact, that there was no point prior to the time at which the offending vessel, the *Canning*, reached the buoys, at which there was anything which, under Article 28, called for a signal from the *Bellanoch;* indeed, I would go so far, & I have the support of a judge of very great experience, the President of the Admlty. Div., as to say that I think it would have been a wrong thing, because misleading (KENNEDY, L.J.).

What they mean to allege as a ground of complaint is that the *Bellanoch*, after she was port to port, & when the period of action, & duty of signalling the action, under the rules had arisen, moved her engines astern without giving the signal under article 28. I understand, looking at the pleadings & the evidence, that that was the case which they came to fight, & upon which they would have had real ground of complaint had their evidence been deemed truthful, & had it been believed by the ct. that the *Bellanoch* did then go astern (KENNEDY, L.J.).—THE BELLANOCH, [1907] P. 170; 76 L. J. P. 83, C. A.; *affd. sub nom.* CANNING (OWNERS) *v.* BELLANOCH (OWNERS), [1907] A. C. 269, H. L.

*Annotations:—As to* (2) **Consd.** The Corinthian, [1909] P. 260. **Reld.** The Hero, [1911] P. 128; The Karamea, [1921] P. 76.

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*v.* M'ARTHUR & CLYDE NAVIGATION TRUSTEES, M'ARTHUR *v.* KIDSTON, ETC. (1878), 5 R. (Ct. of Sess.) 936; 15 Sc. L. R. 631.—**SCOT.**

*n. Green & white light shown—Where white light only required.*]—*Re* THE LORNE (1872), 2 S. V. A. R. 177.—**CAN.**

*o. Navigating lights.*]—HARBOUR NAVIGATION CO. *v.* THE DINTELDYK (B. C.), [1925] Exch. C. R. 10.—**CAN.**

**5628. —— Vessel moored to another—Low water.**]—THE TURQUOISE, No. 5608, *ante*.

**5629. —— Whether article excluded by Thames Bye-Laws, 1898, Article 30.**]—So far as relates to the lights to be carried by a vessel of 150 feet or upwards in length, "aground in or near a fairway," there is no ambiguity in article 30 of the Thames Bye-laws, 1898, for it may be gathered from the earlier part of the same article that a vessel of that length is required to carry two white lights at the height & in the positions indicated, nor is the article *ultra vires*, for, in accordance with the reasoning in *The Carlotta*, No. 5563, *ante*, this bye-law, having been duly made by local authority, excludes the operations of article 11 of the regulations for preventing collisions at sea, by which, in the case of vessels over 150 feet in length, aground in or near a fairway, two red lights are to be carried in addition to the white lights.—THE BITINIA, [1912] P. 186; 82 L. J. P. 5; 107 L. T. 208; 28 T. L. R. 497; 12 Asp. M. L. C. 237; *affd.*, 82 L. J. P. 8; 29 T. L. R. 99, C. A.

**Whether "not under command."**]—*See* No. 5563, *ante*.

*(n) Right to Show Flares.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, p. 457, Article 12.

**5630. Not if calculated to mislead.**]—A sailing vessel, having a steamship approaching on her starboard bow at night, burnt flare-up lights to attract her attention:—*Held:* (1) the burning of a flare was not forbidden by Article 2 of the Regulations; (2) whether a vessel was to blame or not for showing a flare-up light must depend upon whether or not the exhibition of the flare was calculated to mislead.—THE MERCHANT PRINCE (1885), 10 P. D. 139; 54 L. J. P. 79; 53 L. T. 914; 34 W. R. 231; 5 Asp. M. L. C. 520.

*C. Fog.*

*(a) In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Articles 15 & 16.

**5631. Necessity for strict observance.**]—THE RAITHWAITE HALL, No. 6426, *post*.

**5632.** ——.]—THE CHINKIANG, No. 5686, *post*.

*(b) Definition.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Articles 15, 16.

**5633. Thickness of weather—Necessitating use of fog signals.**]—THE MILANESE, No. 5642, *post*.

**5634. —— Masthead light visible but not side lights.**]—THE MILANESE, No. 5642, *post*.

**5635. Analogous to fog—Snowstorm.**]—THE ST. PAUL, No. 5645, *post*.

*(c) Effect of Fog Regulations on Other Articles.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Articles 15, 16.

**5636. General rule — Fog rules prevail.**]—Article 19 of the Regulations for Preventing Collisions at Sea does not apply in cases where the two vessels are not visible to each other by reason of fog. In cases of fog, only the fog rules apply, the other rules being only applicable where the vessels are in sight of each other.—THE KING (1911), 27 T. L. R. 524.

**5637. Vessel closehauled on port tack—Article 17.**]—THE AGNES *v.* THE JAMES GIBB (1856), 5 L. T. 366.

**5638. —— ——.**]—MARPESIA (OWNERS) *v.* AMERICA (OWNERS), THE MARPESIA, No. 6325, *post*.

—— ——.]—*See* Sub-sect. 5, D. (*b*) ii., *post*.

**5639. Vessels crossing—Article 19.**]—THE KING, No. 5636, *ante*.

—— ——.]—*See* Sub-sect. 5, D. (*c*), *post*.

**5640. Duty to keep course & speed—Article 21.**]—THE CATHAY, No. 5967, *post*.

—— ——.]—*See* Sub-sect. 5, D. (*b*) iii., *post*.

*(d) Sound Signals.*

i. *In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 15.

**5641. When duty arises—Another ship approaching.**]—Collision. A collier brig out at sea in foggy weather, descrying a steamer at a distance, as she stated, of three or four cables' length, held to blame for not having given notice by blowing a fog horn.

Doubtful circumstances must be judged by the facts that are admitted or indisputably proved.

The *onus probandi* may shift from one party to the other in the cause.

The safest mode of coming to a conclusion is, where you find certain facts & circumstances admitted, or indisputably proved, & where others are doubtful, to make those doubtful facts consistent, if possible, with those that are certain & proved indisputably (DR. LUSHINGTON).—THE CARRON (1853), 1 Ecc. & Ad. 91; 164 E. R. 53.

**5642. —— Ship approaching fog-bank.**]—It is the duty of a vessel, when in the vicinity of a fog bank, to make the signals prescribed by Article 10 of the Regulations for Preventing Collisions at Sea, to warn vessels within it of her presence.

When at night a masthead light is seen, but no side lights, it is an indication to an approaching vessel that the lights are those of a steamer whose side lights are obscured by fog.—THE MILANESE (1880), 43 L. T. 107; 4 Asp. M. L. C. 318, C. A.; *affd.* (1881), 45 L. T. 151, H. L.

*Annotations:*—**Consd.** The St. Paul (1908), 100 L. T. 184. **Reld.** The Hector (1883), 8 P. D. 218.

**5643.** —— ——.]—THE N. STRONG, No. 5699, *post*.

**5644.** —— ——.]—ORAVIA (OWNERS) *v.* NEREUS (OWNERS), THE ORAVIA, No. 5748, *post*.

**5645. —— On approaching snow storm.**]—A cruiser proceeding up, & a New York liner proceeding down, the Solent on nearly opposite courses, & in about mid-channel, sighted one another at a distance of about half a mile, each having the other a little on the port bow. The speed of both vessels was nearly 10 knots, & the cruiser when seen was coming out of a snow flurry, whilst the liner was in comparatively clear weather. Those in charge of the cruiser, under

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**PART XII. SECT. 3, SUB-SECT. 5.—B. (n).**

p. *Flare obscuring regulation lights.*]—A flare must not be exhibited so as to obscure or shut out the regulation lights or either of them.—THE SEA NYMPH OF CHESTER (1864), Holt, Adm. 34.—**IR.**

**PART XII. SECT. 3, SUB-SECT. 5.—C. (a).**

**5631 i.** *Necessity for strict observance.*]—PALLEN *v.* THE IROQUOIS (1913), 17 Exch. C. R. 185; 15 B. C. R. 76.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—C. (d) i.**

**5641 i.** *When duty arises—Another ship approaching.*]—LAIRD LINE, LTD. (ROWAN (OWNERS)) *v.* CLAN LINE STEAMERS, LTD. (CLAN MALCOLM (OWNERS)), [1923] S. C. 316.—**SCOT.**

**5641 ii.** —— ——.]—LAIRD LINE, LTD. (ROWAN (OWNERS)) *v.* UNITED STATES SHIPPING BOARD (WEST CAMAK (OWNERS)), [1923] S. C. 316.—**SCOT.**

q. *Whether mere sounding of signal sufficient.*]—Mere sounding of the fog signal is not sufficient.—PALLEN *v.* THE IROQUOIS (1913), 17 Exch. C. R. 185; 15 B. C. R. 76.—**CAN.**

*Sect.* 3.—*The sea regulations: Sub-sect.* 5, *C.* (*d*) *i., ii. & iii.*]

the mistaken impression that the liner was starboarding, starboarded their helm, thereby bringing their vessel across the bows of the liner, &, at the last, ported to throw their quarter clear. Those in charge of the liner stopped, then blew one short blast & ported, at the same time reversing the starboard engine, & subsequently also the port engine; but the two vessels came into collision, the liner striking the cruiser on the starboard side amidships & sinking her. In the ct. below, the cruiser was found alone to blame for improper starboarding. On appeal it was contended that the liner was also to blame for excessive speed in the condition of the weather, & for failure to indicate her position by sound signals:—*Held:* both charges against the liner failed, for, though good seamanship required that she should be going at a speed which would be moderate when she herself was enveloped in falling snow, her speed at the material time, & in the weather conditions then prevailing, was not excessive; &, though good seamanship would suggest to those in charge of the liner the advisability, as in the analogous case of fog, of giving warning of the presence of their vessel by sounding the signal when approaching falling snow, yet as both vessels saw one another at a distance & in sufficient time to enable them, with reasonable care, to pass each other in safety, the absence of sound signals on the part of the liner did not contribute to the collision.

*Qu.:* whether, when the liner was approaching falling snow, the responsibility for giving sound signals rested with the master or with the pilot in charge by compulsion of law.

It might be the duty of the master to call the attention of the pilot to the fact that sound signals ought to be given (LORD ALVERSTONE, C.J.).—THE ST. PAUL, [1909] P. 43; 78 L. J. P. 1; 100 L. T. 184; 11 Asp. M. L. C. 169, C. A.

*Annotations:*—**Consd.** The Elysia, [1912] P. 152. **Reld.** The Umsinga, [1911] P. 234.

**5646. By whom signals given—Sailing vessel tacking.**]—Where a sailing vessel is tacking in a fog, she is not relieved during the manœuvre from giving the signals prescribed by Article 12 of the Regulations for Preventing Collisions at Sea, & it is her duty until she gets the wind on to the side other than that on which she has had it to treat herself as still on the tack on which she was when she began to go about & to make the prescribed signal, & only to change that signal when she gets the wind on the other side.—THE CONSTANTIA (1889), 62 L. T. 236; 38 W. R. 272; 6 Asp. M. L. C. 478.

**5647. —— Vessel under compulsory pilotage—Duty of master to call attention of pilot.**]—THE ST. PAUL, No. 5645, *ante.*

**5648. —— Tug & tow—Tug fast but not towing.**]—THE SARGASSO, No. 6402, *post.*

**5649. Sailing vessel tacking—One blast when wind on starboard side—Two blasts when wind on port side.**]—THE CONSTANTIA, No. 5646, *ante.*

**Effect of local regulations.**]—*See* Sect. 4, *post.*

ii. *Mechanical Fog-Horn.*

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 15.

**5650. Use of bell—Foghorn not audible further than bell.**]—(1) A steamer, going at the rate of 7 knots an hour, ran into a barque. The collision occurred in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook. There was at the time a thick fog, & the barque was not seen till within a ship's length of the steamer. The barque, though hove to, was making headway at the rate of about a mile an hour. A bell was frequently sounded on board the barque, but no foghorn was used:—*Held:* the steamer was alone to blame for the collision, because she was going at an improper rate of speed, & because wrong & contradictory orders were given after the barque was sighted.

(2) The rate of speed proper for a steamer must depend on circumstances, but in a thick fog & at a part of the ocean where frequently a great number of vessels are congregated 7 knots an hour is too great.

(3) The barque was wrong in not using a foghorn, as required by the Admiralty Regulations; but, though a foghorn would have been heard farther than a bell, yet the neglect to use a foghorn was not the cause of the vessels coming into the position which caused the collision.—NATIONAL S.S. CO., LTD. *v.* MERRY & CUNNINGHAM, THE PENNSYLVANIA (1870), 23 L. T. 55; 3 Mar. L. C. 477, P. C.

*Annotation:*—*As to* (1) & (2) **Consd.** The Campania, [1901] P. 289.

**5651. Use of mouth horn—Mechanical horn broken down.**]—Where the mechanical foghorn of a sailing ship breaks down, & a mouth horn is made use of in its place, the departure from Article 12, of the Regulations is necessary, & the vessel is not to blame.—THE CHILIAN (1881), 45 L. T. 623; 4 Asp. M. L. C. 473.

**5652. —— Regulations not in force when ship sailed—Owner aware of Regulations.**]—(1) A barque, provided only with a foghorn, sounded by means of the breath, came into collision, during a fog, with a steamship. The foghorn was duly sounded before the collision, & was heard by those on board the steamship, & those on board the steamship neglected, for some time after they heard the foghorn, to stop or reverse the engines. The steamship was held to blame:—*Held:* (1) the barque was to be deemed in fault for not using a foghorn, to be sounded by mechanical means, as required by Article 12 of the Regulations for Preventing Collisions at Sea, 1879. (2) The circumstance that the barque left port a few days before the Regulations came into force did not afford any valid excuse for the neglect of those in charge of her to furnish her with a foghorn, to be sounded by mechanical means, they well knowing, before she left port, that the Regulations would come into force in a few days, & there being no evidence to show that they could not have obtained a foghorn, according to the Regulations, before she left port.—THE LOVE BIRD (1881), 6 P. D. 80; 44 L. T. 650; 4 Asp. M. L. C. 427.

**5653. —— Heard by approaching ship.**]—THE LOVE BIRD, No. 5652, *ante.*

iii. *Failure to Hear.*

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 15.

**PART XII. SECT. 3, SUB-SECT. 5.—C. (d) ii.**

**5651 i.** *Use of mouth horn—Mechanical horn broken down.*]—If a mechanical fog horn, which without negligence has become ineffective when used at sea, is provided for use on a ship to which the regulations apply, the user of the fog horn by mouth in place of the mechanical means comes within the exception contained in Merchant Shipping Act, 1894, s. 419 (4), which permits a departure from the regulations under circumstances which make such departure necessary.—FORTUNATO FIGARI (OWNERS) *v.* S.S. COOGEE (1904), 29 V. L. R. 874.—**AUS.**

**5654. Whether evidence of negligence—Against approaching ship.**]—(1) A collision happened between the steamship *I.* and the barque *Z.* in a fog. It was proved that the *I.* had reduced her speed so far as was possible without stopping her way altogether:—*Held:* she had not infringed Article 13 of the Regulations for Preventing Collisions at Sea.

(2) It was further proved that the *Z.* was proceeding at more than 4 knots an hour:—*Held:* an infringement of Article 13, for the term "moderate speed" means that a vessel is to reduce her speed so far as she can consistently with keeping steerage way.

(3) It was the duty of both vessels, under Article 13, to go at a moderate speed, & it appears to me that the object with which that rule of conduct is imposed is, not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for the making any proper manœuvres which may become necessary under unforeseen circumstances; for, in a fog, it cannot be told exactly from what quarter the danger may come (SIR JAMES HANNEN, P.).

(4) It was further proved that a foghorn was blown on the *Z.* but not heard on the *I.*:—*Held:* this was not *primâ facie* evidence of negligence of those on the *I.*

(5) I do not consider that the fact of those on board the *Iduna* not hearing a foghorn proves that no foghorn was blown (SIR JAMES HANNEN, P.).

(6) Where a sailing ship in a fog hears repeated whistles of an approaching steamship, indicating possible risk of collision, she is bound to take precautions, such as stationing men at the braces ready to put the sails aback, so as to stop her way in the event of a collision becoming imminent.—THE ZADOK (1883), 9 P. D. 114; 53 L. J. P. 72; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. L. C. 252.

**5655.** —— ——.]—The evidence showed that the two vessels, the *Cascapedia* & the *Alaska*, were approaching the *Oxfordshire* & were both whistling regularly . . . once a minute. The *Oxfordshire* was approaching them & . . . those on board of her must have heard the whistle before they saw the lights of the *Cascapedia*. The *Oxfordshire* was therefore to blame in not stopping & reversing earlier than she did. . . . It was plain that the evidence of the *Cascapedia* as to stopping & reversing was erroneous, since the blow struck was too violent to be consistent with such a state of things. Both vessels were in a most frequented part of the sea, & they ought both to have prepared to take the greatest precautions. The degree of slowness to be adopted in a fog often depended on the place in which vessels were. It was, however, plain from the evidence of the *Alaska*, which was entirely to be believed, that the *Oxfordshire* was careless in not hearing the whistle sooner, & it was also plain that the *Cascapedia* had not reversed in time. Both vessels were therefore to blame & there would be no costs (LORD ESHER, M.R.).—THE CASCAPEDIA (1888), 4 T. L. R. 546, C. A.

**5656.** —— ——.]—THE ROSETTA, No. 5733, *post*.

**5657.** —— ——.]—Defts.' vessel going down the river Thames suddenly encountered fog, &, whilst proceeding to bring up, those in charge saw the riding light & heard the bell of pltfs.' vessel lying at anchor; but it was then too late to avoid a collision:—*Held:* the evidence failed to show any negligence on the part of those in charge of defts.' vessel in not seeing the light or hearing the sound signals sooner, &, therefore, on the ground of inevitable accident, the loss must rest where it fell.—THE NADOR, [1909] P. 300; 78 L. J. P. 106; 100 L. T. 1007; 11 Asp. M. L. C. 283.

**5658.** —— **Against ship claiming to have signalled.**]—THE ZADOK, No. 5654, *ante*.

**5659.** ——.]—(1) A large twin screw mail & passenger steamer vessel was proceeding up the St. George's Channel in a dense fog at 9 to 10 knots an hour, her full speed being 21 knots, when she sighted a barque about 150 feet ahead, &, in spite of efforts to avoid her, struck her amidships, cutting her in two, with the loss of eleven lives. It was contended on behalf of the owners of the steam vessel that the speed at which she was travelling was moderate in the existing circumstances & conditions, as that speed was the lowest at which she could be readily manœuvred so as to avoid other vessels, & unless she was kept steaming continuously at about that speed she could not be navigated with safety to herself as there would be danger from uncertainty both in respect of her course and position:—*Held:* the speed was not "moderate" within Article 16 of the Regulations for Preventing Collisions at Sea, 1897, as the terms of that Article are imperative, &, as a general rule, speed such that another vessel cannot, after being seen, be avoided, is excessive.

(2) If a steam vessel cannot in a fog be continuously navigated at a very slow speed she must, in order to comply with the rule, & in the absence of exceptional dangers of navigation such as may arise from narrow waters or current, be stopped from time to time so as to take off her way. This may involve some inconvenience in the shape of delay, & possibly render it necessary to haul out from the coast, besides requiring proper steps to be taken to verify the position of the vessel, but it gives more opportunity of hearing the sound signals of an approaching vessel, more time to act when necessary, & if a collision should occur, the consequences are less disastrous.

(3) The fact that the sound of the fog horn does not appear to have reached the ears of those on board the *Campania* is not sufficient to override the positive evidence of the witnesses from the barque that it was being properly sounded (GORELL BARNES, J.).—THE CAMPANIA, [1901] P. 289; 70 L. J. P. 101; 84 L. T. 673; 17 T. L. R. 509; 9 Asp. M. L. C. 177, C. A.

*Annotations:—As to* (2) **Consd.** The Oceanic (1902), 18 T. L. R. 672. **Refd.** The Counsellor, [1913] P. 70.

**5660. Failure to give signal—No justification that other vessel would have failed to hear.**]—(1) A steam vessel trawling in a fog, & alleged to be sounding the fog signals prescribed by Article 15 for a steamship under way in a fog, namely, a prolonged blast at intervals of not more than two minutes, came into collision with a steamship under way:—*Held:* the trawler was to blame for the collision, for Article 9 (*g*) applied, & the trawler should have sounded a fog horn &

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**PART XII. SECT. 3, SUB-SECT. 5.—C. (d) iii.**

**5654 1.** *Whether evidence of negligence—Against approaching ship.*]—SENLAC CO. *v.* THE ROSALIND, C. R., [1909] A. C. 441.—CAN.

*Sect.* 3.—*The sea regulations: Sub-sect.* 5, *C.* (*d*) *iii. iv.*, (*e*) *&* (*f*) *i.*]

rung a bell alternately at intervals of not more than two minutes.

(2) The steamship colliding with the trawler had heard the whistle of another vessel, not the trawler, & had not stopped:—*Held:* there was no obligation on the steamship to stop, for whether the whistle proceeded from the trawler or not, it was heard abaft the beam.

(3) *Semble:* the steamship would have been held to blame for not stopping if the whistle heard had been forward of the beam, even though the whistle heard did not proceed from the vessel collided with.

(4) If a vessel is not whistling according to the rule it is very difficult for her to argue that it did not matter, because even if it had been sounded properly it would not have been heard. No one can say that (SIR F. H. JEUNE, P.).—THE LONDON. [1904] P. 355; 73 L. J. P. 125; 91 L. T. 327; 10 Asp. M. L. C. 12; *on appeal*, [1905] P. 152, C. A.

iv. *Use of Two Long Blasts.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 15.

**5661. Ship must be stopped—Liability for having way on.**]—THE CASTLEVENTRY (1904), *Times*, Apr. 18.

**5662.** —— ——.]—THE BITTERN (1908), *Times*, Mar. 30.

**5663.** —— ——.]—Article 15 of the Regulations for Preventing Collisions at Sea, provides that in fog & in certain other conditions of weather "(*a*) a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast; (*b*) a steam vessel under way, but stopped & having no way upon her, shall sound, at intervals of nor more than two minutes, two prolonged blasts, with an interval of about one second between them." During a fog a collision occurred between the *Brasilia* & the *Matiana*. The *Matiana* had admitted that she was to blame, but contended that the *Brasilia* was also to blame by reason of the fact that shortly before the collision, & while she had way on her, she had sounded two blasts:—*Held:* the *Brasilia* by sounding two blasts had committed a breach of Article 15 of the Regulations for Preventing Collisions at Sea & having thereby misled the *Matiana* as to her position, was also to blame.—THE MATIANA (1908), 25 T. L. R. 51.

**5664.** —— ——.]—THE KAISER WILHELM II., No. 5225, *ante*.

**5665.** —— **Custom of Mersey Ferry—Whether breach of regulations.**]—In a dense fog one of the Mersey ferry steamers crossing from Woodside to Liverpool came into collision with a tug towing a number of flats up the river. There was a 3 knot flood tide, & to overcome it & make her way across & down the river the ferry steamer was making about 4 knots. Instead of sounding the signal of one prolonged blast as prescribed by Article 15 (*a*) of the Sea Regulations, she was sounding a fog signal of two moderately long blasts, & the evidence established that it was the practice of the ferry steamers to sound special signals according to the particular ferry course they were on, & that this practice was well known on the river.

The tug was held to blame for proceeding up on the wrong side of the river, & it was contended that the ferry steamer was also to blame (*inter alia*), for not sounding her whistle in accordance with the Sea Regulations, for excessive speed, & for being under way at all:—*Held:* (1) although on the facts it did not contribute to the collision the sounding of the two long blasts was a breach of the Sea Regulations; (2) the ferry steamer must be held to blame for excessive speed; (3) although in the circumstances it may have been improper for her to be under way, inasmuch as to counteract the tide she had to go at a speed which was excessive, the ct. was not prepared to lay down any rule of law that ferry steamers should cease running in a dense fog.—THE TRANMERE, [1920] P. 454; 90 L. J. P. 91; 125 L. T. 442; 15 Asp. M. L. C. 290.

**5666. Nature & extent of damage—Whether evidence that ship not stopped.**]—THE KAISER WILHELM II., No. 5225, *ante*.

(*c*) *Duty to Moderate Speed.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5667. Duty of steamship.**] — ALEXANDER *v.* DITCHBURN (1837), 5 L. T. 121.

**5668.** ——.]—*Held:* a steamer which going in a fog with unabated speed, in a track frequented by coasters, did not, when hailed, order her engines to be stopped, & a collision ensued, was liable to the amount of damage & to costs.—THE PERTH (1838), 3 Hag. Adm. 414; 166 E. R. 458; *sub nom.* THE PERTH *v.* THE ARIEL, 9 L. T. 811.

**5669.** ——.]—THE ORION (1849), 5 L. T. 61.

**5670.** ——.]—THE BEEHIVE *v.* THE LEITH (1856), 5 L. T. 525.

**5671.** —— **After whistle ahead.**]—(1) Pltfs.' steamer, in a fog off Cromer, heard a whistle almost right ahead; she was then going slowly, about three knots an hour, & she continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop & reverse; but defts.' steamer coming into sight, a collision occurred. Defts. admitted at the trial that they were to blame:—*Held:* pltfs. were also to blame, for they had infringed Article 18, by going on at the same speed after they heard the first whistle as before.

(2) If an officer in charge of a vessel in a fog hears a whistle ahead, he must act sooner than if it is heard from any other quarter, & on the probability that the vessel which is sounding the whistle is coming towards him. The officer in charge of the pltfs.' steamer, on hearing the first whistle, should have reduced her speed to as slow a rate as possible, only keeping her under command (LORD ESHER, M.R.).

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**PART XII. SECT. 3, SUB-SECT. 5.—C. (e).**

**5667 i.** *Duty of steamship.*]—Where in a fog or thick weather a steamer proceeds at an excessive speed, without a sufficient look-out, & fails to keep out of the way of a schooner keeping properly within her course, she is in violation of Rules of the Road, Arts. 16 & 20, & liable for a collision with the latter vessel.—SMITH *v.* MACKENZIE (Que.) (1918), 17 Exch. C. R. 493.—**CAN.**

**5667 ii.** ——.]—LITTLE *v.* BURNS (1881), 9 R. (Ct. of Sess.) 118; 19 Sc. L. R. 105.—**SCOT.**

**5667 iii.** ——.]—CRAWFORD (THE WARSAW) *v.* GRANITE CITY S.S. CO., LTD. (THE LINN O'DEE) (1906), 8 F. (Ct. of Sess.) 1013; 43 Sc. L. R. 732; 14 S. L. T. 203.—**SCOT.**

**5667 iv.** ——.]—CROWN S.S. CO., LTD. (CROWN OF CORDOVA (OWNERS)) *v.* EASTERN NAVIGATION CO., LTD. (ETHELREDA (OWNERS)), [1918] S. C. 303.—**SCOT.**

**5667 v.** ——.]—LAIRD LINE, LTD. (ROWAN (OWNERS)) *v.* UNITED STATES SHIPPING BOARD (WEST CAMAK (OWNERS)), [1923] S. C. 316.—**SCOT.**

**5671 i.** —— *After whistle ahead.*]—Where a sailing vessel on the port tack was overtaken in a dense fog & was struck in the stern by a steamship, after the former had complied with the rule prescribing blasts from her fog horn:—*Held:* the sailing vessel was not in fault for not showing a stern light, as the steamship could not

(3) In that case [*The Dordogne*, No. 5732, *post*] . . . it was held that "moderate" did not mean moderate speed absolutely, but that moderate speed meant moderate according to circumstances (LORD ESHER, M.R.).—THE EBOR (1886), 11 P. D. 25; 54 L. T. 200; 34 W. R. 448; 2 T. L. R. 251; 5 Asp. M. L. C. 560, C. A.

*Annotation:—As to* (1) **Refd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

**5672. —— On approaching fog.**] — THE N. STRONG, No. 5699, *post*.

**5673. —— Imperative in spite of inconvenience.**] —THE CAMPANIA, No. 5659, *ante*.

**5674. —— Proceeding up river.**]—In foggy weather first deft.'s steamship in tow of second deft.'s tug coming out of Tilbury Dock came into collision with pltfs.' steamship bound up river. The Admiralty Ct. found pltfs.' vessel one-half to blame on the ground of excessive speed, & the tug & tow one-half to blame for leaving the dock in the prevailing state of the weather:—*Held:* on the advice of the nautical assessors, it was not imprudent for the tug & tow to leave the dock under the existing circumstances, & pltfs.' vessel was alone to blame.—THE SOCRATES & THE CHAMPION, [1923] P. 162; 93 L. J. P. 38.

**5675. Duty of sailing ship—Not to carry too great sail.**]—THE BEEHIVE *v.* THE LEITH (1856), 5 L. T. 525.

**5676. Vessel not in fog—Fog in vicinity—No obligation.**]—(1) It is the duty of a steamer, not herself in a fog, upon hearing the whistle of another steamer proceeding from a bank of fog on her bow, to stop her engines, under the second part of Article 16 of the Regulations for Preventing Collisions at Sea.

(2) *Semble:* there is no obligation upon a steamer when in the vicinity of a fog, she not being in the fog nor running into it, to go at a moderate speed.

Where you have officers on the look out themselves, as undoubtedly there were in this case, it would be stretching the matter rather far to say that serious blame is to be attached to the vessel because she had not one man on the look out at a particular spot on the vessel (JEUNE, P.).—THE BERNARD HALL (1902), 71 L. J. P. 72; 86 L. T. 658; 9 Asp. M. L. C. 300.

*Annotation:—As to* (1) **Consd.** The Koning Willem I, [1903] P. 114.

**5677. Duty of trawler.**] — THE TITAN, THE RAMBLER, No. 6221, *post*.

**5678. Duty of ferry boat—Speed necessary to counteract tide—Mersey.**]—THE TRANMERE, No. 5665, *ante*.

**What amounts to moderated speed.**] — *See* Sub-sect. 5, C. (*f*), *post*.

(*f*) *What is Moderate Speed.*

i. *In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5679. Dependent on circumstances.**] — THE EUROPA, No. 5220, *ante*.

**5680. ——.**]—NATIONAL S.S. CO., LTD. *v.* MERRY & CUNNINGHAM, THE PENNSYLVANIA, No. 5650, *ante*.

**5681. ——.**]—(1) The term "moderate speed" used in Article 13 of the Regulations for Preventing Collisions at Sea is a relative term, depending upon the circumstances.

(2) When a sailing ship was going in a dense fog at a speed greater than was enough to keep her under control:—*Held:* she had infringed Article 13.—THE BETA (1884), 9 P. D. 134; 33 W. R. 190; *sub nom.* THE BETA, THE PETER GRAHAM, 51 L. T. 154; 5 Asp. M. L. C. 276, C. A.

*Annotation:—Generally,* **Mentd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**5682. —— Open sea distinguished from river or narrow channel.**] —THE DORDOGNE, No. 5732, *post*.

**5683. ——.**]—THE EBOR, No. 5671, *ante*.

**5684. ——.**]—THE CASCAPEDIA, No. 5655, *ante*.

**5685. —— Ability to stop within short space.**]—(1) The power of stopping in a short space is one of the circumstances which ought to be taken into consideration in deciding whether a vessel is proceeding at a moderate speed or not; but Article 16 of the Regulations for Preventing Collisions at Sea is imperative, & therefore if the ct. is of opinion that in fact a vessel was not going at a moderate speed in a fog under the existing circumstances, the fact that she could stop very quickly, or that a slower rate of speed would lead to unhandiness or loss of position, will not exempt her from liability should a collision occur.

(2) Six & one-third knots in a dense fog in St. George's Channel:—*Held:* in the circumstances not to be a moderate speed, within above Article, in the case of a large Atlantic liner.—OCEANIC STEAM NAVIGATION CO. *v.* WATERFORD S.S. CO., THE OCEANIC (1903), 88 L. T. 303; 19 T. L. R. 364; 9 Asp. M. L. C. 378, H. L.

**5686. ——.**]—Article 16 of the King's Regulations, which is in the same terms as Article 16 of the Regulations under 1894 Act, ought to be most carefully adhered to in order to avert the danger of collision in thick weather.

Where a collision took place in a dense fog off the Shantung Promontory, North China, & the judge held that applts.' vessel was solely to blame for not stopping & going at a speed of 9½ knots an hour in the fog which prevailed:—*Held:* resps.' vessel must be pronounced in part to blame, & her commander should be held guilty of negligence contributing to the collision in that he was going at a speed of about 6·8 knots an hour, which, having regard to the weather & the circumstances of the case, was not a moderate speed within the meaning of the Article, & by not stopping her engines after hearing the first signals by applts.' vessel, until he could ascertain her position with certainty & what she was doing, he failed to comply with its directions.—THE CHINKIANG, [1908] A. C. 251; 77 L. J. P. C. 72; *sub nom.* CHINA NAVIGATION CO., LTD. *v.* ADMIRALTY LORDS COMRS. & LEATHAM, 24 T. L. R. 460, P. C.

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be seen in time & the speed of the steamship was too great, considering the fog, & therefore she was solely in fault.—*Re* THE EUROPEAN (1881), 8 Q. L. R. 72.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—C. (f) i.**

**5679 i.** *Dependent on circumstances.*]—Maritime law recognises no fixed rate of speed for vessels sailing in a fog, & where a vessel is in a fog she should be under sufficient command to avoid collision.—THE ATTILA (1879), 5 Q. L. R. 340.—**CAN.**

**5679 ii.** ——.]—The word "moderate" in Imperial Regulations for Preventing Collisions at Sea, art. 13, is a relative term, & its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen is unlawful.—THE HEATHER BELL, THE FASTNET (1892), 3 Exch. C. R. 40.—**CAN.**

r. *Speed dangerous for other ships—Speed otherwise safe.*]—A ship is not entitled to run through fog & snow at a speed which is safe for herself but immoderate & dangerous for others.—THE BELRIDGE *v.* THE EMPRESS OF JAPAN (B. C.), [1917] 3 W. W. R. 961.—**CAN.**

*Sect.* 3.—*The sea regulations: Sub-sect.* 5, *C.* (*f*) *i., ii., iii. & iv., & (g) i. & ii.*]

**5687. Inability to go slower—Duty to stop.**]—THE IRRAWADDY (1887), cited in [1901] P. at p. 294.

*Annotations:*—**Consd.** The Campania, [1901] P. 289; The Oceanic (1902), 18 T. L. R. 672.

**5688.** —— ——.]—(1) If a steamer in a fog cannot reduce her speed sufficiently to comply with Article 13 of the Regulations for Preventing Collisions at Sea, without occasionally stopping her engines, it is the duty of those in charge of her to stop them.

(2) Where those in charge of a steamship in a dense fog hear the whistle of another steamship on either bow, but not so broad that they may reasonably infer that she will clear their vessel, they ought not to manœuvre with the helm before seeing the other vessel.—THE RESOLUTION (1889), 60 L. T. 430; 6 Asp. M. L. C. 363.

*Annotations:*—*As to* (1) **Consd.** The Campania, [1901] P. 289. *As to* (2) **Refd.** Vindomora (Owners) & Freight Owners *v.* Lamb & Haswell (Owners) & Cargo Owners, The Vindomora, [1891] A. C. 1.

**5689.** —— ——.]—THE CAMPANIA, No. 5659, *ante.*

**Rate of speed in particular instances.**]—*See* Sub-sect. 5, C. (*f*) iv., *post.*

ii. *Sailing Ships.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5690. Dependent on locality—& handiness of ship.**]—What is a "moderate speed" for a sailing ship in a fog, in accordance with Article 13 of the Regulations for Preventing Collisions at Sea, 1879, depends on the place where the ship happens to be, &, *semble*, her handiness, & is not necessarily proportioned to or less than the maximum speed she can make under the circumstances.

A speed of about five knots, in the case of a sailing ship out in the Atlantic Ocean, is a "moderate speed" & in compliance with this rule, the sailing ship being at the time under all plain sail, & going as fast as she can with the wind on her quarter.

What is a moderate speed for a sailing ship is not necessarily the same as a moderate speed for a steamer in the same position (BRETT, L.J.).—THE ELYSIA (1882), 46 L. T. 840; 4 Asp. M. L. C. 540, C. A.

*Annotation:*—**Refd.** The Zadok (1883), 9 P. D. 114.

**5691. Whether same considerations as for steamer.**]—THE ELYSIA, No. 5690, *ante.*

**5692. Duty to reduce sail.**]—THE DORDOGNE, No. 5732, *post.*

**5693. Studding sails set.**]—THE VIRGIL, No. 6294, *post.*

**5694.** ——.]—A vessel running free with a fair wind, & carrying her square sail, topmast studding sail, fore & aft mainsail, & gaff topsail set, the weather being dark & thick & the night foggy. Dismissed from further observance of justice in the suit upon the ground of inevitable accident.—THE EBENEZER (1843), 2 Wm. Rob. 206; 2 L. T. O. S. 191; 7 Jur. 1117; 166 E. R. 732.

*Annotation:*—**Mentd.** The London (1863), 9 L. T. 348.

**5695.** ——.]—Collision, between a sailing vessel & a steamer, during a fog:—*Held:* the sailing vessel was to blame. The carrying of studding-sails, in such circumstances, imprudent.—THE LORD SAUMAREZ (1848), 6 Notes of Cases, 600; 5 L. T. 525.

**5696. Carrying great press of sail.**] — THE EBENEZER, No. 5694, *ante.*

**5697.** ——.]—THE ITINERANT, No. 6223, *post.*

**5698. Speed must not be greater than required for control.**]—THE BETA, No. 5681, *ante.*

**5699.** ——.]—A collision occurred between a steamer & a sailing vessel, about 5 to 6 miles S.W. of the Longships in the English Channel. Immediately before the collision the steamer was proceeding S.W.b.S. at the rate of 8 or 9 knots, & approaching a bank of fog, in which the sailing ship was, but did not sound her whistle, or reduce her speed. The sailing vessel, a barque, was heading N.N.W. with a moderate south easterly breeze of force between 3 & 4, &, under all plain sail, except her mainsail, spanker, & light sails, was making about 4 knots an hour. In an action of damage by collision:—*Held:* (1) the steamer was to blame for excessive speed, &, though it was not an infraction of the terms of Articles 12 (*a*), 13, she ought as a matter of precaution to have whistled on approaching the fog, & also to have reduced her speed; (2) the sailing vessel had not infringed Article 13 as, considering the locality, she was not proceeding at a rate of speed beyond what was necessary to keep her well under command.—THE N. STRONG, [1892] P. 105; 67 L. T. 299; 7 Asp. M. L. C. 194.

*Annotation:*—**Consd.** The St. Paul, [1909] P. 43.

**Rate of speed in particular instances.**]—*See* Sub-sect. 5, C. (*f*) iv., *post.*

iii. *Steamships.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5700. Half speed.**]—THE PERTH (1838), 3 Hag. Adm. 414; 166 E. R. 458.

**5701. Slow as consistent with keeping way on.**]—THE ZADOK, No. 5654, *ante.*

**5702. Sufficiently slow to permit manœuvres to avoid collision.**]—THE ZADOK, No. 5654, *ante.*

**5703.** ——.]—THE GERMANIC (1896), *Times*, Feb. 22.

*Annotation:*—**Refd.** The Campania, [1901] P. 289.

**5704.** —— **Notwithstanding delay or difficulty.**] —THE CAMPANIA, No. 5659, *ante.*

**5705. Ability to stop in own length.**]—THE SARGASSO, No. 6402, *post.*

**5706. Ability to stop within distance of visibility.**] —THE COUNSELLOR, No. 5779, *post.*

**Rate of speed in particular instances.**]—*See* Sub-sect. 5, C. (*f*) iv., *post.*

iv. *Rate of Speed in Particular Instances.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5707. Twelve & a half knots—Seven hundred miles from land—No special precautions taken.**]—THE EUROPA, No. 5220, *ante.*

**5708. Seven knots—Two hundred miles from land.**]—NATIONAL S.S. CO., LTD. *v.* MERRY &

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**PART XII. SECT. 3, SUB-SECT. 5.—C. (f) iii.**

5702 i. *Sufficiently slow to permit manœuvres to avoid collision.*]—It is a general rule that, in a fog, a steamship is going too fast if, by reason of her speed, she is unable to avoid a collision with a vessel from which she is bound to keep clear, & the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions; only such speed is lawful as will permit her to avoid a collision by slacking speed or by stopping & reversing within the distance at which another vessel can be seen.—THE CLACKAMUS *v.* THE CAPE D'OR, [1926] S. C. R. 331; [1926] 1 D. L. R. 384.—CAN.

**PART XII. SECT. 3, SUB-SECT. 5.—C. (f) iv.**

t. *Seven knots—Over fishing ground.*] —On the hearing of a case of collision: —*Held:* a ship sailing at the rate of seven knots an hour in a fog over a

CUNNINGHAM, THE PENNSYLVANIA, No. 5650, *ante*.

**5709. Four to five knots—Twenty-five miles East of Gothland.**]—Four to five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic, twenty five miles East of Gothland. —THE MAGNA CHARTA (1871), 25 L. T. 512; 1 Asp. M. L. C. 153.

*Annotations:*—**Refd.** The Fred (1895), 72 L. T. 153; The City of Berlin, [1908] P. 110; S.S. Australia *v.* S.S. Nautilus, The Australia, [1927] A. C. 145.

**5710.** ——.] — THE CASTLEVENTRY (1904), *Times*, Apr. 18.

**5711. Five knots — Sailing ship in Atlantic Ocean.**]—THE ELYSIA, No. 5690, *ante*.

**5712. Four knots.**]—THE ZADOK, No. 5654, *ante*.

**5713. 6·5 knots.**]—THE IRRAWADDY (1887), cited in [1901] P. at p. 294.

*Annotations:*—**Consd.** The Campania, [1901] P. 289; The Oceanic (1902), 18 T. L. R. 672.

**5714. Nine to ten knots.**]—THE CAMPANIA, No. 5659, *ante*.

**5715.** ——.]—THE CHINKIANG, No. 5686, *ante*.

**5716. Six & one third knots—St. George's Channel.**]—OCEANIC STEAM NAVIGATION CO. *v.* WATERFORD S.S. CO., THE OCEANIC, No. 5685, *ante*.

**5717. Five & a half to six knots.**]—THE GEELONG (1908), Shipping Gazette, Mar. 5, C. A.

**5718. 6·8 to 7·2 knots.**]—THE CHINKIANG, No. 5686, *ante*.

**5719. Eighteen knots—English Channel.**]—THE KAISER WILHELM II, No. 5225, *ante*.

*(g) Duty to Stop.*

i. *In Thick Fog.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5720. Duty to anchor—On reaching anchorage ground.**]—(1) In a dense fog it is the duty of a steam vessel to anchor as soon as circumstances will permit. A steam vessel proceeding, though at a moderate speed, under steam in a dense fog, after she reached a proper anchorage ground, held to blame for so doing.

(2) In a damage suit the practice of the ct. requires pltf. to begin, notwithstanding that deft. raises no other defence than that of inevitable accident.—THE OTTER (1874), L. R. 4 A. & E. 203; 30 L. T. 43; 22 W. R. 557; 2 Asp. M. L. C. 208.

*Annotation:*—*As to* (1) **Apld.** The Blue Bell, [1895] P. 242.

**5721. Vessel in river.**]—THE GIROLAMO, No. 5258, *ante*.

**5722. —— Tug & tow.**]—SMITH *v.* ST. LAWRENCE TOW-BOAT CO., No. 5051, *ante*.

**5723. —— ——.**]—THE LORD BANGOR, No. 6037, *post*.

**5724. —— Ferry boat.**]—THE LANCASHIRE, No. 5264, *ante*.

**5725. —— ——.**]—THE TRANMERE, No. 5665, *ante*.

**5726. —— Thames—Dumb barge carrying no anchor.**]—THE ROSE OF ENGLAND, No. 5368, *ante*.

**5727. —— —— Dredging stern first with anchor down.**]—THE AGUADILLANA, No. 5383, *ante*.

**5728. —— —— Anchoring in fairway.**]—THE AGUADILLANA, No. 5383, *ante*.

**5729. —— —— Duty not to leave wharf.**]—THE AGUADILLANA, No. 5383, *ante*.

**5730. Vessel or track frequented by coasters.**]—THE PERTH, No. 5668, *ante*.

ii. *On Hearing Whistle.*

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 16.

**5731. Object of Regulation—Easier to ascertain position.**]—(1) A British & a Dutch steam vessel came into collision, during a dense fog, in the English Channel 6 miles off Dungeness. The owners of the British vessel admitted liability for an infringement of the Collision Regulations; but the owners of the Dutch vessel denied liability on the ground (*inter alia*) that though the whistle of the other vessel was heard forward of the beam, their vessel was going so slow, & the fog signal so far off, that their master thought it better to wait, before stopping his engines, until he heard the whistle again:—*Held:* the Dutch vessel was to blame for not stopping, which omission in fact contributed to the collision, & no circumstances had been shown for disobeying the positive direction contained in Article 16, para. 2, of the Regulations for Preventing Collisions at Sea, 1897, that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines. . . ."

(2) If you stop the engines you lessen the danger & give yourself better information than if you go on with the engines moving, as was done in this case (BUCKNILL, J.).—THE KONING WILLEM I., [1903] P. 114; 72 L. J. P. 28; 88 L. T. 807; 9 Asp. M. L. C. 425.

**5732. Duty to stop immediately—On first hearing whistle.**]—(1) A steamship, the *D.*, in a dense fog off Ushant, proceeding at slow speed, heard a whistle about three points on her starboard bow; the whistle was repeated several times & answered by the *D.* In about a quarter of an hour from the first sound of the whistle the steamship *E.* appeared about a length from the *D.*, crossing from starboard to port. The engines of the *D.* were reversed full speed, but a collision occurred: —*Held:* the *D.* was to blame [as well as the *E.*], for she should have been brought to as complete a standstill as possible, without getting out of command, at an early period after the first sound of the whistle, & should have also stopped & reversed sooner.

(2) Under Article 13 (1) "a moderate speed," in a river or narrow channel, means that a vessel shall be brought nearly to a standstill, whether the whistle or fog horn of another vessel is heard or not, but in the open sea the Article need not be so strictly construed, unless a whistle or fog horn is heard.

(3) Under Article 18 (2) as soon as it is perceived by those on a steamer in a dense fog that a vessel is coming substantially nearer, the steamer should stop & reverse.

(4) To a sailing ship Article 18 does not apply, because she cannot stop & reverse, but she ought, if she is under full sail, to take sail off till she brings herself as nearly to a standstill as is possible whilst being under command (BRETT, M.R.).—THE DORDOGNE (1884), 10 P. D. 6; 54 L. J. P. 29; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. L. C. 328, C. A.

*Annotations:*—*As to* (1) **Consd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670. *As to* (2) **Consd.** The Ebor (1886), 11 P. D. 25.

**5733.** —— ——.]—(1) Where an officer in charge of a steamship in a dense fog hears a whistle apparently two or three points on the bow, but cannot be sure of the bearing within a point or

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fishing ground on the bank of Newfoundland, without adequate means on deck to prevent accident, was in fault, & a plea of inevitable accident was dismissed.—*Re* THE FRANK (1876), 2 Q. L. R. 295.—**CAN.**

*Sect. 3.—The sea regulations: Sub-sect. 5, C. (g) ii. & iii., & (h).]*

two, & does not know the heading of the vessel whistling, it is his duty to diminish the speed of his vessel to the utmost to give him time to ascertain the manœuvres of the other vessel, & for that purpose he must either reduce the speed until the engines are only just moving, or he must stop them, but he need not necessarily continue to keep them stopped, but only sufficiently to diminish his way, & when he is beginning to lose steerage way, then & only then, may put them on again, but as slowly as is possible.

(2) The fact of a steam whistle alleged to have been blown in a fog not being heard by those on an approaching ship is not necessarily proof that there was a bad look out on the approaching ship, as the direction in which & the distance from which the sound would be heard is uncertain.—THE ROSETTA (1888), 59 L. T. 342; 6 Asp. M. L. C. 310.

**5734.** —— ——.]—THE CATHAY, No. 5967, *post*.

**5735.** —— ——.]—In order to comply with the provisions of the second part of Article 16, a steamer in a fog must stop her engines on first hearing, apparently forward of the beam, the whistle of another steamer, & must keep them stopped until by hearing further signals she is able to ascertain the position of that other vessel.—THE RONDANE (1900), 69 L. J. P. 114; 82 L. T. 828; 9 Asp. M. L. C. 106.

**5736.** —— ——.]—THE BRITANNIA, No. 5754, *post*.

**5737.** —— ——.]—THE ARAS, No. 5775, *post*.

**5738.** —— ——.]—THE CHINKIANG, No. 5686, *ante*.

**5739.** —— —— **Vessel not itself in fog—Whistle heard from fog bank.**]—THE BERNARD HALL, No. 5676, *ante*.

**5740.** —— —— **Whistle apparently distant.**]—THE KONING WILLEM I., No. 5731, *ante*.

**5741.** —— —— ——.]—THE BRITANNIA, No. 5754, *post*.

**5742.** —— —— **Whistle heard abaft beam.**]—THE LONDON, No. 5660, *ante*.

**5743.** —— —— **Whistle heard forward of beam—Though not proceeding from vessel collided with.**]—THE LONDON, No. 5660, *ante*.

**5744.** —— —— **Tug & tow—Possibility of letting way run off tow.**]—A steamship proceeding in a dense fog up the English Channel at a moderate speed on a course of E. ½ N. stopped her engines, in accordance with Article 16, para. 2, of the Regulations for Preventing Collisions at Sea, on hearing a fog signal apparently forward of her beam, & on hearing a second signal reversed; but she came into collision with a sailing vessel in tow of a tug proceeding on a crossing course of W.S.W. at a moderate speed of from two to three knots. The whistle of the steamship had been heard fine on the starboard bow of the sailing vessel; but the engines of the tug were not stopped in accordance with the above Regulation, on the ground that as the tug was proceeding at the minimum speed compatible with keeping the tow under control, it was not the duty of the tug to stop:—*Held:* (1) the steamship was not to blame as she had complied with the rule by stopping, & was not bound to reverse before she did so; (2) both tug & tow were to blame, as it was practicable for the tug to have stopped her engines & let the way run off the tow.—THE CHALLENGE & THE DUC D'AUMALE, [1905] P. 198; 74 L. J. P. 55; 93 L. T. 390; 10 Asp. M. L. C. 105, C. A.

**5745.** —— **Until position of vessel ascertained.**]—THE RONDANE, No. 5735, *ante*.

**5746.** —— ——.]—THE CHINKIANG, No. 5686, *ante*.

**5747.** —— ——.]—THE ANTWERP CITY (1912), Shipping Gazette, Jan. 29.

**5748.** —— —— **Position ascertained before vessel hidden by fog bank.**]—Pltfs.' steamship when making about 8 knots saw defts.' steamship 3 miles off about a point on the port bow. Defts.' vessel was making about 10 knots, & the vessels were on opposite courses. Pltfs.' vessel was kept on her course & defts.' vessel broadened to about two points on her port bow, the vessels thus approaching so as to pass clear port to port. A fog bank then hid defts.' vessel from sight, & pltfs.' vessel continued on her course & speed until she reached the fog bank, when she heard the whistle of defts.' vessel. She then sounded her whistle & her engines were put to slow, when another whistle was heard & her engines were put full speed astern & her whistle sounded. Defts.' vessel then came in sight 300 or 400 yards off under a starboard helm & at high speed, & struck & sank pltfs.' vessel. Defts.' vessel was found to blame for going at an excessive speed in a fog & in starboarding her helm, & there was no appeal as to this. Pltfs.' vessel was found not to blame:—*Held:* on the facts of the case, inasmuch as the position & course of defts.' vessel were ascertained before she was hidden by the fog so that the vessels would pass clear port to port, pltfs.' vessel did not act wrongly in continuing her speed & in not sounding her whistle sooner.—ORAVIA (OWNERS) *v.* NEREUS (OWNERS), THE ORAVIA (1907), 97 L. T. 523; 23 T. L. R. 663; 10 Asp. M. L. C. 525, H. L.

*Annotation:*—**Distd.** The St. Paul (1908), 78 L. J. P. 1.

**5749. Application of regulation in canal—Manchester Ship Canal—Position of vessel sufficiently ascertained.**]—THE HARE, No. 6150, *post*.

**5750. Effect of war conditions—Orders of French Admiralty.**]—Pltfs. *The S.* & defts. *The E.* both under escort came into collision off the coast of France during a dense fog. *The S.* was proceeding at two to three knots, *The E.* at eight knots, & both vessels & their escorts were sounding their whistles for fog Each vessel went astern when the other came into sight, but *The S.* did not stop her engines on hearing the whistle of *The E.* forward of the beam. *The E.'s* evidence was that she did not hear the whistles of *The S.* or her escort.

It was argued that the non-stopping of *The S.* & the excessive speed of *The E.*, in breach of Article 16 of the Regulations, were justified respectively on the grounds: (*a*) that by the orders of the French Admlty. authorities the vessels had to follow their escorts, & obey their instructions; (*b*) that the circumstances of the war & the risk of enemy submarines justified a departure from the regulation; & (*c*) in the case of *The E.* assuming the whistles were heard, that the presence of other vessels of the convoy astern of her prevented her stopping:—*Held:* (1) even assuming the orders

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**PART XII. SECT. 3, SUB-SECT. 5.—C. (g) ii.**

**5739 i.** *Duty to stop immediately—On first hearing whistle—Vessel not itself in fog—Whistle heard from fog bank.*]—THE TARTAR *v.* THE CHARMER (1908), 7 W. L. R. 417.—**CAN.**

**a.** —— —— *Whistle heard forward of beam.*]—ROBERTS *v.* THE PAWNEE (1902), 7 Exch. C. R. 390; *affd.*, 32 S. C. R. 509.—**CAN.**

**b.** —— —— ——.]—SOUTHERN SALVAGE CO., LTD. *v.* THE REGIN (N. S.) (1919), 19 Exch. C. R. 159; 49 D. L. R. 107.—**CAN.**

**c.** —— —— ——.]—CORY & SON, LTD. *v.* KOPAJTIC, THE JAMES JOICEY *v.* THE KOSTRENA, [1908] S. C. 295; 45 Sc. L. R. 216; 15 S. L. T. 558.—**SCOT.**

were compulsory they could not be construed as orders to disobey Article 16; (2) there was no evidence that the danger of submarines in the particular locality made it necessary for *The E.* & her escort to go full speed ahead in a dense fog; (3) the presence of other vessels of the convoy astern of her was no justification for *The E.* not stopping her engines.—THE EMLYN, [1918] P. 67; 87 L. J. P. 62; 119 L. T. 156; 14 Asp. M. L. C. 329.

**5751. —— Danger of submarines.**]—THE EMLYN, No. 5750, *ante*.

**When another vessel astern.**]—*See* Sub-sect. 5, C. (*g*) iii., *post*.

iii. *When Another Vessel Astern.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5752. No justification for not stopping—Though vessel loaded with dynamite.**]—THE STAR OF NEW ZEALAND (1899), Shipping Gazette, Nov. 7.

*Annotations*:—**Refd.** The Rondane (1900), 69 L. J. P. 114; The Emlyn, [1918] P. 67.

**5753.** ——.]—THE RONDANE, No. 5735, *ante*.

**5754. —— Vessel some distance away on port quarter.**]—Two steam vessels, proceeding in opposite directions, came into collision during a dense fog, off the coast of Portugal. Those in charge of pltfs.' vessel did not "stop her engines" in accordance with Article 16 of the Regulations for Preventing Collisions at Sea, on "hearing apparently forward of her beam, the fog signal of" defts.' vessel, because another vessel was sounding her whistle apparently on the port quarter & overtaking her; whilst those in charge of defts.' vessel alleged that they did not stop her engines on first hearing the whistle of pltfs.' vessel, because two other vessels, sounding their whistles, one on each bow, helped to ascertain the position of defts.' vessel, which was a long way off, & as soon as the whistle was distinctly made out to be on the starboard bow the engines were stopped:—*Held*: both vessels were to blame, as both had infringed the positive directions as to stopping the engines contained in Article 16. In the case of pltfs.' vessel, it would have been incumbent on the alleged overtaking vessel to have stopped when she heard the whistle of pltfs.' vessel indicating that she was stopped, so that any danger would have been averted. In the case of the defts.' vessel, as distance & bearing could not be at once definitely determined in fog, it was no excuse for a breach of the rule that the whistle of the other vessel was heard apparently a long way off.—THE BRITANNIA, [1905] P. 98; 74 L. J. P. 46; 92 L. T. 634; 21 T. L. R. 119; 10 Asp. M. L. C. 65.

**5755. —— Sailing vessel at anchor—One hundred yards astern.**]—A collision took place in a dense fog between the *Children's Hope*, a steam drifter, & the *Ariadne*, a steam trawler. The *Children's Hope* was stemming the ebb tide waiting for the fog to clear before going up the Humber to Grimsby. In order to stem the tide, which was running with the force of 2 or 3 knots, her engines were kept working slowly ahead, & she was duly sounding her whistle for fog. In these circumstances the whistle of the steam trawler *Ariadne* was heard on the port bow. The *Children's Hope* blew her whistle, but did not stop her engines, her excuse for not doing so being that there was a sailing vessel at anchor about 100 yards astern of her, & that the tide would have taken her on to that vessel had she stopped. Shortly afterwards the *Ariadne*, which was outward bound, loomed in sight about two ship's lengths off, & almost at once her stem struck the port bow of the *Children's Hope* doing damage. It was admitted that the *Ariadne* was to blame, but it was contended that the *Children's Hope* was also to blame for a breach of Article 16 of the International Regulations in not stopping her engines on hearing the whistle of the *Ariadne* forward of her beam:—*Held*: there were no circumstances justifying the non-observance by the *Children's Hope* of the provisions of Article 16, &, therefore, she was also to blame for the collision. —THE ARIADNE (1911), 27 T. L. R. 304.

**5756. —— Convoy astern.**]—THE EMYLN, No. 5750, *ante*.

(*h*) *Duty to Stop and Reverse.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5757. When duty arises—Vessel approaching—Unless clear that no collision can take place.**]—(1) By Article 18 of the Regulations of 1884 for Preventing Collisions at Sea "Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed or stop & reverse if necessary." When two steamships, invisible to each other by reason of a thick fog, find themselves gradually drawing nearer until they are within a few ships' length, they are within the second direction of Article 18, & each of them ought at once to stop & reverse: unless the fog signals of the other vessel have unequivocally indicated that she is steered so as to pass clear without involving risk of collision; or unless other circumstances exist which make it dangerous to stop & reverse.

(2) It appears to me that, under the terms of that rule [the 18th sailing rule of 1884] the burden of proof was upon the *Lebanon* (LORD SELBORNE). —LEBANON (OWNERS) *v.* CETO (OWNERS), THE CETO (1889), 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. L. C. 479, H. L.

*Annotations*:—*As to* (1) **Expld.** Bibby, Lancashire (Owners) *v.* Leetham, Ariel (Owner), The Lancashire, [1894] A. C. 1. **Apld.** The Knarwater (1894), 63 L. J. P. 65; The Lord Bangor, [1896] P. 28. **Consd.** S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556. **Refd.** The Kaiser Wilhelm der Grosse, [1907] P. 259. *Generally*, **Refd.** The London, [1905] P. 152.

**5758. —— —— ——.**]—By art. 18 of the Regulations of 1884 for Preventing Collisions at Sea, "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop & reverse if necessary."

Two steamships were approaching one another on opposite course in a fog. One of these, the *L.*, stopped but did not reverse, & a collision occurred: —*Held*: at the time when the *L.* stopped the circumstances were such as to make it apparent to a reasonable & prudent master that in order to avoid risk of collision it was necessary to stop & reverse.—BIBBY BROTHERS & CO. (LANCASHIRE (OWNERS)) *v.* LEETHAM (ARIEL (OWNER)), THE LANCASHIRE, [1894] A. C. 1; 63 L. J. P. 80; 69 L. T. 663; 7 Asp. M. L. C. 376; 6 R. 46, H. L.

*Annotation*:—**Refd.** The Lord Bangor, [1896] P. 28.

**5759. —— —— Unless circumstances make reversal dangerous.**]—LEBANON (OWNERS) *v.* CETO (OWNERS), THE CETO, No. 5757, *ante*.

**5760. —— —— Hailing distance.**]—A steamship, navigating in a fog at a moderate speed, hearing a whistle sounded many times, indicating that a steamer was approaching her, & had come very near to her, so near that if the vessels had then been stopped they would have been within hailing distance, is bound under Article 16 of the Rules & Regulations for Preventing Collisions at Sea not only to stop the motion of her engines,

*Sect. 3.—The sea regulations: Sub-sect. 5, C. (h), (i) & (k), & D. (a) i.*]

but to reverse them, so as to stop the motion of the vessel, & ought not to wait until the vessels sight each other, when such a manœuvre may be too late.—MORTON *v.* HUTCHINSON, THE FALKLAND (OR FRANKLAND) & THE KESTREL (1872), L. R. 4 P. C. 529; 9 Moo. P. C. C. N. S. 365; 27 L. T. 633; 1 Asp. M. L. C. 489; 17 E. R. 551, P. C.

*Annotations:*—**Apld.** The Kirby Hall (1883), 8 P. D. 71; The Dordogne (1884), 10 P. D. 6. **Refd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

**5761.** —— —— **Should not wait until seen.**]—MORTON *v.* HUTCHINSON, THE FALKLAND (OR FRANKLAND) & THE KESTREL, No. 5760, *ante*.

**5762.** —— —— **Close proximity.**]—THE CALVILLA (prior to 1883), cited in 52 L. J. P. at p. 32.

*Annotation:*—**Apld.** The Kirby Hall (1883), 52 L. J. P. 31.

**5763.** —— —— ——.]—It is the duty of those who have charge of a steamship in motion during a dense fog, on first hearing the whistle of a steamship in such close proximity to them that risk of collision between the two vessels is involved, to bring their vessel immediately to a standstill on the water, & not execute any manœuvre with their helm until they have definitely ascertained the position & course of the other ship.—THE KIRBY HALL (1883), 8 P. D. 71; 52 L. J. P. 31; 48 L. T. 797; 31 W. R. 658; 5 Asp. M. L. C. 90.

*Annotations:*—**Apld.** The Dordogne (1884), 10 P. D. 6. **Refd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670; The Tynwald, [1895] P. 142.

**5764.** —— —— ——.]—THE CASCAPEDIA, No. 5655, *ante*.

**5765.** —— —— **Coming substantially nearer.**]—THE DORDOGNE, No. 5732, *ante*.

**5766.** —— —— **Repeated whistles.**]—Where those on a steamship in a dense fog hear the whistle or foghorn of another vessel more than once on either bow & in the vicinity from such a direction as to indicate that the other vessel is nearing them, it is their duty, under Article 18 of the Regulations for Preventing Collisions at Sea, to at once stop & reverse her engines, so as to bring their vessel to a standstill in the water.—THE JOHN MCINTYRE (1884), 9 P. D. 135; 53 L. J. P. 115; 51 L. T. 185; 33 W. R. 190; 5 Asp. M. L. C. 278, C. A.

*Annotation:*—**Apprvd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

**5767.** —— —— ——.]—THE EBOR, No. 5671, *ante*.

**5768.** —— —— **Repeated blasts on fog horn.**]—A steamship on a N. by W. ½ W. course, in a dense fog, the wind being about south, heard a single blast of a fog horn, on her port bow, whereupon her engines were at once stopped. Shortly afterwards another blast of the fog horn was heard closer to & nearer on the bow, & her engines were then reversed full speed & her helm put hard aport, but a collision occurred:—*Held:* the steamship was to blame for not reversing when she stopped her engines, since those on board of her ought to have known that the fog horn they heard came from a sailing vessel on the starboard tack not far off, & that with the wind where it was the sailing vessel must be on a course crossing that of the steamship from port to starboard. It was the duty of the steamship under Articles 20 & 22 of the Regulations for Preventing Collisions at Sea to avoid passing ahead of the sailing vessel, &, to enable her to perform that duty, it was necessary for her under Article 23 to reverse her engines.—THE MERTHYR (1898), 79 L. T. 676; 8 Asp. M. L. C. 475.

*Annotation:*—**Refd.** The Challenge & The Duc d'Aumale, [1904] P. 41.

**5769.** —— —— **Burden of proof for failure to reverse.**]—LEBANON (OWNERS) *v.* CETO (OWNERS), THE CETO, No. 5757, *ante*.

**5770.** —— —— ——.]—A collision occurred during a dense fog in the North Sea between a steamer & an iron barque which was in tow of a tug. The captain of the steamer heard a faint whistle, which appeared to him to be a considerable distance away, about five points on his starboard bow. Two minutes afterwards he heard a second whistle, which appeared to him to be a little broader, & he estimated that the distance between the vessels was about three-quarters of a mile. This was a mistake on his part, as the vessels were then close together. He then heard a third whistle, &, as it appeared not so broad on his bow, but more distinct, he immediately stopped & reversed his engines full speed astern. The tug & barque directly afterwards loomed through the fog & the collision took place, resulting in the barque being sunk. He was mistaken, as a matter of fact, in thinking that, when he heard the second whistle, the vessels were some distance away from each other:—*Held:* the burden of proof lay on the steamer to show that, when her captain heard the second whistle, the indications were such as to convey to a seaman of reasonable skill that the two vessels were so approaching that they would pass well clear of one another, but that had not been shown, because at that time he was mistaken, in point of fact, in thinking that the two vessels were some distance apart, & consequently he ought then to have stopped & reversed his engines.—THE KNARWATER (1894), 63 L. J. P. 65; 6 R. 784, C. A.

*Annotation:*—**Refd.** The Lord Bangor, [1896] P. 28.

**5771. Sailing ship—Duty to take sail off.**]—THE DORDOGNE, No. 5732, *ante*.

*(i) Duty to "Navigate with Caution."*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 16.

**5772. Steamer getting under way in fog—After being stopped.**]—THE EARL OF DUMFRIES (1885), as reported in 5 Asp. M. L. C. 329, n.

**5773.** —— ——.]—THE CATHAY, No. 5967, *post*.

**5774.** —— —— **Heavy sea running.**]—THE BYRON (1905), Shipping Gazette, Feb. 9.

**5775.** —— —— **Engines working ahead for twenty minutes.**]—Those in charge of a steam vessel, proceeding at night at slow speed on account of fog, stopped the engines on learning the proximity of another steam vessel by the sound of her whistle, the bearing of which was taken by compass & made out to be a point & a quarter

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**PART XII. SECT. 3, SUB-SECT. 5.—C. (h).**

5762 i. *When duty arises — Vessel approaching—Close proximity.*]—SENLAC CO. *v.* THE ROSALIND, C. R., [1909] A. C. 441.—**CAN.**

d. —— —— *Signals heard before entering fog.*]—LAIRD LINE, LTD. (ROWAN (OWNERS)) *v.* CLAN LINE STEAMERS, LTD. (CLAN MALCOLM (OWNERS)), [1923] S. C. 316.—**SCOT.**

e. —— ——.]—LEITRIM'S TRUSTEES *v.* BURNS, THE ROSSGULL *v.* THE SPANIEL (1897), 24 R. (Ct. of Sess.) 993; 34 Sc. L. R. 748; 5 S. L. T. 78.—**SCOT.**

**PART XII. SECT. 3, SUB-SECT. 5.—C. (i).**

f. *Whether vessel entitled to alter course.*]—A sudden alteration of course even through a very wide angle is not *per se* wrong.—ACT. BORGESTED (BRAND (OWNERS)) *v.* THE DAINI KOTOHIRA MARU (1906), 1 Hong Kong L. R. 116.—**HONG KONG.**

g. *Until danger of collision past.*]—S.S. PAWNEE *v.* ROBERTS (1902), 32 S. C. R. 509.—**CAN.**

h. ——.]—Where two vessels are approaching one another a parallel course is not to be assumed by the one which is apparently the overtaken ship

to a point & a half on the port bow, & estimated to be at a considerable distance. Whilst the vessel was losing steerage way & falling off her course the sound of subsequent whistles apparently broadened a point. The engines were then put dead slow ahead to get steerage way & bring the vessel back to her course, & so continued for some twenty minutes, during which time, although the sound of the whistle was getting closer, it was estimated to have broadened so as to be about four points on the port bow. A collision occurred: —*Held:* as in fog the estimated bearing of sound signals cannot be relied on, there was no sufficient ground for assuming that the sound of the whistle was broadening to such an extent as to justify continuing on for twenty minutes without stopping from time to time, &, therefore, there had been a breach of Article 16, paragraph 2, of the Regulations for Preventing Collisions at Sea, by which "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, & then navigate with caution until danger of collision is over."—THE ARAS, [1907] P. 28; 76 L. J. P. 37; 96 L. T. 95; 10 Asp. M. L. C. 358.

**5776. Whether vessel entitled to alter course—Before position of approaching vessel ascertained—Dependent on circumstances.**]—There is no hard & fast rule of practice in the Admlty. Ct. that where two steamships in a fog are approaching one another so as to involve risk of collision, neither ship ought to alter her helm until the signals of the other give a clear indication of her direction: each case must depend on its own circumstances, & these may afford reasonable ground for believing what the direction must be.—VINDOMORA (OWNERS) & OWNERS OF FREIGHT *v.* LAMB & HASWELL (OWNERS) & OWNERS OF CARGO, THE VINDOMORA, [1891] A. C. 1; 60 L. J. P. 1; 63 L. T. 749; 6 Asp. M. L. C. 569, H. L.

**5777.** ——.]—THE KIRBY HALL, No. 5763, *ante*.

**5778.** ——.]—THE RESOLUTION, No. 5688, *ante*.

**5779.** ——.]—(1) As a rule those in charge of a steam vessel in a fog, in order to go at a "moderate speed" within Article 16 of the Sea Regulations, 1910, ought not to go so fast that the vessel cannot be pulled up within the distance which they can see.

(2) To alter the helm of a steam vessel on hearing the first whistle of another steam vessel ahead in a fog at sea, before doing anything to ascertain the position of the other vessel, is not to "navigate with caution" within Article 16 of the Sea Regulations, 1910.—THE COUNSELLOR, [1913] P. 70; 82 L. J. P. 72.

*(k) Duty to Keep Look Out.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Articles 15 & 16.

**5780. One man only at wheel—Insufficient.**]—THE EUROPA, No. 5220, *ante*.

**5781. Duty on sailing ship—Not relieved by duty of steamer to slacken speed.**]—Although it is incumbent on steamships, notwithstanding their desire to make all progress, to slacken speed so as to avoid every possible collision; yet this necessity does not in any way relieve sailing ships from the duty of keeping a sharp look out, & sounding such fog signals & bells as the provisions of the statute direct.—THE NORTH AMERICAN *v.* THE WILD ROSE (1865), 14 L. T. 68; 2 Mar. L. C. 319.

**5782. —— On hearing whistles of approaching steamer—To station men in braces—Ready to put sails back.**]—THE ZADOK, No. 5654, *ante*.

**5783. Officers on look out—Man on particular spot not necessary.**]—THE BERNARD HALL, No. 5676, *ante*.

**5784. Liability for failure to keep look out.**]—THE GEELONG (1908), Shipping Gazette, Mar. 5, C. A.

**5785.** ——.]—THE SARGASSO, No. 6402, *post*.

*D. Steering and Sailing Rules.*

*(a) Vessel Running Free approaching Vessel Closehauled.*

i. *Duty of Vessel Running Free.*

**5786. Duty to give way.**]—It is a rule in navigating vessels, that the ship sailing before the wind must give way to one that goes by it. Where, therefore, in an action on the case for running down pltf.'s brig, it was proved that defts.' vessel was sailing before the wind at the time of the accident, which happened at night, & that she had her studding sails set in the Channel: the ct. granted a new trial, in order to ascertain whether it was the custom to carry such sails; or whether, under the circumstances, the master of defts.' vessel had kept a proper look out, it being his duty to have made way for pltf.'s brig, which might have been done by a slight alteration of the rudder of defts.' vessel.—JAMESON *v.* DRINKALD (1826), 12 Moore, C. P. 148; 5 L. J. O. S. C. P. 30.

**5787.** ——.]—A vessel with a free course, must give way to a vessel beating up to windward & tacking. The *onus* is, under such circumstances, upon the *Baron Holberg*, to show that all possible skill was used on her part, & that the collision arose from fault in the barge, or that it was unavoidable (SIR J. NICHOLL).—THE BARON HOLBERG (1835), 3 Hag. Adm. 244; 166 E. R. 396.

**5788.** ——.]—THE CELT, No. 5860, *post*.

**5789.** ——.]—THE CHESTER (1836), 3 Hag. Adm. 316; 166 E. R. 423.

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unless the sequence of sounds from the other vessel justifies it. If the sequence is interrupted she must stop her engines until the position from which the new sound comes is ascertained, & navigate with caution until the new danger of collision is over, irrespective of what she may have already done when the whistles were first heard.—ACT. BORGESTED (BRAND (OWNERS)) *v.* THE DAINI KOTOHIRA MARU (1906), 1 Hong Kong L. R. 116.—**HONG KONG.**

k. *Necessity for strict observance.*] —Regulations for Preventing Collisions at Sea, art. 16, requiring each vessel in case of fog or thick weather to "stop her engine & then navigate with caution," must be strictly adhered to in order to avert a collision.—PALLEN *v.* THE IROQUOIS (1913), 17 Exch. C. R. 185; 15 B. C. R. 76.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—C. (k).**

**5784 i.** *Liability for failure to keep look out.*]—A steamer proceeding at easy speed on a thick & foggy night ran down a schooner lying at anchor on a fishing ground. The latter had a bright light burning & a fog horn blowing, & at sound of the steamer's whistle, some minutes before the collision, a flash-light or flare-up was exhibited & muskets fired which were heard on the steamer:—*Held:* the steamer must be condemned, for not keeping a sufficient look out, notwithstanding the schooner's infraction of the law in sounding a fog horn instead of ringing a bell, it appearing that this had not contributed to the accident.—LOHNES *v.* S.S. BARCELONA (1884), 10 Q. L. R. 305.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—D. (a) i.**

**5786 i.** *Duty to give way.*]—A vessel having the wind free is bound to take proper measures to get out of the way of a vessel closehauled.—THE ANNE JOHANNE (1860), 10 L. C. R. 411; 2 S. V. A. R. 43.—**CAN.**

**5786 ii.** ——.]—*Re* THE COURIER (1862), 2 S. V. A. R. 91.—**CAN.**

**5786 iii.** ——.]—It is an established rule of sailing, that when two vessels meet, one being closehauled & the other not, that the vessel having the mastership of the wind should yield to the other.—THE JERSEY TAR (1856), 8 Ir. Jur. 317.—**IR.**

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (a) i. & ii., & (b) i. & ii.*]

**5790.** ——.]—HARRISON *v.* GORDON (1838), 5 L. T. 241.

**5791.** ——.]—THE MARSHALL BLUCHER (1841), 5 L. T. 241.

**5792.** ——.]—Where a light vessel with the wind free meets a laden vessel closehauled, it is the duty of the former to give way, & the latter is to keep her course.—THE HARRIETT (1841), 1 Wm. Rob. 182; 5 L. T. 241; 166 E. R. 541.

**5793.** ——.]—WALKER *v.* FLETCHER (1841), 5 L. T. 241.

**5794.** ——.]—THE VOLANT (1842), 5 L. T. 241.

**5795.** ——.]—THE ROSE, No. 5234, *ante*.

**5796.** ——.]—A vessel, with the wind free, must not keep her course where there is a possibility of collision, though, in a nice calculation, it is thought that the other ship would pass astern. She must not enter into narrow calculations. In the present case the *Colonia*, having first done wrong by keeping her course, put her helm to starboard instead of to port, & was held to have caused the accident.—THE COLONIA (1844), 2 L. T. O. S. 373.

**5797.** ——.]—In a case of collision, where it is alleged that the two vessels are steering in directly opposite courses, & are both closehauled, which, on each tack, is impossible, the Trinity Masters, amidst the conflicting evidence, infer that one was not quite close to the wind, from the circumstance of her having a square sail set, & that the other was closehauled from her having reefed sails, & the former is condemned in the damage for not having given way, & likewise in the costs of the suit.—THE CHRISTINA (1844), 3 L. T. O. S. 20; 8 Jur. 321.

**5798.** ——.]—A vessel going free should avoid another going by the wind.—THE SPEED (1844), 2 Wm. Rob. 225; 2 L. T. O. S. 316; 166 E. R. 739.

**5799.** ——.]—THE SERINGAPATAM, No. 5178, *ante*.

**5800.** ——.]—A vessel, *A.*, on the starboard tack, with the wind three points free, at night, descries another vessel, *B.* ahead, closehauled, on the larboard tack, approaching, but so far to windward that, believing if *B.* kept her course they would have gone clear, she did not give way, whereas *B.* ported her helm, & the vessels came in collision:—*Held:* *A.* was in fault & *B.* did right.—THE GEORGE (1847), 5 Notes of Cases, 368; 5 L. T. 241.

*Annotation:*—**Reld.** Harrison *v.* Cheesman (1848), 6 Notes of Cases, 53.

**5801.** ——.]—THE FRANKLIN (1847), 5 L. T. 241.

**5802.** ——.]—A vessel *A.*, sailing on the starboard tack, with the wind three points free, at night, descries, at a quarter of a mile, another vessel *B.* closehauled on the larboard tack, as alleged, so far to windward that, believing, if both vessels kept their courses, they would go clear, she did not give way, whereas *B.* ported her helm, & the vessels came in collision:—*Held:* *A.* was in fault & *B.* did right, the two vessels having approached each other stem on.—HARRISON *v.* CHEESMAN (1848), 6 Notes of Cases, 53.

**5803.** ——.]—THE FLINT (1848), 6 Notes of Cases, 271; 5 L. T. 241.

**5804.** ——.]—THE DARLINGTON & THE VESTAL (1849), 5 L. T. 366.

**5805.** ——.]—THE RICHARD MOUNT *v.* THE CHRISTIAN (1850), 5 L. T. 366.

**5806.** ——.]—THE BONANZA *v.* THE FANCHON (1850), 5 L. T. 366.

**5807.** ——.]—THE CONDOR *v.* THE FORTITUDE (1851), 5 L. T. 366.

**5808.** ——.]—THE BLENHEIM, No. 6717, *post*.

**5809.** ——.]—A barque held solely to blame for causing a collision off the Lizard, for not giving way upon a dark night to a small schooner close hauled to the wind on the starboard tack under close reefed sails.—MACKAY *v.* ROBERTS, THE FORTUNE (1854), 9 Moo. P. C. C. 357; 5 L. T. 366; 14 E. R. 333.

**5810.** ——.]—THE ALERT *v.* THE ACTIV (1857), 5 L. T. 367.

**5811.** ——.]—THE HELEN HELIGERS (1858), 5 L. T. 461.

**5812.** ——.]—THE SAXONIA, THE ECLIPSE, No. 5247, *ante*.

**5813.** ——.]—A ship going with the wind free & not keeping such a look out at night as to enable her to see the lights of another ship laying to or driving so as to ease until close upon her held liable for the whole consequences of the subsequent collision that took place.—THE ELEANOR *v.* THE ALMA (1865), Holt, Adm. 259; 2 Mar. L. C. 240.

**5814.** —— **Vessel with ship in tow.**]—THE ARTHUR GORDON, THE INDEPENDENCE, No. 5912, *post*.

**5815. Duty to port helm.**]—A vessel sailing upon a dark night with her studding sails set, & not porting her helm in time, condemned in the damages.—THE SWITZERLAND (1846), 2 Wm. Rob. 482; 166 E. R. 838.

**5816.** ——.]—THE SALLY & SUSANAH *v.* THE EMMA (1853), 5 L. T. 366.

**5817.** ——.]—THE EMERALD ISLE *v.* THE RED JACKET (1856), 5 L. T. 366.

**5818.** ——.]—THE SINGAPORE & THE HEBE (1866), L. R. 1 P. C. 378; 4 Moo. P. C. C. N. S. 271; Holt, Adm. 124; 16 E. R. 319.

**5819.** —— **Unless no risk of collision.**]—THE HENDRIKA *v.* THE SEA PARK (1853), 5 L. T. 366; 164 E. R. 108; *sub nom.* THE SEA PARK, 1 Ecc. & Ad. 186.

**5820.** —— **Unless "not under command."**]—Two sailing vessels were approaching one another so as to involve risk of collision, the one close hauled on the starboard tack, showing her green light to the other, the other running free, showing her red light; but also exhibiting two red lights as signals that from an accident she was "not under command," &, therefore, could not get out of the way. The closehauled vessel being unable to luff owing to the presence of the green & masthead lights of a steam vessel on her starboard bow, put her helm up, & would have crossed the bows of the vessel running free, had not the vessel defeated the manœuvre by porting. In an action of damage by collision:—*Held:* the vessel running free was alone to blame, as she had indicated by her two red lights & side lights that she was not under command, & was making way through the water. She should, therefore, have kept her course so as to enable the closehauled vessel, otherwise entitled to keep her course, to get out of the way.

*Qu.:* whether a vessel is, in the circumstances, "not under command," so as to justify her under Article 4 of the Regulations for Preventing Collisions at Sea, in exhibiting the appropriate signal, is a nautical question for the assessors.

Their [The Elder Brethren's] view is that defts.' ship was, in the circumstances, not under command, having regard to all the conditions of the traffic, & the action which she might be called upon to take, to act promptly & properly for other vessels. I understand by that, that although it

would be possible for a vessel going as she was to alter her course slowly, or to take action some way for the purpose of altering her course for a vessel which she might meet & so get out of the way, she had not only one vessel to consider when she put up these lights, she had to consider the traffic in the Channel & all the vessels out of the way of which she might have to keep (GORELL BARNES).—THE HAWTHORNBANK, [1904] P. 120; 73 L. J. P. 18; 90 L. T. 293; 9 Asp. M. L. C. 535.
*Annotation:*—**Expld.** H.M.S. Drake, [1919] P. 362.

ii. *Meaning of Giving Way.*

**5821. General rule.**]—HARRISON *v.* GORDON (1838), 5 L. T. 241.

**5822.** ——.]—THE MARSHALL BLUCHER (1841), 5 L. T. 241.

**5823.** ——.]—WALKER *v.* FLETCHER (1841), 5 L. T. 241.

**5824.** ——.]—THE VOLANT (1842), 5 L. T. 241.

**5825.** ——.]—THE ROSE, No. 5234, *ante*.

(*b*) *Closehauled Vessels.*

i. *Meaning of Closehauled.*

**5826. Sails reefed.**]—THE CHRISTINA, No. 5797, *ante*.

**5827. Wind West by North—Course South by East.**]—THE BLENHEIM, No. 6717, *post*.

**5828. Possibility of sailing nearer wind.**]—A sailing vessel, sailing on the starboard tack very near the wind, met a steamer. The vessel did not put her helm to port, & a collision ensued. The judge left it to the jury to say whether the vessel was closehauled on the starboard tack, & whether she would have lost command by putting her helm to port; intimating his own opinion as to the fact to be that a vessel may be closehauled, though not quite so near the wind as she could lie; & that a vessel going about was not under command. The verdict was for pltf. On a rule for a new trial on the ground of misdirection:—*Held:* the direction was unexceptionable.

I think the jury very justly found that the ship was closehauled, though they might think tha tshe could be put a quarter of a point nearer to the wind (LORD CAMPBELL, C.J.).—CHADWICK *v.* CITY OF DUBLIN STEAM PACKET CO. (1856), 6 E. & B. 771; 3 Jur. N. S. 207; 119 E. R. 1051.

**5829.** ——.]—The custom of sailors to treat sailing ships when in the trades as closehauled ships when they are sailing a point or two from being as closehauled as they can lie, does not affect the legal construction of the regulations, & the ct. will not exonerate vessels so sailing from duties applicable to sailing ships in other latitudes. *Semble:* a sailing ship is closehauled within the meaning of Article 14 if she is sailing half a point free of the nearest she can lie to the wind, but not if she is two points off.

The sailing ship *E. W.* while sailing free in the trades saw the red light of the sailing vessel *A.* on her starboard bow. The *A.* was sailing closehauled, as it is called in the trades, but was in fact not as close to the wind as she could lie. As the vessels approached the *E. W.* ported to keep out of the way of the *A.* At about the same time the *A.* not only luffed up as close as she could to the wind, but also went a little farther under a starboard helm, thus counteracting the porting of the *E. W.*, & a collision occurred:—*Held:* the *A.* altered her course in breach of Article 22, & was to blame for the collision.—THE EARL WEMYS (1889), 61 L. T. 289; 6 Asp. M. L. C. 407, C. A.

**5830. Sailing ship hove to.**]—THE ELEANOR *v.* THE ALMA, No. 5813, *ante*.

ii. *Vessel Closehauled on Port Tack.*

**5831. Meeting vessel closehauled on starboard tack—Duty to give way.**]—The *Alexander Wise* departed, in the first instance, from the acknowledged rule of navigation, inasmuch as the *Hylton* being upon the starboard tack, & the *Alexander Wise* upon the larboard, it was the duty of the former to keep her course & the latter to give way (*per* CUR.).—THE ALEXANDER WISE (1843), 2 Wm. Rob. 65; 166 E. R. 679.

**5832.** —— ——.]—THE JOHN BROTHERICK (1844), 2 L. T. O. S. 499; 8 Jur. 276.

**5833.** *S. P.* THE BROTHERS (1844), 2 L. T. O. S. 316.

**5834.** *S. P.* THE ANNE (1844), 5 L. T. 241.

**5835.** *S. P.* THE MARY STEWART (1844), 2 Wm. Rob. 244; 2 L. T. O. S. 375; 166 E. R. 746.

**5836.** *S. P.* THE IRON DUKE (1845), 2 Wm. Rob. 377; 4 Notes of Cases, 94; 9 Jur. 476; 166 E. R. 797; *affd. sub nom.* WILLIAMS *v.* CHAPMAN (1846), 4 Notes of Cases, 585, P. C.
*Annotations:*—**Consd.** The Juliet Erskine (1849), 6 Notes of Cases, 633. **Refd.** Londonderry (Owners) *v.* Dolbadarn Castle (Owners) (1845), 4 Notes of Cases Supp. xxxi; The Victoria (1848), 6 Notes of Cases, 176; The Europa (1850), 14 Jur. 627.

**5837.** *S. P.* THE SERINGAPATAM (1846), 2 Wm. Rob. 506; 5 Notes of Cases, 61; 10 Jur. 1064; 166 E. R. 847.

**5838.** *S. P.* THE WAVE (1847), 5 L. T. 241.

**5839.** *S. P.* THE ALBION (1848), 5 L. T. 241.

**5840.** *S. P.* THE FLINT (1848), 6 Notes of Cases, 271; 5 L. T. 241.

**5841.** *S. P.* THE SPECULATOR (1848), 5 L. T. 241.

**5842.** *S. P.* THE FAME (1849), 5 L. T. 241.

**5843.** *S. P.* THE ARGUS (1849), 5 L. T. 241.

**5844.** *S. P.* WOLFE *v.* COBBOLD (1849), 5 L. T. 241.

**5845.** *S. P.* THE POLKA (1849), 5 L. T. 241.

**5846.** *S. P.* PEARSONS *v.* WEATHERLEY (1850), 5 L. T. 241.

**5847.** *S. P.* THE LADY ANN (1850), 7 Notes of Cases, 364; 15 Jur. 18; *sub nom.* THE HOPE *v.* THE LADY ANNE, 5 L. T. 241.

**5848.** *S. P.* THE HOPE *v.* THE JACOBUS (1852), 5 L. T. 366.

**5849.** —— ——.]—THE WOODPARK (1850), 7 Notes of Cases, 397.

**5850.** —— ——.]—THE WILLIAM & SARAH ANN *v.* THE JAMES (1856), 5 L. T. 366.

**5851.** —— ——.]—THE EAST LOTHIAN, KILGOUR *v.* ALEXANDER (1861), 14 Moo. P. C. C. 271;

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**PART XII. SECT. 3, SUB-SECT. 5.—D. (a) ii.**

**5821 i.** *General rule.*]—By the words giving way" it is always to be understood at sea, that the vessel going free should yield, but they are not synonymous with the words "keeping away," which have a distinct & separate meaning.—THE JERSEY TAR (1856), 8 Ir. Jur. 317.—IR.

**PART XII. SECT. 3, SUB-SECT. 5.—D. (b) i.**

**1.** *Vessel not strictly closehauled yet not running—Free at most points.*]—THE PRIVATEER (1881), 9 L. R. Ir. 105, 111, 112.—IR.

**PART XII. SECT. 3, SUB-SECT. 5.—D. (b) ii.**

**5831 i.** *Meeting vessel closehauled on starboard tack—Duty to give way.*]—Where two ships closehauled, on opposite tacks, meet, & there is danger of collision if each continue her course, the one on the port tack is to give way & the other to hold her course; but she is not to do this if by doing so she will cause unnecessary risk to the other; neither is the other bound to do so if thereby she would run into unavoidable & imminent danger; but if there be no such danger the one on the starboard tack is entitled to the benefit of the rule.—*Re* THE MARY BANATYNE (1855). 1 S. V. A. R. 350.—CAN.

**5831 ii.** —— ——.]—LANDRY *v.* RAY, THE BERNADETTE & THE MURIEL (1894), 4 Exch. C. R. 280.—CAN.

*Sect.* 3.—*The sea regulations: Sub-sect.* 5, *D.* (*b*) *ii. & iii.*, (*c*) & (*d*) *i. & ii.*]

Lush. 241; 4 L. T. 487; 1 Mar. L. C. 76; 15 E. R. 271, P. C.

*Annotations:*—**Reld.** Yeo *v.* Tatem, The Orient (1871), L. R. 3 P. C. 696; The Secret (1872), 26 L. T. 670. **Mentd.** The Why Not (1868), L. R. 2 A. & E. 265.

**5852.** —— ——.]—Two sailing flats were beating to windward at night down the Mersey, & in the process of tacking backwards & forwards across the river pltf.'s flat gradually overtook the other; but before she had quite done so, & whilst the two vessels were on opposite tacks, they came into collision:—*Held:* in the circumstances, the rule applicable was Article 17 (*b*) of the Regulations for Preventing Collisions at Sea, &, therefore, defts.' vessel, which, at the material time, was closehauled on the port tack, was to blame for not keeping out of the way of pltf.'s vessel closehauled on the starboard tack.—THE ANNIE, [1909] P. 176; 78 L. J. P. 81; 100 L. T. 415; 25 T. L. R. 416; 11 Asp. M. L. C. 213.

*Annotation:*—**Mentd.** The Moliere, [1925] P. 27.

**5853.** —— **Duty to port helm.**]—(1) The vessels, the one *A.* closehauled on the port tack, the other *B.* on the starboard tack, sailing free, meet each other under circumstances of probable collision; *A.* luffed twice:—*Held:* she was to blame for not having ported; the collision was principally occasioned by her non-obedience to the rule, & by the statute she would not recover.

(2) *B.* also luffed up three times:—*Held:* to blame for not having ported in time. Neither vessel can recover.—THE WANSFELL (1854), 1 Ecc. & Ad. 269; 164 E. R. 156.

*Annotation:*—*As to* (1) **Reld.** Lawson *v.* Carr, The James (1856), 10 Moo. P. C. C. 162.

**5854.** —— ——.]—THE FLYING FISH *v.* THE AEROLITE (1856), 5 L. T. 366.

**5855.** —— ——.]—THE MARY *v.* THE KONG HAKON (1857), 5 L. T. 367.

**5856.** *S. P.* THE FOTINI *v.* THE EFFORT (1857), 5 L. T. 367.

**5857.** *S. P.* THE VIKING *v.* THE JAMES HOLMES (1857), 5 L. T. 367.

**5858. Meeting vessel running free.**]—In doubtful circumstances, where there is a probability of collision, a vessel on the larboard tack although closehauled, is bound to give way to a vessel upon the starboard tack, notwithstanding the latter may be sailing at the time with the wind free.—THE ANN & MARY (1843), 2 Wm. Rob. 189; 2 L. T. O. S. 107; 7 Jur. 999; 166 E. R. 725.

*Annotation:*—**Mentd.** The Sir Robert Peel (1880), 43 L. T. 364.

**5859.** ——.]—BAKER *v.* THEODORE H. RAND (OWNERS), THE THEODORE H. RAND, No. 5415, *ante*.

iii. *Vessel Closehauled on Starboard Tack.*

*See* Sea Regulations, 1910, Article 21.

**5860. Duty to keep course—Meeting vessel running free.**]—(1) Where the mismanagement of a vessel totally lost was, in the opinion of the Trinity Masters, the blameable cause of the collision; but in their opinion, the master of the other vessel was also blameable, for not endeavouring to render assistance, after the collision, the ct. decreed that the owner of that other vessel was not liable for the loss, but condemned him in the costs of the suit.

(2) Here is one vessel closehauled & beating to windward, & the other with the wind free & all sail set, & if it had been open daylight it would have been *primâ facie* the duty of the *Celt* to have kept clear of the *Anthony*, & of the *Anthony* to have kept on her course (SIR JOHN NICHOLL).—THE CELT (1836), 3 Hag. Adm. 321; 166 E. R. 424.

*Annotation:*—**Reld.** The St. Lawrence (1850), 7 Notes of Cases, 556.

**5861.** —— ——.]—THE JANE ARCHIBALD *v.* THE ILOS (1855), 5 L. T. 366.

**5862.** ——.]—THE WASHINGTON (1841), 5 Jur. 1067.

*Annotations:*—**Mentd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795; The Modica, [1926] P. 72.

**5863.** ——.]—THE HOPE *v.* THE FINLAND (1852), 5 L. T. 366.

**5864.** ——.]—THE BETSEY (1853), 1 Spinks, 34, n.; 164 E. R. 20.

**5865.** ——.]—A ship going northward, in the Gulf Stream, meets a brig closehauled on the starboard tack, the wind from S.W., other vessels in the neighbourhood; the brig kept her course, & was held to be right in so doing.—THE MOBILE (1856), Sw. 69; 166 E. R. 1024; *on appeal*, Sw. 127, P. C.

*Annotation:*—**Mentd.** Oakley *v.* Speedy (1879), 40 L. T. 881.

**5866.** ——.]—THE META HERMINA (1857), 5 L. T. 367.

**5867.** ——.]—A vessel meeting another, within 17 & 18 Vict. c. 104, s. 296, is not if closehauled, on the starboard tack, bound by the rule of that sect. to port her helm.—THE HALCYON (1860), Lush. 100; 167 E. R. 51.

——.]—*See* Sub-sect. 5, D. (*b*) ii., *ante*.

**5868. Duty when collision imminent.**]—THE LADY ANN, No. 5454, *ante*.

(*c*) *Vessels on Port Tack.*

**5869. Duty to give way—To vessel on starboard tack.**]—NELSON *v.* FAWCETT, THE RESOLUTION & THE LANGTON (1789), Burrell, 332; 167 E. R. 596.

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**PART XII. SECT. 3, SUB-SECT. 5.—D. (b) iii.**

**5862 i.** *Duty to keep course.*]—A brigantine on starboard tack & a schooner on port tack, both closehauled, collided in a dense fog, the schooner having ported her helm promptly, & the brigantine having luffed at the last moment:—*Held:* in the circumstances, the vessel on the starboard tack was not in fault for luffing, & that manœuvre did not contribute to the collision.—HONDUCE *v.* THE ALCAEA (1911), 9 Nfld. L. R. 524.—**NFLD.**

**m.** *Duty to give way—Meeting helpless vessel hove to on port tack.*]—A schooner was drifting hove to on the port tack in foggy weather, & at a distance of a quarter to half a mile came in sight of a barque closehauled on the starboard tack & making between four & five knots an hour, & had no time to swing off & clear the barque:—*Held:* the barque ought to have seen that the schooner was helpless to manœuvre, & the barque could easily have swung off one or two points to clear her, & was alone to blame.—THE PARAMATTA (1891), Stockton, 192.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—D. (c).**

**5869 i.** *Duty to give way—To vessel on starboard tack.*]—In an action for damages between two vessels caused by a collision:—*Held:* if two sailing vessels, both upon a wind, are so approaching each other, the one on the starboard & the other on the port tack, as that there will be danger of collision if each continue her course, it is the duty of the vessel on the port tack to immediately give way, so as to prevent all chance of a collision occurring.—*Re* THE ROSLIN CASTLE, *Re* THE GLEN CAIRN (1854), 4 L. C. R. 38.—**CAN.**

**5869 ii.** ——.]—*Re* THE LIBERTY (1864), 2 S. V. A. R. 102.—**CAN.**

**5869 iii.** —— ——.]—Collision by two vessels while sailing, the one on the starboard tack close to the wind, & the other on the port tack:—*Held:* the latter was to blame for not porting her helm in time, & the other complied with the rules of the road by keeping on the wind closehauled.—*Re* THE TORNADO (1872), 2 S. V. A. R. 172.—**CAN.**

**5869 iv.** —— ——.]—Where two steamers, one on the starboard & the other on the port tack, came into collision, the latter held to be in fault for not keeping out of the way.—THE PRINCESS ROYAL (1880), 6 Q. L. R. 342.—**CAN.**

**5870.** —— ——.]—If two vessels are beating to windward on opposite tacks it is the duty of the vessel on the starboard tack to continue her course, & that on the larboard to give way.—THE JUPITER (1836), 3 Hag. Adm. 320; 166 E. R. 424.

**5871.** —— ——.]—One vessel being on the larboard tack & the other on the starboard, & the vessels being seen from each other half a mile off, it is acknowledged to be the rule of navigation that when two vessels are on contrary tacks, the duty of the vessel on the larboard tack is to give way, & the duty of the vessel on the starboard tack is to keep her course (SIR JOHN NICKOLL).—THE IX. OF MARTZ (1836), 7 Notes of Cases, 371, n.

**5872.** —— ——.]—THE HOPE (1840), 1 Wm. Rob. 154; 166 E. R. 531.

*Annotations:*—**Mentd.** The Volant (1842), 1 Notes of Cases, 503; The Nostra Senora del Carmine (1854), 1 Ecc. & Ad. 303; Nelson *v.* Couch (1863), 15 C. B. N. S. 99; The Bowesfield (1884), 51 L. T. 128; The Dictator, [1892] P. 304; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; The Joannis Vatis (No. 2), [1922] P. 213.

**5873.** —— ——.]—LACY *v.* SCURLOCK (1842), 5 L. T. 241.

**5874.** —— ——.]—It is the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack at once, without considering whether the other vessel be one or more points to leeward.—THE TRAVELLER (1843), 2 Wm. Rob. 197; 2 Notes of Cases, 476; 7 Jur. 1094; 166 E. R. 728.

**5875.** —— ——.]—THE NORDEN (1846), as reported in 5 L. T. 241.

**5876.** —— ——.]—Where two vessels are on a wind, that on the larboard tack is to give way to the one on the starboard tack. . . . If it had been broad daylight . . . the rule applies, whether the vessel be to the windward or to the leeward, if there be a reasonable chance of collision. Nobody ever said that the rule does not apply where, each vessel keeping its course, there is no chance of collision (DR. LUSHINGTON).—THE ENGLAND (1847), 5 Notes of Cases, 170.

**5877.** —— ——.]—THE STRANGER (1848), 6 Notes of Cases, 36.

**5878.** —— ——.]—THE JULIET ERSKINE (1849), 6 Notes of Cases, 633.

**5879.** —— ——.]—THE ARGUS (1849), 5 L. T. 241.

**5880.** —— ——.]—THE MARGARETS (1856), 5 L. T. 241.

**5881.** —— ——.]—THE WALTER HOOD *v.* THE EMIGRANT (1857), 5 L. T. 366.

**5882.** —— ——.]—THE TUSCARORA (1858), 5 L. T. 461.

**5883.** —— ——.]—A vessel on her port tack is bound to give way to a vessel on her starboard tack, &, if there is any danger of collision, to port her helm & go to leeward of the other vessel, who is to keep her course.—ZUGASTI *v.* LAMER, THE NORTH AMERICAN (1858), 12 Moo. P. C. C. 331; Sw. 358; 14 E. R. 937, P. C.

*Annotations:*—**Mentd.** The Ann (1860), Lush. 55; The Despatch (1860), Lush. 98; North German Lloyd S.S. Co. *v.* Elder (1860), 14 Moo. P. C. C. 241; The East Lothian (1861), Lush. 241.

**5884.** —— **Except where collision inevitable.**]—THE ELEANOR & NANCY (1837), 5 L. T. 241.

**5885.** —— ——.]—THE MARSDEN (1845), 5 L. T. 241.

**Vessel closehauled on port tack.**]—*See* Nos. 5831-5857, *ante*.

*(d) Ships approaching End on or Nearly End on.*

i. *In General.*

**5886. Application of end on rule.**]—The application of the Trinity House regulation with respect to two vessels meeting each other, the one upon the larboard & the other upon the starboard tack, depends upon the presumption that the two vessels are directly opposing each other, & is not intended to apply when the heads of the respective vessels are lying in different directions.—THE LONDON PACKET (1843), 2 Wm. Rob. 213; 2 Notes of Cases, 501; 166 E. R. 734.

**5887.** ——.]—THE GLENBURN *v.* THE HOPE (1854), 5 L. T. 185.

**5888.** ——.]—THE GRACE DARLING *v.* THE PERU (1857), 5 L. T. 462.

**5889.** ——.]—DRYDEN *v.* ALLIX, THE MODERATION, No. 5458, *ante*.

**5890.** ——.]—THE ARTHUR GORDON, THE INDEPENDENCE, No. 5912, *post*.

**5891.** ——.] — Where two steamships are approaching one another at sea in such a position as to pass in safety, the closing in & coming more into line of the masthead & a side light is not necessarily such an indication that the ship is altering her course so as to cause risk of collision & to impose upon the other ship the duty to obey Article 18 of the Regulations.—THE ALBIS (1895), 73 L. T. 664; 8 Asp. M. L. C. 92.

**5892.** —— **Discretion of assessors.**]—THE ST. CYRAN *v.* THE HENRY (1864), Holt, Adm. 72; *sub nom.* THE HENRY, THE ST. CYRAN, 12 W. R. 1014.

**5893.** —— ——.]—THE KEZIA *v.* THE ELIZA (1864), Holt, Adm. 67.

**5894. Intention of rule.**]—THE ST. CYRAN *v.* THE HENRY (1864), Holt, Adm. 72; *sub nom.* THE HENRY, THE ST. CYRAN, 12 W. R. 1014.

**5895. What constitutes end on—Question of fact.**]—THE ST. CYRAN *v.* THE HENRY (1864), Holt, Adm. 72; *sub nom.* THE HENRY, THE ST. CYRAN, 12 W. R. 1014.

**5896.** —— ——.]—THE THAMES *v.* THE STORK (1866), Holt, Adm. 151, P. C.

**5897.** —— ——.]—WILSON, SONS & CO. *v.* CURRIE, No. 6023, *post*.

**5898.** —— **Vessel within two points of end on.**]—THE FRUITER *v.* THE FINGAL (1865), Holt, Adm. 158; 13 L. T. 611; 2 Mar. L. C. 291.

**5899.** ——.]—THE RONA, THE AVA, No. 5223, *ante*.

**5900. Right to assume compliance with rule.**]—THE ESTHER *v.* THE CONCORDIA (1866), Holt, Adm. 142, P. C.; *affg.* S. C. *sub nom.* THE CONCORDIA, L. R. 1 A. & E. 93.

*Annotations:*—**Refd.** The Carlotta, [1899] P. 223; The Anselm, [1907] P. 151.

ii. *Risk of Collision.*

**5901. Duty to port helm.**]—THE ATHOL (1842), 1 Notes of Cases, 586; 5 L. T. 241.

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**PART XII. SECT. 3, SUB-SECT. 5.—D. (d) i.**

**5899 i.** *What constitutes end on.*]—Respective ships were proceeding the one West by South ½ South & the other North 70° East:—*Held:* the words "end on or nearly end on" should have signification as wide as "right ahead" in Art. 2; & the ships, in any event were "end on" within the spirit of the rule, when the above-mentioned courses were adopted or shortly afterwards.—CANADIAN PACIFIC RY. CO. *v.* THE CAMOSUN, [1925] Exch. C. R. 39.—**CAN.**

n. —— *Vessels one point apart.*]—Where vessels are on courses which are at least one point apart, they are not end on or nearly end on to each other. — CROWN S.S. CO., LTD. (CROWN OF CORDOVA (OWNERS)) *v.* EASTERN NAVIGATION CO., LTD. (ETHELREDA (OWNERS)), [1918] S. C. 303.—**SCOT.**

**PART XII. SECT. 3, SUB-SECT. 5.—D. (d) ii.**

**5901 i.** *Duty to port helm.*]—*Re* THE JAMES MCKENZIE (1862), 12 L. C. R. 393; 2 S. V. A. R. 87.—**CAN.**

**5901 ii.** ——.]—TUCKER *v.* THE TECUMSEH (1905), 6 O. W. R. 131; 10 Exch. C. R. 44, 149.—**CAN.**

o. —— *Sailing vessel meeting*

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (d) ii. & iii., & (e) i., ii. & iii.]*

**5902.** ——.]—THE CITY OF LONDON (1845), 4 Notes of Cases, 40; 5 L. T. 462.

**5903.** ——.]—THE SHAMROCK (1849), 5 L. T. 462.

**5904.** ——.]—THE CLARENCE (1849), 5 L. T. 462.

**5905.** ——.]—THE ARGUS (1849), 5 L. T. 462.

**5906.** ——.]—When the master of a vessel proceeding in one direction is about to pass a vessel proceeding in the opposite direction, he cannot do wrong in porting his helm; & when there is danger of a collision the master is bound to port his helm, & the owner is liable for any injury sustained by the other vessel from the two coming into collision by reason of the master not porting his helm, whether he saw the danger or not; & the question for the jury is "Was there danger?" —GENERAL STEAM-NAVIGATION CO. *v.* MANN (1853), 14 C. B. 127; 139 E. R. 53; *sub nom.* STEAM NAVIGATION CO. *v.* MANN, 22 L. T. O. S. 87.

**5907.** ——.]—THE LADY ANN *v.* THE SHANNON (1856), 5 L. T. 462.

**5908.** ——.]—The *C.* steamer, steering E. ½ N., on a clear night in the Sea of Marmora, saw the bright & green lights of the *S.* three points on her starboard bow, distant at least three miles. She starboarded her helm, & then put it hard to starboard. The *S.* having ported her helm when she made out the *C.* a collision ensued:—*Held:* the vessels were meeting each other within Merchant Shipping Act, 1854 (c. 104), s. 296, & the *C.* was solely to blame for the collision, in not having ported her helm.—THE CLEOPATRA (1856), Sw. 135; 166 E. R. 1059.

*Annotation:*—**Consd.** The Guildhall, [1908] P. 29.

**5909.** ——.]—THE COLNE *v.* THE NORVAL (1857), 5 L. T. 367.

**5910.** ——.]—THE ANN (prior to 1860), cited in 6 Jur. N. S. at p. 783, P. C.

*Annotation:*—**Distd.** The Ironmaster (1860), 6 Jur. N. S. 782.

**5911.** ——.]—A master is not bound to give directions for the porting of the helm of his vessel, in accordance with the terms of Merchant Shipping Act, 1854 (c. 104), s. 296, until he has discovered the course of the vessel approaching him. —THE IRONMASTER (1860), 6 Jur. N. S. 782.

**5912.** ——.]—The statutory rule of port helm, given by Merchant Shipping Act, 1854 (c. 104), s. 296, applies only to a case when vessels meet in opposite directions end on, or nearly so, when the observance of the rule would make the vessels diverge, so as to pass port side to port side.

A steamer towing has not the same obligations to give way to sailing vessels as a steamer not towing.

A vessel closehauled on the port-tack, in the open sea, & in day time, & a steamer towing a large ship, were standing so as to cross each other's bows, the steamer being on the lee-beam of the sailing vessel—*Held:* the sailing vessel was to blame for holding her reach, & the steamer was likewise to blame for taking no measure in time to avoid collision.—THE ARTHUR GORDON, THE INDEPENDENCE (1861), Lush. 270; 4 L. T. 563; 9 W. R. 582; 1 Mar. L. C. 88; 167 E. R. 121; *sub nom.* MADDOX *v.* FISHER, THE INDEPENDENCE, 14 Moo. P. C. C. 103, P. C.

*Annotations:*—**Consd.** Union S.S. Co. *v.* The Aracan, The American & The Syria (1874), L. R. 6 P. C. 127. **Refd.** The Milan (1861), Lush. 388; The Warrior (1872), L. R. 3 A. & E. 563; M'Cowan *v.* Baine, The Niobe, [1891] A. C. 401; The Grovehurst, [1910] P. 316.

**5913.** ——.]—The positive rule of the road as laid down by Article 11 of the Admlty. Regulations of 1862 (without any exception with regard to starboard tack vessels) is, that if two sailing vessels meet end on, or nearly end on, so as to involve risk of collision, the helm of both vessels shall be put to port, so that each may pass on the port side of the other; & this article is subject only to the reservation contained in Article 19 as to the "dangers of navigation, & where the special circumstances of any particular case render the departure from the rule necessary in order to avoid immediate danger."

In the opinion of the ct all vessels not meeting end on are vessels crossing, with the exception of those mentioned in Article 17 as overtaking any other vessel (DR. LUSHINGTON).—THE PRINCESSAN LOVISA *v.* THE ARTEMAS (1865), Holt, Adm. 75; 2 Mar. L. C. 241.

**5914.** ——.]—GENERAL STEAM NAVIGATION CO. *v.* HEDLEY, THE VELOCITY, No. 5955, *post.*

**5915.** ——.]—THE KNARESBRO (1900), [1907] P. 38, n.

*Annotations:*—**Refd.** The Kaiser Wilhelm der Grosse, [1907] P. 36; The Peter Benoit (1915), 114 L. T. 147.

**5916.** ——.]—THE AGNES (1913), cited in Halsbury's Laws of England, Vol. XXVI. at p. 470.

**5917.** ——.]—The rule laid down by the Merchant Shipping Act, 1854 (c. 104), s. 296, as to cases of collision, is, that when there is danger of a collision each vessel shall port her helm; the penalty is, that if a vessel neglect to port her helm, she cannot recover anything, even if the other vessel is also in fault. The sect. is not confined to cases where one vessel only is in fault, & applies also to the case of vessels lying-to. —THE JAMES (1856), Sw. 60; 10 Moo. P. C. C. 162; 27 L. T. O. S. 1; 4 W. R. 353; 166 E. R. 1019, P. C.

*Annotation:*—**Refd.** The Bothnia (1860), Lush. 52.

**5918.** ——.]—THE FANNY *v.* THE MANX FAIRY (1857), 5 L. T. 462.

**5919.** ——.]—Article 16 of the Admiralty Regulations for Preventing Collisions at Sea only applies where there is a continuous approaching of two steamships. When two ships under steam "are meeting end on, or nearly end on, so as to involve risk of collision," as provided for in Article 13, & one of them at a proper distance ports her helm sufficiently to put her on a course which will carry her clear of the other, & enable her to pass on the port side she thereby determines the risk, & is not approaching another ship so as "to involve risk of collision," within the meaning of Article 16, & is not bound to slacken speed or stop.—THE JESMOND & THE EARL OF ELGIN (1871), L. R. 4 P. C. 1; 8 Moo. P. C. C. N. S. 179; 25 L. T. 514; 1 Asp. M. L. C. 150; 17 E. R. 280, P. C.

*Annotation:*—**Apld.** Scicluna *v.* Stevenson, The Rhondda (1883), 8 App. Cas. 549.

**5920.** ——.]—The rule that whenever vessels are coming in opposite directions they should each port only applies when they are coming end on in the same line so as to be likely to meet.—THE LADY WODEHOUSE (1880), 2 T. L. R. 252, C. A.

*Annotation:*—**Consd.** The Guildhall, [1908] P. 29.

### iii. *Exceptions to Rule.*

**5921. Steamer meeting steam tug with vessel in tow.**]—THE GLENBURN *v.* THE HOPE (1854), 5 L. T. 185.

*steamship.*]—When a sailing vessel going free is meeting a steamship end on or nearly so, both vessels ought to port their helms.—SPEARS *v.* SMITH (1878), 1 N. S. W. S. C. R. N. S. (L.) 120.—**AUS.**

p. —— ——.]—THE STATESMAN *v.* THE DISPATCH (1858), 5 L. T. 462.—**IR.**

**5922. Other vessel on starboard bow.**]—THE BYWELL CASTLE, No. 6267, *post.*

(c) *Crossing Vessels.*

i. *In General.*

*See* Sea Regulations, 1910, Articles 19, 20.

**5923. When rule may be disregarded—Collision more probable by observance.**]—GENERAL STEAM NAVIGATION CO. *v.* TONKIN, THE FRIENDS, No. 5464, *ante.*

**5924. Meaning of "keep out of the way"—Not confined to porting.**]—(1) Article 14 of the Regulations for Preventing Collisions at Sea which provides that "if two vessels under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other" is not to be construed so that "keeping out of the way" means in all cases porting. A vessel may within that article keep out of the way by stopping, or by going ahead, or by starboarding, or by porting, or by going astern as the circumstances of the case may require.

(2) A vessel which, having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another is not to be held liable if at that moment she adopts a wrong manœuvre.—THE NOR (1874), 30 L. T. 576; 2 Asp. M. L. C. 264, P. C.

**5925. When conditions come into operation.**]—The conditions which render the regulations for crossing ships applicable begin as soon as the two ships are approaching one another on courses which, if continued, may cause a collision. These conditions continue to subsist until the vessels have definitely passed out of the phase of crossing ships (VISCOUNT FINLAY).—ORDUNA (OWNERS) *v.* SHIPPING CONTROLLER, [1921] 1 A. C. 250; *sub nom.* ORDUNA (OWNERS) *v.* SHIPPING CONTROLLER, THE ORDUNA, 90 L. J. P. 67, H. L.

ii. *What Constitutes Crossing.*

**5926. Ships not meeting end on—Or overtaking.**]—THE PRINCESSAN LOVISA *v.* THE ARTEMAS, No. 5913, *ante.*

**5927. Approaching & courses crossing if pursued.**]—THE HELVETIA (1868), 3 Asp. M. L. C. 43, n., P. C.

*Annotations:*—**Distd.** The Broomfield (1905), 94 L. T. 109. **Refd.** The Jennie S. Barker, The Spindrift (1875), L. R. 4 A. & E. 456.

**5928. What difference in points sufficient.**]—THE BREADALBANE, No. 5598, *ante.*

**5929. Crossing & meeting distinguished.**]—When two vessels are approaching, one heading N.N.E. ½ E., & the other S.W. ½ W., they are crossing & not meeting.—THE ST. CYRAN *v.* THE HENRY (1864), Holt, Adm. 72; *sub nom.* THE HENRY, THE ST. CYRAN, 12 W. R. 1014.

**5930. Crossing & overtaking distinguished.**]—THE FRANCONIA, No. 6118, *post.*

**5931. —— Question of fact.**]—A ship & a barque were both on the port tack. The barque was the windward vessel, & had the wind three points free. The ship was closehauled, & when first sighted by the barque was approaching her on her lee beam:—*Held:* the ships were crossing each other, & it was the duty of the barque, being the windward vessel, to get out of the way of the other.

There is no fixed rule as to when a ship is to be considered as crossing or overtaking, but the question must be decided from the circumstances of each particular case.—THE PECKFORTON CASTLE (1878), 3 P. D. 11; 47 L. J. P. 69; 37 L. T. 816; 26 W. R. 346; 3 Asp. M. L. C. 533, C. A.

*Annotations:*—**Refd.** The Seaton (1883), 32 W. R. 600; The Main (1886), 11 P. D. 132.

iii. *Duties of Vessels.*

**5932. Duty to ascertain precise position.**]—The foreign steam vessel *B. O.* saw the green & white lights of another steamer (the English steam vessel *B. D.*) distant about a mile & a half, & a point on the starboard bow. The *B. O.* ported. The *B. D.* kept her course, & at the last moment starboarded:—*Held:* the *B. O.* ought either to have kept her course, or to have slowed until the precise situation of the other vessel had been ascertained; the *B. O.* improperly ported, & was therefore to blame.—THE BLACK DIAMOND (1863), 9 L. T. 396; 12 W. R. 219; 1 Mar. L. C. 399.

**5933. Duty to give appropriate signal.**]—A steam vessel on a course of N. 26° W. sighted the masthead & then the green light of a steam vessel, which was on a course of S. 74° E. about two points on the port bow, about six miles off. The vessels ultimately collided. The steam vessel on the N. 26° W. course, whose duty it was to keep her course & speed under Article 21, obeyed the Article until shortly before the collision, when she slowed her engines & sounded a long warning blast, & shortly afterwards put her engines full speed astern & sounded three short blasts on her whistle. The steam vessel on the S. 74° E. course, whose duty it was to keep out of the way under Article 19 & avoid crossing ahead under Article 22, starboarded & alleged she heard a short blast from the vessel on the N. 26° W. course, when she put her engines full speed astern & sounded three short blasts on her whistle, keeping her starboard helm up to the collision. In an action for damage:—*Held:* (1) the vessel on the N. 26° W. course, which, while admittedly keeping her course, eased her speed, was not to blame for doing so; for, it being difficult to decide when the precise moment has arrived at which the giving-way vessel should take action, the officer in charge must be allowed some latitude, & when it is shown that he is carefully watching the other vessel & endeavouring to do his best to act at the right moment, he ought not to be held to blame even if it afterwards appears that he waited too long or acted too soon; (2) the vessel on the S. 47° E. course was to blame for attempting to cross ahead of the other vessel & for not indicating her course on her whistle when she starboarded & when she first reversed her engines.—THE HUNTSMAN (1911), 104 L. T. 464; 11 Asp. M. L. C. 606.

*Annotation:*—*As to* (1) **Refd.** The Gulf of Suez, [1921] P. 318

**5934. ——.**]—Two steamships, one, the *K.*, outward bound, & the other, the *H.*, inward bound, were, whilst approaching by night the Whistling Buoy which lies off the entrance to the channel

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**PART XII. SECT. 3, SUB-SECT. 5.—D. (e) ii.**

**5927 1.** *Approaching & courses crossing if pursued.*]—Just before the collision, the course of the *Durley Chine* was south 50 degrees west, & that of the *Harlem*, south 50 degrees east, or at right-angles to one another, with the *Harlem* on the starboard side of the *Durley Chine*. Rules to Prevent Collision at Sea, Art. 19, provides that when vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other:—*Held:* within the meaning of said rule, the *Harlem* was a crossing ship, carrying proper regulation lights, & that being so, the *Durley Chine* was obliged to keep out of her way.—R. *v.* THE HARLEM (N. S.) (1919), 19 Exch. C. R. 41; 47 D. L. R. 471; *affd.*, 59 S. C. R. 653; 52 D. L. R. 690.—CAN.

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (e) iii. & iv.*]

to Monte Video, on crossing courses, the *K.* having the *H.'s* green light open on her port bow. Accordingly, under Articles 19 & 21 of the Regulations for Preventing Collisions at Sea, it was the duty of the *K.* to keep her course & speed, & of the *H.* to keep out of the way. When the vessels were nearly two miles apart the *H.* ported 3½ points, but did not blow a helm signal as required by Article 28. The *K.*, when she got the Whistling Buoy abeam, starboarded to get to her course out to sea, & the *H.* failed to stop & reverse with the result that the two ships came into collision :—*Held:* both vessels were to blame, the *K.* for not keeping her course & the *H.* for not stopping & reversing, & also for not giving the appropriate signal on the whistle when she began to port, it not being proved that the vessels were too far apart for the whistle to be heard, or that the breach of Article 28 was not a contributory cause of the collision; & the blame should be divided equally.—S.S. HAUGLAND *v.* S.S. KARAMEA, THE KARAMEA, [1922] 1 A. C. 68; 91 L. J. P. 22; 38 T. L. R. 161; 15 Asp. M. L. C. 430, H. L.

*Annotation s*—**Consd.** The Clara Camus (1925), 134 L. T. 50.

**5935. Duty to keep course—When departure justifiable.**]—Where two vessels were approaching each other in Canadian waters on courses which converged at a point outside a harbour where each vessel expected to pick up a pilot :—*Held:* as they were so doing on courses & at speeds which would probably bring them to that point so as to present a danger of collision when they reached it, they were vessels crossing so as to involve risk of collision within Articles 19, 22 & 23 of the Regulations of 1897, which had been substituted for those contained in Canadian R. S. c. 79; & consequently it was the duty, negligently disregarded, of resps.' vessel, which had the aplts.' vessel on her own starboard side, to keep out of her way, there being no special circumstances within Article 27 to authorise a departure from that rule; (2) aplts.' vessel was not to blame under Article 21. It was not shown that with reasonable care she ought to have taken action thereunder earlier than she did.—S.S. ALBANO *v.* ALLAN LINE S.S. CO., LTD., UNION DAMPFSCHIFFSRHEDEREI ACT. *v.* S.S. PARISIAN, [1907] A. C. 193; 76 L. J. P. C. 33; 96 L. T. 335; 10 Asp. M. L. C. 365; *sub nom.* S.S. ALBANO *v.* S.S. PARISIAN, 23 T. L. R. 344, P. C.

*Annotations :—As to* (1) **Consd.** The Roanoke, [1908] P. 231; The Olympic & H.M.S. Hawke, [1913] P. 214. *As to* (2) **Reld.** The Olympic & The Hawke (1914), 84 L. J. P. 49; The Gulf of Suez, [1921] P. 318.

**5936.** ——.]—GENERAL STEAM NAVIGATION CO. *v.* HEDLEY, THE VELOCITY, No. 5955, *post.*

**5937.** —— **Meaning of.**]—When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall, under Article 19 of the Regulations for Preventing Collisions at Sea, keep out of the way of the other, &, to enable her effectually to do so, it is provided by Article 21 that the other shall keep her course & speed; but the obligation, with reference to speed, incumbent upon the latter vessel, is subject to the qualification that if she is, at the material time, to the knowledge of the giving-way vessel, properly engaged in an ordinary nautical manœuvre, such as picking up a pilot, she will be entitled to carry it out, although the operation involves a reduction of speed.—THE ROANOKE, [1908] P. 231; 77 L. J. P. 115; 99 L. T. 78; 24 T. L. R. 526; 52 Sol. Jo. 426; 11 Asp. M. L. C. 253, C. A.

*Annotations :*—**Apld.** The Echo, [1917] P. 132. **Reld.** The Fancy, [1917] P. 13.

**5938.** —— ——.]—Two steamships were on crossing courses, & defts.' vessel neglected to keep out of the way. Pltfs.' vessel, which had twin screws, kept her course & speed, & at the last hard a-ported, blew one short blast, & kept her engines full ahead, as the best means of preventing her stem from striking. After the first blow the port engine was ordered to be stopped, but this was not done owing to the telegraph not being pulled sharply enough, & the port propeller holed the other vessel, which afterwards sank. The vessels cleared, & pltfs.' vessel continued on her course at full speed, as the collision seemed slight, & the visible damage to the other vessel was not serious, though those on board suspected that their port propeller might have done damage; the other vessel blew some long blasts on her whistle, & pltfs.' vessel inquired by flags whether she required assistance, to which there was no reply, & she proceeded :—*Held:* (1) defts.' vessel was alone to blame; (2) pltfs.' vessel was right in her manœuvre of hard a-porting, & to reverse then would have counteracted it & been wrong; (3) being bound to keep her course & speed under Article 21 of the Sea Regulations, 1897, she was not to blame under the circumstances, even if there might have been an error of judgment in keeping her speed too long; (4) she was not to blame for the mistake with the telegraph in the extreme peril of the collision; (5) that though under the circumstances her master had neglected to "stay by" within 1894 Act, s. 422, still the collision was entirely caused by the other vessel. —THE TRYST, [1909] P. 333; 79 L. J. P. 17; 101 L. T. 716; 11 Asp. M. L. C. 333.

**5939.** —— **Easing too soon.**]—THE HUNTSMAN, No. 5933, *ante.*

**5940.** ——.]—S.S. HAUGLAND *v.* S.S. KARAMEA, THE KARAMEA, No. 5934, *ante.*

**5941. Duty to stop & reverse.**]—The *A.* & *B.* were crossing within the meaning of Art. 16, & it was the duty of the *A.* to keep out of the way of the *B.*, but she did not do so. The *B.* when from a quarter to half a mile distant slackened her speed & continued with slackened speed to within 300 yards of the *A.*, & then stopped & reversed, but not in time to prevent a collision :—*Held:* the *B.* must be held, for not stopping & reversing sooner, to blame as well as the *A.* Arts. 16 & 18 are intended to be applicable according to the circumstances as they would present themselves to the mind of a prudent sailor, & come into force before the risk of collision is fixed & determined.

The consideration must always be in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable (BRETT, M.R.).

The *A.*, no doubt, ought to have acted, but she did not act. She was obstinately going on.

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**PART XII. SECT. 3, SUB-SECT. 5.—D. (e) iii.**

**5936 i.** *Duty to keep course.*]—Two vessels crossing, one on the starboard & the other on the port tack :—*Held:* the latter did not keep a proper look out & the former did not keep her course, but ported helm too late to avoid a collision.—*Re* THE SIGNE (1884), 10 Q. L. R. 28.—**CAN.**

**5936 ii.** ——.]—THE OCLAND *v.* THE REGULUS (1909), 6 E. L. R. 587.—**CAN.**

What ought the officer on board the *B.* to have done then? He had a right to think she would not continue her obstinacy (BRETT, M.R.).

Another rule of interpretation of these Regulations is, the object of them being to avoid risk of collision, that they are all applicable at a time when the risk of collision can be avoided, not that they are applicable when the risk of collision is already fixed & determined (BRETT, M.R.).

When you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time (BRETT, M.R.).

The basis of the Regulations for Preventing Collisions at Sea is that they are instructions to those in charge of ships as to their conduct; & the legislature has not thought it enough to say, "We will give you rules which shall prevent a collision"; they have gone further & said that "for the safety of navigation we will give you rules which shall prevent risk of collision" (BRETT, M.R.).—THE BERYL (1884), 9 P. D. 137; 53 L. J. P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. L. C. 321, C. A.

*Annotations:*—**Apld.** The John McIntyre (1884), 9 P. D. 135; Baker *v.* Theodore H. Rand (Owners), The Theodore H. Rand (1887), 12 App. Cas. 247. **Distd.** The Memnon (1888), 59 L. T. 289. **Apld.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670. **Consd.** S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556. **Refd.** The Dordogne (1884), 10 P. D. 6; The Stanmore (1885), 54 L. J. P. 89: Liverpool, Brazil & River Plate Steam Navigation Co. *v.* Campanhia Bahiana de Navegacio a Vapor, The Memnon (1889), 62 L. T. 84; The Oporto, [1897] P. 249; The Bellanoch, [1907] P. 170. **Mentd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**5942.** ——.]—S.S. HAUGLAND *v.* S.S. KARAMEA, THE KARAMEA, No. 5934, *ante*.

**5943. Duty to give way—Ship overtaking proceeding to cross.**]—The steamship *M.*, proceeding, at night, down the Bristol Channel, at a speed of seven & a half knots an hour, on a *W.* course, gradually overhauled the steamship *B. H.* . . . proceeding at seven knots an hour, on a W. ½ N. course . . . until she had drawn up on the starboard beam of the *B. H.* when the *M.* altered her course to W.S.W., & a collision occurred. The *M.* charged the *B. H.* with a breach of Article 16 of the Regulations for Preventing Collisions at Sea. The *B. H.* charged the *M.* with a breach of Article 20. The ct. found the *M.* alone to blame:—*Held:* obligation upon the *M.*, under Article 20, as the "overtaking" ship, to keep out of the way, continued, although she had ceased to be within the area lighted by the sternlight, & had advanced into a position in which she could see the side light of the "overtaken" ship.

It may be that, where there is no risk of collision at the time, if, for example, the vessel comes within sight of a side light at a considerable distance, the "crossing" rule may come into force (JEUNE, P.).—THE MOLIÈRE, [1893] P. 217; 62 L. J. P. 102; 69 L. T. 263; 7 Asp. M. L. C. 364; 1 R. 639.

**5944. —— Last of three warships on crossing course — Following vessel in front.**] — THE MELAMPUS (1903), cited in Halsbury's Laws of England, Vol. XXVI. at p. 449.

**5945.** ——.]—S.S. ALBANO *v.* ALLAN LINE S.S. CO., LTD., UNION DAMPFSCHIFFSRHEDEREI ACT. *v.* S.S. PARISIAN, No. 5935, *ante*.

**5946.** ——.]—Two steam vessels approaching one another at a combined speed of twenty knots, on nearly opposite courses, were "crossing" vessels within the meaning of Article 19 of the Regulations for Preventing Collisions at Sea, & the vessel having the other on her own starboard side, & therefore bound to give way, had just crossed the other's bows & reached, at a very short distance ahead of the other, a position of safety, green to green, when she suddenly ported. Those in charge of the vessel bound to keep her course & speed, seeing the masthead lights of the giving-way vessel coming into line, stopped & reversed; but her stem struck the port side amidships of the giving-way vessel and sank her:—*Held:* the giving-way vessel was alone to blame for improper porting, & the other vessel, finding herself in the position indicated by the note to Article 21, that is, so close that collision could not be avoided by the action of the giving-way vessel alone, had, as soon as the danger became apparent, taken such action as would best aid to avert collision.—THE KONING WILLEM II, [1908] P. 125; 77 L. J. P. 65; 98 L. T. 13; 10 Asp. M. L. C. 591, C. A.

*Annotation:*—**Mentd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

### iv. *To What Vessels Rule Applicable.*

**5947. Tug with tow.**]—THE MILO *v.* THE WILLIAM HUNTER (1866), Holt, Adm. 161.

**5948. Vessel lying to.**]—THE HELVETIA (1868), 3 Asp. M. L. C. 43, n., P. C.

*Annotations:*—**Distd.** The Broomfield (1905), 94 L. T. 109. **Refd.** The Jennie S. Barker, The Spindrift (1875), L. R. 4 A. & E. 456.

**5949.** ——.]—The *L.*, a steam trawler, was lying to, heading to the N., with engines stopped, waiting for the tide, when she was run into & damaged by the steamship *B.* which was proceeding on a course of W. ½ S. magnetic. Those on the *B.* saw the masthead & green lights of the *L.* on their port bow, & kept their course & speed until just before the collision, when they slowed, stopped, & reversed their engines. Those on the *L.* did nothing:—*Held:* Article 19 of the Collision Regulations applied, & the *L.* was alone to blame for the collision, as it was her duty to keep out of the way.—THE BROOMFIELD (1905), 94 L. T. 109; 10 Asp. M. L. C. 194, D. C.

**5950. Ship not under command.**]—S.S. MENDIP RANGE *v.* RADCLIFFE, No. 5555, *ante*.

**5951. Trawler with trawl down.**]—(1) A steam trawler fishing in the North Sea, with her trawl down over her starboard quarter, & exhibiting a black ball to indicate how she was engaged, was making from two & a half to three knots on a N.N.E. course, when she came into collision with a small sailing vessel which was making about six knots, & heading S.W. close hauled on the star-

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**5945 i.** *Duty to give way.*]—When vessels are crossing each other in opposite directions, & there is doubt of their going clear, the vessel upon the port or larboard tack is to bear to & heave about for the vessel upon the starboard tack.—*Re* THE NELSON VILLAGE (1837), 1 S. V. A. R. 156.—**CAN.**

**5945 ii.** ——.]—When a port tacked vessel has thrown herself into stays & become helpless, she ought, nevertheless, to execute any practicable manœuvre in order to get out of the way of a starboard tacked vessel; & a starboard tacked vessel when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision.—WILSON *v.* CANADA SHIPPING CO. (1877), 2 App. Cas. 389.—**CAN.**

**5945 iii.** ——.]—R. *v.* THE HARLEM (1919), 59 S. C. R. 653; 52 D. L. R. 690.—**CAN.**

**5945 iv.** ——.]—BEUCKER *v.* ABERDEEN STEAM TRAWLING & FISHING CO., LTD., [1910] S. C. 655.—**SCOT.**

**q.** *Liability of crossing vessel.*]—*Re* THE BYTOWN (1850), 1 S. V. A. R. 278.—**CAN.**

**r.** —— *Unusual turn in crossing.*]—*Re* THE CRESCENT (1853), 1 S. V. A. R. 289.—**CAN.**

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (e) iv. & v.]*

board tack. Those in charge of the trawler seeing the sailing vessel heading for them thought that she wished to speak them, & when they realised that this was not so, it was too late to do anything. The sailing vessel, owing to having no lookout, failed to observe the trawler until close to:—*Held:* though the sailing vessel was to blame for having no lookout, the steam trawler was also to blame, for she might, by a small alteration of her course, have avoided the collision, & should, therefore, have acted under article 20 of the Regulations for Preventing Collisions at Sea, by which a steam vessel must keep out of the way of a sailing vessel.

(2) Not having any lookout was a distinct breach of the regulations (BUCKNALL, J.).—THE CRAIGELLACHIE, [1909] P. 1; 77 L. J. P. 145; 99 L. T. 252; 11 Asp. M. L. C. 103.

*Annotation:—As to* (1) **Overd.** The Grovehurst, [1910] P. 316.

**5952.** ——.] — Collision Regulations, 1907, Article 9, does not apply to a steam trawler with her trawl down & exhibiting the lights mentioned in Article 9 (*d*) (1), & it is the duty of steamships approaching her to keep out of her way.

Paramount authority is to be given to the paramount obligation to obey the rules of good seamanship (BUCKLEY, L.J.).—THE GROVEHURST, [1910] P. 316; 79 L. J. P. 124; 103 L. T. 239; 11 Asp. M. L. C. 440, C. A.

*Annotation:*—**Apld.** The Ragnhild, [1911] P. 254.

**5953.** ——.]—By Article 9 (*d*) 1, of the Regulations for Preventing Collisions at Sea, the exhibition of a triplex light is rendered compulsory on a steam vessel "engaged in trawling," & an intimation is thereby given to a crossing steam vessel that, as the trawler, by being incumbered, is unable to comply with Article 19 of same Regulations, & keep out of the way, the steam vessel must give way, but that the trawler will, under Article 21, keep her course & speed.

Where, therefore, a steam trawler was, as the ct. found, duly exhibiting the triplex light, & those in charge did not stop on seeing a crossing steam vessel causing imminent risk by suddenly porting when close to, & a collision occurred:—*Held:* the crossing steam vessel was alone to blame, for, in the circumstances, as a matter of seamanship, &, under the rules, as a matter of law, those in charge of the trawler were justified in keeping their course & speed.—THE RAGNHILD, [1911] P. 254; 81 L. J. P. 1; 105 L. T. 446; 12 Asp. M. L. C. 44.

**5954. Patrol ship speaking vessel.**] — Defts.' steamship *F.*, bound up the Bristol Channel, came into collision with pltfs.' patrol steamer *E.*, which was about to speak her & was exhibiting lights indicating that she was on patrol duty. The vessels were on crossing courses, & the *F.*, having the *E.* on her own starboard side, under Article 19 of the Regulations for Preventing Collisions at Sea, had the duty of keeping out of the way. It was contended on behalf of the *F.* that in the special circumstances, the object being not to keep out of the way but to come within hailing distance, Article 19 did not apply, & that the case was governed solely by Article 29 (the "good seamanship" rule):—*Held:* (1) Article 19 applied, & in failing to take proper steps to keep clear of the *E.* the *F.* was to blame; (2) the *E.* as the "keep course & speed" vessel was also to blame for altering her course & speed; (3) the blame must be distributed in the proportion of three-fourths to the *F.* & one-fourth to the *E.*—THE FANCY, [1917] P. 13; 86 L. J. P. 38; 116 L. T. 224; 33 T. L. R. 153; 13 Asp. M. L. C. 603.

*v. Narrow Channels and Particular Places.*

**5955. Navigating rivers—Rounding bend.**]—In inferring the intended movements of a vessel approaching from a contrary direction, the relative position of the two vessels when they first come in sight of each other must not alone be regarded; other circumstances, such as the bend of the river, or the necessity of avoiding another vessel, which may occasion the apparent alteration of course, must be considered. By 25 & 26 Vict. c. 63, vessels navigating narrow channels are at liberty to go on whichever side they please, taking care to observe the regulations for preventing collision. A steam vessel coming up the river Thames came in sight of another steam vessel proceeding down the river at the time she was rounding a bend of the river, & for that purpose had placed her head in such a direction that, unless her course was changed, the steamers would, if the former kept her course, cross each other so as to involve risk of collision; whereupon the steamer coming up the river, having the other on her starboard side, changed her course so as to keep out of the way, if the other steamer followed the direction in which her head was turned; the latter not doing so, but pursuing her intention of rounding the bend of the river, the two steamers came in collision. A suit having been instituted against the steamer rounding the bend of the river:—*Held:* (1) Article 14 did not, in the circumstances, apply, & pltfs.' steamer was not justified by it; (2) the steamer sued was acting in conformity with Article 18 which directs, that where by the Steering & Sailing Rules "one of the two ships is to keep out of the way, the other shall keep her course," & the steamer sued was not in any way to blame.

(3) It was admitted on both sides, that this was not a case of two steam vessels meeting end on, or nearly end on, so as to require each of them to put the helm to port in obedience to the Article 13 of the Regulations (LORD CHELMSFORD).—GENERAL STEAM NAVIGATION CO. *v.* HEDLEY, THE VELOCITY (1869), L. R. 3 P. C. 44; 6 Moo. P. C. C. N. S. 263; 39 L. J. Adm. 20; 21 L. T. 686; 18 W. R. 264; 3 Mar. L. C. 308; 16 E. R. 725, P. C.

*Annotations:—As to* (1) **Consd.** Esk (Owners) *v.* Niord (Owners) (1870), L. R. 3 P. C. 436. **Folld.** Malcomson *v.* General Steam Navigation Co., The Ranger & The Cologne (1872), L. R. 4 P. C. 519. *As to* (2) **Consd.** The Roanoke, [1908] P. 231. *Generally,* **Consd.** General Steam Navigation Co. *v.* Oceano (Owners) (1878), 3 P. D. 60. **Refd.** The Franconia (1876), 2 P. D. 8; The Bywell Castle (1879), 41 L. T. 747; S.S. Normandie *v.* S.S. Pekin, [1897] A. C. 532; The Carlotta, [1899] P. 223; The Anselm (1907), 76 L. J. P. 54; The Olympic & H.M.S. Hawke (1914), 84 L. J. P. 49; The Echo, [1917] P. 132.

**5956.** —— ——.]—It is the general practice for steam vessels going down the river Thames to keep on the north side. If, therefore, a vessel rounding a bend on the north side, under a port helm, on her way up the river, sees the red light of one rounding the same bend on her way down, over her starboard bow, & nearer the north side than she is herself, she is not justified in supposing that the vessel coming down will cross her north & pass her on her port side. Vessels under these circumstances are not crossing vessels within Article 14 of the Steering & Sailing Rules.—MALCOMSON *v.* GENERAL STEAM NAVIGATION CO., THE RANGER & THE COLOGNE (1872), L. R. 4 P. C. 519; 9 Moo. P. C. C. N. S. 352; 27 L. T. 769; 21 W. R. 273; 1 Asp. M. L. C. 484; 17 E. R. 546, P. C.

*Annotations:*—**Refd.** General Steam Navigation Co. *v.* Oceano (Owners) (1878), 3 P. D. 60; The Winstanley,

[1896] P. 297; S.S. Normandie *v.* S.S. Pekin, [1897] A. C. 532; The Carlotta, [1899] P. 223; The Olympic & H.M.S. Hawke, [1913] P. 214.

**5957.** —— ——.]—The crossing of vessels "recrossing so as to involve risk of collision," & the consideration which arise in regard to vessels in the open sea are not the same as those which apply to the reaches of a winding river. Whether or not vessels are "crossing vessels" in a river depends on their presumable courses, & the question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, & this greatly depends upon the nature of the locality where she is at that moment.—NORMANDIE (OWNERS OF NORWEGIAN S.S.) *v.* PEKIN (OWNERS OF BRITISH S.S.), THE PEKIN, [1897] A. C. 532; 66 L. J. P. C. 97; 77 L. T. 443; 13 T. L. R. 487; 8 Asp. M. L. C. 367, P. C.

*Annotations* —**Apld.** S.S. Albano *v.* Allan Line S.S. Co., Union Dampfschiffsrhederei Act. *v.* S.S. Parisian, [1907] A. C. 193. **Refd.** S.S. Olympic *v.* Blunt, S.S. Olympic *v.* Lord High Admiral of United Kingdom (1914), 112 L. T. 49.

**5958.** —— ——.]—A steamship going down the river Elbe, & seeing the three lights of a steam tug ahead or a little on her port bow, ported to give more room, thereby bringing herself well over to her proper starboard side of the channel; but the tug starboarded & got on to the starboard bow, whereupon the steamship slightly starboarded & steadied, bringing the vessels green to green at half to three-quarters of a mile & about a point & a half on the starboard bow. The tug then ported back, & whilst crossing the bows of the steamship, was sunk in collision. The tug was found alone to blame for wrongful manœuvring without helm signals:—*Held:* the steamship was also to blame, for when those in charge saw that, though they had starboarded & steadied, the green light of the tug did not broaden, but was, for an appreciable time, getting finer on their starboard bow, they ought to have realised that there was "risk of collision" within the meaning of the preliminary Article to the Steering & Sailing Rules of the Regulations for Preventing Collisions at Sea, & they should, therefore, as a matter of seamanship under Article 29, have at once stopped & reversed.—THE CITY OF BERLIN, [1908] P. 110; 77 L. J. P. 76; 98 L. T. 298; 11 Asp. M. L. C. 4, C. A.

*Annotation*:—**Mentd.** R. *v.* L. G. Board, *Ex p.* Arlidge (1913), 11 L. G. R. 1186.

**5959. Narrow channels—Turning ship—In Bosphorus.**]—CHITTAGONG (OWNERS) *v.* KOSTROMA (OWNERS), [1901] A. C. 597; 70 L. J. P. C. 121; 85 L. T. 430; 9 Asp. M. L. C. 252, P. C.

**5960.** —— **Not giving enough room.**] — A warship, the *Hawke*, & a large Atlantic liner, the *Olympic*, approaching each other on crossing & converging courses in the Solent, off the Isle of Wight, came into collision:—*Held:* the real cause of collision was that the *Olympic*, having the *Hawke* on her starboard hand & the consequent duty to keep clear, took too wide a sweep round the West Brambles Buoy, & having plenty of sea room failed to avail herself of it & keep clear of the *Hawke* as she could & ought to have done.—OLYMPIC (OWNERS) *v.* BLUNT, OLYMPIC (OWNERS) *v.* ADMIRALTY COMRS., [1915] A. C. 385; 84 L. J. P. 49; 112 L. T. 49; 31 T. L. R. 54; 12 Asp. M. L. C. 580, H. L.; *affg.* S. C. *sub nom.* THE OLYMPIC & H.M.S. HAWKE, [1913] P. 214.

*Annotations*:—**Refd.** S.S. Orduna *v.* Shipping Controller, [1921] 1 A. C. 250. **Mentd.** Nash *v.* Rochford R. D. C., [1917] 1 K. B. 384.

**5961. Vessel entering or leaving dock.**]—THE ST. AUDRIES, No. 6140, *post*.

**5962.** ——.]—A collision occurred in the river Mersey, about off the North end of the Liverpool landing stage, between a steamship which was proceeding down, without steam up, in tow of two tugs at a distance of about one-third of the river from the landing stage, & another steamer which had been lying just before the collision in the Prince's Half-tide Dock entrance, & which came out into the river during a strong flood tide at full speed under hard aport helm on the starboard side of the first steamship:—*Held:* the crossing rule, Article 19 of the Sea Regulations, 1897, as introduced by Article 1 of the Mersey Regulations, did not apply so as to bind the first steamship to keep out of the way of the other.—THE SUNLIGHT, [1904] P. 100; 73 L. J. P. 25; 90 L. T. 32; 9 Asp. M. L. C. 509.

*Annotations*:—**Consd.** The Llanelly, [1914] P. 40. **Refd.** The Gulf of Suez (1921), 125 L. T. 653.

**5963.** ——.]—Pltfs.' steamship, bound to Barry Roads, Bristol Channel, for orders, passed the signal station without receiving them, &, proceeding on in an Easterly direction towards Barry Dock, came into collision with defts.' steamship, passing out in a Southerly direction from between the breakwaters:—*Held:* defts.' vessel was not, in the circumstances, to blame, for, assuming the crossing rule to apply, a departure from that rule was justified by Article 27 in order to avoid immediate danger, as, considering the narrowness of the entrance, the shallowness of the water, the set of the tide, & the position of the breakwaters, reversing sooner than she did might have put her ashore.

*Qu.:* whether the Regulations for Preventing Collisions at Sea apply to the case of a vessel coming out of dock in circumstances similar to those under which defts.' vessel was placed.—THE HAZELMERE, [1911] P. 69; 80 L. J. P. 25; 103 L. T. 890; 11 Asp. M. L. C. 536, C. A.

**5964.** ——.]—The Regulations for Preventing Collisions at Sea apply in the Mersey but where one of two steam vessels "crossing so as to involve risk of collision" is a vessel coming out of dock, it is impossible to apply Article 19 before a certain time in the course of her manœuvres & the two vessels must navigate in accordance with the Rules of good Seamanship, Article 29: *Semble:* it depends on the distance the one vessel has got from the dock & on the distance the other vessel is from her when there becomes "risk of collision" whether Article 19 is applicable or not.—THE LLANELLY, [1914] P. 40; 83 L. J. P. 37; 110 L. T. 269; 30 T. L. R. 154; 12 Asp. M. L. C. 485, D. C.

*Annotation*:—**Refd.** The Gulf of Suez (1921), 125 L. T. 653.

**5965.** ——.]—Regulations applicable to the Prevention of Collisions at Sea apply in the Mersey, but where one of two steam vessels "crossing so as to involve risk of collision" is a vessel proceeding out of dock, Article 19 of the Regulations for Preventing Collisions at Sea, 1897, cannot be applied before a certain time in the course of the vessel's manœuvres, & the two vessels must

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**5960 1.** *Narrow channels—Not giving enough room.*]—CAMERONIA (OWNERS) *v.* HAUK (OWNERS), [1927] S. C. 518.—**SCOT.**

*Rounding bend.*] — Two vessels will not come within the crossing rule, whatever their bearings from one another, while rounding a bend in a narrow channel, when there is no indication that either vessel is in fact crossing the channel & when they are keeping on opposite sides of the channel or one is keeping in mid-channel, so that the vessels on the courses to be reasonably attributed to them will pass clear of each other.—R. *v.* DESPATCH, BORDER LINE TRANSPORTATION CO. *v.* MCDOUGAL (1916), 34 W. L. R. 123; 10 W. W. R. 230.—**CAN.**

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (e) v., ..., vii. & viii., &* [illegible]

adhere to the Rules of Good Seamanship provided for in Article 29. The distance that has been covered by the vessel proceeding from the dock & the distance at which the other vessel is from her when the " risk of collision " become apparent are to be taken into account in considering whether Article 19 is applicable or not.—THE GULF OF SUEZ (1920), 37 T. L. R. 60; *on appeal*, [1921] P. 318, C. A.

**5966. Approaching pilot station.**]—Two vessels bearing down at the same time from different directions upon a well-known pilot station to take pilots on board are to be treated as crossing vessels within Article 14 of the Regulations for Preventing Collisions at Sea, if their courses, if continued, would intersect; & the fact of their seeking pilots at the same place is not such a special circumstance within Article 19 as will take them out of the operation of the Rule requiring that the ship which has the other on her own starboard hand shall keep out of the way of the other.—THE ADA, THE SAPPHO (1873), 28 L. T. 825; 2 Asp. M. L. C. 4, P. C.

*Annotations:*—**Apld.** S.S. Albano *v.* Allan Line S.S. Co., Union Dampfschiffsrhederei Act. *v.* S.S. Parisian, [1907] A. C. 193; The Roanoke, [1908] P. 231.

vi. *Fog.*

**5967. General rule.**]—The *C.* while proceeding at the rate of about three knots an hour in a thick fog, heard the whistle of another steamship about four points on the port bow. The *C.* kept her course & speed, & the whistle of the other vessel was heard to be apparently broadening. Shortly afterwards the other steamship was seen close to & bearing five or six points on the port bow of the *C.* The engines of the *C.* were then at once stopped & reversed, but a collision occurred:—*Held:* the *C.* was in part to blame for the collision for having failed, in accordance with Rule 16, Regulations for Preventing Collisions, when the other ship's whistle was first heard, to stop her engines, & afterwards to navigate with caution until all danger of collision was over, & was not justified in continuing her speed under Article 21. Although Article 21 of the Regulations for Preventing Collisions at Sea directing a ship to keep her course & speed is a general rule, it is qualified by Article 16 & hence where two steamships in a fog are crossing, each ought to stop her engines if she hears the whistle of the other forward of her beam.—THE CATHAY (1899), 81 L. T. 391; 9 Asp. M. L. C. 35.

*Annotation:*—**Refd.** The King (1911), 27 T. L. R. 524.

**5968.** ——.]—THE KING, No. 5636, *ante.*

vii. *Sailing Ships.*

**5969. General statement of rule.**]—THE DAPPER *v.* THE LADY NORMANBY (1865), 14 L. T. 895; 2 Mar. L. C. 384.

**5970.** ——.]—THE SUPERB *v.* THE FLORENCE BRAGINTON (1865), 2 Mar. L. C. 237.

**5971. Duty of vessel on port side.**]—Collision by two sailing vessels crossing & having the wind on opposite sides:—*Held:* by the 12th Article of the Rules in the schedule to the Order in Council of Jan. 9, 1863, passed in pursuance of 25 & 26 Vict. c. 63, s. 25, the vessel on the port side was bound to get out of the way of the vessel on the starboard side, unless she had the wind free.—DEAN *v.* MARK, THE CONSTITUTION (1864), 2 Moo. P. C. C. N. S. 453; Brown. & Lush. 324; 10 L. T. 894; 10 Jur. N. S. 831; 15 E. R. 972, P. C.

**5972. Duty of vessel sailing free.**]—Where two ships are crossing each other, the one sailing free & the other closehauled, it is the duty of the ship sailing free to give way on one side or other to the ship that is closehauled; & where the one ship is to keep out of the way, the other is to keep her course; subject to any special circumstances in each particular case which may render a departure from the above rules necessary in order to avoid immediate danger.—THE BOANERGES & THE ANGLO INDIAN (1865), 2 Mar. L. C. 239.

**5973.** ——.]—Article 12 of the Sailing Rules, 25 & 26 Vict. c. 63, s. 25, provides that, " When two sailing ships are crossing, so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is closehauled & the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward." Article 18: " Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following Article." Article 19: " In obeying & construing these rules, due regard must be had to all dangers of navigation, & due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger."

A collision took place between two sailing vessels crossing, the wind being about S.S.E., & the vessel *C.* steering about N.N.E., the vessel *S.* about W. by S.; the vessel *C.* did not " keep out of the way," but kept her course, & the vessel *S.*, instead of keeping her course, ported her helm, alleging " immediate danger " as a reason for so doing:—*Held:* both vessels were to blame—the vessel *C.* for not having kept out of the way, in accordance with the provision in the last clause of Article 12; & the vessel *S.* for not having kept her course, but having improperly ported her helm, there being no evidence of " immediate danger " to justify a departure from Article 18.—THE SPRING (1866), L. R. 1 A. & E. 99; 12 Jur. N. S. 788; 14 W. R. 975.

**5974. Duty to keep course where other to give way.**]—THE SPRING, No. 5973, *ante.*

**5975. Duty of vessel hove to on port tack.**]—A sailing vessel hove to on the port tack is bound to keep out of the way of a crossing vessel under sail closehauled on the starboard tack.—THE ROSALIE (1880), 5 P. D. 245; 50 L. J. P. 3; 44 L. T. 32; 4 Asp. M. L. C. 384.

*Annotation:*—**Refd.** The Olympic & H.M.S. Hawke, [1913] P. 214.

viii. *Warships.*

**5976. Duty of ordinary vessel to keep clear.**]—THE CAMBRIDGE (1903), cited in [1911] P. at p. 146, C. A.

*Annotation:*—**Consd.** The Hero, [1911] P. 128.

**5977.** ——.]—It is improper navigation for a vessel crossing a fleet of her Majesty's ships to keep her course & speed, although a single ship proceeding in the same course as the fleet would, under Article 19 of the Regulations for Preventing Collisions at Sea, be bound to keep out of the way of the crossing vessel. The fact of meeting such a fleet is a " special circumstance " within Articles 27 & 29 of the Regulations.—H.M.S. SANS PAREIL, [1900] P. 267; 69 L. J. P. 127; 82 L. T. 606; 16 T. L. R. 390; 9 Asp. M. L. C. 78, C. A.

*Annotations:*—**Consd.** The Sutlej (1904), 20 T. L. R. 509;

The Hero, [1911] P. 128; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Refd.** The Anselm, [1907] P. 151; The Etna, [1908] P. 269; The Olympic & H.M.S. Hawke, [1913] P. 214; H.M.S. King Alfred, [1914] P. 84; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129.

**5978.** ——.] — A flotilla of torpedo boat destroyers, proceeding down the English Channel in two lines of close formation, sighted the masthead & red lights of a merchant steam vessel drawing across the head of the starboard, & approaching the port, division. When in the position of a crossing vessel with regard to the second destroyer of the port division, the officer in charge of that destroyer kept his station until danger was imminent, & then, putting his engines full speed ahead, tried by hard-a-porting to throw his starboard quarter clear but failed to get across the bows of the merchant vessel. In an action of damage by collision:—*Held:* both ships were to blame, the merchant vessel for bad look out, whereby she got in between the two lines of the flotilla, without regard to the Board of Trade notice warning single ships to keep out of the way of a squadron of warships, & then persisted in maintaining her course & speed under Regulations for Preventing Collisions at Sea, Article 21, when she should have acted under article 27, & in the special circumstances, passed down between the two lines of the flotilla. The destroyer was also to blame, for, under the article of the King's Regulations equivalent to article 19 of the Regulations for Preventing Collisions at Sea, it was the duty of the officer in charge, having the merchant vessel on his own starboard side, to keep out of the way, & though he was required under the King's Regulations to keep his station & not change the course, except to avoid immediate danger, &, therefore, was entitled to a reasonable time to see what the merchant vessel would do, he had, in the circumstances, delayed action too long.—THE ETNA, [1908] P. 269; 77 L. J. P. 138; 98 L. T. 424; 24 T. L. R. 270; 11 Asp. M. L. C. 30.

*Annotation:*—**Refd.** The Hero, [1911] P. 128.

**5979.** ——.]—A Spanish steamship belonging to pltfs. was proceeding in the North Sea on a course N. 21° W., & a squadron of five British cruisers steering N. 27° E. were approaching abaft her port beam, three cruisers being in line & one smaller cruiser being on each side of the leading cruiser. The Board of Trade Notice, 1897, in effect warns single ships to keep out of the way of, & avoid passing through, a squadron of warships, but pltfs.' officers, being Spaniards, had not heard of this notice. The Spanish steamship hoisted the Spanish ensign in compliment to the cruiser, & kept her course & speed until just before the collision, purporting to act under Article 21 of the Sea Regulations; & the second cruiser in line came into collision with her, deft., the navigating officer in charge of the cruiser, being negligent among other respects in not manœuvring to keep out of the way until too late. The Spanish steamship was charged with negligence in not keeping out of the way of the squadron & in not obeying the Board of Trade Notice. Pltfs.' master & deft. both testified at the trial that by the regulations which applied it was the duty of the Spanish steamship to keep her course & speed, & of the cruiser to keep out of the way:—*Held:* in the circumstances the Spanish steamship was not negligent in keeping her course & speed under Article 21 of the Sea Regulations; as regards the Board of Trade Notice, pltfs.' officers being Spaniards & not having heard of the notice, were not negligent as regards it, & deft. knowing that the other vessel was Spanish, deft. was alone to blame.—H.M.S. KING ALFRED, [1914] P. 84; 83 L. J. P. 61; 109 L. T. 956; 30 T. L. R. 102; 12 Asp. M. L. C. 401.

### (*f*) *Risk of Collision between Steamer and Sailing Vessel.*

#### i. *Steamer Running Free.*

**5980. General rule.**]—The *Trident*, being a steamer, must of course be considered as a vessel sailing free, though the wind & tide are against her (DR. LUSHINGTON).—THE LORD SAUMAREZ (1848), 6 Notes of Cases, 600; 9 L. T. 811.

**5981.** ——.]—THE ISAAC ALLERTON (1848), 9 L. T. 811.

**5982.** ——.]—THE LONDON MERCHANT (1849), 9 L. T. 811.

**5983.** ——.]—The steamer knows her duty, she knows that she is to be considered a vessel having the wind perfectly free, & that it is her duty to get out of the way (DR. LUSHINGTON).—THE VIVID (1849), 7 Notes of Cases, 127; 9 L. T. 811.

**5984.** ——.]—THE KINGSTON-BY-SEA, No. 5985, *post*.

**5985. Steamer with merchant vessel in tow.**]—Defence of a vessel in a cause of damage, that from the proximity of the two vessels, & the fact of the damaging vessel missing stays in consequence of a sudden squall of wind, the collision was inevitable, not sustained.

*Semble:* if a vessel in close proximity to another vessel is put in stays & misses, it is the duty of the persons on board to square the mainyard & so let the vessel pay off.

It is true, a steamer is considered always to have the wind free; but it does not, in my opinion, follow, that a steamer having a merchant vessel in tow is always free. That will depend, I conceive, upon the state of the wind & weather, the direction in which the steamer is towing, & the nature of the impediments that she may meet with in her course. (*per* CUR.).—THE KINGSTON-BY-SEA (1849), 3 Wm. Rob. 152; 6 Notes of Cases, 651; 9 L. T. 811; 10 L. T. 242; 166 E. R. 920.

*Annotations:*—**Apld.** Maddox *v.* Fisher, The Independence (1861), 14 Moo. P. C. C. 103. **Refd.** The Milan (1861), Lush. 388; The Thuringia (1872), 41 L. J. Adm. 44.

#### ii. *Incumbered Steamer—Tug and Tow.*

**5986. Duty to give way to sailing vessel.**]—The vessel towed & the vessel towing are to be considered as one long steamer, for the conduct of which the vessel towed is responsible, & a vessel being so towed at night is bound to avoid other vessels.

It was her duty, being in fact a steamer, to get out of the way of another vessel that she was meeting (LORD CHELMSFORD).—STEVENS *v.* GOURLEY, THE CLEADON (1860), 14 Moo. P. C. C. 92; Lush. 158; 5 L. T. 694; 15 E. R. 240, P. C.

*Annotations:*—**Consd.** Maddox *v.* Fisher, The Independence (1861), 14 Moo. P. C. C. 103. **Distd.** Union S.S. Co. *v.* The Aracan, The American & The Syria (1874), L. R. 6 P. C. 127. **Consd.** The Devonian, [1901] P. 221. **Refd.** McCowan *v.* Bain, The Niobe, [1891] A. C. 401; The Englishman & The Australia, [1894] P. 239.

**5987.** ——.]—THE ARTHUR GORDON, THE INDEPENDENCE, No. 5912, *ante*.

**5988.** ——.]—A schooner, closehauled on the starboard tack at night, saw the starboard light & the two towing lights of a steam tug three points on her port bow about a mile off. The schooner kept her luff. The steam tug had a fully laden ship in tow, & was steaming against a head wind in the open sea. The steam tug kept her course until it was too late to get out of the way of the schooner, & the steam tug & the schooner came into collision:—*Held:* the schooner was right in holding her

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course, & the steam tug was alone to blame.—THE WARRIOR (1872), L. R. 3 A. & E. 553; 27 L. T. 101; 21 W. R. 82; 1 Asp. M. L. C. 400.

*Annotation:*—**Consd.** The American & The Syria (1874), 31 L. T. 42.

**5989.** ——.]—The steamship *A.* found at a foreign port the *S.*, a screw steamship, totally disabled in her machinery; both vessels belonged to the same owner. The captain of the *A.*, to protect his employers' interest & earn salvage from the owners of the cargo of *S.*, took the *S.* in tow, & towed her into the English Channel, & whilst so doing came into collision with a sailing ship close hauled on the starboard tack. The damage done by the *A.* caused the sailing ship to sink, but before she sank the *S.* ranged up alongside of her & came into contact with her. The *A.* first saw the green light of the ship at a distance of three quarters of a mile, & then, instead of slackening speed or starboarding her helm, attempted to cross the bows of the ship. The ship saw at two miles' distance the *A.* & *S.*, with a great length of hawser between them, & the red lights of both, & kept her course:—*Held:* (1) the *A.* was to blame for the collision; (2) having regard to the exceptional circumstances under which the towing was undertaken, the governing as well as the motive power being wholly with the *A.*, the *S.* was not liable to be condemned in damages occasioned by the collision. The *S.* cannot be deemed in intendment of law, to be one vessel with the *A.*, or liable for her negligence.

(3) [The regulations for preventing collisions at sea] direct that where the courses of two vessels involve risk of collision, the steamship shall keep out of the way of the sailing ship, & that the sailing ship shall keep her course, subject to due regard to dangers of navigation & to special circumstances rendering a departure from the rule necessary in order to avoid immediate danger (SIR R. P. COLLIER).—UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA (1874), L. R. 6 P. C. 127; 43 L. J. Adm. 30; 31 L. T. 42; 22 W. R. 927; 2 Asp. M. L. C. 350, P. C.

*Annotations:*—*As to* (2) **Consd.** The Englishman & The Australia, [1894] P. 239; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Expld.** The Ran, The Graygarth (1921), 126 L. T. 675. **Reid.** The Grovehurst (1910), 79 L. J. P. 124. *Generally*, **Reid.** The Niobe (1888), 13 P. D. 55.

**5990. Duty of sailing vessel to avoid collision.**]—THE JANE BACON, No. 5110, *ante*.

*iii. Duty of Steamship.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 20.

**5991. To give way.**]—In a cause of collision against a steam vessel, the ct., assisted by Trinity Masters, pronounced for damages & costs; holding that the steam vessel, being more under command, & manifestly having seen the other vessel, was to blame.—THE SHANNON (1828), 2 Hag. Adm. 173; 166 E. R. 208.

**5992.** ——.]—A steam vessel, proceeding at the rate of 9 knots an hour, in a dark night, meeting a sailing vessel, closehauled on the starboard tack, &, porting her helm, struck & sunk the sailing vessel, made responsible for the loss.

Giving way means . . . they were to give way by porting or starboarding the helm, as the case might require (DR. LUSHINGTON).—THE GAZELLE (1846), 2 Wm. Rob. 515; 5 Notes of Cases, 101; 8 L. T. O. S. 294; 10 Jur. 1065; 166 E. R. 850.

**5993.** ——.]—Collision between a steamer & a sailing vessel, the former held to be in fault, for not wearing in time.—THE OSMANLI (1850), 7 Notes of Cases, 507.

**5994.** ——.]—THE CLARENCE, No. 6407, *post*.

**5995.** ——.]—The galliot *A.* running up Channel sees the green light of steamer *S.* three or four points on her starboard bow, & starboards her helm; then she sees the red light appear & ports. A collision ensues; the stem of the *S.* coming in contact with the *A.*'s port midships:—*Held:* the *A.* was justified in starboarding when she saw the green light, & afterwards in porting when she saw the red light appear, & the mode of the collision showed that the *S.* either starboarded her helm, or ported too late, or did not port at all.—THE SYLPH (1857), Sw. 233; 166 E. R. 1112.

**5996.** ——.]—THE IMOGENE *v.* THE FALCON (1857), 5 L. T. 462.

**5997.** ——.]—THE AUSPICIOUS *v.* THE UNDINE (1857), 5 L. T. 462.

**5998.** ——.]—THE SMUGGLER *v.* THE TEUTONIA (1858), 5 L. T. 462.

**5999.** ——.]—THE LEANDER *v.* THE NORTH AMERICAN (1858), 5 L. T. 462, P. C.

**6000.** ——.]—THE TARSA *v.* THE IRONMASTER (1858), 5 L. T. 462.

**6001.** ——.]—A foreign steamer met at night in the river Thames, two brigs advancing in parallel courses from fifty to sixty fathoms apart from each other. The steamer, instead of porting her helm, attempted to pass between them, & thereby caused a collision, by which one of the brigs was lost. The

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**5991 i.** *To give way.*]—When a steamer & a sailing vessel meet, it is the duty of the steamer to give way; & if her master is in doubt as to the position or course of the sailing vessel, he should slacken speed; though it is the duty of the sailing vessel then to keep her course, that does not necessarily mean to keep the same direction by compass.—THE EASBY (1880), 6 V. L. R. (Adm.) 1.—**AUS.**

**5991 ii.** ——.]—*Re* THE ARACIAN, *Re* THE ALMA (1862), 12 L. C. R. 238; 2 S. V. A. R. 72.—**CAN.**

**5991 iii.** ——.]—*Re* THE CHURCHILL, *Re* THE NORMANTON (1876), 2 Q. L. R. 134.—**CAN.**

**5991 iv.** ——.]—*Re* THE NORMA (1875), 1 Q. L. R. 211.—**CAN.**

**5991 v.** ——.]—A steam tug proceeding down the river St. Lawrence met two barques, & in passing between them came into collision with one which ported her helm:—*Held:* both were in fault, the tug for not keeping out of the way, & the barque for not keeping her course.—*Re* THE RANGER (1876), 3 Q. L. R. 21.—**CAN.**

**5991 vi.** ——.]—Where a steamer, shortly after leaving her moorings, came into collision with a sail boat, towing timber:—*Held:* in support of her plea of inevitable accident, the steamer must show an overruling force or *vis major* which could not have been avoided by waiting at her mooring berth until such time as the promoter's boat had passed; & also that after she had left her berth it was impossible for her to keep out of the way of the boat.—*Re* THE UNION (1876), 2 Q. L. R. 186.—**CAN.**

**5991 vii.** ——.]—THE LAKE CHAMPLAIN (1878), 4 Q. L. R. 337.—**CAN.**

**5991 viii.** ——.]—THE CYBELE (1879), 5 Q. L. R. 262.—**CAN.**

**5991 ix.** ——.]—Where a sailing vessel & a steamship were meeting nearly "end on" & the former ported while the latter starboarded:—*Held:* the former was in fault for not keeping her course & the latter for not stopping or slackening her speed.—THE BOTHAL & THE NELSON (1882), 8 Q. L. R. 163.—**CAN.**

**5991 x.** ——.]—COLLIER *v.* WRIGHT (1895), 24 S. C. R. 714.—**CAN.**

**5991 xi.** ——.]—BRINE *v.* THE TIBER (1900), 6 Exch. C. R. 402.—**CAN.**

**5991 xii.** ——.]—BUTT *v.* DARTMOUTH FERRY COMMISSION (N. S.) (1906), 1 E. L. R. 139—**CAN.**

**5991 xiii.** ——.]—SMITH *v.* MACKENZIE (Que.) (1918), 17 Exch. C. R. 493.—**CAN.**

**5991 xiv.** ——.]—THE IRON DUKE (1863), Holt, Adm. 227.—**IR.**

**5991 xv.** ——.]—A steamer, so soon as the risk of collision with a sailing vessel commences, is bound to keep out of the way by throwing off steam or reversing her engines. Then arises the collateral obligation of the sailing vessel to keep her course, & she can be excused from departure from it only by showing that she did so to avoid imminent danger.—THE GENERAL LEE (1869), 3 I. L. T. Jo. 226.—**IR.**

teamer held to blame.—NORTH GERMAN LLOYD .S. CO. *v.* ELDER, THE SCHWALBE (1861), 14 Moo. ». C. C. 241; Lush. 239; 1 Mar. L. C. 42; 15 L. R. 295, P. C.

*Annotations:*—**Refd.** Trask *v.* Dowle, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 260; The Iona (1867), L. R. 1 P. C. 426; The Velasquez (1867), L. R. 1 P. C. 494; The Livia (1872), 25 L. T. 887; Oakley *v.* Speedy (1879), 40 L. T. 881; The Benue, [1916] 1 P. 88.

**6002.** ——.]—PAULINE CONSTANCE ELEONORE OWNERS, ETC.) *v.* HAMBURGH AMERICAN STEAM ›ACKET CO., THE GERMANIA (OWNERS), THE ›ERMANIA, No. 5214, *ante*.

**6003.** ——.]—In a case where a collision occurred ›etween a sailing vessel & a steam tug hove to with ›er engines stopped:—*Held:* it was the duty of ›he steam tug to have kept out of the way of the ›ailing vessel.—THE JENNIE S. BARKER, THE SPINDRIFT (1875), L. R. 4 A. & E. 456; 44 L. J. Adm. 20; 33 L. T. 318; 3 Asp. M. L. C. 42.

*Annotation:*—**Distd.** The Gladys, [1910] P. 13.

**6004. —— Right to assume correct behaviour of sailing vessel.**]—A steam vessel going down channel on a dark night, on seeing the lights of a ship ahead, ported her helm, but did not put it hard-a-port in the first instance:—*Held:* she did all that she was called upon to do, having reason to expect that the ship would either have kept her course or put her helm to port.—THE SAPPHO (1845), 9 Jur. 560.

### iv. *Duty of Sailing Vessel.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 20.

**6005. Duty to keep course.**]—She [the steamship] was bound to show she took all the proper measures in order to avoid the collision; but if it should appear that she did not take the proper measures to avoid the collision, & that also the sailing vessel was to blame for altering her course, it signified not whether she ported or starboarded but that she altered her course, & thereby contributed to the collision (DR. LUSHINGTON).—THE UNA *v.* THE THOMAS LEA (1866), Holt, Adm. 240; 14 L. T. 834; 2 Mar. L. C. 389.

**6006. —— Unless departure necessary to avoid danger.**]—Collision in the Atlantic ocean at midnight between *G.* a steamship of unusual size & tonnage, & *J.* a sailing vessel.

*G.* going at a rate of between 12 & 13 knots an hour. *J.* sailing closehauled on the "port tack," & being two or three miles distant, when she first sighted *G.*, instead of keeping her course, ported her helm:—*Held:* (1) under Article 18 of the Sailing Regulations, issued in pursuance of 25 & 26 Vict. c. 63, it was the duty of *J.* to have kept her course without alteration, unless, as provided by Article 19, the danger of collision was so imminent when *G.* was sighted as to render a departure from Article 18 necessary to avoid danger, & she was, therefore, partly to blame for the collision, having contributed to it by porting; (2) *G.* was also to blame, as, even if *J.* had kept her course, from the rate of speed *G.* was advancing a collision was inevitable, it being, under Article 15 of the Sailing Regulations, the duty of a steamer meeting a sailing vessel to reverse her engines & slacken her speed in sufficient time, so as, having regard to the state of the weather, as far as possible, to avoid a collision.—GREAT SHIP CO. *v.* SHARPLES, THE GREAT EASTERN (1864), 3 Moo. P. C. C. N. S. 31; Brown. & Lush. 287; Holt, Adm. 167; 11 L. T. 5; 2 Mar. L. C. 97; 16 E. R. 12, P. C.

*Annotation:*—*As to* (1) **Refd.** The Agra & Elizabeth Jenkins (1867), L. R. 1 P. C. 501.

**6007.** —— ——.] — A collision took place between a sailing ship & a steam ship on a dark night, the wind S.S.E., the sailing ship steering N.E. by E., the steamship S.S.W., so that the lights of the sailing ship were seen about four points on the starboard bow. The sailing ship instead of keeping her course, ported her helm; thereupon the helm of the steam ship was put hard a-port, & her engines were reversed:—*Held:* the steam ship was solely to blame for the collision.—THE LADY JOCELYN (1866), 12 Jur. N. S. 965.

**6008. —— As against trawler under command.**]—THE TWEEDSDALE, No. 6013, *post*.

**6009.** —— ——.]—THE UPTON CASTLE, No. 5581, *ante*.

**6010. —— Except in exceptional circumstances.**]—The fact that a steamship is neglecting to keep out of the way of a sailing ship does not make it the duty of the sailing ship to take measures to avoid a collision, except possibly in very exceptional circumstances, because it is possible for a steamship to act for a sailing ship up to almost the last moment, & any action on the part of the sailing ship might be liable to increase risk of collision.

The *H.* was approaching the sailing ship *S.* for several minutes, with her masthead & red lights open, on the starboard bow of the *S.* The *S.* kept her course till a collision was imminent, & then hard-a-ported, but the *H.* with her port side struck the stem & port bow of the *S.* The *H.* admitted that she was to blame, but contended that the *S.* was also to blame for breach of Article 23 of the Regulations in not manœuvring for the *H.* after she saw the *H.* persisting in doing nothing to keep out of her way:—*Held:* the *S.* was not to blame, as the circumstances were not such as to require the *S.* to alter her course & manœuvre for the *H.*—THE HIGHGATE (1890), 62 L. T. 841; 6 Asp. M. L. C. 512.

**6011. —— Sailing ship passing through column of warships.**]—A squadron of warships were steaming N.N.W. in two columns, each column consisting of four ships. Each ship was two cables distant from the ship next ahead of her measured from foremast to foremast. The wind was southerly. A sailing vessel was seen on the port bow approaching the port column of the squadron, & showing her green light. The second & third ships in the port column ported in order to pass clear ahead of the sailing vessel, & as the third ship ported the fourth ship in the column—the *Sutlej*—starboarded in order to pass under the stern of the sailing vessel, which she would have done if the sailing vessel had kept her course. Just as the *Sutlej* began to answer her starboard helm, the sailing vessel

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**6004 i.** —— *Right to assume correct behaviour of sailing vessel.*]—When the master of a steamer approaching a sailing vessel in a fairway observes a sudden change in the course of the latter without any apparent reason, he has a right to suppose that the alteration is made for some reason, & that it will be adhered to; he is then, on that supposition to take such steps as may be necessary to get out of way; he is not bound to wait.—THE EDEN (1880), 6 V. L. R. (Adm.) 8.—**AUS.**

**PART XII. SECT. 3, SUB-SECT. 5.—D. (I) iv.**

**6005 i.** *Duty to keep course.*]—A steam tug proceeding down the river St. Lawrence met two barques, & in passing between them came into collision with one which ported her helm:—*Held:* both were in fault, the tug for not keeping out of the way, & the barque for not keeping her course.—*Re* THE RANGER (1876), 3 Q. L. R. 21.—**CAN.**

**6005 ii.** ——.]—THE GENERAL LEE (1869), 19 L. T. 750.—**IR.**

**6006 i.** —— *Unless departure necessary to avoid danger.*]—*Re* THE CHURCHILL, THE NORMANTON (1876), 2 Q. L. R. 134.—**CAN.**

**a.** —— *Right of sailing vessel to go about when not compelled to.*]—A sailing ship & a steamer were so close together as to involve risk of collision. The sailing ship undertook to go about without being compelled to & without any good reason to justify the manœuvre, & by so doing embar-

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (f) iv., & (g).]*

suddenly came up into the wind & altered her course eight points, exposing her red light to the *Sutlej*. The latter thereupon put helm hard-a-port & reversed her starboard engine, but immediately afterwards she came into collision with the sailing vessel:—*Held:* the *Sutlej* acted rightly in starboarding her helm, as she would thereby have passed clear of the sailing vessel if the latter had kept her course; having regard to the obligation under Article 597 of the King's Regulations as to ships in a squadron keeping station as much as possible, she did not act wrongly in not starboarding sooner; &, therefore, the *Sutlej* was not to blame for the collision.—H.M.S. SUTLEJ (1905), 21 T. L. R. 325, C. A.

**6012. To keep out of way.**]—THE SAUCY LASS *v.* THE BOLDERAA (1866), Holt, Adm. 205.

**6013. —— Of trawler with trawl down—Showing proper lights.**]—Pltf.'s steam trawler, above 20 tons register, while fishing with her trawl down in the night & going at the rate of 1½ knots an hour, came into collision with defts.' sailing ship. The trawler was carrying a lantern in front of her foremast head, showing a white, green, & red light, & about 6 or 7 feet below it a white light, according to Article 10 for Preventing Collisions at Sea, as amended by an Order in Council of Dec. 30, 1884. The trawler did not attempt to get out of the way of the sailing ship, so as to comply with Article 17, by which a steamship is to keep out of the way of a sailing ship:—*Held:* the trawler was not to blame for the collision; Article 17 did not apply, inasmuch as there were "special circumstances" within the meaning of Article 23 which authorised a departure from Article 17; by carrying the lights which she did, she apprised other vessels that she was not able to get out of the way, for such lights as she carried were the regular lights of steam vessels engaged in trawling which are not bound by the requirements of Article 17.

She is . . . a steam trawler; she had her trawl down. . . . There would be a difficulty in the way of her reversing, having regard to the fact that her trawl was down. . . . If a trawler has not only sufficient way on her to keep herself in command but also sufficient way to act with effect in altering her course for an approaching ship then . . . those in charge of her should act as the regulations require an unencumbered vessel to act (BUTT, J.). —THE TWEEDSDALE (1889), 14 P. D. 164; 58 L. J. P. 41; 61 L. T. 371; 37 W. R. 783; 6 Asp. M. L. C. 430.

*Annotations:*—**Apld.** The King's County (1904), 20 T. L. R. 202. **Folld.** The Upton Castle, [1906] P. 147. **Distd.** The Craigellachie, [1909] P. 1. **Apld.** The Gladys, [1910] P. 13; The Grovehurst, [1910] P. 316. **Consd.** The Pitgaveney, [1910] P. 215. **Reld.** The Ragnhild, [1911] P. 254.

**6014. —— ——.**]—THE KING'S COUNTY, No. 5480, *ante*.

**6015. —— —— Giving proper signals.**]—THE CRAIGELLACHIE, No. 5951, *ante*.

**6016. —— Of trawler shooting nets—Showing proper lights.**]—A sailing drifter & a steam drifter came into collision, at night, in the North Sea at a time when the sailing vessel, under reduced canvas owing to the heavy weather, & exhibiting the side lights for a vessel under way, was proceeding towards her fishing ground at the rate of about 4 knots, heading to the south-westward. The steam vessel, with her engines stopped, & moving through the water to the E.S.E. before the wind, under her mizzen, at something less than a knot, was engaged in shooting her nets, & as these nets were "partly in the water" she was exhibiting the two white lights prescribed by Article 9 (*b*) (1906) of the regulations for preventing collisions at sea in the case of vessels fishing with drift nets; but the lower of the two lights was not in the direction of the nets as required by the rule. Those in charge of her, seeing that a collision with the sailing vessel was imminent, attempted to avoid it by moving the engines astern, but, after a few revolutions, the propeller fouled the nets & the vessel became helpless. In an action of damage by collision brought by the owners of the sailing vessel against the steam vessel:—*Held:* the sailing vessel was alone to blame, as she ought to have kept out of the way, for the other vessel, though a steamer, was incumbered by her nets, &, therefore, there were "special circumstances," within Article 27 of the regulations, rendering it not necessary for her, under Article 20, to keep out of the way of the sailing vessel; though the direction of the nets of the steam vessel was not properly indicated by the position of the lower of the two lights carried by her, this could not by any possibility have caused or contributed to the collision, &, therefore, she was not to blame for an infringement of the regulations under 1894 Act, s. 419.

She was a vessel fishing with drift nets, having her nets partly in the water, within the meaning of Article 9 (*b*), although she was only shooting her nets preparatory to fishing in the ordinary sense of the term (EVANS, P.).—THE PITGAVENEY, [1910] P. 215; 79 L. J. P. 65; 103 L. T. 47; 26 T. L. R. 473; 11 Asp. M. L. C. 429.

**6017. —— Of trawler hauling in trawl.**]—A steam trawler fishing in the daytime in the vicinity of the Dogger Bank, & indicating her occupation to an approaching sailing vessel by the display of a basket, in accordance with Article 9 (1906), subsect. k of the regulations for preventing collisions at sea, was run into & sunk by the sailing vessel owing to the negligence of those in charge of that vessel in not keeping a good look out. It was contended on behalf of the sailing vessel that, though she was to blame, the trawler was also to blame for not using her steam to keep out of the way of the sailing vessel under Article 20 of the above regulations, by which "When a steam vessel & a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel":—*Held:* the trawler was not to blame, for, at the material time, she was engaged in the operation of hauling in her trawl. In such circumstances she was an incumbered vessel unable, until her trawl was up, to move her engines ahead or astern without risk of fouling her propeller. She was, therefore, not a steam vessel "proceeding" so as to involve risk of collision within Article 20.—THE GLADYS, [1910] P. 13; 79 L. J. P. 5; 101 L. T. 720; 26 T. L. R. 66; 11 Asp. M. L. C. 352.

*Annotation:*—**Consd.** The Pitgaveney, [1910] P. 215.

### *(g) Duty to Slacken Speed, Stop and Reverse.*

*See* Sea Regulations, 1910; Statutory Rules & Orders, 1910, p. 457, Article 23.

**6018. Risk of collision imminent.**]—A steamer going 10 knots an hour on a dark night, up the

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rassed the steamer & rendered her unable to avoid a collision:—*Held:* the sailing vessel had violated Regulations for Preventing Collisions at Sea, Art. 21, & was responsible for the collision.—WATTS *v.* S.S. JOHN IRWIN (1909), 12 Exch. C. R. 374.—CAN.

PART XII. SECT. 3, SUB-SECT. 5.—D. (g).

**6018 i.** *Risk of collision imminent.*]—Every steamship, when approaching another ship, so as to avoid the risk of collision shall slacken her speed, or stop & reverse if necessary. The more imminent the risk of collision, the more imperative is the necessity

Horse Channel, at the entrance of the Mersey, sees a sail three points on her port bow, less than half a mile distant. She ported her helm, but did not ease her engines :—*Held :* (1) the steamer was in fault for the collision which ensued for not having stopped or eased her engines, when she made out the other vessel ; (2) maintaining such a rate of speed was, under the circumstances, unwarrantable.—THE DESPATCH (1856), Sw. 138 ; 166 E. R. 1061.

**6019.** ——.] — STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante.*

**6020.** ——.]—In accordance with Sailing Rule 18, under Order in Council, Aug. 14, 1879, it is the duty of those in charge of a steamship in motion, when they perceive that a risk of collision is involved, to reverse their engines & bring their ship to a standstill on the water.

A collision occurred between the steamship *A.* & the steamship *B.* The evidence was most contradictory. It was, however, satisfactorily proved that although the crew of the ship *B.* had been until a few minutes before the collision engaged in getting the anchors on board in shipshape order, & that the captain had left the deck when he ought to have been there, yet that when it was perceived the two vessels were approaching in such a manner as to involve risk of collision, the engines were reversed, & the ship stopped. On board the ship *A.* everything was proved to have been in good order at the time of the collision. But her captain did not stop his engines until almost the moment of collision, & consequently the ship *A.* cut into the ship *B.* to the water's edge :—*Held :* there was fault on both sides, contributing to the damage & loss which had been suffered, & therefore neither were entitled to costs.—MACLAREN *v.* COMPAGNIE FRANCAISE DE NAVIGATION À VAPEUR (1884), 9 App. Cas. 640, H. L.

*Annotation :*—**Refd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

**6021.** ——.]—The *S.* & the *C.* were approaching each other at night on opposite courses, so as to pass starboard to starboard. The master of the *C.* saw the green & white lights of the *S.* somewhat more than a quarter of a mile distant, coming into line. This indicated a probability that the *S.* was porting, which would cause a risk of collision ; soon after the red light of the *S.* was seen. The engines of the *C.* had been previously stopped, but the master did not reverse her engines till the red light of the *S.* was seen ; the vessels soon after came into collision :—*Held :* the *C.* was to blame for infringing Article 8 of the Regulations for Preventing Collisions at Sea, because as there was a probability of risk of collision when the master of the *C.* saw the green & white lights of the *S.* coming into line, he should, being aware of such probability, have then reversed the engines of the *C.*—THE STANMORE (1885), 10 P. D. 134 ; 54 L. J. P. 89 ; 53 L. T. 10 ; 5 Asp. M. L. C. 441, C. A.

*Annotation :*—**Consd.** The Albis (1895), 73 L. T. 664.

**6022.** ——.]—THE VALLEJO (1887), 4 T. L. R. 169, C. A.

**6023.** ——.]—(1) The steamships *Thorsa* & *Otto* were approaching each other generally speaking on opposite courses in daylight in a narrow channel. In a manœuvre by the *Thorsa* to pass another vessel, the *Thorsa* & *Otto* became nearly end on. When about a mile apart, the *Thorsa* signalled that she was going to starboard, & at the same time put her helm to port to pass the *Otto* on the port side. This brought her head nearly a point to starboard. The *Otto* heard, but kept a steady course. Two minutes or so afterwards, when the ships were within half a mile, the *Thorsa* repeated the signal, & again ported her helm. The *Otto* immediately afterwards starboarded her helm, bringing her head to port, & went across the bows of the *Thorsa.* The *Thorsa* immediately stopped & reversed, but she ran into & sank the *Otto.* The owners of the *Otto* while admitting that their vessel had been in fault alleged fault also against the *Thorsa* in not stopping & reversing at an earlier period :—*Held :* no fault was attributable to the *Thorsa.*

(2) The question whether steamships are meeting end on or are approaching one another so as to involve risk of collision within Articles 15 & 18 of the Regulations for Preventing Collisions at Sea, must always depend upon the circumstances of the particular case.

(3) The master of a steamship approaching another steamship is not bound to assume that, as the latter has paid no attention to a steam whistle signal given by him under Article 19, she will also pay no attention to a second signal given by him.—WILSON, SONS & CO. *v.* CURRIE, [1894] A. C. 116 ; 6 R. 162, H. L.

**6024.** ——.]—THE CITY OF BERLIN, No. 5958, *ante.*

**6025.** ——.]—THE NEREO (1907), cited in Halsbury's Laws of England, Vol. XXVI., at p. 460, C. A.

**6026.** ——.]—THE ARCHTOR (1908), Shipping Gazette, Mar. 7, C. A.

**6027.** ——.]—THE TRY AGAIN (1908), Shipping Gazette, June 2.

**6028.** ——.]—Pltfs.' steamship *Rose*, proceeding to the Southward Down North Lowestoft Roads, sighted defts.' steamship *Ravenna*, at anchor & heading to the Eastward distant about two miles, & bearing fine on the starboard bow. The *Ravenna* was getting under way, &, having hove up her anchor, put her engines ahead, starboarded her helm to cross the channel & proceed up to the Northward, & twice sounded two short blasts on her whistle. The *Rose*, taking these signals as an invitation to pass starboard to starboard, answered each of the *Ravenna's* signals with a signal of two short blasts & starboarded her helm. The *Ravenna* continued on, putting her engines first half speed & then full speed ahead, & the two vessels came into collision, the stern of the *Ravenna* striking the starboard bow of the *Rose.* Just before the collision the engines of the *Ravenna* were reversed full speed astern :—*Held :* the Roads must be regarded as a narrow channel ; the *Rose* was not justified in assuming that the *Ravenna's* starboard helm signals were an invitation to her to pass starboard to starboard, & she was to blame ; but, the *Ravenna* was also to blame for not taking off her headway when she had received a clear indication that the *Rose* was not doing that which she was expected to do & which she ought to have done, namely, to keep to the starboard side of the channel.—THE RAVENNA, [1918] P. 297, C. A.

**6029.** ——.]—Pltfs.' vessel, *M.*, came into collision with defts.' vessel, *C.*, in a fog at a point eleven & three-quarter miles off Cape R. Both vessels were travelling at excessive speed in the fog. Very shortly before the collision those on board pltfs.' vessel heard a fog signal on their starboard bow which they took for the fog signal

*Sect. 3.—The sea regulations: Sub-sect. 5, D. (g) & (h), & E. (a) & (b) i. & ii.]*

at Cape R. Accordingly they starboarded & continued without stopping their engines. The sound proved to be the signal of defts.' vessel. Had those on board pltfs.' vessel recognised the signal as coming from defts.' vessel it would have been their duty to have stopped their engines in accordance with the Article 16:—*Held:* it being impossible that the *C.* had never heard the automatic whistle of the *M.*, the *C.* was at fault in not stopping, just as the *M.* was at fault in not stopping when she first became aware of the proximity of another vessel. Both vessels had broken Article 16 of the Regulations for Preventing Collisions at Sea. The damage causing faults were therefore not two to one, but two to two.—THE CLARA CAMUS (1926), 136 L. T. 291; 17 Asp. M. L. C. 171, H. L.

**6030. "On approaching"—Meaning of.**]—THE CERES, No. 5281, *ante*.

**6031. Where reasonable & prudent.**]—BIBBY BROTHERS & Co. (LANCASHIRE (OWNERS)) *v.* LEETHAM (ARIEL (OWNER)), THE LANCASHIRE, No. 5758, *ante*.

**6032. Immediately object of other ship apparent.**]—Where two steamships entered the Bosphorus from the Black Sea at the same time, both making at about equal speed for a point on the Asiatic side, & on reaching that point resp., being on the European side, crossed the bows of applt., notwithstanding the proximity of the land, the set of the current, & the fact that neither vessel had on it at the time much steerage way:—*Held:* resp. was to blame in the first instance, but applt. was also in fault for not having reversed at once when resp.'s object was or ought to have been apparent.—S.S. NORD KAP *v.* S.S. SANDHILL, THE SANDHILL, [1894] A. C. 646; 10 T. L. R. 622; 11 R. 347, P. C.

**6033. To what vessels rule applicable—Steamer meeting sailing vessel—Uncertain of sailing vessel's course.**]—Where a steamer coming down the river upon a dark night meets a sailing vessel beating up the river, & the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines & to slacken his speed, until he ascertains the course of the sailing vessel.

A defence, that the master of the steamer, under the circumstances, immediately put her helm to port, in compliance with the Trinity House Regulations, not sustained.

As the two vessels are approaching towards each other, the crew of the *Perseverance* perceive that the helm of the *steamer* had been put to port, & as soon as they perceive it, they port their own helm immediately aport likewise. This measure is not inculpated by the persons on board the steamer, because they called upon her so to do (DR. LUSHINGTON).—THE JAMES WATT (1844), 2 Wm. Rob. 270; 3 Notes of Cases, 36; 3 L. T. O. S. 5; 8 Jur. 320; 166 E. R. 756.

*Annotation:*—**Consd.** The Norma (1876), 35 L. T. 418.

**6034.** ——— ——— ———.]—BEAL *v.* MARCHAIS, THE BOUGAINVILLE & THE JAMES C. STEVENSON, No. 5530, *ante*.

**6035.** ——— ——— **Steamer mistaken as to character of other vessel.**]—The commander of a steam vessel of war condemned in a cause of damage. The excuse that the vessel which was run down was mistaken for a fishing vessel at anchor, & that the helm was starboarded to avoid the fishing nets not sustained. The steamer should have eased or reversed her engines, & have ascertained the fact instead of proceeding on her course.—THE BIRKENHEAD (1848), 3 Wm. Rob. 75; 6 Notes of Cases, 365; 166 E. R. 891.

**6036.** ——— ——— **In bad weather.**]—GREAT SHIP CO. *v.* SHARPLES, THE GREAT EASTERN, No. 6006, *ante*.

**6037.** ——— **Tug & tow.**]—By article 18 of the Regulations for Preventing Collisions at Sea, "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop & reverse, if necessary."

A four masted barque, in tow of a tug, in a dense fog at night in the St. George's Channel, was going at the rate of 1½ knots an hour, & did not stop, though she heard the whistle of a steamer on her port side gradually nearing & indicating danger. The steamer was proceeding at about 2½ knots an hour, & heard the whistle of the tug crossing her bows from starboard to port. She ported & reversed her engines on seeing the barque, but struck her at right angles on her port quarter, & was held to blame under article 18 for not stopping sooner:—*Held:* the barque was not also to blame for not stopping, as a tug incumbered with a tow is not to be deemed a steamship for all purposes under the rules, & the speed was as slow as was possible consistently with keeping the tow-rope sufficiently taut to prevent the risk of the two vessels being drawn together, & the propeller of the tug being fouled.—THE LORD BANGOR, [1896] P. 28; 65 L. J. P. 6; 73 L. T. 414; 8 Asp. M. L. C. 217; 11 R. 822.

*Annotation:*—**Refd.** The Challenge & The Duc D'Aumale, [1904] P. 41.

**6038. Justification for departure from article—Onus of proof.**]—When two steamships are approaching so as to involve risk of collision, & it is the duty of one to keep out of the way, & of the other to keep her course, the latter is bound to comply with Article 18 of the Regulations as to slackening her speed or stopping & reversing if necessary, & if she does not do so the *onus* lies upon her to show that to continue her speed was in fact the best & most seamanlike manœuvre under the circumstances.—LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO. *v.* CAMPANHIA BAHIANA DE NAVEGACIO A VAPOR, THE MEMNON (1889), 62 L. T. 84; 6 Asp. M. L. C. 488, H. L.

**6039.** ———.]—A steamer, the *G.*, saw a green light at some distance & starboarded her helm, soon after the port side of the *B.*, without a red light, came into view, so close that the only chance of avoiding a collision was for the *G.* to continue at full speed ahead & starboard her helm, which she did. The *B.* struck the *G.* on her starboard side:—*Held:* the *B.* was alone to blame for the collision & Article 18 of the Regulations did not apply under the circumstances to the *G.*, & Article 23 was applicable.—THE BENARES (1883), 9 P. D. 16 53 L. J. P. 2; 49 L. T. 702; 32 W. R. 268; 5 Asp. M. L. C. 171, C. A.

*Annotation:*—**Consd.** The Boynton (1898), 14 T. L. R. 173.

**6040. What amounts to compliance with rule.**]—Article 18 of the Regulations under 1884 Act

**6033 i.** *To what vessels rule applicable—Steamer meeting sailing vessel—Uncertain of sailing vessel's course.*]—WINDRAM *v.* ROBERTSON (1905), 7 F. (Ct. of Sess.) 665; 42 Sc. L. R. 602; 13 S. L. T. 157.—**SCOT.**

**6033 ii.** ——— ——— ———.]—THE IMPERADOR *v.* THE ARRACAN (1858), 5 L. T. 462.—**SINGAPORE.**

b. ——— ——— *Sailing vessel in tow.*]—A steamer meeting a sailing vessel in tow, in a narrow channel, held to blame in a collision for starboarding her helm in close proximity to the sailing vessel; the proper precaution to have taken under such circumstances being to stop & reverse until the vessel in tow has passed.—THE DE BRUS (1867), 1 I. R. Eq. 72.—**IR.**

is sufficiently complied with though a delay of a few seconds has occurred.

The ct. is not bound to hold that compliance must be made the very moment when danger becomes apparent.—KWANG TUNG (OWNER) *v.* NGAPOOTA (OWNERS), THE NGAPOOTA, [1897] A. C. 391; 66 L. J. P. C. 88; 13 T. L. R. 420, P. C.

*Annotations:*—**Consd.** U.S. Shipping Board *v.* Laird Line, [1924] A. C. 286. **Refd.** Hatfield (Owners) *v.* Glasgow (Owners), The Glasgow (1914), 84 L. J. P. 161.

**6041. Rule not absolute.**] — THE BOYNTON (1898), 14 T. L. R. 173.

**6042. Right to reasonable time to give orders—Position of peril caused by improper navigation of other vessel.**]—The steamship *R.*, going from Greenock to Dublin, was steering a course S.W. by S. ½ S., & was travelling at a speed of 13 knots. On entering an area of dense fog she maintained her speed & did not blow her whistle. The steamship *W.*, bound from America for Glasgow, was steering N. & was proceeding at a rate of 3½ knots & was sounding her fog siren. Suddenly the master of the *W.* became aware of a white light, which turned out to be the masthead light of the *R.*, half a point on the starboard bow & about 1,200 feet away, & he thereupon gave the order hard-a-starboard, but immediately afterwards, on seeing the red light of the *R.*, he gave the order hard-a-port & stop & reverse engines. The original order did not affect the course of the ship, & the interval of time between the two orders was calculated at three seconds. The *W.* struck the *R.* forty seconds later on her port-side near the stern. The *R.*, on sighting the *W.*, hard-a-ported until the moment of the collision, when the order hard-a-starboard was given to throw off the stern & minimise the blow. It was conceded that the *R.* was partly to blame for the collision in navigating at excessive speed:—*Held:* the proper order for the master of the *W.* to have given on first sighting the *R.* was to stop & reverse; but the master, having been put in a position of extreme peril by the improper navigation of the *R.* was entitled to a short interval for his mind to grasp the situation &, in the circumstances, the first order was superseded by the second with sufficient promptitude to exclude the idea of negligence; the *R.* was alone to blame for the collision.—U.S. SHIPPING BOARD *v.* LAIRD LINE, LTD., [1924] A. C. 286; 93 L. J. P. C. 123; 130 L. T. 552; 16 Asp. M. L. C. 302, H. L.

*(h) Keeping Course and Speed.*

**6043. Duty to keep course & speed—Where engaged in nautical manœuvre—Picking up or dropping pilot.**]—THE ROANOKE, No. 5937, *ante.*

**6044.** —— —— ——.]—By Article 21 of the Regulations for Preventing Collisions at Sea it is provided that where by any of the regulations one of two vessels is to keep out of the way, "the other shall keep her course & speed":—*Held:* a steamship required under this Article to keep her course & speed, which was, to the knowledge of the give-way vessel, engaged at the material time in a nautical manœuvre involving an alteration of both course & speed, dropping the pilot, was not committing a breach of the Article in reducing speed & altering course in order to arrive at the proper & usual place to drop the pilot into the pilot boat.—THE ECHO, [1917] P. 132; 86 L. J. P. 121; 117 L. T. 345; 14 Asp. M. L. C. 142.

**6045. —— Vessel not under command—Appropriate signal hoisted.**] — S.S. MENDIP RANGE *v.* RADCLIFFE, No. 5555, *ante.*

**Vessel closehauled on starboard tack.**]—*See* Sub-sect. 5, D. (*b*) iii., *ante.*

**Crossing vessels.**]—*See* Sub-sect. 5, D. (*e*) iii., & vii., *ante.*

**Risk of collision between steamer & sailing vessel—Duty of sailing vessel.**]—*See* Sub-sect. 5, D. (*f*) iv., *ante.*

**Overtaken vessel.**]—*See* Sub-sect. 5, G. (*c*), *post.*

*E. Narrow Channels.*

*(a) In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 25.

**6046. Statement of rule.**]—In a river or narrow channel, a steamer must keep as far as is practicable to that side of the mid-channel which lies on the starboard side.—THE PANTHER (1853), 1 Ecc. & Ad. 31; 17 Jur. 1037; 164 E. R. 19.

*(b) What are Narrow Channels.*

i. *In General.*

**6047. Channel bounded on either side by land—Navigation at great width between banks impossible.**]—GARVIN *v.* BIBBY, THE MAEANDER, THE FLORENCE NIGHTINGALE, No. 6051, *post.*

**6048. Not defined as to width or length.**] — SCICLUNA *v.* STEVENSON, THE RHONDDA, No. 5375, *ante.*

**6049. May be short in length.**]—THE KAISER WILHELM DER GROSSE, No. 6065, *post.*

**6050. Harbour—Consisting of half mile wide opening between ends of two back waters.**]—THE KAISER WILHELM DER GROSSE, No. 6065, *post.*

ii. *Particular Waters Held to be Narrow Channels.*

**6051. Channel leading to port of Liverpool.**]—*Semble:* the channel near the Bell buoy outside the Queen's Channel, leading into the port of Liverpool, is not a narrow channel within Merchant Shipping Act, 1854 (c. 104), s. 297.

Now my notion of a narrow channel is this: where a channel is bounded on either side by land

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**PART XII. SECT. 3, SUB-SECT. 5.—E. (a).**

**6046 i.** *Statement of rule.*]—The rule of the road on our rivers & lakes applicable to "narrow channels" is set out in R. S. C., c. 79, Art. 21, which applies to foreign as well as to British & Canadian ships & is as follows: "In narrow channels every steamship shall, when it is safe & practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship."—TUCKER *v.* THE TECUMSEH (1905), 6 O. W. R. 131; 10 Exch. C. R. 14, 149. —**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—E. (b) i.**

**6048 i.** *Not defined as to width or length.*]—The width alone of a channel or the fact that it has lateral extensions in the nature of bays, are not conclusive & need not necessarily be regarded as of importance in the determination of what is a "narrow channel" within the meaning of regulation 25.—CANADIAN PACIFIC RY. CO. *v.* THE CAMOSUN, [1925] Exch. C. R. 39.—**CAN.**

c. *Dependent on particular circumstances.*]—The statute does not attempt to define "narrow channel"; whether any particular channel is or is not such must be determined in a practical way, having in mind every relevant element obtaining in the particular case.—CANADIAN PACIFIC RY. CO. *v.* THE CAMOSUN, [1925] Exch. C. R. 39.—**CAN.**

d. *Configuration of shore lines & existence of headlands.*]—An important point to consider is whether the configuration of the shore lines & the existence of headlands & other considerations so control & predetermine the movements of ships thereon as to make it a narrow channel. In case of any doubt it should, in the interests of navigation, be resolved in favour of the "narrow-channel" construction.—CANADIAN PACIFIC RY. CO. *v.* THE CAMOSUN, [1925] Exch. C. R. 39.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—E. (b) ii.**

e. *Western passage of Sydney Harbour.*]—The western passage of Sydney Harbour after passing Bradley's Head is a "narrow channel" within Regulations for Preventing

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*primâ facie* so that it is impossible under the circumstances that you can navigate at any great width between the two banks. Now, if you should be of opinion, without regard to what is stated in any boat, or anything of that kind, that the channel had ended, that is to say, that the place of collision was in the open sea, where there is a wide depth of water, an expanse of water on both sides, where ships may safely navigate, then I should come to the conclusion that it is not a narrow channel within the meaning of the section (DR. LUSHINGTON).—GARVIN *v.* BIBBY, THE MAEANDER, THE FLORENCE NIGHTINGALE (1863), 1 Moo. P. C. C. N. S. 63; Brown. & Lush. 29; 8 L. T. 34; 9 Jur. N. S. 475; 11 W. R. 542; 1 Mar. L. C. 501; 15 E. R. 627, P. C.

*Annotation:*—**Refd.** The Hero (1865), Brown. & Lush. 447.

**6052. Strait of Messina.**]—SCICLUNA *v.* STEVENSON, THE RHONDDA, No. 5375, *ante*.

**6053. Entrances to Falmouth Harbour.**]—Article 21 of the Regulations for Preventing Collisions at Sea, 1880, providing that "in narrow channels every steamship shall, when it is safe & practicable, keep to that side of the fairway or mid channel which lies on the starboard side of such ship," applies to a steamship entering & passing up Falmouth Harbour, & if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations.—THE CLYDACH (1884), 51 L. T. 668; 5 Asp. M. L. C. 336.

**6054. Bristol in neighbourhood of English & Welsh grounds.**]—THE BROOKLYN CITY (1885), Pritchard's Admiralty Dig. 3rd ed. Vol. II., 2371.

**6055. Cardiff Dock at junction with Roath Basin channel.**]—A collision occurred at the junction of the main channel leading to Cardiff Docks & the channel to the Roath Basin, between a steamer going up the former & another coming down the latter:—*Held:* the place of the collision was a "narrow channel" within Article 21 of the Regulations for Preventing Collisions at Sea, & Articles 16 & 22 were also applicable, there being no special or local rules to supersede the general rules of navigation.—THE LEVERINGTON (1886), 11 P. D. 117; 55 L. J. P. 78; 55 L. T. 386; 6 Asp. M. L. C. 7, C. A.

*Annotations:*—**Consd.** S.S. Normandie *v.* S.S. Pekin, The Pekin, [1897] A. C. 532; The Olympic & The Hawke (1914), 84 L. J. P. 49.

**6056. Sulina Arm of Danube.**]—S.S. DIANA *v.* S.S. CLIEVEDEN, THE CLIEVEDEN, No. 6087, *post*.

**6057. Thames—Swin Channel.**]—THE CORENNIE, [1894] P. 338, n.

*Annotations:*—**Refd.** The Oporto, [1897] P. 249; The Gustafsberg, [1905] P. 10.

**6058.** —— ——.]—THE MINNIE, No. 6072, *post*.

**6059.** —— ——.]—Inward bound steamships must treat the Swin Middle Lightship as midway in a narrow channel, &, when safe & practicable, pass it on their port hand, in order to comply with Article 21 of the Regulations of 1884.—THE OPORTO, [1897] P. 249; 66 L. J. P. 49; 13 T. L. R. 254, C. A.

*Annotation:*—**Refd.** The Gustafsberg, [1905] P. 10.

**6060.** —— **Space marked by Nore Sand buoys.**]—Pltfs.' steam vessel proceeding up, & defts.' steam vessel going down, the river Thames, came into collision on the starboard side, as regards the incoming vessel, of the channel which lies to the southward of the four red conical lighted buoys, placed by the duly constituted authority, approximately in the central line of Sea Reach, to mark the northern side of the deepest water. On the question whether pltfs.' vessel was on the wrong side of the river:—*Held:* the effect of the placing of the four red conical lighted buoys was to constitute the space of water between them, & the Nore Sand buoys to the south of them, a narrow channel within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea, for, by the uniform system of buoyage adopted on the coast of England, red conical buoys are "starboard hand buoys" denoting that side which would be on the right hand of the mariner entering the river, &, therefore, pltfs.' vessel was justified in being where she was.—THE GUSTAFSBERG, [1905] P. 10; 74 L. J. P. 42; 92 L. T. 630; 53 W. R. 350; 21 T. L. R. 79; 10 Asp. M. L. C. 61.

**6061. Suez—Channel to Great Bitter Lake.**]—THE KNARESBRO (1900), [1907] P. 38, n.

*Annotations:*—**Refd.** The Kaiser Wilhelm Der Grosse, [1907] P. 36; The Peter Benoit (1915), 114 L. T. 147.

**6062. Solent.**]—The waterway known as the Solent constitutes a narrow channel within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea, &, therefore, every steam vessel must, when it is safe & practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.—THE ASSAYE, [1905] P. 289; 74 L. J. P. 145; 94 L. T. 102; 54 W. R. 203; 21 T. L. R. 677; 10 Asp. M. L. C. 183.

**6063. Entrance to Humber.**] — Pltfs.' steam vessel inward bound to, & defts.' steam vessel outward bound from, Grimsby, were at the material time red to green in a position of danger, & owing to the incoming vessel hard-a-porting, & the outgoing vessel starboarding, came into collision close to the Clee Ness buoy at the entrance to the river Humber:—*Held:* both vessels were to blame, for the waterway at the entrance to the Humber, between the Bull & Clee Ness buoys on the south side, & the buoys on the north side, is a narrow channel within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea, & therefore pltfs.' incoming vessel was in her wrong water, &, whether that article applies or not, the nature of the locality & the position of the buoys make it necessary for the incoming vessel to keep well over to the northward, so as to allow the outgoing vessel sufficient room to pass round Clee Ness buoy.—THE ASHTON, [1905] P. 21; 74 L. J. P. 28; 92 L. T. 811; 53 W. R. 639; 21 T. L. R. 126; 10 Asp. M. L. C. 88.

**6064. Navigable water in Queenstown Harbour.**]—THE GLENGARIFF, No. 6073, *post*.

**6065. Cherbourg Harbour.**]—A harbour entrance which consists of an opening about half a mile wide between the ends of two breakwaters is a "narrow channel" within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea, 1897. Where a harbour entrance is about half a mile wide, a steam vessel which is approaching the entrance with a view to entering the harbour is under no obligation to lie outside the entrance until an outgoing vessel gets clear.

Collisions at Sea, Art. 25.—BROWN *v.* LIGHTER NO. 6 & THE BRITANNIAR TUGBOAT (OWNER) (1910), 10 S. R. N. S. W. 905; 27 N. S. W. W. N. 219. —AUS.

*t. Firth of Clyde—From Cloch Lighthouse to Gantocks Beacon.*]—The Firth of Clyde above a line drawn from the Cloch Lighthouse to the Gantocks Beacon is a narrow channel within Regulations for Preventing Collisions at Sea, 1897, Art. 25.—CLYDE NAVIGATION TRUSTEES *v.* WILHELMSEN, [1915] S. C. 392; 52 Sc. L. R. 304; [1915] 1 S. L. T. 141.—SCOT.

*g. Inner harbour of Boston.*]—The inner harbour of Boston, Mass., containing wharves & anchorage for ships on either side, where ships & steam-tugs are continually plying back & forth, is not a "narrow

The west entrance to the harbour of Cherbourg, which opens towards the north, lies between the ends of two breakwaters & is about half a mile wide. The steamship *O.* was approaching the entrance from the north with a view to enter the harbour, & was keeping to her starboard side of the fairway. The steamship *K.* had left the harbour on a westerly voyage & was pursuing a north-westerly course across the harbour entrance. The *O.* gave one short blast on her whistle, the porting sound signal, & ported slightly to keep well over to the starboard side. The *K.* gave two short blasts, the starboarding signal, & continued on her course, trusting to her speed to pass in front of the *O.* The *O.* gave a second short blast, to which the *K.* replied with a second two short-blast signal. Both vessels then stopped & reversed, but a collision ensued, the stem of the *O.* striking the starboard bow of the *K.* :—*Held :* (1) the *K.* was to blame, inasmuch as the harbour entrance was a " narrow channel " within the meaning of Article 25, & she ought, in passing through it, to have kept to her starboard side of the fairway ; (2) in the circumstances, the *O.* was not to blame, either because she had not waited outside the harbour entrance until the *K.* got clear, or because she had not stopped & reversed sooner than she did, or because she ported after hearing the signals of the *K.*—THE KAISER WILHELM DER GROSSE, [1907] P. 259 ; 76 L. J. P. 138 ; 97 L. T. 366 ; 23 T. L. R. 554 ; 51 Sol. Jo. 498 ; 10 Asp. M. L. C. 501, C. A.

*Annotation :—Generally,* **Refd.** The Peter Benoit (1915), 114 L. T. 147.

**6066. Swansea entrance channel.**]—THE PRINCE LEOPOLD DE BELGIQUE, No. 6088, *post.*

**6067. Lerwick Harbour in Shetland Islands.**]—The harbour of Lerwick, in the Shetland Islands, is not, except so far as its northern & southern entrances may be so regarded, a narrow channel within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea.—THE SEYMOLICUS, [1909] P. 109 ; 78 L. J. P. 52 ; 100 L. T. 382 ; 11 Asp. M. L. C. 206.

**6068. Firth of Forth from Forth Bridge upwards.**]—The Firth of Forth from the Forth Bridge upwards is a " narrow channel " within Article 25 of the Regulations for Preventing Collisions at Sea.—SCREW COLLIER CO. *v.* WEBSTER (OR KERR), [1910] A. C. 165 ; 79 L. J. P. C. 57, H. L.

**6069. North Lowestoft Roads.**]—THE RAVENNA, No. 6028, *ante.*

### (c) *Application of Article to Waters not held Narrow Channels.*

**6070. St. Lawrence.**]—Pltfs.' & defts.' steamships, whilst proceeding, the one up, & the other down, the south channel of the river St. Lawrence, sighted one another at a distance of something under a mile, & were, at that time, practically end on, within Article 18 of the Regulations for Preventing Collisions at Sea. Those in charge of defts.' vessel, in breach of above Article, starboarded, & were found alone to blame for the collision which followed. Those in charge of pltfs.' vessel ported, in accordance with Article 18, blew a short blast, in accordance with Article 28, & steadied. Shortly afterwards they hard-a-ported, but did not blow another short blast to indicate the course taken. In the ct. below it was found that not blowing the port helm signal, when the hard-a-porting took place, had no effect on the collision :—*Held :* pltfs.' vessel was also to blame, for the statutory presumption of fault could not be avoided except by showing—which could not be done in this case—that the breach of the rule could not by possibility have contributed to the collision.—THE CORINTHIAN, [1909] P. 260 ; 78 L. J. P. 121 ; 101 L. T. 265 ; 25 T. L. R. 693 ; 53 Sol. Jo. 650 ; 11 Asp. M. L. C. 264, C. A.

*Annotation :—*Refd. The Pitgavency, [1910] P. 215.

### (d) *Rule as to Position in*

**6071. Former rule—Included proviso as to tide—Giving great scope for exercise of judgment.**]—The words of the enactment are these : " That every steam vessel, when meeting or passing any other steam vessel, shall pass as far as may be safe on the port side of such other vessel . . . & every steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel of such river or channel which lies on the starboard side of such vessel." . . . It would have been clearer if it had been said, " which lies on the starboard side of such steam vessel "—whereas, some ambiguity is raised through the absence of that definition. . . . It is my duty to bring your attention to the words that follow : " due regard being had to the tide, & to the position of each vessel in such tide." These are very large qualifying words, for the clause means very much like this—you shall keep along that side of the channel which lies on the starboard side of the vessel, provided it may be done with convenience or safety to the vessel you may happen to meet. Therefore, it is a rule laid down, but with very great scope for the judgment of those who are to follow it (DR. LUSHINGTON).—THE LEITH (1849), 7 Notes of Cases, 137.

**6072. Duty to keep on starboard side of fairway or mid-channel—When safe & practicable.**]—Pltfs.' steamship, bound inwards, & defts.' steamship, bound outwards, came into collision at night in the estuary of the Thames, a little above the Swin Middle Lightship, & a little to the westward of the direct course from that lightship to the East Maplin Buoy :—*Held :* defts.' vessel was to blame (*inter alia*) for being on the wrong side of the channel, as, in navigating the passage known as the Swin, between the Middle Lightship & the Middle Sands, every steamship must, when it is safe & practicable, keep to that side of the fairway which is on her starboard hand, the passage being a narrow channel within the meaning of Article 21 of the Regulations of 1884 for Preventing Collisions

channel " within Rules for Preventing Collisions at Sea, Art. 25.—LOVITT *v.* THE CALVIN AUSTIN (1904), 9 Exch. C. R. 160 ; *affd.* (1905), 25 C. L. T. 78 ; 35 S. C. R. 616.—CAN.

h. *St. Lawrence River—From Victoria Bridge down.*]—MONTREAL TRANSPORTATION CO. *v.* THE NORWALK (1909), 12 Exch. C. R. 434.—CAN.

**PART XII. SECT. 3, SUB-SECT. 5.—E. (d).**

**6072 i.** *Duty to keep on starboard side of fairway or mid-channel—When safe & practicable.*]—The rule that in narrow channels steamships shall, when safe & practicable, keep to the starboard, does not override the general rules of navigation.—THE CUBA *v.* MCMILLAN (1896), 26 S. C. R. 651.—CAN.

**6072 ii.** ——.]—TUCKER *v.* THE TECUMSEH (1905), 6 O. W. R. 131 ; 10 Exch. C. R. 44, 149.—CAN.

**6072 iii.** ——.]—A steamship was coming up the St. Lawrence River in ballast at a great speed, & approaching a tug & tow in the bend of the channel changed her course with the intention of passing them starboard to starboard, contrary to Rules of the Road, Art. 25. Thereupon the master of the tug ported his helm in an endeavour to avoid a collision. The steamer then tried to manœuvre herself into position & collided with two barges at the head of the tow :—*Held :* the collision resulted from the steamer's failure, " when safe & practicable, to keep to the starboard side of the fairway or mid-channel."—WALROD *v.* THE CONISTON (Que.) (1919), 18 Exch. C. R. 330 ; 45 D. L. R. 518.—CAN.

k. ——.]—THE TURRET AGE *v.* JENKS, C. R., [1907] A. C. 472.—CAN.

l. ——.] — Where the *Honoreva*

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at Sea.—THE MINNIE, [1894] P. 336; 71 L. T. 715; 7 Asp. M. L. C. 521; 11 R. 705, C. A.

*Annotations* :—**Consd.** The Oporto, [1897] P. 249. **Refd.** The Gustafsberg, [1905] P. 10.

**6073.** —— ——.]—The waterway forming the entrance to Queenstown Harbour is a narrow channel within Article 25 of the Regulations for Preventing Collisions at Sea, &, therefore, every steam vessel must, when it is safe & practicable, keep to that side, marked by buoys by the local authorities, of the fairway or mid-channel which lies on the starboard side of such vessel.—THE GLENGARIFF, [1905] P. 106; 75 L. J. P. 90; 93 L. T. 281; 53 W. R. 537; 21 T. L. R. 299; 10 Asp. M. L. C. 103.

**6074.** —— **As far as possible.**]—THE KAISER WILHELM DER GROSSE, No. 6065, *ante*.

**6075. Meaning of mid-channel.**]—The provision in 17 & 18 Vict. c. 104, s. 296, as to steamers keeping to the starboard side of the said mid-channel, means that they are to keep inside the mid-channel, & the mid-channel means the whole navigable breadth of the river, unless so far as it is narrowed by tiers of vessels moored on each side, or other causes; & though this may raise a question for the jury, yet they ought to find the whole breadth of the stream which is ordinarily navigable, to be "mid-channel."—SMITH *v.* VOSS (1857), 2 H. & N. 97; 26 L. J. Ex. 233; 29 L. T. O. S. 97; 5 W. R. 534.

*Annotation* :—**Refd.** The Raithwaite Hall (1874), 30 L. T. 233.

**6076. Meaning of fairway.**]—THE BLUE BELL, No. 5389, *ante*.

**6077. Application of rule—Tug & tow.**]—THE LA PLATA, No. 5353, *ante*.

**6078. Justification for departure from rule—Convenience.**]—THE DUKE OF SUSSEX, No. 5471, *ante*.

**6079.** —— ——.]—THE GAZELLE, No. 5424, *ante*.

**6080.** —— —— **Of Customs officers.**]—17 & 18 Vict. c. 104, s. 297, prescribes that "Every steamship, when navigating any narrow channel, shall, whenever it is safe & practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship." This sect. may be controlled by sect. 291, so as not to apply to a foreign steamship; but a customary course of navigation for all steamships on the river Thames will be presumed to have emanated from sect. 297, which course every foreign steamship is bound to know & obey.

The mere convenience of the foreign steamship, or of custom house, officers in the performance of their duty, will not justify a departure from such customary course of navigation.—THE FYENOORD (1858), Sw. 374; 5 L. T. 462; 166 E. R. 1172, P. C.

*Annotations* :—**Folld.** The Seine (1859), Sw. 411. **Refd.** The Saxonia, The Eclipse (1862), Lush. 410.

**6081.** —— —— **Of foreign steamship.**]—THE FYENOORD, No. 6080, *ante*.

**6082.** —— **Custom.**]—THE HAND OF PROVIDENCE, No. 5469, *ante*.

**6083.** —— —— **Necessity for proof of local impediment or extraordinary difficulty.**]—A steamer going down the Tyne, at night, just to the southward of mid-channel, saw the light of one steam tug on her port-bow, & the light of another nearly ahead, but a little on her starboard bow. She kept her course, intending to pass between them, till she discovered a sloop just on her port-bow in tow of latter tug; she then ported her helm, to pass between the tug & the sloop, & came into collision with the sloop. On a suggestion on behalf of the tug, which was on the port side of mid-channel, of a custom in the Tyne for light-draughted vessels going up to keep to the south side, contrary to the rule of the statute:—*Held*: no such custom could be maintained, unless an actual local impediment or extraordinary difficulty could be proved.—THE UNITY (1856), Sw. 101; 166 E. R. 1041.

*Annotation* :—**Refd.** The Hand of Providence (1856), Sw. 107.

**6084.** —— —— **Resting on convenience of public officials—Custom house officers.**]—The owners of a steamship are responsible for damage caused by the act of the master in not observing 17 & 18 Vict. c. 104, s. 297, which prescribes keeping to the starboard side of the mid-channel, notwithstanding 17 & 18 Vict. c. 104, s. 299, declares that the damage in such case shall be deemed to be caused by the wilful default of the person in charge of the deck.

17 & 18 Vict. c. 104, s. 297, is not to be controlled by any custom resting on mere convenience of public officers, as custom house officers, in the discharge of their duties.—THE SEINE (1859), Sw. 411; 5 Jur. N. S. 298; 166 E. R. 1190; *subsequent proceedings*, Sw. 513.

*Annotation* :—**Refd.** Grill *v.* General Iron Screw Colliery Co. (1868), L. R. 3 C. P. 476.

**6085.** —— **Bye-law.**]—THE HAND OF PROVIDENCE (1856), Sw. 107; 166 E. R. 1044; *sub nom.* THE MEDORA *v.* THE HAND OF PROVIDENCE, 5 L. T. 462.

**6086.** —— **Inability to port without grounding.**]—THE LUCIA JANTINA *v.* THE MEXICAN, No. 5467, *ante*.

**6087.** —— **Allowance for behaviour of other vessel.**]—Where a ship ascending the Danube finds itself exposed to the risk of meeting a descending ship at or near a point which does not afford sufficient breadth for passing:—*Held*: Article 32 of the regulations applicable to the Lower Danube is imperative, & the ascending ship is bound to stop & wait. Although an ascending ship is clearly wrong in forcing her way contrary to Article 32, yet when her intention so to do is reasonably apparent, a descending ship commits contributory fault by insisting on her right of precedence.

The Sulina arm may fairly be described, throughout its whole length, as a narrow channel (LORD WATSON).—S.S. DIANA *v.* S.S. CLIEVEDEN, THE CLIEVEDEN, [1894] A. C. 625; 64 L. J. P. C. 22; 10 T. L. R. 589; 6 R. 515, P. C.

collided with the *Maggie* in the Soulanges Canal, owing to the failure of the *Honoreva* to observe Rules for Navigation, Art. 25, which required her to keep to the starboard side of mid-channel, she was held liable for the damages sustained by the *Maggie*.—BONHAM *v.* THE HONOREVA (1916), 27 O. W. R. 324; 54 S. C. R. 51.—**CAN.**

m. —— .]—UNION S.S. CO. *v.* THE WAKENA (B. C.), [1918] 1 W. W. R. 57; 37 D. L. R. 579; 16 Exch. C. R. 397; 24 B. C. R. 156.—**CAN.**

n. —— .]—THE ARBUTUS (1864), 11 L. T. 208.—**IR.**

**6076 i.** *Meaning of fairway.*]—The "fairway" as defined by Sea Regulations, 1910, Art. 25, is practically the same as "mid-channel."—R. *v.* DESPATCH, BORDER LINE TRANSPORTATION CO. *v.* MCDOUGAL (1916), 34 W. L. R. 123; 10 W. W. R. 230.—**CAN.**

o. *Application of rule—To foreign vessels.*]—The rule of the road on our rivers & lakes applicable to "narrow channels" is set out in R. S. C., c. 79, Art. 21, which applies to foreign as well as to British & Canadian ships.—TUCKER *v.* THE TECUMSEH (1905), 6 O. W. R. 131; 10 Exch. C. R. 44, 149.—**CAN.**

p. *Justification for departure from rule—Allowance for behaviour of other vessel—Vessels meeting on bend.*]—ALLEN *v.* REFORD (1889), 15 Q. L. R. 341.—**CAN.**

q. —— *Avoidance of collision.*]—CANADA STEAMSHIP LINES, LTD. *v.* MONTREAL TRANSPORTATION CO., LTD. (Que.) (1919), 18 Exch. C. R. 354; 45 D. L. R. 478.—**CAN.**

**6088. —— Circumstances justifying vessels in crossing.**]—Article 25 of the Regulations for Preventing Collisions at Sea applies to the entrance channel formed by the east & west pier at Swansea, so that it is incumbent on a steam vessel in that narrow channel to keep to that side of mid-channel which lies on her starboard hand, but circumstances may prevent the rule operating to its full extent throughout the channel, for when a vessel is coming away from the tidal basin of the Prince of Wales dock on the east side, & is proceeding down the channel, she will, in order to get on her proper west side, have to cross the channel leading up to the Ocean dry dock, or other dock in the west channel, towards which another vessel, coming in, may be making. In such a case good seamanship dictates that the vessel which will reach the point of intersection of the channels reasonably in advance of the other should keep on, & that the other should wait, though, if both are approaching the point at about the same time, it will be reasonable for the vessel which has the tide against her to wait until the other has passed.

Vessels must cross each other, & however much the starboard hand rule applies, there are circumstances here which prevent it operating to the full extent (SIR GORELL BARNES).—THE PRINCE LEOPOLD DE BELGIQUE, [1909] P. 103; 78 L. J. P. 57; 100 L. T. 201; 25 T. L. R. 183; 11 Asp. M. L. C. 203.

**6089. —— Necessity for strict proof of justification.**]—A steamer coming up the river Thames in the Blackwall Reach, having disregarded, without cause, the directions of 17 & 18 Vict. c. 104, s. 297, by not keeping on that side of the fairway or mid-channel of the river, which lay on her starboard side; & the pilot, as well as those on board, being to blame in not keeping a good look out, & otherwise culpably negligent:—*Held:* liable for damages caused by a collision with a barge.

The burden of proof lies on the steamer to show distinctly what obstacles there were to prevent her going to the northward (ROMILLY, M.R.).—MALCOLMSON *v.* MEESON, THE MALVINA (1863), 1 Moo. P. C. C. N. S. 357; Brown. & Lush. 57; 8 L. T. 403; 9 Jur. N. S. 527; 11 W. R. 576; 1 Mar. L. C. 341; 15 E. R. 736, P. C.

*Annotations:*—**Refd.** The Sylph (1867), L. R. 2 A. & E. 24; Smith *v.* Brown (1871), L. R. 6 Q. B. 729; R. *v.* City of London Court Judge (1882), 8 Q. B. D. 609; The Vera Cruz No. 2 (1884), 9 P. D. 96; Mersey Docks & Harbour Board *v.* Turner, The Zeta, [1893] A. C. 468; The Veritas, [1901] P. 304.

**6090. —— Burden of proof of justification.**]—MALCOLMSON *v.* MEESON, THE MALVINA, No. 6089, *ante*.

**6091. What amounts to breach—Part of vessel in other side of fairway.**]—Article 25 of the Regulations for Preventing Collisions at Sea is not infringed by a vessel turning round in a narrow channel whereby some portion of her length must necessarily during the process fail to remain on that side of the fairway or mid-channel which lies on her starboard side.—THE WHITLIEBURN (1900), 83 L. T. 748; 17 T. L. R. 183; 9 Asp. M. L. C. 154.

*F. Signals.*

*(a) Sound Signals.*

*i. In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 28.

**6092. Statement of rule.**]—THE USKMOOR, No. 6106, *post*.

**6093. Direction imperative.**]—THE USKMOOR, No. 6106, *post*.

**6094. Importance of giving signal.**]—(1) It is too late now to question the validity of the direction in the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, that they are not only to be followed by all vessels upon the high seas; but "in all waters connected therewith navigable by seagoing vessels," & the reservation by Article 30 of any "special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters," shows that the general regulations were intended by their framers to apply to inland navigation except so far as they would interfere with the operation of a local rule.

(2) It is to my mind far more important that these signals [sound signals in Article 28] should be given when the course taken is not the ordinary one prescribed by the regulations, but is the result of a deduction from the principles that underlie them, & from the dictates of good seamanship, that is to say, a course which has to be taken at the moment by the individual under the particular circumstances of the case, & which is justified only by their special character & the imminent danger that has arisen (FLETCHER MOULTON, L.J.).

(3) The word "course" could not mean compass course only, because it is quite plain that helm directions & engine directions are meant to indicate the movements of the vessel for the purpose of avoiding collision or to put an end to any condition of danger existing (LORD ALVERSTONE, C.J.)

(4) The Regulations for the Prevention of Collisions at Sea apply to collisions taking place between vessels in the river Amazon.—THE ANSELM, [1907] P. 151; 76 L. J. P. 54; 97 L. T. 16; 23 T. L. R. 378; 51 Sol. Jo. 342; 10 Asp. M. L. C. 438, C. A.

*Annotations:*—*As to* (1) **Consd.** The Bellanoch, [1907] P. 170; The Corinthian, [1909] P. 260. **Refd** The Hero, [1911] P. 128. *As to* (3) **Refd.** The Aristocrat, [1908] P. 9.

**6095. First signal ignored—Assumption that further signals will be ignored.**]—WILSON, SONS & Co. *v.* CURRIE, No. 6023, *ante*.

**6096. Liability for failure to signal.**]—THE NEREO (1907), cited in Halsbury's Laws of ... Vol. XXVI., at p. 460, C. A.

**6097. ——.**]—THE ANNIE (1912), Shipping Gazette, Feb. 2, C. A.

**6098. Intention of article.**]—THE ANSELM, No. 6094, *ante*.

**6099. In sight — Meaning of — Reference to manœuvres authorised or required to avoid collision.**]—THE BELLANOCH, No. 5627, *ante*.

**6100. Signals may be wrongful because misleading.**]—THE BELLANOCH, No. 5627, *ante*.

**6101. Duty to answer signals.**]—Where applts.' steamship came into collision with resps.' lighter in a narrow channel under circumstances which rendered resps.' tug clearly to blame:—*Held:* the judge was in error in holding applts.' steamship also to blame because she did not stop her engines on the tug's failure to answer her signal to the effect that she had altered her course to the starboard. The tug seemed to be acting in accordance with the rule of the road, & the captain of applts.' steamship in proceeding on his course cautiously at half speed did not fail in his duty in any respect.

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r. *Meaning of safe & practicable.*]—In narrow channels every steam vessel shall, when it is safe & practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel:—*Held:* the words "safe & practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision.—LOVITT *v.* THE CALVIN AUSTIN (1904), 9 Exch. C. R. 160; *affd.* (1905), 25 C. L. T. 78; S. C. R. 616.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—F. (a) i.**

t. *Misleading signals—Liability for.*]—ONTARIO GRAVEL FREIGHTING CO., LTD. *v.* MATTHEWS S.S. CO., LTD., [1927] 1 D. L. R. 1045; [1927] S. C. R. 92.—**CAN.**

*Sect. 3.—The sea regulations: Sub-sect. 5, F. (a) i., ii. & iii., (b), (c) & (d), & G. (a).]*

—CHINA NAVIGATION CO., LTD. *v.* ASIATIC PETROLEUM CO., LTD. & THE TAKU TUG & LIGHTERAGE CO., LTD., THE TIENTSIN, [1910] A. C. 204; 79 L. J. P. C. 58; 101 L. T. 547; 11 Asp. M. L. C. 310, P. C.

**6102. Liability for wrong helm signal.**]—THE FRANKFORT, No. 5381, *ante*.

**6103. Mistaken signals — Liability for.**] — THE RAVENNA, No. 6028, *ante*.

**6104. Misleading signals—Signals must in fact mislead.**]—Pltf.'s steamship *G.*, coming out of the Alfred Dock, Birkenhead, & defts.' steamship *G. S.*, coming up the river Mersey, sighted each other about half a mile apart, the *G. S.* having the *G.* on her own starboard bow. To counteract the effect of the tide on her starboard bow the *G.* ported her helm a little & sounded two separate signals of one short blast. She did not, however, port her helm sufficiently to alter her course to starboard but continued on straight across the river under a slight port, or port & steady, helm. The two vessels came into collision on the Liverpool side of the river:—*Held:* the port helm signals were misleading in the sense that they had a tendency to mislead; but as in fact they did not appear to have misled the pilot of the *G. S.*, who saw that the *G.* was not altering her course, the *G.* was not to blame.—THE GULF OF SUEZ, [1921] P. 318; 90 L. J. P. 321; 125 L. T. 653; 37 T. L. R. 704; 15 Asp. M. L. C. 328, C. A.

ii. *When Duty to Signal Arises.*

**6105. Manœuvre commenced before vessel sighted.**]—Pltfs.' steam vessel, after giving a prolonged blast on her whistle, left a dock entrance in the Mersey under easy starboard helm, &, whilst continuing to round under that helm in order to bring up alongside a wall a short distance further up, came into collision with defts.' down coming steamer. It was alleged on behalf of defts. that those in charge of pltfs.' vessel should have indicated that she was directing her course to port by giving two short blasts of her whistle in accordance with Article 28 of the Regulations for Preventing Collisions at Sea, by which, "when vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by" the appropriate signal:—*Held:* the rule was not applicable, as the starboard action of the helm began before leaving the entrance, &, when the other vessel was in sight, pltfs.' vessel was not, with reference to that other vessel, taking a course authorised or required by the rules.—THE MOURNE, [1901] P. 68; 70 L. J. P. 7; 83 L. T. 748; 17 T. L. R. 194; 9 Asp. M. L. C. 155.

**6106. Duty in case of doubt.**]—The direction in Article 28 of the Regulations for Preventing Collisions at Sea, 1897, that "when vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the specified signals on her whistle or syren," is not only imperative, but the word "authorised" includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight.

I hope that masters of vessels will in future err, if they err at all, on the side of whistling (JEUNE, P.).—THE USKMOOR, [1902] P. 250; 71 L. J. P. 103; 87 L. T. 55; 51 W. R. 93; 18 T. L. R. 727; 9 Asp. M. L. C. 316.

*Annotations:*—**Apprvd.** The Anselm, [1907] P. 151. **Consd.** The Bellanoch, [1907] P. 170. **Refd.** The Aristocrat, [1908] P. 9; The Hero, [1911] P. 128.

**6107. Vessel acting in ordinary course of navigation.**] — THE CALGARTH (1906), Shipping Gazette, Nov. 3.

**6108. Steamer bound to keep course & speed—Going astern—For purposes of own navigation.**]—THE BELLANOCH, No. 5627, *ante*.

**6109. Duty to give further signals on first signal being ignored.**]—A tug which, with a lighter in tow, was crossing the Humber under a slightly starboard helm on account of the ebb tide, starboarded further, & gave a long blast signal to indicate her presence to a steamship, under the stern of which she was passing. The steamship, which was showing a stern light & lying athwart the river waiting to go into dock, came astern to allow another vessel to pass out of dock, & the tug thereupon hard-a-starboarded her helm to clear the stern of the steamship, but failed to give the appropriate two-short-blast signal required by Article 28 of the Regulations for Preventing Collisions at Sea as applied to the Humber. The steamship had no look out aft, &, in the ct. below, was found alone to blame for a collision with the lighter, whilst the tug was absolved from liability on the ground that the infringement of the rule could not by possibility have contributed to the collision:—*Held:* the tug was also to blame, for, though those in charge of the steamship were so negligently inattentive that they did not notice what was going on astern of them, it could not be said that, if the two-short-blast signal had not been given by the tug when further starboarding or hard-a-starboarding, as an indication that she was manœuvring for them, the signal might not have been heard & acted upon by those in charge of the steamship in time to have avoided the collision with the lighter; &, therefore, the statutory presumption of fault arose under 1894 Act, s. 419 (4).

The continuing of a helm is just as much a directing of the vessel's head or the vessel's course to one side or the other as changing her course (LORD ALVERSTONE, C.J.).—THE ARISTOCRAT, [1908] P. 9; 77 L. J. P. 57; 97 L. T. 838; 24 T. L. R. 21; 10 Asp. M. L. C. 567, C. A.

*Annotation:*—**Consd.** The Gulf of Suez (1921), 125 L. T. 653.

**6110. Vessel signalling full speed astern—Duty to further signal hard-a-port.**]—By Article 28 of the Regulations for Preventing Collisions at Sea, a steam vessel under way, in taking any course authorised or required by the rules in respect of another vessel in sight, shall indicate that course by the appropriate sound signal:—*Held:* a steam vessel having sounded three short blasts to indicate that "my engines are going full speed astern" did not infringe the rule by omitting to sound one short blast on hard-a-porting, as this helm action was to prevent her head canting to starboard under the reverse action of the engines.—THE ABERDONIAN, [1910] P. 225; 79 L. J. P. 89; 102 L. T. 543; 11 Asp. M. L. C. 393.

**6111. Vessel altering course to prevent collision.**] —A steam vessel bound, under the Regulations for Preventing Collisions at Sea, to keep her course & speed, found herself so close to a steam vessel bound to give way, that a collision could not be avoided by the action of the other vessel alone.

*a. Liability for disregarding signal.*] —COY *v.* THE D. J. PURDY (N. B.) (1919), 19 Exch. C. R. 212.—CAN.

PART XII. SECT. 3, SUB-SECT. 5.—F. (a) ii.

*b. Vessel leaving dock.*] — SHIP ROBERT L. FRYER *v.* WESTMOUNT (OWNERS) (Ont.), [1924] Exch. C. R. 109.—CAN.

She, therefore, by reversing her engines & hard-a-porting, endeavoured to avoid the other vessel; but did not indicate her manœuvres by the appropriate sound signals required by Article 28:—*Held:* the omission to give the sound signals neither caused the collision, nor contributed to the casualty, & did not, in the circumstances, amount to a breach of the rule, as the words "I am directing my course to starboard" were not applicable to an attempt, at the last moment, to escape a collision.—THE TEMPUS, [1913] P. 166; 83 L. J. P. 33; 109 L. T. 669; 29 T. L. R. 543; 12 Asp. M. L. C. 396.

**6112. Vessel manœuvring for anchored vessel.**]—In weather more or less foggy, the steamship *M.*, proceeding to an anchorage, had to starboard her helm to clear a vessel at anchor. There was no other vessel in sight at the time, but directly afterwards the steam barge *B.* came in sight. The *M.* gave no signal when she directed her course to port under starboard helm:—*Held:* while it was only necessary under Article 28 of the Rules for Preventing Collisions at Sea for the *M.* to sound her whistle when directing her course to port or starboard with reference to a moving vessel, & therefore she was not wrong in omitting to sound her whistle when she starboarded her for the anchored vessel, she ought to have sounded it when the *B.* came in sight, to indicate that her course was being directed to port.—THE MEGANTIC (1915), 31 T. L. R. 190.

iii. *Course.*

**6113. Meaning of.**]—THE ANSELM, No. 6094, *ante.*

**6114.** ——.]—THE ARISTOCRAT, No. 6109, *ante.*

**6115. Course "authorised or required"—What included.**]—The duty which Article 28 of the Regulations for Preventing Collisions at Sea imposes upon steam vessels in sight of one another to give appropriate sound signals "in taking any course authorised or required by these rules" is not limited to the case of a course which at the trial of a collision action is found by the ct. to have been authorised or required by the Rules. It applies to the case of any course taken by a vessel purporting to act under any of the Rules with the intention of avoiding immediate danger.—THE HERO, [1911] P. 128; 80 L. J. P. 66; 105 L. T. 87; 27 T. L. R. 398; 12 Asp. M. L. C. 10, C. A.; *on appeal, sub nom.* HERO (OWNERS) *v.* ADMIRALTY COMRS., [1912] A. C. 300, H. L.

*Annotations:*—**Refd.** The Olympic & H.M.S. Hawke, [1913] P. 214; H.M.S. King Alfred, [1914] P. 84; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129.

(*b*) *Distress Signals.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, p. 457, Article 31.

**6116. Duty to answer signals.**]—THE EMMY HAASE, No. 5487, *ante.*

**6117. Improper use of distress signal—Compensation.**]—By 1894 Act, s. 434 (2), the improper use or display of the signals of distress, authorised by the Act, renders the master of a vessel liable to pay compensation for any labour undertaken, risk incurred, or loss sustained, in consequence of the signal being supposed to be a signal of distress; but the sub-sect. does not, by implication, give any right to compensation in favour of those who, in response to signals of distress properly used or displayed, offer services which are not required.—THE ELSWICK PARK, [1904] P. 76; 72 L. J. P. 79; 89 L. T. 217; 9 Asp. M. L. C. 481.

(*c*) *Lights.*

*See* Sub-sect. 5, B., *ante.*

(*d*) *Fog Signals.*

*See* Sect. 3, sub-sect. 5, C. (*d*), *ante.*

*G. Overtaking Vessels.*

(*a*) *In General.*

*See* Sea Regulations, 1910, Statutory Rules & Orders, 1910, p. 457, Article 24.

**6118. What constitutes "overtaking"—Implication that following ship going faster than followed ship.**]—A vessel is overtaking another vessel, within the meaning of Articles 16 & 17 of the Regulations, & not crossing the other vessel, within the meaning of Article 14, when she is going faster than the other vessel & is so much behind her as to be unable to see the side light of the other vessel. In the English Channel the rules as to vessels at sea, & not the rules as to vessels in a river, apply; & in the English Channel there is no customary course for vessels.—THE FRANCONIA (1876), 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. L. C. 295, C. A.

*Annotations:*—**Dbtd.** The Peckforton Castle (1878), 3 P. D. 11. **Folld.** The Main (1886), 11 P. D. 132. **Refd.** The Seaton (1883), 32 W. R. 600; The Imbro (1889), 14 P. D. 73; S.S. Olympic *v.* Blunt, S.S. Olympic *v.* Admiralty Comrs. (1914), 112 L. T. 49.

**6119.** —— ——.]—THE MAIN, No. 5591, *ante.*

**6120.** —— **Ship following more than two points abaft beam of foremost ship.**]—THE IMBRO, No. 5592, *ante.*

**6121. Application of rule—Vessel overtaking & crossing.**]—When a vessel is at the same time overtaking & crossing the course of another vessel, she is to be deemed an overtaking, & not a crossing ship under Article 16, & is bound therefore to obey the directions of Article 20, & keep out of the way of the other vessel.—THE SEATON (1883), 9 P. D. 1; 53 L. J. P. 15; 49 L. T. 747; 32 W. R. 600; 5 Asp. M. L. C. 191.

*Annotations:*—**Expld.** The Imbro (1889), 14 P. D. 73. **Refd.** The Molière, [1893] P. 217.

**6122.** ——.]—THE MOLIÈRE, No. 5943, *ante.*

**6123. Overtaking distinguished from crossing.**]—THE FRANCONIA, No. 6118, *ante.*

**PART XII. SECT. 3, SUB-SECT. 5.—G. (a).**

**6118 i.** *What constitutes "overtaking"—Implication that following ship going faster than followed ship.*]—Where two ships are in such a position, & are on such courses, & are at such distances, that, if it were night, the hinder ship could not see any part of the side lights of the forward ship, & the hinder ship is going faster than the other, the former is to be considered as an overtaking ship within rule 20 of the collision rules in force before July, 1897, & must keep out of the way of the latter.—INCHMAREE S.S. CO., LTD. *v.* THE ASTRID (1898), 6 Exch. C. R. 178.—**CAN.**

**c.** —— *Ship seven points of the wind east north-east to ship north seventy-two degrees west.*]—Where a steamer is proceeding on a course north seventy-two degrees west, & a barque is sailing on the starboard tack within about seven points of the wind whose direction is east north-east, the barque is not an overtaken ship within the meaning of the regulations.—SMITH *v.* THE EMPRESS OF JAPAN (1901), 21 C. L. T. 430; 8 B. C. R. 122; 7 Exch. C. R. 143.—**CAN.**

**6121 i.** *Application of rule—Vessel overtaking & crossing.*]—THE CUTCH (1893), 2 B. C. R 357.—**CAN.**

**6121 ii.** —— ——.]—The *A.* passed the *C.* & her tow boat to port some distance away; she then pursued a circuitous course & coming about on a parallel course with the tug & tow placed herself in a direct line between them & stopped, when she was struck on the stern by the tow:—*Held:* the *A.* was an overtaking vessel & was bound to keep clear of the overtaken vessel.—MACDONALD *v.* ATLANTIC SALVAGE CO., LTD., [1925] Exch. C. R. 209.—**CAN.**

**6123 i.** *Overtaking distinguished from crossing.*]—No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of rule 16 in force before July, 1897.—INCHMAREE S.S. CO., LTD. *v.* THE ASTRID (1898), 6 Exch. C. R. 178.—**CAN.**

*Sect.* 3.—*The sea regulations: Sub-sect.* 5, *G.* (*a*), (*b*) & (*c*), & *H. Sect.* 4: *Sub-sects.* 1 & 2.]

**6124.** ——.]—THE BREADALBANE, No. 5598, *ante.*

*(b) Duty of Overtaking Vessel.*

**6125. Duty to keep out of the way—General rule.**]—It is *primâ facie* the duty of an overtaking ship to keep out of the way of a ship ahead of her, but if the latter ship sees another approaching her from a direction where her lights are not visible, & which vessel she has reason to suppose does not, in fact, whether keeping a good look out or not, see her, & is likely to come into collision with her, it is her duty to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the showing a light, or otherwise, which will indicate her whereabouts to the overtaking ship, & call the attention of that ship to the danger of a collision.—THE ANGLO-INDIAN (1875), 33 L. T. 233; 3 Asp. M. L. C. 1; *sub nom.* ANGLO-INDIAN (OWNERS) *v.* PRUST, THE ANGLO-INDIAN & THE EXCEL, 23 W. R. 882, P. C.

*Annotations*:—**Consd.** The City of Brooklyn (1876), 1 P. D. 276. **Refd.** The Earl Spencer (1875), 33 L. T. 235.

**6126.** —— ——.]—Although a ship is, under some circumstances, bound to keep a look out astern, & to show a light or give a signal to another ship overtaking her, & evidently unable to see her, nevertheless, where a steamer going at a high rate of speed in a fairway overtakes a sailing ship showing no light or signal, & does not see her until too near to avoid a collision, although keeping a good look out, the steamer will be held alon blame, if a lower rate of speed would have given the steamer time to have avoided the collision upon sighting the sailing ship.—THE EARL SPENCER (1875), 33 L. T. 235; 3 Asp. M. L. C. 4, P. C.

*Annotation*:—**Refd.** The City of Brooklyn (1876), 1 P. D. 276.

**6127.** —— ——.]—THE SARAGOSSA, No. 6135, *post.*

**6128. Application of rule—Foreign vessels.**]—Admlty. Regulation 17: "that every vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken," applies to foreign ships as well as to British.

A French ship, under sail, following a British ship in tow on entering a harbour, came into collision with her whilst crossing the bar:—*Held:* the collision so occurring was occasioned by the negligence of the French ship in not attending to the rule of the road as laid down in Admlty. Regulation 17, & the French ship was liable for the loss caused by such collision.—THE WHEATSHEAF *v.* THE INTREPIDE (1865), Holt, Adm. 210; 13 L. T. 612; 2 Mar. L. C. 292.

**6129.** —— **In narrow channel.**]—The rule as to keeping course & speed, while a perfectly good rule in open waters, cannot always be applied in close waters such as the Mersey, & each case must depend on its own circumstances. In a river like the Mersey a following vessel must watch the vessel ahead & observe what course she is taking with regard to other vessels.—THE WOODA (1915), 31 T. L. R. 222.

**6130. Justification for departure from rule—Onus of proof on overtaking ship.**]—Admlty. Regulations 17, 18, & 19: "Every vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken, & where by such rules the one ship is to keep out of the way, the other ship shall keep her course, due regard being had, in the observance of both these rules, & their observance being subject, to all dangers of navigation, & to any special circumstances which may exist in any particular case, rendering a departure from such rules necessary in order to avoid immediate danger." Plea: "That a steamer overtaking a sailing vessel could not comply with the first of the above regulations in nsequence of the state of the weather, & the neglect on the part of those on board the sailing vessel to take proper precaution to avoid a collision":—*Held:* the proof of such a plea was entirely on the steamer, who must make out in her defence that it was impracticable for her, in consequence of the state of the weather, to have seen the sailing ship in time to have avoided her; & that the steamer was pursuing her course at a reasonable speed, such weather considered.—THE HANNAH PARK *v.* THE LENA (1865), Holt, Adm. 61; 14 L. T. 675; 2 Mar. L. C. 345.

**6131.** ——.]—When a *primâ facie* case has been made that deft.'s ship was overtaking pltf.'s ship, the burden, as in the case of a ship at anchor, is cast upon defts. to show excuse for the collision. When one ship is overtaking another, it would rarely be the duty of the ship that is being overtaken to warn the other by whistling or exhibiting an extra light.

The *C.* was steered W. by N., & going faster than the *L.*, which was steered W.N.W. The night was not dark, & the *C.* was going at full speed:—*Held:* the *C.* was overtaking the *L.*, &, under the circumstances, the *L.* was not bound to whistle or show a light over the stern or otherwise.—THE CHANONRY, THE LEVERINGTON (1873), 42 L. J. Adm. 58; 28 L. T. 284; 1 Asp. M. L. C. 569.

*Annotations*:—**Expld.** The Earl Spencer (1875), 32 L. T. 370. **Refd.** S.S. Olympic *v.* Blunt, S.S. Olympic *v.* Admiralty Comrs. (1914), 112 L. T. 49.

**6132. Duty to take measures to pass safely.**]—THE GLOBE, No. 5274, *ante.*

**6133. Duty to go about—When leading ship goes about.**]—Two vessels, which had been sailing in company, were beating to windward. They were both close hauled on the same tack, the one ahead & a little to the windward of the other. The leading vessel stood in as near as she could to a shoal, & was then obliged to go about. The other vessel kept her reach. The two vessels came

**PART XII. SECT. 3, SUB-SECT. 5.—G. (b).**

**6125 i.** *Duty to keep out of the way—General rule.*]—The ship overtaking must observe the utmost care & watchfulness of the movements of the ship ahead, & if the movements or changes in the course of the ship ahead are not understood the overtaking ship is bound to slacken speed & if necessary to stop or to keep out of the way of the overtaken ship.—MERLO, MERLO & RAY, LTD. *v.* THE HARRY R. JONES, [1925] Exch. C. R. 183.—**CAN.**

**6125 ii.** ——.]—INCHMARKE S.S. CO., LTD. *v.* THE ASTRID (1898), 6 Exch. C. R. 178.—**CAN.**

**6129 i.** *Application of rule—In narrow channel.*]—Where one steamship was overtaking another steamship in a narrow channel in the river St. Lawrence, & a collision ensued:—*Held:* the former, for not keeping out of the way of the latter by adopting a safe course, was in fault.—*Re* THE NOVA SCOTIAN & THE QUEBEC (1875), 2 Q. L. R. 1.—**CAN.**

**6129 ii.** ——.]—Where a steamship on a narrow channel on Lake St. Peter, was in the act of overtaking a steam tug, & the tow was so carelessly navigated as to create risk of collision, & one of the vessels in tow collided with her:—*Held:* the steamship was in fault for not keeping out of her way.—THE FAREWELL (1882), 8 Q. L. R. 87.—**CAN.**

**6129 iii.** ——.]—THE C. F. BIELMAN *v.* CADWELL (1906), Cout. 405.—**CAN.**

**6132 i.** *Duty to take measures to pass safely.*]—If it be practicable for a vessel which is following close on the track of another vessel to pursue a course which is safe, & she adopts one which is perilous, then if mischief ensue she is answerable for all consequences.—*Re* THE JOHN MUNN (1848), 1 S. V. A. R. 265.—**CAN.**

into collision :—*Held :* it was the duty of the following vessel to have gone about at the time she saw the leading vessel go about ; & as the collision was occasioned by the following vessel neglecting to go about at the proper time, she was to blame for the collision.—THE PRISCILLA (1870), L. R. 3 A. & E. 125 ; 23 L. T. 566 ; 3 Mar. L. C. 503.

*Annotation :*—**Apld.** The Annie, [1909] P. 176.

*(c) Duty of Overtaken Vessel.*

**6134. Keeping course—When departure from rule justified—Ship so far ahead as to enable following ship to avoid her.**]—The Regulations for Preventing Collisions at Sea only apply at a time when two vessels have approached so near to one another that, if either of them does anything contrary to the Regulations, risk of collision will be involved : *Semble :* a vessel, which is being overtaken by another, is not to blame within Article 22 of the Regulations if she alters her course at such a distance ahead of the overtaking vessel that the latter can, by the exercise of reasonable care, keep out of the way of the former.

*Qu. :* what is the duty of a vessel which is being overtaken as to keeping her course when it becomes necessary for her to manœuvre for another vessel.—THE BANSHEE (1887), 57 L. T. 841 ; 6 Asp. M. L. C. 221, C. A.

*Annotation :*—**Apld.** The Roanoke, [1908] P. 231.

**6135. —— Liability for deviating more than necessary.**]—Where a vessel which is being overtaken by another deviates from her course, it is the duty of the overtaking ship to exercise reasonable care to keep out of the way of the former & she is relieved from the absolute obligation prescribed by Article 20 of keeping out of the way. The overtaken vessel which finds it necessary to manœuvre for a danger of navigation is to blame if she deviates from her course more than is necessary to avoid immediate danger.—THE SARAGOSSA (1892), 68 L. T. 400 ; 7 Asp. M. L. C. 289, C. A. ; *affd. sub nom.* THE SARAGOSSA (OWNERS) *v.* WESTOLL, THE SARAGOSSA (1893), 69 L. T. 664 ; 7 Asp. M. L. C. 376, H. L.

**6136. —— Liability for dangerous manœuvre.**]—S.S. NORD KAP *v.* S.S. SANDHILL, THE SANDHILL, No. 6032, *ante.*

**6137. —— Altering course without signalling alteration—Not contributing to collision.**]—THE ANNIE (1912), Shipping Gazette, Feb. 2, C. A.

**6138. Duty to keep out of way—Overtaken ship closehauled on port tack—Overtaking vessel closehauled on starboard tack.**]—THE ANNIE, No. 5852, *ante.*

**6139. Duty as to maintaining speed.**]—Pltfs.' steamsip *M. I.* was proceeding down river with her engines working at half speed. She then put the engines full speed ahead & for about twenty minutes, as the engines developed their capacity, her speed was increasing from about 6 knots to 7½ or 8. When the *M. I.* put her engines full speed ahead, defts.' steamship *C.*, a faster vessel, was about two miles astern of the *M.I.* The *C.* gradually overhauled the *M.I.* & endeavoured to pass her. Before she had drawn clear a collision took place. Defts. alleged (*inter alia*), that the *M. I.*, as the overtaken vessel, failed to keep her speed in accordance with Article 21 of the Regulations for Preventing Collisions at Sea :—*Held :* the development of speed was not a breach of Article 21 ; the Article did not require the *M. I.* to diminish her speed or to keep it at a reduced rate ; & the *C.*, for attempting to pass in a narrow reach of the river, was alone to blame.—THE CEDERIC, [1924] P. 215 ; 94 L. J. P. 15 ; 132 L. T. 731 ; 16 Asp. M. L. C. 466.

**Duty as to giving warning.**]—*See* Nos. 5590-5598, 5602, 6125, 6126, 6131, *ante.*

**Duty to show lights.**]—*See* Sub-sect. 5, B. (*k*), *ante.*

*H. Look Out.*

**Duty to look out generally.**]—*See* Sect. 2, subsect. 6. *ante.*

**Duty to keep look out in fog.**]—*See* Sub-sect. 5, C. (*k*), *ante.*

## SECT. 4.—LOCAL RULES OF NAVIGATION.

### SUB-SECT. 1.—CARDIFF.

**6140. Breach of sea regulations—Whether warranted under local rules.**]—Where a steamship, in charge of a pilot, bound for Penarth Dock, & carrying the usual docking signal of two bright lights aft, saw, when crossing Cardiff East Flat, the red & masthead lights of a steamship coming down Cardiff Drain, bearing on her starboard bow & distant from three to four cables length ; but the pilot in charge took no steps to get out of the way of the other vessel until a collision was inevitable, because he was of opinion that, as he was bound for dock, he was entitled to hold on :—*Held :* his vessel was to blame for breach of Article 16 of the Regulations for Preventing Collisions, there being no " special circumstances " warranting a departure from the Regulations.—THE ST. AUDRIES (1886), 54 L. T. 278 ; 5 Asp. M. L. C. 552.

**6141. —— ——.**]—Those on a steamship, after leaving the Roath Dock Basin under the orders of the dockmaster, sighted the masthead & red lights of a tug & the green light of her tow two to three cables off & one to two points on the port bow. The tug & tow were coming up on the east side of Cardiff Drain, which runs about north & south, bound into the East Bute Dock. The steamship & tug both sounded a port-helm signal, but a collision occurred. In a damage action each side charged the other with breaches of the Collision Regulations, 1897 :—*Held :* the Collision Regulations did not apply to vessels meeting in such circumstances in Cardiff Drain, & the steamship was alone to blame for the collision, as she ought to have waited till the channel was clear before she attempted to cross the incoming traffic.—THE RED CROSS (1907), 97 L. T. 610 ; 10 Asp. M. L. C. 521.

### SUB-SECT. 2.—CLYDE.

**6142. Vessel crossing river in tow—Collision with up-river vessel—After due warning that river**

**PART XII. SECT. 3, SUB-SECT. 5.—G. (c)**

**d.** *Keeping course.*] — Where a steamship on a narrow channel on Lake St. Peter, was in the act of overtaking a steam tug, & the tow was so carelessly navigated as to create risk of collision, & one of the vessels in tow collided with her :—*Held :* the steamship was in fault for not keeping out of her way, & the tow to have been to blame for not keeping her course.—THE FAREWELL (1882), 8 Q. L. R. 87.—**CAN.**

**e.** ——.] — Notwithstanding an overtaking vessel must keep out of the way of an overtaken vessel, there is a correlative duty upon the leading vessel to keep her course.—DONOVAN S.S. CO. *v.* THE HELLEN, [1926] 4 D. L.R. 497.—**CAN.**

**f.** *Duty as to giving warning.*]—If the ship ahead anticipates damages from the approach of an overtaking ship it is the duty of the former to give warning.—MERLO, MERLO & RAY, LTD. *v.* THE HARRY R. JONES, [1925] Exch. C. R. 183.—**CAN.**

**g.** *Duty to keep proper look out.*]—BRYCE *v.* CANADIAN PACIFIC RY. CO., C. R., [1909] A. C. 490.—**CAN.**

*Sect.* 4.—*Local rules of navigation: Sub-sects.* 2, 3, 4, 5, 6, 7, 8, 9 & 10.]

**blocked.**]—By Rule 19 of the Clyde Navigation Bye-laws: "Every steam vessel, under her own steam, crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up & down the river."

The *Bogota*, a steamer 415 feet in length, was being towed stern first by a tug out of a graving dock on the Clyde, at a point where the river is barely 500 feet broad, preparatory to proceeding up stream. She had steam in her boilers, but was not using it. When she was two-thirds of her length out of the dock & slanting across & down the river the *Bogota* sighted, some three-quarters of a mile away, the steamship *Alconda* coming up the river under her own steam with two tugs attached. The *Bogota* & her tug gave four short blasts, which were repeated, as a warning that the river was blocked, & continued their manœuvre. The *Alconda*, however, held on her course, & in attempting to pass between the *Bogota's* tug & the bank, struck the tug while the latter was still about 100 feet from the bank, with the result that the tug was forced back on the *Bogota*, & all three vessels were damaged:—*Held:* the *Alconda* was solely to blame for the collision, (*a*) because in the circumstances the *Bogota* was not contravening Rule 19 of the Clyde Navigation Bye-laws; (*b*) because, assuming that the *Bogota* had contravened the rule, the collision was caused by the subsequent & independent fault of the *Alconda* in holding on her course & attempting to pass the *Bogota* after she had been warned that the river was blocked.—ANGLO-NEWFOUNDLAND DEVELOPMENT CO. *v.* PACIFIC STEAM NAVIGATION CO., [1924] A. C. 406; 93 L. J. P. C. 182; 131 L. T. 258; 16 Asp. M. L. C. 385, H. L.

SUB-SECT. 3.—DANUBE.

**6143. Ascending & descending ships—Descending vessel keeps to right bank—Breach constituting negligence.**]—Under Article 34, c. 2, titre 2, of the Danube Regulations, directing that, where two steamships meet going in opposite directions "*ils sont tenus de se diriger de telle sort qu'ils viennent tous deux sur tribord. A cet effet, le bâtiment qui remonte le fleuve doit appuyer vers la rive gauche, et celui qui descend vers la rive droite,*" vessels going down the river are bound to keep to the right bank, & if a vessel in a mist after sunset keep to the left bank & come into collision with another vessel, the breach of the rule is negligence.—MATWIEF *v.* WHYTOCK, THE YOURRI, THE SPEARMAN (1885), 53 L. T. 29; 5 Asp. M. L. C. 458, P. C.

**6144. —— Approach at narrow point.**]—S.S. DIANA *v.* S.S. CLIEVEDEN, THE CLIEVEDEN, No. 6087, *ante*.

SUB-SECT. 4.—HUMBER.

**6145. Exhibition of lights — Anchor light.**]—The *R.* in charge of a tug was dropping stern foremost up the Humber with the tide, & was eventually brought athwart the tide to go into dock. The *R.* was exhibiting, in addition to the masthead & side lights, a white light from the main peak showing astern, which had been placed there by order of the pilot who was by compulsion of law in charge of the *R.* The Rules for the Navigation of the River Humber, made by Order in Council in pursuance of Merchant Shipping Act, 1862 (c. 63), s. 32, incorporate the Regulations for Preventing Collisions at Sea. The *E.* coming down the Humber & the *R.* came into collision. At the hearing it was admitted that the *E.* was to blame:—*Held:* (1) the *R.* was also to blame, for as the Humber Rules were within Merchant Shipping Act, 1873 (c. 85), s. 17, there had been, by the exhibition of a stern light a breach of a statutory regulation, namely, of Article 2, which it was impossible to say might not have contributed to the collision, & there was no circumstance to make a departure from the regulation necessary; (2) the light having been exhibited by order of the pilot, did not exempt the owner of the *R.* from liability, as the master should not have permitted an infringement of the Regulations.—THE RIPON (1885), 10 P. D. 65; 54 L. J. P. 50; 52 L. T. 438; 33 W. R. 659; 5 Asp. M. L. C. 365.

*Annotations:*—*As to* (1) **Refd.** The Monte Rosa, [1893] P. 23. *As to* (2) **Refd.** The Monte Rosa, [1893] P. 23.

**6146. —— —— Height of.**]—By Rule 2 of the Humber Rules, a vessel with two masts at anchor in the Humber shall exhibit an after-riding light "double the height of the bow light":—*Held:* the rule must be taken to mean that the after light shall be at least double the height of the bow light, but that it need not be exactly double the height of such light, & a vessel carrying an after light of a height five feet more than double that of the bow light had not infringed the rule.—THE MAGNETA (1890), 15 P. D. 101; 59 L. J. P. 55; 63 L. T. 114; 6 Asp. M. L. C. 531, D. C.

**6147. —— "Dumb craft."**]—DOUGHTY, SON & RICHARDS *v.* GRAY (T.) & CO. (1897), 13 T. L. R. 587.

**6148. Approaching vessels with & against tide—Precautions in rounding river bend.**]—THE EZARDIAN, No. 5378, *ante*.

**6149. Vessel turning after signal given—Right to remain athwart channel.**]—A steam vessel which has given the appropriate whistle signal under the Humber Rules to indicate that she is about to turn round in the river, thereby imposing the duty on other vessels of keeping out of her way, is not entitled to put herself athwart the channel & continue to come athwart, but must complete her turn, using no more of the waterway than is reasonably necessary for the purpose.—THE AUSTRALMEAD, [1924] P. 36; 93 L. J. P. 15; 130 L. T. 288; 40 T. L. R. 71; 16 Asp. M. L. C. 247.

SUB-SECT. 5.—MANCHESTER SHIP CANAL.

**6150. Whether regulations applicable.**]—*Semble:* the Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal; but, assuming that they do, the second paragraph of Article 16 of those regulations, by which "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, . . ." will not be compulsory, for the approaching vessel, of which the fog signal is heard, must be in the canal, & presumably on her right side, so that her position is, in the circumstances, sufficiently ascertained by those in charge of the vessel hearing the whistle, to absolve them from the obligation to "stop her engines," & they can, therefore, continue to navigate their vessel with caution on her own right side, so as to pass the other vessel.—THE HARE, [1904] P. 331; 73 L. J. P. 47; 90 L. T. 323; 20 T. L. R. 291; 9 Asp. M. L. C. 547.

*Annotations:*—**Consd.** The Ceylon, [1920] P. 187. **Refd.** The Anselm, [1907] P. 151.

**6151. Fog signals—Vessel lying at lie-by.**]—There is no rule in the Manchester Ship Canal that

a vessel moored alongside one of the lie-bys in a fog shall give any signal to indicate her presence as a warning to other vessels & the rules of good seamanship do not require her to give a signal in the absence of circumstances showing that those on board knew or ought to have known that another vessel was approaching to moor there.—THE CITY OF LIVERPOOL (1912), 29 T. L. R. 139.

SUB-SECT. 6.—MEDWAY.

**6152. Vessel at anchor in fairway—Fog signal.**]—THE CLUTHA BOAT 147, No. 5390, *ante*.

SUB-SECT. 7.—MERSEY.

**6153. Lights—Vessel towed on dark night.**]—THE FAIRY (1850), 5 L. T. 146.

*Annotation:*—**Refd.** The Osmanli (1850), 7 Notes of Cases, 507.

**6154. —— Stern light—Where carried.**] THE FIRE QUEEN, No. 5535, *ante*.

**6155. —— Anchor lights.**]—A vessel failing to exhibit lights as required by 37 & 38 Vict. c. 52, s. 1, is liable to be held in fault under 36 & 37 Vict. c. 85, s. 17, for the provisions of 37 & 38 Vict. c. 52, s. 1, are to be regarded as virtually incorporated with the Regulations for Preventing Collisions at Sea, made under the Merchant Shipping Acts.—THE LADY DOWNSHIRE (1878), 4 P. D. 26; 48 L. J. P. 41; 39 L. T. 236; 27 W. R. 648; 4 Asp. M. L. C. 25.

**6156. —— ——.**]—In considering whether a breach of the Regulations for Preventing Collisions could possibly have contributed to a collision, the ct. must take into consideration the whole of the evidence, even where there is a conflict, subject to the qualification that the *onus* of proof lies on those infringing the Regulations; & if upon such evidence the ct. comes to the conclusion that the breach could not possibly have contributed to the collision, the ship committing it is not to be deemed to blame in respect thereof.

The steamship *H.* at night ran into the barque *E.* at anchor in the river Mersey. By Order in Council of Jan. 5, 1881, every vessel when at anchor in the river Mersey shall carry two white lights, the after light being carried double the height of the foremost light. The *E.* exhibited two anchor lights, both of which were about 20 feet above the deck. It was admitted by defts. that they only saw the after light:—*Held:* the *H.* was to blame for a bad look out, & the *E.* to blame for a breach of the regulation, it not being shown that in the circumstances of the case the breach could not have contributed to the collision.—THE HERMOD (1890), 62 L. T. 670; 6 T. L. R. 257; 6 Asp. M. L. C. 509.

**6157. —— White light at the mizzen truck—Quarantine light.**]—A steamship under way in the Mersey is not entitled to carry a white light at the mizzen truck as a signal for the customs officer, or otherwise than as a quarantine light; & if she carries such a light for the former purpose she is guilty of a breach of the Mersey Navigation Rules, & will be held to blame if the other vessel might have been misled thereby.—THE TALBOT, [1891] P. 184; 64 L. T. 542; 7 Asp. M. L. C. 36.

**6158. —— Tug—Attached to vessel at anchor.**]—THE DEVONIAN, No. 5548, *ante*.

**6159. Warning signal—Vessel turning in river.**]—The Mersey Rules, which consist of the International Regulations with some modifications & alterations are deficient in not providing a rule, such as exists in the Thames prescribing the signal to be given by a vessel turning in the river. A mere repetition of the helm signal, indicating that the vessel is under a particular helm, is not a sufficient indication to other vessels that she is turning round under that helm.—THE ADRIATIC (1914), 30 T. L. R. 593; *subsequent proceedings*, 30 T. L. R. 699.

**6160. Crossing Rule—Where Sea Regulation inapplicable.**]—THE LLANELLY, No. 5964, *ante*.

**6161. Conduct of following vessel—Course & speed.**]—THE WOODA, No. 6129, *ante*.

**Launching rules.**]—*See* Nos. 5162, 5166-5168, *post*.

SUB-SECT. 8.—NEWPORT.

**6162. Entering port.**]—By Article 13 of Newport Harbour Bye-laws, 1894: every vessel shall, unless prevented by stress of weather, be brought into & taken out of the harbour to the right of mid-channel:—*Held:* in order to comply with this bye-law, every vessel proceeding inward from sea must keep outside the southernmost of the buoys, marking the channel at the entrance to the River Usk, until she can round in on her proper side between the buoys.

A vessel which does a wrong thing in regard to another must show, if she can, & the whole burden of that lies with her, that the wrong thing did not conduce to the collision (LORD ESHER, M.R.).—THE WINSTANLEY, [1896] P. 297; 65 L. J. P. 121; 75 L. T. 133; 8 Asp. M. L. C. 170, C. A.

*Annotation:*—**Refd.** The Peter Benoit (1915), 111 L. T. 147.

SUB-SECT. 9.—OUSE.

**6163. Navigation of Goole reach.**]—THE FRANKFORT, No. 5381, *ante*.

SUB-SECT. 10.—SUEZ CANAL.

**6164. Vessels passing.**]—Although it is the recognised practice in part of the Suez Canal for a south going vessel to tie up in due time to allow a north going vessel to pass, still, in their exercise of this right of way, those in charge of the north going vessel have a relative duty cast upon them to act reasonably, &, therefore, they must reduce speed, & keep their vessel so well in hand as to be able promptly to bring her to a standstill should they find themselves approaching too near whilst the giving way vessel is completing the manœuvre of making fast. These precautions are especially necessary at night owing to the difficulty of accurately estimating the distance of the lights of the south going vessel before she exhibits the particular lights prescribed by the rules as an indication that the north going vessel may safely pass.—THE CLAN CUMMING, [1907] P. 311; 77 L. J. P. 1; 97 L. T. 14; 10 Asp. M. L. C. 436, C. A.

**6165. Employment of pilot—Liability of master unaffected.**]—Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal co.'s pilot compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damage arising out of the collision.

The effect of the Regulations for the Navigation of the Suez Canal is to constitute a pilot taken on board a ship traversing the canal the adviser of the master, & to leave the control of the navigation

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of the ship solely with the master.—THE GUY MANNERING (1882), 7 P. D. 132; 51 L. J. P. 57; 46 L. T. 905; 30 W. R. 835; 4 Asp. M. L. C. 553, C. A.

*Annotations:*—**Apld.** The Agnes Otto (1887), 12 P. D. 56. The Augusta (1887), 57 L. T. 326. **Refd.** The Dallington, [1903] P. 77; The Andoni, [1918] P. 14.

SUB-SECT. 11.—TEES.

**6166. Within what limits rules apply.**]—(1) To judge of the degree of a ship's culpability under Maritime Conventions Act, 1911 (c. 57), s. 1 (1), regard must be had to the relative positions of the two vessels, the view which each had of the other, the signals which passed between them, & the opportunity each had of avoiding the consequences of the other's errors.

(2) Faults in navigation which do not contribute to the collision are not to be taken into consideration.

(3) Where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half & half.

(4) The word "river" in Tees Conservancy Bye-laws does not include the buoyed channel outside the river mouth, & there is no analogy between this buoyed channel & certain waterways which have been declared to be narrow channels.

(5) *Qu.:* as to the duty of vessel approaching at a considerable distance to blow whistle signals, & the effect of the omission to do so having regard to Maritime Conventions Act, 1911 (c. 57), s. 1 (1). —THE PETER BENOIT (1915), 85 L. J. P. 12; 114 L. T. 147; 32 T. L. R. 124; 60 Sol. Jo. 88; 13 Asp. M. L. C. 203, H. L.

*Annotations:*—*As to* (2) **Refd.** S.S. Haugland v. S.S. Karamea, [1922] 1 A. C. 68. *As to* (3) **Refd.** The Clara Camus (1925), 134 L. T. 50. *Generally*, **Refd.** Admiralty Comrs. v. S.S. Volute, [1922] 1 A. C. 129.

**6167. Vessels to keep to starboard side of river—Rule strictly observed.**]—Articles 17 & 18 of the River Tees Conservancy Bye-laws, providing that ships shall keep "the starboard side of the river so that the port helm may always be applied," & that a "steamship, when approaching another ship on an opposite course or from an opposite direction, shall before approaching within 30 yards slacken her speed, & keep as near as possible to the starboard side of the river," are to be observed even when vessels are approaching one another so as to show each other their green lights, & nothing will excuse the non-observance of these rules but extreme necessity.—THE MARY LOHDEN (1887), 58 L. T. 461; 6 Asp. M. L. C. 262, C. A.

**6168. Maximum speed—Standard of measurement.**]—In Rule 22 of the Rules for the Navigation of the River Tees, providing that "no steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum speed of 6 miles an hour," the speed mentioned is speed over the ground & not through the water.—THE R. L. ALSTON (1882), 8 P. D. 5; 48 L. T. 469; 5 Asp. M. L. C. 43, C. A.

*Annotation:*—**Refd.** The Philadelphian, [1900] P. 43.

**6169. Low speed in fog.**]—Although Rule 27 of the Tees Bye-laws provides that "whenever the is a fog no steam vessel shall be navigated in any part of the river at a higher rate of speed than 3 statute miles per hour over the ground," the larger type of vessels which now call at Middlesbrough may find a difficulty in obeying the rule at certain states of the tide, &, having regard to the duty to other vessels to keep steerage way, if a vessel has a right to be under any way at all & her speed is not greater than is right under the circumstances, the ct. may consider that the vessel is not to blame for the non-observance of the rule. —THE DETTINGEN (1914), 30 T. L. R. 589.

SUB-SECT. 12.—THAMES.

*A. Passing Points in River.*

**6170. What is a "point."**]—(1) The word "point" in Thames Rules No. 23 means the part of a promontory or headland from the place where a vessel begins to use her steering power to round the promontory or headland to the place where she ceases so to do.

(2) The words "before rounding" are applicable to a vessel not only in the reach before she begins to use her steering powers but also during the time when her steering powers are being so used in order to get round the point.—THE MARGARET (1884), 9 P. D. 47; 53 L. J. P. 17; 50 L. T. 447; 32 W. R. 564; 5 Asp. M. L. C. 204, C. A.; *on appeal, sub nom.* CAYZER *v.* CARRON CO., 9 App. Cas. 873, H. L.

*Annotations:*—*Generally*, **Refd.** The Morgengry & The Blackcock, [1900] P. 1; H.M.S. Sans Pareil, [1900] P. 267; The Ovingdean Grange, [1901] P. 127; The Hero, [1911] P. 128; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1921] A. C. 406; The Modica, [1926] P. 72; The Backworth, [1927] P. 256; S.S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37.

**6171. What is rounding.**]—THE MARGARET, No. 6170, *ante*.

**6172. Behaviour of vessels with & against tide.**]—(1) A steamship navigating the Thames against the tide is always bound to obey Thames Conservancy Rules, 1880, r. 23, & on approaching one of the points there named to wait until vessels then approaching it with the tide have passed her. Whether vessels are also to observe R. 22 & pass port side to port side, depends upon whether the vessel navigating against the tide is close to the shore when waiting for the one coming down with the tide to pass her, or so far out as to allow the latter to pass port side to port side.

(2) The expression "passed clear" in r. 23 means "passed clear of the waiting ship."

(3) *Semble:* where the point to be passed is on the north side of the river, with a flood tide, or on the south side with an ebb tide, if the vessel navigating with the tide has her green light open when ahead of the vessel waiting, r. 23 alone applies, & the vessels will pass clear starboard side to starboard side; otherwise both rules apply.

(4) Steamships rounding a point in the river Thames are not bound to stop or reverse because at one moment they are approaching a vessel coming in the opposite direction where there is no risk of collision if both vessels continue the curvilinear courses they are then on.

(5) Rules issued as these are should be construed literally if they can be construed at all (JESSEL, M.R.).—THE LIBRA (1881), 6 P. D. 139; 45 L. T. 161; 4 Asp. M. L. C. 439, C. A.

*Annotations:*—*As to* (1) **Refd.** The Backworth, [1927] P. 256. *Generally*, **Consd.** The Margaret (1884), 9 P. D. 47.

**6173.** ——.]—Pltfs.' steam vessel, proceeding down the river Thames against the tide, neglected, in breach of Article 47 of the Thames Bye-laws, to wait before rounding Blackwall Point "until any other vessels rounding the point with the tide (had) passed clear," & came into collision with defts.' steam vessel which had come up the river, & was, at the material time, in process of turning, preparatory to entering the West India Docks:—*Held:* pltfs.' vessel was to blame, for, through the

breach of Article 47, she had brought herself into a position in which she placed defts.' vessel in a difficulty, & threw upon those in charge of that vessel the obligation of exercising more than ordinary care.—THE OVINGDEAN GRANGE, [1902] P. 208; 71 L. J. P. 105; 87 L. T. 15; 9 Asp. M. L. C. 295, C. A.

*Annotations:*—**Refd.** The Cumberland Queen (1921), 126 L. T. 679; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129; The Backworth, [1927] P. 256; S.S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37.

**6174.** ——.]—By r. 36 of the Port of London River Bye-Laws, 1914, "every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed & if necessary stop & wait before rounding so as to allow any vessel navigating with the tide to round & pass clear of her":—*Held:* the rule imposed two duties on the vessel navigating against the tide; (*a*) to ease her speed, & (*b*) if necessary, to stop & wait; but the words "if necessary" meant "if necessary to avoid risk of collision" & not "if necessary in order to allow the vessel navigating with the tide to round & pass clear"; & a vessel going down the river against the tide which eased her speed on approaching Blackwall Point was not to blame for not then stopping, as there was nothing at that time to make it dangerous or risky for her to pass the point at the same time as an upcoming vessel with which, owing to the negligent navigation of two other vessels, she afterwards came into collision.—THE BACKWORTH, [1927] P. 256; 96 L. J. P. 172; 137 L. T. 653; 43 T. L. R. 644.

**6175.** —— **Rule not confined to steam vessels.**]—Article 47 of the Thames bye-laws is not confined to the case of steam vessels meeting steam vessels rounding the points mentioned in the article. It applies to the case of a steam vessel meeting a sailing vessel.—THE URSULA FISCHER (1913), 29 T. L. R. 529.

**6176.** —— **Meaning of "tide."**]—By r. 36 of the Port of London River Bye-Laws: "Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed & if necessary stop & wait before rounding so as to allow any vessel navigating with the tide to round & pass clear of her":—*Held:* the expressions "navigating against the tide" & "navigating with the tide" refer to an actual tidal stream, operating at the time & place sufficiently to differentiate for the purposes of practical navigation between with it & against it & not merely to the state of the tide, *i.e.*, ebb or flow, according to the published anticipations of the local time tables.—S.S. HONTESTROOM *v.* S.S. SAGAPORACK, S.S. HONTESTROOM *v.* S.S. DURHAM CASTLE, [1927] A. C. 37; 95 L. J. P. 153; 136 L. T. 33; 42 T. L. R. 741; 17 Asp. M. L. C. 123, H. L.

*Annotation:*—**Consd.** The Backworth, [1927] P. 256.

*B. Vessels Approaching with Risk of Collision.*

**6177. What is "risk of collision."**]—Two steam vessels were meeting in the Thames in broad daylight, the tide at the time being flood. The vessel coming up the river was under a starboard helm to round Cuckold Point, & was a little to the southward of mid-channel, when those on board her saw the other vessel with her starboard side open to them about 400 yards off & half a point on their starboard bow. The vessel coming up the river sounded two short blasts on her whistle, to which the other vessel replied with one, & ported her helm, whereupon the engines of the vessel coming up were reversed, &, although the engines of the vessel coming down were also reversed, a collision took place, the vessels meeting nearly end on:—*Held:* the vessel coming down was solely to blame for the collision, as she was not justified in porting, for if she had kept her course they would have passed clear, starboard side to starboard side, & they were not, when they first saw each other, approaching "so as to involve risk of collision," & Article 46 of the Thames Byelaws, 1898, did not apply.—GUILDHALL (OWNERS) *v.* GENERAL STEAM NAVIGATION CO., LTD., [1908] A. C. 159; *sub nom.* THE GUILDHALL, 77 J. P. 113; 98 L. T. 763; 11 Asp. M. L. C. 58, H. L.

**6178. Vessel sailing up river—Duty to keep North Side.**]—THE FYENOORD, No. 6080, *ante.*

**6179.** —— ——.]—On Aug. 30, 1912, there was no rule in the Thames that steamships should keep to the North side going up, & the only rule was that if there was a risk of collision ships should go port to port, if there was no risk there was no rule to prohibit starboard to starboard.—KARAMEA (OWNERS) *v.* MARIE GARTZ & FREIGHT (OWNERS) (1914), 30 T. L. R. 702, H. L.; *affg.* S. C. *sub nom.* THE MARIE GARTZ (1913), 30 T. L. R. 88, C. A.

**6180.** —— —— **Vessel coming down river—Also on North side.**]—MALCOMSON *v.* GENERAL STEAM NAVIGATION CO., THE RANGER & THE COLOGNE, No. 5956, *ante.*

**6181. Vessel sailing down river—Duty to keep south side.**]—Pltfs.' & defts.' steamships, proceeding down the river Thames, came into collision, in the upper part of Galleon's Reach, owing in part to defts.' vessel, which was leading, & which was to the Southward of mid-channel, attempting, by starboarding, to pass to the Northward of a dredger, moored in about midstream, thereby tending to throw herself across the course of pltfs.' vessel, which was coming down on the north side of the river, & also making to pass on the north side of the dredger. Both vessels were found to blame, defts.' vessel, as the overtaken vessel, for not keeping her course, & pltfs.' vessel, as the overtaking vessel, for not stopping so as to keep out of the way of defts.' vessel when she saw what that vessel was doing. As a matter of seamanship also both vessels were to be deemed in fault for disregarding the understanding on the river, by which, for the safety of navigation, steamships going down keep to the southward of mid-stream, thereby leaving the northern side of the river free for vessels coming up.—THE GERE, [1909] P. 287; 78 L. J. P. 130; 100 L. T. 620; 11 Asp. M. L. C. 243.

**6182. Port to port rule.**]—THE LIBRA, No. 6172, *ante.*

**6183.** ——.]—When two steam-vessels are proceeding in such directions that their respective courses if continued will bring them, so near each other as to cause a risk of collision, Rule 22 of the Thames Conservancy Rules is imperative, & both vessels must so manœuvre as to pass port side to port side:—*Semble:* when two steam-vessels are proceeding one up & the other down the river, & have their green lights only in sight each to each, & bearing one point on each other's starboard bows at a distance of a quarter of a mile, they are approaching so as to involve risk of collision, & are both bound to port their helms to pass port side to port side.—THE ODESSA (1882), 46 L. T. 77; 4 Asp. M. L. C. 493, C. A.

*Annotation:*—**Consd.** The Guildhall, [1908] P. 29.

**6184.** ——.]—THE OCEANA (1892), 8 T. L. R. 740, C. A.

**6185.** ——.]—THE BROOK (1913), Shipping Gazette, Feb. 7.

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**6186.** ——.]—KARAMEA (OWNERS) *v.* MARIE GARTZ & FREIGHT (OWNERS), No. 6179, *ante.*

**6187. Near docks—Duty to warn ahead & keep look out astern.**]—THE JUNO, No. 5384, *ante.*

*C. Carriage of Anchor.*

**6188. A-cockbill—Whether permitted.**]—TAYLOR *v.* LAWSON (1837), 10 L. T. 276.

**6189.** —— ——.]—GENERAL STEAM NAVIGATION CO. *v.* MORISON (1853), 2 L. T. 810.

**6190.** —— —— **Absolute necessity.**]—Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, moves from buoy to buoy to select one, &, finding them all occupied, anchors a short distance above the last of the buoys, she does not navigate within the anchorage ground in contravention of Article 15 of the Rules & Bye-laws for the Navigation of the River Thames, 1872.

Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, finds all the buoys occupied, &, on passing the last buoy, gets her anchor a-cockbill for the purpose of bringing herself to anchor on finding a suitable place, &, after she has got a short distance above the buoys, a collision occurs & damage is done by the anchor, such anchor is only a-cockbill during such time as is "absolutely necessary" for bringing her to anchor within the meaning of Article 19 of the Rules & Bye-laws for the Navigation of the River Thames, 1872.—THE CITY OF DELHI (1887), 58 L. T. 531; 6 Asp. M. L. C. 269.

**6191.** —— **Liability for damage.**]—THE NIMBLE (1843), 4 L. T. 839.

**6192. Stock awash.**]—THE MARGARET, No. 5287, *ante.*

**6193.** ——.]—THE SINDBAD (1887), 4 T. L. R. 170, C. A.

**6194.** ——.]—THE ROSE OF ENGLAND, No. 5368, *ante.*

**6195.** ——.]—*Re* DUNSTANBOROUGH (1891), [1892] P. 363, n.

*Annotation:*—**Refd.** The Hornet, [1892] P. 361.

**6196.** ——.]—THE MONTE ROSA, No. 6430, *post.*

**6197.** ——.]—By Rule 20 of the Rules & Bye-laws for the Regulation of the Navigation of the River Thames, allowed by Order in Council, Feb. 5, 1872, "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the stock shall be awash . . ." In an action of damage for a collision which occurred in the River Thames, it appeared that the anchor of pltfs.' vessel was one of the parts which first came in contact with defts.' vessel. It was hanging from the hawse, shackle, or ring, awash, & defts. by their counterclaim charged pltfs. with neglecting to comply with the rule:—*Held:* the rule had not been infringed, as the anchor must be as low as stock awash, but may be as much lower as is thought proper.—THE J. R. HINDE, [1892] P. 231; 61 L. J. P. 91; 67 L. T. 832; 7 Asp. M. L. C. 257.

*Annotation:*—**Consd.** The Six Sisters, [1900] P. 302.

**6198.** ——.]—The fact that a vessel carrying her anchor hanging from the bows has the ring awash in the position indicated by Rule 11 of the Thames Rules does not exempt her owners from liability for damage done by her anchor to other vessels with which, in the circumstances & without negligence, she is likely to come in contact, & which are likely to be damaged by her anchor, if so carried.—THE SIX SISTERS, [1900] P. 302; 69 L. J. P. 139.

*D. Ships Crossing River.*

**6199. Duty on completion of operation—Where vessel still athwart stream.**]—THE RIVER DERWENT, No. 6428, *post.*

**6200. Vessel turning round—Athwart stream in process of turning.**]—Article 48 of the Thames Bye-laws, 1898, by which steam vessels "crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up & down," does not apply to a steam vessel turning round on the same side of the river as that on which she is being navigated, although, when athwart the river, in the process of turning, part of her may, owing to her length, be across the line of midstream.—THE JOHN HOLLWAY, [1900] P. 37; 69 L. J. P. 15; 81 L. T. 726; 48 W. R. 416; 9 Asp. M. L. C. 36.

*Crossing Ships.*

**6201. What are crossing vessels—Vessels going in opposite direction on same side of river.**]—MALCOMSON *v.* GENERAL STEAM NAVIGATION CO., THE RANGER & THE COLOGNE, No. 5950, *ante.*

**6202. Duty to give way.**]—Where one of two steamers in the Thames was steering parallel to the shore & the other was steering in an oblique course across the stream:—*Held:* they were crossing vessels, so that under Rule 29 of the Rules for the Navigation of the Thames, 1872, the one which had the other on her own starboard was bound to keep out of the way of the other.—THE OCEANO (1878), 3 P. D. 60, C. A.

*Annotations:*—**Refd.** S.S. Normandie *v.* S.S. Pekin, The Pekin, [1897] A. C. 532; S.S. Olympic *v.* Blunt, S.S. Olympic *v.* Admiralty Comrs. (1914), 112 L. T. 49.

*F. Ships Turning Round.*

**6203. Warning signals.**]—A steam vessel turning round in the river Thames, & at a time when, as part of the manœuvre, she was reversing her engines, gave, to a steam vessel in sight, & approaching with risk of collision, the three-blast signal prescribed by Article 17 of the Rules for the Navigation of the River Thames:—*Held:* she was bound to make the four-blast signal, prescribed by Article 18, of the Rules for the Navigation of the River Thames, when beginning to execute the manœuvre of turning round, the object of the four blasts being to give notice, in due time, that a manœuvre of the kind is about to be carried out.—THE NEW PELTON, [1891] P. 258; 60 L. J. P. 78; 65 L. T. 494; 7 Asp. M. L. C. 81.

*Annotation:*—**Mentd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**6204.** ——.]—A steam vessel turning round in the river, & giving the appropriate four-blast signal, under Rule 40 of the Thames Bye-laws, 1898, is not required to give, in addition, three short blasts when, in the process of turning, her engines are going astern.—THE HARBERTON, [1913] P. 149; 83 L. J. P. 20; 108 L. T. 735; 29 T. L. R. 490; 12 Asp. M. L. C. 342.

*Annotation:*—**Consd.** The Ancona, [1915] P. 200.

**6205.** ——.]—Those in charge of defts.' steam vessel, being about to bring up in Gravesend Reach, gave the four short blasts of the steam whistle required by Rule 23 of the Port of London Bye-laws, 1914, to signify that they were about to turn the vessel round, & followed this with one short blast to indicate that they were turning the vessel with her head to starboard. These signals were repeated for the information of an approaching vessel, pltfs.' steamship, which was overtaking them; but on putting the engines astern in the course of the turning movement the pilot in charge of defts.' vessel did not give three short

blasts under Rule 27. In an action of damage by collision:—*Held:* (1) both vessels to blame in different proportions for bad look out & other defects in their navigation; (2) the omission on the part of the pilot of defts.' vessel to give the three-blast signal, when putting the engines full speed astern, was the primary cause of the collision, as if that signal had been given, those in charge of pltfs.' vessel would have had notice, particularly valuable at night, that the other vessel was moving bodily astern to the extent, in this case, of a length & a half.—THE ANCONA, [1915] P. 200; 84 L. J. P. 183.

*G. Ships Overtaken by Fog.*

**6206. Anchoring in fairway.**]—THE AGUADILLANA, No. 5383, *ante*.

**6207. Mode of progress up river—On flood tide.**]—THE AGUADILLANA, No. 5383, *ante*.

**6208. Swinging round at anchor—Not under command.**]—THE WEGA, No. 5617, *ante*.

**6209. Duty to signal.**]—THE WEGA, No. 5617, *ante*.

**6210.** ——.] — *Semble:* the obligation on steamers & sailing vessels under Rule 38 of the Thames Bye-laws, when in the fairway & not under way, to ring a bell, does not apply in clear weather.—THE RHEIN (1902), 86 L. T. 265; 18 T. L. R. 343; 9 Asp. M. L. C. 278.

*H. Sailing Vessels.*

**6211. Duty to keep out of steamer's way—After four blasts.**]—(1) Where a steamship navigating the river Thames is in such a position, through no fault of those in charge of her, that it is unsafe or impracticable for her to keep out of the way of a sailing vessel, it is the duty of the sailing vessel under Article 21 of the Rules & Bye-laws for the Navigation of the River Thames, on hearing the steamer's whistle sounded as therein provided, to keep out of the way of the steamer.

(2) *Qu.:* is a sailing vessel, on hearing such a signal, bound to keep out of the way of a steamer without knowing that it is in fact unsafe or impracticable for the steamer to keep out of her way?—THE LONGNEWTON (1888), 59 L. T. 260; 6 Asp. M. L. C. 302.

**6212. Going about close to shore—Duty of steamers to avoid—Without warning.**]—Where a sailing vessel is beating up the river Thames on a flood tide against the wind, & has gone over towards the south shore to the edge of the tide, & as near to that shore as she can safely go, so as to avoid collision with vessels at anchor on the south side of the river, she is entitled to go about without warning vessels of her intention, & a steamer coming up astern of her ought to know from her position & the state of her sails that she is going about, & is bound to take measures, by stopping or otherwise, to avoid a collision.—THE PALATINE (1872), 27 L. T. 631; 1 Asp. M. L. C. 468.

SUB-SECT. 13.—TRENT.

**6213. Right of "steamers" to navigate.**]—Under Trent Navigation Act, 1858 (c. xxxiv), it is provided that the comrs. thereunder shall maintain the navigation of the river so as to enable vessels usually navigating thereon to carry a burthen of 40 tons at the least, & shall maintain the hauling paths & ways by the side of the river for hauling, towing, or drawing by men or with horses vessels using the navigation, etc.:—*Held:* although previous to the passing of Trent Navigation Act, 1858 (c. xxxiv), steam tugs were not in use upon the river, yet the term "vessels" includes "steamers," & the use of them upon the Trent is lawful.—MARTIN *v.* LEAVERS (1882), 46 J. P. 807, D. C.

SUB-SECT. 14.—TYNE.

**6214. Vessels crossing river.**] — The duty imposed by Article 22 of the Rules for the Navigation of the River Tyne upon vessels crossing the river not to cause obstruction, injury, or damage to other vessels, does not require them in any event to get out of the way of vessels going up or down, & they are at liberty when crossing at a proper time & in a proper manner to do so at such times as may be convenient to themselves, & vessels proceeding up & down must take the ordinary precautions to avoid collision with crossing vessels.—THE THETFORD (1887), 57 L. T. 455; 6 Asp. M. L. C. 179.

*Annotation:*—**Reid.** The Skipsea, [1905] P. 32.

**6215.** —— **Warning signals.**]—The meaning of Articles 21 & 22 of the Tyne Bye-laws, 1884, is that a vessel crossing the river may cross if there is time & opportunity to do so without hampering another vessel, & the vessel which sees a vessel about to cross must act reasonably & give her a little more room if she requires it, but the burden of the operation at the beginning is upon the vessel crossing.

A steamship, *V.*, coming out of dock, was moving slowly out of the lock entrance on the north side of the Tyne to cross & go down the river, when another steamship, *S.*, came in sight on the port bow about 400 yards off, coming up the river on the other side with a tug ahead of her. The *V.* continued to go ahead, & gave two short blasts & hard a-starboarded, but shortly afterwards stopped her engines; the *S.* gave one short blast & ported slightly & reversed her engines for a time, & after other manœuvres the vessels collided:—*Held:* the vessels were at first in such a position that it was the duty of the *V.* to elect to cross ahead of the other vessel or to wait till she had passed, & to indicate in an unmistakable way what her action was to be, & she had not done so, & this had caused the collision; & if she had meant to wait she ought to have blown three blasts at once & reversed her engines & remained near the lock entrance, & the *V.* was alone to blame.—THE SKIPSEA, [1905] P. 32; 74 L. J. P. 34; 93 L. T. 181; 53 W. R. 538; 10 Asp. M. L. C. 91.

**6216.** ——.]—By the bye-laws in force regulating the navigation of the river Tyne, clause 17, all vessels proceeding to sea must keep to the south side of mid-channel &, clause 20, "vessels crossing the river, & vessels turning take upon themselves the responsibility of doing so safely with reference to the passing traffic"; under these bye-laws a vessel outward bound coming at full speed out of the Tyne Dock, on the south side of the river Tyne, & crossing the river to the north side whether intentionally, in violation of clause 17, or unintentionally by reason of the force of the tide, is bound to use the utmost caution to avoid the passing traffic, & to contemplate before attempting to come out any contingencies, such as tide, stoppage of the traffic, etc., which may arise, & she should only cross if it can be done without risk to that traffic; if a collision occurs by want of such caution the ship will be responsible.

*Semble:* clause 21 of the above bye-laws, providing that "when steam vessels are proceeding in the same direction but with unequal speed, the vessel which steams slowest shall when overtaken"

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take certain measures to allow the overtaking steamship to pass her, applies only to a vessel overtaking & passing another actually upon the same course with itself.—THE HENRY MORTON (1874), 31 L. T. 859; 2 Asp. M. L. C. 466, P. C.

**6217. Ships of unequal speed—Proceeding in same direction—On same course.**]—THE HENRY MORTON, No. 6216, *ante*.

**6218. Preparation for entry to port—When course should be set.**]—A vessel entering the Tyne is bound, under Bye-law 20 for the Regulation of the River Tyne, directing that vessels shall be brought into port to the north of mid-channel, to get on to a course to enable her to enter on the north side when at some considerable distance outside the pier heads; & if she crosses from south to north of mid-channel when close up to the pier heads, she thereby infringes the bye-law.—THE HARVEST (1886), 11 P. D. 90; 55 L. T. 202; 6 Asp. M. L. C. 5, C. A.

*Annotations:*—**Consd.** The John O'Scott, [1897] P. 64; The Peter Benoit (1915), 114 L. T. 147. **Refd.** The Winstanley, [1896] P. 297.

**6219. ——— Convenience of outgoing vessel.**]—A collision occurred, in the daytime, about on the line of lights a quarter of a mile outside the pier heads at the entrance to the river Tyne, between pltf.'s steamship going out & defts.' steamship coming in. The judge held pltfs.' steamship alone to blame for bad look out, but that, having regard to the place of collision, defts.' steamship had, by coming up from the southward too close to the pier heads infringed Bye-law 20 of the Regulations of the River Tyne, 1884:—*Held:* defts.' steamship had not broken the rule, as it was not a question of actual distance, but whether the incoming vessel gave the other room to pass out in such a way as not to cause danger, & defts.' steamship had left pltf.'s steamship sufficient room to go out & pass to the southward, provided the outgoing vessel had seen the incoming vessel over the pier, & acted as soon as possible.—THE JOHN O'SCOTT, [1897] P. 64; 66 L. J. P. 47; 76 L. T. 222; 8 Asp. M. L. C. 235, C. A.

**6220. Duties in fog.**]—The River Tyne Bye-laws provide in great detail for vessels navigating on their proper side of the channel; for fog signals; & for speed in fog:—*Held:* as the Bye-laws dealt with the whole scope of the duties of vessels in fog, the sea regulations did not apply; & a vessel which was proceeding "at a very moderate speed," as required by Bye-law 39, was not to blame for not stopping her engines, as required by Article 16 of the Sea Regulations, on hearing, forward of her beam, the fog whistle of an approaching vessel, the position of which was not ascertained.—THE CEYLON, [1920] P. 187; 89 L. J. P. 173; 123 L. T. 681; 36 T. L. R. 419; 15 Asp. M. L. C. 100.

**6221. Fog signal—Duty of anchored ship to sound.**]—The steam tug *T.* was lying in the river Tyne moored at a pontoon connected with the bank by a bridge when she was run into by the steam trawler *R.*

The pontoon & bridge were the property of the Tyne General Ferry co. The pontoon, the bridge, & the *R.* were all damaged by the collision.

The owners of the pontoon & bridge sued the owners of the *T.* for the damage they had sustained, & the owners of the *T.* sued the owners of the *R.* for the damages sustained by the *T.* The owners of the *R.* then agreed with the Tyne Ferry co. that if the Ferry co. would bring an action against the *T.* for the damage sustained by the Ferry co. they would indemnify the Ferry co. against the costs of the action, & make good the difference between the sum recovered & the total amount of the damage sustained & if the action proved unsuccessful would pay them the amount of their damage.

The two actions were heard together. The owners of the *R.* charged the *T.* with not sounding her bell when anchored in the fog:—*Held:* (1) the action by the Ferry co. against the *T.* should be dismissed for the damage to the pier & pontoon were not caused by the *T.* being at the pontoon; (2) the *R.* was liable for the damage for being improperly under way & for excessive speed, & the *T.* was not to blame for not sounding the bell in accordance with Article 18 (*c*) of the Tyne Bye-laws, 1884, as she was not at anchor.—THE TITAN, THE RAMBLER (1906), 96 L. T. 93; 10 Asp. M. L. C. 350.

*Annotation:*—*As to* (1) **Refd.** The City of Liverpool (1912), 29 T. L. R. 139.

## SECT. 5.—NEGLIGENCE CAUSING DAMAGE AND RULE OF DIVISION OF LOSS.

### SUB-SECT. 1.—ESSENTIALS OF LIABILITY.

#### *A. Negligence.*

**6222. Necessity for.**]—THE LIGO, No. 6340, *post*.

**6223.** ——.]—A vessel sailing upon a foggy night with all her sail set excepting her foretop gallant sail dismissed upon the ground of inevitable accident.—THE ITINERANT (1844), 2 Wm. Rob. 236; 3 Notes of Cases, 5; 2 L. T. O. S. 374; 8 Jur. 131; 166 E. R. 743.

*Annotations:*—**Consd.** The Lord Saumarez (1848), 6 Notes of Cases, 600. **Refd.** The London (1863), Brown. & Lush. 82; The Marpesia (1872), L. R. 4 P. C. 212.

**6224.** ——.]—MORGAN *v.* SIM, THE LONDON, No. 5246, *ante*.

**6225.** ——.]—Pltfs.' vessel, whilst being towed into a harbour by a steam tug, got aground, & defts.' vessel, which was being towed in at the same time by the same tug, astern of pltfs.' vessel, without any active default on defts.' part, struck & damaged pltfs.' vessel:—*Held:* no evidence to go to a jury of negligence for which defts. were liable.

I cannot say that this was the result of negligence on the part of defts., unless they omitted to do something which they might & ought to have done to avoid the collision (ERLE, C.J.).—HARRIS *v.* ANDERSON (1863), 14 C. B. N. S. 499; 143 E. R. 541.

*Annotation:*—**Mentd.** Giblin *v.* McMullen (1868), L. R. 2 P. C. 317.

**6226.** ——.]—INMAN *v.* RECK, THE CITY OF ANTWERP & THE FRIEDRICH, No. 6416, *post*.

**6227.** ——.]—THE MARGARET, No. 5287, *ante*.

**6228.** ——.]—THE EUROPEAN, No. 6280, *post*.

**What amounts to.**]—*See* Sub-sect. 2, *post*.

#### *B. Damage.*

**6229. Necessity for.**]—THE MARGARET, No. 5287, *ante*.

**6230. Meaning of.**]—[Damage] "done by a ship" means done by those in charge of a ship, with the ship as the noxious instrument (BOWEN, L.J.).—THE VERA CRUZ (No. 2) (1884), 9 P. D. 96; 53 L. J. P. 33; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. L. C. 270, C. A.; *on appeal, sub nom.* SEWARD *v.* THE VERA CRUZ, 10 App. Cas. 59, H. L.

*Annotations:*—**Refd.** The Theta, [1894] P. 280; The Circe, [1906] P. 1. **Mentd.** The Englishman & The Australia, [1894] P. 239; The Tynwald, [1895] P. 142; Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430; Davidson *v.* Hill, [1901] 2 K. B. 606; The Swift, [1901] P. 168; Whitechapel Board of Works *v.* Crow (1901), 84 L. T.

595; Cavendish *v.* Strutt, [1904] 1 Ch. 524; Headland *v.* Coster, [1905] 1 K. B. 219; Williams *v.* Mersey Docks & Harbour Board, [1905] 1 K. B. 804; Bristol Corpn. *v.* Canning (1906), 95 L. T. 183; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648; L. G. Board *v.* South Stoneham Union (1908), 7 L. G. R. 167; Jackson *v.* Watson, [1909] 2 K. B. 193; British Assocn. of Glass Bottle Manufacturers *v.* Nettlefold (1911), 27 T. L. R. 527; British Columbia Elec. Ry. *v.* Gentile, [1914] A. C. 1034; Hobson *v.* Leng, [1914] 3 K. B. 124; Date *v.* Gas Coal Collieries, [1915] 2 K. B. 454; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38; Flannagan *v.* Shaw, [1920] 3 K. B. 96; Starr Estate Co. *v.* Blackpool Corpn. (1920), 19 L. G. R. 9; Nicolle *v.* Nicolle, [1922] 1 A. C. 284; Harper *v.* Hedges, [1923] 2 K. B. 314; McColl *v.* Canadian Pacific Ry., A.-G. for Manitoba, Intervener, [1923] A. C. 126; Nunan *v.* Southern Ry., [1924] 1 K. B. 223; The Molière, [1925] P. 27; Parry *v.* Harding, [1925] 1 K. B. 111; Venn *v.* Tedesco, [1926] 2 K. B. 227.

*C. Collision.*

**6231. Whether collision necessary.**]—THE MARGARET, No. 5287, *ante*.

**6232. —— Negligence of one vessel causing damage without collision.**]—THE INDUSTRIE, No. 5395, *ante*.

**6233. —— Negligent navigation of one vessel causing collision between other vessels.**]—A steamship meeting three barges was compelled by the negligent management of the foremost barge to take a course which brought her into collision with the other two barges:—*Held:* the owners of the first barges were liable to those of the other two barges for the damage done by the collision.—THE SISTERS (1876), 1 P. D. 117; 45 L. J. P. 39; 34 L. T. 338; 24 W. R. 412; 3 Asp. M. L. C. 122, C. A.

*Annotations:*—**Refd.** The Englishman & The Australia, [1894] P. 239. **Mentd.** Weld-Blundell *v.* Stephens, [1920] A. C. 956.

*D. Negligence Must Be Effective Cause of Damage.*

(*a*) *In General.*

*See, generally*, NEGLIGENCE, Vol. XXXVI., pp. 24–34, Nos. 118–205.

**6234. General rule.**] — RAISIN *v.* MITCHELL (1839), 9 C. & P. 613; 4 L. T. 774.

**6235.** ——.]—THE LIBERTY *v.* THE CATHERINE (1853), 5 L. T. 146.

**6236.** ——.]—(1) Where pltf. charges two separate collisions, whereby his vessel, being at anchor, was driven on the rocks, & sustained great damage, & the first collision was such, that pltf.'s vessel might, & probably would, have driven on the rocks, if no second collision had happened, he will be entitled to recover, on proving the first collision only; as the rule that pltf. must recover *secundum allegata et probata* is thereby satisfied.

(2) Where a collision has occurred, in order to establish a case of inevitable accident, he who alleges it must prove that what occurred was entirely the result of some *vis major*, & that he had neither contributed to it by any previous act or omission, nor when exposed to the influence of the force had been wanting in any effort to counteract it.—THE DESPATCH (1860), Lush. 98; 14 Moo. P. C. C. 83; 3 L. T. 219; 15 E. R. 237, P. C.

*Annotation:*—*As to* (2) **Refd.** The San Onofre, [1922] P. 213.

**6237.** ——.]—CAYZER *v.* CARRON CO., No. 6441, *post*.

**6238.** ——.]—Where a steamer collided with a sailing ship which after sunset was showing no lights:—*Held:* although there was some look out on the steamer, nevertheless the absence of the lights could not in the circumstances have possibly caused or contributed to the collision & the sailing ship was not to be deemed to be in fault under 1894 Act, s. 419.—THE ARGO (1900), 82 L. T. 602; 9 Asp. M. L. C. 74, C. A.

*Annotations:*—**Refd.** The Devonian, [1901] P. 221; The Pitgaveney, [1910] P. 215.

**6239.** ——.]—THE PETER BENOIT, No. 6166, *ante*.

(*b*) *Liability for Consequential Damage.*

**6240. General rule—No liability for damages avoidable by exercise of ordinary care & skill.**]—THE COUNTESS OF DURHAM & THE JOHNS (1840), 5 L. T. 61.

*Annotation:*—**Apld.** The Pensher (1857), Sw. 211.

**6241.** —— ——.]—Upon a decree pronouncing generally for damages occasioned by a collision, & ordering a reference to the Registrar to assess the amount, deft. is not liable for such damages as might have been avoided by the exercise of ordinary nautical skill & diligence after the collision on the part of the servants of pltfs. in charge of their ship.—ANDERSON *v.* HOEN, THE FLYING FISH (1865), 3 Moo. P. C. C. N. S. 77; Brown. & Lush. 436; 34 L. J. P. M. & A. 113; 12 L. T. 619; 2 Mar. L. C. 221; 16 E. R. 29.

*Annotations:*—**Refd.** The Kingsway, [1918] P. 344. **Mentd.** The Generous (1868), L. R. 2 A. & E. 57; The Thuringia (1871), 41 L. J. Adm. 20.

**6242. Vessel drifting against another.**]—The owners of a vessel disabled by the negligence of its crew are answerable for damage done by its accidentally drifting when so disabled, against another vessel.—SECCOMBE *v.* WOOD (1840), 2 Mood. & R. 290, N. P.

**6243. Damage to cargo.**]—THE EOLIDES, No. 5259, *ante*.

**6244. Damage to third vessel.**]—THE LYRA *v.* THE VENUS (1855), 4 L. T. 774.

**6245. Damage sustained while taking damaged ship into port.**]—THE FAMA *v.* THE TELL (1858), 5 L. T. 61.

**6246. Loss of life.**]—A brig by the negligence of those on board her, came into collision with a barque, in Jan. 15, about 5 a.m. off the Lizard. In the collision the main rigging of the barque was carried away, & shortly afterwards her fore & main masts went by the board. Towards evening the wind increased in violence, & about 2 a.m. the next morning the barque was driven on shore, & some of her crew were drowned:—*Held:* the loss of life was occasioned by the collision.

In a suit for limitation of liability, instituted on behalf of the owners of the brig, an appearance was entered on behalf of a child of one of the drowned men *en ventre sa mère*. The ct. reserved leave to

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**PART XII. SECT. 5, SUB-SECT. 1.—D. (a).**

**6234 i.** *General rule.*]—MAITLAND *v.* MOLSON (1830), S. R. C. 441.—**CAN.**

**6234 ii.** ——.]—*Re* THE HAROLD HAARFAGER (1874), 18 L. C. J. 303.—**CAN.**

**6234 iii.** ——.]—OGILVIE FLOUR MILLS CO. *v.* RICHELIEU & ONTARIO NAVIGATION CO., NORTHERN ELEVATOR CO. *v.* SAME, CANADA ATLANTIC RY. CO. *v.* SAME (1908), 11 Exch. C. R. 231.—**CAN.**

**h.** *When negligence ceases to be effective cause.*]—A deft.'s negligence may cease to operate as the efficient cause of an accident which would not have happened in the absence of it, if notwithstanding deft.'s negligence the accident be directly & approximately brought about by some supervening negligent act or omission by pltf.; but that principle does not apply where deft.'s negligence operated from beginning to end & step by step in natural & obvious sequence so as to render escape from its consequences impossible or so hazardous as not to commend the attempt to reasonable judgment.—CANADA S.S. LINES, LTD. *v.* THE JOHN B. KETCHUM II., [1925] 1 D. L. R. 961; [1925] S. C. R. 81.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 1.—D. (b).**

**6244 i.** *Damage to third vessel.*]—A steamship after colliding with a sailing vessel continued her course & struck another sailing vessel, & on action brought for the second collision:—*Held:* the steamship having disregarded the rules of navigation before the first collision, could not plead the fault of the vessel first struck to the action by the second.—*Re* THE QUEBEC (1875), 19 L. C. J. 195.—**CAN.**

**6244 ii.** ——.]—LAIRD LINE, LTD. (ROWAN (OWNERS)) *v.* CLAN LINE STEAMERS, LTD. (CLAN MALCOLM (OWNERS)), [1923] S. C. 316.—**SCOT.**

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 1, D. (b) & (c); sub-sect. 2, A. (a) & (b).]*

the child, *en ventre*, if born within due time, to prefer its claim for damages sustained by the death of its father.—THE GEORGE & RICHARD (1871), L. R. 3 A. & E. 466; 24 L. T. 717; 20 W. R. 245; 1 Asp. M. L. C. 50.

*Annotations:*—**Refd.** Robson *v.* N. E. Ry. (1875), 32 L. T. 551; The Theta (1894), 71 L. T. 25; Day *v.* Markham (1904), 6 W. C. C. 115; Williams *v.* Ocean Coal Co., [1907] 2 K. B. 422; H.M.S. London, [1914] P. 72.

**6247. Ship opened up for repair—Renewal of rotten wood.**]—Where a ship is damaged by collision & on opening her up to effect the repairs rendered necessary by the collision, certain parts of her not injured by the collision are found to be rotten & to require renewing, the cost of such renewal cannot be charged to the collision damage, although such parts but for such opening up would have lasted for some years.—THE PRINCESS (1885), 52 L. T. 932; 5 Asp. M. L. C. 451, D. C.

**6248. Damage due to stranding.**]—A collision took place between a steamer & a barque, the steamer being alone to blame. The steering compass, charts, log & log glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass which he found on board. The barque while on her way, without any negligence on the part of the captain or crew, & owing to the loss of the requisites for navigation above mentioned, grounded, & was necessarily abandoned:—*Held:* the grounding of the barque was a natural & reasonable consequence of the collision, & the owners of the steamer were liable for the damages caused thereby.—THE CITY OF LINCOLN (1889), 15 P. D. 15; 59 L. J. P. 1; 62 L. T. 49; 38 W. R. 345; 6 Asp. M. L. C. 475, C. A.

*Annotations:*—**Consd.** The San Onofre, [1922] P. 243. **Distd.** S.S. Singleton Abbey *v.* S.S. Paludina, The Paludina, [1927] A. C. 16. **Refd.** Dulieu *v.* White (1901), 85 L. T. 126; H.M.S. London, [1914] P. 72.

**6249. —— Failure to render assistance after collision—Impossibility of rendering assistance "without danger."**]—THE SAN ONOFRE, No. 5485, *ante*.

**6250. Damage through breaking of tow rope.**]—THE GERTOR, No. 5177, *ante*.

**6251. Expenses incurred to avoid collision.**]—A vessel which negligently dragged her anchor down upon another so as to cause danger of collision held liable for expenses reasonably incurred by the latter to avoid collision, such as the value of the anchor & chain lost, & coals & other stores consumed.—THE PORT VICTORIA, [1902] P. 25; 71 L. J. P. 36; 86 L. T. 804; 50 W. R. 383; 18 T. L. R. 165; 9 Asp. M. L. C. 314.

**6252. Subsequent loss of ship—Failure to repair after collision.**]—Pltfs.' steamship was so badly damaged in a collision in the English Channel with defts.' vessel that she had to put into Portland, where she was temporarily repaired, & she then proceeded to complete her voyage to Bristol in order to deliver her cargo & earn the freight; but she sank off the Lizard. In an action of damage by collision pltfs. claimed to recover as for a total loss:—*Held:* though the collision was due to the negligence of those in charge of defts.' vessel, & therefore her owners were liable for the damage sustained by pltfs.' steamship, they were not liable for her subsequent loss, as that was not the natural & reasonable result of the wrongful act of defts.' servants, but was due to the insufficient measures taken by pltfs. to repair their vessel in the port of refuge, by reason of which she could not be safely navigated to her port of discharge.—THE BRUXELLESVILLE, [1908] P. 312; 77 L. J. P. 156; 98 L. T. 251; 24 T. L. R. 223; 11 Asp. M. L. C. 24.

**6253. —— Failure to examine after collision.**]—A watchman employed by applts. to take charge of their trawler in dock agreed with resps.' manager to take resps.' trawler into the same dock. By pure negligence the watchman so navigated resps.' trawler as to cause a collision with applts.' trawler. Instead of examining the damage done to applts.' trawler, as in duty bound, he entirely neglected his duty & consequently applts.' trawler sank in the dock:—*Held:* though resps. were liable for the damage caused by the collision they were not liable for the foundering of applts.' vessel, it having been proved that the vessel need not have sunk if the watchman had examined applts.' trawler immediately.—GRANT *v.* EGYPTIAN (OWNERS), THE EGYPTIAN, [1910] A. C. 400; 79 L. J. P. 57; 102 L. T. 465; 11 Asp. M. L. C. 388, H. L.

**Burden of proof.**]—*See* Sub-sect. 4, B., *post*.

*(c) Burden of Proof.*

**6254. Presumption that damage due to collision.**]—THE MELLONA, No. 5194, *ante*.

**6255. ——.**]—(1) A collision took place between vessels *A.* & *B.* After the collision *B.* anchored, & subsequently drove on shore, by which further damage was done to her, & salvage expenses incurred. The owners of *A.* admitted their liability to make good the damage directly caused by the blow between the vessels, but denied their liability to the further damage & expense arising from the driving on shore:—*Held:* where parties object to being made liable to such damage, the burden of proof is on them to show that such damage, subsequent to the collision, arose from want of ordinary nautical skill & prudence in the master of the damaged ship.

(2) The ct. has always said, that if it could be proved that the abandonment took place when the parties might have known to a certainty that their lives were not in danger, then the ct. would take that into consideration (DR. LUSHINGTON).—THE PENSHER (1857), Sw. 211; 29 L. T. O. S. 12; 166 E. R. 1100.

*Annotations:*—*As to* (1) **Consd.** The San Onofre, [1922] P. 243; The Paludina, [1925] P. 40. **Refd.** The Thuringia (1872), 41 L. J. Adm. 44.

**6256. Presumption restricted to stranding.**]—In an action of damage by collision the *onus* of proving that damage directly flows from deft.'s

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**6248 i.** *Damage due to stranding.*]—Where a ship has been driven on shore as the result of a collision or other accident, & damages are claimed as arising therefrom, it is incumbent on her to prove that such damage was occasioned by the stranding as a consequence of the collision or other accident; & that the stranding, collision or other accident was the result of the negligence of the other ship.—INTER-LAKE NAVIGATION CO., LTD. *v.* THE GLENFARN, [1925] Exch. C. R. 179.—**CAN.**

**ii.** *Detention in consequence of collision.*]—In an action by the owners of a ship, which when ready for sea has been run into & injured by another ship, to recover for demurrage, loss of profits & expenses incurred whilst the ship was detained in port in consequence of the collision, pltfs. must prove that the detention was the consequence of the collision, that they sustained an actual loss, & give reasonable proof of the amount of such loss.—BARQUE STRATHEARN CO., LTD. *v.* MCILWRAITH, MCEACHARN & CO. (1895), 16 N. S. W. L. R. (L.) 94.—**AUS.**

**PART XII. SECT. 5, SUB-SECT. 1.—D. (c).**

**6254 i.** *Presumption that damage due to collision.*]—Where a ship is lost or receives further injury after a collision the presumption is that the loss or damage is caused by the collision, & the burthen is on the other vessel, if proved to be in fault for the collision, to show that the subsequent loss or damage was not caused by her negligence.—ROSS *v.* THE HENRY IV (1887), 13 Q. L. R. 379.—**CAN.**

negligence causing the collision is on pltf.; & the dicta of DR. LUSHINGTON in *The Mellona*, No. 5194, *ante*, *The Pensher*, No. 6225, *ante*, & similar cases, to the effect that where damage follows a collision the presumption is that the damage is the result of the collision, unless deft. proves the contrary, must not be taken as laying down a principle, but as having reference only to the particular circumstances of those cases, where the damage (stranding) so obviously followed on the collision that it *primâ facie* was to be regarded as a consequence of the negligence causing the collision.—THE PALUDINA, [1925] P. 40; 132 L. T. 724; 16 Asp. M. L. C. 453, C. A.; *on appeal, sub nom.* S.S. SINGLETON ABBEY *v.* S.S. PALUDINA, [1927] A. C. 16, H. L.

**6257. Loss due to want of nautical skill & courage —Burden on original wrongdoers.**]—THE THURINGIA, No. 5484, *ante*.

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SUB-SECT. 2.—WHAT AMOUNTS TO NEGLIGENCE.

*A. Degree of Care Required.*

*(a) In General.*

*See, generally*, NEGLIGENCE, Vol. XXXVI., pp. 12–21, Nos. 33–101.

**6258. General rule.**]—If, in an action for the negligence of deft.'s servants in managing a barge, so that pltf.'s barge was run down, it appeared that the accident happened from circumstances which persons of competent skill could not guard against; pltf. will not be entitled to recover; nor will he, if his men had put his barge in such a place that persons using ordinary care would run against it; nor, if the accident could have been avoided, but for the negligence of pltf.'s own men in not being on board his barge at a time when it was lying in a dangerous place.—JACK *v.* SEWARD (1829), 4 C. & P. 106; 172 E. R. 628, N. P.

**6259.** ——.]—In case for running down a ship, the exercise of ordinary care for pltf. in avoiding the collision is the criterion of his conduct to be presented to the jury.—DOBSON *v.* DENNE (1839), 3 Jur. 1149.

**6260.** ——.]—Gross negligence is a relative term & means the absence of the care that was requisite under the circumstances.

Gross, therefore, is a word of description, & not a definition, & it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care & skill in navigating the vessel (WILLES, J.).—GRILL *v.* GENERAL IRON SCREW COLLIER CO. (1866), L. R. 1 C. P. 600; Har. & Ruth. 654; 35 L. J. C. P. 321; 14 L. T. 711; 12 Jur. N. S. 727; 14 W. R. 893; 2 Mar. L. C. 362; *on appeal* (1868), L. R. 3 C. P. 476, Ex. Ch.

*Annotations:*—**Consd.** Notara *v.* Henderson (1872), L. R. 7 Q. B. 225. **Reld.** Leuw *v.* Dudgeon (1867), 17 L. T. 145; Giblin *v.* McMullen (1869), L. R. 2 P. C. 317; Oppenheim *v.* White Lion Hotel Co. (1871), L. R. 6 C. P. 515; The Chasca (1875), L. R. 4 A. & E. 446; Scaramanga *v.* Stamp (1880), 28 W. R. 691; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; Wilson *v.* The Xantho (1887), 12 App. Cas. 503; Steinman *v.* Angier Line, [1891] 1 Q. B. 619; The Glendarroch, [1894] P. 226; Johnson *v.* Wainwright (1894), 38 Sol. Jo. 362; Trinder, Anderson *v.* Thames & Mersey Marine Insce., Trinder, Anderson *v.* North Queensland Insce., Trinder, Anderson *v.* Weston, Crocker, [1898] 2 Q. B. 114; Fenton *v.* Thorley, [1903] A. C. 443; Price *v.* Union Lighterage Co., [1904] 1 K. B. 412; *Re* Etherington & Lancashire & Yorkshire Accident Insce., [1909] 1 K. B. 591; Newman *v.* Bourne & Hollingsworth (1915), 31 T. L. R. 209; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873; Becker, Gray *v.* London Assce. Corpn., [1918] A. C. 101; *Re* City Equitable Fire Insce., [1925] Ch. 407.

**6261.** ——.]—THE THURINGIA, No. 5484, *ante*.

**6262.** ——.]—DOWARD *v.* LINDSAY, THE WILLIAM LINDSAY, No. 5173, *ante*.

**6263.** ——.]—THE BYWELL CASTLE, No. 6267, *post*.

**6264.** ——.] — STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante*.

**6265.** ——.]—THE CITY OF PEKING *v.* COMPAGNIE DES MESSAGERIES MARITIMES, THE CITY OF PEKING, No. 5373, *ante*.

**6266. Comparison with degree of care required by common law rules.**]—CAYZER *v.* CARRON CO., No. 6441, *post*.

*(b) In Sudden Difficulty.*

**6267. Allowance made for difficult circumstances —General rule.**]—It is wrong to port the helm when a collision is apprehended & the other ship is on the starboard bow. But where one ship had by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, & has not been manœuvred with perfect skill & presence of mind.

The captains of ships are bound to show such skill as persons of their position with ordinary nerve ought to show under the circumstances. But any ct. ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; & the ct. ought not, in fairness & justice to him, to require perfect nerve & presence of mind, enabling him to do the best thing possible (BRETT, L.J.).

It seems to me that that is to propound a most dangerous rule, that if vessels are coming round a point, one under a starboard helm, if she crosses so that her red light is on the port bow of the other, she shall have a right to keep her helm to starboard. It seems to me that the rule that both ships ought to pass port side to port side applies & it would be dangerous to hold the contrary (BRETT, L. J.)

A ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, & then charge that other ship with misconduct (JAMES, L.J.).—THE BYWELL CASTLE (1879), 4 P. D. 219; 41 L. T. 747; 28 W. R. 293; 4 Asp. M. L. C. 207, C. A.

*Annotations:*—**Consd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Woodley *v.* Michell (1883), 11 Q. B. D. 47. **Apprvd.** The Tasmania & Freight Owners *v.* Smith, The

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**PART XII. SECT. 5, SUB-SECT. 2.—A. (a).**

**6258 i.** *General rule.*]—SAUVAGEAU *v.* LA COMPAGNIE DE RICHELIEU (1862), 7 L. C. J. 39.—**CAN.**

**6258 ii.** ——.]—No vessel is justified in not taking proper precautions against collision with another by the fact that such other is in any way contravening the rules of the sea.—*Re* THE CLARA KILLAM (1875), 2 Q. L. R. 56.—**CAN.**

**6258 iii.** ——.]—Although a ship has received signals authorising her to continue her course & speed, where she is aware of the other's intended manœuvre & the time & space required therefor, & is not embarrassed by any doubtful movements on her part; if there is at any time reason to apprehend that to continue her course might lead to a collision, she is no longer justified in doing so, but, by the practice of seamen & prudent navigation, is required to take such manœuvres as will prevent collision, even where no danger signal is given by the other.—THE GLENCLOVA *v.* SOWARDS, [1925] Exch. C. R. 217.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 2.—A. (b).**

**6267 i.** *Allowance made for difficult circumstances—General rule.*]—In the case of a collision, those on board the damaged ship must exhibit ordinary courage in standing by their vessel & show proper skill & seamanship according to the circumstances of case, but the ct. will make reasonable allowance for the excitement which usually attends a collision, & those on board will not be expected to be so acute in their judgment as to act with

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 2, A. (b), B. (a) & (b), & C.; sub-sect. 3, A. & B. (a).]*

City of Corinth, The Tasmania (1890), 15 App. Cas. 223. **Apld.** S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492; The Koning Willem II., [1908] P. 125. **Apprvd.** United States Shipping Board *v.* Laird Line, [1924] A. C. 286. **Refd.** The Harton (1884), 50 L. T. 370; Dulieu *v.* White, [1901] 2 K. B. 669; The Frankfort (1909), 101 L. T. 664; The Hero, [1911] P. 128; S.S. Orduna *v.* Shipping Controller, [1921] 1 A. C. 250; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129; S.S. Singleton Abbey *v.* S.S. Paludina, [1927] A. C. 16.

**6268.** —— ——.]—STOOMVAART MAATSCHAPPY NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO., THE VOORWARTS, THE KHEDIVE, No. 5186, *ante*.

**6269. —— Emergency arising without default of master—Wrong course adopted.**]—THE NOR, No. 5924, *ante*.

**6270.** —— —— **Best possible course not adopted.**]—MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGATION CO., THE MEANATCHY, No. 5312, *ante*.

**6271.** —— —— **Lesser of two risks adopted.**]—FRANCES (OWNERS) *v.* HIGHLAND LOCH (OWNERS), THE HIGHLAND LOCH, No. 5168, *ante*.

**6272. Reasonable time allowed for judgment.**]—THE EMMY HAASE, No. 5487, *ante*.

**6273.** ——.]—KWANG TUNG (OWNER) *v.* NGAPOOTA (OWNERS), THE NGAPOOTA, No. 6040, *ante*.

**6274.** ——.]—UNITED STATES SHIPPING BOARD *v.* LAIRD LINE, LTD., No. 6042, *ante*.

**6275. Vessel aground coming off suddenly.**]—THE COXON (1849), 4 L. T. 838.

*B. Particular Instances.*

*(a) Negligence in Equipment.*

**6276. Anchor too light to hold ship.**]—Collision occasioned by the dragging of the anchor of the damaging vessel, the anchor being too light to hold the ship.—THE MASSACHUSETTS (1842), 1 Wm. Rob. 371; 4 L. T. 839; 166 E. R. 612.

**6277. Ship not in ordinary trim.**]—(1) The trim of a ship is within the province of the master; if, therefore, a ship is not in ordinary safe trim, & a collision is in any degree occasioned thereby, the owners are liable, notwithstanding a licenced pilot is in charge of the ship.

(2) But if a ship is in ordinary safe trim, the owners are not liable, although the ship might have been in handier trim, & although the trim of the ship in part contributed to the collision.—THE ARGO (1859), Sw. 462; 166 E. R. 1217.

*Annotations:—Generally,* **Refd.** The Monte Rosa, [1893] P. 23; The Tactician (1907), 76 L. J. P. 80; The St. Paul (1908), 78 L. J. P. 1; The Ape, [1916] P. 303.

**6278. Defective apparatus—Cable breaking.**]—BIBBY *v.* BOISSEVAIN, THE EGYPTIAN, No. 5277, *ante*.

**6279.** —— **Inherent latent defect—No negligence on part of user of apparatus.**]—The owners of a vessel are not liable for damage caused to another vessel in a collision occasioned by the sudden breaking down of an apparatus in which there was an inherent latent defect, in the absence of any negligence in the user of the apparatus.—THE VIRGO (1876), 35 L. T. 519; 25 W. R. 397; 3 Asp. M. L. C. 285.

**6280.** —— **Failure of steering gear—Similar failure on previous voyage.**]—A steamship fitted with a patent steam-steering gear ran into a vessel at anchor in the Thames, owing to the steering gear suddenly not acting; every effort was unavailingly made to avoid the collision. A few days before, on the previous voyage of same steamship, same apparatus had similarly refused to act, but no cause for it so doing could be seen on examination. Large numbers of the gears were in use on steamers. In an action of damage:—*Held:* (1) defts. were not liable for damage caused by the use of this apparatus without negligence; (2) the use of this apparatus on the Thames after it had acted wrongly on a previous occasion, was evidence of negligence, & defts. were liable for the damage caused thereby.—THE EUROPEAN (1885), 10 P. D. 99; 54 L. J. P. 61; 52 L. T. 868; 33 W. R. 937; 5 Asp. M. L. C. 417.

*Annotations:—As to* (1) **Refd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. *As to* (2) **Consd.** The Indus (1886), 56 L. T. 376.

**6281.** —— ——.]—THE MERCHANT PRINCE, No. 5175, *ante*.

**6282. Insufficient crew—How many men are sufficient—Sufficient crew to protect against ordinary perils.**]—THE EXCELSIOR, No. 5404, *ante*.

**6283.** —— —— **For manning barge—Two men.**]—THE MINNA (1868), L. R. 2 A. & E. 97.

*Annotation:—***Mentd.** The Duke of Buccleuch, [1892] P. 201.

**6284.** —— —— **In safe docks—One man.**]—THE EXCELSIOR, No. 5404, *ante*.

**6285.** —— —— **On trial trip—Sufficient crew to carry out orders properly.**]—CLYDE NAVIGATION CO. *v.* BARCLAY, No. 5188, *ante*.

**6286. Lack of apparatus—Mechanical fog horn—Not acquired before leaving port—Knowledge that regulation requiring fog horn would come into force.**]—THE LOVE BIRD, No. 5652, *ante*.

**6287.** —— **Mast to exhibit lights.**] — THE HIRONDELLE, No. 5625, *ante*.

**6288. Ship not in good repair—Insufficient measure taken to repair vessel in port of refuge.**]—THE BRUXELLESVILLE, No. 6252, *ante*.

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the same skill & coolness as if there had been no collision.—ROSS *v.* THE HENRY IV (1887), 13 Q. L. R. 379.—**CAN.**

**6269 i.** —— *Emergency arising without default of master—Wrong course adopted.*]—DAVIDSON *v.* GEORGIAN BAY NAVIGATION CO., THE SHENANDOAH & THE CRETE (1902), 23 C. L. T. 79; 33 S. C. R. 1.—**CAN.**

l. —— *Difficulty arising from misconduct of other ship.*]—WEBSTER & CO. *v.* AUSTRALASIAN UNITED STEAM NAVIGATION CO., LTD., THE TINANA, [1902] S. R. Q. 207.—**AUS.**

m. —— ——.]—Where a ship is placed in a position of peril by the misconduct of another ship, & her master, exercising his judgment, commits an error which contributes to the collision, he will not be held in fault.—WHITEWAY *v.* POWER (1892), 7 Nfld. L. R. 625.—**NFLD.**

n. —— ——.]—Where two sailing vessels are meeting & it is the duty of one, under the rules, to avoid the other, but it fails to do so, it then becomes the duty of the other so to manœuvre as to avoid the consequences of such breach of the rules, if possible to do so by exercise of ordinary care & prudence. The precise point when such manœuvring should begin by the vessel with right of way cannot be arbitrarily fixed & some latitude must be allowed the master in determining this. The burden of proof in such a case is on the offending vessel.—LE BLANC *v.* THE EMILIEN BURKE (P. E. I.) (1919), 19 Exch. C. R. 24; 46 D. L. R. 59.—**CAN.**

o. —— ——.]—INDIA GENERAL STEAM NAVIGATION CO. *v.* JAGAT CHANDRA KUNDU (1904), I. L. R. 31 Calc. 36.—**IND.**

p. —— ——.]—When a ship is placed in a position of peril & difficulty by the wrong manœuvring of another ship, & her captain in exercising his best judgment for the safety of his vessel commits an error which causes or contributes to a collision between them, he will not be held in fault.—HINE BROTHERS *v.* CLYDE TRUSTEES (1888), 15 R. (Ct. of Sess.) 498; 25 Sc. L. R. 361.—**SCOT.**

q. —— *Gross negligence must be shown.*]—BURNS *v.* STIRLING (1819), 2 Murr. 96.—**SCOT.**

**6272 i.** *Reasonable time allowed for judgment.*] — HOEK VAN HOLLAND MAATSCHAPPIJ *v.* CLYDE SHIPPING CO. (1902), 5 F. (Ct. of Sess.) 227; 40 Sc. L. R. 194; 10 S. L. T. 612.—**SCOT.**

r. *Duty to act promptly.*]—THE SANTANDARINO *v.* THE VANVERT (1894), 23 S. C. R. 145.—**CAN.**

t. ——.]—Where a captain of a ship neglects, in the special circumstances of the peril then imminent, to observe the dictates of the highest prudence, & especially the just & peremptory measures of precaution which the Rules of Navigation enforce, the ship is liable for damages arising from a collision.—LAKE ONTARIO & BAY OF QUINTE STEAMBOAT CO., LTD. *v.* FULFORD (1909), 12 Exch. C. R. 483.—**CAN.**

(b) *Breach of Sea Regulations.*

*See* Sect. 3, *ante.*

*C. Inevitable Accident.*

*See* Sub-sect. 3, *post.*

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SUB-SECT. 3.—INEVITABLE ACCIDENT.

*A. In General.*

*See, generally,* NEGLIGENCE, Vol. XXXVI., pp. 100 *et seq.*

**6289. Defence to action for damages.**]—THE VERNON (1842), as reported in 1 Notes of Cases, 277; 5 L. T. 121; *subsequent proceedings*, 1 Wm. Rob. 316.

**6290.** ——.]—THE SHANNON, No. 5402, *ante.*

**6291.** ——.]—THE JOHN BUDDLE, No. 5270, *ante.*

**6292.** ——.]—THE HAREWOOD *v.* THE JOHN INGO (1853), 5 L. T. 122.

**6293.** ——.]—THE INDUS, No. 6370, *post.*

*B. What Amounts to Inevitable Accident.*

(a) *In General.*

*See, generally,* NEGLIGENCE, Vol. XXXVI., pp. 100 *et seq.*

**6294. General rule.**]—(1) Masters of vessels navigating at night are bound to use all proper precautions for avoiding the chances of a collision. A vessel sailing upon a dark & foggy night with her topmast studding sails set condemned in the damage sued for.

(2) An inevitable accident in point of law is this, viz. that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution & maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of 8 or 9 miles an hour, when she ought to have proceeded only at the speed of 3 or 4, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable (DR. LUSHINGTON).

(3) It rarely happens in cases of this description that the ct. can place any safe reliance upon declarations or admissions purporting to have been made, *recente facto*, by the masters, or the crews of either of the vessels in the cause (DR. LUSHINGTON).—THE VIRGIL (1843), 2 Wm. Rob. 201; 2 Notes of Cases, 499; 5 L. T. 122, 524; 7 Jur. 1174; 166 E. R. 730.

*Annotations:—As to* (2) **Consd.** S.S. Londonderry *v.* Schooner Dolbadarn Castle (1845), 4 Notes of Cases, Supp. xxxi. **Apld.** The Marpesia (1872), L. R. 4 P. C. 212; The Secret (1872), 26 L. T. 670; The Pladda (1876), 2 P. D. 34. **Consd.** The Schwann, The Albano, [1892] P. 419.

**6295.** ——.]—THE ADLER (1845), 5 L. T. 122.

**6296.** ——.]—THE CHASE (1873), Y. A. D. 113, P. C.

**6297.** ——.]—THE MELLONA, No. 5194, *ante.*

**6298.** ——.]—THE JULIET ERSKINE (1849), 6 Notes of Cases, 633; 5 L. T. 122.

**6299.** ——.]—By inevitable accident, I must be understood as meaning a collision which occurs when both parties have endeavoured by every means in their power, with due care and caution, & a proper display of nautical skill, to prevent the occurrence of the accident (DR. LUSHINGTON).—THE LOCHLIBO (1850), 3 Wm. Rob. 310; 14 Jur. 1074; 166 E. R. 978; *on appeal, sub nom.* POLLOK *v.* M'ALPIN, THE LOCHLIBO (1851), 7 Moo. P. C. C. 427, P. C.

*Annotations:*—**Refd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451; The Oakfield (1886), 11 P. D. 31.

**6300.** ——.]—THE EUROPA, No. 5220, *ante.*

**6301.** ——.]—THE HANNAH *v.* THE KATE (1851), 5 L. T. 122.

**6302.** ——.]—THE HETTY CLIFTON *v.* H.M.S. STROMBOLI (1852), 5 L. T. 122.

**6303.** ——.]—THE HAREWOOD *v.* THE JOHN INGO (1853), 5 L. T. 122.

**6304.** ——.]—In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being prevented by ordinary skill & diligence, not extraordinary skill & extraordinary diligence, by that degree of diligence & skill which is generally to be found in persons who properly discharge their duty.—THE THOMAS POWELL *v.* THE CUBA (1866), 14 L. T. 603; 2 Mar. L. C. 344.

**6305.** ——.]—THE UHLA, No. 5318, *ante.*

**6306.** ——.]—Inevitable accident is where the collision could not possibly have been prevented by the proper care & seamanship under the particular circumstances of the case. So that where the defence of inevitable accident is set up on behalf of a vessel *primâ facie* to blame for a collision, the defence, to succeed, must be supported by proof that everything was done which could & ought to have been done to avoid the collision; & this, though the vessel be in some degree disabled, & so less manageable than she would otherwise have been.

The *Calcutta* is *primâ facie* to blame for the collision, because it was her duty to keep out of the way of the *Emma*. . . . It must be remembered that at this time the *Emma* was almost motionless upon the water, being in the act of reefing (LORD CHELMSFORD).—THE CALCUTTA (OWNERS) *v.* THE EMMA (OWNERS), THE CALCUTTA (1869), 21 L. T. 768; 3 Mar. L. C. 336, P. C.

**6307.** ——.]—MARPESIA (OWNERS) *v.* AMERICA (OWNERS), THE MARPESIA, No. 6325, *post.*

**6308.** ——.]—By reason of the improper navigation of the steamship *Schwan*, in starboarding across the bows of the steamship *Albano*, the latter vessel sustained damage by coming into collision with the *M.* at anchor, &, by reason of the *Schwan* continuing under a starboard helm, that vessel came into collision with, & sank, the *D.* at anchor.

In an action by the owners of the *D.* against the *Schwan*, the latter vessel was found to blame. Her owners thereupon instituted a limitation suit,

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**PART XII. SECT. 5, SUB-SECT. 3.—A.**

**6289 i.** *Defence to action for damages.*]—In a case of collision, if the damages have been occasioned by accident or by a *vis major* the loss must be borne by the party who suffers it.—*Re* THE SARAH ANN (1853), 3 L. C. R. 485.—**CAN.**

**6289 ii.** ——.]—THE MARGARET (1859), 5 L. T. 121.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 3.—B. (a).**

**6294 i.** *General rule.*]—If at a critical moment in the agony of collision, or immediately before it takes place, a vital or material part of the machinery, or of the steering-gear, or equipment of a ship, fails or breaks & cannot possibly be remedied, & the command of the movement of the ship by those in charge of her is lost & cannot be regained, & a collision then occurs without any antecedent negligence on the part of the disabled ship, & is unavoidable as far as she is concerned, the accident is inevitable.—TAYLOR *v.* THE PRESCOTT (1908), 13 Exch. C. R. 424.—**CAN.**

**6294 ii.** ——.]—An "inevitable accident" is that which a party charged with an offence could not possibly avoid by the exercise of ordinary care, caution, or maritime skill. It is not enought to show that the accident could not be prevented by the party at the very moment it occurred; but the question is, could previous measures have been resorted to to render the occurrence less probable.—THE DUNA (1860), 12 Ir. Jur. 384.—**IR.**

**6294 iii.** ——.]—Inevitable accident is where the collision could not have been prevented by proper care & seamanship in the particular circumstances of the case.—THE SECRET (1872), 26 L. T. 670.—**IR.**

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 3, B. (a) & (b), C. & D.; sub-sect. 4, A. & B. (a).]*

& obtained a decree under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, limiting their liability to £8 per ton for damage caused by the improper navigation of the *Schwan* on the occasion of the collision between that vessel & the *D.*

In an action, by the owners of the *M.*, against the *Albano*, it was held by the Ct. of Appeal that the collision was an inevitable accident. By LORD ESHER, M.R., because it had been shown that, owing to the wrongful starboarding of the *Schwan*, something happened over which those in charge of the *Albano* had no control, & the effect of which could not be avoided by the "greatest" care & skill. By FRY & LOPES, L.JJ., because the accident, being one which those in charge of the *Albano* could not possibly prevent by the exercise of "ordinary" care, caution, & maritime skill, it was inevitable within the definition in *The Marpesia*, No. 6325, *post*.—THE SCHWAN, THE ALBANO, [1892] P. 419; 69 L. T. 34; 8 T. L. R. 425; 7 Asp. M. L. C. 347, C. A.

*Annotations:*—**Reld.** The Merchant Prince (1892), 8 T. L. R. 430; The Benue, [1916] P. 88.

*(b) Particular Cases.*

**6309. Ship colliding while extricating herself from danger.**]—THE THORNLEY (1843), 1 L. T. O. S. 293; 7 Jur. 659.

*Annotations:*—**Reld.** The London (1863), Brown. & Lush. 82; The Marpesia (1872), L. R. 4 P. C. 212.

**6310. —— Consequence of previous collision—Ship swinging round after anchoring.**]—THE HIBERNIA (1858), 5 L. T. 122; 4 Jur. N. S. 1244.

**6311. Collision in fog.**]—THE EBENEZER, No. 5694, *ante*.

**6312. —— Ship sailing at high speed—Insufficient look out.**]—THE EUROPA, No. 5220, *ante*.

**6313. —— Ship swinging round to anchor.**]—THE NADOR, No. 5657, *ante*.

**6314. Cable catching on windlass.**] — The catching of the cable on the windlass in running out may be an inevitable accident.—THE PEERLESS (1860), Lush. 103; 13 Moo. P. C. C. 484; 30 L. J. P. M. & A. 89; 3 L. T. 125; 15 E. R. 182, P. C.

*Annotations:*—**Reld.** The Tactician (1907), 76 L. J. P. 80; The Ape, [1916] P. 303.

**6315. Collision by drifting ship—Defective moorings—Ship unable to let go anchor.**]—DOWARD *v.* LINDSAY, THE WILLIAM LINDSAY, No. 5173, *ante*.

**6316. —— Ship adrift as result of collision—Chain cables unbent at time of collision—Insufficiency of look out.**]—THE PLADDA, No. 5314, *ante*.

**6317. —— Collision with anchored vessel.**]—THE BUCKHURST, No. 5526, *ante*.

**6318. Ship given foul berth—Dragging anchor fouling cable.**]—THE INNISFAIL, THE SECRET (1876), 35 L. T. 819; 3 Asp. M. L. C. 337.

**6319. Collision due to failure of steering apparatus—Latent defect.**]—THE VIRGO, No. 6279, *ante*.

**6320. —— Helm jamming—No hand steering gear available.**]—THE CALDERON (1912), *Times*, Mar. 26.

**6321. —— Sudden sheer of ship.**]—THE WOODFORD (1905), Shipping Gazette, Mar. 13, C. A.

*C. Onus of Proof.*

**6322. General rule.**]—Where there is no *primâ facie* case of negligence & want of seamanship, the *onus* does not necessarily attach to the party proceeded against, alleging inevitable accident, to prove it, but on the party seeking indemnification to prove that blame attaches to the other party.—THE BOLINA (1844), 3 Notes of Cases, 208.

*Annotations:*—**Apprvd.** The Marpesia (1872), L. R. 4 P. C. 212. **Consd.** The Schwan, The Albano, [1892] P. 419.

**6323. ——.**]—THE GEORGE, No. 5181, *ante*.

**6324. ——.**]—THE MARGARETS (1846), 5 L. T. 122.

**6325. ——.**]—Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, & maritime skill:—*Held:* affirming the principles laid down in *The Bolina*, No. 6322, *ante*, that where in a cause of collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit against the vessel, & seek to be indemnified for damage sustained; & does not attach to the vessel proceeded against until a *primâ facie* case of negligence & want of due seamanship is shown.

If a pltf. in a collision suit intends to rely on a particular act of negligence by deft., he is bound specifically to allege that act in his pleadings, & it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not clearly state such particular act; as it is likely to mislead deft. & prevent his being prepared to meet that particular case.

Two sailing vessels approaching stem on in such a manner as that under the sailing rules each would be bound to port, being in a dense fog, only sighted each other at a distance of about 200 yards. Defts.' vessel having been closehauled on the port tack, was then preparing to go about, & had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting & the collision. Pltfs.' petition alleged that defts.' vessel neglected to port, & it was stated that the head sheets of defts.' vessel were not again hauled aft. On this evidence that vessel was held to blame by the Admlty. Ct., on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel:—*Held:* the collision was the result of an inevitable accident, defts.' vessel having done all

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**PART XII. SECT. 5, SUB-SECT. 3.—B. (b).**

a. *Collision by drifting ship—Ship adrift as result of collision.*]—A vessel while at anchor in the Harbour of Quebec having been run into & made to start from her anchorage & drift down with the tide against other vessels, the action was dismissed on the ground of inevitable accident.—*Re* THE MCLEOD (1866), 2 S. V. A. R. 140.—**CAN.**

b. ——.]—The ship *Thames* was lying a mere hulk, waiting for repair, when a board drifted her stern foremost up the river, & she came into collision with another ship. No negligence was proved against the master, & the accident was held to be inevitable.—ABDOOLA ROHOMAN MOOSAN *v.* THE THAMES (1865), Bourke, 21.—**IND.**

c. *Collision by vessel seeking shelter from storm.*]—THE RICHMOND (1873), Y. A. D. 164.—**CAN.**

d. *Collision by raft in tow with anchored schooner.*]—Where a raft in tow of a steamer collided with a schooner at anchor, in a part of the river St. Lawrence of difficult navigation:—*Held:* inevitable accident.—FRADET *v.* THE RIVAL (1885), 11 Q. L. R. 382.—**CAN.**

e. *Vessel moored to another—Extraordinary storm.*]—BAILEY *v.* CATES (1904), 35 S. C. R. 293; 24 C. L. T. 412; 11 B. C. R. 62.—**CAN.**

f. *Breaking of bell-spring.*]—If a bell-spring, a mere accessory of the equipment of the vessel, breaks, but the command of the vessel is not necessarily thereby lost by those in charge of her, & antecedent fault on her part is proved, this cannot be deemed to be an "inevitable accident."—TAYLOR *v.* THE PRESCOTT (1908), 13 Exch. C. R. 424.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 3.—C.**

6322 f. *General rule.*]—To support a plea of inevitable accident the burden of proof rests upon the party pleading it.—*Re* THE AGAMEMNON (1876), 1 Q. L. R. 333.—**CAN.**

that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; & pltfs., if they meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.—MARPESIA (OWNERS) *v.* AMERICA (OWNERS), THE MARPESIA (1872), L. R. 4 P. C. 212; 8 Moo. P. C. C. N. S. 468; 26 L. T. 333; 1 Asp. M. L. C. 261; 17 E. R. 387, P. C.

*Annotations:*—**Folld.** The Abraham (1873), 28 L. T. 775. **Apld.** The Benmore (1873), L. R. 4 A. & E. 132; The Otter (1874), L. R. 4 A. & E. 203. **Reld.** The Pladda (1876), 2 P. D. 34; The Merchant Prince, [1892] P. 179; The Schwan, The Albano, [1892] P. 419; The Calderon (1912), *Times*, Mar. 26.

**6326.** ——.]—In a cause of collision, where defts. plead inevitable accident alone, it lies upon pltf. to show a *primâ facie* case of negligence against defts., & pltfs. must therefore begin.—THE ABRAHAM (1873), 28 L. T. 775; 2 Asp. M. L. C. 34.

*Annotation:*—**Apld.** The Otter (1874), L. R. 4 A. & E. 203.

**6327.** ——.]—When the issue in the cause is one of inevitable accident, pltfs. must begin even though no charge of negligence is made against them by defts.—THE BENMORE (1873), L. R. 4 A. & E. 132; 43 L. J. Adm. 5; 22 W. R. 190.

*Annotation:*—**Apld.** The Otter (1874), L. R. 4 A. & E. 203.

**6328.** ——.]—THE OTTER, No. 5720, *ante*.

**6329. What must be proved.**]—THE DESPATCH, No. 6236, *ante*.

**6330.** ——.]—THE CALCUTTA (OWNERS) *v.* THE EMMA (OWNERS), THE CALCUTTA, No. 6306, *ante*.

**6331.** ——.]—THE MERCHANT PRINCE, No. 5175, *ante*.

**6332.** ——.]—THE POLYNÉSIEN, No. 5374, *ante*.

**6333.** ——.]—THE VALDES, No. 6373, *post*.

### *D. Costs.*

*See* ADMIRALTY, Vol. I., pp. 207, 208, 209, 241, 242, Nos. 1279–1282, 1300–1307, 1684, 1688–1691.

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### SUB-SECT. 4.—PROOF OF NEGLIGENCE.

### *A. In General.*

**6334. What must be proved—Vessel was able to perform duty.**]—INMAN *v.* RECK, THE CITY OF ANTWERP, & THE FRIEDRICH, No. 6416, *post*.

**6335. —— Performance would prevent collision.**]—INMAN *v.* RECK, THE CITY OF ANTWERP, & THE FRIEDRICH, No. 6416, *post*.

**6336. —— Performance would occur to officer of competent skill & experience.**]—INMAN *v.* RECK, THE CITY OF ANTWERP, & THE FRIEDRICH, No. 6416, *post*.

**6337. Circumstances to be considered.**]—THE PETER BENOIT, No. 6166, *ante*.

**6338. Cross actions—Evidence equally balance—Court unable to decide—Actions dismissed.**]—In cross actions, in which the evidence was so balanced that neither the Trinity Masters nor the ct. could decide which vessel was to blame both actions were dismissed.—THE MAID OF AUCKLAND (1848), 6 Notes of Cases, 240.

**6339. Right to recover secundum allegata e probata.**]—Pltfs., in a cause of collision, alleged in their petition, in two separate articles, that the helm of defts.' vessel was not duly ported, & was improperly starboarded. They also produced witnesses who deposed that defts.' vessel had starboarded, & that the collision was thereby occasioned. The finding of the ct. was that the collision was occasioned by the helm of defts.' vessel not having been duly put to port:—*Held:* pltfs. were not barred from recovering by the rule confining pltfs.' right to recover *secundum allegata et probata*.—THE AMALIA (1864), Brown. & Lush. 311; 167 E. R. 379; *sub nom.* THE AMALIA, THE MARIE DE BRABANT, 10 L. T. 826; 2 Mar. L. C. 58, P. C.

*Annotation:* **Reld.** The Alice & The Rosita (1868), 19 L. T. 753.

——.]—*See, also*, ADMIRALTY, Vol. I., p. 182, Nos. 950–954.

### *B. Burden of Proof.*

### *(a) In General.*

**6340. General rule—Onus on party alleging negligence.**]—(1) In collision, the owners are only entitled to indemnification if the damage is occasioned by the fault or misconduct of the vessel charged as the wrongdoer; therefore, the collision having arisen from the neglect of the vessel damaged, the owners of the other vessel dismissed with costs.

(2) The law will support a claim for indemnification on the part of the owners of a vessel, provided it can be shown that the loss was owing to the fault or misconduct of the vessel charged as the wrongdoer (SIR CHRISTOPHER ROBINSON).

(3) The law requires that there should be preponderating evidence to fix the loss on the party charged, before the ct. can adjudge him to make compensation; & in this case the complainant has not sufficiently sustained the burthen of proof imposed upon him (SIR CHRISTOPHER ROBINSON).—THE LIGO (1831), 2 Hag. Adm. 356; 166 E. R. 273.

**6341.** —— ——.]—THE HARRIET (1841), as reported in 7 L. T. 441.

**6342.** —— ——.]—THE PATRIOT (1845), 7 L. T. 441.

**6343.** —— ——.]—THE CITY OF LONDON (1845), 7 L. T. 441.

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**6329 i.** *What must be proved.*]—To support a plea of inevitable accident the party pleading it must show, before he can derive any benefit from it, that the damage was caused immediately by the irresistible force of the wind & waves; that it was not preceded by any fault, act or omission on his part as the principal or indirect cause, & that no effort to counteract the influence of the force was wanting.—*Re* THE AGAMEMNON (1876), 1 Q. L. R. 333.—**CAN.**

**6329 ii.** ——.]—In order to support a defence of "inevitable accident" for injury done by one vessel to another it must be shown that the accident could not have been prevented by the exercise of ordinary skill & prudence in the management of the vessel doing the damage.—THE JESSIE MAC *v.* THE SEALION, [1921] 1 W. W. R. 873.—**CAN.**

**6329 iii.** ——.]—In a case of collision, in order to succeed under a plea of "inevitable accident" it must be shown that the accident would not possibly have been prevented by the exercise of ordinary care, caution & maritime skill; it must show what was the cause of the accident, & that the result of that cause was inevitable, or must show all the possible causes one or other of which produced the collision & must further show with regard to every one of these possible causes, that the result could not have been avoided.—POPLAR BAY S.S. CO. *v.* THE CHARLES DICK, [1926] Exch. C. R. 46.—**CAN.**

**6329 iv.** ——.]—A deft., in order to support a defence of inevitable accident, is bound to show that everything was done which could & ought to have been done to avoid a collision.—THE SECRET (1872), 26 L. T. 670.—**IR.**

**PART XII. SECT. 5, SUB-SECT. 4.—B. (a).**

**6340 i.** *General rule—Onus on party alleging negligence.*]—Where a collision had occurred between two vessels in the Lachine canal, as alleged by pltf., through the gross negligence & malice of those in charge of deft.'s steamer, & deft. pleaded that the collision was the result of pure accident:—*Held:* as pltf. had failed to establish the allegations of his declaration, & as his barge was at the time of the collision in a position which was in violation of the rules & regulations of the canal, that the action would be dismissed with costs.—LEGER *v.* JACKSON (1859), 3 L. C. J. 225.—**CAN.**

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 3, B. (a) & (b), C. & D.; sub-sect. 4, A. & B. (a).]*

& obtained a decree under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, limiting their liability to £8 per ton for damage caused by the improper navigation of the *Schwan* on the occasion of the collision between that vessel & the *D.*

In an action, by the owners of the *M.*, against the *Albano*, it was held by the Ct. of Appeal that the collision was an inevitable accident. By LORD ESHER, M.R., because it had been shown that, owing to the wrongful starboarding of the *Schwan*, something happened over which those in charge of the *Albano* had no control, & the effect of which could not be avoided by the "greatest" care & skill. By FRY & LOPES, L.JJ., because the accident, being one which those in charge of the *Albano* could not possibly prevent by the exercise of "ordinary" care, caution, & maritime skill, it was inevitable within the definition in *The Marpesia*, No. 6325, *post*.—THE SCHWAN, THE ALBANO, [1892] P. 419; 69 L. T. 34; 8 T. L. R. 425; 7 Asp. M. L. C. 347, C. A.

*Annotations:*—**Refd.** The Merchant Prince (1892), 8 T. L. R. 430; The Benue, [1916] P. 88.

*(b) Particular Cases.*

**6309. Ship colliding while extricating herself from danger.**]—THE THORNLEY (1843), 1 L. T. O. S. 293; 7 Jur. 659.

*Annotations:*—**Refd.** The London (1863), Brown. & Lush. 82; The Marpesia (1872), L. R. 4 P. C. 212.

**6310. —— Consequence of previous collision—Ship swinging round after anchoring.**]—THE HIBERNIA (1858), 5 L. T. 122; 4 Jur. N. S. 1244.

**6311. Collision in fog.**]—THE EBENEZER, No. 5694, *ante*.

**6312. —— Ship sailing at high speed—Insufficient look out.**]—THE EUROPA, No. 5220, *ante*.

**6313. —— Ship swinging round to anchor.**]—THE NADOR, No. 5657, *ante*.

**6314. Cable catching on windlass.**] — The catching of the cable on the windlass in running out may be an inevitable accident.—THE PEERLESS (1860), Lush. 103; 13 Moo. P. C. C. 484; 30 L. J. P. M. & A. 89; 3 L. T. 125; 15 E. R. 182, P. C.

*Annotations:*—**Refd.** The Tactician (1907), 76 L. J. P. 80; The Ape, [1916] P. 303.

**6315. Collision by drifting ship—Defective moorings—Ship unable to let go anchor.**]—DOWARD *v.* LINDSAY, THE WILLIAM LINDSAY, No. 5173, *ante*.

**6316. —— Ship adrift as result of collision—Chain cables unbent at time of collision—Insufficiency of look out.**]—THE PLADDA, No. 5314, *ante*.

**6317. —— Collision with anchored vessel.**]—THE BUCKHURST, No. 5526, *ante*.

**6318. Ship given foul berth—Dragging anchor fouling cable.**]—THE INNISFAIL, THE SECRET (1876), 35 L. T. 819; 3 Asp. M. L. C. 337.

**6319. Collision due to failure of steering apparatus—Latent defect.**]—THE VIRGO, No. 6279, *ante*.

**6320. —— Helm jamming—No hand steering gear available.**]—THE CALDERON (1912), *Times*, Mar. 26.

**6321. —— Sudden sheer of ship.**]—THE WOODFORD (1905), Shipping Gazette, Mar. 13, C. A.

*C. Onus of Proof.*

**6322. General rule.**]—Where there is no *primâ facie* case of negligence & want of seamanship, the *onus* does not necessarily attach to the party proceeded against, alleging inevitable accident, to prove it, but on the party seeking indemnification to prove that blame attaches to the other party.—THE BOLINA (1844), 3 Notes of Cases, 208.

*Annotations:*—**Apprvd.** The Marpesia (1872), L. R. 4 P. C. 212. **Consd.** The Schwan, The Albano, [1892] P. 419.

**6323. ——.**]—THE GEORGE, No. 5181, *ante*.

**6324. ——.**]—THE MARGARETS (1846), 5 L. T. 122.

**6325. ——.**]—Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, & maritime skill:—*Held:* affirming the principles laid down in *The Bolina*, No. 6322, *ante*, that where in a cause of collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit against the vessel, & seek to be indemnified for damage sustained; & does not attach to the vessel proceeded against until a *primâ facie* case of negligence & want of due seamanship is shown.

If a pltf. in a collision suit intends to rely on a particular act of negligence by deft., he is bound specifically to allege that act in his pleadings, & it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not clearly state such particular act; as it is likely to mislead deft. & prevent his being prepared to meet that particular case.

Two sailing vessels approaching stem on in such a manner as that under the sailing rules each would be bound to port, being in a dense fog, only sighted each other at a distance of about 200 yards. Defts.' vessel having been closehauled on the port tack, was then preparing to go about, & had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting & the collision. Pltfs.' petition alleged that defts.' vessel neglected to port, & it was stated that the head sheets of defts.' vessel were not again hauled aft. On this evidence that vessel was held to blame by the Admlty. Ct., on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel:—*Held:* the collision was the result of an inevitable accident, defts.' vessel having done all

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**PART XII. SECT. 5, SUB-SECT. 3.—B. (b).**

a. *Collision by drifting ship—Ship adrift as result of collision.*]—A vessel while at anchor in the Harbour of Quebec having been run into & made to start from her anchorage & drift down with the tide against other vessels, the action was dismissed on the ground of inevitable accident.—*Re* THE MCLEOD (1866), 2 S. V. A. R. 140.—**CAN.**

b. ——.]—The ship *Thames* was lying a mere hulk, waiting for repair, when a board drifted her stern foremost up the river, & she came into collision with another ship. No negligence was proved against the master, & the accident was held to be inevitable.—ABDOOLA ROHOMAN MOOSAN *v.* THE THAMES (1865), Bourke, 21.—**IND.**

c. *Collision by vessel seeking shelter from storm.*]—THE RICHMOND (1873), Y. A. D. 164.—**CAN.**

d. *Collision by raft in tow with anchored schooner.*]—Where a raft in tow of a steamer collided with a schooner at anchor, in a part of the river St. Lawrence of difficult navigation:—*Held:* inevitable accident.—FRADET *v.* THE RIVAL (1885), 11 Q. L. R. 382.—**CAN.**

e. *Vessel moored to another—Extraordinary storm.*]—BAILEY *v.* CATES (1904), 35 S. C. R. 293; 24 C. L. T. 412; 11 B. C. R. 62.—**CAN.**

f. *Breaking of bell-spring.*]—If a bell-spring, a mere accessory of the equipment of the vessel, breaks, but the command of the vessel is not necessarily thereby lost by those in charge of her, & antecedent fault on her part is proved, this cannot be deemed to be an "inevitable accident."—TAYLOR *v.* THE PRESCOTT (1908), 13 Exch. C. R. 424.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 3.—C.**

6322 i. *General rule.*]—To support a plea of inevitable accident the burden of proof rests upon the party pleading it.—*Re* THE AGAMEMNON (1876), 1 Q. L. R. 333.—**CAN.**

that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; & pltfs., if they meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.—MARPESIA (OWNERS) *v.* AMERICA (OWNERS), THE MARPESIA (1872), L. R. 4 P. C. 212; 8 Moo. P. C. C. N. S. 468; 26 L. T. 333; 1 Asp. M. L. C. 261; 17 E. R. 387, P. C.

*Annotations:*—**Folld.** The Abraham (1873), 28 L. T. 775. **Apld.** The Benmore (1873), L. R. 4 A. & E. 132; The Otter (1874), L. R. 4 A. & E. 203. **Refd.** The Pladda (1876), 2 P. D. 34; The Merchant Prince, [1892] P. 179; The Schwan, The Albano, [1892] P. 419; The Calderon (1912), *Times*, Mar. 26.

**6326.** ——.]—In a cause of collision, where defts. plead inevitable accident alone, it lies upon pltf. to show a *primâ facie* case of negligence against defts., & pltfs. must therefore begin.—THE ABRAHAM (1873), 28 L. T. 775; 2 Asp. M. L. C. 34.

*Annotation:*—**Apld.** The Otter (1874), L. R. 4 A. & E. 203.

**6327.** ——.]—When the issue in the cause is one of inevitable accident, pltfs. must begin even though no charge of negligence is made against them by defts.—THE BENMORE (1873), L. R. 4 A. & E. 132; 43 L. J. Adm. 5; 22 W. R. 190.

*Annotation:*—**Apld.** The Otter (1874), L. R. 4 A. & E. 203.

**6328.** ——.]—THE OTTER, No. 5720, *ante*.

**6329. What must be proved.**]—THE DESPATCH, No. 6236, *ante*.

**6330.** ——.]—THE CALCUTTA (OWNERS) *v.* THE EMMA (OWNERS), THE CALCUTTA, No. 6306, *ante*.

**6331.** ——.]—THE MERCHANT PRINCE, No. 5175, *ante*.

**6332.** ——.]—THE POLYNÉSIEN, No. 5374, *ante*.

**6333.** ——.]—THE VALDES, No. 6373, *post*.

### *D. Costs.*

*See* ADMIRALTY, Vol. I., pp. 207, 208, 209, 241, 242, Nos. 1279–1282, 1300–1307, 1684, 1688–1691.

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### SUB-SECT. 4.—PROOF OF NEGLIGENCE.

### *A. In General.*

**6334. What must be proved—Vessel was able to perform duty.**]—INMAN *v.* RECK, THE CITY OF ANTWERP, & THE FRIEDRICH, No. 6416, *post*.

**6335. —— Performance would prevent collision.**]—INMAN *v.* RECK, THE CITY OF ANTWERP, & THE FRIEDRICH, No. 6416, *post*.

**6336. —— Performance would occur to officer of competent skill & experience.**]—INMAN *v.* RECK, THE CITY OF ANTWERP, & THE FRIEDRICH, No. 6416, *post*.

**6337. Circumstances to be considered.**]—THE PETER BENOIT, No. 6166, *ante*.

**6338. Cross actions—Evidence equally balanced—Court unable to decide—Actions dismissed.**]—In cross actions, in which the evidence was so balanced that neither the Trinity Masters nor the ct. could decide which vessel was to blame, both actions were dismissed.—THE MAID OF AUCKLAND (1848), 6 Notes of Cases, 240.

**6339. Right to recover secundum allegata et probata.**]—Pltfs., in a cause of collision, alleged in their petition, in two separate articles, that the helm of defts.' vessel was not duly ported, & was improperly starboarded. They also produced witnesses who deposed that defts.' vessel had starboarded, & that the collision was thereby occasioned. The finding of the ct. was that the collision was occasioned by the helm of defts.' vessel not having been duly put to port:—*Held:* pltfs. were not barred from recovering by the rule confining pltfs.' right to recover *secundum allegata et probata*.—THE AMALIA (1864), Brown. & Lush. 311; 167 E. R. 379; *sub nom.* THE AMALIA, THE MARIE DE BRABANT, 10 L. T. 826; 2 Mar. L. C. 58, P. C.

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——.]—*See, also*, ADMIRALTY, Vol. I., p. 182, Nos. 950–954.

### *B. Burden of Proof.*

### *(a) In General.*

**6340. General rule—Onus on party alleging negligence.**]—(1) In collision, the owners are only entitled to indemnification if the damage is occasioned by the fault or misconduct of the vessel charged as the wrongdoer; therefore, the collision having arisen from the neglect of the vessel damaged, the owners of the other vessel dismissed with costs.

(2) The law will support a claim for indemnification on the part of the owners of a vessel, provided it can be shown that the loss was owing to the fault or misconduct of the vessel charged as the wrongdoer (SIR CHRISTOPHER ROBINSON).

(3) The law requires that there should be preponderating evidence to fix the loss on the party charged, before the ct. can adjudge him to make compensation; & in this case the complainant has not sufficiently sustained the burthen of proof imposed upon him (SIR CHRISTOPHER ROBINSON).—THE LIGO (1831), 2 Hag. Adm. 356; 166 E. R. 273.

**6341.** —— ——.]—THE HARRIET (1841), as reported in 7 L. T. 441.

**6342.** —— ——.]—THE PATRIOT (1845), 7 L. T. 441.

**6343.** —— — -.]—THE CITY OF LONDON (1845), 7 L. T. 441.

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**6329 i.** *What must be proved.*]—To support a plea of inevitable accident the party pleading it must show, before he can derive any benefit from it, that the damage was caused immediately by the irresistible force of the wind & waves; that it was not preceded by any fault, act or omission on his part as the principal or indirect cause, & that no effort to counteract the influence of the force was wanting.—*Re* THE AGAMEMNON (1876), 1 Q. L. R. 333.—**CAN.**

**6329 ii.** ——.]—In order to support a defence of "inevitable accident" for injury done by one vessel to another it must be shown that the accident could not have been prevented by the exercise of ordinary skill & prudence in the management of the vessel doing the damage.—THE JESSIE MAC *v.* THE SEALION, [1921] 1 W. W. R. 873.—**CAN.**

**6329 iii.** ——.]—In a case of collision, in order to succeed under a plea of "inevitable accident" it must be shown that the accident would not possibly have been prevented by the exercise of ordinary care, caution & maritime skill; it must show what was the cause of the accident, & that the result of that cause was inevitable, or must show all the possible causes one or other of which produced the collision & must further show with regard to every one of these possible causes, that the result could not have been avoided.—POPLAR BAY S.S. CO. *v.* THE CHARLES DICK, [1926] Exch. C. R. 46.—**CAN.**

**6329 iv.** ——.]—A deft., in order to support a defence of inevitable accident, is bound to show that everything was done which could & ought to have been done to avoid a collision.—THE SECRET (1872), 26 L. T. 670.—**IR.**

**PART XII. SECT. 5, SUB-SECT. 4.—B. (a).**

**6340 i.** *General rule—Onus on party alleging negligence.*]—Where a collision had occurred between two vessels in the Lachine canal, as alleged by pltf., through the gross negligence & malice of those in charge of deft.'s steamer, & deft. pleaded that the collision was the result of pure accident:—*Held:* as pltf. had failed to establish the allegations of his declaration, & as his barge was at the time of the collision in a position which was in violation of the rules & regulations of the canal, that the action would be dismissed with costs.—LEGER *v.* JACKSON (1859), 3 L. C. J. 225.—**CAN.**

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 4, B. (a) & (b) i. & ii.*]

**6344.** —— ——.] — MORGAN *v.* SIM, THE LONDON, No. 5246, *ante*.

**6345.** —— ——.]—When a collision occurs between a dumb barge without lights & a steamer on a dark night in the river Thames, there is no presumption of law that the steamer is to blame. It is in all cases necessary for those who allege negligence, causing a collision, on the party of another vessel, to prove it.—THE SWALLOW (1877), 36 L. T. 231; 3 Asp. M. L. C. 371, C. A.

**6346.** —— ——.]—In an action of damage by collision, pltfs., by their statement of claim, alleged that they had suffered damage by reason of a collision between their vessel & defts.' vessel solely caused by the negligent navigation of the latter, & they charged defts. with specific acts of negligence & with breaches of certain articles of the regulations for preventing collisions at sea. Defts., by their defence, denied that the collision & damage were so caused, & alleged that they were solely due to the negligent navigation of pltfs.' vessel, &, after charging pltfs. with specific acts of negligence & breaches of certain articles of the same regulations, defts. counterclaimed for the damage they had suffered by reason of the collision. By their reply, pltfs., as to the defence, joined issue, &, as to the counterclaim, denied the allegations therein contained. Subsequently defts., by letter, admitted that the collision was contributed to by fault on the part of those in charge of their vessel:—*Held:* on the pleadings as they stood, even coupled with defts.' admission of contributory negligence, it was for pltfs. to begin, as the burden of proof was upon them to show affirmatively that defts.' vessel was solely to blame.—THE CADEBY, [1909] P. 257; 78 L. J. P. 85; 101 L. T. 48; 25 T. L. R. 630; 11 Asp. M. L. C. 285.

**6347. Exception to rule—Evidence not obtainable.**] — THE CONCORD *v.* THE MANCHESTER (1840), 7 L. T. 441.

**6348. Plaintiff must establish his case beyond doubt.**]—THE LIGO, No. 6340, *ante*.

**6349. Whether onus may shift.**]—THE CARRON, No. 5641, *ante*.

**6350. Obligation to begin follows onus of proof.**] —THE BOTTLE IMP, No. 6395, *post*.

**6351.** ——.]—THE CADEBY, No. 6346, *ante*.

**6352. To show breach in chain of causation—Sufficiency of discharge of burden.**]—As the result of a collision between applts.' steamship *M.* & resps.' steamship *B. V.* in the river Clyde the latter vessel was so seriously damaged that it was resolved to beach her on the north side of the river in what was described as position 1. She subsequently slipped off the bank, & drifted to position 2 along the fairway of the river, where she was made fast by moorings under the supervision of the Clyde Navigation Authorities. As the result of the action of the tide she slipped into position 3 across the fairway, which increased the difficulty & cost of salvage. The owners of the *M.*, whilst admitting initial liability for the collision & for damage truly consequent thereon, alleged that the damages claimed were to a large extent due to the subsequent negligence on the part of resps. or of those for whom they were responsible:—*Held:* there was no breach in the chain of causation initiated by the collision, & no *novus actus interveniens* which was the direct cause of the final damage. The burden of showing that the chain of causation started by the initial injury had been broken lay on applts. In order to discharge that burden they must prove that the breach in the chain was due to unwarrantable action, & not merely to action on an erroneous opinion by people who had *bonâ fide* made a mistake while trying to do their best, which was all that was known to have happened in the present case, not only as regards position 1, but also as regards the subsequent positions described as 2 & 3 respectively.—CANADIAN PACIFIC RY. CO. *v.* KELVIN SHIPPING CO., LTD. (1927), 138 L. T. 369; 72 Sol. Jo. 16; 17 Asp. M. L. C. 354, H. L.

*(b) Particular Instances.*

*i. Collision with Vessels at Anchor.*

**6353. General rule—Onus lies on vessel in motion.**]—THE SARAH (1845), 4 Notes of Cases, 98, n.; 4 L. T. 839.

*Annotation:*—**Refd.** The Victoria (1818), 6 Notes of Cases, 176.

**6354.** —— ——.]—Where a vessel at anchor is run down by another vessel under weigh, the *onus probandi* lies with the vessel doing the damage, & she is bound to show that the accident was not occasioned by any fault or negligence on her part.—THE BATAVIER (1845), 2 Wm. Rob. 407; 4 Notes of Cases, 356; 6 L. T. O. S. 258; 10 Jur. 19; 166 E. R. 808.

*Annotation:*—**Refd.** Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759.

**PART XII. SECT. 5, SUB-SECT. 4.—B. (b) i.**

**6353 i.** *General rule—Onus lies on vessel in motion.*]—Where the defence is inevitable accident pltf. must begin. The fact of a steamer in motion colliding with a stationary vessel is, itself, *primâ facie* proof that the accident was caused by the steamer's fault.—THE JOHN OWEN, 5 C. L. T. 565.—**CAN.**

**6353 ii.** —— ——.]—Where a cause of collision was brought against a ship for running foul of a floating light vessel:—*Held:* there was a presumption of gross carelessness or want of skill, & the burden was cast upon the shipmasters & the owners to repel that presumption, in default of which the ct. must pronounce for damages.—*Re* THE MIRAMICHI (1841), 1 S. V. A. R. 237.—**CAN.**

**6353 iii.** —— ——.]—When a vessel at anchor is run down by another under weigh, the latter is bound to show that the accident did not arise from fault on her part, because the vessel at anchor has no means of shifting her position to avoid collision. —THE MARTHA SOPHIA (1860), 1 L. T. 449.—**CAN.**

**6353 iv.** —— ——.]—When a collision occurs between a vessel at anchor & a ship under weigh, *primâ facie* the vessel in motion is in fault & the *onus* of proof is thrown on her & she is compelled to show that the other vessel was improperly anchored & that the improper anchorage rendered the collision inevitable.—ROSS *v.* THE HENRY IV (1887), 13 Q. L. R. 379.—**CAN.**

**6353 v.** —— ——.]—Where a collision occurs between a moving vessel & one lying at anchor, the burden of proof is upon the moving vessel to show that such collision was not attributable to her negligence.—WARD & PEMBERTON *v.* THE YOSEMITE (1894), 4 Exch. C. R. 241; 3 B. C. R. 311.—**CAN.**

**6353 vi.** —— ——.]—Where a steamer collided with a dredge at anchor:—*Held:* to be no defence that the dredge was lying in an improper place & did not exhibit lights, if it be shown that the collision could have been avoided by the exercise of reasonable skill & care on the part of the moving vessel.—MONTREAL HARBOUR COMRS. *v.* THE ALBERT M. MARSHALL (1908), 12 Exch. C. R. 178; Q. R. 34 S. C. 299.—**CAN.**

**6353 vii.** —— ——.]—The burden rests upon the vessel under way to exonerate herself from liability for an injury to one which was stationary, to show that it was not in her power to prevent the injury by adopting any practicable precautions, & in shallow waters she is bound to know & guard against the effect of the swell & suction caused by her movement.—PINEBAY S.S. CO., LTD. *v.* THE STEELMOTOR, [1925] Exch. C. R. 147.—**CAN.**

**6353 viii.** —— ——.]—When a vessel in motion collides with a vessel at rest the presumption is that the former is in fault, & this presumption will not be overcome by proof that the colliding vessel was compulsorily in charge of a pilot, unless it is also proved that the collision was due to the fault of the pilot.—MANN, MACNEAL & CO. *v.* ELLERMAN LINES (1904), 7 F. (Ct. of Sess.) 213; 42 Sc. L. R. 159; 12 S. L. T. 481.—**SCOT.**

**6355.** *S. P.* THE SWEA (1845), 4 Notes of Cases, 97, n.; 4 L. T. 839.
*Annotation:*—**Refd.** The Victoria (1848), 6 Notes of Cases, 176.

**6356.** *S. P.* THE GIPSY KING (1847), as reported in 4 L. T. 839.

**6357.** *S. P.* THE VICTORIA (1848), 3 Wm. Rob. 49; 6 Notes of Cases, 176; 4 L. T. 839; 166 E. R. 881.

**6358.** *S. P.* THE JOHN & WILLIAM & THE THETIS (1850), 4 L. T. 839.

**6359.** *S. P.* THE FINLAND (1850), 4 L. T. 839.

**6360.** *S. P.* THE ANT *v.* THE BALFOUR (1850), 4 L. T. 839.

**6361.** *S. P.* THE LOCHLIBO (1850), 3 Wm. Rob. 310; 4 L. T. 839; 14 Jur. 1074; 166 E. R. 978; *on appeal, sub nom.* POLLOK *v.* M'ALPIN, THE LOCHLIBO (1851), 7 Moo. P. C. C. 427, P. C.
*Annotations:*—**Refd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451; The Oakfield (1886), 11 P. D. 34.

**6362.** *S. P.* THE TWO SISTERS (1852), 1 Pritchard's Admiralty Digest, 3rd ed. 248.

**6363.** *S. P.* THE NORTON *v.* THE BESSIE (1855), 4 L. T. 839.

**6364.** *S. P.* THE CHANGE *v.* THE LEGATUS (1856), 4 L. T. 839.

**6365.** *S. P.* THE LAUREL *v.* THE DIAMOND (1858), 4 L. T. 839.

**6366.** ——.]—THE GEORGE, No. 5181, *ante*.

**6367.** ——.]—Pltf., whose vessel has been run down at anchor, may charge negligence generally, & the burden of proof, the collision proved, is thrown upon the defendant to establish his defence.

Where, therefore, pltf.'s vessel was run down at anchor, & pltf. pleads that fact, charging negligence generally, & the answer pleads that the collision was not occasioned by negligence, but the violence of the tempest & sea, which prevented the anchors of deft.'s vessel from holding, pltf. may reply that the collision was occasioned by the default of deft.'s ground tackle.—THE BOTHNIA (1860), Lush. 52; 29 L. J. P. M. & A. 65; 2 L. T. 160; 167 E. R. 28.

**6368.** ——.]—The vessels *A.* & *B.* coming into collision while *B.* is at anchor, the burden of proof is upon *A.* to account for the collision, & that burden is not shifted by the fact that at such time *A.* was drifting in consequence of a prior collision.—THE ANNAPOLIS (1861), 5 L. T. 326; 1 Mar. L. C. 155.

**6369.** ——.]—In an action founded upon a collision between a vessel at anchor & one in motion, the burden of proof is upon the owners of the latter to prove that the collision was not occasioned by any negligence on their part.—THE ANNOT LYLE (1886), 11 P. D. 114; 55 L. T. 576; 6 Asp. M. L. C. 50, C. A.
*Annotations:*—**Apld.** The Merchant Prince, [1892] P. 179; The Schwan, The Albano, [1892] P. 419.

**6370.** ——.]—In an action for damage by collision it appeared that defts.' vessel while in motion came into collision with pltf.'s vessel, which was at anchor:—*Held:* the fact that pltfs.' vessel at the time of the collision was at anchor & could be seen was *primâ facie* evidence of negligence on the part of defts., & the burden of proof was then upon them to rebut the presumption of liability, by showing either that the collision was occasioned by no fault on their part, or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law.—THE INDUS (1886), 12 P. D. 46; 56 L. J. P. 88; 56 L. T. 376; 35 W. R. 490; 3 T. L. R. 213; 6 Asp. M. L. C. 105, C. A.
*Annotations:*—**Apld.** The Schwan, The Albano, [1892] P. 419. **Refd.** The Boucau, [1909] P. 163; The Benue, [1916] P. 88.

**6371.** ——.]—THE CITY OF PEKING *v.* COMPAGNIE DES MESSAGERIES MARITIMES, THE CITY OF PEKING, No. 5373, *ante*.

**6372.** ——.]—THE CULGOA (1893), 9 T. L. R. 564, C. A.
*Annotation:*—**Refd.** The Merthyr (1898), 79 L. T. 676.

**6373.** —— **When vessel at anchor acts correctly.**]—(1) Where in a fog there has been a collision between two vessels one of which was at anchor, the vessel at anchor has not the *onus* of proving that her sound signals were audible in the approaching vessel.

(2) If the vessel at anchor sounded the regular signals, it is for the other vessel to show some reason or excuse for the accident.—THE VALDES (1914), 31 T. L. R. 144.

**6374. Shifting of onus to vessel at anchor—Allegation of improper mooring.**]—THE TELEGRAPH, VALENTINE *v.* CLEUGH, No. 5529, *ante*.

**6375.** ——.]—Where two ships come into collision & the main allegations to be sustained or disproved are that the collision occurred through one of the ships being improperly moored, or from her having an insufficient or improper look out, the burden of proof, or rather of disproving such allegations, lies upon the ship so accused.—THE JOHN HARLEY *v.* THE WILLIAM TELL (1865), 13 L. T. 413; 2 Mar. L. C. 290.

**6376.** —— **Allegation of absence of lights.**]—THE TELEGRAPH, VALENTINE *v.* CLEUGH, No. 5529, *ante*.

**6377.** ——.]—THE LAUREL *v.* THE DIAMOND (1858), 4 L. T. 839.

**6378.** —— **Allegation of insufficient look out.**]—THE JOHN HARLEY *v.* THE WILLIAM TELL, No. 6375, *ante*.

**6379.** —— **Allegation that sound signals inaudible.**]—THE VALDES, No. 6373, *ante*.

**6380.** —— **Vessel at anchor drifting in consequence of prior collision.**]—THE ANNAPOLIS, No. 6368, *ante*.

**6381. Presumption that anchorage proper one—In absence of proof to contrary—Vessel in charge of licenced pilot.**]—THE CAROLINE *v.* THE MEDUSA (1852), 3 L. T. 217.

### ii. *Infringement of Sea Regulations.*

**6382. Onus on party pleading necessity for departure from ordinary rule—To prove necessity.**]—THE TWENTY-NINTH OF MAY (1846), 4 L. T. 774.

**6383.** ——.]—If a ship bound to keep her course, under the 18th Sailing Rule of 1863, justifies her departure from that rule under the 19th rule, she takes upon herself the obligation of showing not only that her departure was at the time it took place necessary, in order to avoid immediate danger; but also that the course adopted by her was reasonably calculated to avoid that danger.—THE AGRA & THE ELIZABETH JENKINS (1867), L. R. 1 P. C. 501; 4 Moo. P. C. C. N. S. 435; 36 L. J. Adm. 16; 16 L. T. 755;

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**6374** i. *Shifting of onus to vessel at anchor—Allegation of improper mooring.*]—In a case of collision with a moored ship the *onus* of proving that she was properly & securely fastened to the docks, in view of perils which she should have anticipated, is upon the moored ship, & a duty lies on her to do all that is possible in the circumstances to render a collision or accident less probable. The degree of vigilance to be exercised must depend on the possible danger to be anticipated & guarded against.—PINE BAY S.S. CO. *v.* THE CHARLES DICK, [1925] Exch. C. R. 203.—CAN.

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 4, B. (b) ii., iii. & iv., & C.; sub-sect. 5, A.]*

16 W. R. 735; 2 Mar. L. C. 532; 16 E. R. 382, P. C.

*Annotation:*—**Apld.** The General Lee of Dublin (1869), 19 L. T. 750.

**6384. —— To show that course adopted was reasonably calculated to avoid danger.**]—THE AGRA & THE ELIZABETH JENKINS, No. 6383, *ante*.

**6385. Onus on party infringing regulations—To show compliance with regulations impracticable.**]—THE LIVINGSTONE, No. 5511, *ante*.

**6386. —— To show that non-compliance did not cause collision.**]—THE FENHAM, No. 5505, *ante*.

**6387.** —— ——.]—CAYZER *v.* CARRON CO., No. 6441, *post*.

**6388.** —— ——.]—THE HERMOD, No. 6156, *ante*.

**6389.** —— ——.]—THE WINSTANLEY, No. 6162, *ante*.

iii. *Inevitable Accident.*

*See* Sub-sect. 3, *ante*.

iv. *Other Cases.*

**6390. Onus on plaintiff—As to conditions of lights—When matter peculiarly within his knowledge.**]—The *onus probandi* is also thrown upon pltf. . . . because the state of the lamps, their original condition & construction, & their state at the time of the collision, are matters peculiarly within his knowledge, & it is a maxim & rule of law, which may be, & has been in well-known cases carried to the very greatest extreme, that the burden of proof should, in all circumstances, be thrown on those who have a peculiar knowledge of the subject, & peculiar means of proving it, which do not belong to the other party (DR. LUSHINGTON).—THE SWANLAND (1855), 2 Ecc. & Ad. 107; 164 E. R. 333.

*Annotations:*—**Mentd.** The Fred (1895), 72 L. T. 153; S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**6391. —— Plaintiff alleging herself to have been in stays—Of helplessness.**]—THE SEA NYMPH, No. 5265, *ante*.

**6392. Onus on defendant—Overtaking steamer colliding with sailing vessel—Of impracticability of avoiding collision—On account of weather.**]—THE HANNAH PARK *v.* THE LENA, No. 6130, *ante*.

**6393. —— —— —— Owing to course of sailing ship.**]—THE HANNAH PARK *v.* THE LENA, No. 6130, *ante*.

**6394. —— —— That going at reasonable speed.**]—THE HANNAH PARK *v.* THE LENA, No. 6130, *ante*.

**6395. —— Collision with fishing vessel attached to her nets.**]—In a cause of damage on behalf of a fishing smack, injured by collision whilst attached to her nets, an allegation in defts.' answer, that pltfs. neglected to comply with the provisions of Sea Fisheries Act, 1868 (c. 45), as to lights, throws upon pltfs. the *onus* of proof & the obligation to begin, contrary to the usual rule that a fishing vessel attached to her nets, being in the same position as a vessel at anchor, has the right to require a vessel coming into collision with her to begin & show excuse for the collision.—THE BOTTLE IMP (1873), 42 L. J. Adm. 48; 28 L. T. 286; 21 W. R. 600; 1 Asp. M. L. C. 571.

**6396. —— To show that collision would not be expected by reasonable seaman.**]—THE KNARWATER, No. 5770, *ante*.

**6397. When onus shifts—Plaintiff proving her helplessness through being put in stays—Duty of defendant to show collision due to improper putting in stays.**]—THE SEA NYMPH, No. 5265, *ante*.

**6398. —— Defendant alleging non-compliance with statutory provisions.**]—THE BOTTLE IMP, No. 6395, *ante*.

**6399. —— Proof by defendants of obedience to orders of pilot—Duty of plaintiff to show negligence of third party contributed to collision—Although defendants offer only evidence of pilot.**]—In an action for damage by collision as soon as defts. have shown that a pilot whose employment was compulsory was on board the wrong doing vessel & that his orders were obeyed, the burden of proving that negligence arising from the act of some other person is a cause which contributed to the collision rests on pltf., even though defts. have only given the testimony of the pilot as evidence.—THE MARATHON (1878), 48 L. J. P. 17.

*Annotation:*—**Mentd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**6400. —— Plaintiff proving that she has complied with statutory requirements—As to lights.**]—THE LINDISFARNE (1896), 12 T. L. R. 267.

*C. Principles on Which Court Acts.*

**6401. Reliability of evidence—Statements made shortly after collision.**]—THE VIRGIL, No. 6294, *ante*.

**6402. —— Evidence as to angle of blow.**]—(1) In an action of damage by collision, deft.

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**PART XII. SECT. 5, SUB-SECT. 4.—B. (b) ii.**

**6386 i.** *Onus on party infringing regulations—To show that non-compliance did not cause collision.*]—FORTUNATO FIGARI (OWNERS) *v.* S.S. COOGEE (1904), 29 V. L. R. 874.—**AUS.**

**6386 ii.** —— ——.]—Pltf.'s vessel was lost in a collision in which deft.'s vessel was at fault. At the time of the collision pltf.'s vessel was not carrying lights as required by 31 Vict. c. 58, it it being a bright moonlight night. On the trial the judge directed the jury that the *onus* was on pltf. of showing that the absence of lights did not in any way contribute to the accident:—*Held:* the direction was correct.—JACKSON *v.* MCLELLAN (1879), 19 N. B. R. (3 P. & B.) 432.—**CAN.**

**6386 iii.** —— ——.]—In case of a collision, burden upon vessel without a look-out to show that this was not contributing cause.—MAGDALEN ISLANDS S.S. CO. *v.* THE DIANA (1907), 11 Exch. C. R. 40; 3 E. L. R. 158.—**CAN.**

**6386 iv.** —— ——.]—HAMBURG PACKET CO. *v.* DESROCHERS (1903), 23 C. L. T. 214; 8 Exch. C. R. 263.—**CAN.**

**6386 v.** —— ——.]—Where a ship has committed a breach of the rule as to keeping the proper side of a narrow channel, but alleges that a collision would not have occurred had the other ship not been guilty of negligence in taking steps which would have averted such collision, the burden of proving such negligence is on the ship primarily at fault, & can only be discharged by clear & plain evidence.—CANADIAN PACIFIC RY. CO. *v.* THE KRONPRINZ OLAV (1913), 13 E. L. R. 178; 14 D. L. R. 178, P. C.—**CAN.**

**6386 vi.** —— ——.]—THE STEEL SCIENTIST *v.* WRANGELL, [1926] 4 D. L. R. 191; [1926] Exch. C. R. 202.—**CAN.**

**6386 vii.** —— ——.]—THE HILDA *v.* THE AUSTRALIA (1884), 12 R. (Ct. of Sess.) 76; 22 Sc. L. R. 70.—**SCOT.**

**g.** *Presumption of fault.*]—The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse if necessary when approaching another ship, so as to involve risk of collision, is not to be considered as a fact contributing to a collision, providing the same could have been avoided by the impinging vessel by reasonable care exerted up to the time of the accident.—THE CUBA *v.* MCMILLAN (1896), 26 S. C. R. 651.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 4.—B. (b) iv.**

**h.** *What amounts to negligence—Failure to slacken speed, stop or reverse when collision imminent.*]—MAGDALEN ISLANDS S.S. CO. *v.* THE DIANA (1907), 11 Exch. C. R. 40; 3 E. L. R. 158.—**CAN.**

**k.** *Undue speed of tug.*]—MONTREAL SAND & GRAVEL CO. *v.* SINCENNES-MCNAUGHTON LINE CO. (Que.) (1908), 6 E. L. R. 183.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 4.—C.**

**l.** *Reliability of evidence.*]—In cases of collision more credit is to be attached to the evidence of the crew of the ship which is on the alert, than

owners of a steam vessel charged those on board pltfs.' steam vessel, & her tug, with, *inter alia*, failing to sound their whistles for fog in accordance with the regulations for preventing collisions at sea:—*Held:* though the tug was attached, by a short scope of rope, to pltfs.' steam vessel, she was not, either in law or in fact, towing, as the time had not yet arrived for her to take the vessel in tow, &, therefore, in the circumstances, she was not bound either to give the sound signals in fog for a separate vessel having way upon her, prescribed by Article 15 (*a*), or the signals for a vessel towing, prescribed by sub-sect. (*e*) of the same Article, & those in charge of pltfs.' vessel were justified, in the interests of safe navigation, in themselves giving the appropriate signals for a vessel under way.

(2) In the result, as both pltfs.' & defts.' vessels were found to blame for excessive speed, & defts.' vessel in addition for bad look out, & for not stopping in accordance with the rules, the decree of fault was apportioned as one-third to two-thirds, with no costs on either side.

This ct. seldom gets much assistance from the consideration of the angle of the blow, because it often happens that very experienced men on the one side say the angle was a small one, & very experienced men on the other side persuade themselves that in that particular case the angle was a broader one (EVANS, P.).

(4) If a vessel is proceeding at a speed which would not allow her to pull up in something like her own length . . . & if a vessel could proceed & have steerage way at a smaller speed than she was going, she ought to have gone at that speed, & in so far as that speed was exceeded it was excessive (EVANS, P.).—THE SARGASSO, [1912] P. 192; 82 L. J. P. 9; 107 L. T. 204; 28 T. L. R. 444; 12 Asp. M. L. C. 202.

**6403. Probabilities weighed where evidence conflicting.**]—In cases of collision, where the evidence on both sides is conflicting & nicely balanced, the ct. will be guided by the probabilities of the respective cases which are set up; *à priori* the presumption is that the master of a vessel would do what was right & follow the regular & correct course of navigation.—THE MARY STEWART (1844), 2 Wm. Rob. 244; 2 L. T. O. S. 375; 166 E. R. 746.

**6404. Presumption in favour of correct navigation.**]—THE MARY STEWART, No. 6403, *ante*.

**6405. Where some facts proved & others disputed—Reconciliation of proved with disputed facts.**]—THE JANE *v.* THE JOHN & ANN (1852), 5 L. T. 61.

**6406.** —— ——.]—THE CARRON, No. 5641, *ante*.

**6407. Perjury not to be attributed—Except where necessary.**]—(1) A steamship held solely to blame for not having given way to a sailing vessel closhauled on the larboard tack, although porting the helm would not have thrown the sailing vessel out of command.

(2) Rule of the Admlty. Ct. not to attribute perjury unless absolutely compelled.—THE CLARENCE (1854), 1 Ecc. & Ad. 206; 164 E. R. 119; *on appeal*, 5 L. T. 366, P. C.

**6408.** —— ——.]—GANNET (OWNERS) *v.* ALGOA (OWNERS), THE GANNET, No. 5624, *ante*.

**6409.** —— ——.]—If the helm was starboarded, all the five must have known that it was starboarded, &, therefore, must have perjured themselves in swearing that it was not starboarded & was ported. The judge who saw & heard them give evidence was satisfied of their honesty, & I conceive in these circumstances, according alike to my own independent judgment & according to authority, that I should not be justified in imputing to them such a piece of wickedness, if any other conclusion were reasonably possible (KENNEDY, L.J.).—THE OLYMPIC & H.M.S. HAWKE, [1913] P. 214; 83 L. J. P. 113; 29 T. L. R. 441, C. A.; *on appeal, sub nom.* OLYMPIC (OWNERS) *v.* BLUNT, OLYMPIC (OWNERS) *v.* ADMIRALTY COMRS., [1915] A. C. 385, H. L.

*Annotations:*—**Mentd.** Nash *v.* Rochford R. C., [1917] 1 K. B. 384; S.S. Orduna *v.* Shipping Controller, [1921] 1 A. C. 250.

**6410. Ascertainment of state of weather—Comparison of weather before & after collision.**]—THE COQUETTE *v.* THE FORTUNATUS (1856), 4 L. T. 774.

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SUB-SECT. 5.—LIABILITY OF ONE OR BOTH VESSELS.

*A. In General.*

**6411. General rule.**]—THE WOODROP-SIMS, No. 6438, *post*.

**6412. One vessel causing situation of peril.**]—THE DUNDEE (1821), *Times*, Dec. 5; *subsequent proceedings* (1823), 1 Hag. Adm. 109.

**6413. Contributory negligence.**]—WILLIAMS *v.* CHAPMAN, No. 5193, *ante*.

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that of the crew of the ship which is at rest.—*Re* THE DAHLIA (1841), 1 S. V. A. R. 242.—**CAN.**

**m.** *Court guided by probabilities.*]—In cases of collision, where the evidence is conflicting, the ct. will be guided by the probabilities of the like cases which are set up, & owners of vessels proceeded against will be dismissed with costs.—*Re* THE AILSA (1860), 10 L. C. R. 362; 2 S. V. A. R. 38.—**CAN.**

**n.** *Duty of promovent.*]—It is a settled principle of the Admiralty law, that promovent of a suit of collision, should before he can be considered to have completed his case, show satisfactorily that he had not himself caused, or contributed to the mischief of which he complains, & also that he had done everything in his power to escape or alleviate it; & if he should fail in either of these requirements, his petition will be dismissed with costs.—THE JACOB (1860), 12 Ir. Jur. 379.—**IR.**

**o.** ——.]—Where the evidence adduced on the hearing of an action arising out of a collision of two ships at sea was of such contradictory nature as to render it difficult to determine which vessel was in fault. The ct. was governed by the well recognised principle, which is that pltf., before he obtains a verdict, is bound to satisfy the ct. that he is entitled to it.—FOX *v.* MORRIS (1882), 6 Nfld. L. R. 424.—**NFLD.**

**PART XII. SECT. 5, SUB-SECT. 5.—A.**

**6411 i.** *General rule.*]—Both parties in fault, neither can recover.—TRAVERSE *v.* WHITE (1837), 4 L. T. 774.—**IR.**

**6412 i.** *One vessel causing situation of peril.*]—Where two steamships were approaching each other at night, green light to green light, so that if each ship had kept her course they would have passed each other safely, & one at a distance between one-fourth & one-half mile away from the other changed her course, showing first her three lights, & then her red & mast-head lights only, & then, when the other ship had put her helm hard to port, changed her course again, exhibiting her three lights:—*Held:* she was solely responsible for a resulting collision.—JOINT STOCK S.S. CO. *v.* THE EUPHEMIA, THE TORDENSKJOLD *v.* HORN JOINT STOCK CO. OF SHIPOWNERS (1907), 11 Exch. C. R. 231.—**CAN.**

**6412 ii.** ——.]—In actions brought by the owner of a tug & the owner of a scow which was being towed by the tug for damages resulting from a collision in Vancouver Harbour between the tug & a steamship:—*Held:* the faulty navigation of the steamship was the cause of the collision & the tug could not have done anything in reason besides what it did do to avoid the disaster & was in no way to blame.—HOPKINS *v.* KATSUDA, HODDER *v.* KATSUDA, [1926] 1 W. W. R. 598.—**CAN.**

**6413 i.** *Contributory negligence.*]—Where a vessel is at anchor without showing the lights required by 16 Vict. No. 46, s. 35, & is run down by another vessel, notwithstanding the fact that a light was exhibited from the former, clearly visible to the latter, the owners of the latter are liable, in spite of the contributory negligence of the other, if the injury could have been avoided by the exercise of ordinary diligence, &

*. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 5, A. & B.]*

**6414.** ——.]—Pltf. cannot recover at law for mischief done to his ship by its being struck by deft.'s ship, in consequence of the latter being improperly managed, if it appear that pltf.'s ship was improperly managed, & that such improper management directly contributed in any degree to the accident, however much deft. may also be in fault: though, if there be negligence on the part of pltf. only remotely connected with the accident, the question is, whether deft. by ordinary care & skill might have avoided the accident.—DOWELL *v.* GENERAL STEAM NAVIGATION CO. (1855), 5 E. & B. 195; 3 C. L. R. 1221; 26 L. J. Q. B. 59; 25 L. T. O. S. 158; 1 Jur. N. S. 800; 3 W. R. 492; 119 E. R. 454.

*Annotations:*—**Apld.** Tuff *v.* Warman (1858), 5 C. B. N. S. 573. **Consd.** Admiralty Comrs. *v.* S.S. Voluto, [1922] 1 A. C. 129. **Reld.** The James (1856), Sw. 60; Witherley *v.* Regents Canal Co. (1862), 12 C. B. N. S. 2; The Vera Cruz (No. 1) (1884), 9 P. D. 88; The Bernina (2) (1887), 12 P. D. 58; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514.

**6415.** ——.]—In actions for injuries by collision, though the damage is not occasioned entirely by the negligence or improper conduct of deft., pltf. is still entitled to recover, if he have not so far contributed to the misfortune by his own negligence or want of ordinary care, that but for such negligence the misfortune could not have happened, & if deft. could, by the exercise of ordinary care & caution, have avoided the consequences of the neglect or carelessness of pltf.—TUFF *v.* WARMAN (1858), 5 C. B. N. S. 573; 27 L. J. C. P. 322; 5 Jur. N. S. 222; 6 W. R. 693; 141 E. R. 231, Ex. Ch.

*Annotations:*—**Apld.** Witherley *v.* Regents Canal Co. (1862), 12 C. B. N. S. 2. **Consd.** L. B. & S. C. Ry. *v.* Walton (1866), 14 L. T. 253; The Vera Cruz (No. 1) (1884), 9 P. D. 88. **Apld.** Paul *v.* G. E. Ry. (1920), 36 T. L. R. 344. **Reld.** Fordham *v.* L. B. & S. C. Ry. (1868), L. R. 3 C. P. 368; Doyle *v.* Kinaham (1869), 17 W. R. 679; Radley *v.* L. & N. W. Ry. (1876), 1 App. Cas. 754; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Brown *v.* G. W. Ry. (1885), 52 L. T. 622; The Bernina (2) (1887), 12 P. D. 58; The Hero, [1911] P. 128; The Highland Loch, [1911] P. 261; British Columbia Electric Ry. *v.* Loach, [1916] 1 A. C 719; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Mentd.** Kymaird *v.* Leslie (1866), 12 Jur. N. S. 468.

**6416.** ——.]—It is a rule in cases of collision between a steamer & a sailing ship, that although the latter may have been guilty of misconduct, or may not have observed the general steering & sailing regulations, yet the steamer will be held culpable, if it appears it was in her power to have avoided the collision. Where a steamer is charged with having omitted to do something which ought to have been done, proof of three things is required: First, that it was clearly in the power of the steamer to have done the thing charged to have been omitted; secondly, that if done it would in all probability have prevented the collision; & thirdly, that it was such an act as would have occurred to any officer of competent skill & experience in command of the steamer. In cross suits between a sailing vessel & a steamer, the Ct. of Admlty. held both vessels to blame, & decreed the damages sustained to be equally divided between them. Such decree reversed on appeal, as the case of the sailing vessel setting forth the alleged negligence on the part of the steamer had not been proved.—INMAN *v.* RECK, THE CITY OF ANTWERP & THE FRIEDRICH (1868), L. R. 2 P. C. 25; 5 Moo. P. C. C. N. S. 33; 37 L. J. Adm. 25; 16 E. R. 427, P. C.

*Annotation:*—**Reld.** The Norma (1876), 35 L. T. 418.

**6417.** ——.]—Upon a question of contributory negligence as applied to collisions at sea, although, where a clear line can be drawn, the subsequent negligence alone is to be regarded, there may be cases in which the two acts of negligence come so

the Statute is not to be interpreted so as to allow the running down of vessels insufficiently lighted.—SPIER *v.* HUNTER RIVER STEAM NAVIGATION CO. (1860), 2 Legge, 1351.—**AUS.**

**6413 ii.** ——.]—To enable the owner of a vessel lost or injured by collision to recover, it must appear that the accident was not in any way owing to the negligence, misconduct, or want of skill in those navigating such vessel, & that the provisions of 7 Will. 4, c. 22, as to the course to be taken, have been, as far as applicable, properly observed.—EBERTS *v.* SMYTHE (1847), 3 U. C. R. 189.—**CAN.**

**6413 iii.** ——.]—Deft. is not liable unless the whole fault can be attributed to his vessel.—BOWEN *v.* EWART (1853), 2 C. P. 542.—**CAN.**

**6413 iv.** ——.]—Neither by the marine nor by the common law is a vessel or a carriage justified in not taking proper precautions against a collision with another, by the fact that such other is not in its proper position or side of the road, or is in any contravening any rule of the sea or of the road.—THE MARTHA SOPHIA (1860), 1 L. T. 449.—**CAN.**

**6413 v.** ——.]—In an action for running down a vessel, if there was negligence on both sides, & pltf., by his own negligence, has contributed to the injury sustained by his vessel, he cannot recover.—DAY *v.* HATHEWAY (1862), 10 N. B. R. (5 All.) 388.—**CAN.**

**6413 vi.** ——.]—*Re* THE GERMANY, *Re* THE CITY OF QUEBEC (1871), 2 S. V. A. R. 158.—**CAN.**

**6413 vii.** ——.]—The owners of the tug *B. H.* sued the owners of the steam propeller *St. M.*, for damages occasioned by the tug being run down by the propeller in the River Detroit: —*Held:* as the evidence showed the master of the tug to have misunderstood the signals of the propeller, & to have directed his vessel on the wrong course when the two were in proximity, the owners of the propeller were not liable.—ROBERTSON *v.* WIGLE, THE ST. MAGNUS (1889), 16 S. C. R. 720.—**CAN.**

**6413 viii.** ——.]—Excusable manœuvres executed in "agony of collision" brought about by another vessel cannot be imputed as contributory negligence on the part of the vessel collided with.—THE CUBA *v.* MCMILLAN (1896), 26 S. C. R. 651.—**CAN.**

**6413 ix.** ——.]—Contributory negligence by sailing vessel may prevent her recovering against steamer even though steamer to some extent in fault.—WHITE *v.* CORBIN & GRIEVE (1852), 3 Nfld. L. R. 344.—**NFLD.**

**6413 x.** ——.]—Where both ships in collision are blameless, or both in fault, judgment will be given for defts.; but if defts. were in fault pltf. may obtain damages if he was not guilty of contributory negligence.—WHITE *v.* GRIEVE & CORBIN (1853), 3 Nfld. L. R. 394.—**NFLD.**

**6413 xi.** ——.]—ONTARIO GRAVEL FREIGHTING CO., LTD. *v.* MATTHEWS S.S. CO., LTD., [1927] 1 D. L. R. 1045; [1927] S. C. R. 92; [1926] Exch. C. R. 210.—**CAN.**

**6413 xii.** ——.]—In cases of collision, the Ct. of Admiralty will consider if impugnant vessel ported, as far as lay in her power, under the circumstances, so as to meet the object & true meaning of the rule at sea, as provided by M. S. Act; & if it appear that she did all in her power to prevent a collision, the ct. will pronounce a decree in her favour, with costs.—THE CAMBRIA (1858), 10 Ir. Jur. 445.—**IR.**

**6413 xiii.** ——.]—In an action for damages, where pltf.'s vessel whilst moored to his wharf, was run into & injured by deft.'s vessel, the judge trying the case told the jury it was no defence that the jib-boom of pltf.'s vessel projected over the public waters of the harbour.—MARCH *v.* BARTLETT (1860), 4 Nfld. L. R. 421.—**NFLD.**

**6413 xiv.** ——.]—In a suit for collision to recover damages, as in the case of a total loss, impugnant vessel will be held liable, if she ported her helm when she should, under all the circumstances, have starboarded, & if she was herself the cause of the collision, in not exhibiting coloured lights as required by the statute.—THE SWAN (1864), 11 L. T. 191.—**IR.**

**6413 xv.** ——.]—S.S. CYPHRENES *v.* S.S. LA FLANDRE (1896), 7 Nfld. L. R. 843.—**NFLD.**

**6413 xvi.** ——.]—A yacht belonging to pltf. broke its moorings in a gale, drove ashore, & sank. A raft of logs, belonging to deft., also broke adrift & went ashore. As the tide fell one of the logs settled on pltf.'s yacht & destroyed it. Both parties were found by the District Judge, sitting as judge & jury, equally negligent:—*Held:* the negligence of pltf. so conduced to the accident as to disentitle him to recover.—BIGGS *v.* LAMB (1880), O. B. & F. 179.—**N.Z.**

**6413 xvii.** ——.]—To establish contributory negligence in the case of a collision, the evidence must be clear & definite.—DUNBAR & SULLIVAN DREDGING CO. *v.* THE AMAZONAS & THE MONTEZUMA (1911), 13 Exch. C. R. 472.—**CAN.**

closely together & the second act is so mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, may invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

The *V.*, as leader of a convoy under the charge of two destroyers, the *R.* & another, the *R.* being on the starboard hand, had instructions when to alter her course, & was to sound the appropriate held signal on altering. Whilst sailing by night she was instructed to keep a certain course until reaching a particular point, & then to alter her course 7 points to the starboard, & this she proceeded to do. The *R.* did not immediately alter her course when the *V.* ported her helm & consequently a position of danger arose. On discovering the *V.'s* change of course to starboard, the *R.* hard-a-ported, but her helm jammed, & she then increased her speed from 8 to 18 knots, with the result that a collision occurred, notwithstanding that the *V.* stopped & reversed her engines :—*Held :* the collision was caused partly by the *V.'s* omission to signal & partly by the *R.'s* going full speed ahead after the position of danger brought about by the *V.'s* negligence, & both vessels were to blame.—ADMIRALTY COMRS. *v.* S.S. VOLUTE, [1922] 1 A. C. 129 ; 91 L. J. P. 38 ; 126 L. T. 425 ; 38 T. L. R. 225 ; 66 Sol. Jo. 156 ; 15 Asp. M. L. C. 530, H. L.

*Annotations :*—**Consd.** Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Refd.** The Manorbier Castle (1922), 129 L. T. 31 ; S.S. Singleton Abbey *v.* S.S. Paludina, [1927] A. C. 16.

**6418.** ——.]—ANGLO-NEWFOUNDLAND DEVELOPMENT CO. *v.* PACIFIC STEAM NAVIGATION CO., No. 6142, *ante*.

**6419. —— Plaintiff's negligence must be cause of damage.**]—SPAIGHT *v.* TEDCASTLE, No. 5091, *ante*.

**Common law rule.**]—*See* NEGLIGENCE, Vol. XXXVI., pp. 109–122.

*B. Breach of Sea Regulations.*

**6420. Both vessels to blame—Negligent navigation by one vessel only.**]—Defts.' steamship was proceeding to the eastward, near the Sandettie lightship in the North Sea, when those in charge observed, at a distance of some six miles, & about ahead, a white light which proved to be the masthead light of pltfs.' steamship, which was proceeding on a converging course in the opposite direction. Assuming that that light, & a second white light, belonged to a fishing boat, those in charge of defts.' vessel disregarded them, &, in the ordinary course of navigation, starboarded the helm for the next lightship, thereby bringing about a collision with pltfs.' vessel, which was properly porting to keep out of the way :—*Held :* apart from other contributing causes, rendering both vessels to blame, the initial cause of the collision was neglect by those in charge of defts.' vessel to comply with the directions contained in the preliminary to Article 17 of the Regulations for Preventing Collisions at Sea, as to "carefully watching the compass bearing of an approaching vessel," for, if this had been done, it would have been ascertained that starboarding would involve risk of collision.—THE PRESIDENT LINCOLN, [1911] P. 248 ; 81 L. J. P. 5 ; 105 L. T. 442 ; 12 Asp. M. L. C. 41.

**6421.** —— ——.]—Where a ship navigating a narrow channel has no proper out-look & neglects to signal her course at a reasonable distance, thus perplexing & misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident.—RICHELIEU & ONTARIO NAVIGATION CO. *v.* THE CAPE BRETON (OWNERS), [1907] A. C. 112 ; 76 L. J. P. C. 14, P. C.

**6422.** —— ——.]—THE KAISER WILHELM II., No. 5225, *ante*.

**6423. —— —— Lights not visible from other vessel.**] — PAULINE CONSTANCE ELEONORE (OWNERS, ETC.) *v.* HAMBURGH AMERICAN STEAM PACKET CO., THE GERMANIA (OWNERS), THE GERMANIA, No. 5214, *ante*.

**6424. One vessel not keeping look out—Other vessel not displaying anchor lights.**]—The Admlty. regulations require all sailing vessels at anchor in roadsteads to exhibit a light, except within harbours, where regulations for other lights for ships are legally established. Regulations for the exhibition of lights by steam vessels going down the Thames are legally established in the port of London, but none have been established for sailing vessels :—*Held :* sailing vessels are bound to exhibit the light, required by the Admlty. rules. *Semble :* if a sailing vessel, negligently at anchor without a light, be run down by another vessel, through the sheer negligence of the latter in not keeping a proper look out, the owner of the vessel at anchor may recover, notwithstanding his own neglect.—MORRISON *v.* GENERAL STEAM NAVIGATION CO. (1853), 8 Exch. 733 ; 1 C. L. R. 63 ;

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**6419 i.** —— *Plaintiff's negligence must be cause of damage.*]—The persons in charge of pltf.'s steamer, supposing deft.'s vessel to be at anchor, tried to pass inside it & the shore, & in so doing the two vessels came into collision, & pltf.'s vessel sustained damage :—*Held :* the collision being caused by pltf.'s mistake they could not recover.—TRINITY HOUSE *v.* BROWN (1866), 2 L. C. L. J. 132.—**CAN.**

**6419 ii.** —— ——.]—Where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it, although the other ship may have been guilty of some breach of the rules, not contributing to the collision. When the defence of contributory negligence is set up by the deft. in an action for collision, he must show, with reasonable clearness, not only that the other ship was at fault, but that her fault may have contributed to the collision.—THE PORTER *v.* HEMINGER (1898), 6 Exch. C. R. 208.—**CAN.**

**6419 iii.** —— ——.]—Where a ship navigating a narrow channel has no proper look-out, & neglects to signal her course, at a reasonable distance, thus perplexing & misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident.—RICHELIEU & ONTARIO NAVIGATION CO. *v.* THE CAPE BRETON, C. R., [1907] A. C. 295.—**CAN.**

**6419 iv.** —— ——.]—DAMPFKIBS AKT. OCLAND *v.* THE REGULUS (N. S.) (1909), 6 E. L. R. 587.—**CAN.**

**6419 v.** —— ——.]—COMPAGNIE GENERALE TRANSATLANTIQUE *v.* THE IMO (1919), 59 S. C. R. 644.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 5.—B.**

**p.** *Both vessels to blame.*]—*Re* THE M. C. UPPER, MCCALLUM *v.* ODETTE, (1882), 7 S. C. R. 36.—**CAN.**

**q.** ——.]—The rules of the road must be strictly observed, & when they are violated by both vessels the ct. will hold them equally liable.—CANADIAN LAKE & OCEAN NAVIGATION CO., LTD. *v.* THE DOROTHY (1906), 10 Exch. C. R. 163 ; 7 O. W. R. 621.—**CAN.**

**r.** *Rules of the road must be complied with.*]—*H.*, a steam barge, was going up the river from the Lachine Canal, & *O.*, a propeller was coming down. *O.* signalled that she wished to pass *H.* on the left or opposite side to that provided by the rules of navigation, *H.* replied that she would keep to the right as usual. *O.* turned to the left & came into collision with *H.* sinking her :—*Held :* as *O.* had deviated from the course which the rules of navigation required her to take, she was liable for the damages caused by the collision.—WEELON *v.* KENNY (1888), 32 L. C. J. 259.—**CAN.**

**t.** ——.]—In case of a collision between vessels, when damage has accrued, the responsibility lies upon the ship guilty of negligent navigation in failing to observe the rules which

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 5, B. & C.; sub-sect. 6, A. & B. (a) & (b).]*

22 L. J. Ex. 233; 21 L. T. O. S. 92; 17 Jur. 507; 1 W. R. 311; 155 E. R. 1547.
*Annotation:*—**Consd.** Tuff v. Warman (1857), 2 C. B. N. S. 740.

**6425. —— Other vessel not keeping out of way.]** —THE WALTER HOOD *v.* THE EMIGRANT (1857), 5 L. T. 366.

*C. Breach of Local Rules.*

**6426. Breach by one vessel.]** — (1) Bye-laws made by a local authority governing the navigation of a river are to be taken as evidence of what it is the duty of vessels to do in the circumstances named therein, & although the mere breach of one of any of them will not be sufficient reason for holding a ship to blame for a collision, yet, if that breach occasions or contributes to the collision, the existence of the bye-law will afford the best reason for holding the ship violating the bye-law to be guilty of a breach of duty, & consequently to blame for the collision.

(2) Where a bye-law regulating the navigation of a river prescribes the side of the river upon which a ship is to navigate going up or down the river, the observance of this bye-law is doubly necessary during a fog when vessels can only be made out at short distances; & the breach of the bye-law cannot be excused by the plea that it was usual during foggy weather to navigate on the wrong side of the river in order to insure greater safety for the vessel so doing.—THE RAITHWAITE HALL (1874), 30 L. T. 233; 2 Asp. M. L. C. 210.

**6427. —— Other vessel failing to take ordinary care.]**—CAYZER *v.* CARRON CO., No. 6441, *post.*

**6428.** —— ——.]—A steamship ceases to be "crossing from one side of the river towards the other side" within the meaning of Article 24 of the Rules & Bye-laws for the Navigation of the River Thames when her stem had got so far across that it can go no further, although she is still athwart the stream; but where a vessel is swinging for the purpose of turning in the river with her anchor down but not holding, she is not a crossed ship if she is still moving towards the shore, although she may have got more than athwart, & although her stern may be swinging to the tide.

A steamship *A.*, having come up the Thames as far as Bugsby's Reach on the flood tide, was about to turn head down, &, having whistled, her helm was ported & anchor let got so that it might dredge, & she began to swing round. Meanwhile the steamship *R. D.*, which had been coming up the river astern of the *A.*, instead of taking any steps to keep out of the way of the *A.*, although she saw that the *A.* was doing nothing to keep out of her way in obedience to Article 24 of the Thames Rules & Bye-Laws, came on & collided with the *A.*:—*Held:* both vessels were to blame, the *A.* because, being a crossing ship, she neglected to keep out of the way of the *R. D.*, & the *R. D.* because, after she saw that the *A.* was neglecting her duty to keep out of the way, she failed to take any steps in sufficient time to avoid the collision.—THE RIVER DERWENT (1889), 62 L. T. 45; 6 T. L. R. 86; 6 Asp. M. L. C. 467, C. A.; *affd.* (1891), 64 L. T. 509, H. L.
*Annotations:*—**Consd.** The New Pelton, [1891] P. 258. **Distd,** The John Hollway, [1900] P. 37.

**6429.** —— ——.] — THE DUNSTANBOROUGH (1891), [1892] P. 363, n.
*Annotation:*—**Distd.** The Hornet, [1892] P. 361.

**6430.** —— ——.]—In daylight, in the river Thames, a tug negligently came into collision with a steamer, & sustained damage from the anchor which, in breach of Rule 20 of the Thames Rules, the steamer was carrying, by order of a compulsory pilot, at the hawse pipe instead of stock awash. Those in charge of the tug were aware of the position of the anchor; but, after the negligent act of the tug had produced risk of collision, there was no time for those in charge of the steamer, by lowering the anchor or otherwise, to avert the damage. In an action of damage by collision, brought by the owners of the tug against the steamer:—*Held:* the owners of the steamer were not responsible, for though the Thames rule was infringed, the position of the anchor was a matter within the province of the pilot in navigating the vessel, & though the steamer was guilty of negligence in breaking the rule, still the tug, by ordinary care, exerted up to the moment of the collision, might have avoided it, & the consequent damage.—THE MONTE ROSA, [1893] P. 23; 62 L. J. P. 20; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. L. C. 326; 1 R. 557.
*Annotations:*—**Refd.** The Kaiser Wilhelm II. (1915), 85 L. J. P. 26; Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129.

**6431.** —— ——.]—THE WINSTANLEY, No. 6162, *ante.*

**6432.** —— ——.]—THE FRANKFORT, No. 5381, *ante.*

**6433.** —— ——.]—THE ANCONA, No. 6205, *ante.*

**6434. —— Negligence of other vessel admitted.]** —THE ARIADNE, No. 5755, *ante.*

**6435. —— Duty imposed on other vessel.]**—THE OVINGDEAN GRANGE, No. 6173, *ante.*

**6436. Breach by both vessels.]**—The question in what is called a running down case, is, whether pltf., by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its occurrence. Therefore where a brig was carrying the anchor in a position contrary to the bye-laws of the river Thames, at the time when she came in collision with a barge:—*Held:* the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself

should have governed her course & speed.—STARKE DREDGE & DOCK CO., LTD. *v.* THE WILLIAM S. MACK (1914), 15 Exch. C. R. 118.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 5.—C.**

**6426 i.** *Breach by one vessel.*]—Where a collision occurred in the night between two sailing vessels in the River St. Lawrence, in consequence of the non-observance of the rules respecting lights:—*Held:* the owner of the vessel by which such rule was infringed could not recover for any damage sustained in the collision.—*Re* THE AURORA (1860), 10 L. C. R. 445; 2 S. V. A. R. 53.—**CAN.**

**6426 ii.** ——.]—If in cases of collision between two vessels in a canal, pltf.'s vessel was on the wrong side of the canal, & had not the light usually carried, he would be allowed no damages, even if there were doubt as to the cause of the collision.—BERTRAND *v.* DICKINSON (1862), 12 L. C. R. 304.—**CAN.**

**6426 iii.** ——.]—In an action of damages by the owners of a brig arising from a collision with a steamboat of deft.'s, the deft.'s boat having run into the brig while across the canal, & unable, owing to a sudden fall of the wind, to get out of the way in time:—*Held:* the vessel in a position contrary to rule could not claim damages for being run into, & consequently that the owners of the brig could not recover.—BLACK *v.* LEFEBVRE (1866), 16 L. C. R. 290; 2 L. C. L. J. 13.—**CAN.**

64 J. *v.* ——.]—A steamer coming up Halifax harbour ran into a schooner, striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow, & the latter starboarded her helm to pass astern, & then ported. She then was so close that he stopped the engines, but too late to prevent the collision:—*Held:* the steamer alone was to blame for the collision.—THE ARRANMORE *v.* RUDOLPH (1906), 27 C. L. T. 152; 38 S. C. R. 176.—**CAN.**

into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of.—SILLS *v.* BROWN (1840), 9 C. & P. 601, N. P.

*Annotation :*—**Apld.** The Margaret (1880), 5 P. D. 238. (But see 29 W. R. 533.)

**6437.** ——.]—THE CLUTHA BOAT 147, No. 5390, *ante*.

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SUB-SECT. 6.—RULE OF DIVISION OF LOSS.

*A. Where No Negligence.*

**6438. Each party bears own loss.**]—This is one of those unfortunate cases in which the entire loss of a ship & cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party ; as where the loss is occasioned by a storm, or any other *vis major :* In that case, the misfortune must be borne by the party on whom it happens to light ; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame ; where there has been a want of due diligence or of skill on both sides : In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them : Thirdly, it may happen by the misconduct of the suffering party only ; & then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down ; & in this case the injured party would be entitled to an entire compensation from the other (SIR WILLIAM SCOTT).—THE WOODROP-SIMS (1815), 2 Dods. 83 ; 165 E. R. 1422.

*Annotations :*—**Consd.** The Drumlanrig, [1910] P. 249 **Refd.** The Celt (1836), 3 Hag. Adm. 321 ; Stoomvaart Maatschappi Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795 ; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634.

**6439.** ——.]—In collision, if both blameable, the loss is equally apportioned. If accidental each bears its own.—THE NANCY (1837), 3 Hag. Adm. 328, n. ; 166 E. R. 427.

*B. Where Negligence of One Vessel.*

*(a) Vessel Causing Damage.*

**6440. General rule—Right of injured party to full compensation.**]—THE WOODROP-SIMS, No. 6438, *ante*.

**6441.** —— ——.]—(1) Rule 23 of the Thames Rules is not confined to the seaward side of "a line drawn from Blackwall Point to Bow Creek."

The order of the Ct. of Appeal reversed & the order of Butt, J., restored, on the ground that even assuming, but without deciding, that the construction put by the Ct. of Appeal upon Rule 23 was correct & that the *Clan Sinclair* had transgressed that rule, yet such transgression was not the cause of the collision : that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, & that she alone was to blame.

(2) Where the cause of the accident is the fault of one party & one party only, Admlty. & Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other (LORD BLACKBURN).

(3) When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admlty. & the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, & it shall be just like an inevitable accident ; the loss shall lie where it falls. . . . The rule of the Admlty. is, that if there is blame causing the accident on both sides they are to divide the loss equally (LORD BLACKBURN).

(4) It is necessary to see that the actual transgression has been in fact the cause of the accident to some extent, it does not matter how much, & that is a matter of proof (LORD BLACKBURN).

(5) There was no attempt to say that any authorities show that the rules of the Ct. of Admlty. & the rules of a Ct. of Law as to what amounts to being a fault occasioning the accident differ in the slightest degree. The nature of the thing of course requires that in applying those rules you should look to what the nature of the accident is & to what the neglect is. If it is two ships, they are to be governed by the same rules of law & of evidence as if it was two carts in the street ; but when you come to apply that you must remember that a ship is a thing which cannot be stopped in an instant like a cart, & cannot be moved from one side to the other like a cart ; & when you have to look out for miles instead of looking out for yards, the application of the rules becomes very different (LORD BLACKBURN).

(6) I think that a vessel which is proved to have disregarded these precautions [laid down in Rule 23] must accept the *onus* of showing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently (LORD WATSON).—CAYZER *v.* CARRON CO. (1884), 9 App. Cas. 873 ; 54 L. J. P. 18 ; 52 L. T. 361 ; 33 W. R. 281 ; 5 Asp. M. L. C. 371, H. L. ; *revsg.* S. C. *sub nom.* THE MARGARET 9 P. D. 47, C. A.

*Annotations :*—*As to* (1) **Consd.** H.M.S. Sans Pareil, [1900] P. 267 ; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Refd.** The Hero, [1911] P. 128. *As to* (3) **Refd.** The Morgengry & The Blackcock, [1900] P. 1. *As to* (6) **Distd.** The Ovingdean Grange, [1901] P. 127. *Generally,* **Refd.** The Modica, [1926] P. 72 ; The Backworth, [1927] P. 256 ; S.S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37.

*(b) Vessel Suffering Damage.*

**6442. General rule—Injured party bears own loss.**]—THE WOODROP-SIMS, No. 6438, *ante*.

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**PART XII. SECT. 5, SUB-SECT. 6.—A.**

**6438 i.** *Each party bears own loss.*]—Damages for a collision which is the result of an inevitable accident, arising from foggy weather, must be sustained by the party on whom it has fallen, & the vessel proceeded against will be dismissed.—*Re* THE ANNE JOHANNE (1860), 10 L. C. R. 411 ; 2 S. V. A. R. 43.—**CAN.**

**6438 ii.** ——.]—In a case of collision where no blame is attributable to either party the misfortune must be borne by the party on whom it happens to light. —*Re* THE MARGERITE (1859), 10 L. C. R. 113 ; 2 S. V. A. R. 19.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 6.—B. (a).**

**6440 i.** *General rule—Right of injured party to full compensation.*]—THE GENOA (1880), Y. A. D. 275.—**CAN.**

**6440 ii.** —— ——.]—Where a collision appears possible, but as yet easily voidable, neither vessel has a right to adopt manœuvres which place the other vessel in a position of unnecessary embarrassment or difficulty. The wrongdoer is solely responsible for damages from a consequent collision.—THE CITY OF PUEBLA (1891), 3 Exch. C. R. 26.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 6.—B. (b).**

**6442 i.** *General rule—Injured party bears own loss.*]—In a case where the ct. was of opinion that the damage was occasioned by accident imputable to the imprudence of the injured vessel, & not to the misconduct of the other vessel, the owners of the latter were dismissed.—*Re* THE LEONIDAS (1841), 1 S. V. A. R. 226.—**CAN.**

**6442 ii.** —— ——.]— The proprietor of a vessel which has suffered damage

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 6, B. (b), & C. (a), (b), (c) & (d).]*

**6443.** —— ——.]—In a cause of collision, where the loss was charged to be owing to wilful malice or gross negligence, the ct. being of opinion that the damage was occasioned by accident chiefly imputable to the mismanagement of the vessel lost, & not to the misconduct of the other vessel, dismissed the owners of the latter vessel with costs.—THE CATHERINE OF DOVER (1828), 2 Hag. Adm. 145; 166 E. R. 197.

**6444.** —— ——.]—THE LIGO, No. 6340, *ante*.

**6445.** —— ——.]—In an acton for running down a ship pltf. may recover if he was not in fault in not trying to prevent the collision; but had he been so in fault, or had both parties been in the wrong, he cannot recover.—VENNALL *v.* GARNER (1832), 1 Cr. & M. 21; 3 Tyr. 85; 149 E. R. 298.

**6446. Abandonment of injured vessel.**]—THE HOPE *v.* THE CHILI, ANDERSON *v.* MALTHOUSE (1840), 4 L. T. 838.

### *C. Where Negligence of Two or More Vessels.*

#### *(a) In General.*

*See, now*, Maritime Conventions Act, 1911 (c. 57), s. 1.

**6447. Rules of Common Law & Admiralty distinguished.**]—CAYZER *v.* CARRON CO., No. 6441, *ante*.

**6448. Review of judge's decision—Function of Court of Appeal.**]—When a judge sitting in Admlty. has apportioned the blame between two wrongdoing vessels in accordance with the provisions of the Maritime Conventions Act, 1911, s. 1, the Ct. of Appeal if it agrees with him on the facts will not lightly interfere with his discretion as to the apportionment of blame; but if the appellate tribunal differs with him on the facts, & finds that one of the vessels was more blameworthy as regards matters in respect of which she was not held to blame in the ct. below, it is bound to review the decision as to the apportionment of the blame.—THE KARAMEA, [1921] P. 76; 90 L. J. P. 81; 124 L. T. 653; 37 T. L. R. 174; 15 Asp. M. L. C. 318, C. A.; *on appeal, sub nom.* S.S. HAUGLAND *v.* S.S. KARAMEA, [1922] 1 A. C. 68, H. L.

*Annotation:*—**Apld.** The Clara Camus (1925), 134 L. T. 50.

**6449.** —— ——.]—Where a judge sitting in Admlty. has apportioned the blame between two wrongdoing vessels in accordance with Maritime Conventions Act, 1911 (c. 57), s. 1, the Ct. of Appeal, if it finds that he has not taken into consideration at all an obviously important matter, is bound to review his decision as to the apportionment of blame in the same way as it would if it had differed with him on the facts & had found that one of the vessels was more blameworthy as regards matters in respect of which she was not held to blame in the ct. below.—THE CLARA CAMUS (1925), 134 L. T. 50; 16 Asp. M. L. C. 570, C. A.; *on appeal* (1926), 136 L. T. 291, H. L.

#### *(b) In What Cases Rule Applicable.*

**6450. Collision between naval ship & convoy.**]—Collision between one of a fleet in charge of a convoy & the convoy herself in which the convoy was sunk. Rule of division of loss applied. In the ct. below the convoy was found to have been sunk by the fault of the merchantman.—THE MARQUIS OF GRANBY (1770), Burrell, 323; 167 E. R. 592.

**6451. Collision between stationary vessels.**]—THE DUNSTANBOROUGH, (1891), [1892] P. 363, n.

*Annotation:*—**Distd.** The Hornet, [1892] P. 361.

**6452. Collision between steamer & submerged wreck—Negligence of wreck-marking vessel.**]—(1) Pltfs.' claim was for damage sustained by their steamer in collision with a submerged wreck at night in the entrance channel to the Grimsby docks. At the time of the collision the wreck, which had been abandoned to underwriters, was marked by a wreck-marking vessel. The lights exhibited by this vessel were placed & maintained by the wreck-marking authority acting under its statutory powers, but in certain other directions the owners of the wreck continued to maintain a measure of control over her. The owners of the wreck counterclaimed for the damage sustained by the wreck:—*Held:* there was negligence on the part of those in charge of the steamer in failing to keep clear of the wreck, & in the wreck-marking authority for exhibiting lights in a wrong position upon the wreck-marking vessel.

(2) Maritime Conventions Act, 1911 (c. 57), s. 1, provides: "Where by the fault of two or more vessels damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault":—*Held:* the only negligence of the wreck-marking authority being the showing by their servants on board the wreck-marking vessel of lights in a wrong position, such negligence was not a cause of the collision. The collision was thus solely caused by the fault of pltfs.' vessel.

(3) Both the wreck-marking vessel & the wreck were vessels within Maritime Conventions Act, 1911 (c. 57), s. 1, for the purpose of apportioning blame for the negligence of their owners, & therefore if the negligence of the wreck-marking authority had been a contributory cause of the collision, the rule for apportioning blame under the Maritime Conventions Act, 1911 (c. 57), & not the common law rule of contributory negligence, would have been applicable as between pltfs. & the wreck-marking authority.

(4) The owners of the wreck, having surrendered control of the wreck for the purposes of marking, were in the event entitled to recover on their counterclaim against pltfs.—THE MANORBIER CASTLE (1922), 129 L. T. 31; 16 Asp. M. L. C. 151.

**6453. Vessels not in actual contact.**]—Maritime Conventions Act, 1911 (c. 57), s. 1 (1), is not confined in its application to cases where the two vessels held to have been in fault have been in collision with each other, but applies to cases where the vessels in fault have not been in actual contact.

Thus, where a vessel broke from her moorings & was damaged, in circumstances in which it was held that the damage was caused partly by the inefficiency of the moorings & partly by the wash raised by another vessel passing at an excessive speed:—*Held:* the blame might be apportioned between the two vessels.—THE BATAVIER III. (1925), 134 L. T. 155; 42 T. L. R. 8; 70 Sol. Jo. 75; 16 Asp. M. L. C. 563.

#### *(c) Apportionment of Damage.*

**6454. Blame apportioned unequally—Damages divided proportionately.**]—In an action of damage

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from a collision caused by neglect on the part of the vessel suffering damage will have no recourse in damages.—PELOQUIN *v.* SINCENNES-MCNAUGHTON LINE (1876), 9 R. L. O. S. 8.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 6.—C. (c).**

*b. General rule.*]—Where both colliding vessels are in fault, neither is entitled to recover damages or costs from the other.—THE CORDELIA & THE OSPREY (1865), 5 N. S. R. (1 Old.) 772.—**CAN.**

**6454** i. *Blame apportioned unequally—Damages divided proportionately.*]—

by collision between two steam vessels both were found to blame for navigating in a fog without proper regard to the regulations for preventing collisions at sea; but the initial fault, without which there would probably not have been any collision, arose from the neglect of those in charge of defts.' vessel to obey the rule requiring them to stop their engines on hearing a whistle on their starboard bow :—*Held :* in applying the provisions as to the division of loss, in cases of collision, contained in Maritime Conventions Act, 1911 (c. 57), s. 1 (1), the justice of the case would be met by directing that defts.' vessel should be liable for 60 per cent. of the damage sustained, leaving pltfs. vessel liable for the remaining 40 per cent., with no order as to costs.—THE ROSALIA, [1912] P. 109; 81 L. J. P. 79; 106 L. T. 351; 28 T. L. R. 287; 12 Asp. M. L. C. 166.

*Annotation :*—**Refd.** The Modica, [1926] P. 72.

**6455.** —— ——.]—THE SARGASSO, No. 6402, *ante*.

**6456. Preponderance of blame not ascertainable —Damages divided equally.**]—THE PETER BENOIT, No. 6166, *ante*.

*(d) Costs.*

**6457. General rule.**]—The law is that if either party is to blame, that party pays the costs of both; if neither are to blame, each pay their own costs; if both are to blame, the costs fall on both (DR. LUSHINGTON).—THE WASHINGTON (1841), 5 Jur. 1067.

*Annotations :*—**Consd.** The Modica, [1926] P. 72. **Refd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795.

**6458. Whether costs apportioned.**] — THE MONARCH (1839), 1 Wm. Rob. 21; 4 L. T. 774.

*Annotations :*—**Refd.** The Markland (1871), 24 L. T. 596. **Mentd.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 543; The Orient (1869), 39 L. J. Adm. 10; The Georg, [1894] P. 330.

**6459.** ——.]—THE DE COCK *v.* THE PARMELIA (1839), 4 L. T. 774.

**6460.** ——.]—THE SIRIUS (1846), 4 L. T. 774.

**6461.** ——.]—Where a collision has occurred

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THE MAPLEHURST *v.* HALL COAL CO. OF CANADA, [1923] 1 D. L. R. 1089; [1923] S. C. R. 507.—**CAN.**

**6454 ii.** —— ——.]—LAIRD LINE, LTD. (ROWAN (OWNERS)) *v.* CLAN LINE STEAMERS, LTD. (CLAN MALCOLM (OWNERS)), [1923] S. C. 316.—**SCOT.**

**6456 i.** *Preponderance of blame not ascertainable—Damages divided equally.*]—Collision between the brig *B.* & the steam tug *A.* The tug *T.* having the brig *B.* & the schooner *L.* in tow, was negligently navigated too close to the tug *A.* lying in the fairway without sufficient steam up to move out of the way of passing vessels. No sufficient look out was kept by those on board the brig *B.* & no effort was made by them to avert the collision :—*Held :* both parties were to blame, & it was ordered that the cost of repairs & demurrage should be equally borne by the parties; each party to pay his own costs.—THE BYRON (1879), 2 N. S. W. L. R. 1.—**AUS.**

**6456 ii.** —— ——.]—When both ships are in fault the Admiralty law will divide the damages among the owners of the ships.—*Re* THE GERMANY, *Re* THE CITY OF QUEBEC (1871), 2 S. V. A. R. 158.—**CAN.**

**6456 iii.** —— ——.]—Where a sailing vessel deviated from her course, contrary to the sailing rules, & came into collision with a steamer which might have avoided her, each held to be in fault & damages divided.—*Re* THE MANICA (1882), 8 Q. L. R. 379.—**CAN.**

**6456 iv.** —— ——.]—Where both ships were at fault, the damages were ordered to be assessed & divided, each party paying his own costs.—LANDRY *v.* RAY, THE BERNADETTE & THE MURIEL (1894), 4 Exch. C. R. 280.—**CAN.**

**6456 v.** —— ——.]—Where a collision is attributable to negligence on the part of both vessels, the loss must be equally apportioned between them, notwithstanding the fact that the negligence of one contributed to the accident in a greater degree than that of the other.—WARD & PEMBERTON *v.* THE YOSEMITE (1894), 4 Exch. C. R. 241; 3 B. C. R. 311.—**CAN.**

**6456 vi.** —— ——.]—SHIPMAN *v.* PHINN (1914), 32 O. L. R. 329; 20 D. L. R. 596; 7 O. W. N. 363.—**CAN.**

**6456 vii.** —— ——.]—In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half & half.—THE BELRIDGE *v.* THE EMPRESS OF JAPAN (B. C.), [1917] 3 W. W. R. 961.—**CAN.**

**6456 viii.** —— ——.]—A steamer descending the St. Lawrence River in foggy weather had come to anchor for safety. Previous to anchoring the ship was being overtaken by another ship descending the river. Both ships had failed to give the proper fog signals, & as a result the steamer at anchor was run down by the other :—*Held :* as the ships were both at fault the damages should be divided.—CROWN S.S. CO. *v.* S.S. LADY OF GASPE, BOUCHARD *v.* S.S. CROWN OF CORDOVA (Que.) (1918), 17 Exch. C. R. 191.—**CAN.**

**6456 ix.** —— ——.]—Where both vessels are at fault "the damages shall be borne equally by the two vessels," pursuant to Canada Shipping Act (R. S. C. 1906, c. 113), s. 918.—PALLEN *v.* THE IROQUOIS (1913), 17 Exch. C. R. 185; 15 B. C. R. 76.—**CAN.**

**6456 x.** —— ——.] In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half & half.—CANADIAN PACIFIC RY. CO. *v.* S.S. BELRIDGE (1922), 68 D. L. R. 221; 20 Exch. C. R. 399; 27 B. C. R. 537.—**CAN.**

**6456 xi.** —— ——.] B. W. B. NAVIGATION CO., LTD. *v.* THE KILTUISH, BARNET LIGHTERAGE CO., LTD. *v.* THE KILTUISH, [1922] 2 W. W. R. 959; 67 D. L. R. 525.—**CAN.**

**6456 xii.** —— ——.]—When both ships in a collision are held to be contributory to an accident, the damage can only be apportioned one half to each, as 4-5 Geo. 5, c. 13 (Dom.) does not apply to the Great Lakes.—MERLO, MERLO & RAY, LTD. *v.* THE HARRY R. JONES, [1925] Exch. C. R. 183.—**CAN.**

**6456 xiii.** —— ——.]—THE ULYSSES (1860), 4 L. T. 775.—**IND.**

**6456 xiv.** —— ——.]—Both ships in fault for keeping bad look out. Damages equally divided.—THE MANCHESTER *v.* THE HIBERNIA (1860), 4 L. T. 774.—**IR.**

**c.** *Negligence not contemporaneous.*]—Where two vessels came into collision by reason of negligence on both sides, which, though not contemporaneous, was yet so closely connected in time & circumstance as not to be clearly severable, both vessels were held to blame, & the damage was apportioned at two-thirds & one-third, & no costs were granted to either party.—R. *v.* ARGYLLSHIRE (OWNERS), THE ARGYLLSHIRE, [1922] St. R. Qd. 186.—**AUS.**

**d.** *Injured ship recovers half loss.*]—In an action for collision, where the ct. found both vessels in fault for moving at an immoderate rate of speed in foggy weather, & that such immoderate speed was the chief, if not the sole, cause of the collision, the owner of the damaged ship was allowed to recover only half his loss.—WINEMAN *v.* THE HIAWATHA (1902), 7 Exch. C. R. 416.—**CAN.**

**e.** ——.]—The owners of cargo on board the H. sued the owners of the steam ship S. for damages resulting from a collision which occurred between the H. & the S. The ct. found that both vessels were to blame for the collision :—*Held :* pltfs. could only recover from defts. half of the damages which they had sustained.—OOKERDA POONSEY *v.* THE SAVITRI (1886), I. L. R. 10 Bom. 408.—**IND.**

**f.** ——.]—One ship having run down another, & this having been occasioned equally by the fault of both :—*Held :* the owners of the ship which ran down the other were liable only for the one-half of her value, provided that did not exceed the value of their own ship.—HAY *v.* LE NEVE (1824), 2 Sh. Sc. App. 395.—**SCOT.**

**g.** *Innocent ship damaged through fault of two other ships.*]—The Admiralty rule as to division of loss applies to cases where two colliding vessels are damaged. In a case where an innocent ship is damaged by a collision through the fault of two other ships, the innocent ship (or in this case the cargo) can recover its whole damage from either of the delinquent ships.—RUSSELL *v.* THE GLORIA (Ont.), [1927] Exch. C. R. 162.—**CAN.**

**PART XII. SECT. 5, SUB-SECT. 6.—C. (d).**

**6458 i.** *Whether costs apportioned.*]—Where both vessels are to blame, the costs of the action are in the discretion of the ct.—LEE *v.* THE OLYMPIAN (1892), 2 B. C. R. 84.—**CAN.**

**6458 ii.** ——.]—Where both vessels are in fault, the rule is to give costs to neither.—CANADIAN DEVELOPMENT CO. *v.* LE BLANC (1901), 8 B. C. R. 173.—**CAN.**

**6458 iii.** ——.]—The old rule that each delinquent vessel shall bear her own costs is still in force.—PALLEN *v.* THE IROQUOIS (1913), 17 Exch. C. R. 185; 15 B. C. R. 76.—**CAN.**

**6458 iv.** ——.]—THE PROMPT *v.* THE HENRIETTA (1861), 4 L. T. 775.—**IND.**

**h.** *Joint fault—No order made as to costs.*]—*Re* THE LORNE (1872), 2 S. V. A. R. 177.—**CAN.**

**k.** *Whether court has discretion.*]—NIPPON YUSEN KAISHA *v.* THE WING SANG, INDO-CHINA STEAM NAVIGATION CO., LTD. *v.* THE JINSEN MARU (1914), 9 Hong Kong L. R. 110.—**HONG KONG.**

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 6, C. (d), D., E. & F.]*

between two vessels, through the bad navigation of each of them, the owners of the ships are not entitled to the costs of any litigation arising out of the collision.—THE HECTOR (1883), 8 P. D. 218; 52 L. J. P. 47; 48 L. T. 890; 5 Asp. M. L. C. 101, C. A.

*Annotations:*—**Folld.** The Quickstep (1890), 15 P. D. 196. **Apld.** The Blue Bell, [1895] P. 242. **Refd.** The Seacombe, The Devonshire, [1912] 1 P. 21; The Modica, [1926] P. 72.

**6462.** ——.]—THE HARVEST HOME, No. 5217, *ante*.

**6463.** —— **Where ships held to blame in different degrees.**]—When in a collision action both ships are held to be in fault, but in different degrees, the practice in force before the passing of Maritime Conventions Act, 1911 (c. 57), that each party to the action should bear their own costs, is to be followed unless there are special circumstances in existence to induce the ct. to depart from it.—THE BRAVO (1912), 108 L. T. 430; 29 T. L. R. 122; 12 Asp. M. L. C. 311.

*Annotation:*—**Consd.** The Modica, [1926] P. 72.

**6464.** —— ——.]—THE ROSALIA, No. 6154, *ante*.

**6465.** —— ——.]—Although it has been the practice since Maritime Conventions Act, 1911 (c. 57), to make no order as to costs in collision cases in which both vessels have been held to blame in unequal degrees, the ct. must be guided by the circumstances in each case. In a proper case it will feel itself at liberty to give to the party which is held to blame in the smaller degree such a proportion of that party's costs as on the particular facts appears just.—THE MODICA, [1926] P. 72; 95 L. J. P. 100; 135 L. T. 61; 17 Asp. M. L. C. 30.

**6466. Improper conduct though liability for loss not proved.**]—THE CELT, No. 5860, *ante*.

*D. Actions by Cargo Owners.*

*See, now,* Maritime Conventions Act, 1911 (c. 57), ss. 1, 9 (4).

**6467. Ship carrying cargo at fault.**]—YATES *v.* CITY OF DUBLIN STEAM PACKET CO. (1840), 7 L. T. 166.

**6468. Damages proportionate to fault of ship causing damage.**]—SMITH *v.* DOBSON, No. 5229, *ante*.

**6469.** ——.]—THE BONITO (1854), cited 5 L. T. at p. 593.

*Annotation:*—**Refd.** Astral Shipping Co. *v.* Tongario (Owners) The Drumlanrig (1910), 103 L. T. 359.

**6470.** ——.]—THE FREDERICK WARREN & THE ALFRED (1855), cited 5 L. T. at p. 590.

*Annotation:*—**Refd.** The Milan (1861), Lush. 388.

**6471.** ——.]—THE CAMBRIDGE & THE DESPINA (1855), cited 31 L. J. P. M. & A. at p. 111.

*Annotation:*—**Refd.** The Milan (1861), Lush. 388.

**6472.** ——.]—THE MILAN, No. 5221, *ante*.

**6473.** ——.]—The rule laid down in *The Milan*, No. 5221, *ante*, that where both ships are to blame for a collision the owners of cargo on one ship can recover a moiety of their damages & no more against the owners of the other ship—is a rule in force in the Ct. of Admlty. within Jud. Act, 1873 (c. 66), s. 25 (9).—THE TONGARIRO (CARGO OWNERS) *v.* DRUMLANRIG (OWNERS), THE DRUMLANRIG, [1911] A. C. 16; 80 L. J. P. 9; 27 T. L. R. 146; *sub nom.* TONGARIRO (CARGO OWNERS) *v.* ASTRAL SHIPPING CO., 103 L. T. 773; 11 Asp. M. L. C. 520; *sub nom.* ASTRAL SHIPPING CO., LTD. (DRUMLANRIG (OWNERS)) *v.* TONGARIRO (OWNERS), 55 Sol. Jo. 138, H. L.

*Annotations:*—**Consd.** Devonshire (Owners) *v.* Barge Leslie, [1912] A. C. 634. **Apld.** The Umona, [1914] P. 141. **Refd.** The Koursk, [1924] P. 140.

**6474.** ——.]—A dumb barge in tow of a tug came into collision with a steamship. The cargo on the barge was damaged. The servants of the tug owners controlled the navigation of the barge, & the barge was under hire to the tug owners, who were in the position of owners of the barge.

The tug owners & the cargo owners brought an action against the owners of the steamship to recover the amount of the damage done to the barge & to the cargo on the barge. The owners of the steamship counterclaimed against the tug owners for the damage done to the steamship. The ct. held that the collision was due to the fault of the steamship & the tug, & that the steamship was to blame to the extent of three-fourths & the tug was to blame to the extent of one-fourth. The owners of the cargo claimed to recover the whole of their damage against the owners of the steamship:—*Held:* as the tug & barge were controlled by the servants of the tug, by whose fault the collision was partly caused, the principle laid down in *The Milan*, No. 5221, *ante*, was applicable, & the cargo owners could only recover three-fourths of their damage from the owners of the steamship.—THE UMONA, [1914] P. 141; 83 L. J. P. 106; 111 L. T. 415; 30 T. L. R. 498; 12 Asp. M. L. C. 527.

*Annotation:*—**Refd.** The Ran, The Graygarth, [1922] P. 80.

**6475. Effect of exceptions in bill of lading.**]—Where a vessel carrying cargo under a bill of lading providing against loss & damage from collision & loss or damage from any act, neglect, or default whatsoever of the pilots, master, mariners, or other servants of the owners in navigating the ship, collides with another vessel belonging to the same owners by reason of the joint negligence of both vessels & the cargo is lost, there is no liability under the contract of carriage, as such loss is covered by the above exceptions, but the owners are liable in tort for the negligence of their servants on board the vessel not carrying the cargo.

Under such circumstances the Admlty. Ct. rule as to the division of damages applies, & the owners' liability is one half the damage, their liability in respect of the carrying ship being covered by the bill of lading.

Pltfs. shipped specie on board defts.' ship, under a bill of lading which contained the following: "Accidents, loss & damage from . . . collision . . . & all the perils, dangers, & accidents of the sea . . . & steam navigation of whatsoever nature & kind soever, & accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, master, mariners, or other servants of the co., in navigating the ship . . . excepted."

Defts. were an English limited co., but their ships were registered in Holland in the name of a Dutch co. composed of the same persons as the deft. co., & carried the Dutch flag. The contract was in English, & made at an English port.

On the voyage the carrying ship came into collision with another ship, also belonging to defts., & was sunk, & pltfs.' specie was lost.

In an action to recover the value of the specie, the jury found that the carrying ship was in some degree to blame, but the other ship was mainly at fault:—*Held:* (1) the question of the defts.' liability depended on English law, & they were liable independently of contract, for the negligence of their servants on board the ship which came into collision with the carrying ship;

(2) the exceptions in the bill of lading exempted defts. from liability for collision caused by the negligence of their servants on board the carrying ship, but the acts of their servants on board the other ship were not a breach of the contract contained in the bill of lading: (3) as both ships were to blame, the Admlty. rule as to damages applied by Jud. Act, 1873 (c. 66), s. 25 (9), & therefore the damage occasioned by the collision should be equally between the two ships, &, defts.' liability as owners of one of the ships being excluded by the terms of the bill of lading, they were only liable for half the damage.—CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO., LTD. (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; 48 L. T. 546; 47 J. P. 260; 31 W. R. 445; 5 Asp. M. L. C. 65, C. A.

*Annotations:*—*As to* (1) **Apld.** Jacobs *v.* Credit Lyonnais (1884), 12 Q. B. D. 589. **Refd.** The August, [1891] P. 328; The Industrie, [1894] P. 58; Davidsson *v.* Hill, [1901] 2 K. B. 606. *As to* (2) **Refd.** Woodley *v.* Michell (1883), 11 Q. B. D. 47; Wilson *v.* The Xantho (1887), 57 L. T. 701; Leduc *v.* Ward (1888), 20 Q. B. D. 475. *As to* (3) **Apld.** S.S. Tongariro *v.* S. S. Drumlanrig, The Drumlanrig, [1911] A. C. 16. **Refd.** The Englishman & The Australia, [1894] P. 239. *Generally*, **Mentd.** British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354.

**6476. Action for breach of contract against carrying ship.**]—The Admlty. Ct. rule that in cases of collision the damages are to be equally divided where both ships are to blame, does not apply to actions for breach of contract of carriage brought by owners of cargo against the carrying ship to recover damages for loss of, or injury to, their goods, & hence pltfs. in such actions are entitled to recover their full damages from the owners of the carrying ship.—BURNESS (J.) & SONS *v.* PERSIAN GULF S.S. CO., LTD., THE BUSHIRE (1885), 52 L. T. 740; 5 Asp. M. L. C. 416.

*Annotation:*—**Refd.** The Englishman & The Australia, [1894] P. 239.

### *E. What Damage Included.*

*See, generally*, DAMAGES, Vol. XVII, pp. 93-120.

**6477. Amount paid for salvage.**]—A brig & ship came into collision; both were pronounced to blame, & would, according to general rule, divide the damage. The brig having been abandoned by her master & crew was subsequently towed by another vessel into a port, & there repaired. The owners of the ship contended that the abandonment was unnecessary, & that if so, a sum which had been awarded to this vessel for salvage ought not to be included in the damages:—*Held:* in cases of collision, the master & crew are not bound to incur any extraordinary risk with a view to preserve the vessel; that when both vessels are to blame, the presumption is, that damage immediately arising is in consequence of such collision; & under the circumstances of the case the abandonment was unnecessary, & the amount paid for salvage is not to be included in the damage.—THE LINDA (1857), Sw. 306; 30 L. T. O. S. 234; 4 Jur. N. S. 146; 6 W. R. 196; 166 E. R. 1149.

*Annotations:*—**Refd.** The Duna (1861), 5 L. T. 217; The Flying Fish (1865), Brown. & Lush. 436; The Maid of Kent (1881), 6 P. D. 178.

**6478. Damage to third vessel.**]—The steamer *C.* coming into St. Katharine's Docks, fell against two barges, & drove them against a vessel called the *V.*, which was lying alongside the St. Katharine's Wharf; a skiff was between the *V.* & the wharf, & in such a position as not to be visible to those on board the *C.* By reason of the *C.* falling against the barges the *V.* was driven towards the wharf & crushed the skiff against the wharf. At the time of the collision the *C.* was within the prescribed limits within which the jurisdiction of the dock-master extended, & she was coming into dock under the direction of the dock-master. A cause of damage was instituted in the City of London Ct. on behalf of the owner of the skiff & the owners of her cargo against the owners of the *C.* to recover for the damage done to the skiff & her cargo:—*Held:* the accident might have been avoided if the master of the *C.* had taken proper precautions in entering the dock, & the *C.* must be condemned in the damage proceeded for.—THE CYNTHIA (1876), 2 P. D. 52; 46 L. J. P. 58; 36 L. T. 184; 3 Asp. M. L. C. 378.

**6479. Loss of towage remuneration.**]—SOCIÉTÉ ANONYME DE REMORQUAGE À HÉLICE *v.* BENNETTS, No. 6636, *post*.

### *F. Loss of Life and Personal Injury.*

*See, now*, Maritime Conventions Act, 1911 (c. 52), s. 3.

**6480. Whether rule applicable—Action for negligence.**]—A collision having occurred between the steamships *Bushire* & *Bernina* through the fault or default of the masters & crews of both, two persons on board the *Bushire*, one of the crew & a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of deceased having brought in the Admlty. Division actions *in personam* against the owners of the *Bernina* for negligence under Fatal Accidents Act, 1846 (c. 93):—*Held:* deceased persons were not identified in respect of the negligence with those navigating the *Bushire*; their representatives could maintain the actions & could recover the whole of the damages, the Admlty. rule as to half damages not being applicable to actions under Fatal Accidents Act, 1846 (c. 93).—MILLS *v.* ARMSTRONG, THE BERNINA (1888), 13 App. Cas. 1; 57 L. J. P. 65; 58 L. T. 423; 52 J. P. 212; 36 W. R. 870; 4 T. L. R. 360; 6 Asp. M. L. C. 257, H. L.; *affg.* (1887), 12 P. D. 58, C. A.

*Annotations:*—**Consd.** The Orwell (1888), 13 P. D. 80. **Apld.** The Harvest Home, [1904] P. 409. **Consd.** The Circe, [1906] P. 1; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634; The Koursk, [1924] P. 140. **Refd.** The Sara (1887), 12 P. D. 158; Secretary of State for India *v.* Hewett (1888), 5 T. L. R. 152; The Englishman & The Australia, [1894] P. 239; The Munster (1896), 12 T. L. R. 264; Davidsson *v.* Hill, [1901] 2 K. B. 606; The Frankland, [1901] P. 161; The Duc d'Aumale (No. 2), [1904] P. 60; The General Havelock, [1906] P. 3, n.; The Hero, [1911] P. 128; The Seacombe, The Devonshire, [1912] P. 21; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514; Anchor Line (Henderson) *v.* Dundee Harbour Trustees, Ellerman Lines *v.* Same, Thomson, Shepherd *v.* Same (1922), 38 T. L. R. 299; The Molière, [1925] P. 27. **Mentd.** Page *v.* Met. Ry. Heard *v.* Same (1887), 4 T. L. R.

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**PART XII. SECT. 5, SUB-SECT. 6.—F.**

**6480 1.** *Whether rule applicable—Action for negligence.*]—Pltf. sustained personal injuries in a collision at sea that occurred between a schooner in his charge as pilot, & defts.' steamer. In an action *in personam* against defts., claiming damages in negligence of defts., the jury (*inter alia*) found that defts. were negligent in not getting out of the way of the schooner, or stopping; & assessed pltf.'s damages at £500. It was admitted that the schooner, which was being overtaken by the steamer, displayed no stern light, as required by Art. 10 of the Statutory Regulations. On a motion to set aside the verdict & judgment entered for pltf. for £500 at the trial:—*Held:* the Admiralty rule as to division of loss applied; & pltf. was only entitled to half the damage assessed by the jury.—BOUCHER *v.* CLYDE SHIPPING CO., [1904] 2 I. R. 129.—IR.

*Sect. 5.—Negligence causing damage and rule of division of loss: Sub-sect. 6, F. Sect. 6: Sub-sect. 1, A.*]

103; Mathews v. London Street Tram. Co. (1888), 58 L. J. Q. B. 12; *Re* Palmer, Palmer v. Answorth (1893), 62 L. J. Ch. 988; Reynolds v. Tilling (1903), 19 T. L. R. 539; Weld-Blundell v. Stephens, [1920] A. C. 956.

**6481.** —— ——.]—A collision having occurred between two vessels, an agreement was made between the owners of the vessels that each was to blame & that "the damages rising therefrom ought to be borne equally by the owners of both." Subsequently the representatives of the seamen, who were drowned owing to the collision, on board of one of the vessels, made claims against the owners of the other vessel, & these claims were settled by the payment of a sum of money. The owners who paid the claims sought to recover one half thereof from the owners of the other vessel under the agreement:—*Held:* the sum so paid was not damage arising out of the collision, the representatives of the seamen could not have recovered against the owners of the vessel on which the seamen were serving, inasmuch as the collision was caused by the negligence of a fellow servant, & therefore one half of the sum so paid could not be recovered from the owners of that vessel.—THE GENERAL HAVELOCK, [1906] P. 3, n.; 21 T. L. R. 438.

*Annotation:*—**Refd.** The Circe, [1906] P. 1.

**6482.** —— **Payments by way of compensation apart from negligence—Under foreign law.**]—As the result of a collision between a Spanish & a French ship on the high seas the Spanish vessel sank, & some members of her crew were drowned. At the usual reference following on an agreement equivalent to both to blame, a claim against the owners of the French ship by the owners of the Spanish ship under the Admlty. rule of division of loss, for a moiety of certain sums paid, under Spanish law, to the representatives of deceased seamen, was admitted:—*Held:* the claim must be disallowed, for it was in respect of a payment made by way of indemnity, under a foreign statute, independent of any question of negligence, it was not recognised by English law; & if it was a claim for damages for loss of life, it did not come within the scope of the Admlty. rule of division of loss.—THE CIRCE, [1906] P. 1; 74 L. J. P. 106; 93 L. T. 640; 21 T. L. R. 525; 10 Asp. M. L. C. 149.

*Annotations:*—**Consd.** The Amerika, [1914] P. 167. **Refd.** The Molière, [1925] P. 27.

**6483.** —— —— —— **Maritime Conventions Act, 1911 (c. 57), s. 3.**]—In a collision between Swedish & British steamships, for which both ships were held to blame, a seaman on the former vessel was drowned. Under Swedish law the Swedish shipowners paid compensation to the relatives of the seaman. At the reference to assess the collision damage the Swedish shipowners claimed to recover from the owners of the British vessel: (*a*) a moiety of the compensation so paid; & (*b*) a moiety of the survey fees incidental to the repair of the collision damage although in fact, those fees had been paid by the underwriters. The registrar allowed both items:—*Held:* (1) the decision of the Registrar as to (*a*) was wrong, for apart from the Maritime Conventions Act, 1911 (c. 57), the Ct. of Admlty. has no jurisdiction to entertain an action *in rem* for loss of life, & the Admlty. rules as to division of loss have no application to such a claim, & Maritime Conventions Act, 1911 (c. 57), s. 3, which provides for contribution between the owners of wrongdoing vessels in respect of (*inter alia*) damages for loss of life or personal injuries, only applies to damages recoverable by action & not to claims for compensation arising out of some statute & independently of fault on the part of the shipowner; (2) as to (*b*) the survey fees were an indispensable part of the cost of repairs, & it was immaterial that they were paid by the underwriters & not by the owners, for the doctrine of subrogation applied.—THE MOLIÈRE, [1925] P. 27; 94 L. J. P. 28; 132 L. T. 733; 41 T. L. R. 154; 16 Asp. M. L. C. 470.

**6484.** —— **Capitalised value of pensions—Compassionate allowance.**]—One of H.M. submarines was run into & sunk by a steamship & the crew were drowned. In an action for damage by collision brought by the Comrs. for executing the Office of Lord High Admiral of the United Kingdom against the owners of the steamship, defts. submitted to judgment on the basis of paying to pltfs. 95 per cent. of their damage to be assessed by the Admlty. registrar. Pltfs. claimed as an item of damage the capitalised amount of the pensions payable by them to the relatives of deceased men:—*Held:* the claim failed (*a*) on the principle of *Baker* v. *Bolton* (1808), 1 Camp. 493, that in a civil ct. the death of a human being could not be complained of as an injury; (*b*) on the ground of remoteness, the pensions being voluntary payments in the nature of compassionate allowances.—ADMIRALTY COMRS. v. S.S. AMERIKA, [1917] A. C. 38; *sub nom.* ADMIRALTY COMRS. v. THE AMERIKA (OWNERS), THE AMERIKA, 86 L. J. P. 58; 116 L. T. 34; 33 T. L. R. 135; 61 Sol. Jo. 158; 13 Asp. M. L. C. 558, H. L.

*Annotations:*—**Consd.** Baker v. Dalgleish S.S. Co., [1922] 1 K. B. 361. **Refd.** The Molière, [1925] P. 27. **Mentd.** Berry v. Humm, [1915] 1 K. B. 627; Bradford Corpn. v. Webster, [1920] 2 K. B. 135.

**6485.** —— **Liability for loss of life governed by foreign law.**]—As the result of a collision between the French steamship *Y. O.* & the British steamship *C.*, the *Y. O.* sank & several of her crew were drowned. Both vessels were held to blame for the collision in equal degrees. The owners of the *Y. O.* proved their damages in the registry. Meanwhile representatives of deceased members of the crew of the *Y. O.* had begun actions in the K. B. Div. against the owners of the *C.* who admitted liability. Pending the ascertainment of these damages by a sheriff's jury, the owners of the *C.* applied by motion (*a*) for an order that they might be allowed to pay into ct. the amount of the damages found by the registrar to be due to the owners of the *Y. O.*; & (*b*) for a declaration that under the Maritime Conventions Act, 1911 (c. 57), they were entitled to deduct from that sum half the amount they would have to pay in respect of the life claims. It was admitted that the liability of the owner of the *Y. O.* in respect of the loss of life on his vessel was governed by French law & the ct. found that according to French law the owner of the *Y. O.* would not be liable if sued by the representatives of deceased members of the crew:—*Held:* (1) as under the provisos to Maritime Conventions Act, 1911 (c. 57), ss. 1, 3, these sects. were not to be construed as imposing any liability upon any person who was exempted by any provision of law or who for any reason was not liable to be sued, the owners of the *C.*, when they paid the damages awarded in respect of the loss of life would have no right of contribution from the owner of the *Y. O.*, & the motion must be dismissed; (2) even if the case had been governed by English law the same result would follow, as the defence of common employment would have been open to the owner of the *Y. O.*—THE CEDRIC, [1920] P. 193; 89

L. J. P. 228; 125 L. T. 120; 36 T. L. R. 443; 15 Asp. M. L. C. 285.

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## SECT. 6.—GENERAL INCIDENCE AND EXTENT OF LIABILITY.

### SUB-SECT. 1.—PARTIES LIABLE.

#### *A. In General.*

**6486. General rule—Party in default.**]—YOUNG *v.* BROOKS (1851), 5 L. T. 185.

**6487. Liability of owner—Loan of barge.**]—The owner of a barge upon the Thames lends it to another, who navigates it with his own men, who are guilty of negligence, in consequence of which mischief is done, *Semble:* the owner is not liable.—SCOTT *v.* SCOTT (1818), 2 Stark. 438; 171 E. R. 698, N. P.

**6488. —— Presumption that vessel in charge of servant of owner.**]—In an action for damage done to pltf.'s lug boat by the negligence of defts.' servant in steering defts.' barge, it was proved that the barge was defts., but pltf.'s witness could not identify the bargeman who was steering the barge:—*Held:* this was *primâ facie* evidence that the barge was steered by defts.' servant, & if the barge was on hire, or was taken by any other person, it lay on defts. to show that.—JOYCE *v.* CAPEL (1838), 8 C. & P. 370, N. P.

**6489. —— Damage wilfully committed by master.**]—Owners are not responsible for damage wilfully committed by a master in their employ, the acts of such master not being within the scope of his ordinary duties, nor otherwise directed or subsequently sanctioned by them.—THE DRUID (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 5 L. T. 61; 6 Jur. 441; 166 E. R. 619.

*Annotations:*—**Consd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220. **Distd.** The Seine (1859), Sw. 411. **Consd.** The Ida (1860), Lush. 6; The James Seddon (1866), 35 L. J. Adm. 117; The Lemington (1874), 32 L. T. 69; The Tasmania (1888), 13 P. D. 110. **Refd.** The Charkieh (1873), L. R. 4 A. & E. 59; The Leon (1881), 6 P. D. 148; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; The Ripon City, [1897] P. 226; The Sylvan Arrow, [1923] P. 220.

**6490. —— —— Parties foreigners—Collision in foreign waters.**]—*Qu.:* whether in an action brought in the Admlty. Ct. here by a foreign pltf. against a foreign deft., in respect of a matter occurring in foreign waters, deft. is liable for the wilful act of his servant.—THE IDA (1860), Lush. 6; 1 L. T. 417; 167 E. R. 3.

*Annotations:*—**Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41; The Ripon City, [1897] P. 226. **Mentd.** Forster *v.* Forster & Berridge (1862), 31 L. J. P. M. & A. 185; Wilson *v.* Wilson & Howell (1871), 40 L. J. P. & M. 77; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; Mersey Docks & Harbour Board *v.* Turner, The Zeta, [1893] A. C. 168; The Tervaete, [1922] P. 259.

**6491. —— Vessel navigated under local regulations.**]—By a local Act for regulating watermen & lightermen on the Thames, & the bye-laws ordained in pursuance thereof, no one besides freemen, or apprentices to freemen or to widows of freemen, of the Watermen & Lightermen's co., with certain exceptions not material, may navigate craft on the river for hire within the limits of the Act, under a penalty; but any persons may keep & use craft for carrying their own goods by their servants, being such freemen or apprentices: & on board of every barge, etc., there must be at least one able & skilful man authorised by law to navigate. There are about six thousand freemen & apprentices. The owner of a barge hired two qualified persons to navigate it within the limits; &, by their negligent management of the barge, another vessel was injured:—*Held:* the owner of the barge was liable to a civil action for the mischief, & it made no difference whether the navigators were hired for the job or by time.—MARTIN *v.* TEMPERLEY (1843), 4 Q. B. 298; 3 Gal. & Dav. 497; 12 L. J. Q. B. 129; 11 L. T. 159; 7 J. P. 145; 7 Jur. 150; 114 E. R. 912.

*Annotations:*—**Distd.** Turnbull *v.* Wieland (1916), 33 T. L. R. 143. **Refd.** The Eden (1846), 2 Wm. Rob. 442; Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53.

**6492. —— Vessel in charge of pilot.**]—If one ship run against another by the negligence of the pilot while the owner is on board, the remedy against the owner is an action on the case.—HUGGETT *v.* MONTGOMERY (1807), 2 Bos. & P. N. R. 446; 127 E. R. 702.

*Annotation:*—**Consd.** Moreton *v.* Hardern (1825), 4 B. & C. 223.

**6493. —— ——.**] — THE LIFFEY & THE ATHENIAN, HUGHES *v.* TEIGHE & SMITH (1855), 5 L. T. 213.

**6494. —— ——.**]—THE CASTOR (1859), 6 L. T. 106; 1 Mar. L. C. 205.

**6495. —— —— Negligence of servant hired at request of pilot.**]—A French vessel coming up the Thames took on board a pilot, &, as none of her crew understood English, a waterman to take the wheel. The waterman put her helm up instead of luffing, as the pilot ordered, whereby a barge was run into & damaged; the French owner claimed exemption under Merchant Shipping Act, 1851 (c. 104), s. 388:—*Held:* the pilot was not answerable for the waterman's incapacity or fault, & the sect. of the Act, inasmuch as it deprives parties injured of a remedy they would otherwise have had, should be construed strictly.—THE GENERAL DE CAEN (1855), Sw. 9; 26 L. T. O. S. 165; 166 E. R. 990.

**6496. —— —— False evidence to shield pilot.**]—THE SINDORO (1915), *Times*, Feb. 18.

**6497. —— Negligence of officer.**]—Where a vessel is in charge of a licenced pilot, the owners are not exempted, by Merchant Shipping Act, 1854 (c. 104), from liability for damage caused by the vessel, unless the damage was caused exclusively by the negligence or unskilfulness of the

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**PART XII. SECT. 6, SUB-SECT. 1.—A.**

**6486 i.** *General rule—Party in default.*]—In a case of collision, where there is reasonable doubt as to the party who is to blame, the loss must be sustained by the party on whom it has fallen.—*Re* THE ROCKAWAY (1866), 2 S. V. A. R. 129.—**CAN.**

**6486 ii.** —— ——.]—When a fishing boat is given out "on deal" by the owner, the proceeds of the fishing are divided into shares, which are divided among the owner of the boat, the crew, & the owners of the nets in certain proportions:—*Held:* the owner of a boat who has given it out "on deal" is a joint adventurer with the master, the crew, & the owners of the nets, & is therefore liable for damage wrongfully done to a third party by the master & crew to prevent loss of the joint adventure.—M'GEE *v.* ANDERSON (1895), 22 R. (Ct. of Sess.) 274; 32 Sc. L. R. 207; 2 S. L. T. 433.—**SCOT.**

**6492 i.** *Liability of owner—Vessel in charge of pilot.*]—In matters of collision the owners of vessels are not exempt from their legal responsibility, notwithstanding their vessel is under the care of a pilot.—*Re* THE LORD JOHN RUSSELL (1838), 1 S. V. A. R. 190.—**CAN.**

**6492 ii.** —— ——.]—Where the accident was attributed to the deficiency of the look out & negligence on board the vessel doing the damage, & not solely the fault or neglect on the pilot's part, the owner was held liable for damage.—*Re* THE SECRET (1867), 11 L. C. J. 294; 17 L. C. R. 399; 4 C. L. J. N. S. 41.—**CAN.**

**6492 iii.** —— ——.]—The owners of a vessel were made liable for damages caused by coming into collision with another, where the fault was not exclusively that of the pilot.—*Re* THE GORDON (1873), 2 S. V. A. R. 198.—**CAN.**

**6492 iv.** —— ——.]—*Re* THE THAMES (1874), 2 S. V. A. R. 222.—**CAN.**

**6492 v.** —— ——.]—CLYDE SHIPPING CO., LTD. *v.* MILLER, [1907] S. C. 1145.—**SCOT.**

**1.** —— *Necessity for production of partnership deed.*]—In an action for running down a ship it appeared that pltfs. were owners of the vessel at the

*Sect. 6.—General incidence and extent of liability: Sub-sect. 1, A., B. & C. (a) i.]*

pilot, & there was no blame attributable to the master & crew.—THE MOBILE (1856), Sw. 127; 10 Moo. P. C. C. 467; 28 L. T. O. S. 129; 4 W. R. 708; 166 E. R. 1055, P. C.

*Annotation:*—**Refd.** Oakley v. Speedy (1879), 40 L. T. 881.

**6498. —— Duration of liability—Parting with possession.**]—BROWN v. MALLETT, No. 6501, *post.*

**6499. —— —— ——.**]—Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession & control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it; & this obligation may be transferred with the transfer of the possession & control to another person; &, on the abandonment of the possession & control the obligation ceases.—WHITE v. CRISP (1854), 10 Exch. 312; 2 C. L. R. 1215; 23 L. J. Ex. 317; 23 L. T. O. S. 300; 2 W. R. 624; 156 E. R. 463.

*Annotations:*—**Consd.** The Douglas (1882), 7 P. D. 151. **Apld.** S.S. Utopia v. S.S. Primula, The Utopia, [1893] A. C. 492. **Consd.** The Snark, [1899] P. 74; The Ella, [1915] P. 111. **Refd.** Manley v. St. Helen's Canal & Ry. Co. (1858), 27 L. J. Ex. 159; Vivian v. Mersey Docks Board (1869), L. R. 5 C. P. 19; Arrow Shipping Co. v. Tyne Improvement Comrs., The Crystal, [1894] A. C. 508.

**6500. —— Non-observance of navigation rules.**]—THE SEINE, No. 6084, *ante.*

**6501. —— Sufficiency of allegation of negligence.**]—The obligation to manage a navigable vessel properly attaches to the possession of the vessel, & ceases as soon as the possession of the vessel is innocently & wholly parted with.

A declaration stated that before the happening of the damage complained of, to wit, on, etc., a certain barge of deft.. & of which he was then in possession, etc., sunk & went to the bottom in a certain navigable river, etc., & that the barge, being so sunk, lay concealed under the water in such a manner that vessels passing over the place where it lay would necessarily strike against the same; & that deft. had notice of the premises; & "that it thereupon became & was the duty of deft. while the barge continued so sunk, to take & use due & proper care" to prevent danger to vessels navigating that part of the river by giving due notice of the danger by buoy or other signal; & assigned for a breach the neglect to give such notice, or use such means to prevent danger, by reason of which pltf.'s vessel sustained a damage by striking against the barge:—*Held:* the declaration disclosed no obligation upon the part of deft. to give such notice or use such means to prevent danger as suggested.

It is the duty of a person using a public navigable river with a vessel of which he is possessed, & has the control & management, to use reasonable skill & care to prevent mischief to other vessels; & in case of a collision arising from his negligence, he must sustain without compensation the damages occasioned to his own vessel, & is liable to pay compensation for that sustained by another, navigated with due skill & care; & this liability is the same, whether his vessel is in motion or stationary, floating or aground, under water or above it (MAULE, J.).—BROWN v. MALLETT (1848), 5 C. B. 599; 17 L. J. C. P. 227; 11 L. T. O. S. 64; 12 Jur. 204; 136 E. R. 1013.

*Annotations:*—**Apld.** Hancock v. York, Newcastle & Berwick Ry. (1850), 10 C. B. 348; White v. Crisp (1854), 10 Exch. 312. **Distd.** The Industrie (1871), L. R. 3 A. & E. 303. **Apld.** The Douglas (1882), 7 P. D. 151; S.S. Utopia v. S.S. Primula, The Utopia, [1892] A. C. 492. **Refd.** Card v. Case (1848), 5 C. B. 622; General Steam Navigation Co. v. Morrison (1853), 13 C. B. 581; Metcalfe v. Hetherington (1855), 11 Exch. 257; Manley v. St. Helens Canal & Ry. Co. (1858), 2 H. & N. 840; White v. Phillips (1863), 15 C. B. N. S. 245; Submarine Telegraph Co. v. Dixon (1864), 3 New Rep. 572; Vivian v. Mersey Docks Board (1869), L. R. 5 C. P. 19; Arrow Shipping Co. v. Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Snark, [1899] P. 74; The Ella, [1915] P. 111. **Mentd.** Kidgill v. Moor (1850), 9 C. B. 364; Charles v. Altin (1854), 15 C. B. 46.

**6502. —— ——.**]—The declaration stated that defts. were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides, that the anchor had become removed into, & remained in, another part of the river covered by ordinary tides, not indicated, whereof defts. had notice, & although they had the means & power of refixing & securing the anchor, & indicating it, they neglected so to do, whereby pltfs.' vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of & struck against the anchor, & was thereby damaged, etc. On demurrer:—*Held:* bad, for not showing that defts. were privy to the removal of the anchor, or that it was their duty to refix it & to indicate it.—HANCOCK v. YORK, NEWCASTLE & BERWICK RY. CO. (1850), 10 C. B. 348; 14 L. T. O. S. 467; 138 E. R. 140.

**6503. —— Negligence of master & crew.**]—The owner of the *D. C.* would have had a right of action to recover 50 per cent. from B., not because he was the owner of the *F.*, but because he was the master of the captain & crew whose negligence in the course of their employment occasioned the damage (LORD BLACKBURN).—SIMPSON v. THOMSON (1877), 3 App. Cas. 279; 38 L. T. 1; 3 Asp. M. L. C. 567, H. L.

*Annotations:*—**Refd.** Sir John Jackson, Ltd. v. S.S. Blanche, [1908] A. C. 126. **Mentd.** Burnand v. Rodocanachi (1881), 6 Q. B. D. 633; Midland Insce. v. Smith (1881), 6 Q. B. D. 561; Castellain v. Preston (1883), 11 Q. B. D. 380; Sea Insce. v. Hadden (1884), 13 Q. B. D. 706; Dufourcet v. Bishop (1886), 18 Q. B. D. 373; King v. Victoria Insce., [1896] A. C. 250; Soc. Anon. de Remorquage à Hélice v. Bennetts, [1911] 1 K. B. 243; The Amerika, [1914] P. 167; The Coaster (1922), 91 L. J. P. 145; Edwards v. Motor Union Insce., [1922] 2 K. B. 249; Elliott Steam Tug Co. v. Shipping Controller, [1922] 1 K. B. 127; McColl v. Canadian Pacific Ry., [1923] A. C. 126.

**—— —— —— Defence of common employment.**]—*See* No. 3080, *ante.*

**6504. —— Sunken vessel—Instructions to harbour master to light wreck—Collision before action by harbour master.**]—The *D.* in consequence of the sole default of her master & crew had sunk in the Thames, & had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel without any fault on the part of those on board her, came into collision with the wreck & sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the *D.*, the judge at the trial refused to admit the evidence showing that the mate of the *D.* had sent a message to the harbour master, & that the latter had promised to light the wreck:—*Held:* the evidence was wrongly rejected, the collision had not been caused by the negligence of the owners of the wreck, & they were not liable for the damage done.—THE DOUGLAS (1882), 7 P. D.

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time of the collision, & in receipt of the profits; & that there was a deed of partnership executed by some of the owners, but not by others, which provided for the mode of transfer:—*Held:* sufficient as against a wrongdoer; & it was not necessary to produce this deed.—SUTHERLAND v. BETHUNE (1853), 10 U. C. R. 388.—**CAN.**

151; 51 L. J. P. 89; 47 L. T. 502; 5 Asp. M. L. C. 15, C. A.

*Annotations:*—**Consd.** S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492; The Snark, [1899] P. 74. **Refd.** Dormont *v.* Furness Ry. (1883), 11 Q. B. D. 496; The Ella, [1915] P. 111.

**6505. Liability of agents—Of owner of yacht.**]—HOLMES *v.* CLARK (1862), 3 F. & F. 336, N. P.

**Foreign Law—Law of Spain.**]—*See* CONFLICT OF LAWS, Vol. XI., p. 412, Nos. 793, 794.

**Liability of pilot.**]—*See* Part XVI., Sect. 1, subsect. 2, C., *post.*

*B. Where Ship Chartered.*

**6506. Liability of owners—Crew appointed by owners—Paid by charterers.**]—Case for sinking pltf.'s vessel by a steam boat, of which defts. were possessed & had the care, management, & direction by their servants & mariners, through the mismanagement of the servants & mariners. Plea, that defts. had not the possession & care, etc., by their servants & mariners, or otherwise. Defts., being owners of the steam vessel, chartered her to D., for six months, at £20 per week, the owners to keep her in good & sufficient order for the conveyance of goods, etc., to & from Newcastle & Goole, or any other coasting station which D. might employ her in: D. to pay all disbursements, including harbour dues, pilotages, seamen's & captain's wages, & coals, oils, tallow, etc., for engines, & to insure the vessel; the policy to be deposited with the owners:—*Held:* the issue ought to be found for pltf. upon the interpretation of the charterparty alone. *A fortiori*, upon proof, in addition, that D. had no power to appoint or dismiss the officers & crew, & did not interfere in the arrangements of the ship.—FENTON *v.* CITY OF DUBLIN STEAM PACKET CO. (1838), 8 Ad. & El. 835; 1 Per. & Dav. 103; 1 Will. Woll. & H. 628; 8 L. J. Q. B. 28; 2 Jur. 1087; 112 E. R. 1054.

*Annotations:*—**Apld.** Dalyell *v.* Tyrer (1858), E. B. & E. 899. **Refd.** The Scout (1872), 26 L. T. 371; Omoa & Cleland Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464.

**6507. —— Transport employed by government—Acting under orders of naval officer.**]—Pltf. & deft. had each a vessel chartered & used by govt. as a transport for troops in a war expedition, & were each towed by different steamers, commanded by officers in Her Majesty's navy, to whose orders the masters of the transports were respectively subject. The steamers anchored near each other, but the officer commanding the steamer which had defts.' vessel in tow ordered the master of it to hang on as long as possible without anchoring. He accordingly hung on without anchoring, but the wind changing in the night, & becoming squally, deft.'s vessel swung round, & came in collision with pltf.'s vessel, which accident would not have occurred had deft.'s vessel anchored when the wind began to change. In an action against deft. for this collision, the judge left it to the jury to say whether there had been negligence or want of good seamanship on the part of deft. in not anchoring after the change of circumstances which had occurred after the order had been given by the officer commanding the steamer:—*Held:* the direction was right, as the order was not an absolute one, but applied only to the then existing state of circumstances. *Semble:* obedience to the positive order of the officer in command of the steamer would have been a justification, & deft. would not have been liable to pltf. for any damage done to his vessel in consequence of obeying such order.—HODGKINSON *v.* FERNIE (1857), 2 C. B. N. S. 415; 26 L. J. C. P. 217; 3 Jur. N. S. 818; 6 W. R. 181; 140 E. R. 479.

*Annotation:*—**Expld.** The Tasmania (1888), 13 P. D. 110.

**6508. ——.**] — THE AMSTELSTROOM (1904), [1913] P. 68, n.; 18 Com. Cas. 99, n.

*Annotation:*—**Refd.** The Okehampton, [1913] P. 54.

**6509. Liability of ship in rem—Ship in control of charterers.**]—THE TICONDEROGA, No. 6520, *post.*

**6510. —— ——.**]—A ship chartered by her owners so that the whole control & management of ship & crew is vested in the charterers, still remains liable in a proceeding *in rem* for damage done to another ship by the negligence of her crew, although they are the charterer's servants.—THE LEMINGTON (1874), 32 L. T. 69; 23 W. R. 421; 2 Asp. M. L. C. 475.

*Annotations:*—**Expld.** The Tasmania (1888), 13 P. D. 110. **Consd.** The Ripon City, [1897] P. 226. **Apld.** The Hopper No. 66, [1906] P. 34. **Distd.** The Sylvan Arrow, [1923] P. 220. **Refd.** The Jacob Christensen, [1895] P. 281; The Sarpen, [1916] P. 306.

**6511. —— ——.**]—THE AMSTELSTROOM (1904), [1913] P. 68, n.; 18 Com. Cas. 99, n.

*Annotation:*—**Refd.** The Okehampton, [1913] P. 54.

**6512. —— —— Defence to action—Exemption of charterers from liability for acts of servants.**]—THE TASMANIA, No. 5137, *ante.*

*C. In Case of Vessel in Tow.*

*(a) Liability to Third Parties.*

*i. Liability of Tow.*

**6513. Depends on which has control.**]—The steamship *A.* found at a foreign port the *S.*, a screw steamship, totally disabled in her machinery; both vessels belonged to same owner. The captain of the *A.*, to protect his employers' interest & earn salvage from the owners of the cargo of *S.*, took the *S.* in tow, & towed her into the English Channel, & whilst so doing came into collision with a sailing ship close hauled on the starboard tack. The damage done by the *A.* caused the sailing ship to sink, but before she sank the *S.* ranged up alongside of her & came into contact with her. The *A.* first saw the green light of the ship at a distance of three-quarters of a mile, & then, instead of slackening speed or starboarding her helm, attempted to cross the bows of the ship. The ship saw at two miles' distance the *A.* & *S.*, with a great length of hawser between them, & the red lights of both, & kept her course:—*Held:* (1) the *A.* was to blame for the collision having regard to the exceptional circumstances under which the towing was undertaken, the governing as well as the motive power being wholly with the *A.*, the *S.* was not liable to be condemned in damages occasioned by the collision; (2) the *S.* cannot be deemed, in intendment of law, to be one vessel with the *A.*, or liable for her negligence.

(3) Where a collision takes place between a tug

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**PART XII. SECT. 6, SUB-SECT. 1.—B.**

**m.** *Liability of owners—Ship chartered by Government.*]—The fact that a boat has been chartered to the Government does not affect the liability of its owner under the Act (C. C. Arts. 2391, 2414.—KENNEDY *v.* THOM (1915), Q. R. 49 S. C. 211.—**CAN.**

**n.** —— *Damage caused by charterer's crew.*]—CLARKE *v.* SCOTT (1896), 23 R. (Ct. of Sess.) 442; 33 Sc. L. R. 318; 3 S. L. T. 257.—**SCOT.**

**o.** —— ——.]—COMPAGNIE DES MESSAGERIES MARITIMES *v.* AGRICULTURAL CO-OPERATIVE UNION, LTD., & COHEN (FRED) GOLDMAN & CO., LTD. (1922), 43 N. L. R. 84.—**S. AF.**

**PART XII. SECT. 6, SUB-SECT. 1.—C. (a) i.**

**p.** *Lighter not provided with steering gear.*]—A lighter was being towed down the harbour & out to sea on a long line when it struck against an anchored vessel:—*Held:* in the circumstances that the owner of the lighter was guilty of negligence in not providing the lighter with steering gear.—BROWN *v.* LIGHTER NO. 6 & THE BRITANNIAR TUGBOAT (OWNER) (1910), 10 S. R. N. S. W. 905; 27 N. S. W. W. N. 219.—**AUS.**

*Sect. 6.—General incidence and extent of liability: Sub-sect. 1, C. (a) i. & ii., & (b).]*

towing a ship & another ship, the question whether the tow is liable to make good damage done by the negligence of the tug, depends upon the determination of the question whether the "governing power" is in the tug or in the tow. If the tug is in the service of & under the orders of the tow, the tow is answerable for the negligence of the tug as for the negligence of a servant; but if the tug is, although rendering service to the tow, not under the control of the latter, but is itself the governing power, then the tow is not liable for the negligence of the tug.—UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA (1874), L. R. 6 P. C. 127; 43 L. J. Adm. 30; 31 L. T. 42; 22 W. R. 927; 2 Asp. M. L. C. 350, P. C.

*Annotations:*—*As to* (1) **Expld. & Distd.** The Ran, The Graygarth, [1922] P. 80. *As to* (2) **Expld.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Expld. & Distd.** The Ran, The Graygarth, [1922] P. 80. **Refd.** The Niobe (1888), 13 P. D. 55. *As to* (3) **Apld.** The Englishman & The Australia, [1894] P. 239. *Generally*, **Refd.** The Grovehurst (1910), 79 L. J. P. 124.

**6514.** ——.]—THE SEACOMBE, No. 5144, *ante*.

**6515.** ——.]—DEVONSHIRE (OWNERS) *v.* BARGE LESLIE (OWNERS), No. 5326, *ante*.

**6516. Depends on existence of relation of master & servant—Question of fact.**]—No general rule can be laid down as to the liability of a vessel in tow for a collision between it & a third vessel occasioned by the negligence of those on board the tug. Whether the relation of master & servant exists between the owners of the vessel in tow & the crew of the tug, so as to make the former liable, depends upon the circumstances of each case.

No doubt in many cases of tonage the negligence relied on as making the owners of the vessel in tow liable for a collision has been the negligence of those on board the tug. . . . However, the real question is whether or not the relation of master & servant exists between defts., the owners of the vessel towed, & the persons in charge of the navigation of the steam tug. Unless that relation exists, considerations of expediency cannot avail to impose liability on the owners of the vessel in tow (BUTT, J.).—THE QUICKSTEP (1890), 15 P. D. 196; 59 L. J. P. 65; 63 L. T. 713; 6 T. L. R. 476; 6 Asp. M. L. C. 603, D. C.

*Annotations:*—**Consd.** The Devonian, [1901] P. 221. **Apprvd.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Apld.** The Ran, The Graygarth, [1922] P. 80.

**6517. Tow guilty of negligence.**]—THE COUNTESS OF LONSDALE *v.* THE AGNES BLAIKIE, GENERAL STEAM NAVIGATION CO. *v.* JORDESON (1855), 9 L. T. 810.

**6518. —— In selection of tug.**]—The vessel *O. W.* being at anchor in the Mersey in charge of a pilot, her master went to obtain the service of the steam tug *E.* to tow the *O. W.* up the river. Having failed to get the *E.* the master brought the *L.* a steam tug considerably less powerful than the *E.* While being towed up by the *L.* the *O. W.* came into collision with, & damaged another vessel anchored in the river. The collision arose from an improper handling of the vessels by the pilot, having regard to the motive power of the *L.* & the state of the wind & tide:—*Held:* under these circumstances, the owners of the *O. W.* were free from liability. *Secus:* had negligence by the master in the selection of the steam tug *L.* shown to have been wholly or in part the cause of the collision.—MARSHALL *v.* MORAN, THE OCEAN WAVE (1870), L. R. 3 P. C. 205; 6 Moo. P. C. C. N. S. 492; 23 L. T. 218; 3 Mar. L. C. 482; 16 E. R. 812, P. C.

**6519. Damage done by collision with tow.**]—BARKER *v.* HENDERSON (1856), 5 L. T. 558.

**6520. Tow under obligation to obey order of tug —Under terms of charterparty.**]—The *Ticonderoga*, under charterparty to the French govt., was towed by a steamer athwart the hawse of the *Melampus*. The *Ticonderoga* alleged that she was not liable for the damage done, as her charterparty obliged her to obey orders & put herself in tow of the steamer:—*Held:* such obligation was no compulsion, so as to lay the ground for exemption from liability for the damage done; as it arose from a voluntary stipulation entered into by the owners themselves.

By the maritime law there is a right of proceeding *in rem* against the vessel doing the damage, which cannot be taken away by any voluntary contract of the owners with a third party.—THE TICONDEROGA (1857), Sw. 215; 166 E. R. 1103.

*Annotations:*—**Apld.** The Lemington (1874), 32 L. T. 69; The Mary (1879), 5 P. D. 14. **Expld.** The Tasmania (1888), 13 P. D. 110. **Consd.** The Ripon City, [1897] P. 226; The Hopper No. 66, [1906] P. 34; The Penrith Castle, [1918] P. 142. **Distd.** The Sylvan Arrow, [1923] P. 220. **Refd.** The Jacob Christensen, [1895] P. 281; The Seacombe, The Devonshire, [1912] P. 21.

**6521. Where tow in control.**]—UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA, No. 6513, *ante*.

**6522.** ——.]—A vessel leaving dock with a pilot on board, & within the space over which the dock master's authority extends by statute, is responsible for damage resulting from the use of a tug of insufficient power by her master, even when such tug is in the general employment of the dock co., there being no obligation on the dock co. to supply a tug.—THE BELGIC (1875), 2 P. D. 57, n.; 35 L. T. 929; 3 Asp. M. L. C. 348; *affd.* (1876), 2 P. D. 59, n., C. A.

**6523.** ——.]—THE NIOBE, No. 5053, *ante*.

**6524. Tug negligently navigated.**]—A steamer towing another vessel is to be considered as in the service of the owners of the vessel she has in tow & the owners of the vessel in tow are responsible for the acts of the steamer. If the steamer was in fault the owners of the [vessel in tow] will have to bear the consequences (*per* CUR.).—THE KINGSTON-BY-SEA (1849), 3 Wm. Rob. 152; 6 Notes of Cases, 651; 9 L. T. 811; 166 E. R. 920.

*Annotations:*—**Refd.** Maddox *v.* Fisher, The Independence (1861), 14 Moo. P. C. C. 103; The Milan (1861), Lush. 388; The Thuringia (1872), 41 L. J. Adm. 44.

**6525.** ——.]—THE COMET (OWNERS) *v.* THE W. H. No. 1 (OWNERS), THE W. H. No. 1 & THE KNIGHT ERRANT, No. 5331, *ante*.

**6526. Tow in charge of pilot.**]—THE DUKE OF SUSSEX, No. 6535, *post*.

**6527. —— Tug & tow both in same ownership.**]—In 1919 the tug *G.* was towing the barge *R.*, when the *R.* collided with & sank the barge *P.* The *R.* & the *G.* both belonged to pltfs. in the limitation proceedings. In a collision action the *G.* was found to be in fault, & as the owners of the *R.* were also owners of the *G.*, judgment was given against the owners of the *R.* The owners of tug & tow brought an action to limit their liability under 1894 Act, s. 503, to £8 a ton on the tonnage of the *G.* The judge limited the liability to that tonnage. On appeal by defts. it was admitted that there was no personal negligence by any one on board the *R.*, & that the control of the navigation of the *R.* & the *G.* was upon the *G.*:—*Held:* (1) the judgment in the collision action should have been given against the *R.*; (2) the navigation of the *G.* controlled the navigation of the *R.*, & the *R.* was improperly navigated by the servants of the owners of the *R.*; (3) it did not matter whether the servants of the owners who navigated improperly were on the *R.* or the *G.*, &, allowing the appeal in the collision action, liability should

be measured in respect of the tonnage of the *R.* & not of the *G.*—THE RAN, THE GRAYGARTH, [1922] P. 80; 91 L. J. P. 113; 126 L. T. 675; 38 T. L. R. 208; 66 Sol. Jo. 182; 15 Asp. M. L. C. 517, C. A.

*Annotations:—As to* (3) **Expld.** The Harlow, [1922] P. 175. **Distd.** The Alde, [1926] P. 211.

**6528.** —— ——.]—Where a ship in charge of a pilot whose employment is compulsory is being towed by a steam tug, & the steam tug without waiting for orders from the pilot suddenly adopts a wrong manœuvre, & so causes the ship to come into collision, the owners of the ship are responsible. *Semble:* where a pilot is in charge of a ship in tow in a crowded river, it is not necessarily incumbent upon him to direct every movement of the tug.—THE SINQUASI (1880), 5 P. D. 241; 50 L. J. P. 5; 43 L. T. 768; 4 Asp. M. L. C. 383.

*Annotation:*—**Consd.** The Englishman & The Australia, [1894] P. 239.

**6529.** ——.]—MARSHALL *v.* MORAN, THE OCEAN WAVE, No. 6518, *ante*.

**6530. Action against tow—Right of tow to join owners as third parties.**]—In an action for damage by collision brought by a vessel at anchor against a vessel in tow of a tug, the owners of the tug were made third parties under R. S. C., Ord. 16, r. 18, as defts. claimed to be indemnified by the owners of the tug against pltfs.' claim on the ground that the improper navigation, if any, was that of the tug. An application for directions under R. S. C., Ord. 16, r. 21, was subsequently made, & pltfs. thereupon asked that the third parties should be dismissed from the action on the ground that pltfs. would be embarrassed by the proceedings between defts. & the third parties:—*Held:* the third parties must be dismissed, as under the circumstances questions would probably arise between them & defts. by which pltfs. might be embarrassed, as they were different from those upon which the action between pltfs. & defts. would turn.—THE BIANCA (1883), 8 P. D. 91; 52 L. J. P. 56; 18 L. T. 410; 31 W. R. 954; 5 Asp. M. L. C. 60.

### ii. *Liability of Tug.*

**6531. Tug in control—Liability for acts of tow.**]—THE TICONDEROGA, No. 6520, *ante*.

**6532.** ——.] — UNION S.S. CO. *v.* ARACAN (OWNERS), THE AMERICAN & THE SYRIA, No. 6513, *ante*.

**6533.** ——.]—A collision took place between pltfs.' vessel & a barge in tow of a tug owing to the negligent navigation of the tug. By the contract between the tug owners & the barge owners the master & crew of the tug became the servants of the barge owners during the towage. The tug master was employed & paid by the tug owners & was subject to dismissal by them alone. The sole control of the navigation of the tug & tow was with the tug. In an action by pltfs. against the tug owners & the barge owners:—*Held:* notwithstanding the terms of the contract the master & the crew of the tug were, in fact, the servants of the tug owners & therefore in law the tug owners, & not the barge owners were responsible for the negligence of the master & crew of the tug.—THE ADRIATIC & THE WELLINGTON (1914), 30 T. L. R. 699.

**6534. Liability for own negligence.**]—THE INDIA (1887), 3 T. L. R. 535, C. A.

**6535. Pilot on board vessel in tow—Tug not negligent.**]—A steam tug employed in towing a vessel in the river Medway:—*Held:* not responsible for a damage occasioned by the vessel in tow coming in contact with another vessel, the vessel in tow having a licensed pilot on board at the time, & no error or negligence being established on the part of the crew of the steam tug.—THE DUKE OF SUSSEX (1841), 1 Wm. Rob. 270; 1 Notes of Cases, 161; 5 L. T. 558; 166 E. R. 573.

*Annotations:*—**Expld.** The Duke of Manchester (1846), 2 Wm. Rob. 470; The Gipsey King (1847), 5 Notes of Cases, 282. **Consd.** The Christina (1848), 3 Wm. Rob. 27; The Energy (1870), L. R. 3 A. & E. 48; The Mary (1879), 5 P. D. 14. **Refd.** The Leda (1863), Brown. & Lush. 19.

**6536.** —— **Tug negligent.**]—THE MARY, No. 5334, *ante*.

### (*b*) *Liability inter se.*

**6537. Liability of tow—Collision between tow & tug.**]—In a contract of towage, each party contracts to use proper skill & diligence, & for damages solely occasioned by the negligent act of his servant is responsible to the other party.

*Semble:* a steam tug, under engagement to tow a ship when required, is not, if the circumstances are perilous to her own safety, bound to take the ship in tow upon orders from the master; & the owner of the tug, so taking the ship in tow, cannot recover damages for a collision thereby occasioned. But if misconduct on the part of the ship, combined with the perilous circumstances produces a collision, held that the owner of the steam tug is entitled to recover.—THE JULIA (1861), 1 Lush. 224; 14 Moo. P. C. C. 210; 15 E. R. 284, P. C.

*Annotations:*—**Consd.** The Energy (1870), L. R. 3 A. & E. 48; Smith *v.* St. Lawrence Tow-Boat Co. (1873), L. R. 5 P. C. 308; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Altair, [1897] P. 105. **Refd.** North German Lloyd S.S. Co. *v.* Elder, The Schwalbe (1860), 14 Moo. P. C. C. 241; General Iron Screw Co. *v.* Moss, The Araxes & The Black Prince (1861), 15 Moo. P. C. C. 122; Ward *v.* M'Corkill, The Minnehaha (1861), 15 Moo. P. C. C. 133; The Nightwatch (1862), Lush. 512; The Falkland, The Navigator (1863), Brown. & Lush. 204; Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243; The Constitution (1864), Brown. & Lush. 324; The Alice & The Princess Alice (1868), L. R. 2 P. C. 245; The Esk *v.* The Niord (1870), L. R. 3 P. C. 436; The Glannibanta (1876), 1 P. D. 283; Johnson *v.* Lindsay (1889), 23 Q. B. D. 508; The Ophelia, [1916] 2 A. C. 206; S.S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37.

**6538.** —— **Collision between vessels in tow of same tug.**]—HARRIS *v.* ANDERSON, No. 6225, *ante*.

**6539. Liability of tug—Collision between tow & third vessel.**]—By the improper navigation of a steam tug which was towing her, vessel *A.* came in collision with vessel *B.* & sustained damage:—*Held:* this was "damage done by the steam tug," & the owners of vessel *A.* could sue the steam tug in the Admlty. Ct.—THE [illegible] (1862), 1 Lush. 542; 32 L. J. P. M. & A. 47; 7 L. T. 396; 8 Jur. N. S. 1161; 11 W. R. 189; 1 Mar. L. C. 260; 167 E. R. 244.

*Annotation:*—**Refd.** The Energy (1870), L. R. 3 A. & E. 48.

**6540.** —— **Indemnity clause—Construction.**]—YORK CORPN. *v.* ROWBOTHAM (1901), Shipping Gazette, Mar. 14th.

*Annotation:*—**Consd.** Page *v.* Darling & Gaseler, The Millwall (1904), 74 L. J. P. 13.

**6541.** —— —— ——.]—THE RICHMOND (1902), 19 T. L. R. 29, D. C.

**6542.** —— —— ——.]—Cargo owners instructed barge owners to lighter their goods, &, as time pressed, to employ a tug. The tug was so negligently navigated by the servants of the tug owners that the barge containing the goods was brought into collision with another barge, & the goods thereby damaged. In an action by the cargo owners, as pltfs., against the barge owners & the tug owners as co-defts., the barge owners were dismissed from the suit with costs to be paid by the cargo owners, but the tug owners were held liable with costs for the damage sustained by the

*Sect. 6.—General incidence and extent of liability: Sub-sect. 1, C. (b) & (c), & D.*]

cargo owners, together with the costs to be paid by the cargo owners to the barge owners. The tug owners, by a third-party notice, served on the barge owners, set up a contract of indemnity under which their customers agreed that the tug owners should "not be answerable for any loss or damage which might happen to, or be occasioned by, any barge, or its cargo, while in tow, however such loss or damage might arise," & undertook to hold them harmless & indemnify them "from any such loss or damage, & against the faults or defaults of their servants or any claim therefor by whomsoever made." Under the issue raised between co-defts. by the third-party notice, the barge owners were adjudged responsible for the amount of the damage for which the tug owners had been held liable together with the two sets of costs. Both defts. served notices of appeal; but the appeal of the tug owners was subsequently withdrawn:—*Held:* there was no privity of contract between pltfs., the owners of the damaged cargo, & the tug owners, which would bind pltfs. to the conditions attached to the towage, &, therefore, on the construction of the contract of indemnity as between the barge owners & the tug owners, the barge owners not only could not bring an action against the tug owners for any loss or damage which might happen to, or be occasioned by, any barge or its cargo, while in tow, but the contract assumed an existing liability against which the barge owners had undertaken to indemnify the tug owners, so that the barge owners were liable for the damages recovered by pltfs. in the action brought against the tug owners, together with the costs reasonably incurred by the tug owners in defending such action, including the costs which pltfs. had been adjudged to pay the barge owners, & which the tug owners had been ordered to repay to pltfs.—THE MILLWALL, [1905] P. 155; 74 L. J. P. 61, 82; 93 L. T. 426, 429; 53 W. R. 471; 21 T. L. R. 316; 10 Asp. M. L. C. 110, 113, C. A.

*Annotations:*—**Refd.** The Seacombe, The Devonshire, [1912] 1 P. 21; The Devonshire & The St. Winifred, [1913] P. 13; The Adriatic (1915), 85 L. J. P. 12. **Mentd.** Colchester Corpn. v. Gepp, King Third Party (1913), 11 L. G. R. 349.

**6543.** —— —— ——.]—A laden barge whilst in tow of a tug was sunk in the Mersey in a collision with a steamship, & the owners of the lost cargo commenced an action of damage against the steamship & the tug. The tug owners brought in the owners of the barge as third parties, &, in respect of any sum to which they (the tug owners) might be liable to the cargo owners, claimed a declaration that they were entitled to be indemnified by the barge owners under the terms of a "towage requisition" by which the tug owners (the Manchester Ship Canal Co.) were "not to be responsible or liable for damage or injury to any ship, vessel or craft, or the persons or goods on board any ship, vessel or craft, of which the co. may undertake the towage or docking in the river Mersey, the Manchester Ship Canal & the Bridgewater Canals, or which may be piloted by any of their servants to or from any place in the river Mersey, the said Ship Canal & the said Bridgewater Canals, or for any loss sustained or liability incurred by any one by reason of such damage or injury, or for any loss or liability incurred in consequence of any such ship, vessel or craft colliding with or otherwise damaging any other vessel or thing, or for any loss or liability of any kind whatsoever arising from the towing, docking or piloting, whatever may be the cause or causes of such damage, injury, loss or liability, or under whatever circumstances such damage, injury, loss or liability may have happened or accrued, even though arising from or occasioned by the act, omission, incapacity, negligence or default, whether wilful or not, of the co.'s servants or agents or any other persons, or any defect, imperfection, or insufficiency of power in or any delay, stoppage or slackness of speed of any tug or vessel, her machinery or equipment engaged in towing or docking any ship, vessel or craft, whether such defect, imperfection or insufficiency of power be in existence at the beginning of or during the said towing or docking." On the hearing of the issue as between the tug owners & the barge owners:—*Held:* the third parties, the owners of the barge, were entitled to be dismissed from the action with costs, as no such liability by the third parties, namely, the owners of the barge, to indemnify the owners of the tug, could be implied from the terms of the towage requisition.—THE DEVONSHIRE & THE ST. WINIFRED, [1913] P. 13; 82 L. J. P. 61; 108 L. T. 427; 29 T. L. R. 86; 12 Asp. M. L. C. 314.

**6544.** —— —— ——.]—Whilst in tow of pltf.'s tug defts.' dumb barge came into a collision with a steamship. The owners of the steamship brought an action against the owners of the tug & the owners of the barge. The tug was found alone to blame, & judgment was entered against present pltfs. for damages to be assessed & costs. Pltfs. claimed to be indemnified by defts. against these damages & costs in virtue of the terms of the contract under which the barge was being towed, which provided (*inter alia*) that: "The tug owners will not be responsible for the acts of, or defaults of the master or crew of the tug or of any of their servants or agents . . . nor for any damages, injuries, losses, or delay from whatsoever cause arising, that may occur either to the vessel or vessels towed . . . or to any other ship or vessel . . . & the tug owners shall be held harmless & indemnified by the hirer against all damages, injuries, losses, & delay, & against all claims in respect thereof, even though the same be caused or have arisen directly or indirectly from any unseaworthiness, defects, . . . or otherwise howsoever":—*Held:* these terms covered an indemnity for damage or loss, even if caused by the negligence of pltfs.' servants, & pltfs. were entitled to the indemnity they claimed.—THE ADRIATIC (1915), 85 L. J. P. 12; *sub nom.* THE WELLINGTON, 32 T. L. R. 49.

*Annotation:*—**Refd.** The Luna (1919), 89 L. J. P. 109.

**6545.** —— —— ——.]—The master of the Dutch fishing vessel *L.*, who spoke very little English & could not read English at all, engaged the tug *K.* to tow his vessel from the mouth of the Humber to dock & from dock to sea for £15. He verbally agreed the terms with one of the partners of the firm owning the *K.* who wrote them down on a debit note form & the master signed it. The form contained a printed clause of condition of towage under which the owners of vessels towed undertook to indemnify the tug owners against all liability whatsoever & against all costs & charges in respect of any actions that might be brought against the tug owners in relation to loss or damage to any other ship through collision or otherwise. The master, though he knew he was signing a contract, was not aware that the printed conditions contained an indemnity clause. In the course of the towage the *K.* towed the *L.* into the *F.* & *J.*, a vessel at anchor, whose owners sued both the *K.* & the *L.*, & the *K.* was held alone to blame. In third party proceedings

by the owners of the *K.* against the owners of the *L.* for an indemnity:—*Held:* the master of the *L.* was bound by the conditions of towage & had authority to bind his owners, & accordingly the owners of the *K.* were entitled to be indemnified by the owners of the *L.* against the damages assessed against the *K.* in the collision action, & the costs payable to the owners of the *F.* & *J.* in that action, & also against the *K.'s* own costs in that action.—THE LUNA, [1920] P. 22; 89 L. J. P. 109; 124 L. T. 382; 36 T. L. R. 112; 15 Asp. M. L. C. 152.

**6546.** —— —— ——.]—A towage contract by which defts. engaged pltfs.' tug to assist their vessel in dock provided that the master & crew of the tug should cease to be under the control of pltfs. during & for all purposes connected with the towage, & should become subject in all things to the orders & control of the master or person in charge of the vessel towed, & were the servants of the owners thereof, who thereby undertook to pay for any damage caused to any part of pltfs.' property & to bear, satisfy, & indemnify pltfs. against liability for all claims for loss or damage by collision or otherwise to the vessel or to or by the vessel towed, or to or by any vessel of any other person, or to the tug or tugs supplied, whether such damage, loss, or injury arose or was occasioned by any negligence of any servants of pltfs. Pltfs. were a statutory authority in control of the docks where defts.' vessel was being towed, & they supplied all tugs for dock work & would not allow any one except themselves to do the work. A collision took place whilst the towage was in progress between pltfs.' tug & defts.' vessel, in which damage was caused to both vessels. Defts. counterclaimed for the damage to their vessel:—*Held:* the towage contract was valid & was not void as being against public policy; &, further, the effect of the contract was that even if the collision was solely caused by the negligent navigation of pltfs.' tug defts. were liable for the whole of the damage occasioned thereby.—THE PRESIDENT VAN BUREN (1924), 132 L. T. 253; 16 Asp. M. L. C. 444.

**6547.** —— —— ——.]—THE RIVERMAN, No. 5130, *ante*.

*(c) Application of Doctrine of Non-Contribution of Joint Tortfeasors.*

*See* Sub-sect. 3, *post*.

*D. In Case of Compulsory Pilotage.*

*See* Pilotage Act, 1913 (c. 31), s. 15.

**6548. Abolition of compulsory pilotage as defence—Compulsory pilotage under orders under Defence of Realm Regulations.**]—Pilotage Act, 1913 (c. 31), s. 15 (1), has not merely the effect of abolishing the defence of compulsory pilotage given under some public or local Act, but it applies also to the case of a pilot compulsorily taken on board a ship under orders issued under the Defence of the Realm Regulations, & the shipowners cannot in these circumstances avail themselves of the common law defence that they are not responsible for the negligent acts of a person who is not their servant.—THE CHYEBASSA, [1919] P. 201; 88 L. J. P. 191.

**6549.** —— **Collision in Admiralty waters abroad—Application of Pilotage Act, 1913 (c. 31).**]—By virtue of a general regulation applicable to the Admlty. waters of Gibraltar, pilotage was compulsory on defts.' vessel, which ran into & damaged pltfs.' vessel lying at the Detached Mole. The collision was solely due to the fault of the pilot put on board defts.' vessel under the orders of the King's Harbour Master in order to shift her to another berth:—*Held:* (1) as Pilotage Act, 1913 (c. 31), did not extend expressly or by necessary implication to Gibraltar, & as, by the ordinary common law, if sued in Gibraltar defts. would not have been liable for the negligence of a pilot put on board their vessel by compulsion of law, the defence of compulsory pilotage succeeded; (2) the fact that the vessel was under the form of charterparty known as "T. 99," which contained a provision that "the Admlty. shall not be held responsible for losses sustained through the negligence of pilots . . . or others employed by them, the owners recognising them as their servants even if appointed & paid by the Admlty. . . ." did not make the pilot in fact the servant of the owners.—THE ARUM, [1921] P. 12; 90 L. J. P. 166; 37 T. L. R. 38.

**PART XII. SECT. 6, SUB-SECT. 1.—D.**

q. *Liability of owner.*]—Where a ship is compulsorily in charge of a pilot, that circumstance does not exonerate the owners from liability for a collision by the fault of the ship; unless it was occasioned solely by the act of the pilot.—THE EDEN (1880), 6 V. L. R. (Adm.) 8.—**AUS.**

r. — —.]—To entitle the owner of a ship, having by compulsion of law a pilot on board, to the benefit of exemption from liability for damage, the fault must be exclusively that of the pilot.—*Re* THE SECRET (1867), 11 L. C. J. 294; 17 L. C. R. 399; 4 C. L. J. N. S. 41.—**CAN.**

t. ——.]—Where a collision was occasioned by the improper steering of a vessel, the exclusive act of the pilot, the owners of the vessel were held entitled to the exemption provided by 27 & 28 Vict. c. 13, & this exemption was not affected by the constant employment of the same pilot by the owners.—*Re* THE HIBERNIAN (1872), 1 Q. L. R. 319; 2 S. V. A. R. 148.—**CAN.**

a. ——.]—A certificate was given by the master of a sailing vessel, which, while in charge of a pilot had, by collision with a vessel at anchor, caused damage, in which certificate it was stated that the pilot had piloted the vessel to his, the master's, entire satisfaction:—*Held:* in a case of doubt as to whether the master or the pilot was to blame for the collision, the certificate was a subsequent ratification of what was done, so as to render the owners of the sailing vessel liable for the damage.—*Re* THE ABERGELDIE (1872), 2 S. V. A. R. 187.—**CAN.**

b. ——.]—The owners of a vessel having a duly licensed pilot on board are protected by 27 & 28 Vict. c. 13, s. 14, for liability for damage occasioned by the act or neglect of the pilot, the pilot being solely responsible for getting the vessel under way under improper circumstances.—*Re* THE ANGLO SAXON (1876), 2 S. V. A. R. 117.—**CAN.**

c. ——.]—A vessel is exempted from liability for the fault of a pilot in charge of her, first where a master is authorised to employ a pilot, & is exempted from responsibility if he elects to do so; &, secondly, where the employment of a pilot is compulsory, & the owners of the vessel so employing him are relieved from responsibility for his misconduct.—*Re* THE HANOVER (1865), Bourke, 15.—**IND.**

d. ——.]—To come within M. S. Act, 1854, s. 388, which exempts the owner of a vessel from the consequences of a collision if she was in charge of a qualified pilot, the owner must prove that he was compelled by law to take a pilot at the time, & that the damage was occasioned by the fault or incapacity of the pilot.—THE VICTORIA (1867), 1 I. R. Eq. 336.—**IR.**

e. ——.] — DUDMAN & BROWN *v.* DUBLIN PORT & DOCKS BOARD (1873), I. R. 7 C. L. 518.—**IR.**

f. ——.]—THE METEOR (1875), 9 I. R. Eq. 567.—**IR.**

The master & owner of a ship arriving at a port in New Zealand from a place beyond the sea are exempt from liability as carriers for damage to cargo caused by the act or default of a pilot compulsorily taken.—EVANS *v.* HORSFALL (1877), 3 N. Z. Jur. N. S. 61.—**N.Z.**

h. ——.]—BURRELL (STRATHSPEY (OWNER)) *v.* MACBRAYNE (ISLAY (OWNER)) (1891), 18 R. (Ct. of Sess.) 1048.—**SCOT.**

k. ——.] — LONDON & GLASGOW ENGINEERING & IRON SHIPBUILDING CO., LTD. *v.* ANCHOR LINE (HENDERSON BROS., LTD.), THE ASSYRIA (1903), 5 F. (Ct. of Sess.) 1089; 40 Sc. L. R. 753; 11 S. L. T. 213.—**SCOT.**

l. ——.]—STEPHEN & SONS, LTD. *v.* ALLAN LINE S.S. CO., LTD., [1911] S. C. 836; *affd.*, [1912] S. C. (H. L.) 69.—**SCOT.**

m. ——.]—RENNIE (J. T.) & SONS *v.* MINISTER OF RAILWAYS & HARBOURS (1913), 34 N. L. R. 396.—**S. AF.**

n. *Liability of Government.*] — An action will lie against the Govt. of Queensland for damages caused to a vessel by the negligent or improper navigation of a pilot into whose charge she is compulsorily delivered for

*Sect. 6.—General incidence and extent of liability: Sub-sect. 1, E. & F.; sub-sect. 2, A.]*

### *E. In Case of Ship Acting under Harbour Authority.*

*See* Part XXI, Sect. 8, sub-sect. 2, B., *post.*

### *F. In Case of National Ships.*

**6550. Actual wrongdoer liable—Not person indirectly involved—Captain of ship.**]—The captain of a sloop of war is not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, & had the actual direction & management of the steering & navigating of the sloop at the time, & when the captain was not upon deck, nor was called by his duty to be there.—NICHOLSON *v.* MOUNSEY & SYMES (1812), 15 East, 384; 104 E. R. 890.

*Annotations:*—**Refd.** Carruthers *v.* Sydebotham (1815), 4 M. & S. 77; The Maria (1839), 1 Wm. Rob. 95. **Mentd.** Laugher *v.* Pointer (1826), 5 B. & C. 547; Mersey Dock Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93; Adair *v.* Young (1879), 12 Ch. D. 13.

**6551. —— —— Lords Commissioners of Admiralty.**]—Monition refused against Lords Comrs. of Admlty., to answer in a suit for damage by collision occasioned to a British vessel in the English Channel by H.M. troop ship *Athol.*

In case of tort or damage committed by vessels of the Crown the legal responsibility attaches to the actual wrongdoer & the injured party must seek his redress, not against the parties who may be indirectly involved in the transaction but from the person who immediately commits the injury (*per* CUR.).—THE ATHOL (1842), 1 Wm. Rob. 374; 3 L. T. 123; 6 Jur. 376; 166 E. R. 613; *subsequent proceedings*, 1 Notes of Cases, 586.

*Annotation:*—**Refd.** The Parlement Belge (1880), 5 P. D. 197.

**6552. Transport ship obeying orders of naval .**]—HODGKINSON *v.* FERNIE, No. 6507, *ante.*

**6553. Action against naval officer—Time for commencing proceedings—Extention of time—Maritime Conventions Act, 1911 (c. 57), ss. 8, 9.**]—Above Act, s. 8, provides that no action shall be maintainable to enforce any claim against a vessel or her owners in respect of any damage to another vessel unless the proceedings are commenced within two years from the date when the damage was caused; but the ct. "may, in accordance with the rules of ct.," extend the period to such extent & on such conditions as it thinks fit. By sect. 9, the Act is made applicable to any persons other than the owners responsible for the fault of the vessel.

On Jan. 18, 1915, a collision occurred in the North Sea between pltf.'s vessel, a Dutch Trawler, & H.M.S. *Archer.* Diplomatic correspondence ensued, & on July 14, 1916, the British Consul-General in Rotterdam informed pltf. that the Admlty. would not admit liability. Pltf. continued to make diplomatic representations, & on Feb. 21, 1918, was informed through the Dutch Minister that the Foreign Office could not reopen the matter.

On Oct. 21, 1918, an application was made *ex parte* to the judge in chambers for leave to commence proceedings against the officer commanding the *Archer*, notwithstanding that the period of two years had elapsed. The judge granted leave. Thereupon deft. applied to set aside the order on the grounds (*a*) that the ct. had no power to deal with the matter *ex parte*; (*b*) that no rules of ct. had been made under the Act, & therefore that the second part of above Act, s. 8, was inoperative; & (*c*) that if the Ct. had power to exercise its discretion, on the facts it ought not to have been exercised:—*Held:* (1) whether or not the application should have been dealt with *ex parte*, the ct. had power to review its order; (2) by virtue of the Act applied to actions brought against the responsible officer of a King's ship; (3) although there were no rules of ct. made under the Act the ct. had power to exercise its discretion under above Act, s. 8; (4) having regard to the delay in making the application after Feb. 21, the latest date on which it might be urged in pltf.'s favour that the case was still under consideration, the ct. ought not to exercise its discretion, & the order obtained *ex parte* must be set aside.—H.M.S. ARCHER, [1919] 1 P. 1; 88 L. J. P. 3; 35 T. L. R. 80.

*Annotation:*—**Refd.** The Loredano, [1922] P. 209.

**Immunity of national ships from arrest.**]—*See* Sect. 7, sub-sect. 2, C. (*b*), *post.*

## SUB-SECT. 2.—PRESUMPTION OF FAULT.

### *1. For Breach of Sea Regulations.*

*See, now,* Maritime Conventions Act, 1911 (c. 57), ss. 4 (1), 9 (2).

**6554. On proof of breach of regulations for preventing collisions—Former law.**]—THE AGNES *v.* THE JAMES GIBB (1856), 5 L. T. 186.

**6555. —— ——.**]—THE CALLA (1859), Sw. 465; 166 E. R. 1218.

**6556. —— ——.**]—THE FENHAM (1870), L. R. 3 P. C. 212; 6 Moo. P. C. C. N. S. 501; 23 L. T. 329; 3 Mar. L. C. 481; 16 E. R. 815, P. C.

*Annotations:*—**Refd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Cayzer *v.* Carron Co. (1884), 9 App. Cas. 873.

**6557. —— ——.**]—THE MARY HOUNSELL (1879), 4 P. D. 204; 48 L. J. P. 54; 40 L. T. 368, 28 W. R. 140; 4 Asp. M. L. C. 101.

**6558. —— ——.**]—OCEAN S.S. Co. (HEBE (OWNERS)) *v.* APCAR & CO. (ARRATOON APCAR (OWNERS)), THE ARRATOON APCAR (1889), 15 App. Cas. 37; 62 L. T. 331; 38 W. R. 481; 6 Asp. M. L. C. 491; *sub nom.* HEBE (OWNERS) *v.* ARRATOON APCAR (OWNERS), 59 L. J. P. C. 49, P. C.

**6559. —— ——.**]—THE TRIDENT, THE WILLIAM, MARSHALL *v.* GENERAL STEAM NAVIGATION CO. (1853), 5 L. T. 146.

**6560. —— ——.**]—THE PANTHER (1853), 1 Ecc. & Ad. 31; 17 Jur. 1037; 164 E. R. 19.

**6561. —— ——.**]—THE FAIRY (1854), 1 Ecc. & Ad. 298; 164 E. R. 172.

**6562. —— ——.**]—DOWELL *v.* GENERAL STEAM NAVIGATION CO. (1855), 5 E. & B. 195; 3 C. L. R. 1221; 26 L. J. Q. B. 59; 25 L. T. O. S. 158; 1 Jur. N. S. 800; 3 W. R. 492; 119 E. R. 454.

*Annotations:*—**Apld.** Lawson *v.* Carr, The James (1856), 10 Moo. P. C. C. 162. **Expld.** Admiralty Comrs. *v.* S.S. Volute, [1922] 1 A. C. 129. **Refd.** Tuff *v.* Warman (1858), 5 C. B. N. S. 573; Witherley *v.* Regents Canal Co. (1862), 12 C. B. N. S. 2; The Vera Cruz (1884), 53 L. J. P. 33; The Bernina (2) (1887), 12 P. D. 58. **Mentd.** Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514.

pilotage.—EASTERN & AUSTRALIAN S.S. Co., LTD. *v.* FOWLES, [1913] S. R. Q. 64.—**AUS.**

**PART XII. SECT. 6, SUB-SECT. 2.—A.**

*o. On proof of breach of regulations for preventing collisions.*]—Navigation Act, 1901 (No. 60 of 1901), s. 117, must be read subject to M. S. Act, 1894, s. 419 (4). Maritime Conventions Act, 1911 (c. 57), not extending to Australia, & Commonwealth Navigation Act, 1912 (No. 4 of 1913) not yet having come into operation, that sub-sect. is still in force in New South Wales. The sub-sect. provides that in a case of collision a vessel which has unnecessarily departed from any of the collision regulations shall be deemed to be in fault:—*Held:* such a vessel cannot be excused from blame, unless it is

**6563.** —— ——.]—THE ABEONA & THE WEST KENT, DIXON *v.* CLEMENTS (1855), 5 L. T. 147.

**6564.** —— ——.]—THE JANE ARCHIBALD *v.* THE ILOS (1855), 5 L. T. 147.

**6565.** —— ——.]—THE JULIANA (1855), Sw. 20; 166 E. R. 996.

*Annotation :*—**Consd.** The Margaret *v.* The Tuscar (1866), 15 L. T. 86.

**6566.** —— ——.]—CHURCHWARD *v.* PALMER, THE VIVID (1856), 10 Moo. P. C. C. 472; 4 W. R. 755; 14 E. R. 570, P. C.

**6567.** —— ——.]—THE HELEN HELIGERS (1858), 5 L. T. 461, P. C.

**6568.** —— ——.]—TUFF *v.* WARMAN (1858), 5 C. B. N. S. 573; 27 L. J. C. P. 322; 5 Jur. N. S. 222; 6 W. R. 693; 141 E. R. 231, Ex. Ch.

*Annotations :*—**Expld.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876. **Consd.** The Vera Cruz (1884), 53 L. J. P. 33. **Refd.** Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Bernina (2) (1887), 12 P. D. 58; The Hero, [1911] P. 128; The Highland Loch, [1911] P. 261; Anglo Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406. **Mentd.** Witherley *v.* Regents Canal Co. (1862), 12 C. B. N. S. 2; Kymaird *v.* Leslie (1866), 12 Jur. N. S. 468; Walton *v.* L. B. & S. C. Ry. (1866), Har. & Ruth. 424; Fordham *v.* Brighton Ry. (1868), L. R. 3 C. P. 368; Doyle *v.* Kinaham (1869), 17 W. R. 679; Radley *v.* L. & N. W. Ry. (1876), 1 App. Cas. 754; Brown *v.* G. W. Ry. (1885), 52 L. T. 622; Canadian Pacific Ry. *v.* Frechette, [1915] A. C. 871; British Columbia Electric Ry. *v.* Loach, [1916] 1 A. C. 719; Ellerman Lines *v.* Grayson, [1919] 2 K. B. 514. Paul *v.* G. E. Ry. (1920), 36 T. L. R. 344.

**6569.** —— ——.]—THE MAGNET, THE DUKE OF SUTHERLAND, THE FANNY M. CARVILL (1875), L. R. 4 A. & E. 417; 32 L. T. 129; 23 W. R. 598; 2 Asp. M. L. C. 478; *sub nom.* THE EUGENIE, THE MAGNET, THE DUKE OF SUTHERLAND, THE MAGGIE TRIMBLE, THE FANNY M'CARVILL, 11 L. J. Adm. 1; *on appeal, sub nom.* THE FANNY M. CARVILL (OWNERS) *v.* THE PERU (OWNERS), THE FANNY M. CARVILL, 13 App. Cas. 455, n., P. C.

*Annotations :*—**Apld.** The Englishman (1877), 3 P. D. 18; The Mary Haunsell (1879), 4 P. D. 204. **Apprvd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876. **Apld.** China Merchants' Steam Navigation Co. *v.* Bignold, The Hochung, The Lapwing (1882), 7 App. Cas. 512; The Glamorganshire (1888), 13 App. Cas. 454. **Apprvd.** Eastern S.S. Co. *v.* Smith, The Duke of Buccleuch, [1891] A. C. 310. **Consd.** The Sansparcil (1900), 82 L. T. 356; The Devonian, [1901] P. 221. **Apld.** The Corinthian, [1909] P. 260. **Refd.** The Hermod (1890), 62 L. T. 670; The Argo (1900), 82 L. T. 602; The Anselm, [1907] P. 151; The Pitgaveney, [1910] P. 215.

**6570.** —— ——.]—THE ENGLISHMAN (1877), 3 P. D. 18; 47 L. J. P. 9; 37 L. T. 412; 3 Asp. M. L. C. 506; *subsequent proceedings* (1878), 38 L. T. 756.

*Annotations :*—**Apld.** China Merchants' Steam Navigation Co. *v.* Bignold, The Hochung, The Lapwing (1882), 7 App. Cas. 512. **Refd.** The Argo (1900), 82 L. T. 602; The Reginald (1907), 97 L. T. 608; The Pitgaveney, [1910] P. 215.

**6571.** —— ——.]—THE TIRZAH (1878), 4 P. D. 33; 48 L. J. P. 15; 39 L. T. 547; 27 W. R. 584; 4 Asp. M. L. C. 55.

*Annotation :*—**Refd.** The Aristocrat, [1908] P. 9.

**6572.** —— ——.]—EMERY *v.* CICHERO, THE ARKLOW (1883), 9 App. Cas. 136; 53 L. J. P. C. 9; 50 L. T. 305; 5 Asp. M. L. C. 219, P. C.

**6573.** —— ——.]—THE CHUSAN (1885), 53 L. T. 60; 5 Asp. M. L. C. 476.

**6574.** —— ——.]—THE RIPON (1885), 10 P. D. 65; 54 L. J. P. 56; 52 L. T. 438; 33 W. R. 659; 5 Asp. M. L. C. 365.

*Annotation :*—**Distd.** The Monte Rosa, [1893] P. 23.

**6575.** —— ——.] — THE GLAMORGANSHIRE (1888), 13 App. Cas. 454; 59 L. T. 572; 6 Asp. M. L. C. 344, P. C.

*Annotation :*—**Mentd.** The Joannis Vatis, [1922] P. 92.

**6576.** —— ——.]—EASTERN S.S. CO. *v.* SMITH, THE DUKE OF BUCCLEUCH, [1891] A. C. 310; 65 L. T. 422; 7 Asp. M. L. C. 68, H. L.

*Annotations :*—**Consd.** The Hermod (1890), 62 L. T. 670; The Argo (1900), 82 L. T. 602; The Devonian, [1901] P. 221; Canning (Owners) *v.* Bellanoch (Owners), The Bellanoch (1907), 97 L. T. 315. **Apld.** The Corinthian, [1909] P. 260. **Refd.** The Sansparcil (1900), 82 L. T. 356; The Anselm (1906), 94 L. T. 853; The Aristocrat, [1908] P. 9; The Pitgaveney, [1910] P. 215. **Mentd.** The Duke of Buccleuch, [1892] P. 201; Paquin *v.* Beauclerk, [1906] A. C. 148.

**6577.** —— ——.]—THE HERMOD (1890), 62 L. T. 670; 6 T. L. R. 257; 6 Asp. M. L. C. 509.

**6578.** —— ——.]—THE GRENMAR (1896), 12 T. L. R. 342.

**6579.** —— ——.]—THE ARGO (1900), 82 L. T. 602; 9 Asp. M. L. C. 71, C. A.

*Annotations :*—**Consd.** The Aristocrat, [1908] P. 9. **Refd.** The Devonian, [1901] P. 221; The Pitgaveney, [1910] P. 215.

**6580.** —— ——.]—THE HIBERNIA (1874), 31 L. T. 805; 24 W. R. 60; 2 Asp. M. L. C. 454, P. C.

*Annotations :*—**Consd.** Fanny M. Carvill (Owners) *v.* Peru (Owners), The Fanny M. Carvill (1875), 13 App. Cas. 455, n. **Apprvd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876. **Consd.** China Merchants' Steam Navigation Co. *v.* Bignold, The Hochung, The Lapwing (1882), 7 App. Cas. 512. **Mentd.** The City of Manchester (1879), 40 L. T. 591.

**6581.** —— ——.]—CHINA MERCHANTS' STEAM NAVIGATION CO. *v.* BIGNOLD, THE HOCHUNG, THE LAPWING (1882), 7 App. Cas. 512; 51 L. J. P. C. 92; 47 L. T. 485; 31 W. R. 303; 5 Asp. M. L. C. 39, P. C.

**6582.** —— ——.]—BAKER *v.* THEODORE H. RAND (OWNERS), THE THEODORE H. RAND (1887), 12 App. Cas. 247; 56 L. J. P. 65; 56 L. T. 343; 35 W. R. 781; 6 Asp. M. L. C. 122, H. L.

*Annotations :*—**Consd.** S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670. **Refd.** S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556.

**6583. Application of Maritime Conventions Act, 1911 (c. 57)—To collision occurring before statute.**]—Maritime Conventions Act, 1911 (c. 57), applies to an action of damage by collision, in which the proceedings have been, as in the case before the ct., taken after, though the cause of action arose before, the passing of the Act, &, therefore, the statutory presumption of fault, arising under 1894 Act, s. 419 (4), could not be invoked, as it had been abolished by Maritime Conventions Act, 1911 (c. 57), s. 1 (1).—THE ENTERPRISE, [1912] P. 207; 82 L. J. P. 1; 107 L. T. 271; 28 T. L. R. 598; 12 Asp. M. L. C. 240.

*Annotation :*—**Refd.** The Caliph, [1912] P. 213.

*See, now,* Maritime Conventions Act, 1911 (c. 57), ss. 4 (1), 9 (2).

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established that the departure from the regulation could not by any possibility have contributed to the accident.—COAL CLIFF COLLIERIES, LTD. *v.* THE SAROS, HAZELWOOD S.S. CO., LTD. *v.* THE SAROS (1915), 16 S. R. N. S. W. 11.—**AUS.**

p. ——.]—THE GOVIUS (1880), 6 Q. L. R. 57.—**CAN.**

q. ——.]—Contrarily to the rule applied in England, a breach of the regulations of navigation creates no presumption, in Canada, that a collision following the same was due to it, & the party charging fault must establish it in the ordinary way.—MONTREAL HARBOUR COMRS. *v.* THE ALBERT M. MARSHALL (1908), Q. R. 34 S. C. 299.—**CAN.**

r. ——.]—THE MARGARET *v.* THE TUSCAR (1866), 15 L. T. 86.—**IR.**

t. ——.]—If there be a defect in lights, the vessel with the defect must be held to blame unless she can show the defect could not have contributed to the collision.—WHITEWAY *v.* POWER (1892), 7 Nfld. L. R. 625.—**NFLD.**

*Sect. 6.—General incidence and extent of liability: Sub-sect. 2, B.: sub-sects. 3 & 4.]*

*B. For Failure to Stand by and Render Assistance.*

**6584. Former law.**]—THE QUEEN OF THE ORWELL (1863), 7 L. T. 839; 11 W. R. 499; 1 Mar. L. C. 300.

**6585.** ——.]—THE ADRIATIC (1875), 33 L. T. 102; 3 Asp. M. L. C. 16.

**6586.** ——.]—THE EMMY HAASE (1884), 9 P. D. 81; 53 L. J. P. 43; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. L. C. 216.

*Annotations:*—**Refd.** S.S. Kwang Tung *v.* S.S. Ngapoota, [1897] A. C. 391; U.S. Shipping Board *v.* Laird Line, [1924] A. C. 286.

**6587.** ——.]—THE SUSSEX, [1904] P. 236; 73 L. J. P. 73; 90 L. T. 549; 20 T. L. R. 381; 9 Asp. M. L. C. 578.

**6588.** ——.]—THE TRYST, [1909] P. 333; 79 L. J. P. 17; 101 L. T. 716; 11 Asp. M. L. C. 333.

*See, now,* Maritime Conventions Act, 1911 (c. 57), s. 4 (2).

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SUB-SECT. 3.—PRINCIPLE OF NON-CONTRIBUTION BETWEEN JOINT TORTFEASORS.

**6589. Whether principle applicable.**]—DEVONSHIRE (OWNERS) *v.* BARGE LESLIE (OWNERS), No. 5326, *ante.*

**6590.** —— **Collision of two negligent vessels causing damage to third.**]—In an action of damage by collision both vessels were found to blame. The decree, in the usual form, condemned the owners of defts.' vessel & their bail in a moiety of pltfs.' claim in respect of the said damage, & the owners of pltfs.' vessel & their bail in a moiety of defts.' counterclaim in respect of the said damage. At the reference the registrar added to the moiety of pltfs.' claim, payable by defts., a moiety of the amount of damage recovered from pltfs. by the owners of a barge against which pltfs.' vessel was driven in consequence of the collision. Defts. appealed on the ground that, as pltfs. & defts. were joint tortfeasors, no contribution could be claimed from defts. in respect of the damage to the barge paid by pltfs.:—*Held:* the decree in Admlty. had been properly carried out by adding to the moiety of their damage claimed by pltfs. a moiety of the consequential damage recovered by the barge owner from pltfs., & it was not material that the damage arose out of a tort.—THE FRANKLAND, [1901] P. 161; 70 L. J. P. 42; 84 L. T. 395; 17 T. L. R. 419; 9 Asp. M. L. C. 196.

*Annotations:*—**Consd.** The Cairnbahn, [1914] P. 25. **Expld.** The Koursk, [1924] P. 140. **Refd.** The General Havelock (1905), [1906] P. 3, n.; The Seacombe, The Devonshire, [1912] P. 21.

**6591.** —— —— **Separate & independent acts of negligence.**]—By separate & independent acts of negligence on the part of each vessel a collision took place between the *C. C.* & the *K.* As a direct consequence of that collision, & without any intervening act of negligence, the *C. C.* ran into & sank pltfs.' vessel. Pltfs., having recovered judgment against the owners of the *C. C.*, who limited their liability, brought an action against the owners of the *K.* in respect of the same damage:—*Held:* the causes of action were separate & distinct; accordingly the owners of the *C. C.* & the owners of the *K.* were not joint tortfeasors; & therefore, the judgment recovered against the owners of the *C. C.* was not a bar to pltfs.' action against the owners of the *K.*—THE KOURSK, [1924] P. 140; 93 L. J. P. 72; 131 L. T. 700; 40 T. L. R. 399; 68 Sol. Jo. 842; 16 Asp. M. L. C. 374, C. A.

*Annotation:*—**Refd.** Debenhams *v.* Perkins (1925), 133 L. T. 252.

**6592. Action against tug & tow—Both negligent.**]—In an action to recover damages for collision brought against a tug & vessel in tow each of these vessels was found to blame. On motion to amend the judgment by the insertion of words to the effect that each of the wrong-doing vessels was severally liable for one-half only of the entire damages:—*Held:* such amendment ought not to be made.—THE AVON & THE THOMAS JOLIFFE, [1891] P. 7; 63 L. T. 712; 39 W. R. 176; 6 Asp. M. L. C. 605.

*Annotations:*—**Apld.** The Englishman & The Australia [1894] P. 239. **Expld.** The Frankland, [1901] P. 16. **Consd.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Expld.** The Koursk, [1924] P. 140. **Refd.** The Duc d'Aumale (1902), 87 L. T. 674.

**6593.** —— ——.]—A steamship came into collision with a tug, which was towing a barque. The owners of the steamship sued the tug & the barque for the sinking of the steamship, & the tug counterclaimed for the damage sustained by her. All three vessels were found to blame, & the decree condemned the owners of the tug & the owners of the barque in a moiety of the claim of the owners of the steamship, & condemned the owners of the steamship in a moiety of the counterclaim of the tug. At the reference these amounts were ascertained, & the owners of the barque applied for an order that, on payment to the owners of the steamship of the balance due to them on the respective moieties, the owners of the steamship should under 19 & 20 Vict. c. 97, s. 5, execute an assignment of the judgment to them:—*Held:* the application must be refused as the owners of the barque & the owners of the tug were joint tortfeasors & not co-debtors liable for a debt or duty within 19 & 20 Vict. c. 97.—THE ENGLISHMAN & THE AUSTRALIA, [1895] P. 212; 64 L. J. P. 74; 72 L. T. 203; 43 W. R. 670; 11 T. L. R. 58; 7 Asp. M. L. C. 605; 11 R. 757.

*Annotations:*—**Distd.** The Morgengry & The Blackcock [1900] P. 1. **Expld.** The Frankland, [1901] P. 161. **Apld.** The Seacombe, The Devonshire, [1912] P. 21. **Expld.** The Koursk, [1924] P. 140. **Refd.** The Duc d'Aumale (1902), 87 L. T. 674.

**6594.** —— ——.]—A Norwegian barque, whilst in tow of a tug in the Bristol Channel, came into collision with, & sank, a third vessel. Pltfs. owners of the third vessel, brought an action *in rem* against the owners of the barque & the owners of the tug. The owners of the barque having allowed judgment to go by default, the barque was sold by the marshal under a decree condemning that vessel in the amount of pltfs.' damage.

The action proceeded against the tug, & resulted in a decree pronouncing both pltfs.' vessel & the tug to blame, & condemning the owners of the tug

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**PART XII. SECT. 6, SUB-SECT. 2.—B.**

**a.** *Consequences of failure to stand by—Ship deemed to have caused collision.*]—*Re* THE LIBERTY (1864), 2 S. V. A. R. 102.—**CAN.**

**b.** —— ——.]—ESQUIMALT & NANAIMO RY. CO. *v.* THE CUTCH (1893), 3 Exch. C. R. 362.—**CAN.**

**c.** —— ——.]—Where a vessel does not stop or offer to render assistance to the vessel collided with, but proceeds on her way without giving her name & the other information which is required by M. S. Act, 1873, & no excuse is shown for such failure to comply with the law, that failure alone, if the case be otherwise doubtful, will fix the responsibility on the one so acting.—*Re* THE CLARA KILLAM (1875), 2 Q. L. R. 56.—**CAN.**

**d.** —— ——.]—In a case of collision, if the vessel in default improperly pursue her course deserting & declining to assist the injured vessel & if the crew of the latter, under well grounded apprehension of danger to their lives, abandon her, & she in consequence goes ashore, & becomes a total loss, the vessel in default will be held liable for the loss, though it may appear probable that, if the crew of the vessel injured had remained on board, such total loss might not have occurred.—THE LINDSAY (1867), 1 I. R. Eq. 259.—**IR.**

in a moiety of pltfs.' damage. On the question of the division of loss :—*Held :* pltfs. were entitled to proceeds in ct. of the barque, in part satisfaction of the whole of their damage under the decree by default against that vessel, & they were also entitled to a moiety of their damage from the owners of the tug, under the decree of both to blame, the proceeds of the barque, & the moiety due from the owners of the tug, taken together, not exceeding the whole of pltfs.' loss.—THE MORGENGRY & THE BLACKCOCK, [1900] P. 1 ; 69 L. J. P. 3 ; 81 L. T. 417 ; 48 W. R. 121 ; 16 T. L. R. 14 ; 8 Asp. M. L. C. 591, C. A.

*Annotation :*—**Refd.** The Seacombe, The Devonshire, [1912] P. 21.

**6595. —— Tug only negligent.**]—THE STORMCOCK, No. 5106, *ante*.

**6596. —— ——.**]—DEVONSHIRE (OWNERS) *v.* BARGE LESLIE (OWNERS), No. 5326, *ante*.

**6597. Action by tow—Against tug & third vessel.**]—In an action of damage, brought by the owners of a barge against the owners of a steamship, & the owners of a tug, which had the barge in tow, in respect of a collision between the steamship & the barge, the steamship & the tug were found to blame in equal degree, & the owners of the steamship having paid the owners of the barge the amount of the damage sustained by this barge, they included this amount in their claim against the owners of the tug :—*Held :* the case was not governed by the common law rule as to no contribution between joint tortfeasors, &, therefore, applying the principles laid down by Maritime Conventions Act, 1911 (c. 57), s. 1, the owners of the steamship were entitled, as against the owners of the tug, to half the amount of the damage sustained by the steamship, including therein half the amount of the damage sustained by the barge. —THE CAIRNBAHN, [1914] P. 25 ; 83 L. J. P. 11 ; 110 L. T. 230 ; 30 T. L. R. 82 ; 12 Asp. M. L. C. 455, C. A.

*Annotations :*—**Refd.** The Umona, [1914] P. 141 ; The Cedric, [1920] P. 193 ; The Batavier III. (1925), 134 L. T. 155.

SUB-SECT. 4.—LIMITATION OF TIME.

*See, now,* Maritime Conventions Act, 1911 (c. 57), s. 8.

**6598. Effect of Maritime Conventions Act, 1911 (c. 57), s. 8—On limitation under Fatal Accidents Act, 1846 (c. 93).**]—A claim against a vessel, or her owners, for damages for loss of life may, under Maritime Conventions Act, 1911 (c. 57), s. 8, be brought within two years from the date when the loss was caused, notwithstanding the provisions of Fatal Accidents Act, 1846 (c. 93), by which an action to recover damages for loss of life must be commenced within twelve calendar months after the death of deceased person.—THE CALIPH, [1912] P. 213 ; 82 L. J. P. 27 ; 107 L. T. 274 ; 28 T. L. R. 597 ; 12 Asp. M. L. C. 244.

*Annotations :*—**Folld.** The Espanoleto, [1920] P. 223. **Consd.** The Danube II. (1921), 125 L. T. 156 ; The Kashmir, [1923] P. 85.

**6599. —— Relation to Crown—Action by Lords Commissioners of Admiralty.**]—The provisions of Maritime Conventions Act, 1911 (c. 57), do not bind the Crown, & an action by the Lords Comrs. of the Admlty. in respect of damage to one of His Majesty's ships need not be instituted within two years from the date of the damage as provided by Maritime Conventions Act, 1911 (c. 57), s. 8.—THE LOREDANO, [1922] P. 209 ; 91 L. J. P. 158 ; 127 L. T. 158 ; 38 T. L. R. 516 ; 15 Asp. M. L. C. 565.

**6600. Cause of action before passing of Maritime Conventions Act, 1911 (c. 57)—Action begun after passing of Act.**]—THE ENTERPRISE, No. 6583, *ante*.

**6601. Action against Crown servants—Application of Public Authorities Protection Act, 1893 (c. 61).**]—Above Act applies to servants of the Crown acting within the scope of their public duties, & the Act is not impliedly repealed, as regards actions in respect of damage by collision, by Maritime Conventions Act, 1911 (c. 47), s. 8, which provides that no action shall be maintainable to enforce any claim against a vessel or her owners, or any other person responsible for the fault of the vessel in respect of any damage to another vessel unless the proceedings are commenced within two years.

Accordingly, actions against commissioned officers in charge of His Majesty's ships for damage by collision must be commenced within six months & not within the period of two years allowed by Maritime Conventions Act, 1911 (c. 57).—THE DANUBE II., [1921] P. 183 ; 90 L. J. P. 314 ; 125 L. T. 156 ; 37 T. L. R. 421 ; 65 Sol. Jo. 396 ; 15 Asp. M. L. C. 187, C. A.

*Annotation :*—**Refd.** The Wilhelmina, [1923] P. 112.

**6602. Issue of writ within two years—Res not within jurisdiction.**]—It is not necessary that, at the time of the issue of a writ *in rem*, the *res* should be within the jurisdiction of the ct. ; & Maritime Conventions Act, 1911 (c. 57), s. 8, which provides that in the case of collision or salvage actions the proceedings must be commenced within two years of the cause of action, is complied with if the writ is issued within two years ; the sect. does not contemplate that the arrest of the *res* constitutes the commencement of the proceedings.

In general, the ct. will not grant an extension of time for the renewal of an unserved writ, which has not been renewed within the period of one year as provided by R. S. C., Ord. 8, r. 1, if, but for the extension of time, the claim would be barred by a Statute of Limitations. But, inasmuch as Maritime Conventions Act, 1911 (c. 57), s. 8, contains provisoes for extension of time unknown to any other Statutes of Limitation, the application to renew a writ in an action which comes within the operation of Maritime Conventions Act, 1911 (c. 57), s. 8, must be considered on its merits, & if, under the circumstances, the ct. would give leave to issue a writ notwithstanding the lapse of two years, the ct. will allow an extension of time for the renewal of a writ, the time for the renewal of which has expired.—THE ESPANOLETO, [1920] P. 223 ; 90 L. J. P. 32 ; 125 L. T. 121 ; 36 T. L. R. 554 ; 15 Asp. M. L. C. 287.

**6603. Entry of appearance after two years—Whether waiver of benefit of statute.**]—Maritime Conventions Act, 1911 (c. 57), s. 8, provides that no action shall be maintainable to enforce any claim against a vessel or her owners in respect of (*inter alia*) salvage services unless the proceedi are commenced within two years from the date when the services were rendered :—*Held :* by entering an unconditional appearance to a writ issued more than two years after the date of the services, defts. do not waive the right of pleading the protection of the statute in their defence & raising it at the trial of the action.—THE

**PART XII. SECT. 6, SUB-SECT. 4.**

e. *Two years.*]—A suit to recover damages for the loss of a ship caused by collision at sea in an action of tort founded upon the negligence of deft. or his servants in the management of his vessel & must be brought within two years under Limitation Act (XV of 1877), Art. 36, Sch. 2.—ESSOO BHAYAJI *v.* THE SAVITRI (1886), I. L. R. 11 Bom. 133.—**IND.**

*Sect. 6.—General incidence and extent of liability: Sub-sects. 4 & 5, A.*]

LLANDOVERY CASTLE, [1920] P. 119; 89 L. J. P. 141; 124 L. T. 383; 15 Asp. M. L. C. 153.

**6604. Effect of decree of limitation of liability.**]—A decree of limitation of liability under 1894 Act, ss. 503, 504, under which all claims against limitation fund are ordered to be brought in within a certain time, usually three months, does not override the provisions of Maritime Conventions Act, 1911 (c. 57), s. 8, & rival claimants to the limitation fund are entitled to object, if more than two years have elapsed since the cause of action, to the claims of persons who have not commenced proceedings within the statutory period of two years provided for in Maritime Conventions Act, 1911 (c. 57).

Generally speaking, however, if the cause for not issuing a writ in respect of the damage sustained has been the fact that limitation proceedings are pending, that would be sufficient ground for the exercise of the discretion vested in the ct. under Maritime Conventions Act, 1911 (c. 57), to extend the time for the issue of a writ notwithstanding that the period of two years has expired.—THE DISPERSER, [1920] P. 228; 89 L. J. P. 257; 123 L. T. 683; 36 T. L. R. 578; 15 Asp. M. L. C. 112.

**6605. Discretion to extend time—Lack of opportunity of obtaining necessary information.**]—THE CAMBRIC (1912), 29 T. L. R. 69.

**6606. —— Undue delay in making application.**]—H.M.S. ARCHER, No. 6553, *ante*.

**6607. —— Opportunity of arrest.**]—On Sept. 15, 1916, a collision occurred between the steamship *P. H.* & the steamship *C.* In an action by the owners of the *P. H.* against the owners of the *C.* the latter pleaded that the fault was that of the *C.* &/or in the alternative, of the steamship *P. L. M.* 8, then called the *V.*; & in a separate action the owners of the *C.* sued the owners of the *V.* The two actions were tried in Mar. 1920, & the ct. found in both actions that the fault was solely that of the *V.* Thereupon the owners of the *P. H.* issued a writ against the owners of the *P. L. M.* 8, the *V.*, to recover the amount of the damage sustained in the collision with the *C.* The owners of the *P. L. M.* 8 moved to set aside the writ on the ground that, more than two years having elapsed since the date of the collision, under Maritime Conventions Act, 1911 (c. 57), s. 8, the action was not maintainable.—*Held:* as the owners of the *P. H.* were aware that the owners of the *C.* blamed the *P. L. M.* 8, & there had been ample opportunity within the two years of arresting her & joining her as a deft., the discretion vested in the ct. under Maritime Conventions Act, 1911 (c. 57), s. 8, to extend the time ought not to be exercised in pltfs.' favour; & the action declared not maintainable.—THE P. L. M. 8, [1920] P. 236; 90 L. J. P. 45; 123 L. T. 560; 36 T. L. R. 552; 15 Asp. M. L. C. 51.

**6608. —— ——.**]—Pltfs.' steamship, the *L. D.*, & defts.' steamship the *L. L.*, collided in Sept. 1917. The *L. L.* was at the time & till Mar. 21, 1919, under requisition. From Mar. 25 to Apr. 4, 1919, she was within the jurisdiction at Barry Roads, but not again till Feb. 1920. Pltfs. obtained leave on an *ex parte* application to issue a writ in Mar. 1920. Defts. now moved to have the writ set aside. Pltfs. denied & defts. affirmed that the period from Mar. 25 to Apr. 4, 1919, had provided " a reasonable opportunity of arresting " the *L. L.* within Maritime Conventions Act, 1911 (c. 57), s. 8:—*Held:* there could have been no effective arrest of the vessel while she was under requisition, & the period alleged did not constitute a " reasonable opportunity " within Maritime Conventions Act, 1911 (c. 57), s. 8.—THE LARGO LAW (1920), 123 L. T. 560; 15 Asp. M. L. C. 104.

**6609. —— Limitation proceedings pending.**]—THE DISPERSER, No. 6604, *ante*.

**6610. —— No knowledge of exact amount of claim—Inconvenience & injustice to defendants.**]—THE JAMES WESTOLL (1913), [1923] P. 94, n.; 132 L. T. 717, n.; 16 Asp. M. L. C. 453, n., C. A.

*Annotations:*—**Apld.** The Kashmir, [1923] P. 85; The Arraiz (1924), 132 L. T. 715. **Refd.** H.M.S. Archer, [1919] P. 1.

**6611. —— No knowledge of exact circumstances of damage.**]—Maritime Conventions Act, 1911 (c. 57), s. 8, which provides that no action shall be maintainable to enforce any claim against a vessel or her owners in respect of (*inter alia*) damages for loss of life unless proceedings are commenced within two years from the date when the loss was caused, gives defts. rights which should not without good reason be set aside under the proviso in the sect. that the ct. may extend the period to such extent & on such terms as it thinks fit. The mere fact that plft. did not know that he had a cause of action is not sufficient reason for interfering with the operation of the statutory limitation. Pltf. was the mother of an American soldier who was drowned at sea on Oct. 6, 1918, as the result of a collision between defts.' steamship & the transport in which he was being carried. Pltf. knew that her son had been drowned, but was unaware until the summer of 1922 of the precise circumstances under which the loss occurred or that she had a legal right of action against defts., who had been held partly to blame for the collision. Her writ was issued in Dec. 1922:—*Held:* the reason for the delay in issuing the writ was insufficient for the exercise of the ct.'s discretion to extend the time, & that accordingly the action was not maintainable.—THE KASHMIR, [1923] P. 85; 92 L. J. P. 113; 128 L. T. 681; 39 T. L. R. 197; 16 Asp. M. L. C. 81, C. A.

*Annotation:*—**Apld.** The Arraiz (1924), 132 L. T. 715.

**6612. —— Applies to action in personam & in rem.**]—By Maritime Conventions Act, 1911 (c. 57), s. 8, no action is maintainable by the owners of any vessel to enforce a claim in respect of damage to such vessel occasioned by the fault of another vessel unless proceedings are commenced within two years from the date of the damage; provided that the ct. may extend such time as it thinks fit, & shall if satisfied that there has been no reasonable opportunity of arresting deft.'s vessel within the jurisdiction during the period, extend the time so as to give such opportunity:—*Held:* the whole proviso was applicable to actions *in rem* & *in personam* alike, & that the ct. could therefore at its discretion extend the time for bringing an action *in rem* notwithstanding that there had been an earlier opportunity of arresting deft.'s vessel.—THE ARRAIZ (1924), 132 L. T. 715; 40 T. L. R. 867; 16 Asp. M. L. C. 451, C. A.

### SUB-SECT. 5.—MEASURE OF

### *A. In General.*

**6613. Full amount of damage—From ship in default.**]—Term compensation is not very accu-

**PART XII. SECT. 6, SUB-SECT. 5.—A.**

**6613 i.** *Full amount of damage—From ship in default.*]—The fundamental principle in determining the measure of damages in all these cases of collision is that the party to blame is considered a wrong-doer, & the party injured is entitled to *restitutio in integrum*, to full & complete indemnity for all the

rately applied to any restitution that falls short of a fair & full indemnification.

The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, & of whom the other parties who suffered damage knew nothing, & over whom they had no control (LORD STOWELL). —THE DUNDEE (1823), 1 Hag. Adm. 109; cited in 4 L. J. O. S. K. B. at p. 150; 166 E. R. 39; *subsequent proceedings* (1827), 2 Hag. Adm. 137.

*Annotations:*—**Consd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795; The Dictator, [1892] P. 304. **Refd.** The Girolamo (1834), 3 Hag. Adm. 169; The John Dunn (1840), 1 Wm. Rob. 159; Langton *v.* Horton (1842), 5 Beav. 9; Cope *v.* Doherty (1858), 31 L. T. O. S. 173; The Duna (1861), 5 L. T. 217; The Milan (1861), Lush. 388; The Wild Ranger (1862), Lush. 553; *Re* Salmon & Woods, *Ex p.* Gould (1885), 2 Morr. 137; Colman *v.* Chamberlain (1890), 25 Q. B. D. 328.

**6614.** —— —— **Though other concurrent cause.**]—A successful pltf. in a cause of damage is entitled to be reimbursed by deft. to the extent, but only to the full extent, of the damage occasioned.

The burden of proving the damage done lies in the first instance upon pltf., but it is for deft. to show that, notwithstanding *primâ facie* evidence to the contrary, there was another & concurrent cause to which the damage may be attributed.

If a portion only of the damage is clearly attributable to the wrongdoer, & that portion cannot be distinguished from the rest, the wrongdoer is responsible for the whole damage.

Even though the injured vessel may have been at the time of collision in such a condition that the collision occasioned an unusual amount of damage, a wrongdoer is nevertheless responsible for all the consequences.

A schooner, having previously encountered severe weather, put into Gibraltar, & while at anchor there was injured by a steamer. The steamer being to blame for the collision, the registrar & merchants, considering it probable that the subsequent condition of the vessel was caused partly by the previous severe weather & partly by the collision, divided the damage:—*Held:* on behalf of the schooner there was *primâ facie* proof that all the damage was caused by the collision, & the owners of the steamer having failed to rebut by conclusive evidence such proof, they were responsible for all the damage.—THE EGYPTIAN (1864), 10 L. T. 910; 2 Mar. L. C. 56.

**6615. Both vessels to blame—Apportionment of damage.**]—THE PETERSFIELD *v.* THE JUDITH RANDOLPH (1789), cited in 2 Ecc. & Ad. at p. 110, n.; 164 E. R. 335.

*Annotations:*—**Consd.** Stoomvaart Maatschappij Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795. **Refd.** The Monarch (1839), 1 Wm. Rob. 21; The Jupiter *v.* The Swanland (1855), 4 L. T. 774.

**6616.** —— ——.]—THE TAY *v.* THE COMMERCE (1850), as reported in 4 L. T. 774.

*Annotations:*—**Refd.** The William Frederick, The Byfoged Christensen (1879), 4 App. Cas. 669; The Olympic & H.M.S. Hawke, [1913] P. 214.

**6617. Duty of injured vessel — To mitigate damages.**]—Where one ship is run down by another, through no default, previously to the collision, on the part of the ship run down, the fact of the latter ship not having taken all proper measures & the most prudent means to mitigate the consequences of the collision, subsequently to its occurrence, does not necessarily disentitle her to indemnity against the ship running her down.—THE ELIZABETH *v.* THE LOTUS (1865), Holt, Adm. 181; 2 Mar. L. C. 238.

—.]—A person injured must ordinarily mitigate damages if he can reasonably do so (A. L. SMITH, L.J.).—THE MEDIANA, [1899] P. 127; 80 L. T. 173; 8 Asp. M. L. C. 493, C. A.; *on appeal, sub nom.* MEDIANA (OWNERS) *v.* COMET (OWNERS, ETC.), THE MEDIANA, [1900] A. C. 113, H. L.

*Annotations:*—**Refd.** The Bodlewell, [1907] P. 286; The Astrakhan, [1910] P. 172; The Tugela (1913), 30 T. L. R. 101; The Kingsway, [1918] P. 344; Admiralty Comrs. *v.* S.S. Valeria, [1922] 2 A. C. 242; The Molière (1924), 41 T. L. R. 154; Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637; Admiralty Comrs. *v.* S.S. Susquehanna, [1926] A. C. 655.

**6619. Improper conduct by claimants—Damages modified.**]—SILLS *v.* BROWN, No. 6436, *ante*.

**6620. Deduction of money paid by insurers.**]—Pltf. sued defts. for damaging his ship by collision:—*Held:* defts. were not entitled to deduct from the amount of damages to be paid by them, a sum of money paid to pltf. by insurers in respect of such damage.—YATES *v.* WHYTE (1838), 4 Bing. N. C. 272; 1 Arn. 85; 5 Scott, 640; 7 L. J. C. P. 116; 5 L. T. 525; 132 E. R. 793.

*Annotations:*—**Apld.** Bradburn *v.* G. W. Ry. (1874), 31 L. T. 464. **Consd.** Jebsen *v.* East & West India Dock Co. (1875), L. R. 10 C. P. 300; Simpson *v.* Thomson (1877), 3 App. Cas. 279. **Refd.** Morgan *v.* Price (1849), 4 Exch. 615; Kemp *v.* Halliday (1866), 6 B. & S. 723; Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639; Stringer *v.* English & Scottish Marine Insce. (1870), 10 B. & S. 770; Jamal *v.* Moolla Dawood, [1916] 1 A. C. 175; Hill *v.* Showell (1918), 87 L. J. K. B. 1106. **Mentd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561.

**6621. Damages less than amount tendered—Repayment of balance.**]—THE R. W. BOYD (1886), cited in [1894] P. at p. 270; 43 W. R. at p. 175.

*Annotation:*—**Folld.** The Mona, [1894] P. 265.

**6622.** —— ——.]—In an action of damage by collision defts. admitted their liability, & agreed to pay a certain percentage of pltfs.' proved, or agreed, damages & taxed costs. The parties being unable to agree as to the amount of the damages, the question was, by consent, referred to the

losses sustained.—MAGDALEN ISLANDS S.S. CO. *v.* THE DIANA (1908), 5 E. L. R. 530.—**CAN.**

**6613 ii.** —— —— .]—The wrongdoer in a collision is liable for all the reasonable consequences of his negligence, such damages as flow directly & in the usual course of things from the wrongful act.—CROSSWELL *v.* DABALL (1920), 47 O. L. R. 354; 18 O. W. N. 119.—**CAN.**

**6613 iii.** —— ——.]—(1) The damages to be allowed to owners of cargo for the loss thereof by collision is the market value thereof to the owners at the time & place of delivery, if there is one, & if not, the value is to be calculated, taking into account among other things the cost price, the expenses of transit & importer's profit. (2) A schooner cannot be dealt with like an ordinary commodity sold every day, & in the absence of any market value, the question of damages for the loss of such vessel, resolves itself into what shall be deemed its proper value to the owners as a going concern, in order to determine, which many matters have to be considered such as original price, cost of repairs, amount of insurance, etc.—WARREN & STARR, LTD. *v.* THE PERENE, [1924] Exch. C. R. 229.—**CAN.**

**6613 iv.** —— ——.]—In a case of total loss, arising from collision, where the fault is admitted, it is the duty of the ct. to give the party who has sustained the injury the full value of his ship, as she lay the moment before it occurred; but in doing so, it will narrowly investigate her true market value, considering her age, the several repairs she had undergone from time to time, & the amount for which she was insured at the date of the accident. —THE CUMBERLAND (1861), 12 Ir. Jur. 399.—**IR.**

**6620 i.** *Deduction of money paid by insurers.*]—MORISON & MILNE *v.* BARTOLMEO & MASSA (1867), 5 Macph. (Ct. of Sess.) 848; 39 Sc. Jur. 474.—**SCOT.**

**f.** *Right to have damages assessed—Without admitting liability.*]—MILLER *v.* POWELL (1875), 2 R. (Ct. of Sess.) 976.—**SCOT.**

**g.** *Damages more than amount offending ship liable for—Whether court will re-open matter.*]—THE OLGA *v.* THE ANGLIA (1905), 42 Sc. L. R. 439.—**SCOT.**

**h.** *Duty of injured vessel — To mitigate damages.*]—S.S. BARON VERNON *v.* S.S. METAGAMA, [1927] S. C. 498.—**SCOT.**

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registrar & merchants. Before the hearing of the reference defts. tendered & paid into ct. £750 in satisfaction of the claim. Pltfs. did not accept the amount tendered, & the reference proceeded. The registrar, by his report, found that, at the agreed percentage, the sum due from defts. was £713 16*s.* with interest at 4 per cent. to the date of tender. Pltfs. applied under R. S. C., Ord. 22, r. 5, for payment out to them of the amount tendered, viz. £750:—*Held:* pltfs. were only entitled to the amount due, viz. £713 16*s.*, with interest, as, except the rules expressly dealing with the mode of payment of money into & out of ct. in Admlty. actions, the provisions of R. S. C., Ord. 22, do not affect the Admlty. practice relating to tender.—THE MONA, [1894] P. 265; 63 L. J. P. 137; 71 L. T. 24; 43 W. R. 173; 7 Asp. M. L. C. 478; 6 R. 707.

*Annotations:*—**Apld.** The Chiltonford, [1901] W. N. 48. **Refd.** The Vulcan, [1898] P. 222.

**6623. Necessity for actual pecuniary loss.]**—NO. 7 STEAM SAND PUMP DREDGER (OWNERS) *v.* GRETA HOLME (OWNERS), THE GRETA HOLME, No. 6689, *post.*

**6624.** ——.]—The *P.*, an oil tanker belonging to the Admlty. & engaged in supplying oil fuel to the Fleet, was damaged in a collision with resps.' steamship. Resps. admitted liability, & the damages were referred to the registrar & merchants for assessment. The Admlty. owned a number of tankers, some of which they from time to time chartered for commercial purposes, but it was admitted that neither the *P.* nor the *B.*, which took her place while she was being repaired, would have been chartered. The registrar awarded the Admlty. in respect of loss of use of the *P.* during the time occupied by the repairs a sum based on her commercial value if she had been let on hire, namely, £200 *per diem;* but the President remitted the case to him for reconsideration on the ground that he had adopted a wrong basis of assessement:—*Held:* the damages ought not to be assessed on the footing that the *P.* should be treated as a ship to be let out on a mercantile charter, but should be assessed on the principle of *The Greta Holme*, No. 6689, *post*, with such rates of interest & depreciation as the evidence might justify.

The *P.'s* services during the time of repair were lost. . . . The loss of user for the time of repair made the *P.'s* then capital value infructuous for the time being (LORD SUMMER).—ADMIRALTY COMRS. *v.* SUSQUEHANNA (OWNERS), THE SUSQUEHANNA, [1926] A. C. 655; 95 L. J. P. 128; 135 L. T. 456; 42 T. L. R. 639; 17 Asp. M. L. C. 81; 33 Com. Cas. 1, H. L.

*Annotation:*—**Refd.** Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637.

**6625. Interest on capital value—Where material for assessment wanting.]**—THE IKALA, No. 6677, *post.*

**Reference to registrar & merchants.]**—*See* ADMIRALTY, Vol. I., pp. 215–221, Nos. 1390–1477.

### *B. Loss of Profits.*

#### *(a) In General.*

**6626. Whether actual loss necessary—Loss of anticipated profits.]**—Where a party who has received a damage by collision, claims to be indemnified for a consequential loss, arising from the non-employment of his vessel whilst under repair, he is bound to prove that he has sustained a direct & positive loss; it will not be sufficient to aver that the vessel, if she had not been detained in dock, might have earned certain probable freight, Claim of a steam co. for demurrage, at the rate of £20 *per diem* during the repairs, as being the amount at which the vessel might have been hired, not allowed by the registrar & merchants, & the objection to their report upon this ground overruled.

Upon general principles a party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered (*per* CUR.).

In order to entitle a party to be indemnified for . . . a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, & reasonable proof of the amount (*per* CUR.).—THE CLARENCE (1850), 3 Wm. Rob. 283; 7 Notes of Cases, 579; 14 Jur. 557; 166 E. R. 968; *sub nom.* THE CATHERINE *v.* THE CLARENCE, 5 L. T. 121.

*Annotations:*—**Consd.** The Argentino (1888), 13 P. D. 191. **Refd.** The Risoluto (1883), 8 P. D. 109; The City of Peking (1890), 15 App. Cas. 438; Comet (Owners) *v.* S.S. Mediana, The Mediana (1899), 80 L. T. 173; The Kingsway, [1918] P. 344.

**6627.** —— —— **Under existing contract.]**—A collision occurred between two vessels, the *A.* & the *G.*, shortly after a contract had been made by the owners of the *A.* that upon the completion of her then voyage she should proceed upon another voyage. The repairs to the *A.* made necessary by the collision could not be completed in time to enable her to fulfil the contract. In an action by the owners of the *A.* against the owners of the *G.* the former claimed damages in respect of the loss of the earnings which would have been derived from the employment contracted for:—*Held:* the damages claimed were not too remote, but flowed directly & naturally from the collision, & such damages should be allowed as would represent the loss of ordinary & fair earnings of such a ship as the *A.*, having regard to the fact that the contract had been entered into.—GRACIE (OWNERS) *v.* ARGENTINO (OWNERS), THE ARGENTINO (1889), 14 App. Cas. 519; 59 L. J. P. 17; 61 L. T. 706; 6 Asp. M. L. C. 433, H. L.

*Annotations:*—**Consd.** The Kate, [1899] P. 165; The Racine, [1906] P. 273. **Distd.** The Bodlewell, [1907] P. 286; Remorquage à Helice (Soc. Anon. de) *v.* Bennetts, [1911] 1 K. B. 243. **Apld.** H.M.S. London, [1914] P. 72. **Consd.** The Philadelphia, [1917] P. 101; The Kingsway, [1918] P. 344. **Apld.** The Veraston, [1920] P. 12. **Consd.** Admiralty Comrs. *v.* S.S. Valeria, [1922] 2 A. C. 242; The San Onofre, [1922] P. 243; The Susquehanna, [1925] P. 196. **Apld.** The Chekiang, [1925] P. 80. **Refd.** The City of Lincoln (1889), 15 P. D. 15; The City of Peking (1890), 15 App. Cas. 438; The Walter D. Wallet, [1893] P. 202; Shelbourne *v.* Law Investment & Insce. Corpn., [1898] 2 Q. B. 626; Griffith *v.* Clay, [1912] 2 Ch. 291; Cointat *v.* Myham, [1913] 2 K. B. 220; Quirk *v.* Thomas, [1916] 1 K. B. 516; Spalding *v.* Gamage (1918), 35 R. P. C. 101; Wilson *v.* United Counties Bank, [1920] A. C. 102; S.S. Celia *v.* S.S. Volturno, [1921] 2 A. C. 544; Elliott Steam Tug Co. *v.* Shipping Controller, [1922] 1 K. B. 127; The Zelo, [1922] P. 9.

**6628.** —— —— **Ship working at loss to establish new trade.]**—In the case of a vessel worked at a loss to establish a new trade, & temporarily put out of employment whilst undergoing repairs necessitated by a collision, the contingent profit which may hereafter be earned, when the trade is established, & rates become remunerative, is too remote to be taken into consideration as special damage, &, in such a case, there being no loss, apart from actual expenses, which can be shown to result from the deprivation of the use of the vessel, general damages are also not recoverable from the owner of the wrongdoing ship.—THE BODLEWELL, [1907] P. 286; 76 L. J. P. 61; 96 L. T. 854; 23 T. L. R. 356; 10 Asp. M. L. C. 479.

**6629. What profits recoverable—Salvage.]**—In a cause of collision the protest of the master of a foreign vessel, which being in distress was in tow

by the vessel run foul of, is *res inter alios acta*, & not admissible evidence where no necessity exists. The ct. may order compensation for consequential damage.—THE BETSY CAINES (1826), 2 Hag. Adm. 28; 166 E. R. 154.

*Annotations*:—**Distd.** Remorquage à Hélice (Soc. Anon. de) v. Bennetts, [1911] 1 K. B. 243. **Refd.** The Argentino 1 P. D. 191.

**6630. —— Loss of charterparty—Less saving of wear & tear.**]—A barque, lying in the Madras Roads, was chartered to proceed to the Coromandel coast, & there load a cargo for London, at a freight of 55*s.* per ton. When about to proceed to her loading port she was run into & seriously damaged by a ship whose owners admitted their liability for the collision. At a reference before the registrar, assisted by merchants, to assess the damages, it was proved that, owing to the barque having been delayed at Madras for repairs, rendered necessary by the collision, the charterers had acquired a right to cancel the charterparty, & that they had cancelled the charterparty; afterwards, when the repairs were completed, the barque being unable to procure more profitable employment, sailed from Madras for London with cargo, at a freight of 45*s.* per ton. The registrar disallowed a claim made by pltfs. in respect of the loss of the charterparty so cancelled, & pltfs. appealed to the ct.:—*Held*: the case must be again referred to the registrar, with directions to include in the amount of damages a sum in respect of the loss of the charterparty.

Among the deductions . . . will have to be considered . . . the saving of what is called wear & tear of the vessel (SIR ROBERT PHILLIMORE).—THE STAR OF INDIA (1876), 1 P. D. 466; 45 L. J. P. 102; 35 L. T. 407; 25 W. R. 377; 3 Asp. M. L. C. 261.

*Annotations*:—**Consd.** The Argentino (1888), 13 P. D. 191. **Refd.** The City of Chester (1884), 9 P. D. 182; The Kate, [1899] P. 165.

**6631. —— Profits earned by substituted ship.**]—THE YORKSHIREMAN (1827), 2 Hag. Adm. 30, n.; 166 E. R. 155.

**6632. —— ——.**]—The vessel *C.*, which was proceeding in ballast to Montreal to load a cargo of grain for the United Kingdom pursuant to charterparty, was injured by collision with another vessel, & compelled to put into port to repair. The repairs necessarily occupied so long a time that it was not reasonably possible for the *C.* to have arrived at Montreal in time to fulfil her charter before the navigation of the St. Lawrence was stopped by ice for the winter. In these circumstances the owners of the *C.* abandoned the charter, & it was found that they acted prudently in so doing:—*Held*: the loss arising from the abandonment of the charter was a loss caused by the collision.—THE CONSETT (1880), 5 P. D. 229; 5 Asp. M. L. C. 34. n.

*Annotations*:—**Consd.** The Argentino (1888), 13 P. D. 191. **Refd.** The Kate, [1899] P. 165.

**6633. —— Anticipated profits under existing contract.**]—GRACIE (OWNERS) *v.* ARGENTINO (OWNERS), THE ARGENTINO, No. 6627, *ante*.

**6634. —— Loss of freight.**]—THE NORHAM CASTLE (1895), 11 T. L. R. 321.

**6635. —— ——.**]—In 1917 a ship, which had been chartered by the Admlty., was damaged owing to a collision with another ship, the latter being solely to blame, & was detained for a week for repairs. At the time of the collision the chartered ship was used as an ordinary trading vessel for freight. In assessing the damage caused by the detention of the ship for repairs:—*Held*: the measure of damages was the amount of freight which, but for the accident, the ship would have earned during the period of detention, plus working expenses, & was not the sum of the actual out of pocket expenses, including the cost of the hire of the ship, to which the Admlty. were put during that period.—ADMIRALTY COMRS. *v.* S.S. VALERIA, THE VALERIA (NO. 2), [1922] 2 A. C. 242; 92 L. J. K. B. 42; 128 L. T. 97; 16 Asp. M. L. C. 25, H. L.

*Annotations*:—**Consd.** The Chekiang, [1925] P. 80; Admiralty Comrs. *v.* S.S. Susquehanna, [1926] A. C. 655. **Refd.** Granby *v.* Bakewell U. D. C. (1923), 87 J. P. 105.

**6636. —— Towage remuneration.**]—A steam tug belonging to pltfs. was engaged under a towage contract in towing a ship when a steamship belonging to deft., by the negligence of deft.'s servants, came into collision with & sank the tow. No damage was caused to the tug or her equipment by the collision. In an action brought by pltfs. to recover from deft. as damages the amount of towage remuneration which they would have earned if they had completed the towage contract:—*Held*: pltfs. had no cause of action, for, although there was negligence on the part of deft.'s servants, the loss of towage remuneration was not damage to pltfs. which was the direct consequence of the negligence so as to be recoverable in law.—SOCIÉTÉ ANONYME DE REMORQUAGE À HÉLICE *v.* BENNETTS, [1911] 1 K. B. 243; 80 L. J. K. B. 228; 27 T. L. R. 77; 16 Com. Cas. 24.

*Annotations*:—**Refd.** Elliott Steam Tug Co. *v.* Shipping Controller, [1922] 1 K. B. 127; The Zelo, [1922] P. 7.

**—— Fishing vessels.**]—*See* Sub-sect. 5, B. (*b*), *post*.

**Where ship total loss.**]—*See* Sub-sect. 5, J.,

**Loss of profits recoverable as demurrage.**]—*See* Sub-sect. 5, C., *post*.

(*b*) *Fishing Vessels.*

**6637. What damages recoverable.**]—THE WANDERER *v.* THE KONINGSBERG (1839), 6 L. T. 615.

**6638. ——.**]—THE MARIA ANNA (1856), 5 L. T. 775.

**6639. —— Freight paid to substituted vessel.**]—THE YORKSHIREMAN (1827), 2 Hag. Adm. 30, n.; 166 E. R. 155, n.

**6640. —— Damages for loss of fishing.**]—Pltfs.' steam trawler was sunk by collision between it & defts.' steamship, the latter vessel being along to blame:—*Held*: a claim by pltfs. for loss of fishing till they got a new vessel to replace the one

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**PART XII. SECT. 6, SUB-SECT. 5.—B. (a).**

**6636 i.** *What profits recoverable—Towage remuneration.*]—The loss of profit resulting from the laying-up of a tug while her master & engineer were in attendance at the Wreck Comrs.' Ct. of Investigation:—*Held*: not to be an item which should be allowed on the assessment of damages arising out of a collision between the tug & another vessel.—THE CLEEVE *v.* THE PRINCE RUPERT (B. C.), [1918] 1 W. W. R. 345.—**CAN.**

**k. —— *Anticipated profits.***]—The profits that would have been made if the collision had not taken place are recoverable as part of the damages, & are not too remote.—LAKE ONTARIO & BAY OF QUINTE STEAMBOAT CO., LTD. *v.* FULFORD (1909), 12 Exch. C. R. 483.—**CAN.**

**l. —— *For delay—Detention of ship not frustating voyages.***]—VITRUVIA S.S. CO. *v.* ROPNER SHIPPING CO., [1923] S. C. 574.—**SCOT.**

**m. *Deduction from estimated profit.***]—In an action of damages at the instance of the owners of a ship which had been sunk in a collision, the pursuers claimed to include in the damages sued for the estimated profit on the voyage which was lost in consequence of the collision, & offered a deduction of 10 per cent. from that estimated profit in respect of special contingencies:—*Held*: 10 per cent. was a reasonable deduction in respect of special contingencies.—S.S. BARON VERNON *v.* S.S. METAGAMA, [1927] S. C. 498.—**SCOT.**

**PART XII. SECT. 6, SUB-SECT. 5.—B. (b).**

**6640 i.** *What damages recoverable—Damages for loss of fishing.*]—LANGILLE

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that was sunk was not maintainable.—THE ANSELMA DE LARRINAGA (1913), 29 T. L. R. 587.

**6641. —— —— Value of fish caught by other vessels.**]—A fishing boat was run down by a vessel & was in consequence prevented for some time from continuing her fishing operations, & she obtained judgment against the vessel. The registrar estimated part of the damage sustained by the fishing boat at a sum which he arrived at by considering the value of the fish caught by other boats during the absence of pltf.'s vessel:—*Held:* a proper mode of estimating these damages.—THE RISOLUTO (1883), 8 P. D. 109; 52 L. J. P. 46; 48 L. T. 909; 31 W. R. 657; 5 Asp. M. L. C. 93.

*Annotation:*—**Refd.** The Argentino (1888), 13 P. D. 191.

### *C. Demurrage.*

**6642. Where vessel sunk & value allowed as total loss.**]—Where a vessel is sunk in a collision, & compensation is awarded by the Ct. of Admlty. to the full value of the vessel as for a total loss, pltf. will not be entitled to recover anything in the nature of a demurrage for loss of the employment of his vessel or his own earnings in consequence of the collision.—THE COLUMBUS (1849), 3 Wm. Rob. 158; 6 Notes of Cases, 671; 13 Jur. 285; 166 E. R. 922.

*Annotations:*—**Consd.** British Columbia Saw-Mill Co. *v.* Nettleship (1868), L. R. 3 C. P. 499; The Kate, [1899] P. 165. **Refd.** The Clyde (1856), Sw. 23; Harrison *v.* R., The Levin Lauk (1856), 10 Moo. P. C. C. 202; The Linda (1857), 30 L. T. O. S. 234; The Argentino (1888), 13 P. D. 191; The Racine, [1906] P. 273; The Philadelphia, [1917] P. 101.

**6643. What included—Loss of profit.**]—THE HEBE (1847), 2 Wm. Rob. 530; 5 Notes of Cases, 176; 5 L. T. 121; 166 E. R. 855.

**6644.** —— ——.]—H.M.S. INFLEXIBLE. No. 6646, *post.*

**6645.** —— ——.]—HEARD *v.* HOLMAN. No. 6647, *post.*

**6646. —— Expenses of detention.**]—(1) Where the collision makes the hiring of a steam tug necessary, the cost of the tug must be allowed, though the vessel would probably have hired a steam tug had there been no collision. (2) Discount is to be deducted where it has been paid, or might have been demanded & obtained. (3) The whole actual damage caused by the collision must be allowed. (4) Demurrage includes expenses of detention & loss of profit, & to that extent must be allowed.—H.M.S. INFLEXIBLE (1857), Sw. 200; 28 L. T. O. S. 374; 5 W. R. 517; 166 E. R. 1094.

*Annotations:*—*As to* (4) **Apld.** The City of Peking (1890), 15 App. Cas. 438. *Generally*, **Refd.** The Argentino (1888), 13 P. D. 191.

**6647.** —— ——.]—The ship *A.*, insured in a club, of which defts. were managers, by one of the conditions of which it was provided that, "in case of damage or loss by contact which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sun insured, & also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy," ran into & damaged pltfs.' ship *B.* The owners of the injured vessel caused the ship *A.* to be arrested under process from the Admlty. ct.; whereupon her owner & defts., in order to procure her release, agreed that they or one of them would pay them "the amount of damage which the said ship *B.* has received from the said collision, & also the costs of the proceedings in the Ct. of Admlty. against the ship," to be ascertained, in case of dispute, by R., the average stater:—*Held:* "the ship *B.*," meant "the owners of the ship *B.*," & pltfs. were entitled to recover the same measure of damages under the agreement that they would have been entitled to in the proceedings in the Admlty. Ct., viz. the expenses of repairing their vessel, the costs incurred in the arrest & detention of the *A.*, & the loss of freight during the time the *B.*'s repairs were going on.—HEARD *v.* HOLMAN (1865), 19 C. B. N. S. 1; 6 New Rep. 150; 34 L. J. C. P. 239; 12 L. T. 455; 11 Jur. N. S. 544; 13 W. R. 745; 2 Mar. L. C. 203; 144 E. R. 685.

*Annotation:*—**Refd.** The Argentino (1888), 13 P. D. 191.

**6648. —— Probable earnings of ship during detention—Net earnings.**]—In fixing the amount of demurrage to be paid for the detention of the vessel during the repairs, a deduction must be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in the earning of the freight.—THE GAZELLE (1844), 2 Wm. Rob. 279; 3 Notes of Cases, 75; 8 Jur. 428; 166 E. R. 759.

*Annotations:*—**Refd.** The Hebe (1847), 5 Notes of Cases, 176; The Columbus (1850), 3 Wm. Rob. 158; The Clyde (1856), Sw. 23; The Halley (1867), L. R. 2 A. & E. 3; The Star of India (1876), 35 L. T. 407; The Argentino (1888), 13 P. D. 191; The Munster (1896), 12 T. L. R. 261; The Kate (1899), 68 L. J. P. 41.

**6649.** —— ——.]—THE MATCHLESS (1846), as reported in 5 L. T. 121.

**6650. —— Length of time vessel thrown out of usual employment.**]—The true measure of the length of demurrage caused by a collision is the length of time which, by reason of the collision, the vessel has been thrown out of her usual employment.—THE BLACK PRINCE (1862), Lush. 568; 1 Mar. L. C. 251; 167 E. R. 258.

*Annotations:*—**Distd.** The City of Peking (1890), 15 App. Cas. 438. **Consd.** S.S. Mediana *v.* Comet (Owners), The Mediana, [1900] A. C. 113. **Refd.** The Argentino (1888), 13 P. D. 191.

**6651. —— Time in dock for repairs.**]—DODSON *v.* DENDY (1837), 9 L. T. 811, N. P.

**6652.** —— ——.]—DOBSON *v.* DUNN (1839), 9 L. T. 811.

**6653. —— —— Warship.**]—A Danish warship was just completing a long winter training cruise when she came into collision, in the Sound, with a British vessel, & in an action of damage by collision, brought by the Danish Govt. against the owners of the British vessel, the British vessel was found alone to blame. In ordinary course, the warship would have been docked & overhauled, & not put into commission until three months had elapsed, & would then have been used for a summer training cruise. Before the expiration of the three months the repairs necessitated by the collision were executed, & the vessel ready to be put into commission. At the reference for the assessment of the

*v.* ERNST (N. S.) (1906), 2 E. L. R. 56.—**CAN.**

n. —— *Value of hire of craft.*]—In an action for damages caused by a collision with a fishing craft, where it was shown the owner had lost a week's fishing by reason of the collision, the measure of damages will be represented by the value of her hire for one week, & not the speculative prospects of the fishery.—KING *v.* KEEPING (1883), 6 Nfld. L. R. 516.—**NFLD.**

o. —— *Estimated value of prospective catch of fish.*]—In case of a collision between a steamship & a fishing schooner owing to the fault of the former, by which the fishing vessel is so much injured as to prevent her continuing on her trip to the grounds, the fair measure of damages is the estimated value of a prospective catch of fish by the injured vessel had she been permitted to prosecute her trip.—RHEINHARDT *v.* THE CAPE BRETON (1916), 15 Exch. C. R. 98; 20 D. L. R. 989.—**CAN.**

**PART XII. SECT. 6, SUB-SECT. 5.—C.**

p. *Allowance for loss of time.*]—The measure of damages for the detention of a vessel after a collision is the amount she could have earned while unemployed by reason of it.—THE NORMANTON (1877), 3 Q. L. R. 303.—**CAN.**

damage sustained by the warship a claim of £1,500 for the loss of the use of the vessel was disallowed. On objection to the report :—*Held :* the principles laid down in *The Mediana*, No. 6618, *ante*, with reference to damages for deprivation of the use of a chattel, were applicable to the case of a warship, &, therefore, as, by reason of the wrongful act of defts., the Danish Govt. had not for a period of twenty-two days, during which the repairs rendered necessary by the collision were being executed, had the vessel under their control for use if they wanted her, the registrar was directed to assess the damages on the basis of that portion of the three months, thereby reducing the amount claimable under the head of deprivation of the use of the vessel to something under £400.—THE ASTRAKHAN, [1910] P. 172 ; 79 L. J. P. 78 ; 102 L. T. 539 ; 26 T. L. R. 329 ; 11 Asp. M. L. C. 390.

*Annotation :*—**Refd.** Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637.

**6654.** —— —— **Transaction of business connected with collision.**]—Demurrage is allowed to the owners of a ship damaged by collision during the time that she has been necessarily delayed for the purpose of effecting the repairs rendered requisite by the collision, & of transacting business unquestionably connected with the collision.

As the master has, in some circumstances, the duty cast upon him of acting as agent for the cargo as well as the ship, the making a protest & obtaining the necessary official documents in a foreign port relating to the damage done to both ship & cargo is business unquestionably connected with the collision. Delay in their preparation caused by the dilatoriness of the foreign authorities, & by no default of the master, is chargeable to the collision.—THE CITY OF BUENOS AYRES (1871), 25 L. T. 672 ; 1 Asp. M. L. C. 169.

**6655.** —— —— **Necessity to prove actual loss.**]—THE CLARENCE, No. 6626, *ante*.

**6656.** —— —— ——.]—THE GLENFINLAS, [1918] P. 363, n. ; 122 L. T. 655, n. ; 14 Asp. M. L. C. 594, n.

*Annotation :*—**Apprvd.** The Kingsway, [1918] P. 341.

**6657.** —— —— —— **Work of ship done by substitute ship at defendants' expense.**]—Indemnity for consequential loss from detention of a vessel can only be recovered where there has been actual loss resulting therefrom, & reasonable proof of its amount. In estimating damages resulting from a collision :—*Held :* a claim for demurrage during the detention of the injured vessel in port whilst a substituted vessel, belonging to the same owners, was doing at defts.' expense & indemnity for loss occasioned by the substitution, the work which the injured vessel ought to have done, must be disallowed.—THE CITY OF PEKING *v.* COMPAGNIE DES MESSAGERIES MARITIMES, THE CITY OF PEKING (1890), 15 App. Cas. 438 ; 59 L. J. P. C. 88 ; 63 L. T. 722 ; 39 W. R. 177 ; 6 Asp. M. L. C. 572, P. C.

*Annotations :*—**Expld.** S.S. Mediana *v.* Comet (Owners), The Mediana, [1900] A. C. 113. **Consd.** The Kingsway, [1918] P. 344. **Refd.** The Emerald (1896), 80 L. T. 178, n. ; Admiralty Comrs. *v.* S.S. Susquehanna, The Susquehanna, [1926] A. C. 655.

**6658.** —— —— **Permanent repairs.**]—THE KINGSWAY, No. 6671, *post*.

**6659.** —— —— **Extension beyond time actually under repair—Strike.**]—By reason of a collision, due to the negligence of those in charge of another vessel, pltfs.' vessel was obliged to go into dry dock to repair the damage sustained, &, whilst there, delay occurred owing to a strike of workmen. On objection, on the ground of remoteness, to the allowance by the registrar of an item in pltfs.' claim in respect of this delay :—*Held :* the item, covering the loss of the use of the vessel during the period of the strike, was properly allowed in accordance with the principles of the common law, for the loss flowed directly, naturally, & in the usual or ordinary course of things from the proximate cause, namely, the negligence of defts. in bringing about a collision with pltfs.' vessel, & thereby rendering it necessary to dry dock her for the purpose of repair.—H.M.S. LONDON, [1914] P. 72 ; 83 L. J. P. 74 ; 109 L. T. 960 ; 30 T. L. R. 196 ; 12 Asp. M. L. C. 405.

*Annotations :*—**Distd.** The Kafue (1919), 123 L. T. 559 ; The Charles le Borgne, [1920] P. 15, n. 1. **Refd.** The Amerika, [1914] P. 167 ; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

**6660.** —— —— —— **Loss of convoy.**]—On Jan. 13, 1918, pltfs.' steamship *A.* was damaged in a collision with the steamship *V.*, whose owners admitted liability, & the damages were referred to the registrar for assessment, but for the repairs rendered necessary by the collision the *A.* would have sailed in convoy on Jan. 15. The next convoy with which the *A.* was able to sail did not leave until Jan. 31. The actual repairs to the *A.* occupied only four days :—*Held :* the delay flowed directly from the collision, the damage thereby suffered by pltfs. was not too remote, & accordingly pltfs. were entitled to sixteen days' demurrage.—THE VERASTON, [1920] P. 12 ; 89 L. J. P. 7 ; 122 L. T. 750 ; 36 T. L. R. 30 ; 14 Asp. M. L. C. 595.

**6661.** —— —— —— **Compliance with Governments requirements.**]—THE CHARLES LE BORGNE, [1920] P. 15, n. 1.

*Annotations :*—**Folld.** The Kafue, [1920] P. 15, n. 2. **Distd.** The Veraston, [1920] P. 12.

**6662.** —— —— —— ——.]—THE KAFUE, [1920] P. 15, n. 2 ; 123 L. T. 559 ; 15 Asp. M. L. C. 48.

*Annotation :*—**Distd.** The Veraston, [1920] P. 12.

**6663.** —— —— —— **Annual refit simultaneously effected.**]—Resps.' steamship collided with H.M.S. *Cairo*, a light cruiser, & damaged her. Resps. admitted liability for the collision subject to a reference to the registry for the assessment of damages. The *Cairo* was temporarily repaired at Hankow, & she then proceeded to Hong Kong for permanent repairs. She was shortly due for her annual refit, & after her arrival at Hong Kong the Admlty. decided to do both sets of repairs at the same time. The combined operations occupied about eight weeks, but the registrar found that the time properly allocated to the collision repairs was twenty days, &, in respect of the loss of the use of the *Cairo*, he allowed a sum of £100 *per diem*, this sum being calculated on the basis of 5 per cent. *per annum* on the estimated capital value of the ship at the time of the collision :—*Held :* the fact that the Admlty. took the opportunity of the docking required for the collision repairs to do the refitment repairs, which had not become necessary at the time of the collision, was not a ground for reducing the liability of resps. to make good the damage caused by the collision, & the registrar had rightly allowed damages as for the total deprivation of the use of the vessel for the twenty days.—ADMIRALTY COMRS. *v.* S.S. CHEKIANG, [1926] A. C. 637 ; 95 L. J. P. 119 ; *sub nom.* THE CHEKIANG, 135 L. T. 450 ; 42 T. L. R. 634 ; 17 Asp. M. L. C. 74 ; 32 Com. Cas. 91, H. L.

*Annotation :*—**Consd.** Admiralty Comrs. *v.* S.S. Susquehanna, The Susquehanna, [1926] A. C. 655.

**Damages assessed in foreign currency—Rate of exchange.**]—*See* MONEY & MONEYLENDING, Vol. XXXV., p. 174, No. 39.

*D. Compensation for Depreciation in Value.*

**6664. In addition to expenses of repairs.**]—A yacht belonging to pltf. having been sunk in a

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collision, & evidence having been given that her marketable value was depreciated:—*Held:* in addition to the claims made for repairs, pltf. was entitled to be paid such sum as would compensate for the impaired value.—THE GEORGIANA *v.* THE ANGLICAN (1872), 21 W. R. 280.

**6665. In addition to damages for injury to property.**]—ADMIRALTY COMRS. *v.* SUSQUEHANNA (OWNERS), THE SUSQUEHANNA, No. 6624, *ante*.

*E. Repairs.*

**6666. Full expenses recoverable—For necessary repairs.**]—ALEXANDER *v.* DITCHBURN (1837), 5 L. T. 121.

**6667.** ——.]—HEARD *v.* HOLMAN, No. 6647, *ante*.

**6668.** —— **Though value of ship consequently enhanced.**]—The owners of a ship damaged by collision are entitled to the full expenses of repairing her & fitting her for sea, though such repairs may make her more valuable than she was before the collision. If the charges are extravagant they must be reduced, but for necessary repairs the owners have a right to be reimbursed; & the evidence of skilful persons who saw the ship after the collision is the best proof of that necessity. —THE PACTOLUS (1856), Sw. 173; 28 L. T. O. S. 220; 5 W. R. 167; 166 E. R. 1079.

*Annotations:*—**Apld.** The Munster (1896), 12 T. L. R. 264. **Reld.** Southern Ry. *v.* Gosport Corpn. (1926), 135 L. T. 630.

**6669.** ——.]—THE MUNSTER (1896), 12 T. L. R. 264.

**6670.** —— **Repairs necessary for reconditioning.**]—A successful pltf. in a collision action is entitled to have his ship put into the same condition in which it was previous to the collision at the cost of the wrongdoer irrespective of the fact that some of the repairs necessitated by the collision would shortly have been necessary to enable the ship to pass her classification survey, & in estimating the amount of the wrongdoers liability no deduction can be made on this account. —THE BERNINA (1886), 55 L. T. 781; 6 Asp. M. L. C. 65.

*Annotations:*—**Apld.** The Munster (1896), 12 T. L. R. 264. **Reld.** Southern Ry. *v.* Gosport Corpn. (1926), 135 L. T. 630.

**6671. Expenses of prospective repairs.**]—Pltfs.' steamship received damage in a collision for which defts.' steamship was alone to blame. Sufficient repairs, which took four days, were effected to enable the vessel to continue her voyage. At the time the reference to assess the damages was held no permanent repairs had been effected, & it was improbable that any such repairs would be effected before the end of the war. The district registrar allowed, in addition to the cost of the temporary repairs, (*a*) a sum for demurrage incurred by reason of the temporary repairs; (*b*) a sum in respect of the permanent repairs which would have to be done to restore the ship to the same condition as before the collision; & (*c*) a sum for the prospective loss of time during the execution of such repairs. Defts. appealed:—*Held:* although the permanent repairs had not been done, pltfs. had proved with reasonable certainty that they would be done; & the prospective loss of time which would be occupied in doing such repairs was a proper element to take into account in assessing damages.—THE KINGSWAY, [1918] P. 344; 87 L. J. P. 162; 122 L. T. 651; 14 Asp. M. L. C. 590, C. A.

*Annotations:*—**Reld.** The Chekiang, [1925] P. 80; Admiralty Comrs. *v.* S.S. Susquehanna, [1926] A. C. 655.

**6672.** ——.]—THE GLENFINLAS, [1918] P. 363, n.; 122 L. T. 655, n.; 14 Asp. M. L. C. 594, n.

*Annotation:*—**Reld.** The Kingsway, [1918] P. 344.

**6673. Loss arising from detention for repairs—Prospective loss.**]—THE KINGSWAY, No. 6671, *ante*.

**6674.** ——.]—THE GLENFINLAS, [1918] P. 363, n.; 122 L. T. 655, n.; 14 Asp. M. L. C. 594, n.

*Annotation:*—**Reld.** The Kingsway, [1918] P. 344.

**6675.** ——.]—The *Vitruvia*, in a collision with the *Carperby*, for which the latter vessel was to blame, sustained damage which did not render her unseaworthy. Seven months afterwards she came to Glasgow to have the damage repaired. The repairs, which took about three weeks, were carried out in a wet dock, but on the last day of the operations she went into a dry dock, which then for the first time became available to have her propeller examined & repaired, a defect, unconnected with the collision, having manifested itself immediately prior to her arrival to Glasgow. That defect, which rendered her unseaworthy, was repaired in a few hours.

In an action against the owners of the *Carperby* for damages for detention of the *Vitruvia* during the period necessary to repair the collision damage, the defenders maintained that the pursuers had suffered no loss by that detention, in respect that, during that period, the vessel, owing to the defect in her propeller, was not a seaworthy vessel capable of earning profits.—*Held:* the defenders were liable for damages for the detention, seeing that, had the collision repairs not been necessary the vessel could have been tipped in a wet dock & the repair to the propeller effected without delay. —VITRUVIA S.S. CO. *v.* ROPNER SHIPPING CO., [1925] S. C. (H. L.) 1.

**6676.** —— **Loss on capital value.**]—ADMIRALTY COMRS. *v.* SUSQUEHANNA (OWNERS), THE SUSQUEHANNA, No. 6624, *ante*.

**6677.** —— **Ship completing necessary voyages—Notwithstanding detention.**]—Pltfs.' vessel *S.*, inward bound to this country with a cargo of oil, was run into & damaged by a vessel owned by defts., who admitted liability for 70 per cent. of the proved damages. The *S.* was detained thirteen days while the repairs consequent on the collision were carried out. The collision occurred

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**6666 i.** *Full expenses recoverable—For necessary repairs.*]—The owner of a ship wrongfully injured in a collision is entitled to have her fully & completely repaired.—THE HEATHER BELL, THE FASTNET (1892), 3 Exch. C. R. 40.—**CAN.**

**6666 ii.** ——.]—After a collision between two steam-trawlers for which one was solely to blame, the vessel which was not in fault put into A. for repairs, & then proceeded to her home at G. where she was finally repaired at a cost of about £350, the repairs occupying 14 days. In an action between the owners of the vessels it was proved that the repairs could have been executed in A. in ten days for about £220:—*Held:* the owner of the injured vessel could only recover a sum equal to the cost of repairing the vessel at A. together with compensation for the time which the vessel would have lost if she had been repaired there.—BEUCKER *v.* ABERDEEN STEAM TRAWLING & FISHING CO., LTD., [1910] S. C. 655.—**SCOT.**

**6668 i.** —— *Though value of ship consequently enhanced.*]—The owner of a ship wrongfully injured in a collision is entitled to have her fully & completely repaired, & the increased value of a ship by reason of such repairs is not ground for deduction in the amount of damages recoverable.—INTERLAKE NAVIGATION CO., LTD. *v.* THE GLENFARN, [1925] Exch. C. R. 179.—**CAN.**

**q.** *Laying up of tug.*]—The loss of profit resulting from the laying-up of a tug while her master & engineer were in attendance at the Wreck Comrs.' Ct. of Investigation:—*Held:* not to be an item which should be allowed on the assessment of damages arising out of a collision between the tug & another vessel.—THE CLEEVE *v.* THE PRINCE RUPERT (B. C.), [1918] 1 W. W. R. 345. —**CAN.**

in 1917, in war time, & by arrangement with the Govt. so long as the *S.*, which was owned by an oil importing co., was engaged in carrying oil she was free from requisition. The amount of oil her owners could import was limited to a certain quantity *per annum*, & in fact pltfs. imported during 1917 the maximum quantity allowed.

The registrar, & on appeal the President, on evidence that extra tonnage was chartered, allowed damages for the thirteen days' detention based on the cost of hiring a substituted ship at the market rate for free tonnage :—*Held :* as it appeared that all the extra tonnage chartered during 1917 was chartered in order to carry the full quota & not in consequence of the collision, & that the *S.*, in spite of the detention, made the only other voyage she could have made in 1917, the damages had been assessed on a wrong basis, & the case must go back to the registrar to assess the actual pecuniary loss, taking into consideration the facts that pltfs. imported their full quota of oil during 1917 & that they could not have used the *S.* for any other purpose.

In the absence of material on which the loss could be estimated the registrar might have to award damages on the basis of interest on capital value (SCRUTTON, L.J.).—THE IKALA, [1928] P. 86 ; 97 L. J. P. 46 ; 138 L. T. 508, C. A.

**6678. Expenses exceeding value of ship—Amount recoverable.**]—Where the ship of pltf. carrying cargo was sunk in a collision, & afterwards raised & repaired, & the cost of repairs exceeded the original value of the ship, which might have been ascertained before the repairs were commenced :—*Held :* pltf. could not recover upon a principle of partial loss, but the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would in ordinary course have been delivered, together with the costs of raising, & the cost of placing the ship in dock for inspection, less the value of the wreck as raised [& having been disallowed one half of his claim he was condemned *per curiam* in the costs of the reference].—THE EMPRESS EUGÉNIE (1860), Lush. 138 ; 167 E. R. 66.

*F. Dock Dues.*

**6679. Ship docked for repair of damage—Other repairs effected while in dock—Apportionment of dues.**]—In order to repair the damage sustained in a collision for which defts. were liable, pltfs.' vessel was dry docked, & pltfs., without causing delay or increase of dock expenses, took advantage of the opportunity to fit her with bilge keels :—*Held :* even though pltfs. had derived material benefit, deft. wrongdoers were not entitled to any contribution from them towards the expenses of, & consequent upon the dry docking.—THE ACANTHUS, [1902] P. 17 ; 71 L. J. P. 14 ; 85 L. T. 696 ; 18 T. L. R. 160 ; 9 Asp. M. L. C. 276.

*Annotation :*—**Apprvd.** Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637.

—— —— ——.]—*See, also,* INSURANCE, Vol. XXIX., pp. 245, 246, Nos. 1980-1982.

*G. Salvage.*

**6680. Whether recoverable.**]—REDMAN *v.* CITY OF DUBLIN STEAM PACKET CO. (1840), 5 L. T. 121.

**6681.** ——.]—(1) The vessels *C.* & *L.* came into collision, in consequence of which certain salvage services were rendered to the *C.* The salvors brought a suit & recovered £50. The *L.* was condemned in a suit for damage brought by the *C.* & on reference to the registrar & merchants as to the amount, they struck out the costs of the salvage suit incurred by the *C.* because her owners had made no tender to the salvors. On objection to their report :—*Held :* such costs are, by the practice of the ct., a proper item in the amount to be recovered in a suit for damage, & there is no general principle laid down in *Tindall* v. *Bell*, No. 6684, *post*, to induce the ct. to depart from its usual practice.

(2) It has always been the custom, whenever an action for damage has been brought against another vessel, & where it has been necessary to have recourse to assistance in the nature of salvage, for the remuneration paid for that salvage service to form a part of the claim for damage as well as the costs incurred on both sides in the salvage suit (DR. LUSHINGTON).—THE LEGATUS (1856), Sw. 168 ; 5 L. T. 121 ; 5 W. R. 154 ; 166 E. R. 1077.

*Annotation :*—**Dbtd.** The British Commerce (1884), 9 P. D, 128.

**6682.** ——.]—(1) Defts. in an action for damage before any statement of claim had been delivered, admitted their liability for the damage proceeded for, & by consent the question of amount was by an order of ct. referred to the registrar & merchants to report thereon. At the reference before the registrar pltfs. claimed as damages £295 18*s.* 1*d.* The registrar reported to the ct. that there was due to pltfs. £199 18*s.* 6*d.* Afterwards pltfs. moved the judge to condemn defts. in the costs of the action & of the reference. Evidence was given on affidavit in support of the motion to the effect that pltfs. at the time their action was instituted were liable to a claim for salvage in respect of services rendered to their vessel after the collision, & that subsequently & before the reference £60 had been paid & accepted in settlement of such claim :—*Held :* the ct. had jurisdiction to certify that the case was a fit case to be tried before it, & the proper order to be made was that pltfs. should have the costs of the action, but that each party should bear their own costs of the reference.

(2) The salvage claim, arising as it did out of the collision . . . would have been recoverable from defts. as consequential damages in the collision action (SIR ROBERT PHILLIMORE).—THE WILLIAMINA (1878), 3 P. D. 97.

*Annotation :*—**Reid.** The Saltburn (1892), 69 L. T. 88.

**6683.** —— **Vessel improperly abandoned.**]—THE LINDA, No. 6477, *ante*.

**6684.** —— **Costs of defending salvage suit.**]—(1) In an action for running down a ship, it appeared that pltf. had been obliged in consequence of the injury to employ a steam tug, the owners of which demanded £150 for salvage, & commenced a suit in the Ct. of Admlty. against pltf., who paid £20 into ct. ; the ct. ultimately decreed £45 to the salvors :—*Held :* upon these facts, pltf. was not entitled to recover the amount of the costs incurred by him in that suit.

(2) *Semble :* the proper question for the jury in such a case is, whether, in respect to the suit for salvage, pltf. pursued the course which a prudent & reasonable man would do in his own case ; & if the jury think he did, the costs of the suit may be recovered.—TINDALL *v.* BELL (1843), 11 M. & W. 228 ; 12 L. J. Ex. 160 ; 152 E. R. 786.

*Annotations :*—*As to* (1) **Distd.** The Legatus (1856), Sw. 168. **Reid.** The Wallsend, [1907] P. 302. *As to* (2) **Consd.** Ronneberg *v.* Falkland Islands Co. (1864), 17 C. B. N. S.



r. *Ship docked for repair of damage—Expenses increased by docking difficulties.*]—THE ADMIRALTY *v.* ABERDEEN STEAM TRAWLING & FISHING CO., LTD., [1910] S. C. 553.—**SCOT.**

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1. **Apld.** Mors-le-Blanch *v.* Wilson (1873), L. R. 8 C. P. 227. **Reld.** Broom *v.* Hall (1859), 7 C. B. N. S. 503; Anderson *v.* Hoen, The Flying Fish (1865), 3 Moo. P. C. C. N. S. 77; Baxendale *v.* L. C. & D. Ry. (1874), L. R. 10 Exch. 35; Hammond *v.* Bussey (1887), 57 L. J. Q. B. 58. *Generally*, **Reld.** Nettleingham *v.* Powell (1912), 82 L. J. K. B. 54.

**6685.** —— ——.]—THE LEGATUS, No. 6681, *ante*.

**6686.** —— —— **Commission on bail.**]—Commission paid for bail in a salvage action will not be allowed as part of the damages recoverable by the salved vessel in an action of damage.—THE BRITISH COMMERCE (1884), 9 P. D. 128; 53 L. J. P. 72; 51 L. T. 604; 33 W. R. 200; 5 Asp. M. L. C. 335.

**6687.** —— ——.]—THE KAUSS (1904), 20 T. L. R. 326.

—— **Salvage remuneration.**]—*See* No. 6629, *ante*.

**Salvage, generally.**]—*See* Part XV., *ante*.

*H. Damage to Dredgers.*

**6688. Whether damages recoverable for loss of use—No actual damage sustained.**]—THE RUTLAND (1886), 80 L. T. 177, n.

*Annotation:*—**Consd.** The Greta Holme (1897), 66 L. J. P. 166.

**6689.** —— ——.]—Owing to a collision with a ship, the ship being in fault, a steam dredger was injured & the owners were deprived of the use of it for some weeks, & the dredging works were delayed. The dredger belonged to trustees charged with the duty of maintaining a harbour & waterway, deriving their funds from rates, & not entitled to distribute profits. The trustees having brought a collision suit in the Admlty. against the shipowners:—*Held:* though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger.—No. 7 STEAM SAND PUMP DREDGER (OWNERS) *v.* GRETA HOLME (OWNERS), THE GRETA HOLME, [1897] A. C. 596; 66 L. J. P. 166; 77 L. T. 231; 13 T. L. R. 552; 8 Asp. M. L. C. 317, H. L.; *revsg.* S. C. *sub nom.* THE EMERALD, THE GRETA HOLME, [1896] P. 192, C. A.

*Annotations:*—**Apld.** Mediana (Owners) *v.* Comet (Owners), The Mediana, [1900] A. C. 113; The Bodlewell, [1907] P. 286. **Distd.** Admiralty Comrs. *v.* S.S. Valeria, [1922] 2 A. C. 242. **Consd.** Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637. **Apld.** Admiralty Comrs. *v.* S.S. Susquehanna, [1926] A. C. 655. **Reld.** The Kate (1899), 80 L. T. 423; Mersey Docks & Harbour Board *v.* S.S. Marpessa, [1907] A. C. 241; The Astrakhan (1910), 102 L. T. 539; The Tugela (1913), 30 T. L. R. 101. **Mentd.** Jackson *v.* Watson, [1909] 2 K. B. 193.

**6690.** —— ——.]—A dock & harbour board were deprived of the services of a dredger owing to a collision with a steamship in fault. The dredger cost much to maintain, earned nothing, & was maintained out of the rates:—*Held:* the loss sustained was the value of the work which would have been done by the dredger if she had not been disabled, & a sum for the cost of the daily supplies requisite for the dredger when at work, but not a sum for owners' profit, since the board had not incurred the expense of hiring a dredger.—MERSEY DOCKS & HARBOUR BOARD *v.* MARPESSA (OWNERS), THE MARPESSA, [1907] A. C. 241; 76 L. J. P. 128; 97 L. T. 1; 23 T. L. R. 572; 51 Sol. Jo. 530, H. L.

*Annotations:*—**Apld.** The Tugela (1913), 30 T. L. R. 101. **Distd.** Admiralty Comrs. *v.* S.S. Valeria, [1922] 2 A. C. 242. **Consd.** Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637; Admiralty Comrs. *v.* S.S. Susquehanna, [1926] A. C. 655. **Reld.** The Bodlewell, [1907] P. 286; The Astrakhan (1910), 102 L. T. 539; The Kingsway [1918] P. 344; *Re* Mersey Docks & Admiralty Comrs., [1920] 3 K. B. 223.

**6691.** ——.]—Pltfs.' dredger was sunk by defts.' steamship in the entrance to the Swansea Channel on Feb. 4, 1912. She was raised on Sept. 2, 1912, & was ready for use on Feb. 6, 1913. It was impossible until after she had been raised to dredge where she was sunk, & a bank was formed by the sand silting down on her. After she was raised pltfs. hired another dredger:—*Held:* pltfs. were entitled to damages, not merely for the period during which they had hired another dredger, but also for the period during which they had lost the use of their own dredger by reason of the fact that she was sunk.—THE TUGELA (1913), 30 T. L. R. 101.

**6692. What may be considered—Value of work which would have been performed.**] — MERSEY DOCKS & HARBOUR BOARD *v.* MARPESSA (OWNERS), THE MARPESSA, No. 6690, *ante*.

**6693.** —— **Sum required for daily support of dredger when working.**]—MERSEY DOCKS & HARBOUR BOARD *v.* MARPESSA (OWNERS), THE MARPESSA, No. 6690, *ante*.

**6694.** —— **Not owners' profits—Where no hire of substituted vessel.**]—MERSEY DOCKS & HARBOUR BOARD *v.* MARPESSA (OWNERS), THE MARPESSA, No. 6690, *ante*.

**6695. Period of computation—Period of non-user—Together with period of hire of substituted dredger.**]—THE TUGELA, No. 6691, *ante*.

*I. Action by Cargo Owners.*

**6696. What damages recoverable—Value of goods at port of destination—How value ascertained.**]—It appears to me that the passage which has been read from LORD BLACKBURN'S judgment in *O'Hanlan* v. *Great Western Ry. Co.* (1865), 6 B. & S. 484, is applicable to all those cases where the question is what amount of damages should be allowed. He says "setting aside all special damage," & no question of "special damage was left to the jury," the natural & fair measure of damages is the value of the goods at the place & time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price if there is a market there for such goods. If there is not either from the smallness of the place or the scarceness of the particular goods, the value at the time & place of delivery would have to be ascertained as a fact by the jury taking into consideration various matters, including in addition to the cost price & expenses of transit the reasonable profits of the importer, which are adjusted by what is called the higgling & bargaining of the market (HANNEN, P.).—THE NOTTING HILL (1884), 9 P. D. 105; 51 L. T. 66; 5 Asp. M. L. C. 241.

*Annotations:*—**Reld.** Smith, Edwards *v.* Tregarthen (1887), 56 L. J. Q. B. 437; The Argentino (1888), 13 P. D. 191; Anglo-Argentine Live Stock & Produce Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403; H.M.S. London, [1914] P. 72; Sargant *v.* East Asiatic Co. (1915), 85 L. J. K. B. 277; Montevideo Gas & Drydock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 866. **Mentd.** Victorian Rys. Comrs. *v.* Coultas (1888), 13 App. Cas. 222 Addis *v.* Gramophone Co., [1909] A. C. 488.

**6697.** —— —— **Less expenses of earning value—Cargo owner also shipowner.**]—(1) A ship *A.* & her cargo belonged to same owners, & pltfs. advanced £1,000 as a loan to such owners, & received as security, in conformity with the agreement made between them & the borrowers, the bill



**6692 i.** *What may be considered—Value of work which would have been performed.*]—CANADA DREDGING CO., LTD. ——— NAVIGATION CO., LTD. (Ont.), [1924] Exch. C. R. 163.—CAN.

of lading, on which the master endorsed a receipt for £1,000 as advanced freight, & also a policy of insurance on advanced freight. Ship *A.* was lost through a collision with defts.' vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination & at the port of loading would have considerably exceeded £1,000. In an action by the holders of the bill of lading for £1,000 against defts.' ship:—*Held:* pltfs. were entitled to recover the sum, though it was not strictly speaking advanced freight, but a prospective increase in the value of the cargo, & the insurers were subrogated to the rights of pltfs.

(2) A sum in respect of disbursements for ship *A.* on her voyage & wages paid in advance had been awarded to the owners of the *A.* by the registrar & merchants:—*Held:* this was no bar to pltfs.' right to recover in this action.

(3) In a case of total loss at sea by collision, a shipowner who has cargo of his own on board is entitled to recover in lieu of freight, what would have been the enhanced value of the cargo at its destination, less the expenses of earning that value, & that is the proper form of claim, & not a claim for expenses in making the ship fit for sea, etc.—THE THYATIRA (1883), 8 P. D. 155; 52 L. J. P. 85; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. L. C. 147.

*Annotation:*—**Refd.** The Thyatira (No. 125) (1883), 49 L. T. 713.

**6698.** —— —— **Less proceeds of forced sale.**]—Cargo was laden on board a ship at a foreign port for carriage c.i.f. to an English port. Owing to a collision on the high seas the cargo was damaged, & was subsequently landed at another English port & sold:—*Held:* the damage recoverable against the vessel in fault was the sound value of the cargo if delivered at the English port of destination, less the net proceeds of the sale.—THE ACTIV (1901), 17 T. L. R. 351.

**6699.** —— **Not damages for loss of market.**]—A ship having been damaged by a collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo owners claimed (*inter alia*) for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—*Held:* loss of market was too remote a consequence to be considered as an element of damage, & there was no difference in the principles which regulate the measure of damages in an action of collision, & an action for a breach of duty under a shipping contract.—THE NOTTING HILL (1884), 9 P. D. 105; 53 L. J. P. 56; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. L. C. 241, C. A.

*Annotations:*—**Refd.** Smith, Edwards *v.* Tregarthen (1887), 56 L. J. Q. B. 437; The Argentino (1888), 13 P. D. 191; Anglo-Argentine Live Stock & Produce Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403; H.M.S. London, [1914] P. 72; Sargant *v.* East Asiatic Co. (1915), 85 L. J. K. B. 277; Montevideo Gas & Drydock Co. *v.* Clan Line Steamers (1921), 37 T. L. R. 866. **Mentd.** Victorian Rys. Comrs. *v.* Coultas (1888), 13 App. Cas. 222; Addis *v.* Gramophone Co., [1909] A. C. 488.

——.]—*See, also,* Part XII., Sect. 5, sub-sect. 6, D., *ante.*

*J. Total Loss.*

**6700. Loss of trade.**]—LEVERETT *v.* HILL (1838), 7 L. T. 195.

**6701. Loss of profits—On voyages contracted for.**]—THE UNDINE (1857), 2 Pritchard's Admiralty Dig. 3rd ed., 1761, n.

*Annotation:*—**Distd.** The Kate, [1899] P. 165.

**6702.** —— ——.]—Where ship & cargo are totally lost in a collision, the measure of the loss of freight is the gross freight contracted for at the time of the accident, less the charges which would have been necessarily incurred in earning it, & which were saved to the owner by the accident.—THE CANADA (1861), Lush. 586; 167 E. R. 267.

**6703.** —— ——.]—H.M.S. FORK (1864), 2 Pritchard's Admiralty Dig. 3rd ed., 1761, n.

*Annotation:*—**Consd.** The Kate, [1899] P. 165.

**6704.** —— ——.]—THE APPENDIX (1872), 2 Pritchard's Admiralty Dig. 3rd ed., 1761, n.

*Annotation:*—**Consd.** The Kate, [1899] P. 165.

**6705.** —— ——.]—Where there is a total loss the question of the value of the thing lost at that time is what is to be taken into account, without reference to the prospect of what a vessel would have earned if she had gone on a longer or a shorter voyage than the one on which she was engaged at the time (HANNER, P.).—THE CITY OF ROME (1887), 80 L. T. 426, n.; 8 Asp. M. L. C. 542, n.

*Annotations:*—**Distd.** The Kate, [1899] P. 165. **Dbtd.** The Racine, [1906] P. 273. **Consd.** The Anselma de Larrinaga (1913), 29 T. L. R. 587. **Distd.** The Philadelphia, [1917] P. 101.

**6706.** —— ——.]—Pltf.'s barque, whilst proceeding in ballast from London to a North American port under charter to load a cargo for the Continent, came into collision with defts.' steamer & was totally lost. Defts. admitted liability, & on the reference to assess the damages, the registrar, assisted by merchants, allowed a sum representing the value of pltf.'s barque at the date when she would have accomplished the homeward voyage, together with a sum for the loss of the profit which would have been realised under the charter. On motion in objection to the report on the ground that, in the case of the total, as distinguished from the partial, loss of a vessel without cargo, pltfs. were only entitled to the market value of the vessel at the time of her loss:—*Held:* the proper measure of damage was the value of the vessel at the end of the voyage, plus the profits lost under the charterparty.—THE KATE, [1899] P. 165; 68 L. J. P. 41; 80 L. T. 423; 47 W. R. 669; 15 T. L. R. 309; 8 Asp. M. L. C. 539.

*Annotations:*—**Folld.** The Racine, [1906] P. 273. **Consd.** The Anselma de Larrinaga (1913), 29 T. L. R. 587; The Empress of Britain (1913), 29 T. L. R. 423. **Apprvd.** The Philadelphia, [1917] P. 101.

**6707.** —— ——.]—The measure of damage in the case of a vessel totally lost by collision at a time when she is proceeding from a home port with cargo under charter to a foreign port, thence to proceed under charter to another port, & home under charter from that port, is her value at the date when she would have accomplished the homeward voyage, together with such a sum as will represent the profit which would have been realised under the three successive charters, less a reasonable percentage for contingencies.—THE RACINE, [1906] P. 273; 75 L. J. P. 83; 95 L. T. 597; 22 T. L. R. 575; 10 Asp. M. L. C. 301, C. A.

*Annotations:*—**Folld.** The Empress of Britain (1913), 29 T. L. R. 423. **Expld.** The Philadelphia, [1917] P. 101. **Refd.** Thames & Mersey Marine Insce. *v.* British & Chilian S.S. Co., (1915) 85 L. J. K. B. 384.

**6708.** —— ——.]—The measure of damage in the case of the total loss by collision of a vessel under charter is the value of the vessel at the time of her loss, plus the proper sum for freights or profits at the end of the voyages fixed by her existing charter, subject to proper deduction for contingencies & wear & tear.—THE PHILADELPHIA, [1917] P. 101; 86 L. J. P. 112; 116 L. T. 794; 14 Asp. M. L. C. 68, C. A.

*Annotations:*—**Refd.** The Germania, [1918] A. C. 472; The Kingsway, [1918] P. 344.

**6709. Loss of ship—Computation of value—Evidence.**]—On an appeal from a report of the registrar & merchants new evidence is admissible.

*Sect. 6.—General incidence and extent of liability: Sub-sect. 5, J., K. & L.*]

In estimating the value of a vessel at the time of a collision, whereby she was lost, the best evidence is the opinion of competent persons who knew the vessel shortly before the time of loss; next, the opinion of persons well conversant with shipping generally. The original price of the vessel, the cost of repairs done, the amount at which she was insured, etc., are evidence of value, but evidence of inferior weight.—THE IRON-MASTER (1859), Sw. 441; 166 E. R. 1206.

*Annotations:*—**Follid.** The Harmonides, [1903] P. 1. **Reld.** The Philadelphia, [1917] P. 101.

**6710.** —— ——.]—In estimating the value of a vessel at the time of a collision, whereby she was lost, the test, in the absence of a market value, is what the vessel was fairly worth to her owners from a business point of view.—THE HARMONIDES, [1903] P. 1; 72 L. J. P. 9; 87 L. T. 448; 51 W. R. 303; 19 T. L. R. 37; 9 Asp. M. L. C. 354.

*Annotations:*—**Apld.** The Hohenzollern, [1906] P. 339; Mersey Docks & Harbour Board *v.* Admiralty Comrs. (1920), 123 L. T. 462.

**6711.** —— **Value at time of collision.**]—In case of a total loss the market value of the ship just prior to the collision is what the owner is entitled to.—THE CLYDE (1856), Sw. 23; 5 L. T. 121.

*Annotations:*—**Expld.** The Kate, [1899] P. 165. **N.F.** The Racine, (1906) 22 T. L. R. 575. **Reld.** The Cumberland (1861), 5 L. T. 496; The Philadelphia, [1917] P. 101.

**6712.** —— ——.]—THE PHILADELPHIA, No. 6708, *ante*.

**6713.** —— ——.]—In May, 1916, claimants, a neutral co., bought for £129,500, the *Persien*, a British steamship, then under requisition by the British Admlty., under the terms of Charterparty T.99, whereby the Shipping Controller agreed to pay to the owners in the event of the loss of the vessel by war risk, "the ascertained value of the steamer at the time of her loss." The *Persien*, while still under requisition, was lost by enemy action in Dec. 1917. Owing to restrictions imposed by the Defence of the Realm Regulations & the general position of shipping, it was impossible for claimants to buy any British vessel to replace the *Persien*, & the price in the market of a neutral vessel of the same size as the *Persien* would amount to £432,000. The owners claimed that sum, or, alternatively, the price which they paid for the vessel in May, 1916, as the ascertained value of the *Persien* at the time of her loss. The umpire found that the value of the *Persien* in the market at the time of her loss was £111,000:—*Held:* the value so found by the umpire was the "ascertained value" within the meaning of the charterparty.—LLOYD-BELGE (GREAT BRITAIN), LTD. *v.* SHIPPING CONTROLLER (1919), 89 L. J. K. B. 916; *sub nom.* SHIPPING CONTROLLER *v.* LLOYD-BELGE (GREAT BRITAIN), LTD., 122 L. T. 415; 36 T. L. R. 97; 14 Asp. M. L. C. 565.

**6714.** —— **Value at expiration of charterparty.**]—Pltfs.' vessel, the *Helvetia*, was sunk by collision with defts.' vessel in July, 1912. The *Helvetia* had a charterparty dated 1909 which was to be in force from the spring of 1911 until 1917, unless the charterers cancelled it for any particular season:—*Held:* the value of the *Helvetia* must be ascertained, as at the date in 1917 when the charterparty would expire, taking into account all the contingencies & the special terms of the charterparty.—THE EMPRESS OF BRITAIN (1913), 29 T. L. R. 423.

*Annotation:*—**Distd.** The Anselma de Larrinaga (1913), 29 T. L. R. 587.

**6715.** —— **Value at termination of homeward voyage.**]—THE KATE, No. 6706, *ante*.

**6716.** —— ——.]—THE RACINE, No. 6707, *ante*.

*K. Abandonment of Vessel.*

**6717. Justifiable abandonment.**]—(1) A vessel is not relieved of her obligation to make way for another close hauled on the starboard tack by reason of her crew being engaged in reefing her topsails.

(2) A vessel to which the blame of a collision is attributed is liable, not only for the immediate damage, but for the consequential loss arising from the abandonment of the injured vessel by her crew, under reasonable apprehension of danger.

(3) I think if the wind was W. by N. & the proper course to Jersey was S. by E., she was not close hauled (DR. LUSHINGTON).—THE BLENHEIM (1854), 1 Ecc. & Ad. 285.

**6718.** ——.]—THE PENSHER, No. 6255, *ante*.

**6719. Unjustifiable abandonment.**]—THE THURINGIA, No. 5484, *ante*.

**6720.** ——.]—Where in a collision action for which defts. were held to blame the ct. found that after the collision pltfs.' vessel had been improperly abandoned, & it appeared that in consequence thereof she sank & was afterwards raised by pltfs., whereas she might have been beached, the ct. directed the registrar in assessing the damages, that, as the only ascertainable extra cost arising from the abandonment was the cost of raising, he was to disallow that amount.—THE HANSA (1887), 58 L. T. 530; 6 Asp. M. L. C. 268.

*L. Other Heads of Damage.*

**6721. Wages of crew—While ship under repair.**]—ALEXANDER *v.* DITCHBURN (1837), 5 L. T. 121.

**6722. Cost of towage.**]—H.M.S. INFLEXIBLE, No. 6646, *ante*.

**6723. General average contribution.**]—A general average contribution payable as between ship & cargo, in respect of a sacrifice rendered necessary by a collision, cannot be recovered against the wrongdoer as damages caused by the collision.—THE MARPESSA, [1891] P. 403; 61 L. J. P. 9; 66 L. T. 356; 40 W. R. 239; 7 Asp. M. L. C. 155.

*Annotation:*—**Consd.** The Minnetonka, [1905] P. 206.

**6724. Extra expense of coaling at particular port.**]—Two steamships, *N.* & *O.*, having collided in the Mersey, the *N.* agreed to pay 75 per cent. of the damage to the *O.* The *O.* carried mails & passengers from Liverpool for South America, & after leaving Liverpool her practice was to call at Cardiff to coal & then proceed to Havre, where the bulk of her passengers embarked. Upon the occasion in question she was delayed at Liverpool repairing the damage caused by the collision, & in order to save time & to get to Havre as soon as possible she filled up with coal at Liverpool & did not call at Cardiff. The extra expense thereby caused was £309:—*Held:* this sum could not be recovered as part of the damages.—THE NORMANDY (1900), 16 T. L. R. 567.

**6725. Sum paid in lieu of barge hire.**]—A collier from the Tyne to Cape Town, under charter to



6711 I. *Loss of ship—Value at time of collision.*]—If a ship is totally lost the owner is entitled to recover her market value at the time of the collision.—THE HEATHER BELL, THE FASTNET (1892), 3 Exch. C. R. 40.—CAN.

the Admlty., came into collision with a steamship in the English Channel, & put back to the Thames for repairs. The cargo of coals had to be discharged, &, by arrangement between the Admlty., as the owners of the cargo, & the owners of the collier, the voyage was treated as abandoned, the cargo sold, & a sum of £1,000 agreed to be paid by the Admlty. to the owners of the collier as a "substituted expense" in lieu of the larger sum which, it was estimated, would have been incurred for storage & reshipment if the collier had carried on the coals at the end of the period required for repairs. At the usual ships' reference, after a decree of both to blame, a moiety of the claim by the owners of the collier for repairs & detention was paid by the owners of the steamship; but, at a reference between the Admlty. & the owners of the steamship, a claim, made by the Admlty. against the owners of the steamship for a moiety of their adjusted proportion of the £1,000, was disallowed by the registrar, & the disallowance affirmed on appeal:—*Held:* the amount claimed by way of "substituted expense" was the result of a reasonable arrangement to minimise the loss, & was such a consequence of the collision as to render the owners of the steamship, as wrongdoers, liable for a moiety of their adjusted proportion.—THE MINNETONKA, [1905] P. 206; 74 L. J. P. 97; 93 L. T. 581; 53 W. R. 521; 21 T. L. R. 407; 10 Asp. M. L. C. 142, C. A.

**6726. Cost of sending seamen home—Liability to send home arising under foreign law—Cost paid by foreign state** ]—By the Norwegian Maritime Code, if a ship is "lost," the expenses of sending home the master & crew are defrayed by the State, &, they are not recoverable by them from the owners of the wrongdoing ship which caused the loss.—THE CRAFTSMAN, [1906] P. 153; 75 L. J. P. 87; 95 L. T. 157; 10 Asp. M. L. C. 274.

**6727. Cost of raising wreck.**]—A steamship ran down & sank a fishing vessel in the river Thames. The owners of the steamship admitted liability subject to the claim of the owners of the fishing vessel being referred to the registrar & merchants. At the reference the owners of the fishing vessel claimed £355, the sum which the Thames Conservancy were claiming from them as the cost of raising the vessel. The registrar rejected the claim on the ground that the owners of the fishing vessel had abandoned their vessel or ought to have abandoned her, in which case the Thames Conservancy would have had no right to recover the cost of raising the wreck from them. The Thames Conservancy sued the owners of the fishing vessel in the K. B. Div., & recovered the expense of raising the wreck & costs. The owners of the fishing vessel appealed from the decision of the Admlty. registrar:—*Held:* (1) the Thames Conservancy had under Thames Conservancy Act, 1894 (c. clxxxvii), s. 77, a right to recover from the owners of the vessel sunk the cost of raising the wreck whether it had been abandoned or not, & the owners of the fishing vessel were entitled to recover that sum from the owners of the steamship; (2) the owners of the fishing vessel were not entitled to recover from the owners of the steamship the costs paid to the conservancy in the K. B. action, as the owners of that steamship had had no opportunity of saying whether that action should be defended or not.—THE WALLSEND, [1907] P. 302; 76 L. J. P. 131; 96 L. T. 851; 23 T. L. R. 356; 10 Asp. M. L. C. 476.

*Annotation:—As to* (1) **Reld.** Sheppy Glue & Chemical Works *v.* Medway River Conservators (1926), 24 L. G. R. 457.

**6728. Damages for loss of life.**]—THE ALAR, ALCOCK *v.* GENERAL SCREW STEAM SHIPPING CO. (1855), 7 L. T. 166.

**6729. —— Pensions payable to relatives.**]—ADMIRALTY COMRS. *v.* S.S. AMERIKA, No. 6484, *ante*.

**6730. ——.**]—THE MOLIÈRE, No. 6483, *ante*.

**6731. Surveyor's fees.**]—THE MOLIÈRE, No. 6483, *ante*.

**6732. Damages through deprivation of use of vessel—Though substitute constantly in readiness.**]—THE EMERALD (1896), [1899] P. 130, n.; 80 L. T. 178, n.; *on appeal, sub nom.* THE EMERALD, THE GRETA HOLME, [1896] P. 192, C. A.

*Annotation:—***Consd.** Comet (Owners) *v.* Mediana (Owners), The Mediana (1899), 80 L. T. 173.

**6733. —— ——.**]—A lightship, belonging to a harbour board & used for lighting approaches, was damaged in a collision caused by the negligence of applts. The place of the damaged lightship was during her repair taken by another lightship belonging to the board & maintained at an annual expense for the purpose of such an emergency:—*Held:* the board was entitled to recover from applts. not only the out of pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted lightship.—MEDIANA (OWNERS) *v.* COMET (OWNERS, ETC.), THE MEDIANA, [1900] A. C. 113; 69 L. J. P. 35; 82 L. T. 95; 48 W. R. 398; 16 T. L. R. 194; 44 Sol. Jo. 259; 9 Asp. M. L. C. 41, H. L.

*Annotations:—***Consd.** The Bodlewell, [1907] P. 286. **Apld.** The Astrakhan, [1910] P. 172. **Distd.** Admiralty Comrs. *v.* S.S. Valeria, [1922] 2 A. C. 242. **Consd.** Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637; Admiralty Comrs. *v.* S.S. Susquehanna, [1926] A. C. 655. **Reld.** The Tugela (1913), 30 T. L. R. 101; The Kingsway, [1918] P. 344; The Molière (1924), 41 T. L. R. 154.

**6734. —— Out of pocket expenses.**]—MEDIANA (OWNERS) *v.* COMET (OWNERS, ETC.), THE MEDIANA, No. 6733, *ante*.

**6735. —— Cost of hiring substitute—No substitute in fact hired.**]—(1) Pltfs., a foreign govt., claimed damages in respect of a collision between their steamship *M. R. I.* & deft.'s steamship *St. C.*, which took place on Dec. 6, 1917. After the collision the *M. R. I.* was beached, & part of

**PART XII. SECT. 6, SUB-SECT. 5.—L.**

**6731 i.** *Surveyor's fees.*]—CHARLTON *v.* THE COLORADO & THE BYRON TRERICE (1893), 3 Exch. C. R. 263.—**CAN.**

t. *Value of goods not owned by person claiming.*]—In a case of collision, the owner of the vessel not in fault may recover from the owner of the other vessel the value of goods on board not owner by him, but in his custody as a carrier.—IRVING *v.* HAGERMAN (1863), 22 U. C. R. 545.—**CAN.**

a. *Expenses of hire of another vessel.*]—In an action for injury to pltf.'s vessel, caused by collision with deft.'s steamboat:—*Held:* pltf. was entitled to recover the cost of repairing his vessel, & for the permanent injury done to her, & the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, or for the profits which he would have earned by her employment.—BROWN *v.* BEATTY (1874), 35 U. C. R. 328.—**CAN.**

b. *Cost of sending seamen home—& seamen's wages.*]—Where after a collision the vessel injured was docked for the winter, & her voyage could not be resumed until the following spring, by reason of the closing of the navigation of the River St. Lawrence:—*Held:* her owners could not recover as part of their damages the seamen's wages while idle during the winter, & no more than would suffice to send them to the place where they were shipped & to pay their wages until their arrival there.—THE NORMANTON (1877), 3 Q. L. R. 303.—**CAN.**

c. *Unexpired portion of insurance premium.*]—In an action claiming damages for loss of a ship in a collision the owner cannot recover the amount of the unexpired portion of the premium paid for insurance against such loss.—THE PERENE *v.* MAID OF SCOTLAND (OWNERS), THE PERENE *v.* STAR

*Sect. 6.—General incidence and extent of liability: Sub-sect. 5, L. & M. Sect. 7: Sub-sect. 1, A.]*

her cargo transferred to the steamship *G. S.*, which was at that time chartered to pltfs. at £5 10*s.* per day.

Pltfs. did not charter a substitute for the *M. R. I.*, but they claimed detention at the rate which they would have been required to pay had they in fact chartered a neutral substitute upon the ground that although no specific vessel had in fact been substituted, they had substituted tonnage chartered at the above rate for tonnage which would, but for the collision, have been available on the *M. R. I.* & the *G. S.* The registrar allowed British "Blue Book rates":—*Held:* there was no sufficient evidence that pltfs. had in fact acquired substitute tonnage at the pre-charter rate, & the ct. could not interfere with the rough method at which the registrar had calculated compensation. The registrar was not bound to take the chartering rate for neutrals.

(2) When ashore after the collision some cargo was transhipped to the steamship *G. S.* which was occupied with cargo from the *M. R. I.* for twenty days. Pltfs. claimed (*a*) a sum of £872 16*s.* ..., paid by them as an *ex gratia* payment to the owners of the *G. S.*; (*b*) £249 7*s.* 9*d.* paid to the crew of the *G. S.*; (*c*) thirty-three days' loss of use of the *G. S.* The registrar allowed a sum of £350, including something for loss of use, in respect of (*a*); £100 in respect of (*b*); & disallowed (*c*):—*Held:* pltfs., having lost the use of the *G. S.* for twenty days, were entitled to damages in respect thereof calculated at a sum proportionate to that allowed for the *M. R. I.*, *per diem*, in accordance with the respective sizes of each vessel.

(3) Interest is allowed in the Admlty. as part of the damages up to the date of judgment. After judgment it is a judgment debt (SCRUTTON, L.J.). —THE ST. CHARLES (1927), 138 L. T. 456; 17 Asp. M. L. C. 399, C. A.

**6736. —— Cargo transhipped to other vessel—Loss incurred thereby by other vessel.**]—THE ST. CHARLES, No. 6735, *ante*.

*M. Interest.*

**6737. By whom fixed—Registrar.**]—A British ship having been arrested for a collision which took place before the passing of Merchant Shipping Act (Amendment) Act, 1862 (c. 63), was left under arrest in charge of the Admlty. marshal. Upon the cause being determined in favour of pltfs., the ship was sold by order of the ct.:—*Held:* pltfs. were only entitled to the nett proceeds of the ship, *i.e.* the gross proceeds, less possession fees & marshal's charges, together with costs of suit & interest; the amount of interest to be referred to the registrar.—THE EUROPA (1863), Brown. & Lush. 210; 3 New Rep. 216; 9 L. T. 781; 1 Mar. L. C. 420; 167 E. R. 339.

*Annotation:*—**Refd.** The Joannis Vatis (No. 2), [1922] P. 213.

**6738. Interest allowed from date of collision—Whether cargo carried or not.**]—THE CITY OF BUENOS AYRES (1869), cited in L. R. 3 A. & E. at p. 9.

*Annotation:*—**Apld.** The Northumbria (1869), L. R. 3 A. & E. 6.

**6739. —— ——.**]—In the event of the vessel sunk having no cargo, then interest upon the value of the ship from the day of the collision was given (SIR ROBERT PHILLIMORE).—THE NORTHUMBRIA (1869), L. R. 3 A. & E. 6; 39 L. J. Adm. 3; 18 W. R. 188; 3 Mar. L. C. 314; *subsequent proceedings*, L. R. 3 A. & E. 24.

*Annotations:*—**Apld.** Smith *v.* Kirby (1875), 24 W. R. 207; The Gertrude, The Baron Aberdare (1887), 12 P. D. 204; The Crathie, [1897] P. 178. **Consd.** The Kate, [1899] P. 165. **Refd.** The Philadelphia, [1917] P. 101; The Rosalind (1920), 90 L. J. P. 126.

**6740. —— Eleven years delay in proceeding.**]—(1) In 1878, a collision occurred, in the North Sea, between a Norwegian steamer & a British vessel, in which the latter was sunk. The name & place of business of the Norwegian co. owning the steamer were known to the owners of the British vessel, & for one or more days, on forty-seven occasions during the following eleven years, the Norwegian steamer put into ports in the United Kingdom. During the same period there were changes in the capital & in the shareholders of the Norwegian co.

In 1889 pltfs., the owners of the British vessel, instituted an action *in rem* against the Norwegian steamer.

The owners of the Norwegian steamer, as defts., pleaded, in bar of the action, that the claim of pltfs., their rights, if any, & their maritime lien, if acquired, had been lost by laches, & that it would be otherwise inequitable to allow the action to proceed, as there had been changes of interest in the ownership of the steamer, the rights of third parties had intervened, & the greater part of the crew of the steamer were not now available to give evidence:—*Held:* pltfs. were entitled to prosecute their claim for damages, for in each case the particular circumstances must be looked at to see whether it would be inequitable to entertain the suit, considering the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witnesses, the loss of evidence, & the change of property, & in this case, though defts. would be entitled to every presumption which could fairly be made in their favour by reason of the absence of any witness, defts. had failed to show that the merits could not be gone into.

(2) The action was subsequently compromised on the term that defts. should pay to pltfs. one half of the damages proceeded for. In assessing such damages the registrar awarded interest on the amount at 4 per cent. from the time the British vessel would probably have reached her destination, May 1, 1878, until payment.

On objection to the registrar's report, on the ground that no interest was due at all on an amount which had not been ascertained until the institution of the action, or that no interest was due under the circumstances of this case, as no claim had been made for eleven years, or that the interest should be limited to six years by analogy to the Statute of Limitations:—*Held:* the interest was properly awarded for the whole period, according to the practice in Admlty.—THE KONG MAGNUS, [1891] P. 223; 65 L. T. 231; 7 Asp. M. L. C. 64.

*Annotations:*—*As to* (2) **Apld.** The Rosalind (1920), 90 L. J. P. 126. **Refd.** The Joannis Vatis (No. 2), [1922] P. 213.

**6741. Interest on sum paid for repairs—From date payment made.**]—Upon objection to the registrar's report, in a cause of damage by collision:—*Held:* the party damaged & obtaining judgment was entitled to interest upon the amount paid for

(R. P. & W. F.), LTD. [1925] 1 D. 574; [1925] S. C. R. 1; *varying*, [1924] Exch. C. R. 206, 229.—**CAN.**

*d. Value of nautical instruments & books.*]—THE CERES (1860), 5 L. T. 121.—**IR.**

*e. Loss of seamen's clothes.*]—THE PIRRO GUERRINI *v.* THE CUMBERLAND (1860), 5 L. T. 121.—**IR.**

**PART XII. SECT. 6, SUB-SECT. 5.—M.**

**6741** *i. Interest on sum paid for repairs—From date payment made.*]—VITRUVIA S.S. CO. *v.* ROPNER SHIPPING CO., [1923] S. C. 574-5.—**SCOT.**

*f. Interest on value of vessel & freight.*]—In an action of trespass on the case for the loss of pltf.'s vessel by

the repairs from the date of payment, not from the date of the decree only.—THE HEBE (1847), 2 Wm. Rob. 530; 5 Notes of Cases, 176; 5 L. T. 121; 166 E. R. 855.

**6742. Interest allowed from date of judgment in Court of Appeal—To date of judgment in House of Lords—Full value of ship paid into court.**]—In an action *in rem* in respect of damage by collision defts. gave bail in the sum of £100,000 as representing the full value of their vessel & the limit of their liability according to French law. In the Admlty. Ct. both pltfs.' & defts.' vessels were held to blame, but the Ct. of Appeal held defts.' vessel alone to blame & this decision was upheld by the House of Lords.

The £100,000 being insufficient to satisfy pltfs.' judgment, pltfs., who admitted that *qua* damages they could not recover more than the £100,000, threatened to arrest defts.' vessel in respect of interest & costs; &, under protest, defts. provided bail in a further sum to avoid arrest:—*Held:* (1) interest on sums due in respect of collision damage was awarded by way of damages, & accordingly pltfs. were not entitled to interest except for the period between the judgment of the Ct. of Appeal & the judgment of the House of Lords, three hundred & nine days, in respect of which defts. were liable for interest on the £100,000 at 4 per cent.; (2) pltfs. were entitled to costs & interest on costs at 4 per cent.—THE JOANNIS VATIS (No. 2), [1922] P. 213; 91 L. J. P. 196; 127 L. T. 494; 38 T. L. R. 566; 16 Asp. M. L. C. 13.

**6743. Vessel hired by Admiralty—Special agreement as to payment—Interest on sum paid from date of payment.**]—While on hire by the Admlty. a steam trawler was sunk through a collision with the *Rosalind*. The value of the trawler was agreed between the parties, but the Admlty. claimed, as bailees in possession, to recover as part of their damages interest from the date of the loss. The owners of the *Rosalind* contended that interest was only payable from the date when the Admlty. paid the value of the trawler to her owners:—*Held:* under the Admlty. rule a bailee in possession was entitled to recover from a wrongdoer a complete equivalent of the chattel deteriorated or lost, namely, its value at the time of the deterioration or loss, with interest from that date; but, inasmuch as there was an agreement between the parties that defts. should pay what the Admlty. had to pay to the owners of the trawler, interest on that payment only ran from the date of payment.—THE ROSALIND (1920), 90 L. J. P. 126; 37 T. L. R. 116.

**6744. Interest such as evidence might warrant.**]—ADMIRALTY COMRS. *v.* SUSQUEHANNA (OWNERS), THE SUSQUEHANNA, No. 6624, *ante*.

**6745. Interest allowable up to date of judgment—Judgment debt after judgment.**]—THE ST. CHARLES, No. 6735, *ante*.

**Effect of proceedings for limitation of liability.**]—*See* Nos. 8060–8065, *post*.

## SECT. 7.—RIGHTS AND REMEDIES OF INJURED PARTIES.

### SUB-SECT. 1.—PERSONS ENTITLED TO RECOVER.

*A. Persons Interested in Ship.*

**6746. Part owners—Suing alone.**]—If one of several part owners of a chattel sue alone, deft. can only take advantage of the objection by a plea in abatement, even though the defect appear on the declaration.—ADDISON *v.* OVEREND (1796), 6 Term Rep. 766; 101 E. R. 816.

*Annotations:*—**Apld.** Sedgworth *v.* Overend (1797), 7 Term. Rep. 279; Watson *v.* King (1815), 1 Stark. 121. **Refd.** Bloxam *v.* Hubbard (1804), 5 East, 407. **Mentd.** Scott *v.* Godwin (1797), 1 Bos. & P. 67; Stancliffe *v.* Hardwick (1835), 2 Cr. M. & R. 1; Jones *v.* Smith (1849), 18 L. J. Ex. 145.

**6747.** —— ——.]—If one of two part owners of a chattel, sue alone for a tort, & deft. do not plead in abatement, the other part owner may afterwards sue alone, & deft. cannot plead in abatement to such action.—SEDGWORTH *v.* OVEREND (1797), 7 Term Rep. 279; 101 E. R. 974.

*Annotation:*—**Apld.** Bloxam *v.* Hubbard (1804), 5 East, 407.

—.]—*See, also*, R. S. C., Ord. 16, r. 11.

**6748. Beneficial owner.**]—THE ILOS (1856), Sw. 100; 166 E. R. 1040.

*Annotations:*—**Consd.** The Duke of Buccleuch, [1892] P. 201. **Refd.** The Minna (1868), L. R. 2 A. & E. 97.

**6749. Holders of bills of lading—As security for loan—Previous payment to owners in respect of disbursement—Whether bar to action.**]—THE THYATIRA, No. 6697, *ante*.

**6750. Salvors—Wreck damaged during salving.**]—Pltfs. contracted to salve a sunken vessel on a "no cure, no pay" basis. In pursuance of the contract they attached their salvage plant to the wreck & incurred considerable expenditure in the salving operations. At a time when, as pltfs. alleged, the successful raising of the wreck was assured, it was run into by deft.'s steamship through the negligence of deft.'s servants & irreparably damaged. Pltfs. claimed damages for the loss of their plant & also in respect of the loss of the beneficial contract due to the damage to the wreck:—*Held:* pltfs. were in possession of the wreck, & accordingly they were entitled to recover in respect of the damage thereto; & between them pltfs. & the owners of the wreck, if the latter recovered judgment against defts., were entitled to recover the whole value of the wreck. The exact value, which was a question for the registrar, would depend on whether pltfs. were right in their contention that the salvage operations would have been successful.—THE ZELO, [1922] P. 9; 91 L. J. P. 57; 126 L. T. 351; 38 T. L. R. 69; 15 Asp. M. L. C. 428.

**Bailee.**]—*See* ADMIRALTY, Vol. I., pp. 140, 141, Nos. 477, 483; BAILMENT, Vol. III., p. 114, No. 379; Supp. III., p. 150, No. 374b.

**6751. Ship repairer—Bankruptcy of person entitled to damages.**]—Where in the registrar's report in a collision action it appears that claimant claims (*inter alia*) as part of his damages the cost

collision with deft.'s vessel, interest on the value of the vessel & freight is not recoverable as part of the damages under Consolidated Statutes, c. 37, s. 119.—JACKSON *v.* MCLELLAN (1879), 19 N. B. R. (3 P. & B.) 432.—**CAN.**

*g. Interest allowed from date of collision.*]—THE OLGA *v.* THE ANGLIA (1905), 7 F. (Ct. of Sess.) 739.—**SCOT.**

**PART XII. SECT. 7, SUB-SECT. 1.—A.**

*h. Mortgagor.*]—The mtgor. of a boat destroyed by collision may recover the full value against the owners of the other vessel, without abatement for the mtge.—SHAW *v.* DE SALABERRY NAVIGATION CO. OF MONTREAL (1859), 18 U. C. R. 541.—**CAN.**

*k. Mortgagee in possession.*]—A mtgee. in possession may maintain an action for damages occasioned by a collision.—WARD & PEMBERTON *v.* THE YOSEMITE (1894), 4 Exch. C. R. 241; 3 B. C. R. 311.—**CAN.**

*l. Charterers.*]—Where a vessel under charter was injured by collision caused by another vessel, the charter-party providing that in case of damage the hiring should cease until she could be repaired:—*Held:* an action by the charterers against the offending ship for the detention would not lie.—*Re* THE NETTLESWORTH (1883), 9 Q. L. R. 359.—**CAN.**

*m. Registered or nominal owner.*]—The registered or nominal owner, not beneficially interested in the voyage or employment of the vessel, cannot recover consequential damages.—WHITEWAY *v.* POWER (1892), 7 Nfld. L. R. 625.—**NFLD.**

*Sect. 7.—Rights and remedies of injured parties: Sub-sect. 1, A., B., C. & D.; sub-sect. 2, A., B. & C. (a) & (b): sub-sects. 3 & 4. Sects. 8 & 9.]*

of repairing his ship, but has not paid the shipwright, & has since the repairs were effected become insolvent, & the registrar allows such item, the ct. has no power to do anything to ensure the money being paid over by claimant to the shipwright, & will not retain the money in the registry until claimant has given satisfactory evidence that he had paid the shipwright. —THE ENDEAVOUR (1890), 62 L. T. 840; 6 Asp. M. L. C. 511.

*Annotation:*—**Refd.** The Glenfinlas, [1918] P. 363, n.

*B. Owner of Cargo.*

**Recovery against carrying ship.**]—*See* ADMIRALTY, Vol. I., p. 143, No. 508.

**6752. Recovery against ship in fault.**]—THE DIANA (1842), 5 L. T. 61.

——.]—*See, also,* ADMIRALTY, Vol. I., pp. 140, 141, Nos. 481, 482.

*C. Crew.*

*See,* ADMIRALTY, Vol. I., p. 144, No. 511; MASTER & SERVANT, Vol. XXXIV., pp. 210, 214, Nos. 1726, 1757.

**Under Workmen's Compensation Act.**]—*See* ADMIRALTY, Vol. I., p. 145, Nos. 521, 522; MASTER & SERVANT, Vol. XXXIV., p. 242, No. 2066.

*D. Persons Injured or their Representatives.*

**Fatal injuries.**]—*See* ADMIRALTY, Vol. I., pp. 143–145, Nos. 510–523; ALIENS, Vol. II., p. 131, No. 73; NEGLIGENCE, pp. 121, 130, Nos. 804, 807, 866.

SUB-SECT. 2.—RIGHTS IN REM.

*A. In General.*

**Jurisdiction of Court of Admiralty.**] — *See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 22 (1) (*a*) (iv), 33 (2); ADMIRALTY, Vol. I., pp. 104, 105, 111, Nos. 64–75, 150, 151.

**Preliminary acts in damage actions.**]—*See* ADMIRALTY, Vol. I., pp. 177–178.

**Practice in actions in rem.**]—*See* ADMIRALTY, Vol. I., pp. 158–172.

**Conclusiveness of foreign judgments in rem.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 463–466.

**Costs.**]—*See, generally,* ADMIRALTY, Vol. I., pp. 207–210.

*B. Maritime Lien.*

*See* Part XIX., Sect. 1, sub-sect. 2, *post.*

*C. Statutory Powers of Arrest.*

*(a) In General.*

*See, generally,* ADMIRALTY, Vol. I., pp. 161–166; & *compare* CONFLICT OF LAWS, Vol. XI., p. 485, No. 1379.

**Costs arising out of arrest.**]—*See* ADMIRALTY, Vol. I., p. 206, Nos. 1268–1278.

*(b) Immunity from Arrest.*

*See* 1894 Act, s. 688; & *generally* ADMIRALTY, Vol. I., pp. 109–111.

**6753. What vessels are immune—Vessel requisitioned by Crown.**]—After the outbreak of war, pltfs., the owners, master, & crew of a steam tug, commenced a salvage action *in rem* against the owners of a steamship, her cargo & freight; but they did not arrest the vessel, & subsequently abandoned the claim against the cargo, which consisted of oil fuel for the use of the navy & was the property of the Crown. The owners of the steamship & her freight appeared as defts., & gave the usual undertaking in lieu of bail, statements of claim & defence being subsequently delivered. Prior to the commencement of the salvage action the steamship had been requisitioned under the powers conferred by the Royal Proclamation (Transports & Auxiliaries) of Aug. 3, 1914, & as the vessel thereby became, for the time being, a ship belonging to His Majesty, within 1894 Act, s. 557, the Crown applied for & obtained an order that all further proceedings in the action with a view to the arrest or detention of the ship should be stayed so long as the vessel remained under requisition in the service of the Crown.—THE BROADMAYNE, [1916] 1 P. 64; 85 L. J. P. 153; 114 L. T. 891; 32 T. L. R. 304; 60 Sol. Jo. 367; 13 Asp. M. L. C. 356, C. A.

*Annotations:*—**Consd.** The Sarpen, [1916] P. 306. **Apld.** The Messicano (1916), 32 T. L. R. 519; The Crimdon (1918), 35 T. L. R. 81; The Gagara, [1919] P. 95. **Refd.** The Porto Alexandre (1919), 89 L. J. P. 97; The Tervaete (1922), 128 L. T. 176; The Sylvan Arrow, [1923] P. 14; France Fenwick v. R., [1927] 1 K. B. 458.

**6754.** —— ——.]—A ship requisitioned by the Govt. of an allied country has the same privilege from arrest in a collision action as a ship requisitioned by the British Crown.—THE MESSICANO (1916), 32 T. L. R. 519.

*Annotations:*—**Refd.** The Crimdon (1918), 35 T. L. R. 81; The Porto Alexandre (1919), 89 L. J. P. 97.

**6755.** —— **Vessel belonging to or used by foreign state—Security for damage—On counterclaim by defendant.**]—The ct. has jurisdiction to order a pltf. in an action for damage by collision to give security for damages to a deft. who brings a counterclaim. The ct. can exercise this power when such pltf. is a foreign sovereign whose ship cannot be arrested.—THE NEWBATTLE (1885), 10 P. D. 33; 54 L. J. P. 16; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. L. C. 356, C. A.

*Annotations:*—**Consd.** The Tervaete, [1922] P. 259. **Apld.** *Re* Bjornstad & Ouse Shipping Co., [1924] 2 K. B. 673. **Refd.** Duff Development Co. *v.* Kelantan Government, [1924] A. C. 797.

**6756.** —— —— —— ——.]—Pltfs.' & defts.' vessels came into collision & both received damages. Pltfs. brought an action *in rem* against defts., "the owners of the steamship *Neptune*." Defts. counterclaimed, & applied to pltfs. for security to answer the counterclaim. Security was given, but on pltf. making a similar application defts. refused to give security on the ground that the *Neptune* was owned by the French Govt., & was not subject to arrest:—*Held:* the ct. had no power to order security to be given or, in default thereof, to stay defts.' counterclaim.—THE NEPTUNE, [1919] P. 17; 88 L. J. P. 94.

**6757.** —— —— **Used for trading purposes.**]—A ship belonging to a foreign sovereign, but used by him as a merchant vessel for trading purposes, is liable to be proceeded against *in rem* in the Admlty. Ct. for damage done to another ship by collision.

*Semble:* mail packets, although the property of a govt., are not exempt from the ordinary process of the tribunals of a foreign state, unless expressly exempted by treaty.—THE CHARKIEH (1873),

PART XII. SECT. 7, SUB-SECT. 1.—B. n. *Although insurance money recovered.*]—The payment of insurance to the owner of the cargo is no bar to an action brought by him to recover its value from the steamer that caused the loss.—NORTHERN ELEVATOR CO., LTD. *v.* RICHELIEU & ONTARIO NAVIGATION CO. (1907), Q. R. 32 S. C. 52.—CAN.

L. R. 4 A. & E. 59; 42 L. J. Adm. 17; 28 L. T. 513; 1 Asp. M. L. C. 581; *subsequent proceedings*, L. R. 4 A. & E. 120.

*Annotations:*—**Distd.** The Constitution (1879), 4 P. D. 39. **Consd.** The Parlement Belge (1880), 5 P. D. 197. **Refd.** The Heinrich Bjorn (1885), 10 P. D. 44; Mighell *v.* Johore, [1894] 1 Q. B. 149; The Porto Alexandre (1919), 89 L. J. P. 97; Aksionairnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 1 K. B. 456; Compania Mercantil Argentina *v.* United States Shipping Board (1924), 93 L. J. K. B. 816; Duff Development Co. *v.* Kelantan Government, [1924] A. C. 797. **Mentd.** Foster *v.* Globe Venture Syndicate (1900), 82 L. T. 253.

**6758.** —— —— ——.]—An unarmed packet belonging to the sovereign of a foreign state, & in the hands of officers commissioned by him, & employed in carrying mails, is not liable to be seized in a suit *in rem* to recover redress for a collision, & this immunity is not lost by reason of the packet's also carrying merchandise & passengers for hire.—THE PARLEMENT BELGE (1880), 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. L. C. 234, C. A.

*Annotations:*—**Apld.** Strousberg *v.* Costa Rica Republic (1880), 44 L. T. 199. **Consd.** The Newbattle (1885), 10 P. D. 33; Mighell *v.* Johore, [1894] 1 Q. B. 149. **Apld.** The Jassy, [1906] P. 270. **Consd.** The Broadmayne, [1916] P. 64. **Apld.** The Gagara, [1919] P. 95; The Porto Alexandre, [1920] P. 30. **Consd.** The Sylvan Arrow, [1923] P. 220. **Apld.** Compania Mercantil Argentina *v.* United States Shipping Board (1924), 93 L. J. K. B. 816. **Refd.** The Longford (1889), 14 P. D. 34; Chalmers *v.* Scopenich (1892), 66 L. T. 318; The Dictator, [1892] P. 304; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492; The Ripon City, [1897] P. 226; The Burns, [1907] P. 137; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; The Crimdon (1918), 35 T. L. R. 81; Aksionairnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 3 K. B. 532; The Edna, [1921] 1 A. C. 735; The Mogileff, [1922] P. 122; The Tervaete, [1922] P. 259; *Re* Bjornstad & Ouse Shipping Co., [1924] 2 K. B. 673; Duff Development Co. *v.* Kelantan Government, [1924] A. C. 797; The Jupiter (1924), 93 L. J. P. 156; The Jupiter (No. 3) (1927), 137 L. T. 333. **Mentd.** Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352; South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190; *Re* Suarez, Suarez *v.* Suarez, [1918] 1 Ch. 176.

**6759.** —— —— **Used for carrying mails.**]—THE CHARKIEH, No. 6757, *ante*.

**6760.** —— —— ——.]—THE PARLEMENT BELGE, No. 6758, *ante*.

**6761.** —— —— **Used for public service—Waiver of immunity.**]—Process by way of arrest in a damage action *in rem* does not lie against a vessel the property of a foreign sovereign state & destined to its public use, &, therefore, on the application of the foreign govt., & the production of a certificate from the Foreign Office as to the public character of the vessel in question, all proceedings will be stayed & no waiver of the privileged assumed, although during the temporary presence of the vessel in this country, & under a misapprehension, in order to procure her release, agents of the govt. to which the vessel belonged have given an undertaking to put in bail, & have entered an absolute appearance.—THE JASSY, [1906] P. 270; 75 L. J. P. 93; 95 L. T. 363; 10 Asp. M. L. C. 278.

*Annotation:*—**Refd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139.

**6762.** —— —— ——.]—A privately-owned vessel, used by a sovereign state for public purposes is immune from arrest in a collision action.—THE CRIMDON (1918), 35 T. L. R. 81.

*Annotation:*—**Refd.** The Porto Alexandre (1919), 89 L. J. P. 97.

**6763.** —— —— **Subsequent sale into private ownership.**]—Damage occasioned by collision with a foreign state-owned vessel does not impose a maritime lien upon the vessel, & if the vessel be subsequently sold into private ownership she is not then liable to arrest in an action *in rem*.—THE TERVAETE, [1922] P. 259; 91 L. J. P. 213; 128 L. T. 176; 38 T. L. R. 825; 67 Sol. Jo. 98; 16 Asp. M. L. C. 48, C. A.

*Annotations:*—**Distd.** The Meandros, [1925] P. 61. **Consd.** The Stream Fisher, [1927] P. 73. **Refd.** The Colorado, [1923] P. 102; The Sylvan Arrow, [1923] P. 14; The Goulandris, [1927] P. 182.

**6764.** —— **Vessel requisitioned by allied state.**]—See THE MESSICANO, No. 6754, *ante*.

—— **Determination of immunity—Jurisdiction of Court of Admiralty.**]—*See* ADMIRALTY, Vol. I., p. 110, No. 143.

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SUB-SECT. 3.—RIGHTS IN PERSONAM.

**Jurisdiction of Court of Admiralty.**] — *See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 22 (1) (*a*) (iv), 33 (2); & ADMIRALTY, Vol. I., pp. 104, 105.

**Practice in actions in personam.**]—*See* ADMIRALTY, Vol. I., pp. 172–174.

**Conclusiveness of foreign judgments in personam.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 459–463.

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SUB-SECT. 4.—ADMIRALTY PRACTICE.

*See, generally*, ADMIRALTY, Vol. I., pp. 158 *et seq.*

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SECT. 8.—**COLLISION AS AFFECTING SALVAGE.**

*See* Part XV., Sect. 6, sub-sect. 3, *post*.

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SECT. 9.—**PRACTICE AND PROCEDURE.**

**Nature & extent of jurisdiction.**]—*See* ADMIRALTY, Vol. I., pp. 139–143, Nos. 467–509.

**Trinity Masters.**]—*See* Part XXVI., *post*.

**Practice & procedure.**]—*See* ADMIRALTY, Vol. I., pp. 158 *et seq.*

# Part XIII.—Damage to Objects Other than Ships.

## SECT. 1.—IN GENERAL.

**6765. Duty to avoid invisible objects—Whether dependent on notice of existence—Damage to cables—Presumption that master knows existence of cable.**]—In an action for damage done through negligence to the telegraphic cable of pltfs. by reason of its being dragged & broken by an anchor from defts.' ship, defts. pleaded that they were aliens, & that their vessel was more than three miles from the seashore of England & out of the jurisdiction, & that in the usual & ordinary course of navigation the ship had occasion to cast anchor & afterwards got it up again, & that the anchor, without any default of defts. & in consequence of the effect of the winds & waves upon the vessel, dropped the cable, & became entangled in it, & was necessarily a little injured; & that there was no buoy to mark the position & existence of the cable, of which defts. were wholly ignorant: —*Held:* pltfs. had a good cause of action, as it must be inferred that shipowners were aware of the existence of those cables, & therefore were bound to navigate their vessels with such care & skill as not to damage them.—SUBMARINE TELEGRAPH CO. *v.* DICKSON (1864), 15 C. B. N. S. 759; 3 New Rep. 572; 33 L. J. C. P. 139; 10 L. T. 32; 10 Jur. N. S. 211; 12 W. R. 384; 2 Mar. L. C. 9; 143 E. R. 983.

*Annotations:*—**Consd.** The Clara Killam (1890), L. R. 3 A. & E. 161. **Mentd.** Wilson *v.* Newberry (1871), 36 J. P. 215.

**6766. —— —— —— Ferryboat cable not matter of general knowledge.**]—THE JAMES & ANN (1922), 153 L. T. Jo. 86.

**6767. —— —— Damage to oyster bed.**]—A ship in charge of a compulsory pilot, was at high water brought into & anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual & customary place for vessels of her size & draught to anchor in. At low water she grounded, & thereby did damage to an oyster bed. On notice of the existence of the oyster bed being given to the master he took all reasonable means to remove his ship as speedily as possible. In an action by the lessee of the oyster bed against the shipowner & pilot:—*Held:* the act of the pilot in anchoring the ship where he did was negligence which made him liable, but the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures, not extraordinary measures, to remove his ship, & this he had done. —THE OCTAVIA STELLA (1887), 57 L. T. 632; 6 Asp. M. L. C. 182.

*Annotations:*—**Consd.** The Swift, [1901] P. 168; The Bien, [1911] P. 40. **Refd.** The Carlgarth, The Otarama, [1927] P. 93.

**6768. Liability for indirect consequences—Negligence causing collision with sandbank—Ship becoming unmanageable—Subsequently driven by wind & tide against sea wall.**]—Defts.' vessel, owing to the negligence of their servants, struck on a sandbank, & becoming from that cause unmanageable, was driven by wind & tide upon a sea wall of pltfs.', which it damaged:—*Held:* defts. were liable for the damage caused.—ROMNEY MARSH (BAILIFFS) *v.* TRINITY HOUSE (1870), L. R. 5 Exch. 204; 39 L. J. Ex. 163; 22 L. T. 446; 18 W. R. 869; 3 Mar. L. C. 398; *affd.* (1872), L. R. 7 Exch. 247, Ex. Ch.

*Annotations:*—**Consd.** The George & Richard (1871), L. R. 3 A. & E. 466. **Refd.** Gilbert *v.* Trinity House Corpn. (1886), 17 Q. B. D. 795.

**6769. —— Assistance from tug not secured until after collision with pier—Subsequent breaking of tow rope—Damage to property on shore.**]—THE GERTOR, No. 5177, *ante.*

**6770. —— Collision with dock gates—Detention of vessel arriving later.**]—Defts.' vessel negligently damaged the gates of a dock, & the gates were closed for repairs. Pltfs.' vessel arrived outside the dock & was prevented from entering the dock to load a cargo then waiting therein.

By statute the dock co. were obliged upon payment of certain rates & subject to certain conditions to keep the dock "open to all persons for the shipping & unshipping of goods, & the embarking & landing of passengers."

In an action by pltfs. against defts. to recover damages for the detention of the vessel so caused by defts.:—*Held:* defts.' negligence was too indirectly related to the alleged interference with pltfs.' rights & their loss to constitute a good cause of action by pltfs. against defts. *Semble:* where a shipowner has been obstructed in the exercise of his right to navigate his ship in a public navigable channel, a highway for ships, & has thereby suffered actual loss & damage by detention of the ship an action lies.—ANGLO-ALGERIAN S.S. CO., LTD. *v.* HOULDER LINE, LTD., [1908] 1 K. B. 659; 77 L. J. K. B. 187; 98 L. T. 440; 24 T. L. R. 235; 11 Asp. M. L. C. 45; 13 Com. Cas. 187.

*Annotation:*—**Refd.** South Wales & Liverpool S.S. Co. *v.* Nevill's Dock & Ry. Co., Nevill's Dock & Ry. Co. *v.* Maatschappij S.S. Bestevaer Rotterdam (1913), 18 Com. Cas. 124.

**6771. Liability of owner—For negligence of master—Contract creating special relationship between owner & master.**]—A sloop was navigated under a verbal agreement between A., the "managing owner" registered according to Merchant Shipping Act, 1875 (c. 88) & B. the captain by which, on condition that A. should have one-third of the net profits, accounts of which were to be rendered to him by B. from time to time. B. was at liberty to go to any port, & take or refuse any cargo he chose, & was also to hire & pay the crew & supply the stores, A. having no control over the vessel. While discharging cargo under a charter made by B. "for & on behalf of the owner," the vessel, through the negligence

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**PART XIII. SECT. 1.**

o. *Duty to avoid invisible objects—Whether dependent on notice of existence—Damage to cables.*]—By anchoring in a prohibited part of a river, a ship becomes liable for all damages caused thereby to a submarine cable, even when there were no indications of the place where such cable had been laid down, nor any notices of warning given as to where it stood.—BELL TELEPHONE CO. OF CANADA, LTD. *v.* THE RAPID (1897), 5 Exch. C. R. 413; Q. R. 12 S. C. 37.—**CAN.**

p. —— —— —— *Onus of proof.*]—BRITISH COLUMBIA TELEPHONE CO. *v.* THE ARABIEN (1924), 34 B. C. R. 319.—**CAN.**

q. —— —— *Damage to fishing nets.*]—NENO *v.* VANCOUVER PORT MOODY FERRIES, LTD. (1921), 30 B. C. R. 306.—**CAN.**

r. —— *Damage to oyster bed.*]—PETRIE *v.* THE ROSTREVOR (OWNERS), [1898] 2 I. R. 556.—**IR.**

t. *Liability for indirect consequences.*]—THE WALTER S. FROST, 5 C. L. T. 471.—**CAN.**

a. *Liability of owner—Pilot in charge.*]—HAYES *v.* PACIFIC MAIL S.S. Co. (1878), 1 N. S. W. S. C. R. N. S. (L.) 139.—**AUS.**

b. —— ——.]—BELL TELEPHONE

of B., broke loose from her moorings & damaged the wharf of pltf., who brought an action against A. & B. :—*Held :* the agreement did not amount to a demise of the vessel, & whatever was the precise relationship thereby created between defts. *inter se* A. was responsible to the public for the negligence of B., & therefore, both were liable in the action.—STEEL *v.* LESTER & LILEE (1877), 3 C. P. D. 121 ; 47 L. J. Q. B. 43 ; 37 L. T. 642 ; 26 W. R. 212 ; 3 Asp. M. L. C. 537.

*Annotations :*—**Distd.** Baumvoll Manufactur von Scheibler *v.* Gilchrest, [1892] 1 Q. B. 253. **Apprvd.** Associated Portland Cement Manufacturers (1910) Ltd. *v.* Ashton, [1915] 2 K. B. 1. **Mentd.** Boon *v.* Quance (1909), 102 L. T. 443.

**Recovery of damages in case of inevitable accident—Damage to harbour, dock or pier.**]—*See* Part XXI., Sect. 11, *post.*

## SECT. 2.—PARTICULAR INSTANCES.

**6772. Damage caused by negligent navigation—Crane on shore.**]—HACKWOOD *v.* SOMERS (1840), 6 L. T. 194.

**6773. —— Mooring dolphin—Dolphin not strong enough to resist slight pressure.**]—A steamship, in coming alongside a pier, struck, & did damage to a mooring dolphin :—*Held :* the contact being slight, the dolphin ought to have been strong enough to resist the pressure, & the suit against the steamship was dismissed with costs.—THE ALBERT EDWARD (1875), 44 L. J. Adm. 49 ; 24 W. R. 179.

**6774. Damage caused by negligent mooring—Premises on shore.**]—LAMBERT *v.* HASTIE (1853), 7 L. T. 286.

**6775. —— Bowsprit hanging over adjoining wharf—Damage to mast projecting from wharf over river—On falling of tide.**]—A. was possessed of a wharf, & had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, &, on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it :—*Held :* B. was not responsible.—DALTON *v.* DENTON (1857), 1 C. B. N. S. 672 ; 6 L. T. 228 ; 5 W. R. 203 ; 140 E. R. 277.

**6776. Collision with piles—Damage to plaintiff's vessel—Damage due to plaintiff's own negligence.**]—Defts. contracted with the Lords of the Admlty. for the erection of docks & works in Plymouth harbour, & for that purpose sunk piles in the navigable part of the channel. After the completion of the works, & after a reasonable time for the removal of the piles, defts. sold the piles to J., who undertook to remove them by a certain date, or sooner if required by the Lords of the Admlty. The Admlty. subsequently required J. not to draw the piles, & J., acting under those orders, cut the piles off on a level with the bed of the channel. The soil was subsequently washed from around the stumps, & pltf.'s vessel struck against them & was injured. In the position in which the piles existed at the time defts. delivered them up to J., the damage could not have been done without pltf.'s gross negligence :—*Held :* there was no cause of action against defts.—BARTLETT *v.* BAKER (1864), 3 H. & C. 153 ; 34 L. J. Ex. 8 ; 159 E. R. 486.

*Annotation :*—**Mentd.** Sandford *v.* Clarke (1888), 57 L. J. Q. B. 507.

**Harbours, docks & piers.**]—*See* Part XXI., Sect. 11, *post.*

**Collision with pier in foreign country—Pier**

CO. OF CANADA, LTD. *v.* THE RAPID (1897), 5 Exch. C. R. 413; Q. R. 12 S. C. 37.—**CAN.**

c. *Contributory negligence.*]—BRACE *v.* UNION FORWARDING CO. (1871), 32 U. C. R. 43.—**CAN.**

### PART XIII. SECT. 2.

d. *Damage caused by negligent navigation—Pier.*]—EVANS, COLEMAN & EVANS, LTD. *v.* THE ROMAN PRINCE (B. C.), [1924] Exch. C. R. 93.—**CAN.**

e. —— *Passing under bridge undergoing repair.*]—PADULAROGA *v.* CANADIAN CANNING CO. (1907), 5 W. L. R. 196 ; 12 B. C. R. 468.—**CAN.**

f. —— *Swing bridge.*]—Deft. owned & operated a swing bridge. Pltfs.' ship, the *L.*, on the night preceding the accident was forced to tie up on account of stormy weather. Next morning, the weather being still stormy with a high gusty wind blowing across the canal, the *L.* cast off, steamed up towards the bridge & attempted to pass through before it was fully opened. When the *L.* was partly through the opening, the swing of the bridge was stopped by a great gust of wind & the bridge was blown back striking the *L.* which had ventured into the gap, causing her considerable damage :—*Held :* neither the machinery nor the handling of the bridge in anyway caused or contributed to the accident ; but the *L.*, in attempting to pass through before the bridge was fully opened was *per se*, apart from any rules forbidding it, guilty of negligence & of reckless & unseamanlike manœuvre, which was the sole originating & determining cause of the accident.—NIAGARA, ST. CATHARINES & TORONTO RY. CO. *v.* THE LAKES & ST. LAWRENCE TRANSIT CO. (Ont.), [1924] Exch. C. R. 1.—**CAN.**

g. —— —— *Effect of custom.*]—The fact that it may be customary to enter a bridge before the swing is fully opened does not absolve a ship from negligence ; such a custom being dangerous & unreasonable cannot be the foundation of a claim against another person where an accident has occurred by the injured ship putting the custom into practice.—NIAGARA, ST. CATHARINES & TORONTO RY. CO. *v.* THE LAKES & ST. LAWRENCE TRANSIT CO. (Ont.), [1924] Exch. C. R. 1.—**CAN.**

h. —— ——.]—CANADA ATLANTIC RY. CO. *v.* THE NICARAGUA & OGDENSBURG COAL & TOWING CO. (1907), Q. R. 32 S. C. 134.—**CAN.**

k. *Damage caused by negligent mooring.*]—MONTREAL HARBOUR COMRS. *v.* GRANGE (1860), 10 L. C. R. 259.—**CAN.**

l. *Drifting vessel colliding with bridge—Res ipsa loquitur.*]—In an action against the owners of a steamboat for damage done to pltfs.' bridge, it appeared that the steamer was found drifting against the bridge one morning after a storm, & that the injury complained of was thus caused :—*Held :* sufficient *primâ facie* proof of negligence, & it lay upon defts. to account for the accident.—CATARAQUI BRIDGE CO. *v.* HOLCOMB (1861), 21 U. C. R. 273.—**CAN.**

m. *Damage to fishing nets—Evidence of negligence.*]—BARRETT *v.* SUTTIS (1884), 17 N. S. R. (5 R. & G.) 262.—**CAN.**

n. *Damage caused by fire communicated by ship.*]—The owner of a steamboat navigating the inland waters of Ontario, without legislative authority, is liable for loss occasioned to property by fire, communicated thereto by the steamer, without any proof of actual negligence.—HILLIARD *v.* THURSTON (1884), 9 A. R. 514.—**CAN.**

o. *Collision with stakes illegally put down in public harbour.*]—ZWICKER *v.* LAHAVE S.S. CO. (N. S.) (1910), 9 E. L. R. 114.—**CAN.**

p. *Collision with wharf in fog.*]—HUNT *v.* DARTMOUTH FERRY COMMISSION (N. S.) (1910), 9 E. L. R. 249.—**CAN.**

q. *Damage to works lawfully constructed across navigable waters—Damage caused by absence of lights on works.*]—Apart from any statutory regulation as to lights, those who place obstructions across navigable waters, though lawfully authorised to do so, cannot complain if damage is done to their works by collision brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of absence of lights, to define his exact position in relation to such obstructions.—NEW WESTMINSTER CORPN. *v.* THE MAAGEN (1913), 18 B. C. R. 441 ; 14 Exch. C. R. 323.—**CAN.**

r. *Collision with boom of logs in tow—Negligence of tug.*]—In an action against deft. ship for having run through & scattered a boom of logs belonging to pltf. while being towed by pltf.'s steam tug, the collision having occurred at night at a difficult point of a channel :—*Held :* the collision was occasioned by the tug's negligence, in showing misleading lights, having too long a tow, displaying insufficient lights on the boom, & losing control of the boom & blocking the channel.—PATERSON TIMBER CO. *v.* THE BRITISH COLUMBIA (1917), 16 Exch. C. R. 305 ; 18 B. C. R. 86.—**CAN.**

t. *Damage to "property on public work."*]—COMPAGNIE GENERALE D'ENTERPRISES PUBLIQUES *v.* R. (1919), 57 S. C. R. 527 ; 44 D. L. R. 459.—**CAN.**

*Sect.* 2.—*Particular instances.* *Sect.* 3. *Part XIV.* *Sect.* 1: *Sub-sects.* 1, 2, 3, 4 & 5. *Sect.* 2: *Sub-sects.* 1, 2 & 3.]

**owned by English company.**]—*See* CONFLICT OF LAWS, Vol. XI., p. 346, No. 333.

**Damage to fisheries.**]—*See* FISHERIES, Vol. XXV., pp. 39, 40, Nos. 366–376.

SECT. 3.—JURISDICTION

**Jurisdiction of Admiralty Division.**]—*See* ADMIRALTY, Vol. I., pp. 140, 141, Nos. 480, 488–493.

**Jurisdiction of county courts.**]—*See* ADMIRALTY, Vol. I., pp. 245, 246, Nos. 1728–1732.

# Part XIV.—Wreck.

## SECT. 1.—DEFINITIONS.

### SUB-SECT. 1.—"WRECK."

**Statutory definition.**]—*See* 1894 Act, s. 510 (1); Fisheries Act, 1883 (c. 22), s. 10, Sched. I., Art. 25.

**6777. What is "wreck"—Property cast ashore by the sea.**]—That nothing shall be said *wreccum maris*, but such goods only which are cast or left on the land by the sea; for *wreccum maris significat illa bona, quae naufragio ad terram appellintur;* flotsam is when a ship is sunk, or otherwise perished, & the goods float on the sea; jetsam is when the ship is in danger of being sunk, & to lighten the ship the goods are cast into the sea, & afterwards notwithstanding the ship perish. Lagan, *vel potius* ligan, is when the goods which are so cast into the sea, & afterwards the ship perishes, & such goods cast are so heavy that they sink to the bottom, & the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again, & *dicitur lig, a ligando;* & none of these goods which are called jetsam, flotsam or ligan, are called wreck so long as they remain in or upon the sea; but if any of them by the sea be put upon the land, then they shall be said wreck.—CONSTABLE'S CASE (1601), 5 Co. Rep. 106 a; 77 E. R. 218.

*Annotations:*—**Consd.** Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831; The Schiller (1877), 2 P. D. 145. **Refd.** Admiralty Case (1609), 13 Co. Rep. 51; Prideaux *v.* Warne (1673), Freem. K. B. 355; R. *v.* Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257; R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* Thurborn (1848), 2 Car. & Kir. 831; Beaufort *v.* Swansea Corpn. (1849), 3 Exch. 413; R. *v.* Wood (1849), 4 New Mag. Cas. 27; The Gas Float Whitton No. 2, [1896] P. 42; The Olympic, [1913] P. 92. **Mentd.** Gold *v.* Death (1615), Cro. Jac. 381; R. & Waller *v.* Hanger (1615), 3 Bulst. 1; Onslow *v.* Horne (1771), 2 Wm. Bl. 750; Baldwin *v.* Elphinston (1775), 2 Wm. Bl. 1037; R. *v.* G. W. Ry., (1842), 3 Q. B. 333; Penryn Corpn. *v.* Holm (1877), 37 L. T. 133.

**6778.** —— ——.] — Timber found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, is not "wreck" within the meaning of that word as defined by 17 & 18 Vict. c. 104, s. 2:—*Held:* persons who had secured such timber could not enforce a claim for salvage in respect of their services under 17 & 18 Vict. c. 104, ss. 458, 460.

We must give to the words found in this Act their ordinary interpretation. Wreck, in many parts of England, belongs to the lords of manors. But in order to constitute a legal wreck the goods must come to land; if they continue at sea the law distinguishes them as jetsam, flotsam or lagan. That is the well known legal interpretation of the terms, & we need not search modern dictionaries to see how they are to be understood (WATSON, B.).

According to the well-known meaning of flotsam, as stated in the *Termes de la Ley*, it refers to goods having been at sea in a ship & separated from it by some peril (MARTIN, B.).—PALMER *v.* ROUSE (1858), 3 H. & N. 505; 27 L. J. Ex. 437; 31 L. T. O. S. 220; 22 J. P. 773; 6 W. R. 674; 157 E. R. 569.

*Annotation:*—**Refd.** The Gas Float Whitton No. 2, [1896] P. 42.

**6779.** —— —— **Not necessarily "left dry."**]—To constitute "wreck of the sea," goods must have touched the ground, though they need not have been left dry.—R. *v.* FORTY NINE CASKS OF BRANDY (1836), 3 Hag. Adm. 257; 166 E. R. 401.

*Annotations:*—**Consd.** R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* The Pauline (1845), 9 Jur. 286. **Refd.** R. *v.* Keyn (1876), 2 Ex. D. 63; The Olympic, [1913] P. 92; The Fagernes, [1926] P. 185.

**6780.** —— —— **Property becoming again afloat after having touched land.**]—Things floating, though between high & low water mark, not having touched the ground, can not be *wreccum maris;* if fixed to the land between high & low water mark, though with some water round them, they are *wreccum maris.* If after having once touched the land between high & low water mark, they are again afloat, they are not necessarily *wreccum maris*, but their legal character will depend on the particular circumstances.

"*Wreccum maris*" is not such in legal acceptation, till it comes ashore, until it is within the land jurisdiction; whilst at sea, it belongs to the King in his office of Admlty., as derelict, flotsam, jetsam, or ligan. Above high water mark it belongs to the lord of the manor as grantee of the Crown; but beyond low water mark he can have no claim; it is on the high seas & belongs to the Admlty. It is equally clear law that between high & low water marks it is *divisum imperium;* when the tide covers this space it is sea; when it recedes, it is again land & within the jurisdiction of the manor. If the article be floating it belongs to the sea; if it is not "*wreccum maris*" but "flotsam"; if it become fixed to the land, though there may be some tide remaining round it, it may be considered as "wreccum maris," but it having merely touched the ground, & being again floating about, its character will depend upon its state at the time it was seized & secured into possession; whether, for instance, the person who seized it, as salvor, was in a boat, or wading, or swimming (SIR JOHN NICOLL).—R. *v.* TWO CASKS OF TALLOW (1837), 3 Hag. Adm. 294; 6 L. T. 558; 166 E. R. 414.

*Annotations:*—**Refd.** The Pauline (1845), 2 Wm. Rob. 358; The Olympic, [1913] P. 92.

**6781.** —— —— ——.]—A claim by the Lord of the Manor, as grantee of wreck, to a foreign vessel, found deserted upon a sand in the mouth of a river:—*Held:* the property was not *wreccum maris*, because when taken possession of by the agents of the Lord of the Manor it was not on the shore or land, but on land covered by sea; the claim of the Lord of the Manor not being sustainable, unless, at the time of taking possession, the vessel was either on the actual shore, or left dry on land at other times covered with water.—THE PAULINE (1845), 2 Wm. Rob. 358; 3 Notes of

Cases, 616; 6 L. T. 558; 9 Jur. 286; 166 E. R. 790.

**6782. —— Whether flotsam jetsam or lagan—On touching land.**]—CONSTABLE'S CASE, No. 6777, *ante*.

**6783.** ——————.]—R. *v.* FORTY NINE CASKS OF BRANDY (1836), 3 Hag. Adm. 257; 166 E. R. 401.

*Annotations:*—**Consd.** R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294. **Refd.** R. *v.* The Pauline (1845), 9 Jur. 286; R. *v.* Keyn (1876), 2 Ex. D. 63; The Olympic, [1913] P. 92; The Fagernes, [1926] P. 185.

**6784.** ——————.]—R. *v.* TWO CASKS OF TALLOW, No. 6780, *ante*.

**6785. —— Whether property ownership of which identifiable.**]—If the property of goods can be proved, the Lord of the Manor is not entitled to them as wreck.—HAMILTON & SMYTH *v.* DAVIS (1771), 5 Burr. 2732; 98 E. R. 433.

*Annotation:*—**Apld.** Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831.

**6786. —— Whether vessel must be lost with all hands.**]—To constitute "wreck," it is not necessary that no person should have escaped alive to land from the vessel.—DUNWICH CORPN. *v.* STERRY (1831), 1 B. & Ad. 831; 9 L. J. O. S. K. B. 167; 109 E. R. 995.

—— **In respect of claim for wages.**]—*See* Part III., Sect. 4, sub-sect. 3, A., *ante*.

—— **In respect of salvage.**]—*See* Part XV., Sect. 7, sub-sect. 3, *post*.

——.]—*See, also*, ADMIRALTY, Vol. I., pp. 153–155.

**Whether "wreck" passes under general words in Royal Grant.**]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 569, No. 692.

SUB-SECT. 2.—"JETSAM."

**6787. Goods cast overboard from ship in peril—Ship subsequently foundering.**] — CONSTABLE'S CASE, No. 6777, *ante*.

**Whether "jetsam" is "wreck."**]—*See* 1894 Act, s. 510 (1), & Nos. 6777–6780, *ante*.

SUB-SECT. 3.—"FLOTSAM."

**6788. Goods floating from foundered ship.**]—CONSTABLE'S CASE, No. 6777, *ante*.

**6789.** ——.]—R. *v.* TWO CASKS OF TALLOW, No. 6780, *ante*.

**6790.** ——.]—PALMER *v.* ROUSE, No. 6778, *ante*.

**Whether "flotsam" is "wreck."**]—*See* 1894 Act, s. 510 (1), & Nos. 6777–6780, *ante*.

SUB-SECT. 4.—"LIGAN."

**6791. Goods cast from foundering ship—Attached to floating object for purpose of subsequent recovery.**]—CONSTABLE'S CASE, No. 6777, *ante*.

**Whether "ligan" is "wreck."**]—*See* 1894 Act, s. 510 (1), & Nos. 6777–6780, *ante*.

SUB-SECT. 5.—DERELICT.

*See* Part XIV., Sect. 7, sub-sect. 4, *post*.

SECT. 2.—DEALING WITH WRECK.

SUB-SECT. 1.—FINDERS OF WRECK.

*See* 1894 Act, ss. 518, 519, & 1906 Act, s. 72.

**Forfeiture of salvage—For non-delivery of wreck to receiver.**]—*See* Nos. 7549, 7551, *post*.

SUB-SECT. 2.—OWNERSHIP OF WRECK.

*See* 1894 Act, ss. 521, 525, 547, 549; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 33 (1).

**Right of Crown.**]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 588, Nos. 885–886.

**Right of lord of manor.**]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 572, No. 724; COPYHOLDS, Vol. XIII., pp. 23–24, Nos. 171–178.

SUB-SECT. 3.—RECEIVERS OF WRECK.

**Appointment.**]—*See* 1894 Act, s. 566.

**Fees.**]—*See* 1894 Act, ss. 567–568.

**Application of fees.**]—*See* 1894 Act, s. 567 (4); & 1898 Act, s. 1.

**Duties.**]—*See* 1894 Act, ss. 519, 520, 522, 524, 525.

**Admissibility of depositions before receiver.**]—*See* ADMIRALTY, Vol. I., p. 199, Nos. 1160–1166.

**6792. Salvage — Detention of wreck — Pending payment of salvage or security given.**]—A vessel having run ashore on the coast of Essex, was assisted by the owner of a smack, who put down an anchor & an hawser attached to the vessel for the purpose of securing her. The smack then left her for the purpose of carrying away some of her stores, with the intention however of returning. The owner of another smack came to her afterwards & finding no one in or near the vessel, & her deck under water, took away the anchor & hawser; & delivered them to the deputy vice-admiral of Essex. The deputy vice-admiral, who received the anchor & hawser, alleged to have been left at sea, from the finder, refused, on application by the real owner, to deliver them up until the salvage was paid, or security given for the payment of it:—*Held:* this was a conversion; but if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion.—CLARK *v.* CHAMBERLAIN (1836), 2 M. & W. 78; 2 Gale, 217; 6 L. J. Ex. 2; 150 E. R. 676.

*Annotations:*—**Distd.** Kerford *v.* Mondel (1859), 28 L. J. Ex. 303. **Consd.** Burroughes *v.* Bayne (1860), 5 H. & N. 296.

**6793.** ——————.]—A British steamship, belonging to pltfs., with cargo from & to a Continental port, was in the English Channel, in distress, for want of fuel, twenty miles off the coast. A British steam tug towed her into Plymouth, & at the request of the master of the tug, deft., receiver of wreck at that port, detained pltfs.' vessel two days pending the production of satisfactory bail to answer a claim for salvage. In an action for damages for the illegal detention of the vessel:—*Held:* deft. as receiver, had jurisdiction to detain the property which was in his district, & liable for salvage.—THE FULHAM, [1899] P. 251; 68 L. J. P. 75; 81 L. T. 19; 47

**PART XIV. SECT. 2, SUB-SECT. 3.**

**6792*a.** *Salvage—Detention of wreck—Pending payment of salvage or security given.*]—A comr. under the Wreck & Salvage Act, though originally not acting in a manner to give him official rights under the said Act will, if he acquire the custody & possess himself of the property which floats out of a ship & not abandoning possession of the same, establish a lien for fair charges for its salvage, custody & preservation. This right would follow the property no matter who may acquire the title of it.—DRYER *v.* HARNEY (1883), 6 Nfld. L. R. 510.—**NFLD.**

**b.** *Right to possession—As against salvors.*]—The receiver of wrecks at Sydney put in a claim for the possession of the ship, as against the salvors:—*Held:* there was no ground for the claim.—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**c.** *Jurisdiction of wreck commissioner—Property found outside three*

*Sect.* 2.—*Dealing with wreck: Sub-sect.* 3. *Sects.* 3 & 4: *Sub-sects.* 1 & 2. *Sect.* 5: *Sub-sects.* 1

W. R. 598; 15 T. L. R. 404; 43 Sol. Jo. 568; 8 Asp. M. L. C. 559. C. A.

—— **Right to salvage.**]—*See* Part XV., Sect. 6, sub-sect. 2, H., *post.*

## SECT. 3.—VESSELS IN DISTRESS.

*See* 1894 Act, ss. 511–517.

## SECT. 4.—LIGHTING AND BUOYING OF WRECKS.

### SUB-SECT. 1.—LIGHTING OF WRECKS.

*See* Sea Regulations, 1910, Articles 1–14.

**6794. Liability for lighting—Control remaining in owner.**]—(1) Where the owners of a wreck remained in possession thereof, but the port authority undertook & neglected the duty of indicating its position so as to secure ships entering the harbour where she lay from the danger of collision with her:—*Held:* neither the owners nor the wreck were liable for a collision which ensued; the control & management thereof had been legitimately transferred by the owners to the port authority, acting within the apparent scope of its powers, & in the absence of negligence by the owners no maritime lien arose.

(2) In order to fix the owners of a wreck with liability two things must be shown, first, that . . . the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, &, secondly, that they have . . . been guilty of wilful misconduct or neglect (JEUNE, P.).

(3) The colliding ship having been navigated in circumstances of instant peril with reasonable care & skill:—*Held:* it was not answerable for the collision.—UTOPIA (OWNERS) *v.* PRIMULA (OWNERS), THE UTOPIA, [1893] A. C. 492; 62 L. J. P. C. 118; 70 L. T. 47; 9 T. L. R. 542; 7 Asp. M. L. C. 408; 1 R. 394, P. C.

*Annotations:*—*As to* (1) **Consd.** Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Ripon City, [1897] P. 226. **Apld.** The Manorbier Castle (1923), 129 L. T. 31. **Consd.** The Sylvan Arrow, [1923] P. 220. *As to* (2) **Apld.** The Snark, [1900] P. 105. *Generally,* **Reid.** The Tervaete, [1922] P. 259.

**6795. —— Control transferred from owner—To port authority—Owner in possession.**]—UTOPIA (OWNERS) *v.* PRIMULA (OWNERS), THE UTOPIA, No. 6794, *ante.*

**6796. —— —— What amounts to transfer of control—Employment of independent contractor to raise wreck.**]—A barge belonging to defts., without negligence on their part, was sunk in the fairway of the river Thames. They employed an underwaterman to conduct the salvage operations necessary to raise her &, for that purpose, put him in possession & control; but, owing to the guard vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, pltf.'s steamship coming up the river, without negligence, ran upon the wreck & sustained damage:—*Held:* defts. were personally responsible, as (*a*) they were bound to see that the necessary precautions were taken to prevent danger to the public, & could not escape from this liability by throwing the blame on the contractor employed by them to do the work; (*b*) because they were under an obligation to protect other vessels from receiving injury from the sunken barge, as the employment of the contractor did not amount to an abandonment or transfer of the possession, management, & control of the wreck.—THE SNARK, [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42; 48 W. R. 279; 16 T. L. R. 160; 44 Sol. Jo. 209; 9 Asp. M. L. C. 50, C. A.

*Annotations:*—**Distd.** The Manorbier Castle (1923), 129 L. T. 31. **Reid.** The Wallsend (1907), 76 L. J. P. 131.

**6797. Liability for expenses of lighting.**]—Through the negligence of defts.' servants a collision occurred in the port of Southampton between defts.' steamship & a barge, with the result that the barge sank. The owners & underwriters of the barge having abandoned her, the statutory harbour authority incurred expenses in lighting & buoying the wreck & subsequently removing the obstruction by blowing it up. In an action brought by the harbour authority against the owners of the steamship to recover the expenses so incurred:—*Held:* defts., the owners of the steamship, were liable to make good to pltfs., the harbour authority, the expenses incurred by them whether the case was regarded from the point of view of the breach of duty or negligence of defts. or from that of a public nuisance caused through their fault.—THE ELLA, [1915] P. 111; 84 L. J. K. B. 97; 30 T. L. R. 566.

*Annotations:*—**Apld.** The Solway Prince (1914), 31 T. L. R. 56. **Reid.** Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Walter Nelson, [1918] 2 K. B. 381.

—— **Wrecks in navigable rivers.**]—*See* WATERS & WATERCOURSES.

**6798. Lights in wrong position—Liability for collision.**]—THE MANORBIER CASTLE, No. 6452, *ante.*

### SUB-SECT. 2.—BUOYING OF WRECKS.

**6799. Liability for not buoying—Damages.**]—By 26 & 27 Vict. c. lxxxix. the harbour of B. was vested in defts., the limits were defined, & defts. had jurisdiction over the harbour of P. & the channel of P. beyond those limits for the purpose of (*inter alia*) buoying "the said harbour & channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. cxlvi, a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, were to be paid to defts. & to be applied by them in (*inter alia*), buoying & lighting the harbour & channel of P. A vessel was wrecked

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*mile limit.*]—A wreck comr. under 23 Vict. c. 5, has no jurisdiction over property found & taken at sea outside the three mile limit.—BRENTON *v.* BIRKETT (1864), 5 Nfld. L. R. 81.—**NFLD.**

**PART XIV. SECT. 4, SUB-SECT. 1.**

c. *Liability for lighting—Wreck sold to be taken to pieces—Wreck still in charge of persons put in charge after ship sank.*]—Pltfs. claimed damages suffered by running into the steamer *O.* which was sunk & obstructed navigation. Deft. was neither proprietor nor in possession of the steamer at the time it was sunk, but had purchased it a few days before the accident for the purpose of taking it to pieces. The persons who had been placed in charge of it, after it was sunk, were still in charge at the time of the accident but had kept no lights or other sufficient indications to prevent a collision:—*Held:* deft. was liable for the damages caused.—BAKER *v.* FREEMAN (1884), 10 Q. L. R. 368.—**CAN.**

**6797 i.** *Liability for expenses of lighting.*]—The right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it constitutes an obstruction was first given by 49 Vict. c. 36, & such expenses could not be recovered under 37 Vict. c. 29 or 43 Vict. c. 30.—R. *v.* MISSISSIPPI & DOMINION S.S. CO. (Que.) (1894), 4 Exch. C. R. 298.—**CAN.**

in the channel of P., which under Wrecks Removal Act, 1877 (c. 16), s. 4, defts. had power to, & did partially, remove. The wreck not removed was not buoyed, & pltf.'s vessel was in consequence wrecked:—*Held:* the statutes imposed upon defts. an obligation to remove the wreck from the channel or to mark its position by buoys, & not having done so they were liable in damages to pltf.—DORMONT *v.* FURNESS RY. CO. (1883), 11 Q. B. D. 496; 52 L. J. Q. B. 331; 49 L. T. 134; 47 J. P. 711; 5 Asp. M. L. C. 127.

*Annotation:*—**Refd.** The Ella, [1915] P. 111.

**6800.** —— ——.]—The first action was brought by the owners of a steamship bound from Calcutta to Dundee against the Dundee Harbour Trustees to recover the damage alleged to have been caused to the ship by a collision in the spring of 1919 with a submerged wreck at the mouth of the estuary of the Tay, of which the trustees were the harbour authority, by reason of the negligence of the trustees in not taking reasonable steps to secure the attendance of pilots for vessels coming up the Tay & in failing to have the estuary properly buoyed so as to apprise vessels coming in of the presence of the wreck. The trustees denied negligence & pleaded that the faulty navigation of the ship contributed to the collision. The second was a similar action by the owners of another ship & was met by a similar plea. The third action was brought by the owners of the cargo on board the latter ship in respect of damage sustained in consequence of the collision of the ship:—*Held:* in each action the damage was solely caused by the negligence of the trustees in both the particulars mentioned.—ANCHOR LINE (HENDERSON BROTHERS), LTD. *v.* DUNDEE HARBOUR TRUSTEES, ELLERMAN LINES, LTD. *v.* DUNDEE HARBOUR TRUSTEES, THOMSON, SHEPHERD & CO., LTD. *v.* DUNDEE HARBOUR TRUSTEES (1922), 38 T. L. R. 299, H. L.

**6801. Control surrendered by owners—For purposes of marking—Right to damages for injury to wreck.**]—THE MANORBIER CASTLE, No. 6452, *ante*.

**6802. Wreck & wreck marking vessel—"Vessels"—Within Maritime Conventions Act, 1911 (c. 51).**]—THE MANORBIER CASTLE, No. 6452, *ante*.

**Buoying of wrecks in rivers.**]—*See* WATERS & WATERCOURSES.

## SECT. 5.—REMOVAL OF WRECK.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, ss. 530, 531 (1)–534; & Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 56.

**6803. Non-exercise of powers of removal—Liability for damages—Vessel colliding with partially-removed wreck.**]—DORMONT *v.* FURNESS RY. CO., No. 6799, *ante*.

**6804. Exercise of powers of removal—Condition precedent to exercise—Report in writing of marine surveyor—Mersey Docks.**]—Mersey Docks Act, 1874, s. 11, as amended by Mersey Docks & Harbour Board Act, 1889, s. 28, enables the Mersey Docks & Harbour Board to raise, destroy, or remove any wrecks of vessels or any vessels sunk or stranded in any dock or elsewhere within the port of Liverpool which are "in the judgment of the marine surveyor . . . of the Board . . . such judgment being recorded in writing signed by him & deposited with the secretary of the Board," an obstruction to safe & convenient navigation:—*Held:* it is not a condition precedent to the exercise by the Board of their statutory power to raise, destroy, or remove a sunken or stranded vessel that the judgment of the marine surveyor that the vessel is an obstruction to safe navigation should first have been recorded in writing & deposited with the secretary of the Board. It is sufficient to enable the Board to exercise their powers that the marine surveyor honestly comes to the conclusion that the vessel must be raised, destroyed or removed, & that within a reasonable time after the forming of his judgment to that effect, he puts it in writing & deposits it with the secretary of the Board.—JONES *v.* MERSEY DOCKS & HARBOUR BOARD (1913), 108 L. T. 722; 29 T. L. R. 468; 12 Asp. M. L. C. 335; 18 Com. Cas. 163.

*Annotations:*—**Consd.** Christie *v.* Trinity House Corpn. (1919), 35 T. L. R. 480. **Refd.** The Countess (1922), 91 L. J. P. 161.

**6805.** —— **Liability for damages—Destruction of wreck purchased by third party from Admiralty.**]—A steam drifter which had been taken over by the Admlty. as a mine-sweeper ran ashore & became a wreck in Nov. 1914, & defts., the Corpn. of Trinity House, decided that they would take no action for the time being. The Admlty. sold the wreck in June, 1918, to pltf. who commenced salvage operations. In Sept. 1918, before these operations were completed, defts., being unaware that the wreck had been sold, blew it up under the powers conferred by 1894 Act, s. 531 (1), on the ground that it was a danger to navigation. In an action for damages:—*Held:* as by sect. 741 of above Act defts. had no right to deal with ships belonging to the Crown, & as an opinion formed in Nov. 1914, that the wreck was a danger to navigation could be no justification for defts.' action in Sept. 1918, pltf. was entitled to damages.—CHRISTIE *v.* TRINITY HOUSE CORPN. (1919), 35 T. L. R. 480.

**Removal of wrecks in rivers.**]—*See* WATERS & WATERCOURSES.

### SUB-SECT. 2.—EXPENSES OF REMOVAL.

**6806. Liability for expenses—Owner—Meaning of "owner"—Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 56.**]—The "owner" of any wreck, who, under above sect., is to repay the harbour master the expense of removing it if it becomes an obstruction to his harbour, is he who was the owner thereof when such wreck became an obstruction. Where a wreck became an obstruction to a harbour, & the underwriters subsequently, & before the removal, paid the owner as for a total loss:—*Held:* such payment did not make them liable to the harbour master

**PART XIV. SECT. 5, SUB-SECT. 1.**

**d.** *Exercise of powers of removal—Liability for damages.*]—Applt.'s punt sank in a harbour. Applt. was required by the harbour board to remove it & obtained leave to use explosives, on condition that he removed all wreckage & assumed liability for any damage done. The punt was blown up & most of the wreckage removed by applt. Some however remained in the channel & resp.'s launch collided with it & was damaged:—*Held:* there [illegible] negligence in applt.'s failure to remove the punt & its wreckage after undertaking to do so, & resp. was entitled to recover.—GRIFFIN *v.* WHITNEY (1914), 33 N. Z. L. R. 1028.—**N.Z.**

**PART XIV. SECT. 5, SUB-SECT. 2.**

**e.** *Liability for expenses—Owner—Meaning of "owner"—Marine Act, 1890, s. 13.*]—The "owner" referred to in above sect. is the owner of the ship at & before the time of the occurrence which led to her being sunk, stranded or run ashore.—HOWARD SMITH *v.* WILSON, [1896] A. C. 579, P. C.—**AUS.**

*Sect. 5.—Removal of wreck: Sub-sect. 2. Sect. 6: Part XV. Sects. 1 & 2: Sub-sect. 1.]*

as "owners," but the original shipowner, to whom the burden attached at the time the wreck became an obstruction, must bear the expense of removal. —EGLINTON *v.* NORMAN (1877), 46 L. J. Q. B. 557; 36 L. T. 888; 25 W. R. 656; 3 Asp. M. L. C. 471, C. A.

*Annotations:*—**Overd.** Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508. **Reid.** River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743.

**6807.** —— —— —— ——.]—A ship belonging to applts. came into collision with another vessel & sank near the approach to a harbour where it was an obstruction to the navigation. There was no evidence of negligence on applts.' part. Applts. gave their underwriters notice of abandonment as a total loss & were paid on that footing, & also gave the harbour authority notice of the abandonment. The harbour authority, acting under Harbours, Docks & Piers Clauses Act, 1847 (c. 27), & Removal of Wrecks Act, 1877 (c. 16), took possession of the wreck, raised part of the cargo & sold it, dispersed the wreck by explosives, & after deducting the proceeds of the cargo from the expenses sued applts. for the balance under s. 56 of the Act of 1847:—*Held:* applts. were not liable (1) because although owners of the ship when she became an obstruction, yet having abandoned her before the expenses were incurred, they were not "the owners" within sect. 56 of the Act of 1847 & were not personally liable for the repayment; (2) because the expenses could not be recovered from the owner where the wreck had been removed by destruction since the Act of 1847 only gave the harbour authority power to "remove" & not to "destroy."—ARROW SHIPPING CO. *v.* TYNE IMPROVEMENT COMRS., THE CRYSTAL, [1894] A. C. 508; 63 L. J. P. 146; 71 L. T. 346; 10 T. L. R. 551; 7 Asp. M. L. C. 513; 6 R. 258, H. L.

*Annotations:*—*As to* (1) **Distd.** Howard Smith *v.* Wilson, [1896] A. C. 579. **Consd.** Barraclough *v.* Brown (1897), 66 L. J. Q. B. 672; The Ella, [1915] P. 111; Boston Corpn. *v.* Fenwick (1923), 129 L. T. 766. *Generally*, **Reid.** The Wallsend, [1907] P. 302; Sheppy Glue & Chemical Works *v.* Medway River Conservators (1926), 24 L. G. R. 457; The Mostyn, [1927] P. 25. **Mentd.** Postmaster-General *v.* Beck & Pollitzer (1924), 93 L. J. K. B. 1017; *Re* Ryder & Steadman's Contract, [1927] 2 Ch. 62.

**6808.** —— —— **Abandonment by owner before expenses incurred.**]—ARROW SHIPPING CO. *v.* TYNE IMPROVEMENT COMRS., THE CRYSTAL, No. 6807, *ante*.

**6809.** —— —— ——.]—The expense of removing a wreck can only be recovered from the owners at the time the expense is incurred. Whom the owners of a vessel that has become a wreck treat it as a constructive total loss, & give a notice of abandonment to their underwriters, they divest themselves of their property in the vessel abandoned & cease to be its owners.—BOSTON CORPN. *v.* FENWICK & CO., LTD. (1923), 129 L. T. 766; 39 T. L. R. 441; 16 Asp. M. L. C. 239; 28 Com. Cas. 367.

**6810.** —— —— **Expenses of destruction by harbour authority—Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 56.**]—ARROW SHIPPING CO. *v.* TYNE IMPROVEMENT COMRS., THE CRYSTAL, No. 6807, *ante*.

**6811.** —— —— **Of vessel at fault—Wreck due to collision.**]—THE ELLA, No. 6797, *ante*.

**6812.** —— **Cargo owners.**]—The ship *Swansea* came into collision with another vessel & was sunk in the Mersey, within the port of Liverpool, having on board copper ore & other goods belonging to pltfs. Defts. took possession of the wreck, which obstructed the navigation, & claimed the exclusive right of dealing with ship & cargo. A portion of the cargo, worth about £1,200, was raised by them from the wreck, at a cost of £294 14*s.*, & they ultimately blew up & destroyed the hull of the vessel & the rest of the cargo. The expense incurred by them in removing the obstruction caused by ship & cargo was about £4,500:—*Held:* defts. were not entitled to detain pltfs.'

**6808 i.** —— —— *Abandonment by owner before expenses incurred.*]—The Victorian Marine Act, 1890, s. 13, differing in that respect from the English Harbours, Docks, & Piers Clauses Act, 1847, s. 56, imposes upon the owner or master of any ship sunken within a port, the duty of clearing the port thereof, or of reimbursing the statutory officer the expenses incurred by him for that purpose:—*Held:* the registered owner of the ship at the date of the occurrence cannot escape liability by abandoning the wreck to the underwriters, who, although they become at common law owners of the wreck, are not within the terms of the sect.—HOWARD SMITH *v.* WILSON, [1896] A. C. 579, P. C.—**AUS.**

**6808 ii.** —— —— ——.]—Appcts. were owners of a vessel which was stranded at the entrance to a port, but before she became an impediment to navigation they abandoned her to the underwriters, who sold her to a third party:—*Held:* appcts. had ceased to be owners of the wreck within Navigation Act, 1901, s. 143, & were not liable for removal costs.—*Ex p.* COTTIGAN (1913), 13 S. R. N. S. W. 232; 30 N. S. W. W. N. 61.—**AUS.**

**i.** —— —— *Expenses of removal by Crown.*]—A ship had become a wreck, &, owing to her position, constituted an obstruction to navigation:—*Held:* it was not necessary in an information against the owners for the recovery of moneys paid out by the Crown under 37 Vict. c. 29 & 43 Vict. c. 30, for removing the obstruction, to allege negligence or wrongdoing against the owners in relation to the existence of such obstruction; under the Acts it is only the owner of the ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal.—R. *v.* MISSISSIPPI & DOMINION S.S. CO. (1894), 4 Exch. C. R. 298.—**CAN.**

**g.** —— —— ——.]—The owner or underwriters sold the rights in a wreck for $5 on terms of removal, but the purchaser failed to remove it. The Minister of Marine & Fisheries advertised for tenders, the materials after removal to belong to the tenderer, & on such terms contracted with one to remove it for a certain sum. The contractor blew up the wreck & sold for his own benefit some of the material. The Crown sued the owner for the contract price it had paid the contractor & for certain expenses:—*Held:* the Crown should recover; the Minister had substantially complied with Navigable Waters Protection Act, 1906, ss. 16–18; the value to the contractor of the materials after removal must be deemed to have been considered in making his tender for the work, & the owner thus got the benefit thereof in a lower contract price.—R. *v.* ANDERSON, [1920] 1 W. W. R. 170; 50 D. L. R. 231; 59 S. C. R. 379.—**CAN.**

**h.** —— —— *Expenses of removal by harbour authority.*]—Where the owner of a vessel wrecked in a harbour has undertaken to remove the wreck & fails to do so, Harbour Act, 1908, s. 90 (6), vests in the harbour board a power to remove & a right of action to recover the cost from such owner. —GRIFFIN *v.* WHITNEY (1914), 33 N. Z. L. R. 1028.—**N.Z.**

**k.** —— —— ——.]—In an action brought by the trustees of the Clyde navigation against the owners of a vessel, which had sunk in the navigable channel of the river Clyde, to recover the cost of removing the wreck, the trustees founded on Clyde Navigation (Amendment) Act, 1869, s. 33, & Clyde Navigation Act, 1899, s. 49:—*Held:* the right of the trustees was not restricted to recovering the extra expense directly referable to the removal of the wreck, but they were entitled to recover from defenders, as owners of the wreck, the whole business costs, in so far as fair & reasonable, of operations rendered necessary by reason of the presence of the wreck in the navigable channel.—CLYDE NAVIGATION TRUSTEES *v.* KELVIN SHIPPING CO., LTD., [1927] S. C. 622. —**SCOT.**

**l.** —— —— *Vessel sunk by act of God or by negligence of person not the owner.*]—A personal liability is not imposed by Dublin Port & Docks Act, 1869, s. 96, on the owner in respect of the removal of a vessel which has been sunk in the harbour, or in the approaches of the harbour, either by act of God, or through the negligence of a person not the owner, or for whose act the owner is not responsible.—THE EDITH (1883), 11 L. R. Ir. 270.—**IR.**

**m.** —— —— *What included in expenses of removal—Expenses of lighting.*]—The expenses of lighting the wreck prior to its removal are not expenses of removal within Marine Act, 1890, s. 13.—HOWARD SMITH *v.* WILSON, [1896] A. C. 579, P. C.—**AUS.**

goods to indemnify themselves for the costs incurred in the destruction of the ship, of which pltfs. were not the owners.—VIVIAN *v.* MERSEY DOCKS & HARBOUR BOARD (1869), L. R. 5 C. P. 19; 39 L. J. C. P. 3; 21 L. T. 362; 3 Mar. L. C. 298.

*Annotation*:—**Refd.** The Gas Float Whitton No. 2, [1895] P. 301.

**Removal of wrecks in navigable rivers.**]—*See* WATERS & WATERCOURSES.

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SECT. 6.—**OFFENCES IN RESPECT OF WRECK:** *See* 1894 Act, ss. 535–587.

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# Part XV.—Salvage.

## SECT. 1.—IN GENERAL.

**6813. Statutable meaning.**]—It [the word salvage] does not . . . extend to all acts of salvage, or services rendered to the cargo; but its statutable meaning is confined . . . to the remuneration allotted to salvors, under the name of salvage, for a direct salvage bounty; & in which they have the sole interest, & it does not go beyond that part of the cargo which may be sold for their express benefit. . . . The property saved is to be restored to the owners upon the payment of a reasonable remuneration; but they are not to be indemnified by the Govt., nor is the Govt. to be charged with unreasonable demands for their advantage (LORD STOWELL).—THE JONGE NICOLAAS (1823), 1 Hag. Adm. 201; 166 E. R. 72.

**6814. Duty of salved vessel—To accommodate movements to those of salving vessel.**]—In salvage operations, the vessel asking for assistance has a duty cast upon her to accommodate, as far as possible, her own movements to those of the salving vessel & to render assistance in the common enterprise.—HATFIELD (OWNERS) *v.* GLASGOW (OWNERS), THE GLASGOW (1914), 84 L. J. P. 161; 112 L. T. 703; 13 Asp. M. L. C. 33, H. L.

**Whether doctrine applicable to insurance.**]—*See* INSURANCE, Vol. XXIX., pp. 383, 384, Nos. 3068, 3069.

**Distinguished from towage.**]—*See* Part XI., *ante*.

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## SECT. 2.—NATURE OF SALVAGE.

### SUB-SECT. 1.—IN GENERAL.

**6815. A question of jus gentium.**]—THE TWO FRIENDS, No. 8219, *post*.

**6816. Founded on equity of remuneration.**]—All salvage, whether civil or military, is founded on the equity of remunerating private & spontaneous services rendered in the protection of the lives & property of others.—THE CALYPSO (1828), 2 Hag. Adm. 209; 166 E. R. 221.

**6817.** ——.]—(1) Salvage, in its primary character at least, is personal.

Salvage, in its simple character, is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, & with a lien for their reward. It is personal in its primary character, at least; & those who are so employed in the service are those whom the law considers as standing in the first degree of relation to the property & to the proprietors. . . . These are the principles on which the ct. proceeds in compelling restitution, when necessary, or in assigning a reward. It looks primarily to the actual salvor, & has uniformly rejected all claims founded on prerogative rights, as of the Lord High Admiral in former times, of lords of manors, of magistrates, & of flag officers, except with reference to assistance substantially & beneficially afforded (SIR CHRISTOPHER ROBINSON).

(2) In cases of salvage the estimate of reward is affected by various considerations.

The general principles which govern the discretion of this ct. in such cases, & the principle cases on the subject are too familar to be repeated; they amount to this, that the ct. endeavours always to combine the consideration of what is due to the owners, in the protection of property, with the liberality due to the salvors in remunerating meritorious services. All claims of specific proportions & particularly the distinction of derelict, have been discountenanced, & may be said, indeed, never to have existed in modern times (SIR CHRISTOPHER ROBINSON).—THE THETIS (1833), 3 Hag. Adm. 14; 6 L. T. 914; 166 E. R. 312; *on appeal* (1834), 2 Knapp, 390, P. C.

*Annotations*:—*As to* (1) **Consd.** The Schiller (1877), 2 P. D. 145. *As to* (2) **Refd.** The Ewell Grove (1835), 3 Hag. Adm. 209; The Amérique (1874), L. R. 6 P. C. 468; The Glengyle, [1898] P. 97. *Generally*, **Mentd.** Gore *v.* Bethel, The Inca (1858), 12 Moo. P. C. C. 189.

**6818.** ——.]—(1) Towage of a ship near the land in unsettled weather, if her ground tackle is disabled, is in the nature of salvage.

A steam tug was engaged to tow a ship from the North Foreland to Gravesend, & towed her to the Prince's channel, where both vessels anchored to stop tide. In the night a gale of wind arose, & blew the ship to sea, with loss of anchors & damage to hawsepipes, bowplanking & windlass. The tug was forced to run to Ramsgate, & the next day, the weather having moderated, put to sea, & after considerable search discovered the ship, which had received an anchor & chain by a lugger from the shore. The ship was then towed by the steam tug, another tug assisting, to the port of London:—*Held*: the services of both tugs were in the nature of salvage, & the first tug was entitled to salvage remuneration for her labour & loss of employment whilst seeking the ship.

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**PART XIV. SECT. 6.**

n. *Who may prosecute.*]—The right to prosecute for taking possession of wreck, & unlawfully failing to deliver the same to the Receiver of Wreck under Merchant Shipping Act, 1894, s. 518 (*b*), is not confined to the Board of Trade or their officers. An officer of police can prosecute in such a case without any authorisation from the Board of Trade.—DOWLING *v.* GRIFFIN, [1917] 1 I. R. 609.—IR.

**PART XV. SECT. 2, SUB-SECT. 1.**

**6816 i.** *Founded on equity of remuneration.*]—THE W. G. PUTNAM (1880), Y. A. D. 271.—CAN.

**6816 ii.** ——.]—Salvage is a reward for benefits actually conferred.—THE GLENIFFER (1892), 3 Exch. C. R. 57.—CAN.

**6816 iii.** ——.]—Salvage is an obligation of an exceptional nature to indemnify those by whose assistance a ship, her cargo or the lives of those on board are saved from imminent loss.—MONTREAL LIGHTERAGE CO. *v.* GORDON (1903), Q. R. 28 S. C. 198.—CAN.

**6816 iv.** ——.]—A claim to salvage is founded on a principle of equity which the cts. are bound to recognise.—GILMORE *v.* ROSE (1874), 6 N. W. 2 1.—IND.

*Sect. 2.—Nature of salvage: Sub-sects. 1 & 2, A. (a), (b), (c) & (d).*]

It is of the utmost importance to the safety of shipping, that the owners of steam tugs & other salvors should know that the ct. is inclined to reward liberally unusual efforts to assist vessels in distress, wherever these efforts are successful (DR. LUSHINGTON).

(2) As Mr. Justice Story has said, "Salvage is a mixed question of private right & public policy" (DR. LUSHINGTON).—THE ALBION (1861), 1 Lush. 282; 167 E. R. 121.

**6819. Primarily personal in character.**]—THE THETIS, No. 6817, *ante*.

**6820. Whether founded in prerogative right.**]—THE THETIS, No. 6817, *ante*.

**6821. Right independent of contract.**] — (1) Where the owners of a tug contracted to tow a number of barges at sea for an agreed sum, it being part of the contract, that, if the barges or any of them broke adrift during the towage, the tug owners were nevertheless to be entitled to the sum, & in consequence of the severity of the weather the voyage was unduly protracted, the barges broke adrift on several occasions, & were picked up again, & men in charge of the barges were saved from possible loss of life, the ct. awarded salvage on the ground that the services were beyond what was contemplated by the parties when entering into the towage contract.

(2) An action *in personam* for salvage lies against the owners of the salved property, although the salved property has been transferred to others before the institution of the suit.

(3) The liability for salvage is not confined to those who have the absolute property in the thing saved, but extends to persons having a beneficial interest therein & subject to pecuniary loss if the property were not saved.

(4) The right to salvage may arise out of an actual contract, but it does not necessarily do so (SIR JAMES HANNEN).—THE FIVE STEEL BARGES (1890), 15 P. D. 142; 63 L. T. 499; 6 Asp. M. L. C. 580; *sub nom.* THE STEEL BARGES, 59 L. J. P. 77; 39 W. R. 127.

*Annotations:—As to* (2) **Apld.** The Meandros, [1925] P. 61. *As to* (3) **Apld.** The Port Victor, [1901] P. 243. **Refd.** Pyman S.S. Co. *v.* Admiralty Comrs., [1919] 1 K. B. 49. *As to* (4) **Consd.** Leon Blum, [1915] P. 90. **Refd.** The Veritas, [1901] P. 304. *Generally*, **Refd.** The Dictator, [1892] P. 304.

**6822.** ——.]—(1) Salvage claims rest, not upon contract, but upon the right to be paid out of the property salved, & therefore a salvor who has contributed, though to a small extent, to the ultimate safety of the disabled vessel, is not wholly disentitled to remuneration because he acted under an express agreement which he has failed to perform.

(2) Second salvors who finally rescued the disabled vessel & to whom substantial remuneration was awarded, had refused to consolidate their action with that of the first:—*Held:* the extra expense so caused must be deducted from their costs.

(3) The way in which an agreement affects the questions of salvage is laid down by KENNEDY, J., thus: "A salvage agreement is an agreement which fixes, indeed, the amount to be paid for salvage, but leaves untouched all the other conditions necessary to support a salvage award, one for which is the preservation of some part at least of the *res*, that is ship, cargo or freight (BRUCE, J.).—THE HESTIA, [1895] P. 193; 64 L. J. P. 82; 72 L. T. 364; 43 W. R. 668; 7 Asp. M. L. C. 599; 11 R. 808.

*Annotation:—Generally*, **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6823.** ——.]—THE PORT VICTOR (CARGO EX), No. 7671, *post*.

**6824. —— Services which a prudent man would accept—Though in fact declined.**]—A steam tug, employed by the National Lifeboat Institution solely for the purpose of towing a lifeboat of that institution, went out with the lifeboat in tow to the assistance of a disabled steam vessel, &, after lying by all night, made fast ahead of the steam vessel & towed her, whilst the lifeboat, with her crew, was towed astern of the steam vessel. Subsequently the services of a second tug were accepted by the master of the steam vessel, & the master of that tug insisted, in spite of the remonstrance of the master of the steam vessel, in taking the services of a third tug, which was made fast ahead of the second tug. The steam vessel was successfully towed to a place of safety. In an action of salvage it was admitted by the owners of the salved vessel that services were rendered by the first two tugs; but they denied the right of the coxswain & crew of the lifeboat & of the owners, master, & crew of the third tug, to any award:—*Held:* (1) all pltfs. were entitled to salvage, for the first tug could not go out without taking the lifeboat with her, &, therefore, for salvage purposes, the crew of the lifeboat were to be regarded as if they formed part of the crew of the tug, though with a more moderate reward; (2) the owners, master, & crew of the third tug were to be regarded as salvors, for though the services of that tug were refused by the master of the salved vessel, &, as it turned out, were not in fact required, that tug made fast at the request of the second tug at a time when it was reasonably prudent & necessary for the salved vessel to have the services of a third tug.—THE AUGUSTE LEGEMBRE, [1902] P. 123; 71 L. J. P. 53; 86 L. T. 358; 50 W. R. 622; 18 T. L. R. 373; 9 Asp. M. L. C. 279.

**6825. —— —— Services accepted under protest.**]—Defts.' steamship *K.*, under convoy with other vessels, owing to engine trouble dropped behind the rest of the convoy. Pltfs.' steamship *P.*, one of the vessels in the convoy, offered to tow the *K.*, & the commander of the escorting warship accepted the offer & ordered the *P.* to take the *K.* in tow. The *P.* went back to the *K.* & informed her master that, acting under orders the *P.* was to take the *K.* in tow. The master of the *K.* accepted the services under protest, & the *P.* towed the *K.*, which was able to work sometimes both & sometimes one of her engines for a distance of 900 miles. The services enabled the *K.* to rejoin the convoy & to remain with it, thereby securing the protection of the escort against hostile attack:—*Held:* the *K.* being in danger, it was immaterial that the services were accepted under protest, or that the commander whose orders the *K.*, had to obey, had ordered her to be taken in tow, & pltfs. were entitled to salvage remuneration.—THE KANGAROO, [1918] P. 327; 88 L. J. P. 5.

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SUB-SECT. 2.—SALVAGE SERVICES.

*A. To ship.*

*(a) Rescue.*

**6826. Rescue of ship—From mutineers.**]—THE ANNE (1804), 5 Ch. Rob. 101; 165 E. R. 712.

**6827. —— From pirates.**]—The owners of a ship recovered from persons alleged to be pirates, by one of H.M. ships, have, under Piracy Act, 1850 (c. 26), s. 5, a sufficient interest to entitle them to be heard against an application, on the part of the officers & crew of such H.M. ship, for a reward

for services as against pirates.—H.M.S. VIRAGO (1852), 16 Jur. 1145.

**6828. —— From wreckers.**]—A vessel having got ashore on the Parkin Rock in the Red Sea, her master & part of the crew proceeded to Aden for assistance. During their absence the crew left on board were driven away by Arab wreckers, but the vessel was never permanently abandoned. Three steamers rendered valuable services to the vessel, & finally succeeded in getting her off the rocks & saving part of her cargo. The value of the vessel for the purposes of the action was taken to be £3,750. The ct. awarded £2,000 as salvage.—THE ERATO (1888), 13 P. D. 163; 57 L. J. P. 107; 59 L. T. 840; 6 Asp. M. L. C. 334.

**6829. —— From insurrectionary troops.**]—In Feb. 1920, pltfs., two British & two Belgian officers & twenty-three Belgian soldiers, were in Murmansk on their way to take service with the Govt. of Northern Russia, when a Bolshevik rising took place & the town & port of Murmansk fell into the hands of the Bolsheviks. Pltfs., who would have been imprisoned & probably shot if they had remained in Murmansk, could have escaped by sleigh to the Norwegian frontier, but they decided to escape by sea, &, if they could, to take with them one of the vessels lying in the harbour. Accordingly they boarded defts.' steamship *L.* which was still flying the mercantile flag of the Govt. of Northern Russia. Most of the vessels lying in the port had already hoisted the red flag in token of submission & many of them had been boarded by armed Bolsheviks. A number of the crew of the *L.* were on shore & there was insufficient steam in the boilers for her to proceed to sea. Pltfs., who brought two machine guns with them, cast off sufficient ropes to let the *L.* fall away from the quay, helped to raise steam, & returned the heavy fire from the quay & from other ships which had surrendered. In the course of the fighting three of pltfs. were wounded. The *L.* was thus enabled to effect her escape from Murmansk. Pltfs., with some assistance from the officers & crew of the *L.* then navigated her as far as Tromso, where pltfs. handed her over the representatives of the owners:—*Held:* although in saving the *L.* pltfs. were also effecting their own escape, they had other means of escape & were under no duty to save the *L.*, &, therefore, were volunteers; the Bolsheviks were not acting with the authority of a politically organised & recognised society & the danger to the *L.* was not that of passing from the control of one form of govt. into the control of another, but was analogous to a rescue from pirates or mutineers; accordingly there was nothing in the comity of nations which compelled the ct. to treat the rescue as a rescue from lawful authority & pltfs. were entitled to salvage remuneration.—THE LOMONOSOFF, [1921] P. 97; 90 L. J. P. 141; 37 T. L. R. 151.

—— **From enemy.**]—*See* PRIZE LAW, Vol. XXXV., pp. 673–678, Nos. 1387–1462.

**6830. Protection from fire—Towing ship to port.**]—THE ANNE LOGAN (1854), 8 L. T. 154.

**6831. —— Life salvage.**] — THE EASTERN MONARCH (1860), 1 Lush. 81; 8 L. T. 441: 167 E. R. 43.

**6832. —— Towing ship from neighbourhood of fire.**]—A vessel lying in a dock, & in danger of catching fire from the surrounding warehouses which were in flames, was towed thence by a steamer to a place of safety:—*Held:* salvage was payable.—THE TEES, THE PENTUCKET (1862), 1 Lush. 505; 1 Mar. L. C. 251.

**6833. —— Extinguishing fire at wharf.**]—A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, & had no one but her master & a watchman on board. At the request of the master a steamship, which had just arrived, hove alongside, & getting her hose on board the burning vessel extinguished the fire which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was £9,500. Defts. tendered £200. The ct. upheld the tender, being of opinion that the services were not of such a character, as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another.—THE CITY OF NEWCASTLE (1894), 71 L. T. 848; 7 Asp. M. L. C. 546.

(*b*) *Towage.*

*See* Sect. 4, *post.*

(*c*) *Pilotage.*

*See* Sect. 5, *post.*

(*d*) *Other Services.*

**6834. Transhipment of crew & cargo.**]—(1) A Dutch ship going to the assistance of a British merchantman almost in a sinking state, & whose crew refused any longer to stay by her, receives on board the master, officers, passengers & crew, & valuable treasure, & brings them to England, held entitled to salvage as for a derelict.

(2) A moiety of the treasure decreed & apportioned.—THE COLUMBIA (1838), 3 Hag. Adm. 428; 166 E. R. 464.

**6835. Pumping.**]—THE PERSEVERANCE (1841), 8 L. T. 122.

**6836. ——.**]—THE LIBERTY (1850), 8 L. T. 154.

**6837. Raising sunken ship.**]—A vessel, having been wrecked, was sold, as sunk, & the purchaser, in order to raise her, employed a patented apparatus, belonging to a salvage co., by a verbal agreement with N., & the first attempt failing, he made an agreement in writing with another person, E., for a further attempt with the same apparatus, which likewise failed; & another agreement, in writing, was made between the purchaser & N., for a third attempt, which succeeded; the salvage co., the owners of the apparatus, sued for salvage, disavowing the agreements, as unauthorised by them; the owners appeared under protest, alleging that the services were not of the nature of salvage, but had been rendered under a contract made on land, over which this ct. had no jurisdiction:—*Held:* the service being in its nature of a salvage character, the jurisdiction of this ct. over the subject-matter was not ousted by a mere averment of a binding agreement on land; the ct. must try the question whether there was an agreement or not, & if there was, it has jurisdiction over the money brought in under an

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**PART XV. SECT. 2, SUB-SECT. 2.—A. (a).**

**6828 i.** *Rescue of ship — From wreckers.*]—R. *v.* THE WINDSOR CASTLE, MEILICAN *v.* THE WINDSOR CASTLE (1843), 2 Notes of Cases, Supp. liii; 1 L. T. O. S. 553.—**IR.**

**6828 ii. —— ——.**]—THE HEBE (1849), 7 Notes of Cases, Supp. i.—**IR.**

**o.** —— *Ship seized for breach of law.*]—Salvage not due for rescuing a ship which had been seized for a breach of the laws of its own country.—THE ABIGAIL (1812), Stewart, 355.—**CAN.**

**6833 i.** *Protection from fire—Extinguishing fire at wharf.*]—THE MAGNOLIA (1883), 3 C. L. T. 107.—**CAN.**

*Sect.* 2.—*Nature of salvage: Sub-sect.* 2, *A.* (*d*), *& B. Sect.* 3: *Sub-sects.* 1 *& 2, A. & B.*]

agreement pleaded in bar.—THE CATHERINE (1848), 6 Notes of Cases, Supp. 43; 12 Jur. 682.

*Annotation:*—**Refd.** Bradley *v.* Newsum (1918), 24 Com. Cas. 1.

**6838. Recovering anchor — General salvage already completed by another vessel.**]—(1) Upon a tender for salvage services in getting a vessel off the Newcombe Sand, it appeared that in order to get the vessel off the Sand, both her bower anchors & chains were slipped, & that the salvors, after getting her off, called in the aid of another boat to recover the anchors:—*Held:* the general salvage was completed, when the vessel was off the Sand, & the getting up of the anchors formed no ingredient in the salvage services as to entitle those who recovered the anchors to share in the general salvage of the ship & cargo.

(2) Where the salvors took no step in the Admlty. Ct. to issue a commission of appraisement of the vessel proceeded against, this Ct. as the Ct. of final appeal, will not admit affidavits appraising the vessel.—COLBY *v.* WATSON, THE ENDEAVOUR (1848), 6 Moo. P. C. C. 334; 6 Notes of Cases, 56; 13 E. R. 712, P. C.

**6839. Supply of additional hands.**]—Where the crew of a vessel are much reduced by deaths or sickness, another vessel supplying the deficiency on the high seas from among her own crew is entitled to salvage.—THE ROE (1856), Sw. 84; 166 E. R. 1032.

**6840.** ——.]—THE CHARLES, No. 7747, *post.*

**6841. Fetching assistance.**]—The carrying an order for a steamer to go out of harbour, to a vessel which was in danger & distress, held to be a salvage service under the circumstances of the case.—THE OCEAN (1843), 2 Wm. Rob. 91; 1 L. T. O. S. 58; 166 E. R. 689.

**6842.** ——.]—THE SARAH, No. 7335, *post.*

**6843. Supply of tackle.**]—The supplying of a cable & chain by the crew of a lugger to a vessel which had slipped her anchor, but was not otherwise disabled, in boisterous weather, & in the neighbourhood of dangers, held to be a salvage service.—THE PRINCE OF WALES (1848), 6 Notes of Cases, 39; 12 Jur. 163.

*Annotation:*—**Refd.** The Genessee (1848), 12 Jur. 401.

**6844.** ——.]—THE ÆOLUS, No. 7031, *post.*

**6845. Navigation.**]—THE CORO (1865), 3 Mar. L. C. Digest, 68.

**6846.** —— **Infected vessel.**]—It is a salvage service of a very high order on the part of a navigator to go on board an infected vessel & navigate her.

Two Norwegian barques, both bound to England, fell in with each other on the high seas, about 3,000 miles from Liverpool; one of the barques was in distress, her first mate having died, & her master, her second mate, & one of the crew being sick with yellow fever. The other barque was short handed, but her mate, with the consent of the master, went on board the distressed vessel & succeeded in navigating her to Liverpool. During the voyage, the master, the second mate, & two of the crew died. On the arrival of the vessel at Liverpool an action of salvage was instituted against her. At the hearing of the action, the value of the salved property was taken at £5,135 13*s.* 2*d.* The ct. awarded £600 to the mate who had gone on board the distressed vessel, £100 to the owners of the salving vessel, £50 to her master, & £150 amongst the remaining pltfs.—THE SKIBLADNER (1877), 3 P. D. 24; 47 L. J. P. 84; 38 L. T. 150; 3 Asp. M. L. C. 556.

**6847. Information of position.**]—Mere ignorance of the master cannot in itself be a proper ground of salvage (SIR WILLIAM SCOTT).—THE VROUW MARGARETHA (1801), 4 Ch. Rob. 103; 165 E. R. 551.

*Annotations:*—**Expld.** The Eugenie (1844), 3 Notes of Cases, 430. **Refd.** The General Palmer (1828), 2 Hag. Adm. 176; The Sovereign (1860), 2 L. T. 669; The Hickman (1869), L. R. 3 A. & E. 15; The Mona, [1894] P. 265.

**6848.** ——.]—THE LITTLE JOE, No. 6885, *post.*

**6849.** ——.]—Advice may, in certain circumstances, constitute a salvage service.

A vessel ran on shore by mistaking her course, & being in danger, hoisted a signal of distress. A pilot's cutter came up, & hailed the vessel to adopt certain measures. The vessel acted accordingly & came off the shore:—*Held:* the service so rendered by the cutter was in the nature of salvage.—THE ELIZA (1862), Lush. 536; 7 L. T. 257; 1 Mar. L. C. 251; 167 E. R. 242.

*Annotation:*—**Refd.** Akerblom *v.* Price (1881), 7 Q. B. D. 129.

**6850. Services to one vessel after collision—Position of other vessel relieved—Whether salvage recoverable from both vessels.**] — Where two vessels are in collision, & a salvor renders service to one, without a request from or engagement by the other, & the latter is thereby rescued from a position of immediate danger, such service being a direct benefit to both vessels, entitles the salvor to salvage reward from both.—THE VANDYCK (1882), 47 L. T. 694; 5 Asp. M. L. C. 17, C. A.

*Annotation:*—**Distd.** The Emilie Galline, [1903] P. 106.

**6851. Responding to S.O.S. call for assistance.**]—THE STIKLESTAD, No. 6927, *post.*

*B. To Cargo.*

**6852. Landing & warehousing.**]—A person who, under an agreement with the master of a stranded vessel, had taken charge of the ship, & had succeeded in saving & warehousing a portion of the cargo, the vessel having gone to pieces, held entitled to a salvage remuneration, although his services were to be considered in the character of a meritorious agency rather than of salvage services.—THE FAVORITE (1844), 2 Wm. Rob. 255; 2 L. T. O. S. 405; 166 E. R. 751.

*Annotations:*—**Refd.** The Purissima Concepcion (1849), 3 Wm. Rob. 181; The Honor (1866), L. R. 1 A. & E. 87; The Kate B. Jones, [1892] P. 366.

**6853.** ——.]—THE NARBOTTEN (1845), 8 L. T. 153.

**6854.** ——.]—THE ROSALIE, No. 7495, *post.*

**6855. Shifting cargo.**]—THE ANTILOPE, No. 7629, *post.*

**6856. Saving derelict cargo.**]—A RAFT OF TIMBER (1849), 8 L. T. 154.

**6857.** ——.]—Two agreements were made with one set of salvors, which, after being acted upon for a certain time, were each abandoned by force of circumstances. A second set of salvors saved part of the property but at a time when the agents of the owners had given notice that no assistance was to be given by any person not belonging to the first set of salvors:—*Held:* (1) the first set of salvors were entitled to a reward, not under the agreements, but as having contributed to the saving of the property; (2) the agents had a right to refuse the assistance of all persons; but as only two of the second set of salvors were proved to have received the notice of the agents to that



**6843 i.** *Supply of tackle.*]—Claim for use of anchor, chains, etc., used in saving vessel:—*Held:* a salvage service.—THE GLENIFFER (1892), 3 Exch. C. R. 57.—CAN.

effect, they, with the exception of those two, were entitled to a reward.

It seems to have been thought, that upon the ship breaking up & the cargo floating out of her, such cargo became derelict. . . . I am of opinion that this notion was wholly erroneous. The ship & cargo were, in the eye of the law, in the possession of the master, though he was not & could not be actually on board. But it may well be that certain parts of the cargo afterwards became derelict, by being carried by the force of the elements out of the possible reach of the master (DR. LUSHINGTON).—THE SAMUEL (1851), 17 L. T. O. S. 204; 15 Jur. 407.

**6858.** ——.]—THE REGINA (CARGO EX) (1862), 7 L. T. 257; 1 Mar. L. C. 251.

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## SECT. 3.—CONDITIONS GOVERNING SALVAGE.

### SUB-SECT. 1.—IN GENERAL.

**6859. Onus of proof of salvage—On party alleging salvage.**]—A suit for compensation not sustained, on the ground that the vessel was not in danger. The salvors may have believed the vessel in need of assistance; but the master did not, & the salvors have not proved this fact.—THE WILHELMINE (1842), 1 Notes of Cases, 376; 7 L. T. 441.

**6860.** —— ——.]—THE WILHELMINA LUCIA (1858), 8 L. T. 613.

**6861.** —— ——.]—Before there can be a claim for salvage services, there must be an element of real & sensible danger or a reasonable apprehension of it on the part of the vessel against which the salvage is claimed; if there is an entire absence of this element, the claim of the salvor must fail. The *onus* of proving salvage services rests upon those who allege them.—THE CALYX (1910), 27 T. L. R. 166.

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### SUB-SECT. 2.—DANGER TO SHIP OR CARGO.

#### *A. Necessity for.*

**6862. General rule.**]—Where pilots had not made a fair trial to get off to a vessel in distress during two days, when there might be danger & difficulty, & went off on the third, when there was no danger, & when the weather was moderate & the wind fair for the harbour:—*Held:* the service amounted only to pilotage, & not to salvage.—THE CITY OF EDINBURGH (1831), 2 Hag. Adm. 333; 166 E. R. 265.

**6863.** ——.]—THE AURORA (1842), 8 L. T. 122.

**6864.** ——.]—Civil salvage is due only for the rescue of a ship & cargo from danger or distress.—THE MARY (1842), 2 Notes of Cases, 27; 7 Jur. 404.

**6865.** ——.]—THE WILHELMINE, No. 6859, *ante*.

**6866.** ——.]—THE CAROLINE (1843), 2 Wm. Rob. 124; 1 L. T. O. S. 293; 166 E. R. 701.

**6867.** ——.]—THE CANOVA, No. 6994, *post*.

**6868.** ——.]—(1) When a pilot has assisted in navigating a vessel from a dangerous situation to a safe anchorage, the test whether he is entitled to be remunerated for salvage services, is not, on the one hand, whether the vessel was at the time of succour in distress, or, on the other hand, whether she was then damaged; but the test is whether the risk attending the services to the vessel was such that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward.

A vessel was, during a heavy storm, being driven to leeward towards dangerous sands; her captain was ignorant of the locality, & her loss appeared almost inevitable; some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea; but by preceding her & signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage:—*Held:* the pilots were entitled to be remunerated for salvage services.

(2) If the parties have made an agreement, the ct. will enforce it, unless it be manifestly unfair & unjust; but if it be manifestly unfair & unjust the ct. will disregard it & decree what is fair & just (BRETT, L.J.).

(3) In order to found a claim for salvage reward, it is absolutely essential that the ship should be in imminent danger of being lost, & should by the service be saved from such danger (BRETT, L.J.).—AKERBLOM *v.* PRICE (1881), 7 Q. B. D. 129; 50 L. J. Q. B. 629; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. L. C. 441, C. A.

*Annotations:—As to* (1) **Apld.** The Santiago (1900), 70 L. J. P. 12. *As to* (2) **Apld.** The Strathgarry, [1895] P. 264.

**6869.** ——.]—THE CALYX, No. 6861, *ante*.

#### *B. Degree of Danger.*

**6870. Need not be actual & immediate—Must be reasonably probable.**]—THE CHARLOTTE, No. 7310, *post*.

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**PART XV. SECT. 3, SUB-SECT. 2.—A.**

**6862 i.** *General rule.*]—Danger to the ship saved is an element essential to the constitution of salvage service.—OWENS *v.* THE ALEXA (1914), 14 S. R. N. S. W. 389; 31 N. S. W. W. N. 154.—**AUS.**

**6862 ii.** ——.]—*Re* THE MARION TELLER, CLARK *v.* ODETTE, Cass. Dig. 2nd ed. 521.—**CAN.**

**6862 iii.** ——.]—*Held:* the services rendered could not be considered as in the nature of salvage services, there being no danger of destruction or loss.—GURNEY *v.* MACKAY (1875), 37 U. C. R. 324.—**CAN.**

**6862 iv.** ——.]—Salvage means rescue from threatened loss or injury. No danger, no salvage.—CANADIAN PACIFIC NAVIGATION CO. *v.* THE C. F. SARGENT (1893), 3 B. C. R. 5; 3 Exch. C. R. 332.—**CAN.**

**6862 v.** ——.]—The element of danger & imminent loss to the ship, etc., is essential, &, without it, no claim to salvage can arise.—MONTREAL LIGHTERAGE CO. *v.* GORDON (1903), Q. R. 28 S. C. 198.—**CAN.**

**PART XV. SECT. 3, SUB-SECT. 2.—B.**

**6870 i.** *Need not be actual & immediate—Must be reasonably probable.*]—Where there is apprehension of risk, or danger, to the ship, though no immediate risk or danger, the services voluntarily rendered such ship are in the nature of salvage services.—CLAYOQUOT SOUND CANNING CO., LTD. *v.* THE PRINCESS ADELAIDE (B. C.) (1919), 19 Exch. C. R. 128; [1919] 3 W. W. R. 241; 48 D. L. R. 478.—**CAN.**

**6870 ii.** —— ——.]—Where it could not reasonably be assumed that a ship would have been carried across a gulf in the dark & be seriously damaged or lost:—*Held:* the element of danger was too remote & speculative to permit of the services rendered the ship being regarded & compensated for as salvage services.—LARSEN *v.* THE GAS BOAT, [1923] 2 D. L. R. 281; [1923] Exch. C. R. 104; 31 B. C. R. 558; [1923] 1 W. W. R. 958.—**CAN.**

**6870 iii.** ——.]—Salvage occurs whenever assistance is rendered to a ship at sea which is in such a dangerous position that in all human probability she will not be able to extricate herself by her unassisted efforts.—THE LORD DUFFERIN (1849), 7 Notes of Cases, Supp. xxxiii.—**IND.**

**6870 iv.** —— ——.]—Any service rendered to a vessel in a state of peril or risk or otherwise in distress, which contributes, in some degree to its ultimate safety, entitles the person rendering the service to salvage reward. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent & absolute. It will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE

*Sect. 3.—Conditions governing salvage: Sub-sect. 2, B., C. & D.; sub-sect. 3, A.]*

**6871.** —— ——.]—THE BATAVIER (1853), 1 Ecc. & Ad. 169; 164 E. R. 98.
*Annotation:*—**Refd.** Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455.

**6872.** —— ——.]—THE WILHELMINA LUCIA (1858), 8 L. T. 613.

**6873.** —— ——.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *post.*

**6874.** —— ——.]—(1) The ct. will set aside an agreement by salvors when about to perform a salvage service, if it be inequitable.

(2) An agreement to pay 8*s.* 6*d.* for salvage services when there is real danger is futile.

(3) It is not necessary there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty, & reasonable apprehension (DR. LUSHINGTON).—THE PHANTOM (1866), L. R. 1 A. & E. 58; 15 L. T. 596; 12 Jur. N. S. 529; 14 W. R. 774; 2 Mar. L. C. 442.

**6875.** —— ——.]—Where a vessel is in neither actual nor imminent probable danger, a vessel engaged to tow her renders towage & not salvage services.—THE STRATHNAVER (1875), 1 App. Cas. 58; 34 L. T. 143; 3 Asp. M. L. C. 113, P. C.
*Annotation:*—**Mentd.** The Walter D. Wallet, [1893] P. 202.

**6876.** —— ——.]—THE CALYX, No. 6861, *ante.*

**6877.** —— ——.]—THE SEA SALVAGE (1912), *Times*, Dec. 9.

*C. What amounts to Danger.*

**6878. Lack of fuel.**]—(1) Where no special risk has been incurred by the salvors, salvage reward is allotted upon a calculation of a fair remuneration for time & trouble to the owners of the salving vessel & to each hand engaged.

(2) Where there is danger to the salvors, the risk of life receives the greatest remuneration.

(3) A lower scale of remuneration is given where the case of the vessel salved is not one of present danger, but a case of urgency.

(4) The lowest where, a vessel being disabled from proceeding, as in the case of a steam vessel in want of fuel, there is a possible contingency of serious consequences.

(5) When a damaged vessel hoists a signal the presumption is that it is a signal of distress.

(6) The capability of steamers to perform services with greater rapidity & certainty entitles hem, as salvors, to a higher scale of reward.

(7) In all cases the value of the vessel salving is regarded, & to whatever remuneration is given must be added a sum to meet any damage she sustains.—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE (1864), 33 L. J. P. M. & A. 189.
*Annotations:*—*As to* (4) **Consd.** The Alicia Annie & The Arminta *v.* The Scindia (1865), 2 Mar. L. C. 232. *As to* (7) **Dbtd.** The City of Chester (1884), 9 P. D. 182. I cannot find anything in the judgments in those cases [*The Otto Hermann, The Albert & The Ella Constance*] which warrants so wide a proposition. It is evidently inaccurate where the damage done to the salving ship is very great compared with the value of the ship & cargo salved (LINDLEY, L.J.).

**6879. Illness of crew — Frost bite.**] — THE AGLAIA, No. 7033, *post.*

**Ignorance of master of locality—When pilotage becomes salvage.**]—*See* Sect. 5, sub-sect. 2, B., *post.*

*D. Evidence of Danger.*

**6880. Ambiguous signal—Materiality of state of ship.**]—THE FELIX (1853), 1 Ecc. & Adm. 23, n.; 9 L. T. 302; 164 E. R. 14, n.
*Annotations:*—**Folld.** The Hedwig (1853), 1 Ecc. & Ad. 19. **Refd.** The Little Joe (1860), 6 Jur. N. S. 783.

**6881.** —— ——.]—THE HEDWIG, No. 7024, *post.*

**6882.** —— ——.]—THE PEPITA (1853), 9 L. T. 302.

**6883.** —— ——.]—THE NIMROD *v.* THE JOHN (1854), 9 L. T. 302.

**6884.** —— ——.]—Where a ship is in distress & accepts the services of strange hands, the services are in the nature of salvage, although the work done may be of no great difficulty or importance.

The true question always is, What was the condition of the ship? Was she in distress? The character of the signal hoisted is only one piece of evidence bearing upon this question. The ct. will form its conclusion upon all the evidence & all the circumstances (DR. LUSHINGTON).—THE BOMARSUND (1860), 1 Lush. 77; 167 E. R. 41.

**6885.** —— ——.]—Salvors, induced by an ambiguous signal to put off from the shore to the assistance of a ship, are not entitled to salvage reward, if the actual condition of the ship shows that the signal was for a pilot only. Action in such case dismissed, but without costs.

*Semble:* mere giving of information concerning the locality, even if needed, is no salvage service.

Where it is clear that a vessel wants more than pilotage, any signal should be interpreted to mean a request for salvage assistance, & on the other hand, if the condition of the ship shows that a

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DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

**6870 v.** —— ——.]—THE BEN ALDER *v.* THE ACACIA, NORTH BRITISH STEAM FISHING CO. *v.* NORTH EASTERN FISHING CO. (1901), 3 F. (Ct. of Sess.) 490; 38 Sc. L. R. 339; 8 S. L. T. 427.—**SCOT.**

**PART XV. SECT. 3, SUB-SECT. 2.—C.**

**p.** *Incapacity of crew — Shortage of hands.*]—Danger, giving rise to a claim for salvage, may arise from the incapacity of the crew, or from insufficiency of hands to work a ship properly in the position in which she finds herself.—AUSTRALIAN UNITED STEAM NAVIGATION CO., LTD. *v.* THE WILLIAM E. BURNHAM (1921), 21 S. R. N. S. W. 224.—**AUS.**

**q.** *Conduct indicating matters not normal on board—Assistance required to avert possible disaster.*]—Where there is no direct evidence of positive danger to a vessel nevertheless a *primâ facie* case for salvage may be established on evidence of conduct on the part of the master, or other persons on board, indicating that matters were not normal on board the vessel & that assistance of some kind was required to avoid possible disaster.—AUSTRALIAN UNITED STEAM NAVIGATION CO., LTD. *v.* THE WILLIAM E. BURNHAM (1921), 21 S. R. N. S W. 224.—**AUS.**

**r.** *Supervening danger.*]—Although at the time when an offer of assistance is made no danger exists, if at any time subsequently, in the course of the rendering of assistance, danger in fact supervenes owing to the default of the vessel accepting assistance, that is a sufficient foundation for a claim of salvage.—AUSTRALIAN UNITED STEAM NAVIGATION CO., LTD. *v.* THE WILLIAM E. BURNHAM (1921), 21 S. R. N. S. W. 224.—**AUS.**

**t.** *Yacht dragging anchor in public harbour.*]—A yacht, with no one on board of her, broke loose from anchorage in a public harbour during a storm, & was boarded by men from the shore when she was in a position of peril, & by their skill & prudence rescued from danger:—*Held:* they were entitled to salvage.—LAHEY, EGAN, KEMP & CALLAGHAN *v.* THE MAPLE LEAF (1898), 6 Exch. C. R. 173.—**CAN.**

**PART XV. SECT. 3, SUB-SECT. 2.—D.**

**6880 i.** *Ambiguous signal — Materiality of state of ship.*]—If assistance is rendered in response to an ambiguous signal, the condition of the vessel at the time assistance is given is the criterion as to whether the services rendered are salvage services or not. A signal hoisted by a ship in peril is not necessarily a signal of distress, so as to entitle any person going to her assistance, in consequence of such signal, to claim for salvage services.—THE TAIAROA (1876), 2 N. Z. Jur. N. S. 16.—**N.Z.**

**a.** *Abandonment of ship.*]—Abandonment of a ship is sufficient evidence of danger to justify the ct. in awarding a larger sum than if the danger were not so great as to coerce the persons in the custody of the vessel to leave her.—THE EMPIRE QUEEN & CARGO (1868), 19 L. T. 576.—**IR.**

pilot only is wanted, the signal used should be interpreted to be a signal for a pilot only (DR. LUSHINGTON).—THE LITTLE JOE (1860), Lush. 88; 2 L. T. 473; 6 Jur. N. S. 783; 167 E. R. 46.

**6886.** —— ——.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante*.

**6887.** —— ——.]—Where a vessel makes an ambiguous signal, it will be construed by the Ct. of Admlty. according to the condition of the vessel when boarded; if she is damaged & is in need of assistance, the signal will be treated as signal for assistance, & those answering it as salvors; if she is not damaged & wants only a pilot, the signal will be treated as a signal for a pilot only.—THE RACER (1874), 30 L. T. 904; 2 Asp. M. L. C. 317.

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SUB-SECT. 3.—SUCCESS.

*A. Necessity for.*

**6888. General rule—Success essential.**]—Salvage reward is for benefit actually conferred in the preservation of property, not for meritorious exertions alone.

A claim of alleged salvors disallowed upon the ground that they had quitted the vessel leaving the salvage service uncompleted.—THE INDIA (1842), 1 Wm. Rob. 406; 8 L. T. 153; 166 E. R. 625.

*Annotations:*—**Apld.** The Cheerful (1885), 11 P. D. 3. **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6889.** —— ——.]—An unsuccessful attempt to salve the ship & cargo; a second successful attempt to preserve the lives of the crew; can found no claim for salvage reward, which is given as a consideration for a benefit actually rendered to the property. A salvage reward is given for a benefit actually conferred. The property cannot be answerable for a service rendered to life.—THE ZEPHYRUS (1842), 1 Wm. Rob. 329; 1 Notes of Cases, 338; 8 L. T. 153; 6 Jur. 304; 166 E. R. 596.

*Annotations:*—**Refd.** The Johannes (1860), Lush. 182; The Schiller (1877), 2 P. D. 145; The Renpor (1883), 52 L. J. P. 49.

**6890.** —— ——.]—THE DUKE OF CLARENCE, (1842), as reported in 8 L. T. 153.

**6891.** —— ——.]—THE LOCKWOODS, No. 7484, *post*.

**6892.** —— ——.]—THE RANGER, No. 6933, *post*.

**6893.** —— ——.]—THE E. U., No. 7818, *post*.

**6894.** —— ——.]—THE EXCHANGE (1860), 8 L. T. 153.

**6895.** —— ——.]—A steamer employed under an agreement for a specified sum to tow a partially disabled steam vessel to a specific destination, towed the vessel for some hours, but in consequence of a gale causing the breaking of the hawser, left the vessel in a position of considerable danger, from which she was only saved by her own exertions:—*Held:* as it did not appear that the towing had contributed to her safety, the steamer was not entitled (*a*) for towage, as she had not performed her contract; or (*b*) to salvage, as no attempt was made by her to save the vessel.—GENERAL STEAM NAVIGATION CO. *v.* DE JERSEY, THE EDWARD HAWKINS (1862), 15 Moo. P. C. C. 486; Lush. 515; 15 E. R. 578, P. C.

*Annotations:*—**Distd.** The Aztecs (1870), 21 L. T. 797. **Consd.** The Camellia (1884), 9 P. D. 27. **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6896.** —— ——.]—THE DUBLIN, ETC. (OWNERS) *v.* THE CHETAH (OWNERS), THE CHETAH (OWNERS) *v.* THE ANNIE GRANT (OWNERS), THE CHETAH, No. 7428, *post*.

**6897.** —— ——.]—The *C.*, a Spanish steamship, fell in at sea with the *S.* an English steamship, with signals of distress flying & entirely helpless from injuries sustained in a collision with a third vessel. The passengers of the *S.* & a quantity of specie, which had formed part of the cargo of the *S.*, having been taken on board the *C.*, attempts were made by the master & crew of the *C.* to tow the *S.* into safety. These attempts were ineffectual, & ultimately, after the master & crew of the *S.* had gone on board the *C.* the *S.* was abandoned, & her passengers, master, & crew were landed in safety at an English port. Afterwards the specie was arrested in an action of salvage instituted at the suit of the owners, master, & crew of the *C.*, who claimed in the action to recover for life salvage & for salvage services rendered to the *S.* & the specie. The owners of the specie appeared as defts., & served a notice on the owners of the *S.* calling upon them to contribute to the remuneration claimed by pltfs. Thereupon the owners of the *S.* appeared. At the hearing of the action the ct. awarded salvage remuneration to pltfs. for the services rendered, but reserved all questions as to the liability of the owners of the *S.* The owners of the specie then moved the ct. to declare that such portion of the sum awarded as was awarded for life salvage ought to be recouped to the owners of the specie. The ct. refused the motion on the ground that no property belonging to the owners of the *S.* having been salved they could not be held personally liable to pay any portion of the sum awarded.

In the absence of any special contract, some property in the ship or cargo must be saved in order to found the liability of the owners of the ship or cargo to the payment of salvage remuneration (SIR R. PHILLIMORE).—THE SARPEDON (CARGO EX) (1877), 3 P. D. 28; 37 L. T. 505; 26 W. R. 375; 3 Asp. M. L. C. 509.

*Annotation:*—**Refd.** The Renpor (1883), 48 L. T. 887.

**6898.** —— ——.]—The barque *N.* fell in with the *K.* a derelict barque, in the Atlantic, & put five hands on board of her who navigated her for three days. The *K.* then fell in with the barque *B.*, & the five hands on board of the *K.* were, at their own request, taken on board the *B.* The *B.* then sent some of her own crew on board the *K.*, & took her in tow, & towed her until the tow rope broke, when the vessels parted company, & the hands on board the *K.*, with the assistance of the *L.*, a steamship which they afterwards fell in with, brought the *K.* into Falmouth. In suits instituted on behalf of the masters, owners, & crews of the *N.*, the *B.*, & the *L.*:—*Held:* the master, owners, & crew of the *N.* were not entitled to salvage reward, but awarded salvage to remaining pltfs.—THE KILLEENA (1881), 6 P. D. 193; 51 L. J. P. 11; 45 L. T. 621; 30 W. R. 339; 4 Asp. M. L. C. 472.

*Annotations:*—**Consd.** The Camellia (1883), 9 P. D. 27. **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6899.** —— ——.]—THE RENPOR, No. 7199, *post*.

**6900.** —— ——.]—In an action of salvage in which the value of the salving steamer was £85,000 & of her cargo & freight £104,047, & of the salved steamer £90,000, & of her cargo & freight £89,535, the ct. awarded £4,500 to the owners, £500 to the master, & £1,500 to the crew. During the hearing the owners tendered evidence of the particular injuries to their steamer caused by the performance of the services of the costs of the repairs & of the pecuniary loss caused by the detention of their steamer whilst such repairs were being executed. The judge refused to receive this evidence or to refer it to the registrar & merchants to assess the amount of such costs & losses:—*Held:* (1) (BRETT, M.R.) the judge of the

*Sect.* 3.—*Conditions governing salvage: Sub-sect.* 3, *A.*]

Admlty. Ct. is not bound *ex debito justitiæ* to admit such evidence or to decree in terms that a specific & ascertained amount shall be paid to salvors in respect of damages or costs caused by rendering salvage services, for he is not bound always to award a sum sufficient to indemnify a salvor. But the judge may in his discretion receive such evidence, & may, if it be proper under the circumstances, include an amount in respect of damages in his award. Having regard to the large value in the present case, the decree should be varied by awarding £1,000 to the shipowners for the actual services rendered, & by referring the costs of repairs to, & of the detention of, the salvor's steamer to be ascertained by the registrar & merchants, unless applts. were willing that the decree of the ct. below should stand; (2) (BAGGALLAY & LINDLEY, L.JJ.) where salvage services have occasioned salvors serious pecuniary loss, & where the value of the ship & cargo saved is ample not only to defray loss sustained by a salvor, in addition to a proper sum for the master & crew, & also to leave a substantial surplus for the owner of the property saved, the salvor should be remunerated where possible with a sum sufficient to reward him for the risk & labour & to cover damages & expenses incurred through rendering the service, & evidence of the damages & expenses ought to be received by the judge, so that they may be ascertained with precision. The present case should be determined as stated by BRETT, M.R.

(3) There is no jurisdiction known which is so much at large as the jurisdiction given to award salvage. . . . It follows that there is no jurisdiction known the administration of which is more within the discretion of the judge who has to administer it (BRETT, M.R.).

(4) The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved & the danger to which the other ship has been exposed. . . . The next matter for consideration is the value of the property saved. . . . It is obvious that whilst a small percentage on a very large value might be an ample remuneration in one case, a very large percentage on a small value might be a very inadequate remuneration in another case. . . . However strenuous those efforts, however heroic, still if unsuccessful they go unrewarded. . . . Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress (LINDLEY, L.J.).—THE CITY OF CHESTER (1884), 9 P. D. 182; 53 L. J. P. 90; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. L. C. 311, C. A.

*Annotations:—As to* (2) **Refd.** The Melanie (1924), 40 T. L. R. 236. *Generally*, **Mentd.** Venn *v.* Tedesco, [1926] 2 K. B. 227.

**6901.** —— ——.]—The *C.*, which had lost her propeller, was taken in tow by the *C. of H.* off Anvil Point. & towed to a position in the neighbourhood of the Shambles, where the hawsers parted & the *C.* came to an anchor. In attempting to take her again in tow, the *C. of H.* came into collision with the *C.*, & both vessels were considerably damaged. The *C. of H.* then left the *C.*, which was afterwards brought into port by two steam tugs. The *C.*, when left by the *C. of H.*, was in a position of greater peril than that in which she was when first taken in tow:—*Held:* the *C. of H.* was not entitled to salvage remuneration, on the ground that her services had conferred no actual benefit on the *C.*—THE CHEERFUL (1885), 11 P. D. 3; 55 L. J. P. 5; 54 L. T. 56; 34 W. R. 307; 5 Asp. M. L. C. 525.

*Annotations:*—**Apld.** The Benlarig (1888), 14 P. D. 3. **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6902.** —— ——.]—Defts.' vessel having been sunk in the River Thames by a collision occasioned by the fault of another vessel, the Conservators, acting under 20 & 21 Vict. c. cxlvii, s. 86, caused it to be raised & sold, & the proceeds of the sale being insufficient to defray the expenses of raising it, they recovered, under sect. 86, the amount of the deficiency from defts. Defts. on their part recovered the full value of their vessel from the owners of the vessel which was to blame for the collision. In an action for salvage in respect of the preservation of the lives of the crew of defts.' vessel at the time of the collision:—*Held:* the salvors could not recover; defts.' vessel not having been saved there was nothing to which the claim for life salvage could attach; it could not be preferred against defts. in respect of the amount recovered as damages from the vessel to blame for the collision.

There can be no claim for salvage services against a person; something must be saved to which the claim can attach (HANNEN, P.).—THE ANNIE (1886), 12 P. D. 50; 56 L. J. P. 70; 56 L. T. 500 35 W. R. 366; 6 Asp. M. L. C. 117.

**6903.** —— ——.]—In an action of salvage it appeared that the master of defts.' ship requested the master of the pltfs.' ship to tow his vessel to Gibraltar, which the latter agreed to attempt to do. The value of defts.' ship, her cargo, & freight, was £78,000, & at the time this request was made she was in a disabled state. Pltfs.' ship, after towing defts.' ship for 130 miles towards Gibraltar, left her, the hawsers having parted owing to severe weather, in a more dangerous position than she was in when she was taken in tow. Defts.' ship was afterwards towed into Gibraltar by another vessel:—*Held:* pltfs. were not entitled to a salvage reward, but were entitled to adequate remuneration for what they had done in fulfilment of their contract. The ct. awarded them £400.—THE BENLARIG (1888), 14 P. D. 3; 58 L. J. P. 24; 60 L. T. 238; 6 Asp. M. L. C. 360.

*Annotations:*—**Apld.** The Lepanto, [1892] P. 122; The August Korff, [1903] P. 166; **Distd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6904.** —— ——.]—The steamship *N.* fell in with the steamship *D.* in the North Atlantic Ocean. The *D.*, which was flying the signal "N. C.," engaged the *N.* to tow her. The weather was very bad.

The *N.* proceeded in making fast to the *D.*, & towed her a short distance. Shortly afterwards the tow rope parted, & the *N.*, after standing by for some time, continued her course, & did not attempt to render further assistance. The *D.* was subsequently salved by another steamship, the *P.* Upon the owners, master, & crew of the *N.* claiming salvage reward:—*Held:* the action must be dismissed, upon the grounds that the *N.* had not rendered any material benefit to the *D.*, & she had not accomplished the service she was engaged to perform, namely, to tow; an engagement to tow is only fulfilled by the vessel engaged towing the other into a port of safety.—THE DART (1899), 80 L. T. 23; 8 Asp. M. L. C. 481.

*Annotations:*—**Apld.** The Stiklestad, [1926] P. 205. **Refd** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6905.** —— ——.] — (1) Govt. stores were shipped on a chartered vessel under bills of lading signed by the master by direction of the charterers, not exempting the shipowner from liability for negligence, & subject to the stipulations of a

freight engagement entered into with the charterers by a Govt. department under which the owners, the term including the charterers, were responsible for the safe delivery of the stores. The vessel, through the negligence of her master & crew, came into collision with another vessel, & was so much damaged as to require salvage assistance in putting back to the port of shipment, where the stores were returned to the Govt. department. In an action of salvage *in personam* by the salvors against the charterers:—*Held:* as the charterers were directly interested in the preservation of the goods, the salvage service was a benefit to them, &, therefore the action would lie.

(2) In all salvage services there must be some *res* saved (LORD ALVERSTONE, C.J.).

(3) An action for salvage in the Admlty. Ct. can be brought either *in personam* or *in rem* (LORD ALVERSTONE, C.J.).—THE PORT VICTOR (CARGO EX), [1901] P. 243; 70 L. J. P. 52; 84 L. T. 677; 49 W. R. 578; 17 T. L. R. 538; 9 Asp. M. L. C. 182, C. A.

*Annotations:—As to* (1) **Apld.** The Meandros, [1925] P. 61. **Refd.** Pyman S.S. Co. *v.* Admiralty Comrs., [1919] 1 K. B. 49.

**6906.** —— ——.]—While pltfs.' tug was attempting to tow a sinking ship ashore the ship struck on a bank & became a constructive total loss, but cargo of the value of over £17,000 was got out of her as she lay on the bank. Pltfs. claimed salvage. The evidence was that if the ship had been allowed to sink in deep water portions of the cargo could have been saved with approximately the same monetary result:—*Held:* as the cargo where the salvors left it was not worth more than it would have been if the salvage service had not been performed, pltfs. were not entitled to any award.

*Semble:* a tug engaged to tow a vessel, in taking on board the crew of the vessel after a collision, is not so far acting outside the scope of her employment as to entitle the owners, master & crew of the tug to an award for life salvage.—THE TARBERT, [1921] P. 372; 90 L. J. P. 353; 125 L. T. 800; 37 T. L. R. 831; 15 Asp. M. L. C. 423.

*Annotation:*—**Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6907.** —— ——.]—THE VALSESIA, No. 7229, *post.*

**6908. Application of rule—Services contributing to ultimate safety of ship in distress.**]—THE JONGE BASTIAAN (1804), 5 Ch. Rob. 322; 165 E. R. 791.

*Annotations:*—**Apld.** Hewett *v.* Aylan, The Atlas (1862), 15 Moo. P. C. C. 329; The Killeena (1881), 6 P. D. 193. **Refd.** The Vesta (1828), 2 Hag. Adm. 189; The Martha (1838), 3 Hag. Adm. 434; The Longford (1881), 6 P. D. 60; The Dictator, [1892] P. 304; S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6909.** —— ——.]—THE GENESSEE, No. 7159, *post.*

**6910.** —— ——.]—THE E. U., No. 7818, *post.*

**6911.** —— ——.]—A valuable vessel having got upon the Church Rocks off Folkestone, received assistance from some small boats, which were unable to get her off. A tug steamer having also tried in vain to tow her off, a large passenger steamer was sent from Folkestone Harbour, & succeeded in moving her from the rocks, & towing her for a few minutes, when the hawser having broken, she drifted ashore, & became a wreck. The cargo was saved to the value of £9,657. The defence that no salvage reward was due, as the service had been unsuccessful, not sustained. Award of £450 to the smaller vessels, & £250 to the steamer.

The first claim is on behalf of three small vessels. . . . The service was not long, nor in itself very successful in the issue, but they rendered all the assistance their means would allow; &, as I think, with risk & danger to themselves. I shall allot to them the sum of £450. . . . All the hazard of life fell on the first set of salvors (DR. LUSHINGTON).—THE SANTIPORE (1854), 1 Ecc. & Ad. 231; 164 E. R. 134.

*Annotation:*—**Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6912.** —— ——.]—Where a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it.

Wilful or criminal misconduct on the part of salvors, if clearly proved, may work entire forfeiture of salvage reward. Mere mistake or misconduct other than criminal, occasioning loss or expense to the owners of the property salved, will not work a forfeiture, but only a diminution of reward.

The amount of salvors' reward may be affected by the mistake or misconduct of an agent, such as the master of a steam tug employed by them to assist, if thereby loss or expense has been occasioned to the owners of the property salved; but, *semble*, only on the ground that the fund of payment has suffered diminution.

Two smacks found a schooner derelict at sea & towed her towards Yarmouth. At some distance from the harbour the smacksmen engaged a steam tug. By mistake or misconduct on the part of the master of the tug, the schooner in entering the harbour got aground; the smacksmen went in search of assistance; in their temporary absence other salvors took possession of the schooner & got her off. Suits were brought in the Admlty. Ct. on behalf of both sets of salvors; the judge of the Admlty. Ct. allowed salvage to the second salvors only:—*Held:* the first set of salvors were also entitled to salvage reward.

There can be no doubt that if by the imprudence or unskilfulness of the agent the value of the property be diminished, the principal, however innocent, or however meritorious as to his own acts, must suffer for it in the diminished amount of his compensation. But when the moral considerations & the considerations of policy, which enter largely into the law of salvage, are taken into account: when also it is remembered in how many instances the salvor cannot select his agent, but is bound to accept on the spur of the moment such offers of service as tend apparently to expedite or secure the completion of the salvage; & also in how many instances the agent's conduct is entirely beyond the control or direction of the principal—it may perhaps be found that even the limited amount of responsibility just stated may almost exceed the extent warranted by sound policy or strict justice (SIR JOHN COLERIDGE).—

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**PART XV. SECT. 3, SUB-SECT. 3.—A.**

**6908 i.** *Application of rule—Services contributing to ultimate safety of ship in distress.*]—A ship, driven from her anchors, was drifting on shore. The master sent up ensigns for assistance. Two whaling boats went to the ship's assistance & managed to keep her off the shore by means of warps, until more efficient aid came up, when the ship was got into deep water & moored into safety:—*Held:* the service of the whalers was highly meritorious, & they were entitled to material salvage reward, upon the principle that where a salvage is finally effected, those who contributed to that result are entitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it.—THE ROSALIND OF LIVERPOOL & CARGO (1865), 12 L. T. 553.—IR.

**6908 ii.** —— ——.] — LIVERPOOL STEAM TUG CO., LTD. *v.* CORNFOOT 1900), 2 F. (Ct. of Sess.) 1060; 37 Sc. L. R. 804; 8 S. L. T. 95.—SCOT.

*Sect.* 3.—*Conditions governing salvage: Sub-sect.* 3, *A., B. & C. Sect.* 4: *Sub-sect.* 1.]

THE ATLAS (1862), Lush. 518; 31 L. J. P. M. & A. 210; 6 L. T. 737; 8 Jur. N. S. 753; 10 W. R. 850; 1 Mar. L. C. 235; 167 E. R. 235; *sub nom.* HEWETT *v.* AYLAN, THE ATLAS, 15 Moo. P. C. C. 329, P. C.

*Annotations:*—**Consd.** The Mario (1882), 7 P. D. 203; The August Korff, [1903] P. 166; S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6913.** —— ——.]—THE HESTIA, No. 6822, *ante.*

**6914.** —— ——.]—A steamship valued at £27,000, from Philadelphia to Bremen, with a part cargo of petroleum belonging to the owners of the steamship, of the value of £7,578, the rest naphtha valued at £7,000, & freight at risk £1,743, became disabled so that she would not steer when about 1,000 miles from Falmouth. After making some progress to the eastward, she was fallen in with by steamship No. 1, the master of which agreed to attempt to get her to Fayal; but, owing to very bad weather, after standing by & steering her for a few miles, he left the disabled vessel. She was then picked up by steamship No. 2, & towed 265 miles, when, owing to damage to the machinery of the salving vessel & the hawser parting, the disabled steamer was lost sight of. Steamship No. 3 then came up; but after a difficult towage of about 12 miles left her owing to being short of feed for the horses she was carrying. Steamship No. 4 then established communication with her, & towed her 468 miles to Falmouth being accompanied by steamship No. 5, which belonged to the same owners as the disabled vessel, & acted as a standby in case of emergency. In consolidated actions of salvage by the owners, masters, & crews of the five steamships:—*Held:* steamship No. 1 was entitled to £800 by way of payment for work done in standing by &, at request, attempting to tow, within the principle laid down in *The Benlarig*, No. 6903, *ante;* steamship No. 2 was entitled to a salvage award af £2,500 for having, within the principle laid down in *The Atlas*, No. 6912, *ante*, & *The Camellia*, No. 6917, *post*, meritoriously contributed to the ultimate safety of the disabled vessel, the award being fixed at a lower standard than that to which the principal salvor was entitled, as the part taken by this salvor by itself would not have produced the successful result; that steamship No. 3 was, on similar grounds, & as having brought the disabled steamer within sight of the principal salvor, entitled to an award of £800; steamship No. 4, having towed the disabled steamer into a port of safety, was entitled, as the principal salvor, to an award of £4,000; whilst the owners of steamship No. 5 were entitled, as against the naphtha cargo, to an award of £300, & her master & crew, as against ship, cargo & freight, to an award of £150, making a total of £8,550.—THE AUGUST KORFF, [1903] P. 166; 72 L. J. P. 53; 89 L. T. 194; 9 Asp. M. L. C. 428.

**6915.** —— **Services rendered at request of distressed ship—Contributing to ultimate safety.**]—Where a vessel makes a signal of distress, & another goes out with the *bonâ fide* intention of assisting that distress, & as far as she can does so, but some accident occurs which prevents her services being as effectual as she intended them to be, & no blame attaches to her, the Ct. of Admlty. will not allow her to go entirely unrewarded, but for the interests of commerce & navigation, & as an encouragement to perform salvage services will give some reward, *semble*, if the property is salved by other means.—THE MELPOMENE (1873), L. R. 4 A. & E. 129; 29 L. T. 405; 21 W. R. 956; 2 Asp. M. L. C. 122.

*Annotations:*—**Apld.** The Camellia (1884), 9 P. D. 27. **Consd.** The Dart (1899), 80 L. T. 23. **Refd.** The Kate B. Jones, [1892] P. 366. **Mentd.** The Jacob Landstrom (1879), 4 P. D. 191; The Strathgarry, [1895] P. 264.

**6916.** —— —— ——.]—Where a steamship has been engaged to render assistance to another in distress by towing her to her port of destination, and after several hours' towing, the ships are parted by no fault of the salvor, & the conduct of the ship in distress leads the salvor to the honest belief that his services are no longer required, & thereupon the latter ship proceeds to her own destination, he is not thereby deprived of his right to salvage reward, but upon the other vessel arriving safe in port by her own exertions, may proceed against her in respect of the services actually rendered.—THE NELLIE (1873), 29 L. T. 516; 2 Asp. M. L. C. 142.

*Annotation:*—**Apld.** The Camellia (1884), 9 P. D. 27.

**6917.** —— —— ——.]—The *V.* fell in with the *C.*, showing signals of distress, with her propeller shaft broken, about 30 miles out of her usual course from America to England, & took her in tow. After the *V.* had towed the *C.* from 8.10 p.m. to 7.45 a.m. the hawser broke, & owing to the danger to the cattle on board the *V.* would not take the *C.* again in tow. By the services of the *V.* the *C.* was brought 10 to 14 miles nearer her proper track, & towed 85 miles on her course, & thus brought into greater comparative safety. The *C.* subsequently arrived safely at Queenstown:—*Held:* the *V.* was entitled to some salvage reward, & she was accordingly awarded £200.

Services which contribute to the ultimate safety of a vessel in distress, if interrupted before completion without default of the salvors, are entitled to some remuneration, not only where a vessel has been saved from a position of imminent peril, but also in a case where the vessel is brought into a position of greater comparative safety than that in which she was when she asked for assistance.—THE CAMELLIA (1884), 9 P. D. 27; 53 L. J. P. 12; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. L. C. 197.

*Annotations:*—**Apld.** The August Korff, [1903] P. 166. **Refd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**6918.** —— —— ——.]—THE AUGUST KORFF, No. 6914, *ante.*

**6919.** —— —— —— **Supersession by master of distressed ship.**]—Where a ship, after having rendered salvage service to another ship in distress, is in a position to render further valuable service but is superseded, at the desire of the ship in distress, by another ship which is chosen to complete the service, the ct., in estimating the amount of remuneration to which the first salvors are entitled, will take into consideration not only the services which they actually effected, but also those which they were ready & able to perform.—THE MAASDAM (1893), 69 L. T. 659; 10 T. L. R. 31; 7 Asp. M. L. C. 400; 6 R. 716.

**6920.** —— —— **Not contributing to ultimate safety.**]—THE BOMARSUND, No. 6881, *ante.*

**6921.** —— —— ——.]—Efforts to give assistance under an engagement to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship is otherwise saved.

A ship parted from both anchors at the North Foreland, & thereupon engaged a steamer to go on shore & bring off an anchor & chain. The steamer went to Ramsgate, &, as the best method of executing the service, got the anchor & chain on board two luggers; & the three vessels were engaged for three days looking for the ship in

distress. The steamer at length fell in with the ship, but no longer in a condition of imminent distress, & then towed her to Gravesend. The luggers did not arrive with the anchor & chain until the ship had arrived at Gravesend, when the master of the ship refused to accept them :—*Held :* the original order to the steamer included a direction to take all necessary measures to carry out the order, & the steamer & the luggers were entitled to salvage remuneration for the whole of their efforts.

Salvors who volunteer, go out at their own risk for the chance of earning reward, & if they labour unsuccessfully, they are entitled to nothing ; the effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour & service may not prove beneficial to the vessel (DR. LUSHINGTON).—THE UNDAUNTED (1860), Lush. 90 ; 29 L. J. P. M. & A. 176 ; 2 L. T. 520 ; 167 E. R. 47.

*Annotations :* —**Apld.** The Aztecs (1870), 21 L. T. 797 ; The Nellie (1873), 29 L. T. 516 ; The Killeena (1881), 6 P. D. 193. **Consd.** The Renpor (1883), 8 P. D. 115. **Apld.** The Helvetia (1894), 8 Asp. M. L. C. 264, n. **Reid.** The Kate B. Jones, [1892] P. 366 ; The Cambrian (1897), 76 L. T. 504.

**6922.** —— —— ——.]—Where salvors enter into an agreement to take a disabled vessel into harbour for a specified sum, & do all in their power to perform their engagement ; but, in consequence of an adverse change of wind, fail to fulfil it, they are nevertheless entitled to salvage reward.—THE AZTECS (1870), 21 L. T. 797 ; 3 Mar. L. C. 326.

**6923.** —— —— ——.]—THE BENLARIG, No. 6903, *ante*.

**6924.** —— —— ——.]—THE LEPANTO, No. 7390, *post*.

**6925.** —— —— —— .]—THE HELVETIA (1891), 8 Asp. M. L. C. 264, n.

*Annotations :*—**Apld.** The Cambrian (1897), 76 L. T. 504 ; The Stiklestad, [1926] P. 205.

**6926.** —— —— ——.]—Where a vessel stands by or renders services to another, upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration.—THE CAMBRIAN (1897), 76 L. T. 504 ; 8 Asp. M. L. C. 263.

**6927.** —— —— ——.]—The mere response to an S.O.S. call for assistance does not of itself necessarily give a right to salvage remuneration on the part of the ship that comes to the help of the vessel in distress ; but where the vessel in distress sends out a wireless call & definitely accepts the offer of a particular ship to come to her assistance on a salvage basis, & that ship comes, she is entitled to an award even if her efforts result in little, if any, benefit, provided the disabled vessel is ultimately saved by other means.—THE STIKLESTAD, [1926] P. 205 ; 95 L. J. P. 161 ; 136 L. T. 479 ; 42 T. L. R. 720 ; 17 Asp. M. L. C. 191 ; *affd.*, 43 T. L. R. 118, C. A.

**6928.** —— —— —— **Supersession by master of distressed ship.**]—Where a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, & does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering & being engaged to tow for a less sum than the former ship is willing to accept, & she will be entitled to recover a fair sum which will remunerate her for the services rendered, & compensate her for the loss she has sustained.—THE MAUDE (1876), 36 L. T. 26 ; 3 Asp. M. L. C. 338.

*B. Degree of Success.*

**6929. Distressed vessel taken to port out of her course.**]—L'ESPERANCE (1811), 1 Dods. 46 ; 165 E. R. 1227.

*Annotations :*—**Reid.** The Cosmopolitan (1848), 6 Notes of Cases Supp. xvii ; Gore *v.* Bettiel, The Inca (1858), 12 Moo. P. C. C. 189.

**6930. Distressed vessel taken to unsafe port.**]—THE ADRIANUS WILHELMUS (1852), 8 L. T. 582.

**6931. Distressed vessel taken to safe port—Burden of proof.**]—(1) *Primâ facie* it is sufficient for salvors to show that they conducted a vessel to a place of safety. The *onus* lies upon the objectors to prove that that place was not the one to which she should have been taken. (2) *Semble :* it is not the duty of salvors to comply with the wish of a master to be conducted to a foreign port, to their own manifest inconvenience.

(3) Salvors bound to show adequate skill in performing the service they have undertaken.—THE HOUTHANDEL (1853), 1 Ecc. & Ad. 25 ; 8 L. T. 582 ; 164 E. R. 15.

**6932. Vessel answering S.O.S. & offering services—Services accepted by vessel in distress—Efforts resulting in little benefit—Disabled vessel ultimately saved by other means.**]—THE STIKLESTAD, No. 6927, *ante*.

*C. Remuneration of Unsuccessful Efforts.*

**6933. Right to.**]—The foundation of the authority & jurisdiction of the ct. is a service actually rendered. No salvage, therefore, can be awarded where no service had been performed ; yet circumstances may justify the ct. in directing the expenses of parties attempting to render a service to be paid by the ship which had been in danger.—THE RANGER (1845), 3 Notes of Cases, 589 ; 9 Jur. 119.

**6934.** ——.]—THE E. U., No. 7818, *post*.

**6935.** ——.]—THE BENLARIG, No. 6903, *ante*.

**6936.** —— **Failure due to negligence of crew of damaged ship—Recovery in personam.**]—THE VALSESIA, No. 7229, *post*.

*See, also*, Nos. 6920-6928, *ante*.

## SECT. 4.—TOWAGE AND SALVAGE.

### SUB-SECT. 1.—IN GENERAL.

**6937. Towage & salvage contrasted.**]—Distinction between a salvage & a towage service. Towage service confined to vessels that have received no injury or damage.—THE REWARD (1841), 1 Wm. Rob. 174 ; 8 L. T. 704.

*Annotations :*—**Reid.** The Beulah (1842), 2 Notes of Cases, 61. **Mentd.** R. *v.* Stone (1853), Dears. C. C. 251.

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**PART XV. SECT. 3, SUB-SECT. 3.—C.**

**6933 i.** *Right to.*]—The time occupied in endeavouring to render unsuccessful salvage services will be taken into consideration by the Ct. of Admlty. in awarding compensation for subsequent successful services, if it appear that the original services were rendered by the salvors at the special request of defts., & were not what might be deemed voluntary or speculative.—THE AVENIR (1868), 18 L. T. 157 ; 2 I. R. Eq. 111.—**IR.**

**PART XV. SECT. 4, SUB-SECT. 1.**

**6937 i.** *Towage & salvage contrasted.*]—THE ZAMBESI & THE FANNY DUTARD (1892), 3 Exch. C. R. 67.—**CAN.**

**6937 ii.** ——.]—The services to the disabled ship were rendered under the easiest conditions, without increase of labour or delay :—*Held :* it was clearly a towage & not a salvage service.—HINE *v.* THE THOMAS J. SCULLY (1899), 20 C. L. T. 54 ; 6 Exch. C. R. 318.—**CAN.**

**b.** *Effect of contract.*]—A salvage co. salved a vessel under a contract made with the master after the vessel had run on to a reef, the remuneration,

*Sect. 4.—Towage and salvage: Sub-sects. 1 & 2, A., B. & C.*]

**6938.** ——.]—THE SCOTLAND (1841), 10 L. T. 790.

**6939.** ——.]—(1) Towage & salvage are nearly connected, though the line between the two may be drawn (DR. LUSHINGTON).

(2) I cannot consider myself bound by any arrangement that the owners might make with the mariners, because . . . the latter are entitled to the judgment of this ct. as to what it thinks equitable & as to the principles which ought to govern each particular case (DR. LUSHINGTON).—THE BEULAH (1842), as reported in 2 Notes of Cases, 61 ; 7 Jur. 207.

*Annotations:—As to* (2) **Consd.** The Ganges (1869), L. R. 2 A. & E. 370. **Refd.** The Wilhelm Tell, [1892] P. 337.

**6940.** ——.]—THE LEDA (1855), 10 L. T. 791.

**6941.** ——.]—THE BROUWERSHAVEN (1857), 8 L. T. 704.

**6942. Whether towage & salvage services separable.**]—SHERSBY *v.* HIBBERT, THE DUKE OF MANCHESTER, No. 7537, *post.*

**6943. Salvage service by tug—To vessel causing collision—No blame attached to tow.**]—Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 33 does not debar the innocent sufferer in a collision from salvage reward for services subsequently rendered to the other party to the collision.

The tug of the vessel declared not to blame in a collision, rendered salvage services to the wrongdoer :—*Held :* sect. 33 did not affect the right of the tug to salvage reward.—THE RETRIEVER *v.* R. (1867), 17 L. T. 329 ; 2 Mar. L. C. 5[illegible].

**6944. No salvage services proved—Power of judge to amend pleadings—Substitution of "towage" for "salvage."**]—In an action brought by the owners, master & crew of a steamer against the owners of a ketch, her cargo & freight for salvage, the judge found that no salvage services were in fact rendered, but on the application of pltfs. he directed the pleadings to be amended by substituting the word "towage" for "salvage" & awarded to pltfs. a sum in respect of towage services :—*Held :* in the absence of consent to an amendment the Judge ought to have given judgment for defts.—THE ANNE (1914), 30 T. L. R. 544, D. C.

SUB-SECT. 2.—CONVERSION OF TOWAGE INTO SALVAGE.

*A. In General.*

**6945. Question of fact.**]—THE MINNEHAHA, No. 6974, *post.*

**6946. —— Actual interruption of towage not essential.**]—A steam tug entered into a contract to tow a ship at sea into the port of Liverpool for £45. During the performance of the service a hurricane arose, & the vessels were in serious danger. The tug, at great peril to herself, continued to tow the ship during the hurricane, & by so doing prevented the ship drifting upon a lee shore. The wind soon afterwards moderated, & the tug, still continuing to tow the ship, brought her into the port of Liverpool in safety :—*Held :* the tug was entitled to salvage reward.

The criterion by which it is to be ascertained whether a vessel under contract to tow has become a salvor is, whether supervening circumstances have occurred such as to justify her in abandoning the contract of towage ; & in order to justify her in abandoning the contract of towage, there must be among the supervening circumstances an element of serious danger, which was not in the contemplation of the parties at the time they entered into the contract.

A tug under contract to tow a ship into port may be entitled to salvage reward for bringing the ship into port, although nothing has occurred to occasion an actual interruption to the towage.—THE I. C. POTTER (1870), L. R. 3 A. & E. 292 ; 40 L. J. Adm. 9 ; 23 L. T. 603 ; 19 W. R. 335 ; 3 Mar. L. C. 506.

*Annotations :*—**Apld.** The Waverley (1871), L. R. 3 A. & E 369. **Consd.** The Leon Blum, [1915] P. 90.

**6947. —— Presumption against conversion.**]—THE LIVERPOOL, No. 6973, *post.*

*B. Tow in Distress.*

**6948. Right to reward.**]—A vessel, suddenly dismasted, was, while at anchor, & with jury masts, taken in tow by a valuable steamer, engaged on purpose, for nine hours ; upon the facts, the Trinity Masters being of opinion that, nautically, the service was towing, without risk on either side, the ct., upon a value of £21,000, awarded £600 & costs.

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payable only if the operation was successful, to be fixed by agreement or arbn. The operation having been successful, & the sum payable to the salvage co. having been fixed by arbn. ; members of the crew of one of the co.'s tugs which had taken part in the operation brought an action against the co., in which they claimed a share of the sum so fixed :—*Held :* the services of the tug were salvage services although rendered under contract, the contract not being one in existence prior to the time when the need for the services arose.—NICHOLSON *v.* LEITH SALVAGE & TOWAGE CO., LTD., [1923] S. C. 409. —**SCOT.**

**PART XV. SECT. 4, SUB-SECT. 2.—B.**

**6948 i.** *Right to reward.*]—Suit for salvage services alleged to have been rendered by the *C.* to the *N.* The latter vessel struck upon a rock close in shore & was rendered totally unseaworthy. The *D.* came up & the *N.* requested that she should tow her. This she was unable to do & the *N.* afterwards attracted the attention of the *C.* who was able to & did tow her, she being in actual & imminent danger, into B. While towing the *C.* was herself injured :—*Held :* the services which were rendered were of a salvage character.—THE NORTHAMPTON (1883), 4 N. S. W. Adm. 1.—**AUS.**

**6948 ii.** ——.]—THE SILVER BELL (1869), Y. A. D. 43.—**CAN.**

**6948 iii.** ——.]—The *H.* on a voyage from New York to Antwerp, broke her shaft when two days out, & the *C.*, another steamer, coming up, an agreement was entered into by the master of the disabled steamer to be towed into Halifax, & to pay for the service such amount as should be settled by the Admiralty Ct. at that port. This was accomplished within 24 hours, without any mishap, except the breaking of two hawsers :—*Held :* the service rendered was not a mere towage, but a salvage service.—THE HERMAN LUDWIG (1877), Y. A. D. 211.—**CAN.**

**6948 iv.** ——.]—A stranded vessel, abandoned by the owners to the underwriters & sold by them, was saved, & was brought by the purchasers to a shipwright for repairs :—*Held :* the towage of the vessel from the place where stranded to the dry dock was a salvage service.—THE GLENIFFER (1892), 3 Exch. C. R. 57.—**CAN.**

**6948 v.** ——.]—The *S.* was found by the tug *M.* in a dangerous position in foul waters. The captain of the tug agreed to tow the ship into the open sea, the amount payable for such services to be left to the respective owners :—*Held :* the *S.* was in impending danger of loss & injury from her situation & the ignorance of her captain of the locality, & the service of the tug was therefore a salvage & not a towage service.—CANADIAN PACIFIC NAVIGATION CO. *v.* THE C. F. SARGENT (1893), 3 B. C. R. 5 ; 3 Exch. C. R. 332.—**CAN.**

**6948 vi.** ——.]—DIE DEUTSCHE AMERIKANISCHE PETROLEUM GESSELSCHAFT *v.* THE BERWINDMOOR, COMMERCIAL CABLE CO. *v.* THE BERWINDMOOR (1911), 14 Exch. C. R. 23.—**CAN.**

**6948 vii.** ——.]—The *B.* became disabled, owing to lack of gasoline, when approaching in the day time the entrance of the First Narrows in Burrard Inlet. There was a fresh breeze & a somewhat rough sea prevailing at the time, but these conditions were not sufficient to make the position of the launch perilous, although the passengers on board were calling for help. The master of the *G.* heard the calls for help & went to the launch's assistance, taking her in tow & bringing her safely to port. The *G.* was not delayed more than half-an-hour by rendering this service, but there was an element of appreciable risk incurred by her master, in that his ship was carried by the tide close to the shore during her manœuvres in taking the

If towage led to the rescue of a vessel from danger, it should be remunerated as salvage, or if an engagement even were made in port to go out & to tow, yet unforeseen circumstances might convert such towage into a salvage service (SIR JOHN NICHOLL).—THE ISABELLA (1838), 3 Hag. Adm. 427; 166 E. R. 463.

*Annotations :*—**Consd.** The Cherubim (1868), 19 L. T. 52; Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241.

**6949.** ——.]—THE DYGDEN (1839), 8 L. T. 613, 704.

**6950.** ——.]—THE ELIZABETH HOLDERNESS (1846), 10 L. T. 790.

**6951.** ——.]—No danger was incurred by the asserted salvors & the master & crew of the vessel assisted were not aware of the existence of any danger to their own vessel, but accepted the services of a steamer to bring them into port, & a tender was made for such services of the usual amount for towage :—*Held :* the services did not amount to salvage services, & the tender affirmed, with costs.—THE HARBINGER (1852), 8 L. T. 612; 16 Jur. 729.

*Annotation :*—**Refd.** The Strathnaver (1875), 1 App. Cas. 58.

**6952.** ——.]—(1) Salvors may forfeit partially or totally, by various degrees of misconduct, their right to salvage reward, but the evidence to establish their misconduct must be conclusive.

(2) Service performed by a steamer to a disabled vessel can never be considered as mere towage.—THE CHARLES ADOLPHE (1856), Sw. 153; 166 E. R. 1069.

*Annotation :*—*As to* (1) **Consd.** Hewett *v.* Aylan, The Atlas (1862), 15 Moo. P. C. C. 329.

**6953.** ——.]—THE DIANA (1862), 7 L. T. 257; 1 Mar. L. C. 251, 261.

**6954.** ——.]—THE ELLORA (1862), 1 Lush. 550; 167 E. R. 249.

*Annotation :*—**Refd.** The City of Chester (1884), 9 P. D. 182.

**6955.** ——.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante*.

**6956.** —— **Vessel aground—But not in peril.**]—THE JOHN BUNYAN (1856), 8 L. T. 704.

**6957.** —— **Necessity for actual or imminent probable danger.**]—THE STRATHNAVER, No. 6875, *ante*.

**6958.** —— **No danger to salvors involved.**]—Where a steamship, carrying fore & aft sails only, & not rigged for proceeding under sail alone, breaks the main shaft of her propeller, & is compelled to take assistance from another ship, which tows her 40 miles into a port, the service is of a salvage character, although the service is not attended with any danger to the salvors.—THE JUBILEE (1879), 42 L. T. 594; 4 Asp. M. L. C. 275.

**6959.** —— **Against cargo owners.**]—THE LEON BLUM, No. 7322, *post*.

*C. Supervening Peril.*

**6960. Duty of tug to stand by tow.**]—The contract to tow embraces the risk of ordinary bad weather, but is put an end to by weather rendering

launch in tow :—*Held :* the service was a salvage service & not one of towage merely.—GRAND TRUNK PACIFIC COAST S S. CO., LTD. *v.* THE B. B. (1914), 15 Exch. C. R. 389; 17 D. L. R. 757.—**CAN.**

**6948 viii.** ——.]—When about 20 miles out from Kingston the sole engineer on the tug *D.* towing two barges, fell overboard & was lost. He was the only one on board who knew anything about engines & the tug was, in consequence, without means of keeping up motive power. She was drifting & was in a position of actual or apprehended danger, & was signalling for help, when the *K.*, with some risk to herself, took them in tow & brought them to safety :—*Held :* the claim arising thereunder was one of salvage & not merely a towage.—THE KEYVIVE *v.* THE S. O. DIXON; THE LOUISA & THE IDLEWILD (1919), 19 Exch. C. R. 87; 48 D. L. R. 114.—**CAN.**

**6948 ix.** ——.]—An amount was awarded pltf. trawler against deft. tug on the basis of salvage services, rather than of towage services, as the services, while not in the strict sense unusually hazardous were skilful, considerable & meritorious.—THE Andrew Kelly *v.* THE COMMODORE (B. C.), [1919] 1 W. W. R. 1059; 19 Exch. C. R. 70; 48 D. L. R. 213.—**CAN.**

**6948 x.** ——.]—Deft. ship was lying anchored by her port anchor in the breakers near the Cape Breton shore at the northern entrance of the Strait of Canso, very near to the beach, & in shallow water, the wind blowing at from 50 to 60 miles an hour from the north-west. She had previously been through rough weather & her sails were in bad condition. She was in a position of great peril, & was only kept from stranding by the backwash from the beach. Pltf.'s steamer hearing of deft.'s difficulties, went to her assistance, &, at considerable danger to herself, as the schooner could only be approached from the port side, sent two lines aboard the schooner & succeeded in making fast two steel hawsers, finally towing her to safety. No other means of salvage was reasonably available at the time :—*Held :* the services so rendered were in the nature of salvage & not of mere towage.—VENOSTA, LTD. *v.* THE MARY MANSON GRUENER (1921), 21 Exch. C. R. 251.—**CAN.**

**6948 xi.** ——.]—If towage leads to the rescue of a vessel in actual danger the services should be remunerated as salvage.—RAFFIN *v.* THE CHILKA (1883), I. L. R. 7 Bom. 196.—**IND.**

**6948 xii.** ——.]—Where a vessel is in such a state of danger that serious consequences may possibly ensue the placing her in safety four hours & a half sooner than she could otherwise be in safety is not a towage but a salvage service.—THE TAIAROA (1876), 2 N. Z. Jur. N. S. 16.—**N.Z**

**6956 i.** —— *Vessel aground—But not in peril.*]—LAWSON *v.* GRANGEMOUTH DOCKYARD CO. (1888), 15 R. (Ct. of Sess.) 753; 25 Sc. L. R. 580.—**SCOT.**

**6957 i.** —— *Necessity for actual or imminent probable danger.*]—THE CITY OF BRISBANE (1884), 5 N. S. W. L. R. (P.) 21.—**AUS.**

**6957 ii.** ——.]—A slight accident happened to the boiler of the steamtug *I.*, in consequence of which her fires had to be extinguished so that the boiler might cool & allow the engineer to make the necessary repairs. At the time she was in the ordinary channel of navigation, & the weather was fine & the sea calm. The accident happened at 8 *p.m.* Three hours afterwards, & before repairs could be made, the steamship *F.*, approached the tug, & at the request of her captain, took the tug in tow. The towage covered a distance of some 230 miles, & continued for a period of 30 hours, during which neither ship was in a position of danger, nor were the crew of the *F.* at any time in peril by reason of the services rendered to the disabled tug :—*Held :* as the service to the disabled tug was rendered under the easiest conditions, without increase of labour or delay to the *F.* it was clearly a towage & not a salvage service.—HINE *v.* THE THOMAS J. SCULLY (1899), 6 Exch. C. R. 318.—**CAN.**

**6957 iii.** —— ——.]—A vessel was sighted dismasted, not in a dangerous position, but in a more or less dangerous condition in which it would have been wrong for the master to have refused assistance. There was no immediate danger to the vessel or to the lives of the crew. She was picked up & towed into port :—*Held :* the services rendered were beyond mere towage services.—*Re* THE WANGANUI (1913), 32 N. Z. L. R. 842.—**N.Z.**

**6958 i.** —— *No danger to salvors involved.*]—Where a ship is in a condition of actual peril, & the service of a tug are sought for & directed to the purpose of releasing her from that condition, such services are salvage services; but where there is nothing in those services as regards risk or exertion or other conduct of the salvors to make them differ from ordinary towage services, their reward should be estimated as for towage with salvage liberality.—*Re* THE ALABAMA (1866), 2 Ind. Jur. N. S. 139.—**IND.**

**6958 ii.** —— ——.]—*Held :* the owners of a steam tug which had towed a disabled vessel from a bay into a harbour, which she could not have otherwise reached, were entitled to a share of the salvage, & not to the mere ordinary rates of tuggage, although the salvor had not left the bounds within which she ordinarily plied, & had not incurred any extraordinary risk or labour.—ROBINSON *v.* THOMS (1851), 13 Dunl. (Ct. of Sess.) 592; 23 Sc. Jur. 267.—**SCOT.**

c. —— *What amounts to danger.*]—For the purpose of determining whether services rendered by towing a vessel partially disabled into port are to be remunerated as salvage or towage, a vessel is to be considered in danger when although not in imminent or absolute danger so far as the ship & the lives of the passengers are concerned, she is not in such a state that a prudent man would send her to sea, not being, in her then condition, fit to encounter the ordinary perils of the sea.—THE WOTONGA (1881), 2 N. S. W. L. R. Adm. 5.—**AUS.**

**PART XV. SECT. 4, SUB-SECT. 2.—C.**

**6960 i.** *Duty of tug to stand by tow.*]—It is the duty of a tug when engaged in towing to stand by in case of accident & also to return to part of the

the completion of the undertaking impossible; & in that case subsequent services may be in the nature of salvage.

A steam tug engaged to tow a brig from Gravesend to the North Foreland. During the prosecution of the voyage thither the weather becoming tempestuous, the brig was in considerable danger, & was so damaged as to be unable to proceed to the North Foreland. The tug rescued her from a position of some peril, & towed her back to London:—*Held:* (1) the towage of the brig to London formed no part of the original engagement, & for so doing, as well as for rescuing her from a dangerous position, the tug was entitled to a salvage remuneration; (2) the tug would not have been at liberty to abandon the brig, but was bound to render her assistance, & to bring her to a place of safety.—THE GALATEA (1858), Sw. 349; 32 L. T. O. S. 49; 4 Jur. N. S. 1064; 7 W. R. 21; 166 E. R. 1162.

*Annotations:—As to* (1) **Apld.** The Waverley (1871), L. R. 3 A. & E. 369. **Refd.** The I. C. Potter (1870), L. R. 3 A. & E. 292.

**6961.** ——.]—If, in the performance of a contract to tow, an unforeseen & extraordinary peril arise to the vessel towed, the steam tug is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, & thereupon becomes entitled to salvage reward.—THE SARATOGA (1861), Lush. 318; 167 E. R. 140.

*Annotations:*—**Consd.** The England (1868), L. R. 2 P. C. 253. **Refd.** Akerblom *v.* Price (1881), 7 Q. B. D. 129; Bird *v.* Gibb, The De Bay (1883), 8 App. Cas. 559; The City of Chester (1884), 9 P. D. 182; The Leon Blum, [1915] P. 90.

**6962.** ——.]—Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind & weather & the time of performing the service will be what are ordinary at the time of the year; but if an unexpected change of weather or other unforeseen accidents occur, he is bound to adhere to the vessel, & to do all in his power to rescue her from danger; & he will be entitled to reasonable extra remuneration for the extra service. Circumstances under which such extra remuneration was allowed.—THE WHITE STAR (1866), L. R. 1 A. & E. 68.

*Annotations:*—**Apld.** The Waverley (1871), L. R. 3 A. & E. 369. **Consd.** The Leon Blum, [1915] P. 90. **Refd.** The I. C. Potter (1870), L. R. 3 A. & E. 292.

**6963.** ——.]—THE I. C. POTTER, No. 6946, *ante.*

**6964. Right to reward.**]—An agreement for towage, when, from unavoidable circumstances, an accident occurs to the vessel towed, does not preclude the towing vessel from rendering services to be rewarded as salvage services.—THE WILLIAM BRANDT JUNIOR (1842), 2 Notes of Cases, Supp. p. lxvii.

*Annotation:*—**Distd.** The Betsey (1843), 2 Wm. Rob. 167.

**6965.** ——.]—THE CHANCELLOR (1853), 10 L. T. 791.

**6966.** ——.]—THE MEDORA (1853), 1 Ecc. & Ad. 17; 10 L. T. 791; 164 E. R. 10.

**6967.** ——.]—THE KILBY (1854), 10 L. T. 791; 18 Jur. 409, n.

*Annotation:*—**Consd.** The Kingalock (1854), 1 Ecc. & Ad. 263.

**6968.** ——.]—THE KINGALOCK (1854), 1 Ecc. & Ad. 263; 18 Jur. 409; 164 E. R. 153.

*Annotation:*—**Consd.** The Albion (1861), Lush. 282.

**6969.** ——.]—THE SARATOGA, No. 6961, *ante.*

**6970.** ——.]—THE I. C. POTTER, No. 6946, *ante.*

**6971.** ——.]—Where in the performance of towage services the tow gets into a position of danger, the tug is not entitled to salvage reward for extricating her from it, unless she can show (*a*) that there was no negligence on the part of the tug causing the tow to get into the position of danger, & (*b*) that her being in the position of danger was the result of an unforeseen & inevitable accident.—THE ROBERT DIXON (1879), 5 P. D. 54; 42 L. T. 344; 28 W. R. 716; 4 Asp. M. L. C. 246, C. A.

*Annotations:*—**Consd.** The Altair, [1897] P. 105; The Duc D'Aumale (No. 2), [1904] P. 60. **Refd.** The Maréchal Suchet, [1911] P. 1.

**6972. ——Tow aground.**]—A towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress. Many circumstances, it is obvious, may arise in the course of such employment, which may convert the service into the character of a salvage service. As for example, where the ship in tow is disabled in her hull or rigging, or where she is aground, or where the service itself is necessarily attended with danger, or extraordinary labour to the towing vessel (DR. LUSHINGTON).—THE PRINCESS ALICE (1849), 3 Wm. Rob. 138; 6 Notes of Cases. 584; 166 E. R. 914.

*Annotations:*—**Apld.** The Jubilee (1880), 42 L. T. 594. **Refd.** Turnbull *v.* Strathnaver (Owners) (1875), 1 App. Cas. 58; The Calyx (1910), 27 T. L. R. 166. **Mentd.** The Sovereign (1860), Lush. 85.

**6973.** —— —— **But not in peril.**]—Pltfs.' tug was engaged, for a fixed sum, to tow from sea, & dock defts.' ship. Whilst pltfs.' tug was, under the direction of the pilot, turning the ship round, in order to enter the dock, stern first, the tow rope of another tug fast on the ship's quarter parted, &, through the effect of the wind & tide, the ship touched the ground. Pltfs.' tug, by the direction of the pilot, then shifted her position, & proceeded to tow the ship into dock bow first. In so doing the ship came off. Pltfs. claimed salvage remuneration, alleging that their tug had rescued defts.' ship from a position of danger:—*Held:* pltfs. were not entitled to salvage remuneration, as the ship was not in any immediate danger, & the tug had not run any risk or performed any duty or rendered any services beyond what, in the contemplation of the parties, was reasonably to be expected of her during the continuance of the towage contract.

It is . . . the duty of the ct. to see, where a towing contract has been made, that a little departure from the exact mode in which that contract is to be performed is not magnified so as to convert towage into salvage services (GORELL BARNES, J.).—THE LIVERPOOL, [1893] P. 154; 68 L. T. 719; 7 Asp. M. L. C. 340; 1 R. 601.

**6974.** —— **Breaking of hawser.**]—(1) If unforeseen danger unavoidable by the steam tug supervenes to the ship in tow, as by breaking of the hawser, the steam tug is bound to complete the service, if still possible; & the steam tug, if thereby incurring risk & performing duties not within the scope of the original engagement, is entitled to salvage reward.

(2) The conversion of towage into salvage depends on the circumstances of each case.

(3) A tug under contract to tow, by misconduct or negligence, or want of reasonable equipments, tow which is disabled or adrift after leaving the remainder in safety.—RUSSELL *v.* THE GLORIA (Ont.), [1927] Exch. C. R. 162.—**CAN.**

**6964 i.** *Right to reward.*]—A steamer towing a vessel is not bound to rescue her from unforeseen danger without extra payment for salvage services.—THE ST. HILAIRE *v.* NADEAU (1886), 12 Q. L. R. 70.—**CAN.**

**6964 ii.** ——.]—An ordinary towage service may, in consequence of supervening danger, be converted into salvage service.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

occasioning or materially contributing to occasion danger to the ship in tow, is not entitled to salvage reward for rescuing the ship from such danger.—THE MINNEHAHA (1861), Lush. 335; 167 E. R. 149; *sub nom.* WARD *v.* M'CORKILL, THE MINNEHAHA, 15 Moo. P. C. C. 133; 4 L. T. 810; 7 Jur. N. S. 1257; 9 W. R. 925; 1 Mar. L. C. 111; *sub nom.* THE STORM KING & THE UNITED KINGDOM (OWNERS) *v.* THE MINNEHAHA (OWNERS), 30 L. J. P. M. & A. 211, P. C.

*Annotations:—As to* (1) **Apld.** The Edward Hawkins (1862), Lush. 515; The Lady Egidia (1862), Lush. 513; The White Star (1866), L. R. 1 A. & E. 68. **Consd.** The I. C. Potter (1870), L. R. 3 A. & E. 292. **Apld.** The Westbourne (1889), 58 L. J. P. 78; The Liverpool, [1893] P. 154; The Aboukir (1905), 21 T. L. R. 200. **Consd.** The Leon Blum, [1915] P. 90. **Refd.** The Waverley (1871), L. R. 3 A. & E. 369. *As to* (3) **Apld.** The Annapolis, The Golden Light, The H.M. Hayes (1861), Lush. 355; The Robert Dixon (1879), 5 P. D. 54; The Duc d'Aumale, [1904] P. 60. *Generally,* **Refd.** The Maréchal Suchet, [1911] P. 1; The West Cock, [1911] P. 208; The Refrigerant, [1925] P. 130. **Mentd.** The Falkland, The Navigator (1863), Brown. & Lush. 204; The Philadelphia (1863), Brown. & Lush. 28; Yeo *v.* Tatem, The Orient (1871), L. R. 3 P. C. 696.

**6975.** —— **No danger to salvors involved.**]—A ship was being towed by a steam tug to be docked at high water, when, to make sure of docking that tide, another tug was engaged for the sum of £5 to assist in towing her to the pier head. After the second tug made fast, the ship grounded, but was towed off by the tugs in a few minutes, & was then docked. In a claim for salvage brought on behalf of the second tug, the ct. held that the ship was not in immediate danger, & that the tug had not "incurred any risk or performed any duty which was not within the scope of her original engagement," & accordingly pronounced against the claim with costs.—THE LADY EGIDIA (1862), Lush. 513; 167 E. R. 234.

*Annotation:*—**Consd.** The Liverpool, [1893] P. 154.

**6976.** —— ——.]—A tug engaged under the ordinary contract to tow, may, by the performance of substantial salvage services in saving the ship towed from supervening danger, earn salvage reward, though not herself incurring risk.—THE PERICLES (1863), Brown. & Lush. 80; 167 E. R. 308.

*Annotations:*—**Refd.** The I. C. Potter (1870), L. R. 3 A. & E. 292; The Liverpool, [1893] P. 154.

**6977.** —— **Peril not rendering fulfilment of towage contract impossible.**]—THE KILBY (1854), 10 L. T. 791; 18 Jur. 409, n.

*Annotation:* **Apld.** The Kingalock (1851), 1 Ecc. & Ad. 263.

**6978.** —— **Peril rendering fulfilment of towage contract impossible.**]—THE GALATEA, No. 6960, *ante.*

**6979.** —— ——.]—THE WESTBOURNE, No. 7265, *post.*

**6980.** —— **Peril necessitating services outside towage contract.**]—Where there is a common danger it is incumbent on all to assist. To entitle passengers to reward for civil salvage, there must be a voluntary remaining on board, accompanied with extraordinary exertions on behalf of the ship. Salvage service may be performed by the seamen of the ship salved, when an abandonment of her has put an end to their original contract.

Passengers voluntarily remaining on board a vessel injured by a collision, & working at the pumps:—*Held:* not entitled to salvage.

A master cannot be a salvor so long as he is performing his duties as master under his contract; nor can a mariner until his contract is at an end; nor can a steam tug under a contract go tow make a title to salvage, unless, unforeseen danger arising, she performs different services from those stipulated for in the original contract. With respect to a passenger, there is no engagement on his part to perform any service, but there is a contract between him & the shipowner that for a certain money payment the ship shall convey him & his property to the place of destination. To a certain extent therefore he is bound up with the ship (DR. LUSHINGTON).—THE VREDE (1861), Lush. 322; 30 L. J. P. M. & A. 209; 167 E. R. 143.

**6981.** —— ——.]—(1) Where the complete performance of a contract to tow a vessel from one place to another is prevented by an accident, which is beyond the control of those in charge of the tug, & of those on board the tow, the owners of the tug cannot recover the towage agreed upon, nor are they entitled to any payment in respect of the part performance of the contract.

Tug owners contracted to tow a ship from Kingroad to Sharpness Dock, but during the towage, & when the vessels had arrived just outside the dock entrance, a fog came on, & the ship stranded without any fault on the part of either tug or tow, & could not be taken into the dock:—*Held:* the tug owners were not entitled to recover anything.

(2) Subsequently, at the request of those on board the ship, the tugs towed so as to keep the ship from slipping off the rocks on which she had grounded, & so enabled cargo to be saved, & freight to be earned:—*Held:* this was a salvage service for which the tugs were entitled to remuneration.—THE MADRAS, [1898] P. 90; 67 L. J. P. 53; 78 L. T. 325; 8 Asp. M. L. C. 397.

**6982.** —— ——.]—THE I. C. POTTER, No. 6946, *ante.*

**6983.** —— ——.]—THE FIVE STEEL BARGES, No. 6821, *ante.*

**6984.** —— ——.]—A tug, which had been engaged to attend a vessel into harbour, accompanied her to the entrance, when, a fog coming on, & before the tug had made fast, the vessel went ashore, & was in a position of danger. The tug assisted to get her off:—*Held:* such service was outside the scope of her engagement, & she was entitled to salvage.—THE WESTBURN (1896), 74 L. T. 200; 8 Asp. M. L. C. 130.

**6985.** —— ——.]—THE STANMORE (1897), 13 T. L. R. 165.

**6986.** —— ——.]—Defts.' barque with three tugs in attendance was lying moored outside the entrance to the Alexandra Dock at Hull waiting to enter, when a steamer coming out of the dock, owing to a rope fouling her propeller, was driven by wind & tide down on to the barque, which in turn was forced on to the Hebbles Sand. The two tugs in attendance on the steamer towed that vessel clear of the barque, & thereby the three tugs in attendance on the barque were enabled to pull that vessel off the sand. In a salvage suit commenced by the five tugs against the owners of the barque:—*Held:* the three tugs which were in attendance on the barque were entitled to salvage, as their services, for the time being, were outside their towage contract, but the claim against the barque, made by the two tugs in attendance on the steamer, must be disallowed, as there was no evidence from which a constructive acceptance of their services by the master of the barque could be inferred within the principle laid down in *The Vandyck,* No. 6850, *ante.*—THE EMILIE GALLINE, [1903] P. 106; 72 L. J. P. 39; 88 L. T. 743; 9 Asp. M. L. C. 401.

**6987.** —— **Peril due to misconduct or negligence of tug.**]—THE MINNEHAHA, No. 6974, *ante.*

**6988.** —— ——.]—THE ROBERT DIXON, No. 6971, *ante.*

**6989.** —— ——.]—THE ALTAIR, No. 7277, *post.*

**6990.** —— —— **Contributory negligence of tow.**]—A sailing vessel, whilst in tow of a steam tug,

*Sect. 4.—Towage and salvage: Sub-sect. 2, C. & D. Sect. 5: Sub-sects. 1 & 2, A. & B.*]

under a contract of towage, came into collision with a third vessel, & the tug & tow were found to blame, the negligence of the tug being that of her master. After the collision the tug towed the sailing vessel in her damaged condition to the nearest port of safety, & the owners, master, & crew of the tug claimed salvage:—*Held:* the tow having been placed in a difficulty by the joint negligence of tug & tow, the tug could not claim salvage for services afterwards rendered in extricating the tow from that difficulty, for the claim of the owners of the tug was barred by reason of the negligence of their agent, the master, having in part caused the mischief from the consequences of which the tow was rescued; the claim of the master was barred by reason of his being the party actually guilty of the negligence in part causing the mischief, & the claim of the crew was also barred in Admlty. on the ground of public policy, which rendered it undesirable to encourage a crew to hope to recover salvage in respect of services to be rendered to a vessel damaged through the contributory negligence of their master.—THE DUC D'AUMALE (No. 2), [1904] P. 60; 73 L. J. P. 8; 89 L. T. 486; 52 W. R. 319; 20 T. L. R. 14; 9 Asp. M. L. C. 502.

*Annotations:*—**Refd.** The Maréchal Suchet, [1911] P. 1; The Clan Sutherland, [1918] P. 332; The Kenora, [1921] P. 90.

**6991. —— Collision with tow—Assistance to vessel in fault.**]—THE HANNIBAL, THE QUEEN, No. 7129, *post.*

**6992. —— Abandonment of ship by crew.**]—Pltfs., tug owners, contracted that their tug with another tug should tow defts.' steamship which had lost her rudder but could use her engines, & had her master & crew on board, from a Spanish port to the Tyne, for the sum of £400; "no cure, no pay; no claim to be made for salvage." The vessels met with bad weather & pltfs.' tug did but little towing, & when eight days out in the Bay of Biscay, the master & crew of the steamship abandoned her & left in the other tug for a neighbouring port. Pltfs.' tug then towed the abandoned steamship to Falmouth, & thence with the assistance of the other tug to the Tyne:—*Held:* owing to the abandonment, the contract came to an end by the fault of defts., & pltfs. were entitled to a *quantum meruit* for their services till the abandonment, & to salvage reward for their subsequent services.—THE GLENMORVEN, [1913] P. 141; 82 L. J. P. 113; 29 T. L. R. 412.

*D. Non-Disclosure.*

**6993. Of damaged state of tow.**]—The master of a brig, which had suffered considerable damage, without mentioning this fact, agreed with the master of a steam tug for ordinary towage to London for £40. During the service the master of the tug discovered the fact of such previous damage, repudiated the agreement, & brought a suit for salvage:—*Held:* (1) additional salvage cannot be engrafted on an agreement for extraordinary though it may upon one for ordinary towage; (2) the mere concealment of a fact which might operate on the service & therefore on the agreement, vitiates it; (3) in this case the facts concealed might operate on the service by rendering it longer & more arduous, & the agreement was invalid.—THE KINGALOCK (1854), 1 Ecc. & Ad. 263; 18 Jur. 409; 164 E. R. 153.

*Annotation:*—*As to* (3) **Apld.** The Albion (1861), Lush. 282.

**6994. Of disabled condition of crew of tow.**]—The owners & crew of a tug sued for salvage services, alleging that an agreement entered into for towage service was invalid, by reason of the fact of the illness of a great part of the crew of the vessel salved having been withheld. No danger to property being proved:—*Held:* there was no salvage service; & the ct. pronounced for the agreement with costs.—THE CANOVA (1866), L. R. 1 A. & E. 54; 12 Jur. N. S. 528.

## SECT. 5.—PILOTAGE AND SALVAGE.

### SUB-SECT. 1.—IN GENERAL.

**6995. Salvage & pilotage contrasted.**]—(1) Distinction between pilotage & salvage. Pilotage is confined to conducting into port a vessel in no state of distress or alarm, or having no apprehension of distress arising from antecedent causes. The scale of remuneration to pilots has been calculated on such definition.

(2) A pilot is not bound to take charge of a vessel which requires more than ordinary pilotage; & if he gives other assistance to a vessel in any way distressed, it is salvage, meriting, according to the circumstances, salvage remuneration.—THE ELIZABETH (1844), 3 L. T. O. S. 40; 8 Jur. 365.

*Annotation:*—*Generally,* **Consd.** Akerblom *v.* Price (1881), 44 L. T. 837.

**6996. ——.**]—(1) The claims of pilots & salvors stand on different grounds, & their services are paid for on different principles.

A pilot is entitled to what may be deemed a quasi monopoly; if there is one on the coast, he must be employed. He has no right to be engaged in any other occupation, & he is paid not in conformity with the nature of the service which he performs, but in conformity with the draught of the vessel; & I must assume that this rate of pay is sufficient: but salvors, who are not pilots, stand in a very different predicament. There is no legal obligation on them to go on board, & they are entitled to be paid not merely as a pilot, for their services, but also for any loss they may sustain in the employment of the vessel (DR. LUSHINGTON).

(2) Ignorance of the locality, though in the case of a foreign master, is, under certain circumstances, no defence against a claim for salvage, but the reverse.—THE CUMBERLAND (1845), 9 Jur. 191.

### SUB-SECT. 2.—RIGHT TO REWARD.

*A. In General.*

**6997. General rule—No right to salvage reward.**]—The safe conduct of a ship into a port, under circumstances of extreme danger & personal exertion, may exalt a pilotage service into something of a salvage service. But in general they are distinguishable enough, & the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor (SIR WILLIAM SCOTT).—THE JOSEPH HARVEY (1799), 1 Ch. Rob. 306; 165 E. R. 186.

*Annotations:*—**Consd.** The Johannes (1835), 6 Notes of Cases, 288, n. **Apld.** The Aeolus (1873), L. R. 4 A. & E. 29. **Refd.** Newman *v.* Walters (1804), 3 Bos. & P. 612.

**6998. —— ——.**]—THE FUNCHAL (1837), 3 Hag. Adm. 386, n.; 166 E. R. 448.

**PART XV. SECT. 5, SUB-SECT. 2.—A.**

**6997 1.** *General rule—No right to salvage reward.*]—If the work he does or the risk he runs was reasonably in the contemplation of the parties, a pilot is not entitled to additional reward for salvage services; a pilot is not encouraged to become "a searcher after salvage."—WILSON *v.* THE TASMAN (1915), 15 S. R. N. S. W. 128 32 N. S. W. W. N. 21.—**AUS.**

**6999.** —— ——.]—THE BRANKEN MOOR (1837), 3 Hag. Adm. 373; 166 E. R. 444; *affd.*, 3 Hag. Adm. 375, n.

**7000.** —— ——.]—HALSEY *v.* ALBERTUSZEN, THE JONGE ANDRIES, No. 7247, *post.*

**7001.** —— ——.]—THE ÆOLUS, No. 7031, *post.*

*B. Conversion of Pilotage into Salvage.*

**7002. Presumption against conversion.**]—HALSEY *v.* ALBERTUSZEN, THE JONGE ANDRIES, No. 7247, *post.*

**7003.** ——.]—THE ÆOLUS, No. 7031, *post.*

**7004.** ——.]—It is not in the interests, either of shipowners & their navigating servants, or of the pilots themselves, to give any countenance to the idea that a pilot, compulsorily in charge of a disabled vessel, may easily convey himself into a salvor.

Defts.' steamship, on a voyage from the Tyne to Marseilles, lost her propeller in the neighbourhood of the Royal Sovereign lightship, &, drifting up channel, was brought to anchor off Rye after bumping several times; but without sustaining material damage. In answer to flares the Winchelsea lifeboat went out to her, & then a tug, which came up, was sent to fetch another tug. The two tugs, with the assistance, later on, of a third, proceeded to tow the vessel up channel, &, off Dungeness, a compulsory pilot boarded her, & took charge of the vessel to Gravesend. Defts. admitted that salvage services had been rendered by the three tugs & by the crew of the lifeboat; but denied the right of the pilot to claim remuneration on salvage terms:—*Held:* the claim of the pilot must be disallowed, but, in the circumstances, without costs, for though the vessel was disabled, &, in consequence, sheered heavily in the bad weather prevailing, &, whilst in charge of the pilot, the hawser of one of the tugs fouled an anchor of defts.' vessel, & there was some apprehension of risk from leakage, still the pilot had not been required to do, & had not in fact done, anything more than ought to be done by a pilot performing his ordinary pilotage work for pilotage reward.—THE BEDEBURN, [1914] P. 146; 83 L. J. P. 109; 111 L. T. 464; 30 T. L. R. 513; 12 Asp. M. L. C. 530.

**7005. Circumstances affecting conversion—Extreme danger.**]—THE JOSEPH HARVEY, No. 6997, *ante.*

**7006.** ——.]—(1) A ship being in danger, & the captain & part of the crew having made their escape, a passenger, at the request of the rest of the crew, took the command & brought the ship safe to port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed his desire to make him a compensation:—*Held:* the passenger was entitled to sue the owner for salvage.

(2) Suppose a tempest should arise while the pilot is on board, & he should go off in a boat to the shore to fetch hands, & should risk his life for the safety of the ship in a manner different from that which his duty as a pilot required: in such case it seems to me that he would be entitled to a compensation in the nature of salvage (LORD ALVANLEY, C.J.).—NEWMAN *v.* WALTERS (1804), 3 Bos. & P. 612; 127 E. R. 330.

*Annotations:—As to* (1) **Distd.** The Vrede (1861), Lush. 322. **Reid.** Lipson *v.* Harrison (1853), 22 L. T. O. S. 83. *As to* (2) **Reid.** Barker *v.* Highley (1863), 15 C. B. N. S. 27.

**7007.** —— **Services outside scope of pilotage duties—Assistance to distressed ship.**]—NEWMAN *v.* WALTERS, No. 7006, *ante.*

**7008.** —— —— ——.]—It has been urged in the argument for the owners, that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed that it is a settled doctrine of this ct. that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward (*per* CUR.).—THE FREDERICK (1838), 1 Wm. Rob. 16; 166 E. R. 480.

*Annotations:*—**Distd.** The Aeolus (1873), L. R. 4 A. & E. 29. **Apld.** The Anders Knape (1879), 4 P. D. 213. **Reid.** Akerblom *v.* Price (1881), 7 Q. B. D. 129.

**7009.** —— —— ——.]—THE HEBBLE (1842), 7 L. T. 648.

**7010.** —— —— ——.]—There can be no doubt, according to decisions which I have over & over again given in this ct., that no pilot could be called upon, in the discharge of his duty, to take charge, for the mere pay of pilotage, of a damaged vessel; & to that principle I am inclined to adhere (DR. LUSHINGTON).—THE SUSAN (1844), 2 L. T. O. S. 374.

**7011.** —— —— ——.]—THE ELIZABETH, No. 6995, *ante.*

**7012.** —— —— ——.]—Assistance afforded to a leaky vessel in getting into so inconvenient a harbour as that of Yarmouth is entitled to a higher reward than mere pilotage, & here the conduct of the salvors merits a liberal remuneration.—THE MARY (1844), 2 L. T. O. S. 499.

**7013.** —— —— ——.]—(1) Where essential service has been rendered, the amount of compensation for that service may not only be diminished by reason of the subsequent negligence or misconduct of the salvors, but all reward may be forfeited.

A ship in great distress was taken by the salvors to, & anchored in, a place of comparative safety; she might have been placed in perfect safety, if the salvors had then availed themselves of further assistance which was offered; but, instead of

**PART XV. SECT. 5, SUB-SECT. 2.—B.**

**7005 i.** *Circumstances affecting conversion—Extreme danger.*]—The law of pilotage is, that if pilots engage in an attempt to pilot a ship in such weather as to expose their lives to great danger, under those circumstances they may be treated as salvors, inasmuch as no pilot is bound to hazard his life in an adventure of the kind; & if he undertakes the duty he is not to be debarred from receiving the compensation that others, who are not pilots, would receive.—THE HERCULE (1856), 8 Ir. Jur. 412.—**IR.**

**7007 i.** —— *Services outside scope of pilotage duties—Assistance to distressed ship.*]—If a pilot renders such services to a vessel in distress as no reasonable person, either owner or pilot, would consider ought to come within the scope of his pilotage contract, he is entitled to salvage reward over & above his pilotage fees, because he runs risk outside that which anybody had in contemplation.—WILSON *v.* THE TASMAN (1915), 15 S. R. N. S. W. 128; 32 N. S. W. W. N. 21.—**AUS.**

**7007 ii.** ——.]—A licenced pilot is not bound to remain on board a ship in distress, which has engaged his services, in any event, & at the peril of his life; & he is entitled to be paid for extraordinary services as a salvor.—THE JANE ANDERSON (1851), 3 Ir. Jur. 293.—**IR.**

**7007 iii.** —— ——.]—In order that a pilot may be entitled to salvage reward, he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, & such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair & unjust that he should be paid otherwise than on the terms of salvage reward.—THE PETUNIA (1899), 8 Nfld. L. R. 32.—**NFLD.**

**d.** ——.]—Pilots may become entitled to extra pilotage, in the nature of salvage, for extraordinary services rendered by them.—*Re* THE ADVENTURER (1836), 1 S. V. A. R. 101.—**CAN.**

**e.** ——.]—RUSSELL *v.* PARKE (1858), 8 L. C. R. 229.—**CAN.**

*Sect. 5.—Pilotage and salvage: Sub-sect. 2, B.; sub-sect. 3. Sect. 6: Sub-sect. 1, A.]*

so doing, they left her at anchor for six hours, while they proceeded for ropes & spars to their own port:—*Held:* the salvors had not conducted themselves with due regard to the lives & property on board the ship, & the amount of salvage must be diminished.

(2) If he [the pilot] does take charge of her in this state & condition, he is entitled to a higher reward than the sum prescribed for common pilotage (DR. LUSHINGTON).—THE DOSSEITEI (1846), 10 Jur. 865.

*Annotation:—As to* (2) **Refd.** The Little Joe (1860), 6 Jur. N. S. 783.

**7014.** —— —— ——.]—(1) A pilot, who had boarded a foreign vessel which had suffered damage, in boisterous weather, & was engaged by the master to take charge of her as a pilot, & who brought her to a place of safety, allowed to claim as a salvor.

(2) Application of the rule, respecting pilots' claiming as salvors, to foreign vessels—THE KING OSCAR (1848), 6 Notes of Cases, 284.

**7015.** —— —— ——.]—The case set up is exaggerated, & a fraudulent attempt to extort salvage from a foreigner. I am satisfied upon the whole of the evidence that this is not a case of salvage, but a mere case of pilotage. In all cases where a real & *bonâ fide* case of salvage is made out, the ct. is in duty bound, & it is its inclination as well as its duty, to allot a liberal reward, to encourage the rendering assistance to vessels in distress. A liberal allowance for services of this kind is not only for the general interests of commerce & the service of navigation, but for the benefit of underwriters. But, on the other hand, if licenced pilots, to whom the Legislature has given special privileges & exclusive rights, no other person being allowed to act as a pilot within certain limits, lend themselves to attempts at extortion upon foreigners, it is the duty of the ct. to repress them (SIR JOHN NICHOLL).—THE JOHANNES (1848), 6 Notes of Cases, 288, n.

*Annotation:—***Refd.** The Mona, [1891] P. 265.

**7016.** —— —— ——.]—THE LIBERTY (1850), 8 L. T. 178.

**7017.** —— —— ——.]—THE BLACK SEA (1855), 8 L. T. 704.

**7018.** —— —— ——.]—(1) A fishing smack fell in near the Long Sand buoy with a foreign steamship. The steamship had been on the sands near the Kentish Knock lightship, but had got off with some damage to her rudder, & had a signal for a pilot hoisted. The master of the smack boarded the steamship & piloted her to the entrance of Harwich harbour:—*Held:* the owners, master, & crew of the fishing smack were entitled to salvage remuneration.

(2) When a person goes on board of a vessel in distress, & pilots her into harbour, he is entitled to salvage remuneration, unless it is established that he has contracted to render the services for pilotage remuneration only.—THE ANDERS KNAPE (1879), 4 P. D. 213; 48 L. J. P. 53; 40 L. T. 684; 4 Asp. M. L. C. 142.

**7019.** —— —— ——.]—AKERBLOM *v.* PRICE, No. 6868, *ante*.

**7020.** —— —— ——.]—A pilot employed to pilot a vessel which is towing another vessel in distress is entitled as against the salved property to be remunerated as a salvor in respect of his services to that property, if in the performance of them he runs risk outside what can reasonably be considered to have been within the ordinary scope of his employment as pilot.—THE SANTIAGO (1900), 70 L. J. P. 12; 83 L. T. 439; 17 T. L. R. 22; 9 Asp. M. L. C. 147.

*Annotation:—***Refd.** The Bedeburn, [1914] P. 146.

**7021.** —— —— **Towing damaged ship.**]—(1) The amount of salvage, for services performed with risk & labour, in the English Channel, by a pilot & his crew, five in number, from Jan. 16 to Jan. 18, was, on a bond of reference to Comrs. of Pilots at Cowes, fixed, on a value of £2,000, at 120 guineas & the expenses: the owner having refused payment, the same sum was, in an action by the salvors decreed with costs.

(2) The amount of remuneration must depend on all the circumstances. It is not a mere question of work & labour, not a mere calculation of hours, though time undoubtedly is an ingredient; but there are various facts for consideration; the state of the weather, the degree of damage & danger as to the ship & cargo, the risk & peril of the salvors, the time employed, the value of the property; & when all these are considered, there is still another principle, to encourage enterprise, reward exertion, & to be liberal in all that is due to the general interests of commerce, & the general benefit of owners & underwriters, even though the reward may fall upon an individual owner with some severity (SIR JOHN NICHOLL).

It is true, boarding is part of a pilot's duty; what, then, is the nature of the service rendered? It is not pilotage. The signal was not for a pilot, but for assistance; it was to take this vessel in tow, & towing is no part of a pilot's ordinary duty (SIR JOHN NICHOLL).—THE INDUSTRY (1835), 3 Hag. Adm. 203.

*Annotation:—As to* (2) **Refd.** The Amérique (1871), L. R. 6 P. C. 168.

**7022.** —— —— **Assisting at pumps.**]—Pilots going on board a vessel in a leaky condition & assisting the crew, & keeping down the water by pumping, entitled to be rewarded as salvors.—THE HEBE (1844), 2 Wm. Rob. 246; 2 L. T. O. S. 404; 166 E. R. 747.

**7023.** —— —— **Trifling services.**]—(1) A compromise of a salvage action agreed to by the salvors under a mistake of fact is not binding upon them. (2) Two tugs rendered salvage services to a ship driven from her moorings in the Bristol Channel, by towing her, in a very heavy gale, into the river Usk. The services lasted for about three hours. The value of the salved ship was £4,000, of her cargo £900, & of her freight £288. £450 was awarded.

(3) A pilot on the salved ship who rendered trifling assistance by helping at the wheel & windlass held not entitled to salvage.—THE MONARCH (1886), 12 P. D. 5; 56 L. J. P. 114; 56 L. T. 204; 35 W. R. 292; 6 Asp. M. L. C. 90.

**7024.** —— —— **Services outside pilotage area.**]—(1) If a vessel out at sea beyond the limits of pilotage ground, requires assistance to conduct her to a place of safety, that is not pilotage, but salvage.

(2) Fishermen salvors cannot claim compensation for the loss of their fishing, unless they clearly state to a foreign master their intention to do so, before their services are accepted.

(3) The vessel having sustained damage . . . a signal was hoisted & . . . I hold it to be a signal for assistance & not for a pilot (DR LUSHINGTON).—THE HEDWIG (1853), 1 Ecc. & Ad. 19; 164 E. R. 11; *sub nom.* THE HÆDWIG, 17 Jur. 977.

*Annotation:—As to* (3) **Folld.** The Racer (1874), 30 L. T. 904.

**7025. —— Services to master ignorant of locality.**]—THE JOSEPH HARVEY (1799), 1 Ch. Rob. 306; 165 E. R. 186.

*Annotations:*—**Consd.** Newman *v.* Walters (1804), 3 Bos. & P. 612; The Johannes (1835), 6 Notes of Cases, 288, n.; The Aeolus (1873), L. R. 4 A. & E. 29.

**7026.** —— ——.]—THE CUMBERLAND, No. 6996, *ante*.

**7027.** —— ——.]—THE PEPITA (1853), 9 L. T. 302.

**7028.** —— ——.]—AKERBLOM *v.* PRICE, No. 6868, *ante*.

SUB-SECT. 3.—UNLICENCED PILOTS.

**7029. Right to reward.**]—THE MICHAEL (1805), cited in 2 Hag. Adm. at p. 178, n.; 166 E. R. 210.

*Annotations:*—**Apld.** The Columbus (1828), 2 Hag. Adm 178, n.; The Aeolus (1873), L. R. 4 A. & E. 29.

**7030.** ——.]—Persons, assuming the characters & duties of pilots, are only to be remunerated according to the rates of that service, & not as salvors.—THE COLUMBUS (1828), 2 Hag. Adm. 178, n.; 166 E. R. 210.

*Annotations:*—**Apld.** The Aeolus (1873), 42 L. J. Adm. 14. **Refd.** The Cherubim (1868), 19 L. T. 53.

**7031.** ——.]—(1) The exceptions to the general rule that a pilot cannot claim as a salvor, ought to be few & well defined. The services of a pilot cannot easily be converted into those of a salvor. The same rule of law applies to a licenced waterman when acting as a pilot.

A Dutch barque was riding at anchor off Deal, & waiting to proceed down Channel, & a waterman who, though not a licenced pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7*s.* a day, with £5 in addition for navigating the vessel as pilot until she arrived off Beachy Head. The day after the waterman came on board, & whilst the barque was still at anchor, a gale came on, & the tempestuous state of the weather caused the vessel to drive, & rendered it necessary to slip the chain, when, under the direction of the waterman, the vessel was taken through the Gull Stream & brought up in safety in Margate Roads. In a salvage suit instituted on behalf of the waterman & other persons who had rendered services to the vessel, the ct. held that the services rendered by the waterman were within the scope of his contract, & he was not entitled to claim as a salvor.

It ought to be well understood that the services of a pilot are not slightly to be converted into salvage services (SIR ROBERT PHILLIMORE).

(2) Taking out during bad weather an anchor & chain to a vessel which is compelled to slip her cable to get away from a dangerous position & run for a place of safety, is, although the anchor & chain in the result are not needed, a salvage service.—THE ÆOLUS (1873), L. R. 4 A. & E. 29; 42 L. J. Adm. 14; 28 L. T. 41; 21 W. R. 704; 1 Asp. M. L. C. 516.

*Annotation:*—**Refd.** The Anders Knape (1879), 4 P. D. 213.

**7032. —— Services in non-pilotage waters.**]—(1) Pilotage service in a place where there are no licenced pilots. A service which would be pilotage in the case of a duly licenced pilot becomes salvage, as regards the reward, when voluntarily performed by others.

(2) An obligation is imposed upon them [pilots] of always going out unless it be at the risk of their lives, & performing their duty, whatever may be the other circumstances (DR. LUSHINGTON).—THE ROSEHAUGH (1854), 1 Ecc. & Ad. 267; 164 E. R. 155.

**7033.** —— ——.]—In an action for salvage it appeared that on Mar. 20, about 11 a.m., pltfs.' fishing smack fell in with defts.' vessel, which was showing an English Jack flag in her rigging, in the North Sea, 40 miles from Lowestoft. The crew of the vessel were suffering from frost bite, the helmsman in consequence steering with one hand. They were also short of provisions. They told the master of the smack that they wished to be piloted to the nearest port, the vessel being at this time out of pilotage waters, & he agreed to take & took the vessel to Great Yarmouth:—*Held:* even assuming that the signal exhibited by defts.' vessel was ambiguous, the assistance rendered to her was in the circumstances a salvage service, & pltfs. were entitled to remuneration accordingly.

The services have been rendered by a man who is not a pilot & in waters which are non-pilotage waters, & though they may be in the nature of pilotage, they are, in fact, salvage services (HANNEN, P.).—THE AGLAIA (1888), 13 P. D. 160; 57 L. J. P. 106; 59 L. T. 528; 37 W. R. 255; 4 T. L. R. 691; 6 Asp. M. L. C. 337.

**7034. —— Services to distressed vessel.**]—THE ANDERS KNAPE, No. 7018, *ante*.

## SECT. 6.—THE SALVORS.

### SUB-SECT. 1.—PERSONAL SERVICE.

*A. In General.*

**7035. General rule—Personal service necessary.**]—Under the general rule, that a person not actually occupied in effecting a salvage service is not entitled to share in a salvage remuneration, the claim of an officer of a coast guard detachment, who sent his men & boat, but did not assist in person, rejected.

The exception to this rule . . . is in favour of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience & loss, for which an equitable compensation may reasonably be claimed (LORD STOWELL).—THE VINE (1825), 2 Hag. Adm. 1; 166 E. R. 145.

*Annotation:*—**Apld.** The Charlotte (1848), 3 Wm. Rob. 68.

**7036.** —— ——.]—THE JUBILEE (1826), 3 Hag. Adm. 43, n.; 166 E. R. 323.

*Annotation:*—**Refd.** Gore *v.* Bethel, The Inca (1858), 12 Moo. P. C. C. 185.

**7037.** —— ——.]—THE CHARLOTTE, No. 7310, *post*.

**7025 i.** —— *Services to master ignorant of locality.*]—The local ignorance of a foreign master, his want of knowledge of the coast, is no ground on which pilots or others can raise a claim of salvage; *i.e.* such ignorance cannot solely & alone confer on those who come to the assistance of it, by offering the necessary advice & instructions, a right to graft thereon pretensions to the character of salvors. But this is only when the value of the advice given is simply & merely the value which belongs to pilotage. It is another case, if a ship be beleaguered with concealed & manifold dangers, & by a prompt & courageous effort, information is brought out from land, in consequence of which fatal mistakes & rash counsels on the part of the endangered ship are anticipated & prevented, & the way of safety first opened to the crew.—THE HEBE (1849), 7 Notes of Cases, Supp. 1.—**IR.**

**PART XV. SECT. 6, SUB-SECT. 1.—A.**

**7035 i.** *General rule—Personal service necessary.*]—A salvor must be one personally engaged in the work done.—SIMPSON *v.* THE KRUGER (Ont.) (1919), 19 Exch. C. R. 64.—**CAN.**

*Sect.* 6.—*The salvors: Sub-sect.* 1, *B.* (*a*), (*b*) & (*c*), & *C.* (*a*).]

*B. Associates of Actual Salvors.*

(*a*) *Crew.*

**7038. Rights as co-salvors—Members of crew not actually employed.**]—Part of a ship's crew going on board a vessel found in distress & bringing her into port, have no exclusive claim to the salvage due for her preservation. Those who remained in their own ship, if equally ready to go, are equally entitled to the reward.—THE BALTIMORE (1817), 2 Dods. 132; 165 E. R. 1438.

*Annotation:*—**Consd.** The Princess Helena (1861), Lush. 190.

**7039.** —— ——.]—When two vessels come up together to render assistance to a ship in distress, all the persons composing the crews, although a part only are actually employed, are entitled to be considered as salvors.—THE MOUNTAINEER (1843), 2 Wm. Rob. 7; 166 E. R. 658.

**7040.** —— ——.]—THE SARAH JANE (1843), 2 Wm. Rob. 110; 8 L. T. 335; 166 E. R. 696.

*Annotations:*—**Refd.** The Macgregor Laird, [1867] W. N. 308; The Friesland, [1904] P. 345.

**7041.** —— ——.]—THE NICOLINE (1849), 8 L. T. 335.

**7042.** —— —— **Lightship.**]—Where a part of crew of a lightship assist in rendering salvage service, the claim for salvage remuneration is confined to the persons actually engaged in the service, & does not extend to the persons left on board the lightship, as in ordinary cases of fishing smacks & other vessels.—THE EMMA (1850), 3 Wm. Rob. 151; 166 E. R. 919.

**7043.** —— —— **Non-navigating members of crew.**]—A large steamer fell in, in the Atlantic, with another large steamer, disabled by the breaking of her propeller shaft, & successfully brought her into port, after a towage of 757 miles, lasting five days. The owners of the disabled steamer settled the claim of the salving steamer by the payment of £12,000, & the owners, master, & crew of the salving steamer applied to the ct. to apportion this sum. Of the fifty-nine persons composing the crew of the salving steamer, there were eleven non-navigating members who took no active part in rendering assistance to the disabled steamer. In apportioning the above sum & awarding £9,200 to the owners, £800 to the master, & the remaining £2,000 to the crew according to their rating:—*Held:* the non-navigating members of the crew above specified were only entitled to a half-share according to their ratings.—THE SPREE, [1893] P. 147; 69 L. T. 628; 7 Asp. M. L. C. 397; 1 R. 584.

*Annotation:*—**Folld.** The Minneapolis, [1902] P. 30.

**7044.** —— —— ——.]—THE MINNEAPOLIS, No. 7788, *post.*

**7045.** —— **Persons only nominally on ship's books—Cattle keepers.**]—A steamer having on board a cargo of cattle in charge of a number of men who were paid by the owners of the cattle, but who were nominally on the ship's books, fell in with a derelict ship in the Atlantic & towed her to Queenstown. The service caused the voyage to be a day & three-quarters longer than it would otherwise have been, but the keepers of the cattle did not assist in the service in any way:—*Held:* they are not entitled to participate in the remuneration payable for the salvage service.—THE CORIOLANUS (1890), 15 P. D. 103; 59 L. J. P. 59; 62 L. T. 844; 6 Asp. M. L. C. 514.

*Annotations:*—**Distd.** The Minneapolis, [1902] P. 30. **Mentd.** The Clymene (1897), 76 L. T. 811.

**7046.** —— —— **Horsemen.**]—THE MINNEAPOLIS, No. 7788, *post.*

**Apportionment of award.**]—*See* Sect. 11, *post.*

**Disqualification from claiming salvage.**]—*See* Sub-sect. 1, C., *post.*

(*b*) *Owners.*

**7047. Right of owner to reward—If interest adversely affected.**]—THE VINE, No. 7035, *ante.*

**7048.** —— ——.]—THE MULGRAVE, No. 7289, *post.*

**7049.** —— ——.]—When smacksmen are employed in a salvage service, the owners of the smacks have a right to sue for remuneration for the detention, even when the service is not dangerous.—THE NORDEN (1853), 1 Ecc. & Ad. 185; 8 L. T. 335; 164 E. R. 107.

**7050.** —— **Salvage by crew of abandoned vessel.**]—The crew of a stranded vessel having taken to their boats, in making for the nearest land fall in with another vessel also stranded & abandoned by the crew. Having boarded the vessel they succeeded in getting her off & bringing her safely to England. A claim to participate in the salvage set up by the owner of the vessel to which the salvors belonged, upon the ground (*a*) that the salvors were enabled to reach the vessel salved solely by means of the boats & the use of his compass; (*b*) that some of the salvors were his apprentices. £300 awarded to the actual salvors. Claim of the owner rejected.—THE TWO FRIENDS (1844), 2 Wm. Rob. 349; 3 L. T. 246; 8 Jur. 1011; 166 E. R. 786.

**Disqualification from claiming salvage.**]—*See* Sub-sect. 1, C., *post.*

(*c*) *Charterers.*

**7051. Right to reward.**]—(1) A ship, abandoned at sea, was taken possession of by a small schooner, & after being towed some time by the schooner, was boarded by several men from *The President* steamer, who took possession of her & towed her into Liverpool. The action on behalf of *The President* was entered in the names of certain persons, who, being the underwriters of the ship & cargo, hired the steamer for the purpose of salving *The Pickwick*:—*Held:* the schooner was entitled to salvage as first salvor; the steamer, looking to the danger of the ship, & the small size of the schooner, was justified in taking possession of the ship; & the persons hiring the steamer were entitled to salvage as owners for the time.

When once salvors are in possession, they are not to be dispossessed by a subsequent act, unless there be reasonable cause. The second set of salvors must show that there was no fair probability that the vessel could be brought into port in safety in due time by the first set; but it would be most injurious to mercantile interests if the principle was carried to an extreme extent (DR. LUSHINGTON).

**PART XV. SECT. 6, SUB-SECT. 1.—B. (a).**

1. *Rights as co-salvors.*]—NICHOLSON *v.* LEITH SALVAGE & TOWAGE CO., LTD., [1923] S. C. 409.—**SCOT.**

2. ——.]—Where paid fishery servants under an agreement for a stipulated amount "in the capacity of fishermen or anything else in their power for the good of the voyage" engage in common with their employers in the recovery of property if successful they are entitled to participate in the benefit of the salvage awarded.—SLONE *v.* UDLE (1880), 6 Nfld. L. R. 217.—**NFLD.**

**PART XV. SECT. 6, SUB-SECT. 1.—B. (b).**

h. *Right of owner to award—Vessel not imperilled.*]—Owners, master & crew claimed remuneration for salvage services:—*Held:* the owners were not entitled to receive anything as their vessel had not been in any-

(2) It has never been held that an abandonment at the instant of collision constitutes "derelict" (DR. LUSHINGTON).—THE PICKWICK (1852), 16 Jur. 669.

*Annotation :—As to* (1) **Distd.** Crowan *v.* Stanier, [1904] 1 K. B. 87.

**7052.** ——.]—The charterers of a vessel are not, except under very special circumstances, entitled to the salvage earned by that vessel. The ct. looks with great favour on services performed by steamers.—THE ALFEN (1857), Sw. 189; 166 E. R. 1088.

**7053. —— Charterparty amounting to demise.**]—THE ARABIAN (1855), 4 L. T. 682.

*Annotation :*—**Refd.** The Alfen (1857), Sw. 189.

**7054.** —— ——.]—By agreement between the owner of a steamer & C., C. agreed to charter the steamer for the purpose of running between certain named ports, & to pay a sum weekly for the use of the steamer until the agreement was determined in manner therein provided. The agreement provided that C. should pay all expenses of the crew & other expenses incidental to the running of the steamer, excepting only marine insurance which was to be defrayed by the owner; that the steamer should be delivered up by C., on the termination of the agreement, in as good condition as at the time of making the agreement, reasonable wear & tear, excepted; that the master should not, except in the event of his misconduct, be removed by C. without consent of the owner. The steamer, while running under this agreement, fell in with a disabled vessel & towed her into safety :—*Held :* C. was entitled to salvage reward in respect of the service rendered by the steamer, & the owner was not entitled to salvage reward. —THE SCOUT (1872), L. R. 3 A. & E. 512; 41 L. J. Adm. 42; 26 L. T. 371; 20 W. R. 617; 1 Asp. M. L. C. 258.

**Disqualification from claiming salvage.**]—*See* Sub-sect. 1, C., *post.*

*C. Disqualification from claiming Salvage.*

*(a) In General.*

**7055. Owner—Part owner of salving vessel also part owner of salved vessel—Portion of other part owners of salving vessel.**]—Where a part owner of the salving vessel has an interest in the vessel salved, his co-owners & the master & crew of the salving vessel may sue for salvage; the sum to which they are entitled being computed by deducting from the value of the entire service the share which would have been due to such part owner if he could have joined as pltf.—THE CAROLINE (1861), 1 Lush. 334; 5 L. T. 89; 1 Mar. L. C. 145; 167 E. R. 149.

**7056.** —— —— **Liability of cargo owners—Effect of breach of contract of affreightment.**]—(1) Where the necessity for salvage services rendered to cargo laden on board a vessel belonging in part to same persons as the salving vessel has arisen from a breach of the contract of affreightment under which the cargo was shipped, those part owners of the salving vessel who are also part owners of the salved vessel, are not entitled to claim as salvors against the cargo.

(2) The main shaft of a screw steamship, laden with cargo broke on the high seas, & her machinery was thereby for the time rendered useless. In these circumstances her master accepted salvage services from a vessel belonging in part to the owners of his own vessel, & after the salvage services had been rendered, arrived in safety at his port of destination. The owners, master & crew of the salving vessel brought an action of salvage against the cargo of the salved vessel :—*Held :* salvage remuneration could only be awarded to the master & crew of the salving vessel, & to those owners of that vessel who were not also owners of the salved vessel; & the owners of the cargo of the salved vessel could claim by way of counterclaim to recover the amount so awarded as damages from those pltfs. who were owners of the salved vessel.—THE GLENFRUIN (1885), 10 P. D. 103; 54 L. J. P. 49; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. L. C. 413.

*Annotations :—As to* (1) **Apld.** The Northumbria (1906), 95 L. T. 618. **Refd.** The Christel Vinnen, [1924] P. 61. *As to* (2) **Refd.** The Leon Blum (1915), 85 L. J. P. 1. *Generally,* **Refd.** The Maori King *v.* Hughes (1895), 73 L. T. 141; The Duc D'Aumale, [1904] P. 60; Nelson *v.* Nelson Line (Liverpool) (1907), 96 L. T. 402; The Europa, [1908] P. 84; Ingram & Royle *v.* Services Maritimes du Treport (1913), 82 L. J. K. B. 374.

**7057. —— Owner of salving vessel also owner of salved vessel—Liability of cargo owners.**]—A steam vessel laden with a general cargo became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to same owners fell in with the disabled vessel & towed her into safety :—*Held :* the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel, & the master & crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight & cargo.—THE MIRANDA (1872), L. R. 3 A. & E. 561; 41 L. J. Adm. 82; 27 L. T. 389; 21 W. R. 84; 1 Asp. M. L. C. 440.

**7058.** —— —— ——.]—Where a steamship laden with cargo becomes disabled through a latent defect in existence prior to the commencement of the voyage & salvage services are rendered to such steamship by a vessel belonging to same owners, the shipowners may recover salvage against the cargo if by the bill of lading the warranty of seaworthiness is abrogated, & the shipowners are not to be liable for latent defects.—THE LAERTES (CARGO EX) (1887), 12 P. D. 187; 56 L. J. P. 108; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. L. C. 174.

*Annotations :*—**Consd.** Maori King (Cargo Owners) *v.* Hughes (1895), 73 L. T. 141. **Refd.** McFadden *v.* Blue Star Line (1905), 74 L. J. K. B. 423; The West Cock (1911), 80 L. J. P. 97; The Christel Vinnen, [1924] P. 208.

**7059.** —— **Part owner of salving vessel also part owner of vessel in fault in collision.**]—(1) By the improper navigation of a steam tug *B.*, a vessel at anchor, was sent adrift & placed in jeopardy. A steam tug *W.*, rendered assistance to the drifting vessel :—*Held :* the owners of the *W.* were entitled to recover salvage reward for the services rendered, notwithstanding that some of them were also owners of the vessel which occasioned the mischief.

(2) A vessel rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision takes place by her default.—THE GLENGABER (1872), L. R. 3 A. & E.

wise imperilled. — THE MAGNOLIA (1883), 3 C. L. T. 107.—**CAN.**

**PART XV. SECT. 6, SUB-SECT. 1.—C. (a).**

**k.** *Crew.*]—Seamen while acting in the strict line of their duty cannot entitle themselves to salvage.—THE ROBERT & ANNE (1842), 1 S. V. A. R. 253.—**CAN.**

**l.** ——.]—If a ship is driven on the coast & becomes a wreck & the sailors escape to the land, & successfully act as salvors so as to save enough to pay their wages, they are entitled to them, though not to salvage.—YOUNG *v.* THE MINNIE A. (P. E. I.) (1918), 40 D. L. R. 408.—**CAN.**

**m.** *Government vessel.*]—The ct. will not recognise salvage services rendered by the officers & crew of a

*Sect. 6. The salvors: Sub-sect.* 1, *C. (a) & (b) i. & ii.; sub-sect.* 2, *A.*]

534; 41 L. J. Adm. 84; 27 L. T. 386; 21 W. R. 160; 1 Asp. M. L. C. 401.

*Annotation:*—**Generally, Refd.** The Duc D'Aumale, [1904] P. 60.

**7060. —— Charterparty by demise.**]—A tug was requisitioned by the Admlty., acting under the powers of the Royal Proclamation of Aug. 3, 1914, upon a gross basis of hire, *i.e.*, the owners were to pay the wages of the officers & crew & all the running expenses of the steamer & were to undertake all risks except war risks; & it was agreed that all salvage was to be for the owners' benefit. Subsequently, with the consent or acquiescence of the owners, the basis of hire was changed from gross to net, & thereafter the master & crew became the servants of the Crown & the tug was employed at the sole risk & expense of the Admlty. The tug rendered salvage services to another vessel in respect of which a salvage award was made:—*Held:* the change in the basis of hire imported a demise of the tug to the Admlty., & therefore, in the absence of any express stipulation to the contrary, the Admlty. & not the owners of the tug, were entitled to the salvage award.—ELLIOTT STEAM TUG CO., LTD. *v.* ADMIRALTY COMRS., PAGE *v.* ADMIRALTY COMRS., [1921] 1 A. C. 137; 89 L. J. K. B. 977; 123 L. T. 754; 64 Sol. Jo. 634; 15 Asp. M. L. C. 81, H. L.; *affg.* S. C. *sub nom.* ADMIRALTY COMRS. *v.* PAGE, [1919] 1 K. B. 299, C. A.; &, [1918] 2 K. B. 447.

*Annotation:*—**Refd.** The Matti, [1918] P. 114.

**7061. Charterer—Owner of salving vessel also charterer of salved vessel.**]—The crews of two ships belonging to J. gave some assistance to a ship chartered to J. who was bound to provide & pay the master & crew of such ship, the cargo on board of which belonged to J. In a suit against the ship:—*Held:* no salvage could be claimed.—THE MARIA JANE (1850), 8 L. T. 582; 14 Jur. 857.

*Annotations:*—**Distd.** The Collier (1866), L. R. 1 A. & E. 83. **Consd.** The Sappho (1871), 8 Moo. P. C. C. N. S. 66.

**7062. —— ——.**]—The owners of a vessel rendering salvage services, being also the charterers of the vessel receiving the services, are not thereby debarred from claiming salvage reward, unless the effect of the charterparty has been to divest the owners of the possession & control of the salved vessel, & to transfer the same for the time to the charterers.—THE COLLIER (1866), L. R. 1 A. & E. 83; 16 L. T. 155; 12 Jur. N. S. 789; 2 Mar. L. C. 473.

*Annotation:*—**Apld.** The Scout (1872), L. R. 3 A. & E. 512.

**7063. Crew—Owner of salving vessel also owner of salved vessel.**]—(1) Where salvage services are performed by one ship to another, both ships belonging to same owners, the master & crew of the ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the owners, & for which they would be paid for by their ordinary wages.

(2) As a general rule of law seamen cannot recover salvage remuneration for services which by their contract they are bound to perform, &, therefore, they never recover salvage remuneration for services connected with the saving of their own ship, as long as the relation of master & servants between them & their owner, with reference to that ship, continues (MELLISH, L.J.).—THE SAPPHO (1871), L. R. 3 P. C. 690; 8 Moo. P. C. C. N. S. 66; 40 L. J. Adm. 47; 24 L. T. 795; 1 Asp. M. L. C. 65; 17 E. R. 238, P. C.

*Annotations:*—*As to* (1) **Apld.** The Miranda (1872), L. R. 3 A. & E. 561; The Scout (1872), L. R. 3 A. & E. 512. **Followed.** The Agamemnon (1883), 48 L. T. 880. *Generally,* **Refd.** The Duc D'Aumale, [1904] P. 60; The Leon Blum (1915), 85 L. J. P. 1.

**7064. —— ——.**]—THE MIRANDA, No. 7057, *ante.*

**7065. —— ——.**]—Where a steamship, disabled by the breaking of her crank shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to same owners as the disabled vessel, & fifteen of the crew of the towing vessel instituted a salvage action in the sum of £5,000 against the vessel towed, & arrested the vessel, cargo, & freight therein, the ct. held such services to be salvage services, but of so slight a character that on a value of £105,000, it awarded £15, & ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the High Ct. & at the arrest of the vessel for such an amount.—THE AGAMEMNON (1883), 18 L. T. 880; 5 Asp. M. L. C. 92.

*Annotation:*—**Refd.** The Leon Blum (1915), 85 L. J. P. 1.

**7066. —— —— Liability of cargo owners.**]—THE LAERTES (CARGO EX), No. 7058, *ante.*

**7067. —— Part owner of salving vessel also part owner of salved vessel.**]—THE CAROLINE, No. 7055, *ante.*

**7068. —— ——.**]—THE GLENFRUIN, No. 7056, *ante.*

*(b) Special Custom or Agreement.*

*i. Custom.*

**7069. Custom to render mutual assistance—Ships engaged in same trade—Slave trade.**]—The nature of the [slave] trade in which these two ships were employed is a service of common danger, on which every vessel, probably, goes out, under an impression of the policy, & duty, of rendering mutual assistance. When vessels are associated in some degree in a common interest, they do not stand so independent of each other, as ships falling only accidentally into the way of rendering such assistance (*per* CUR.).—THE TRELAWNEY (1802), 4 Ch. Rob. 223; 165 E. R. 592.

*Annotations:*—**Refd.** The Anne (1804), 5 Ch. Rob. 100; The Francis & Eliza (1816), 2 Dods. 115.

**7070. —— —— Whaling fishery.**]—THE SWAN (1839), 1 Wm. Rob. 68; 166 E. R. 499.

**7071. —— —— ——.**]—THE HARRIOT (1842), 1 Wm. Rob. 439; 1 Notes of Cases, 613; 8 L. T. 581; 166 E. R. 636.

**7072. —— Ships sailing in same waters—Torres Straits.**]—THE WESTMINSTER (1845), 8 L. T. 581.

**7073. —— —— Chinese rivers.**]—THE MAZEPPA *v.* THE GRAVINA (1856), 7 L. T. 340.

**7074. —— Whether applicable to steamship salving sailing vessel.**]—(1) An agreement for the services of a steamer to assist a vessel which was

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govt. vessel, unless they are of an important & meritorious character.—STUART *v.* THE COLUMBIA RIVER (1921), 21 S. R. N. S. W. 674; 38 N. S. W. W. N. 185.—**AUS.**

**PART XV. SECT. 6, SUB-SECT. 1.—C. (b) i.**

n. *Custom to render mutual assistance—Ships engaged in same trade—Cannery & fishing trade.*]—The deft.'s plea to an action for salvage services, it was alleged that it is the custom amongst those engaged in the cannery & fishing business in certain parts of the British Columbia coast, to render reciprocal services to each other in times of need without thereby creating any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability:—*Held:* even if the alleged usage or custom was valid & binding between cannery people & people engaged in fishing, it did not extend to persons who did not fish but limited their business & avocation to buying fish; nor would it operate to the detriment of the positive rights enjoyed by those outside the class of cannery people engaged in fishing.—THE FREIYA *v.* THE

aground having been made, & the services completed under that agreement, it was subsequently cancelled by the mutual consent of the masters of the two vessels. The owners cannot set up such agreement as a bar to a suit for salvage.

(2) In foreign countries, where the custom prevails of rendering mutual assistance without claiming salvage reward, steamers would not be bound by the custom as regards sailing-vessels, there being no mutuality between them.—THE AFRICA (1854), 1 Ecc. & Ad. 299; 8 L. T. 582; 164 E. R. 173.

ii. *Agreement.*

*See* 1894 Act, s. 156.

**7075. Effect of agreement for mutual assistance—Salvage reward not recoverable.**]—Where vessels sail as consorts, & under an agreement to render mutual assistance, the ct. will not entertain a claim of salvage for services rendered by one to the other.—THE ZEPHYR (1827), 2 Hag. Adm. 43; 166 E. R. 160.

*Annotations:*—**Refd.** The Ganges (1869), L. R. 2 A. & E. 370; The Ronpor (1883), 8 P. D. 115.

**7076. Agreement to sail in company—Does not imply agreement for mutual assistance.**]—THE WESTMINSTER (1845), 8 L. T. 581.

**7077. Agreement between tug companies & dock board—Tugs to tow lifeboats to vessels in distress.**]—The Mersey Docks & Harbour Board, acting in pursuance of enabling powers given them by their Dock Act (21 & 22 Vict. c. xcii., s. 109), entered into an agreement with certain steam tug cos. at Liverpool, whereby the cos. undertook that at all times in day & night one of certain specified steam tugs should always be in readiness to proceed, & should on signal given proceed with one of the Liverpool lifeboats to any ship in distress within certain limits; the Board contracting to pay fifteen guineas for each occasion. The agreement contained a proviso that nothing contained in the agreement should prejudice or affect the rights of the steam tug cos. in regard to services in saving ships or other property to be rendered by their steamers.

One of the steam tugs specified, belonging to one of the cos., in pursuance of a direction received from the mate of the landing stage, who was a servant of the Dock Board, towed out a lifeboat to a vessel in distress, & brought the master & crew into Liverpool; then returned & brought the ship & cargo in also.

In an action for salvage against ship & cargo instituted by the owners, master & crew of the tug:—*Held:* the agreement between the Dock Board & the tug cos. did not bar or affect pltfs.' claim to reward for salvage of life.—THE PENSACOLA (1864), Brown. & Lush. 306; 167 E. R. 376.

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SUB-SECT. 2.—VOLUNTARY SERVICE.

*A. In General.*

**7078. General rule—Service must be voluntary.**]—The crew of a ship cannot be considered as salvors. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, & gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship; not so the crew, whose stipulated duty it is, to be compensated by payment of wages, to protect that ship through all perils, & whose entire possible service for this purpose is pledged to that extent. . . . The crew never claim as joint salvors, although they have contributed as much as, & perhaps more than, the volunteer salvors themselves. . . . In a salvage case you must take into consideration the *quantum* of personal danger incurred, the value of the property saved, . . . whereas the rule of wages presents only a stipulated sum which in no case can be exceeded. . . . On all views of the relative justice between the parties & of the public policy of convenience, there can be no doubt that the rule of wages has the advantage upon the clearest grounds; but take it upon the most naked principles of law applying to it, the contract covers the whole ship, one part as well as another, with the mariners' lien. A part separated by a storm is not disengaged by that accident from that lien (LORD STOWELL).—THE NEPTUNE (1824), 1 Hag. Adm. 227; 166 E. R. 81.

*Annotations:*—**Apld.** The Reliance (1813), 2 Wm. Rob. 119; The Florence (1852), 19 L. T. O. S. 304. **Distd.** The Warrior (1862), Lush. 476; The Le Jonet (1872), L. R. 3 A. & E. 556. **Consd.** The Schiller (1877), 2 P. D. 145; The Solway Prince, [1896] P. 120; The Leon Blum, [1915] P. 90. **Apld.** The Portreath, [1923] P. 155. **Refd.** The Malta (1828), 2 Hag. Adm. 158; The Lady Durham (1835), 3 Hag. Adm. 196; The Riby Grove (1843), 2 Wm. Rob. 52; The Olympic, [1913] P. 92. **Mentd.** Notara v. Henderson (1872), L. R. 7 Q. B. 225.

**7079.** —— ——.]—A German steamship was wrecked in British waters, & the lives of ten passengers & of some of her crew were saved by certain boats. Subsequently, divers employed by the owners of cargo in the steamship succeeded in recovering from the wreck a large amount of *specie*. A cause of salvage was instituted on behalf of the owners, masters, & crews of the boats against the owners of the *specie*:—*Held:* pltfs. were entitled to be paid salvage remuneration out of the proceeds of the *specie*.

Let us first consider whether this *specie* was when it was raised from the bottom of the sea "wreck." . . . It was not "wreck" in the common law meaning of the word. . . .

An action *in personam* might, under certain circumstances, be maintained in the Admlty. Ct. for salvage. . . . Salvage is the service which volunteer adventurers spontaneously render to the owners in the recover of property from loss or damage at sea, under the responsibility of making restitution & with a lien for their reward (BRETT, L.J.).

The liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, & that such liability is not a general personal liability to be enforced in any circumstances whether the ship & cargo are lost or not, but a liability limited to

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R. S. (1922), 65 D. L. R. 218; 21 Exch. C. R. 232; [1922] 1 W. W. R. 409.—**CAN.**

o. —— —— *Whether applicable to person outside that trade.*]—THE FREIYA v. THE R. S. (1922), 65 D. L. R. 218; 21 Exch. C. R. 232; [1922] 1 W. W. R. 409.—**CAN.**

**PART XV. SECT. 6, SUB-SECT. 1.—C. (b) ii.**

p. *Agreement by crew of salvage service vessel—Necessity for strict proof.*]—NICHOLSON v. LEITH SALVAGE & TOWAGE CO., LTD., [1923] S. C. 409.—**SCOT.**

**PART XV. SECT. 6, SUB-SECT. 2.—A.**

**7078** . *General rule—Service must be voluntary.*]—Voluntariness on the part of a salvor is an element essential to the constitution of salvage service.—OWENS v. THE ALEXA (1914), 14 S. R. N. S. W. 389; 31 N. S. W. W. N. 154.—**AUS.**

**7078 ii.** —— ——.]—Services rendered by one vessel to another in distress are not salvage services unless voluntarily rendered.—CLAN STEAM TRAWLING CO. v. ABERDEEN STEAM TRAWLING & FISHING CO., [1908] S. C. 651; 45 Sc. L. R. 462; 15 S. L. T. 897.—**SCOT.**

**7078 iii.** —— ——.]—It is an essential feature of salvage service that it should be voluntary.—MAYTOM v. THE HARRY ESCOMBE (MASTER), [1920] App. D. 187.—**S. AF.**

*Sect.* 6.—*The salvors: Sub-sect.* 2, *A., B. & C.* (*a*) & (*b*).]

the value of the property saved from destruction (BAGGALLAY, L.J.).—THE SCHILLER (CARGO EX) (1877), 2 P. D. 145; 36 L. T. 714; 3 Asp. M. L. C. 439, C. A.

*Annotations:*—**Apld.** The Sarpendon (1877), 3 P. D. 28. **Consd.** The Renpor (1883), 8 P. D. 115. **Refd.** The Elton, [1891] P. 265. **Mentd.** The Tagus (1902), 87 L. T. 598.

**7080.** —— ——.]—THE SOLWAY PRINCE, No 8227, *post.*

**7081.** —— ——.]—By a policy of insurance a vessel was insured against "total or constructive total loss only." The policy contained the usual suing & labouring clause. The vessel having struck on a reef her owner abandoned her, & the underwriters incurred expense in floating her off & bringing her to land. In an action on the policy in which the owner claimed as for a total loss, & the underwriters counterclaimed for the expenses to which they had been put in salving the vessel, the jury found that the vessel was not a total loss, & that the underwriters were not liable on the policy: —*Held:* the underwriters were not entitled to recover the expenses of salving the vessel, either at common law, since those expenses were within the suing & labouring clause in the policy, or as a salvage award, since the underwriters were parties interested in the vessel.—CROUAN *v.* STANIER, [1904] 1 K. B. 87; 73 L. J. K. B. 102; 19 T. L. R. 664; 47 Sol. Jo. 728; 9 Com. Cas. 27; *sub nom.* CRONON *v.* STANIER, 52 W. R. 75.

**7082.** —— ——.]—THE PINNA (1912), *Times*, Nov. 29.

**7083.** —— ——.]—THE LOMONOSOFF, No. 6829, *ante.*

**7084. Service to vessel believed to be salvor's own—Vessel in fact belonging to another person—Whether intention of salvor considered.**]—THE LIFFEY, No. 7550, *post.*

**7085. Application of test of voluntariness.**]—The test of voluntariness is only applicable as between the salvor & salved (PICKFORD, L.J.)—THE SARPEN, [1916] P. 306; 85 L. J. P. 209; 114 L. T. 1011; 32 T. L. R. 575; 60 Sol. Jo. 538; 13 Asp. M. L. C. 370, C. A.

*Annotations:*—**Consd.** The Carrie, [1917] P. 224. **Refd.** The Matti, [1918] P. 314; Admiralty Comrs. *v.* Page, [1919] 1 K. B. 299. **Mentd.** France Fenwick *v.* R., [1927] 1 K. B. 458.

### *B. Coastguards.*

*See* 1894 Act, s. 568.

**7086. Right to reward.**] — The ct. always jealously maintains the right of original salvors, unless further assistance is necessary for the preservation of the property. In a case of derelict & of great merit, the ct. gave to the original salvors, the usual salvage two-fifths of, the whole value, £2,394, & to a revenue cutter, whose assistance was beneficial, £100. Expenses out of the remaining property.—THE CHARLOTTA (1831), 2 Hag. Adm. 361; 166 E. R. 275.

**7087.** ——.]—In an action entered in Nov., for salvage rendered in Apr., by a lieutenant of a coastguard station, & four of his boatmen, a tender of £50 pronounced for; & the salvors, who were resident out of the jurisdiction of the ct., being condemned in £50 *nom. exp.*, the sum paid into the registry, by the owners as the tender, was directed to be paid out to them in discharge of costs.

Salvage is not always a mere compensation for work & labour. . . . The interests of commerce, the benefit & security of navigation, & lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged & liberal scale. The ingredients of a salvage service are first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, & to rescue the property of their fellow subjects; secondly, the degree of danger & distress from which the property is rescued—whether it were in imminent peril & almost certainly lost if not at the time rescued & preserved; thirdly, the degree of labour & skill which the salvors incur & display, & the time occupied. Lastly, the value. Where all these circumstances concur, a large & liberal reward ought to be given; but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore* (SIR JOHN NICHOLL).—THE CLIFTON (1834), 3 Hag. Adm. 117; 166 E. R. 349; *on appeal, sub nom.* KELLY *v.* BUSHBY, THE CLIFTON (1835), 3 Knapp, 375, P. C.

*Annotations:*—**Apld.** Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589; The Cleopatra (1878), 3 P. D. 145. **Refd.** The Ardincaple (1831), 3 Hag. Adm. 151; The Lord Dufferin (1849), 7 Notes of Cases, Supp. xxxiii; The Samuel (1851), 17 L. T. O. S. 204. **Mentd.** Loughnan *v.* Haji Toosub Bhulladina (1851), 5 Moo. Ind. App. 137; The Brinhilda (1881), 45 L. T. 389.

**7088.** ——.]—THE LONDON MERCHANT (1837), 3 Hag. Adm. 394; 166 E. R. 451.

**7089.** ——.]—Under 9 & 10 Vict. c. 99, the ct. is empowered to award remuneration for salvage of life. Coastguardsmen are entitled to salvage reward; for although it is a part of their duty to save life & property, it is a duty for which they should be paid.

An ignorant salvor receiving a sum utterly inadequate to the services performed, & signing a receipt in full of all demands, is entitled to relief in the Ct. of Admlty., & is not barred of his suit for fair & proper remuneration for such services.—*Re* SILVER BULLION (1851), 2 Ecc. & Ad. 70; 164 E. R. 312; *sub nom.* THE SIR ROBERT PEEL, 4 L. T. 742.

*Annotation:*—**Refd.** The Dictator, [1892] P. 304.

**7090.** —— **Nature of services—Protection of revenue.**]—THE QUEEN MAB, No. 7808, *post.*

**Necessity for written consent of Admiralty.**]—*See* Merchant Shipping Act, 1894 (c. 60), s. 557.

### *C. Crew.*

#### (*a*) *In General.*

**7091. General rule—Right to reward dependent on termination of contract of service.**]—(1) A ship was, by order of her master, abandoned at sea, & on the next day her crew, who had been taken to Vigo, were, by order of the British Consul, put on board a steamer, which fell in with the abandoned ship. Part of the crew volunteered to return to their ship, but without the master, & were accordingly put on board by the steamer; &, with the assistance of a smack & other boats, the ship was subsequently brought to Corunna:—*Held:* the crew were entitled to be rewarded as salvors.

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**PART XV. SECT. 6, SUB-SECT. 2.—B.**

**7090 i.** *Right to reward—Nature of services—Protection of revenue.*]—In a case of salvage the ct. said that in rescuing the vessel from the rocks, after the crew left her, the coastguard officer & crew scarcely did more than was incumbent on them to do as connected with the revenue, & awarded a small sum.—THE ENTERPRISE (1849), 8 L. T. 335.—IR.

**PART XV. SECT. 6, SUB-SECT. 2.—C. (a).**

**7091 i.** *General rule—Right to reward dependent on termination of contract of service.*]—Seamen while acting in the strict line of their duty cannot entitle themselves to salvage, but where their connection with the ship has ceased, or they exceed their proper duty, they can be permitted to claim as salvors.—THE ROBERT & ANNE (1842), 1 S. V. A. R. 253.—CAN.

If the mariner's contract be at an end, may he not be a salvor? He then becomes precisely in the situation which belongs to a salvor (DR. LUSHINGTON).

(2) The master is . . . the proper person to form a judgment whether abandonment be absolutely necessary or not (DR. LUSHINGTON).—THE FLORENCE (1852), 19 L. T. O. S. 304; 16 Jur. 572.

*Annotations:—As to* (1) **Distd.** The Vrede (1861), Lush. 322; The Warrior (1862), Lush. 476. **Apld.** The Portreath, [1923] P. 155. *As to* (2) **Consd.** Bradley *v.* Newsom, [1919] A. C. 16. **Apld.** The Portreath, [1923] P. 155. *Generally,* **Refd.** The Olympic, [1913] P. 92; Beal *v.* Horlock, [1915] 3 K. B. 627.

**7092.** ——— ———.]—THE VREDE, No. 6980, *ante.*

**7093.** ——— ———.]—THE SAPPHO, No. 7063, *ante.*

**7094.** ——— ———.]—(1) Two vessels came into collision on the high seas. One of the vessels, a barque, received damage & all her crew, except her mate, escaped on board the other vessel. The mate of the barque remained on board her, & navigated her until he obtained assistance from a steam vessel. The steam vessel then took the barque in tow & brought her into port in safety, the mate still assisting in her navigation:—*Held:* in awarding salvage to the owners, master, & crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services, should be taken into consideration, & the mate, upon his claim being brought before the ct., was entitled to rank as a salvor.

(2) In the first place, the salvors claim for a sum of £108 16s., which was paid by them for pumping & other expenses incurred in dock at Hull. That sum must either be paid as part of the salvage reward or independently of that reward. It cannot be paid in both ways. I consider that it must be paid independently of salvage (SIR ROBERT PHILLIMORE).

(3) I adhere, as DR. LUSHINGTON did in *The Warrior,* No. 7099, *post,* to the doctrine laid down by LORD STOWELL in *The Neptune,* No. 7078, *ante,* that the crew of a salved vessel cannot, under ordinary circumstances, have a *persona standi* as salvors against their own vessel. That principle, I consider, should be maintained in its integrity, but the crew of a salved vessel may, by the acts of their master, be placed in such a position that the engagement they have entered into is at an end. DR. LUSHINGTON, in *The Warrior,* No. 7099, *post,* said, "But there are two ways in which the contract of seamen may be dissolved. It may be dissolved by final abandonment of the ship, or by the act of the master giving the seamen a discharge." In this case, the master abandoned his vessel with all his crew, except the mate, who voluntarily stayed on board, & the mate's contract with the master, to serve in that capacity, must be considered as at an end (SIR ROBERT PHILLIMORE).—THE LE JONET (1872), L. R. 3 A. & E. 556; 41 L. J. Adm. 95; 27 L. T. 387; 21 W. R. 83; 1 Asp. M. L. C. 438.

*Annotations:—Generally,* **Refd.** The Miranda (1872), L. R. 3 A. & E. 561; The Lomonosoff, [1921] P. 97.

**7095.** ——— ———.]—The crew of a vessel are not entitled to salvage remuneration for services rendered to the vessel unless their contract of service has been dissolved, & the mere fact that the master has ordered the ship to be abandoned & the crew to take to the boats & go on board another vessel does not put an end to the contract of service.

The master of defts.' vessel, thinking she was in danger of sinking as the result of a collision, gave orders to abandon ship, & he & the crew went on board a pilot cutter which was standing by. Shortly afterwards he came to the conclusion that the vessel was not sinking & called for volunteers to return to her. About half the crew, including pltfs., the second officer & seven other hands, responded & returned to the vessel & navigated her while she was towed in shore & beached:—*Held:* pltfs.' contract of service had not been determined by the temporary abandonment & pltfs. were not entitled to salvage.—THE PORTREATH, [1923] P. 155; 92 L. J. P. 116; 129 L. T. 475; 39 T. L. R. 356; 16 Asp. M. L. C. 227.

### (b) *What amounts to Termination of Contract of Service.*

**7096. Abandonment of ship—For safety of life—Responsibility of master.**]—THE FLORENCE, No. 7091, *ante.*

**7097.** ——— ———.]—THE VREDE, No. 6980, *ante.*

**7098.** ——— **By order of master—Abandonment not final.**]—THE PORTREATH, No. 7095, *ante.*

**7099.** ——— **Necessity for strict proof.**]—(1) On the wreck of a ship the seamen are bound by their contract to do their utmost to save ship & cargo; but the seamen's contract of service may be terminated either by final abandonment of the ship or by discharge given by the master.

(2) An abandonment of a ship, which is relied upon as operating a dissolution of the seamen's contract, must be clearly proved.

(3) If, upon a ship being wrecked, the master, improperly disregarding the interests of the owners of ship & cargo, discharges the seamen, the discharge is nevertheless valid, unless the seamen are proved to have fraudulently accepted their discharge; & subsequent services rendered by them to ship & cargo are salvage services.

A ship by accident in calm weather went on a rocky beach in the Canary Islands, beat heavily, & in half an hour filled with water; the master & crew immediately quitted the ship & went on shore. The next day the master discharged all the officers & crew; but it was not proved that they were guilty of fraud in accepting their discharge. On same day some of the crew, at the suggestion of the mate, returned to the ship; &, working for several days, succeeded in saving part of the ship's stores & a considerable amount of cargo; the ship then broke up:—*Held:* there was no abandonment terminating the seamen's contract, but the contract was terminated by the discharge given by the master; &, for their subsequent services, the seamen were entitled to salvage reward.—THE WARRIOR (1862), Lush. 476; 6 L. T. 133; 1 Mar. L. C. 204; 167 E. R. 214.

*Annotations:—As to* (2) **Consd.** The Portreath, [1923] P. 155. *As to* (3) **Consd.** The Le Jonet (1872), L. R. 3 A. & E. 556. *Generally,* **Refd.** The Olympic, [1913] P. 92.

**7100.** ——.]—THE LE JONET, No. 7094, *ante.*

**7101. Discharge by master—Improper discharge—Bonâ fide acceptance by crew.**]—THE WARRIOR, No. 7099, *ante.*

**7102.** ——.]—THE LE JONET, No. 7094, *ante.*

**7103. Hostile capture.**]—Salvage is not due to the crew of a ship for rescuing it from mutineers.

It appears to me that it is the bounden duty of the crew to give every assistance in their power

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**PART XV. SECT. 6, SUB-SECT. 2.—C. (b).**

**7097 1.** *Abandonment of ship—For safety of life.*]—Where by an order of the master a ship has been finally abandoned in the open sea, for the purpose of saving life, the contract of the seamen is dissolved & they are entitled to salvage remuneration, if, after such abandonment they are instrumental in saving the vessel.—THE NIGHTINGALE (1885), 6 N. S. W. Ad. 18; 2 N. S. W. W. N. 119.—**AUS.**

*Sect. 6.—The salvors: Sub-sect. 2, C. (b), D., E., F., G., H., I., J. & K.; sub-sect. 3.]*

to prevent or quell a mutiny & to use their utmost exertions to preserve or recover the possession of the vessel & goods of their employers. The case is extremely different from that of rescue from an enemy, because there the moment the capture is effected, the crew are discharged from their duty to their employers (SIR WILLIAM SCOTT). —THE GOVERNOR RAFFLES (1815), 2 Dods. 14; 165 E. R. 1400.

*Annotations:*—**Refd.** The Florence (1852), 19 L. T. O. S. 304; Horlock *v.* Beal, [1916] 1 A. C. 486.

**7104. Mutiny.**]—THE GOVERNOR RAFFLES, No. 7103, *ante*.

**Termination of contract of service.**]—*Compare*, *also*, Part III., Sect. 4, sub-sect. 3, *ante*.

*D. Lifeboat Crews.*

**7105. Right to reward—Salvage of property.**]—THE AUGUSTE LEGEMBRE, No. 6824, *ante*.

**7106. —— —— Burden of proof.**]—Signals for assistance were exhibited by a vessel ashore, &, in response to a telegram sent by the operator at the S. Lighthouse, two tugs proceeded to her assistance. A telegram was also sent by the coxswain of the S. lifeboat, but arrived after that sent from the lighthouse. In an action for salvage by the coxswain & crew of the lifeboat:—*Held:* although a person who has done no more than give information may be entitled to salvage yet in fact no services had been rendered, as the tugs had prepared to proceed to the vessel on the receipt of the first telegram; (2) when a lifeboat crew have gone out for the purposes of saving life, the *onus* is on them to prove that they have afterwards become entitled to salvage against the property in peril.—THE MARGUERITE MOLINOS, [1903] P. 160; 72 L. J. P. 56; 89 L. T. 192; 9 Asp. M. L. C. 424.

**7107. —— —— Launchers.**]—(1) When a lifeboat, belonging to the National Lifeboat Institution, is launched for the purpose of saving life, the crew of the lifeboat, & the launchers, look to the institution for payment according to the scale provided by the rules; (2) but if, on arriving at the vessel in danger, the services of the crew of the lifeboat are engaged to endeavour to save the vessel, then, as the crew of the lifeboat becomes, under the rules, a party of salvors who have borrowed the lifeboat for property salvage purposes, & who look to the owners of the property for their remuneration, the launchers will also be entitled to look to the owners of the property for salvage in respect of the services which their efforts enabled the crew of the lifeboat to render.—THE CAYO BONITO, [1904] P. 310; 73 L. J. P. 93; 91 L. T. 102; 20 T. L. R. 576; 9 Asp. M. L. C. 603.

**7108. —— —— Nature of services.**]—The ship stranded on the West Shingles Sand at the mouth of the Thames, & her crew having been taken off in heavy weather, thirteen hands on a volunteer lifeboat from Walton boarded her, & did a little discharging & took out a small anchor & kept off some small boats sent, as they alleged, to pillage the ship, & they remained on board when the crew returned about a day afterwards, though told they were not wanted, & did a little work:—*Held:* the lifeboat's services did not amount to salvage.—THE MARÉCHAL SUCHET, [1911] P. 1 80 L. J. P. 51; 103 L. T. 848; 26 T. L. R. 660 11 Asp. M. L. C. 553.

*Annotation:*—**Mentd.** The West Cock, [1911] P. 208.

*E. Passengers.*

**7109. Right to reward—Common danger.**]—Claim of a passenger to salvage not sustained.

Where there is a common danger it is the duty of every one on board the vessel to give all the assistance he can; & more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established; though a passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of escaping from the ship & of saving his own life (*per* CUR.).—THE BRANSTON (1826), 2 Hag. Adm. 3, n.; 166 E. R. 146.

*Annotation:*—**Folld.** The Vrede (1861), Lush. 322.

**7110. —— ——.**]—THE VREDE, No. 6980, *ante*.

**7111. —— Special services—Assuming command—After abandonment of vessel by captain & part of crew.**]—NEWMAN *v.* WALTERS, No. 7006, *ante*.

**7112. —— —— By crew of other vessel passengers on distressed ship.**]—THE SALACIA, No 7385, *post*.

—— ——.] — *Compare* PRIZE LAW, Vol. XXXVII., p. 678, No. 1462.

*F. Pilots.*

*See* Sect. 5, *ante*.

*G. Public Officers.*

**7113. Right to reward—Services outside limits of official duty—Magistrate.**]—THE AQUILA, No. 7151, *post*.

**7114.** —— —— ——.]—(1) An agent of Lloyd's at an outport, who had undertaken to relieve a vessel from her difficulties in that character, & had merely employed the necessary hands to perform the service, without having himself incurred any personal risk in the transaction, allowed to claim as salvor.

(2) The first case was an application made by a magistrate in Ireland for a reward for salvage services, which consisted in the sending police officers to protect the cargo of a stranded vessel. There may be some doubt whether LORD STOWELL did not go too far, but he allotted the sum of £100 (DR. LUSHINGTON).—THE PURISSIMA CONCEPCION (1849), 3 Wm. Rob. 181; 7 Notes of Cases, 150; 8 L. T. 178; 13 Jur. 967; 166 E. R. 930; *subsequent proceedings* (1850), 7 Notes of Cases, 503.

*Annotations:*—*As to* (1) **Consd.** The Honor (1866), L. R. 1 A. & E. 87. **Refd.** The Kate B. Jones, [1892] P. 366; The Solway Prince, [1896] P. 120.

*H. Receivers of Wreck.*

**Right to reward.**]—*See* 1894 Act, s. 567.

—— **Substitute of receiver of wreck.**]—*See* 1894 Act, s. 516 (2).

*I. Royal Navy.*

*See* 1894 Act, ss. 557–564.

**What are King's ships.**]—*See* ROYAL FORCES, Vol. XXXIX., pp. 316, 317, Nos. 1–12.

**Salvage by King's ships.**]—*See* ROYAL FORCES, Vol. XXXIX., pp. 318–322, Nos. 27–95.

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**PART XV. SECT. 6, SUB-SECT. 2.—E.**

q. *Right to reward—Special services—Agreement to pilot.*]—Where an agreement for a specific sum was proved as having been made with a passenger, then on board a passenger ship, to pilot the ship into a harbour whilst towing a wreck fallen in with whilst on her voyage. The ct. refused to allow any claim for salvage.—THE SOFALA (1881), 6 Nfld. L. R. 353.—**NFLD.**

r. ——.]—THE STELLA MARIE (1866), Y. A. D. 16.—**CAN.**

t. ——.]—There may be cases in which a passenger may sustain a claim for salvage services.—THE SOFALA (1881), 6 Nfld. L. R. 353.—**NFLD.**

*J. Tug.*

*See* Sect. 4, *ante*.

*K. Ship's Agents.*

**7115. Right to reward.**]—THE LORD CRANSTOWN (1827), cited in 2 Hag. Adm. at p. 207; 166 E. R. 220.

*Annotations*:—**Apld.** The Happy Return (1828), 2 Hag. Adm. 198. **Refd.** The Purisima Concepcion (1849), 7 Notes of Cases, 150.

**7116.** ——.]—The ct., upon the evidences, being satisfied that it was understood & sufficiently expressed that a person, appointed "true & lawful attorney, in the name of the master, to use all possible means for the recovery of the ship & cargo," should act as agent, & that his claim for salvage should be controlled by that understanding:—*Held*: such character, nevertheless, did not wholly supersede the character of salvor.—THE HAPPY RETURN (1828), 2 Hag. Adm. 198; 166 E. R. 217.

*Annotation*:—**Consd.** The Purissima Concepcion (1849), 3 Wm. Rob. 181.

**7117.** ——.]—THE FAVORITE, No. 6852, *ante*.

**7118.** ——.]—THE LADY WORSLEY, No. 7848, *post*.

**7119.** ——.]—THE HONOR (CARGO EX), No. 7127, *post*.

**7120.** ——.]—An agent is not precluded from claiming as a salvor; but where the owners of the property in danger have requested him to render assistance, & thereby have given him a right to some remuneration though the operations prove unsuccessful, the assessment of the award, for successful salvage services, will be based upon the principle that the agent did not, like an independent salvor, run the risk of the loss of the entire expenditure if his efforts had proved unsuccessful.—THE KATE B. JONES, [1892] P. 366; 69 L. T. 197; 7 Asp. M. L. C. 332.

*Annotation*:—**Consd.** The Crusader, [1907] P. 15.

**7121.** ——.]—A large steamship belonging to defts., laden with sugar from Java to Port Said for orders was coaled at Colombo by pltfs., who acted in the usual way as ship's agents. A few days afterwards the vessel grounded on Gofar Island in the Maldives & remained fast. Her master sent the chief officer back to Colombo with a letter to pltfs. acquainting them with the situation, telling them that he wanted a powerful tug, & that they were to draw on defts., the owners of the ship, for disbursements. He also suggested that a contract for a salvage boat, "No cure, no pay," might be advisable. Pltfs., finding that the latter proposition was impracticable, engaged a Govt. tug at a rate working out at about £60 a day, &, making themselves personally liable for the payment of the hire, insured the tug for a limited period. The tug proceeded to the vessel with a representative of pltfs. on board. The master, doubting whether his vessel could be got off, declined to accept the services of the tug except on a "No cure, no pay," agreement, & accordingly, after some discussion with pltfs.' representative as to terms, the master signed a letter agreeing on behalf of defts. to pay pltfs. £4,000 if the vessel was successfully floated. The tug then made fast, &, in the course of the next day's towage, the vessel came off. Pltfs. claimed £4,000:—*Held*: pltfs. could not be allowed to ratify the act of their representative, as, in the circumstances, the substituted agreement, insisted upon by the master & assented to by their representatives, by which they were constituted salvors, was unreasonable, & pltfs. must be deemed, not only when engaging the tug, but throughout the operations, to have acted as agents of the ship. In that capacity they were only entitled to recover by personal action repayment of their disbursements, together with the usual agency charges.—THE CRUSADER, [1907] P. 196; 76 L. J. P. 102; 97 L. T. 20; 23 T. L. R. 382; 10 Asp. M. L. C. 442, C. A.

**7122.** ——.]—THE PURISSIMA CONCEPCION, No. 7114, *ante*.

**7123.** —— **Nature of services—Superintendence of operations.**]—THE TWO BROTHERS (1843), 3 L. T. 182.

**7124.** —— —— ——.]—(1) Moiety of the ship & cargo awarded in a case of derelict. Deductions from the net value allowed to the owners for necessary expenses in bringing the ship into port, & an apportionment directed by the ct.

(2) *Semble*: a person merely hiring labourers to assist in the unloading of a stranded vessel, although entitled to some remuneration for his superintendence, will not be entitled to claim as a salvor.—THE WATT (1843), 2 Wm. Rob. 70; 6 L. T. 371; 166 E. R. 681.

*Annotations*:—*As to* (1) **Refd.** Bird v. Gibb, The De Bay (1883), 8 App. Cas. 559; The Janet Court (1897), 76 L. T. 172.

**7125.** —— —— **Hiring of labour.**]—THE WATT, No. 7124, *ante*.

**7126.** —— —— —— ——.] An agent at Lloyd's is not entitled to sue as a salvor for the mere hiring & engaging of men to assist a vessel in distress.—THE LIVELY (1848), 3 Wm. Rob. 64; 6 Notes of Cases, 206; 166 E. R. 887.

**7127.** —— **Joinder of claims as agent & salvor.**]—Where ship agents render extraordinary services in saving property, the ct. will, under particular circumstances, allow a claim as agent & a claim as salvor to be united.—THE HONOR (CARGO EX) (1866), L. R. 1 A. & E. 87; 35 L. J. Adm. 113; 15 L. T. 677; 12 Jur. N. S. 773; 15 W. R. 10; 2 Mar. L. C. 415.

*Annotations*:—**Consd.** The Kate B. Jones, [1892] P. 366. **Refd.** The Solway Prince, [1896] P. 120.

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SUB-SECT. 3.—SERVICES RENDERED AFTER COLLISION.

**Duty to stand by in case of collision.**]—*See* 1894 Act, s. 422.

**7128. Whether claims encouraged.**]—The *Sappho* & *Salacia* came into collision in the Black Sea, a suit for damage determined that the *Sappho* was to blame, the *Salacia* then brought a suit for salvage. The ct. will not encourage such suits; &, considering on the one hand that the salvage service proved was of a very trifling nature, & greatly exaggerated in the statement of the salvors; on the other, that the owners by going into irrelevant matter had needlessly prolonged the proceedings, gave only £80 as salvage, but gave the salvors their costs.—THE SAPPHO (1857), Sw. 242; 8 L. T. 613; 166 E. R. 1117.

**7129. Whether statutory duty affects right to salvage.**]—A collision occurred between two vessels, *A.* & *B.* *A.* was in tow of a steam tug;

**PART XV. SECT. 6, SUB-SECT. 3.**

**7128 i.** *Whether claims encouraged.*]—Salvage is not recoverable by the ship at fault for services to the vessel with which it collided.—MAGDALEN ISLANDS S.S. CO. v. THE DIANA (1907), 11 Exch. C. R. 40; 3 E. L. R. 158. **-CAN.**

a. *Salvor & salved both to blame.*]—Although the salvor & the salved are both to blame for a collision, the salvor may be awarded salvage.—THE ZAMBESI & THE FANNY DUTARD (1892), 3 Exch. C. R. 67; 2 B. C. R. 91.—**CAN.**

*Sect. 6.—The salvors: Sub-sect. 3. Sect. 7: Sub-sects. 1, 2, 3 & 4, A. & B. (a).]*

the tug afterwards rendered assistance to *B.* *B.* was found solely to blame for the collision:—*Held:* the tug's right of salvage remuneration was not affected by 25 & 26 Vict. c. 63, s. 33, which makes it the duty of ships mutually to assist each other after a collision.

In this case, indeed, the tug itself did not come into collision, but the ship which it towed, & it has been argued that the case of a towing ship is a *casus omissus* from the statute, but I am not of this opinion (PHILLIMORE, P.).—THE HANNIBAL, THE QUEEN (1867), L. R. 2 A. & E. 53; 37 L. J. Adm. 12; *affd.* see, [1925] A. C. p. 262, P. C.

*Annotations:*—**Consd.** The Solway Prince, [1896] P. 120. **Reld.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**7130.** ——.]—THE RETRIEVER *v.* R., No. 6943, *ante.*

**7131.** ——.]—Where two ships having been in collision, one of them renders assistance to the other by towing her, being bound by 36 & 37 Vict. c. 85, s. 16, to stand by & render assistance, *qu.:* whether she is entitled to salvage remuneration even though she is not to blame for the collision.—THE BETA (1884), 9 P. D. 134; 33 W. R. 190; *sub nom.* THE BETA, THE PETER GRAHAM, 51 L. T. 154; 5 Asp. M. L. C. 276, C. A.

*Annotation:*—**Expld.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**7132.** ——.]—(1) Except in cases of absolute necessity, the ct. which tries a claim for salvage should itself assess the amount of the award.

(2) The duty cast by Merchant Shipping Acts upon one of two colliding vessels to stand by & render assistance does not prevent that vessel, if she renders assistance, from claiming salvage.

In a collision, which occurred in the Bristol Channel between the *S.* & the *M.* on a foggy morning in Dec. 1916, the *S.* struck the *M.* on her starboard side & made a large hole in her, with the result that the engine room & one of the holds filled with water. The master of the *M.* believing that he was in immediate danger of sinking, he & most of the crew climbed on to the *S.*, & the rest of the crew boarded the *U.*, an armed steam trawler which was escorting the *S.* As the *M.* did not sink, the master of the *S.* proposed, with the assistance of the *U.*, to tow her to Barry, & the crew of the *M.* returned to her & lashed her to the *S.* on the starboard side & to the *U.* on the port side. After towing for three-quarters of an hour all three vessels inadvertently grounded on a ledge of rocks near the shore. The *S.* & the *U.* got off soon after & left the *M.* on the rocks. When the tide fell the water in the *M.* drained out of her, & the master, by closing a watertight door between the hold & the engine room, was able to prevent the water coming into the hold. Both the *S.* & the *M.* were badly damaged by the grounding. The *M.* was successfully towed to Barry by two tugs on the following day. Upon a claim for salvage by the owners of the *S.* for towing the *M.* BAILHACHE, J., acting on the advice of his assessors, decided that the towage had not materially contributed to the ultimate safety of the *M.* & dismissed the claim, but the Ct. of Appeal, on the advice of their assessors, came to the contrary conclusion:—*Held:* there was ample evidence to support the decision of the trial judge, & it ought not to be disturbed.—MELANIE (OWNERS) *v.* SAN ONOFRE (OWNERS), [1925] A. C. 246; 94 L. J. P. 17; 132 L. T. 567; 69 Sol. Jo. 808; 16 Asp. M. L. C. 479; *sub nom.* THE MELANIE, 41 T. L. R. 206, H. L.

*Annotation:*—*Generally*, **Reld.** S.S. Australia *v.* S.S. Nautilus, The Australia, [1927] A. C. 145.

**7133.** —— **Collision due to default of salving vessel.**]—A collision occurred between two vessels. Both were found to blame. A cause of salvage was instituted by the master & crew of one of the vessels for having saved a quantity of specie laden on board the other vessel:—*Held:* the salvors were not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy.—THE CAPELLA (CARGO EX) (1867), L. R. 1 A. & E. 356; 16 L. T. 800; 2 Mar. L. C. 552.

*Annotations:*—**Consd.** The Ettrick (1881), 6 P. D. 127. **Apld.** The Duc d'Aumale, [1904] P. 60. **Reld.** The Cherubim (1868), 19 L. T. 52.

**7134.** —— ——.]—THE GLENGABER, No. 7059, *ante.*

**7135.** —— ——.]—THE DUC D'AUMALE (No. 2), No. 6990, *ante.*

——.]—*See, now,* Maritime Conventions Act, 1911 (c. 57), s. 6 (2).

**7136. Services not materially contributing to salving of vessel.**]—MELANIE (OWNERS) *v.* SAN ONOFRE (OWNERS), No. 7132, *ante.*

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## SECT. 7.—SALVAGE OF MARITIME PROPERTY.

### SUB-SECT. 1.—VESSEL OR SHIP.

**7137. What is—Drifting gas float.**]—The jurisdiction of the Admlty. over salvage does not extend to all property exposed to perils of the sea, & used to assist navigation.

A gas float shaped like a boat, but neither intended nor fitted to be navigated, was moored in tidal waters to give light to vessels & went adrift in a storm:—*Held:* not being a ship or part of a ship or of her apparel or cargo the structure was not the subject of a claim for salvage within the Admlty. jurisdiction.

It may be that in salvage law a broad & liberal construction should be extended to the word "cargo," so as to embrace goods in course of being transported by a vessel though not inside it (LORD HERSCHELL).—WELLS *v.* GAS FLOAT WHITTON NO. 2 (OWNERS), [1897] A. C. 337; 76 L. T. 663; 13 T. L. R. 422; 8 Asp. M. L. C. 272, H. L.; *sub nom.* THE GAS FLOAT WHITTON NO. 2, 66 L. J. P. 99, H. L.

*Annotations:*—**Reld.** The Craighall [1910] P. 207; The Upcerne, [1912] P. 160.

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### SUB-SECT. 2.—CARGO.

**7138. What amounts to cargo—Passengers' baggage & effects.**]—THE WILLEM III., No. 7189, *post.*

**7139.** —— **Goods in tow—Caisson of dock.**]—CAISSON, OWNERS OF A (1876), 2 Pritchard's Admiralty Dig. 3rd ed. 2078.

*Annotation:*—**Consd.** The Gas Float Whitton No. 2, [1896] P. 42.

**7140.** —— ——.]—WELLS *v.* GAS FLOAT WHITTON NO. 2 (OWNERS), No. 7137, *ante.*



b. *What is—Sunken dredge.*]—The recovery of a sunken dredge, with its contents, constitutes a salvage service creating a maritime lien.—SIMPSON *v.* THE KRUGER (Ont.) (1919), 19 Exch. C. R. 64.—CAN.

SUB-SECT. 3.—WRECK.

*See* Part XIV., Sect. 1, *ante*, & *compare* ADMIRALTY, Vol. I., pp. 153, 154, 155, Nos. 614–16, 622–625.

**Statutory definition.**]—*See* 1894 Act, s. 510.

**7141. What amounts to "wreck"—Raft of timber.**]—A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, & left at low water upon a towing path. A. finding it in that situation, voluntarily conveys it to a place of safety, beyond the reach of the tide, at high water. A. has no lien on the timber for the trouble or expense to which he may have put himself in the carriage of it, but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered him by the owner by way of compensation. But in such a case, in all probability, A. might maintain an action against the owner for a compensation.—NICHOLSON *v.* CHAPMAN (1793), 2 Hy. Bl. 254; 126 E. R. 536.

*Annotations*:—**Consd.** The Gas Float Whitton No. 2, [1896] P. 42. **Refd.** Vivian *v.* Mersey Dock Board (1869), L. R. 5 C. P. 19; Hingston *v.* Wendt (1876), 1 Q. B. D. 367; Aitchison *v.* Lohre (1879), 4 App. Cas 755; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.; Gwilliam *v.* Twist, [1895] 2 Q. B. 84; Jebara *v.* Ottoman Bank, [1927] 2 K. B. 254. **Mentd.** Prager *v.* Blatspiel Stamp & Heacock, [1924] 1 K. B. 566.

**7142.** —— ——.]—Motion for a monition calling upon the owner of a raft of timber which was found flotsam in Yarmouth harbour, to show cause why salvage should not be awarded for the rescue & preservation of the same.

Motion rejected upon the ground that the Court did not possess a jurisdiction over the subject-matter under the provision of Admiralty Court Act, 1840 (c. 65), s. 6.—THE RAFT OF TIMBER (1844), 2 Wm. Rob. 251; 3 L. T. 58; 166 E. R. 749; *sub nom. Re* LARGE RAFT OF TIMBER, 8 Jur. 154.

*Annotations*:—**Refd.** The Mac (1882), 46 L. T. 907; The Gas Float Whitton No. 2, [1896] P. 42.

**7143.** —— **Drifting timber.**]—Timber which has been moored in a river, some miles above a harbour, opposite to the owner's premises, & has drifted therefrom to the sea in consequence of an accidental loosening of the fastenings:—*Held*: not "wreck" within 17 & 18 Vict. c. 104, s. 458, entitling the justices to make an award for salvage.—PALMER *v.* ROUSE (1858), 3 H. & N. 505; 27 L. J. EX. 437; 31 L. T. O. S. 220; 22 J. P. 773; 6 W. R. 674; 157 E. R. 569.

*Annotation*:—**Refd.** The Gas Float Whitton No. 2, [1896] P. 42.

**7144.** —— **Drifting barge.**]—THE ZETA, No. 7549, *post*.

**7145.** —— **Specie.**]—THE SCHILLER (CARGO EX), No. 7079, *ante*.

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SUB-SECT. 4.—DERELICT.

*A. In General.*

*See* 1894 Act, s. 546; ADMIRALTY, Vol. I., pp. 54, 155, Nos. 617–619, 626–628.

**7146. "Derelict" & "wreck" distinguished.**]—THE SOPHIE (1841), 6 L. T. 370.

**7147.** —— **On demand by owners.**]—A ship, laden with lead & iron, sunk off the Shipwash Sand, & was there left by the master & crew:—*Held*: (1) the ship was not a derelict; (2) the authority of the owners & underwriters remained; (3) the first finders, though they recovered part of the property forfeited their claim to salvage, & became liable to the costs of a suit instituted by them as salvors, by reason of their subsequent misconduct towards, & forcible resistance to, the authority of the owners.—THE BAREFOOT (1850), 6 L. T. 371; 14 Jur. 841.

**7148. Application to cargo.**]—R. *v.* PROPERTY DERELICT (1825), 1 Hag. Adm. 383; 166 E. R. 136.

*Annotation*:—**Refd.** Bradley *v.* Newsom, [1919] A. C. 16.

**7149.** —— **Cargo out of possible reach of master.**]—THE SAMUEL, No. 6857, *ante*.

**7150.** —— **Marine boiler.**]—Where five men having found a derelict marine boiler floating in the sea, pulled it ashore & hauled it beyond high water, the ct. in a default salvage action, out of £58, the net proceeds of said boiler, awarded £50 & costs.—THE BOILER EX ELEPHANT (1891), 64 L. T. 543, C. A.

*B. Necessity for Abandonment.*

*(a) In General.*

**7151. General rule—Abandonment must be without hope of recovery or return.**]—(1) It is by no means necessary to constitute derelict, that no owner should afterwards appear. It is sufficient if there has been an abandonment at sea by the master & crew, without hope of recovery; I say, without hope of recovery because a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment (SIR W. SCOTT).

(2) If a magistrate acting in his public duty should [in salvage operations] go beyond the limits of his official duty, in giving extraordinary assistance, he would have an undeniable right to be considered as a salvor (SIR W. SCOTT).—THE AQUILA (1798), 1 Ch. Rob. 37; 165 E. R. 87.

*Annotations*:—*As to* (1) **Refd.** Papayanni *v.* Hocquard, The True Blue (1866), L. R. 1 P. C. 250; The Zeta (1875), L. R. 1 A. & E. 460; Bradley *v.* Newsom, [1919] A. C. 16; The Tubantia, [1924] P. 78. *As to* (2) **Refd.** The Amérique (1874), L. R. 6 P. C. 468; The Nile (1875), 33 L. T. 66.

**7152.** —— ——.]—Dereliction of a prize ship by the enemy not considered as a dereliction imputable to the proprietor.

If the enemy had kept possession, & maintained a contest, the law would have given only one sixth to a recaptor. Can it be said that the merit of the salvors is greater, or that they are entitled to a greater reward, because no person was left on board the ship to defend her? The value is stated to be not more than £600. I shall give £150 (*per* CUR.).—THE JOHN & JANE (1802), 4 Ch. Rob. 216; 165 E. R. 590.

*Annotation*:—**Refd.** Bradley *v.* Newsom, [1919] A. C. 16.

**7153.** —— ——.]—THE MARY (1841), 6 L. T. 370.

**7154.** —— ——.]—THE ST. PETERSBURG (1843), 6 L. T. 371.

**7155.** —— ——.]—THE SARAH BELL (1845), 4 Notes of Cases, 144; 6 L. T. 371.

*Annotation*:—**Refd.** Bradley *v.* Newsom, [1919] A. C. 16.

**7156.** —— ——.]—THE LIVINGSTONE (1853), 6 L. T. 371.

**7157.** —— ——.]—THE ZETA, No. 7549, *post*.

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**PART XV. SECT. 7, SUB-SECT. 3.**

**c.** *Claim of seamen upon parts saved.*]—In case of wreck the claim of the seamen upon the parts saved is a claim for salvage.—*Re* THE ISABELLA 1850), 1 S. V. A. R. 281.—**CAN.**

**d.** *Fishing gear adrift.*]—Cod traps adrift from their shore & sea moorings cannot be the subject of a claim for salvage either under the Salvage Act or at common law.—JERRETT *v.* ROBERTS (1883), 6 Nfld. L. R. 494.—**NFLD.**

**PART XV. SECT. 7, SUB-SECT. 4.—B. (a).**

**7151 i.** *General rule—Abandonment must be without hope of recovery or return.*]—THE ROB ROY (1855), 6 L. T. O. S. 371.—**IND.**

*Sect. 7.—Salvage of maritime property: Sub-sect. 4, B. (a) & (b); sub-sects. 5 & 6. Sect. 8: Sub-sect. 1.]*

**7158.** —— ——.]—COSSMAN *v.* WEST, COSSMAN *v.* BRITISH AMERICA ASSURANCE CO., No. 7813, *post.*

**7159. Whether rule absolute.**]—Derelict does not mean in all cases an abandonment *sine animo recuperandi*; & a ship may, for the purposes of salvage, be considered a derelict, though the expectation of recovering her may exist.

A ship, in a situation of great peril, was assisted by smacks, but the essential service of bringing her away from the place she was in to one of safety was performed by a steamer, the services of the smacks being of no importance in the end, by reason of the steamer's coming up:—*Held:* the smacks, notwithstanding the effective service of the steamer, were entitled to a large reward.—THE GENESSEE (1848), 12 Jur. 401.

**7160.** ——.]—THE GERTRUDE, No. 7169, *post.*

*(b) What amounts to Abandonment.*

**7161. Voluntary abandonment of captors.**]—THE LORD NELSON (1809), Edw. 79; 165 E. R. 1039.

*Annotation:*—**Consd.** The Cosmopolitan (1848), 6 Notes of Cases, Supp. xvii.

**7162. Abandonment in river.**]—THE FENWICK (1841), 6 L. T. 371.

**7163.** ——.]—THE ZETA, No. 7549, *post.*

**7164. Abandonment at moment of collision.**]—THE PICKWICK, No. 7051, *ante.*

**7165.** ——.]—When on the alarm attending a collision the crew of one vessel jumps on board the other, such abandonment does not of itself constitute a case of derelict.—THE FENIX (1855), Sw. 13; 166 E. R. 992.

*Annotations:*—**Refd.** Bradley *v.* Newsom, [1919] A. C. 16. **Mentd.** The John (1860), Lush. 11.

**7166. Derelict ship in hands of salvors—Further assistance given by King's ship.**]—A British ship was found abandoned at sea, & was taken possession of & navigated for some days by the crews of two Danish vessels. She was then fallen in with by H.M. *Dolphin* who sent an officer & men on board, to whom among other salvors, including the Danes, a certain sum was decreed as salvage by the ct.:—*Held:* the British ship, when found by the *Dolphin* was not a derelict.—THE LADY KENNAWAY (1849), 7 Notes of Cases, 130; 13 Jur. 944.

**7167. Crew drowned while attempting to reach shore.**]—THE MINERVA (1854), 1 Ecc. & Ad. 271; 6 L. T. 371; 164 E. R. 157.

**7168. Removal of portable & valuable effects.**]—THE SEDGEFIELD (1859), 1 L. T. 244.

**7169. Removal of compasses & seamen's clothes.**]—Where a vessel was picked up with 4 to 5 feet water in the hold, her compasses & the seamen's clothes having been taken off, the ct. pronounced against her as a derelict, though it did not appear that her crew had left her *sine spe recuperandi.*—THE GERTRUDE (1861), 30 L. J. P. M. & A. 130.

**7170. Abandonment to procure aid from shore.**]—THE CLARISSA (1855), 6 L. T. 371.

**7171. Abandonment for safety of life.**]—THE COROMANDEL, No. 7196, *post.*

**7172. Handing over management of vessel to salvors.**]—THE LEPANTO, No. 7390, *post.*

SUB-SECT. 5.—FREIGHT.

**7173. General rule.**]—The commander & crew of a vessel of war, upon the African station, held to be entitled to a salvage remuneration for putting a sailing master & two seamen on board a homeward bound merchant vessel to assist in navigating the vessel, the master & one of the mariners of the merchant vessel being invalided with fever, & incapable of discharging the duties on board. Deductions claimed by the owners for the value of the ship & cargo on account of freight, primage & insurance, disallowed.

The claim of the salvors extends over the ship, cargo & freight (DR. LUSHINGTON).

Upon the present occasion no dispute is raised between the owners of the ship & the owners of the cargo; & if the freight be deducted from the value of the cargo, it must be taken afterwards as a separate item, upon which the ct. must decree salvage (DR. LUSHINGTON).—THE CHARLOTTE WYLIE (1846), 2 Wm. Rob. 495; 5 Notes of Cases, 4; 166 E. R. 842.

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**7159 i.** *Whether rule absolute.*]—THE SCOTSWOOD (1867), Y. A. D. 25.—**CAN.**

**7159 ii.** ——.]—A vessel was floating amidst the ice on the river St. Lawrence without any person on board, & without a rudder, her master & crew having left her, but intending to return. Four persons went out to her in canoes & by aid of her sails brought her to a place of safety. Salvage was awarded.—THE POMONA (1872), 2 S. V. A. R. 182.—**CAN.**

**7159 iii.** ——.]—THE DASH (1853), 3 Nfld. L. R. 375.—**NFLD.**

**e.** *Test applied—Intention at time of leaving—Effect of subsequent return.*]—If the master & crew of a ship in great danger abandon her *sine spe recuperandi* to preserve their lives, & subsequently make abortive efforts to return on board in company with intended salvors, it will not reduce the case below one of derelict salvage, inasmuch as if a vessel be once abandoned, even a subsequent return, under new circumstances, would not alter the nature of the original abandonment, the intention at the time of leaving being the point upon which the question of dereliction must be decided.—THE BERLIN (1857), 10 Ir. Jur. 34.—**IR.**

**PART XV. SECT. 7, SUB-SECT. 4.—B. (b).**

**i.** *Question of fact.*]—THE COSMOPOLITAN (1848), 6 Notes of Cases, Supp. xvii.—**IR.**

**7164 i.** *Abandonment at moment of collision.*]—THE COSMOPOLITAN (1848), 6 Notes of Cases, Supp. xvii.—**IR.**

**7168 i.** *Removal of portable & valuable effects.*]—THE STELLA MARIE (1866), Y. A. D. 16.—**CAN.**

**7170 i.** *Abandonment to procure aid from shore.*]—THE ROWENA (1880), Y. A. D. 255.—**CAN.**

**7170 ii.** ——.]—At 11.35 *a.m.* the owner of the *G.* coming down the Fraser River had engine trouble & decided to anchor the *G.* & go ashore for assistance. Though apparently the anchor cable was long enough, in some unexplained way the *G.* got adrift & when the owner returned, at or about 4 *p.m.*, she was not to be found. At 2.30 *p.m.* The *C.* finding the *G.* adrift towed her to Vancouver. The weather was fine with a light breeze & no sea to speak of. The *G.* was drifting slowly & was impeded by the trailing anchor:—*Held:* the *G.* could not reasonably be regarded as an apparent derelict.—LARSEN *v.* THE GAS BOAT, [1923] 2 D. L. R. 281; [1923] Exch. C. R. 104; 31 B. C. R. 558; [1923] 1 W. W. R. 958.—**CAN.**

**7170 iii.** ——.]—The mere quitting of a ship or of a cargo to procure aid from shore, or with an intention to return, is not such an abandonment as to constitute a derelict.—THE ROB ROY (1855), 6 L. T. O. S. 371.—**IND.**

**7171 i.** *Abandonment for safety of life.*]—THE BERLIN (1857), 10 Ir. Jur. 34.—**IR.**

**7172 i.** *Handing over management of vessel to salvors.*]—THE CHARLES FORBES (1874), Y. A. D. 172.—**CAN.**

**g.** *Abandonment by persuasion of salvors—Salvors subsequently returning & towing ship to port.*]—The *M.*, when in a helpless condition, was fallen in with by the *A.*, & the captain of the latter vessel persuaded the crew of the *M.* to desert her & take to his vessel. He then sailed off but soon returned, & taking her in tow, brought her into port:—*Held:* this did not constitute the *M.* a derelict.—THE MARGARET (1874), Y. A. D. 171.—**CAN.**

**h.** *Temporary abandonment.*]—*Held:* the salvors were entitled to salvage although there was only a temporary abandonment; the services were meritorious, the vessel having been rescued from impending danger.—THORBURN *v.* WHITEWAY (1892), 7 Nfld. L. R. 603.—**NFLD.**

**7174.** ——.]—(1) Where salvors are embarked in a salvage service with the consent & sanction of the master of a stranded vessel, & are disturbed in their salvage operations, & are ousted from the vessel by persons illegally intruding themselves into the service, no salvage benefit can accrue to the parties so intruding themselves, for any portion of the ship & cargo they may save, but the same will accrue to the original salvors.

(2) The whole value of the property which has been rescued, according to the account sales, amounts to the sum of £1,888; from this sum, however, certain deductions are claimed by the owners on account of expenses incurred by them; & amongst the deductions they claim the expenses incurred by them in prosecuting an action which was successfully instituted against the wreckers, who took forcible possession of the ship & cargo. With respect to the expenses of this prosecution, I have no hesitation in saying that it can form no item of deduction in the case (DR. LUSHINGTON).

(3) Another item in the deductions claimed by the owners of the cargo is the sum of £229 paid by them on account of the freight. This sum I am also of opinion cannot be deducted in the present instance. It is clear that salvors, generally speaking, are entitled to salvage upon ship, cargo & freight; & as far as the owners of the cargo are concerned, it can, it appears to me, make no difference to them whether the salvage is taken from the freight itself or from the cargo as it is sold, which includes of course the value of the freight. So that supposing the owners of the cargo were compelled to pay this £229 on account of freight to the owners of the ship, as in the present instance, they will have to pay so much less for their portion of the salvage. With respect to the item of the insurance, I am of opinion that it does not form a proper subject of deduction (DR. LUSHINGTON).—THE FLEECE (1850), 3 Wm. Rob. 278; 7 Notes of Cases, 534; 166 E. R. 966.

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SUB-SECT. 6.—EXEMPTIONS.

**7175. Vessel of the Crown.**]—THE COMUS (1816), cited 2 Dods. at p. 464; 165 E. R. 1548.

*Annotations:*—**Refd.** The Athol (1842), 6 Jur. 376; The Resolute (1859), 33 L. T. O. S. 80; The Charkieh (1873), L. R. 4 A. & E. 59.

**7176.** ——.]—Where a ship is the property of the Crown, no action *in rem* or otherwise for salvage can be maintained. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute.—YOUNG *v.* S.S. SCOTIA, [1903] A. C. 501; 72 L. J. P. C. 115; 89 L. T. 374; 9 Asp. M. L. C. 485, P. C.

*Annotation:*—**Refd.** The Porto Alexandre (1919), 89 L. J. P. 97.

**7177.** —— **Ex gratia payment.**]—A ship, with Govt. stores, was preserved by thirty-two salvors at great risk to all, & with loss of life to three, besides damage to & loss of boats. The owners of the ship estimating her at £1,500, tendered £400 as salvage for the ship & freight. The stores were valued at about £5,000. The ct., adopting the tender, gave £900 in addition for the stores making together a salvage of about one-fifth, & apportioned this sum among the surviving salvors & the families of those who perished. Costs *pro rata* between the ship & cargo.

The Govt. should not reward less liberally than private individuals; indeed, on grounds of public policy, they should rather give more (SIR JOHN NICHOLL).—THE MARQUIS OF HUNTLY (1835), 3 Hag. Adm. 246; 166 E. R. 397.

*Annotation:*—**Refd.** The Parlement Belge (1880), 5 P. D. 197.

**7178.** —— ——.]—THE SIMLA (1906), cited in Kennedy's Civil Salvage, 2nd ed. at p. 70, n.

**7179. Vessel requisitioned by Crown.**]—A ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be & the exception extends as well to claims of salvage as to claims of collision or other claim (SWINFEN EADY, L.J.).—THE BROADMAYNE, [1916] 1 P. 64; 85 L. J. P. 153; 114 L. T. 891; 32 T. L. R. 304; 60 Sol. Jo. 367; 13 Asp. M. L. C. 356, C. A.

*Annotations:*—**Expld.** The Crimdon (1918), 35 T. L. R. 81. **Refd.** The Messicano (1916), 32 T. L. R. 519; The Sarpen, [1916] P. 306; The Porto Alexandre (1919), 89 L. J. P. 97; The Tervaete, [1922] P. 197. **Mentd.** The Gagara, [1919] P. 95; France Fenwick *v.* R., [1927] 1 K. B. 458.

**7180. Vessel belonging to foreign government.**]—THE PRINS FREDERIK (1820), 2 Dods. 451; 165 E. R. 1543.

*Annotations:*—**Expld.** The Parlement Belge (1880), 5 P. D. 197. **Refd.** Wadsworth *v.* Spain (Queen) (1851), 17 Q. B. 171; The Charkieh (1873), L. R. 4 A. & E. 59; The Charkieh (1873), L. R. 8 Q. B. 197; The Broadmayne, [1916] P. 64. **Mentd.** The Athol (1842), 6 Jur. 376; The Tervaete, [1922] P. 197.

**7181.** —— **Cargo property of private persons.**]—A vessel of war commissioned by the govt. of a foreign state, & engaged in the national service of her govt., was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her govt. had for public purposes charged itself with the care & protection. Important & efficient salvage services were rendered to the ship & her cargo. A suit was instituted on behalf of certain of the salvors against the ship & her cargo. The ct. refused to order a warrant to issue for the arrest of the ship or cargo, & held it had no jurisdiction to entertain the suit.—THE CONSTITUTION (1879), 4 P. D. 39; 48 L. J. P. 13; 40 L. T. 219; 27 W. R. 739; 4 Asp. M. L. C. 79.

*Annotation:*—**Refd.** The Parlement Belge (1879), 4 P. D. 129.

**7182. Government stores.**]—THE MARQUIS OF HUNTLY, No. 7177, *ante*.

**7183.** —— **At risk of charterers.**]—THE PORT VICTOR (CARGO EX), No. 6905, *ante*.

**Jurisdiction of Court of Admiralty.**]—*See* ADMIRALTY, Vol. I., pp. 109–111, Nos. 127–146.

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SECT. 8.—**SALVAGE OF LIFE.**

SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, s. 544.

**7184. No life salvage at common law.**]—THE AID, No. 7197, *post*.

**7185.** ——.]—THE ZEPHYRUS, No. 6889, *ante*.

**7186.** —— **Jurisdiction statutory.**]—*Re* SILVER BULLION, No. 7089, *ante*.

**7187.** —— ——.]—The Ct. of Admlty. has no original jurisdiction to award salvage for the saving of life only; & the Merchant Shipping Act, 1854 (c. 104), does not give the ct. jurisdiction over salvage of life only performed on the high seas, at a distance of more than three miles from the shore of the United Kingdom, at least if the ship from which the lives are saved is a foreign ship. It is immaterial to this question that before action the ship has been brought by other salvors to a British port.—THE JOHANNES (1860), Lush. 182; 30 L. J. P. M. & A. 91; 3 L. T. 757; 1 Mar. L. C. 24; 167 E. R. 87.

*Annotations:*—**Consd.** The Pacific, [1898] P. 70. **Refd.** The Willem III. (1871), L. R. 3 A. & E. 487; The Mullingar (1872), 26 L. T. 326; The Renpor (1883), 8 P. D. 115; The Gas Float Whitton No. 2 (1895), 65 L. J. P. 17.

*Sect.* 8.—*Salvage of life: Sub-sects.* 1, 2 & 3.]

**7188. Extent of court's jurisdiction—Foreign ship—On high seas.**]—THE JOHANNES, No. 7187, *ante.*

**7189.** ——— ——— ———.]—(1) A salvor's lien does not extend to personal baggage & effects (wearing apparel & other goods *ejusdem generis*) belonging to passengers on board the vessel, to which the services have been rendered, & the Ct. of Admlty. will order such effects to be released.

(2) The *F.* schooner, having taken on board part of the passengers & crew of a foreign vessel, which was on fire, afterwards transferred them to the *S.* steamer, in order that they might get ashore more quickly. The whole transaction took place outside British waters:—*Held:* the services of the two vessels were not so continuous that they could be considered as one, & therefore the *F.* was not entitled to life salvage from a foreign vessel as for services rendered either wholly or in part in British waters under the Admlty. Court Act, 1861 (c. 10), s. 9.—THE WILLEM III. (1871), L. R. 3 A. & E. 487; 25 L. T. 386; 20 W. R. 216; 1 Asp. M. L. C. 129.

*Annotations:*—*As to* (1) **Refd.** The Gas Float Whitton No. 2 (1895), 65 L. J. P. 17. *As to* (2) **Consd.** The Pacific, [1898] P. 170.

**7190.** ——— ——— ———.]—Defts. in a cause of salvage instituted against the cargo of a foreign ship to recover for salvage services rendered in saving the lives of a number of the crew & passengers on board such ship alleged in the 10th paragraph of their statement of defence that the vessel in which the cargo proceeded against had been laden was not at the time the salvage services were rendered stranded or in distress on the shore of any sea or tidal water within the limits of the United Kingdom:—*Held:* the facts therein stated was not sufficient to exclude the jurisdiction of the ct.—THE DEUTSCHLAND (1877), 25 W. R. 755.

**7191.** ——— ——— **Services partly in territorial waters.**]—By 1894 Act, s. 544 (1), "Where services are rendered wholly or in part within British waters in saving life from any . . . foreign vessel . . . there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage. . . ."

A British steam trawler whilst on a fishing voyage in the North Sea, & about ninety miles north east of the Spurn, fell in with a water-logged Norwegian barque. After some difficulty the trawler rescued the crew of the barque, & the next day landed them at Hull. The barque was subsequently saved by other salvors, & brought into Grimsby. In an action for life salvage by the owners, master, & crew of the trawler, it was contended by defts., the owners of the barque & of her cargo, that there was no jurisdiction under the statute to make an award:—*Held:* pltfs. were entitled to life salvage, as the salving vessel, in the course of effecting the salvage service, was within British waters, &, therefore, the services were rendered "in part within British waters" within 1894 Act.—THE PACIFIC, [1898] P. 170; 67 L. J. P. 65; 79 L. T. 125; 46 W. R. 686; 8 Asp. M. L. C. 422.

**7192. Salvage of passengers.**]—BLIGH *v.* SIMPSON, THE FUSILIER, No. 7205, *post.*

**7193. Salvage of crew—Derelict.**]—THE QUEEN MAB, No. 7808, *post.*

**7194.** ——— **Abandoning ship without leave.**]—A steam vessel incurred serious damage by a collision, & her master ordered her boats to be got out. Some of her crew, without leave from the master, got into one of the boats & rowed away. The boat's crew were afterwards picked up at sea, & rescued from a position of danger, by a smack. In a salvage suit instituted on behalf of the owners & crew of the smack against the steamship:—*Held:* pltfs. were entitled to recover in such suit salvage for the service they had rendered.—THE CAIRO (1874), L. R. 4 A. & E. 184; 43 L. J. Adm. 33; 30 L. T. 535; 22 W. R. 742; 2 Asp. M. L. C. 257.

*Annotations:*—**Refd.** The Schiller (1877), 2 P. D. 145; The Pacific, [1898] P. 170.

**7195.** ——— **By tug towing vessel after collision.**]—THE TARBERT, No. 6906, *ante.*

**Statutory duty in regard to saving life at sea.**]—*See* Maritime Conventions Act, 1911 (c. 51), s. 6.

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SUB-SECT. 2.—WHEN SALVAGE RECOVERABLE.

**Priority of claim.**]—*See* 1894 Act, s. 544 (2).

**7196.** ———.]—(1) Preservation of human life is made, by 17 & 18 Vict. c. 104, a distinct ground of salvage reward, with priority over all other claims for salvage, where the property is insufficient.

(2) Where a master & crew leave their ship for the safety of their lives, a mere intention of sending a steamer to look for her does not affect the question of derelict.—THE COROMANDEL (1857), Sw. 205; 6 L. T. 371; 8 L. T. 441; 166 E. R. 1097.

*Annotations:*—*As to* (1) **Consd.** The Schiller (1877), 2 P. D. 145. *As to* (2) **Distd.** The Champion (1863), Brown. & Lush. 69. **Refd.** Bradley *v.* Newsom, [1919] A. C. 16.

**7197. Necessity for concurrent preservation of property.**]—The mere preservation of life, the ct. has no power of remunerating; it must be left to the bounty of the individuals; but if it can be connected with the preservation of property, whether by accident or not, then the ct. can take notice of it, & it is always willing to join that to the *animus* displayed in the first instance (LORD STOWELL).—THE AID (1822), 1 Hag. Adm. 83; 166 E. R. 30.

**7198.** ———.]—THE ZEPHYRUS, No. 6889, *ante.*

**7199.** ———.]—A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one till she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, & the damaged steamer immediately afterwards sank. The owners, master, & crew of the salving ship brought an action for life salvage:—*Held:* as no *res* was saved the action

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**PART XV. SECT. 8, SUB-SECT. 1.**

**7188 i.** *Extent of court's jurisdiction—Foreign ship—On high seas.*]—The ct. made no award for life saving services, considering those services to have been completed outside British waters.—CHU TAK LOONG & CO. *v.* BUTTERFIELD & SWIRE & CHINA NAVIGATION CO., LTD. (1908), 4 Hong Kong L. R. 1.—**HONG KONG.**

**7188 ii.** ——— ——— ———.]—A British steam trawler rescued seamen from a disabled foreign vessel on the high seas at a point 200 miles distant from the nearest land. The salvors landed the seamen at Hull, the port for which the trawler was bound. The owners of the trawler having claimed salvage:—*Held:* the claim must be disallowed, in respect that the salvage was complete when the seamen were taken on board a seaworthy vessel, & was therefore "not rendered wholly or in part in British waters."—JÖRGENSEN *v.* NEPTUNE STEAM FISHING CO., LTD, (1902), 4 F. (Ct. of Sess.) 992; 39 Sc. L. R. 765; 10 S. L. T. 206.—**SCOT.**

**7192 i.** *Salvage of passengers.*]—Awards made in the nature of life salvage to fishermen who had been instrumental in saving many lives from a passenger steamer wrecked upon the coast.—THE ATLANTIC (1874), Y. A. D. 170.—**CAN.**

**k.** *Salvage of crew.*]—THE ANNE MITCHELL (1860), 8 L. T. 581.—**IR.**

would not lie either as a salvage action simply or on the agreement.

There is one element invariably required by Admlty. law in order to found an action for salvage, there must be something saved more than life, which will form a fund from which salvage may be paid. I must express a doubt whether if an agreement is made only for the purpose of saving a master & a crew without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet as the subject-matter is without benefit to the property of the shipowner, the master has authority to bind the owner to a money payment (BRETT, M.R.).—THE RENPOR (1883), 8 P. D. 115; 52 L. J. P. 49; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. L. C. 98, C. A.

*Annotations:*—**Apld.** The Mariposa, [1896] P. 273; The Port Victor, [1901] P. 243. **Refd.** The Crusader, [1907] P. 196. **Mentd.** Nourse *v.* Liverpool Sailing Shipowner's Assocn. (1896), 65 L. J. Q. B. 507.

**7200.** ——.]—THE ANNIE, No. 6902, *ante*.

**7201.** —— **In absence of special contract.**]—THE SARPEDON (CARGO EX), No. 6897, *ante*.

**7202.** —— **Property saved by other salvors.**]—Where a steamship having taken in tow a vessel in distress, after towing her for some hours, on the weather getting worse & the lives of her crew becoming endangered, takes the crew out of her & finally abandons her in a place where she is afterwards picked up by another vessel & taken into port, the owners, master, & crew of the steamship are entitled to salvage reward in respect of the lives so saved, but not in respect of ship & cargo.—THE EINTRACHT (1874), 29 L. T. 851; 2 Asp. M. L. C. 198.

**7203.** —— ——.]—Under a claim for life salvage, risk or serious apprehension of danger to the lives of those who have been rescued will entitle those rendering the services to life salvage, even if the lives of those rescued were not in actual danger. The pecuniary value of the life of any one saved cannot be taken into account. Where the services can be adequately recompensed by an inconsiderable sum, the huge value of the vessel & her cargo is not an element of importance.

In an action for salvage of life alone, it appeared that four tugs put out from Falmouth at night to render assistance to a large British steamship stranded off the Lizard, making signals of distress, & having on board nearly four hundred passengers, one hundred & forty crew, & a valuable general cargo.

Owing to the fog prevailing, & the strong wind & heavy ground swell, caution was necessary in getting to the vessel, &, on account of the rocks, the tugs were unable to approach close to her; but, at the request of the local lifeboats, which had already reached the vessel with the object of saving life, they took these boats in tow, & so enabled them, in the course of several trips, to land in safety the whole of the passengers & crew. Part of the vessel & part of her cargo were subsequently salved by other salvors:—*Held:* the owners, master, & crews of the tugs were entitled to an award of £800, for by expediting, at some risk to themselves, the transfer of the passengers from the ship to the shore, the tugs had assisted in saving life from actual, or serious apprehension of, danger.—THE SUEVIC, [1908] P. 154; 77 L. J. P. 92; 98 L. T. 188; 11 Asp. M. L. C. 16.

*Annotation:*—**Mentd.** The Olympic, [1913] P. 92.

**7204. Necessity for danger to passengers & crew.**]—Defts.' steamship, three days out from Montreal for Liverpool, stranded on the coast of Labrador. The master landed his passengers & crew, provided them with food & accommodation, & the same day intercepted a passing steamer, which, at the request of the master, conveyed the passengers to their destination. The following day a steamer passing in the opposite direction at the like request, took off the greater part of the crew, conveyed them to Quebec, &, on the way, telegraphed for assistance to be sent. By the contract with the passengers defts. were "not liable for loss or delay from the act of God . . . perils of the seas, rivers, or navigation . . . or the wrongful act or default" of their servants. Defts.' vessel became a total loss, materials to the value of £335 only being saved. In an action *in personam* by the owners of the passing steamers for salvage, or, in the alternative, for remuneration for services rendered at request, defts. tendered £200:—*Held:* the tender must be upheld, as the passengers & crew were not in any danger, so that no life salvage was claimable; &, as defts. were under no obligation to forward the passengers to their destination, the master, in transhipping them, acted as the agent of the passengers & not of defts.—THE MARIPOSA, [1896] P. 273; 65 L. J. P. 104; 75 L. T. 54; 45 W. R. 191; 12 T. L. R. 518; 8 Asp. M. L. C. 159.

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SUB-SECT. 3.—BY WHOM SALVAGE PAYABLE.

*See* 1894 Act, ss. 544, 545.

**7205. Cargo owners — Extent of liability.**] — (1) The words "persons belonging to such ship" in Merchant Shipping Act, 1854 (c. 104), include passengers on board the ship, as well as the master & crew; & who, in respect to remuneration for life salvage, stand on the same footing as the master & crew.

(2) The owners of the cargo are liable to contribute to that portion of the claim of salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not a criterion of remuneration for life salvage.

(3) The accident of the amount of salvage awarded exceeding the value of the salvage vessels is wholly immaterial, as the value of such vessels is not an element to detract from the value of the salvage service.

(4) The appellate ct. will not disturb an award of salvage by the ct. below, on the ground of that ct. having awarded too large a sum, unless they are satisfied, beyond all doubt, that the judge has made an exorbitant estimate of the salvage services.

(5) The general rule as to the parties liable to pay salvage is, that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage (LORD CHELMSFORD).—BLIGH *v.* SIMPSON, THE FUSILIER (1865), 3 Moo. P. C. C. N. S. 51; Brown. & Lush. 341; 5 New Rep. 453; 12 L. T. 186; 11 Jur. N. S. 289; 13 W. R. 592; 2 Mar. L. C. 177; 16 E. R. 19, P. C.

*Annotations:*—*As to* (1) **Refd.** The Sarpedon (1877), 3 P. D. 28. *As to* (2) **Consd.** The Schiller (1877), 2 P. D. 145. *As to* (4) **Consd.** The Chetah (1868), L. R. 2 P. C. 205; The Glenduror (1871), 24 L. T. 499; The Amérique (1874), L. R. 6 P. C. 468. *Generally*, **Refd.** The Renpor (1883), 8 P. D. 115. **Mentd.** Blackpool & Fleetwood Tramroad Co. *v.* Thornton U. C., [1907] 1 K. B. 568.

**7206.** —— ——.]—THE SCHILLER (CARGO EX), No. 7079, *ante*.

**7207.** —— ——.]—THE SARPEDON (CARGO EX), No. 6897, *ante*.

**7208. Owners of lost ship.**] — THE SARPEDON (CARGO EX), No. 6897, *ante*.

## SECT. 9.—AGREEMENTS AS TO SALVAGE.

### SUB-SECT. 1.—SALVAGE AGREEMENT.

*A. In General.*

**7209. Whether agreement condition precedent to rendering of assistance.**]—THE GOOD HOPE (1842), 8 L. T. 178.

**7210. Significance of agreement.**]—THE HESTIA, No. 6822, *ante*.

*B. Form and Contents.*

**7211. Form—May be verbal.**]—THE GRACES, No. 7231, *post*.

**7212.** —— ——.]—THE DUCHESS OF KENT (1853), 8 L. T. 334.

**7213.** —— ——.]—THE ARTHUR, No. 7234, *post*.

**7214.** —— ——.]—An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of & pledging the credit of the shipowners so as to make them liable to the salvors, for the whole amount so agreed upon, & not merely for such proportion of such amount as the value of the ship & freight bears to the value of the cargo.—THE CUMBRIAN (1887), 57 L. T. 205; 6 Asp. M. L. C. 151.

**7215. Contents—Necessity for explicit statement of terms.**]—An agreement or understanding between the owners of the vessel salved & the owner of a cutter engaged by them to render the service, no specific sum being fixed therein:—*Held:* not to bar the parties suing, including the master & crew of the cutter, who acted in the service under the personal direction of the owner of the cutter, but were not parties t. . or cognisant of, the understanding.—THE WILLIAM LUSHINGTON (1850), 7 Notes of Cases, 361.

*C. Considerations Governing Salvage Agreements.*

**7216. Extent of danger—To property.**]—Salvors agreed to assist a vessel for a stipulated sum; they afterwards refused to take that sum, upon the ground of their having been misinformed by the master as to the value of the cargo. There being no proof of fraud against the master, the agreement was upheld. Salvors are not entitled to stipulate for remuneration proportioned to the value of the cargo.

Where agreements are made at sea between masters & salvors the ct. will always be desirous of upholding them, if it can do so consistently with the ends of justice. The ct. would be very unwilling to disturb under ordinary circumstances an agreement, on account of the sum agreed on being too large or too small. . . . Both parties are fully capable of entering into a contract. The master is the representative of the owners, & the salvors are acting on their own behalf. They have ample means of ascertaining the state & condition of the vessel requiring assistance, & the nature & extent of the services to be performed, & the time they may occupy. It is very desirable that agreements of this kind should, when just & fair, be upheld by this ct. . . . If however fraud has been practised, it cannot be disputed that the ct. ought not to set the agreement aside. The *onus probandi*, however, must rest on those who impute the fraud. . . . I cannot assent to the proposition that by the value of the cargo the salvors are to determine the amount of the agreement. This ct. does, to a certain extent, take into consideration the value of the property saved in assessing salvage services, with the view of making the general rate of compensation sufficient to induce persons to undertake salvage services, &, as it were, to a certain extent, making up in cases of large value for the impossibility of giving a complete & adequate reward in cases of small value. Salvors are not entitled to make an agreement upon any other grounds than these—the extent of danger to which the property to be salved is exposed, the degree of labour they will have to under go, the risk to which they themselves may be exposed, & the length of time to be occupied; but they are not to speculate on the value of the cargo (DR. LUSHINGTON).—THE HENRY (1851), 16 L. T. O. S. 553; 15 Jur. 183.

**7217.** —— **To salvors.**]—THE HENRY, No. 7216, *ante*.

**7218. Degree of labour.**]—THE HENRY, No. 7216, *ante*.

**7219. Length of time.**]—THE HENRY, No. 7216, *ante*.

**7220. Value of cargo.**]—THE HENRY, No. 7216, *ante*.

*D. Parties.*

**7221. Who may make agreement—Competency of master.**]—THE ARTHUR, No. 7234, *post*.

**7222.** —— **Commander & crew of King's ship.**]—(1) The commander & crew of a Queen's ship have the same rights to remuneration for salvage as the master & crew of a merchant ship.

(2) *Qu.:* whether they can make with the captain of the wrecked ship an agreement as to the amount.

(3) The ground of exorbitancy of the agreement [for salvage] would be sufficient to set it aside (BAGGALLAY, J. A.).—THE WOOSUNG (CARGO EX) (1876), 1 P. D. 260; 35 L. T. 8; 25 W. R. 1; 3 Asp. M. L. C. 239, C. A.

*Annotations:—As to* (1) **Refd.** The Sarpen, [1916] P. 306. *As to* (2) **Expld.** The Cybele (1877), 37 L. T. 773. *As to* (3) **Refd.** The Medina (1876), 1 P. D. 272; The Mark Lane (1890), 39 W. R. 47. *Generally*, **Refd.** The Mariposa, [1896] P. 273.

*E. Construction and Effect.*

**7223. Construction—Agreements liberally construed.**]—THE DUCHESS OF KENT (1853), 8 L. T. 334.

**7224.** —— **Reference to verbal contemporaneous conditions.**]—A written agreement to stay by a vessel in distress & see her safe into port for the sum of £500, signed by the masters of the two vessels, upheld by the ct.

Plea of the salvors, that the agreement was conditional, & signed upon the understanding that the service was not to extend beyond the following morning, overruled.

There are two ways, & two ways only by which contracts of this description can be annulled. The first is by proving that the contract was founded in fraud & misrepresentation, in which case it would be void *ab initio;* the second, by showing that it was cancelled by mutual consent (DR. LUSHINGTON).—THE REPULSE (1845), 2 Wm. Rob. 396; 4 Notes of Cases, 141; 166 E. R. 804.

*Annotations:*—**Refd.** The Macgregor Laird (1867), W. N. 308; The Waverley (1871), L. R. 3 A. & E. 369.

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**PART XV. SECT. 9, SUB-SECT. 1.—A.**

1. *Whether valid.*]—It is competent for salvors instead of leaving the amount of remuneration to be determined, to agree for a specified sum.—*Re* THE MARION TELLER, CLARKE *v.* ODETTE, Cass. Dig. 2nd. ed. 521.—**CAN.**

**PART XV. SECT. 9, SUB-SECT. 1.—B.**

7215 i. *Contents—Necessity for explicit statement of terms.*]—A salvage agreement must define a specific amount as to the salvage to be paid, or a rule whereby it may be determined.—INTERNATIONAL WRECKING & TRANSPORTATION CO. *v.* LOBB (1886), 11 O. R. 408.—**CAN.**

**PART XV. SECT. 9, SUB-SECT. 1.—E.**

m. *Acquiescence in change of place of delivery—Distance shortened—Deduction.*]—In a contract for salvage

**7225. Whether agreement binding—On court.**]—THE BRITISH EMPIRE, No. 7230, *post*.

**7226. —— On persons not parties.**]—THE WILLIAM LUSHINGTON, No. 7215, *ante*.

**7227. —— Where value of cargo overestimated.**]—THE BARKLAY (1850), 8 L. T. 178.

**7228.** ——.]—An agreement once made, must be adhered to, whatever may be the consequent advantage to either party; but a proposal made by one party & rejected by the other, cannnot influence the judgment of the ct., which must be guided solely by the evidence.—THE JAN HENDRIK (1853), 1 Ecc. & Ad. 181; 8 L. T. 334; 164 E. R. 105.

**7229. Implied obligation on each party—To act with ordinary skill & care.**]—The masters of pltf.'s tugs hailed defts.' ship, which had grounded on rocks & received damage, &, for £300 & £150 respectively, agreed to beach her. In the course of the operation the servants of deft. shipowners on board the ship negligently failed to slip their cable, with the result that the ship grounded again in no better position than she was when the tugs took hold of her:—*Held:* (1) as pltfs. had not completed the work they contracted to perform they were not entitled to recover the sum stipulated for under the agreement; (2) in such an agreement there was an implied obligation on the part of those in charge of the ship to use ordinary care & skill in carrying out their part of the work; (3) as deft. shipowners by their negligence had deprived pltfs. of the opportunity of earning the stipulated sums pltfs. were entitled to damages; (4) as in substance the tugs had completed the whole of what they had to do the damages were the sums of £300 & £150 respectively; (5) as deft. shipowners had appeared to the writ *in rem* pltfs. were entitled to a judgment *in personam* against them for these amounts.—THE VALSESIA, [1927] P. 115; 96 L. J. P. 38; 136 L. T. 544; 43 T. L. R. 144; 17 Asp. M. L. C. 207.

*F. Burden of Proof.*

**7230. On party alleging existence of agreement.**]—It has been alleged that the salvors bound themselves by an agreement with the master of *The British Empire* to accept a stipulated sum for their services. Now, the general principle with respect to such agreements I apprehend to be this, that it lies upon the party setting it up to prove two things; first, that such agreement was made; &, secondly, that it was just. Where there has been a definite distinct agreement, with ample time for the parties to consider what they are doing, the ct. will be reluctant to interfere with it, but only under these circumstances (*per* CUR.).—THE BRITISH EMPIRE (1842), 6 Jur. 608.

*Annotation:*—**Reld.** The Macgregor Laird, [1867] W. N. 308.

**7231.** ——.]—(1) If a conversation takes place between two parties & in pursuance of that conversation an act is done which is in fact the commencement of a transaction, where the evidence establishes the point, the ct. must assume the existence of an agreement & the party is not at liberty to recede from the effects of such agreement (DR. LUSHINGTON).

(2) *Semble:* where steamers go out of port for the express purpose of rendering assistance to vessels represented to be in distress, the time & expense incurred in reaching the vessel is to be taken into the calculation in fixing the amount of the salvage remuneration.

(3) The proof of the alleged agreement which has been set up rests with the party who has set it up; & this proof must be clear & satisfactory (DR. LUSHINGTON).—THE GRACES (1844), 2 Wm. Rob. 294; 3 L. T. O. S. 320; 8 Jur. 501; 166 E. R. 765.

**7232.** ——.]—Where, in salvage, an agreement is set up, the burthen of proving such agreement is on those relying upon it; & without pronouncing the written agreement a forgery, the ct. will decide against it, as on failure of proof, unless clearly established by evidence.—THE RESULTATET (1853), 8 L. T. 178; 17 Jur. 353.

**7233.** ——.]—THE ASSISTANCE *v.* THE ROBINSONS (1859), 8 L. T. 335, P. C.

**7234.** ——.]—It is competent to the master of a ship to make an agreement with salvors as to the remuneration for their services, & if the agreement be consistent with justice & equity, it shall bind the owners.

In such a case the burden of proof is upon the parties alleging the agreement.

The masts of a ship had been cut away, & she was making a considerable quantity of water, but, being laden with timber, was in no danger of sinking. Salvors, five in number, with their fishing smack of 60 tons burthen, rendered her, for thirty-six hours, services which in effect amounted only to towage services. Their claim included £34 compensation for loss of fish, & £25 damage to hawser. The ct. found that an agreement had been made between them & the master of the ship, that they should receive £150 for their services, & the ct., considering the agreement to be just & equitable, pronounced for a tender to that effect, with costs. Value of the property saved, £1,850.

There may be as valid a verbal agreement in a case of salvage as if it had been reduced into the most formal shape (DR. LUSHINGTON).—THE ARTHUR (1862), 6 L. T. 556; 1 Mar. L. C. 228.

**On party disputing validity.**]—*See* Sub-sect. 1 G. (*b*) iii., (*c*) iv., *post*.

*G. Avoidance of Agreement.*

*(a) In General.*

**7235. Validity of agreement — Necessity for mutual understanding & good faith.**]—(1) I entertain no doubt whatever, that an agreement of this description can be legally made between a master of a vessel in distress, & persons affording a salvage assistance, provided there be a clear understanding of the nature of the agreement; that it is made with fairness & impartiality to all concerned; & that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves (*per* CUR.).

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where the parties acquiesce in a change of the place of delivery, a deduction must be made if the distance is shortened by the change.—REID WRECKING CO., LTD. *v.* THE JOHN B. KETCHAM 2ND (1911), 13 Exch. C. R. 413.—**CAN.**

**PART XV. SECT. 9, SUB-SECT. 1.—F.**

7230 i. *On party alleging existence of agreement.*]—The ct. will uphold an agreement for salvage, if it be clearly understood by the parties, but the proof of the agreement lies on the party setting it up, even although he has omitted to plead it.—THE BRITON (1853), 5 Ir. Jur. 170.—**IR.**

**PART XV. SECT. 9, SUB-SECT. 1.—G. (a).**

n. *Validity of agreement—Agreement equitable at time of making—Supervening difficulties affecting execution.*]—If an agreement for salvage service was just & reasonable when entered into, it will not be disregarded because something has happened subsequently, or some contingency, of which one party or the other has taken the risk, has occurred to make it more onerous on one or the other than was anticipated when it was entered into.—THE DRACONA *v.* CONNOLLY (Que.) (1896), 5 Exch. C. R. 207.—**CAN.**

o. —— —— ——.]—A salvage agreement is not to be set aside by the increase of any difficulties existing at

*Sect. 9.—Agreements as to salvage: Sub-sect. 1, G. (a), (b) i., ii. & iii., (c) & (d).]*

(2) It is the very nature of agreements of this kind to fix a stated sum as a compensation for a stated service, & the parties who enter into the engagement take the risk of any change of circumstances which may in effect alter the extent of the stipulated service. . . . If the vessel had floated off the rocks immediately after the agreement was signed & before the services of the salvors commenced the master . . . would have been bound to pay them the stipulated sum. Can it be doubted that the salvors . . . were equally bound to fulfil their part of the contract, although much greater difficulties might have been introduced into its performance than were originally contemplated (*per* CUR.).—THE TRUE BLUE (1843), 2 Wm. Rob. 176; 2 Notes of Cases, 413; 3 L. T. 182; 7 Jur. 756; 166 E. R. 721.

*Annotations:—As to* (1) **Apld.** The Waverley (1871), L. R. 3 A. & E. 369. *As to* (2) **Apld.** The I. C. Potter (1870), L. R. 3 A. & E. 292. **Consd.** The Waverley (1871), L. R. 3 A. & E. 369. *Generally,* **Refd.** The Catherine (1848), 12 Jur. 682.

**7236. —— Must be just & equitable.**]—THE ALPHA (1849), 8 L. T. 178.

**7237.** —— ——.]—THE KRONE (1849), 8 L. T. 178.

**7238. —— Agreement upheld—Unless manifestly inequitable.**]—THE HENRY, No. 7216, *ante.*

**7239.** —— —— ——.]—Where an agreement for salvage services is clearly established, the ct. will uphold it, unless wholly inequitable, & will not set it aside on the ground that it is a hard bargain. —THE FIREFLY (1857), Sw. 240; 29 L. T. O. S. 147; 166 E. R. 1116.

**7240.** —— —— ——.]—(1) An agreement dishonestly made by the master of a ship to secure to so-called salvors an excessive reward is not valid against the owner of the ship.

(2) The ct. is very much indisposed to set aside an honest agreement, but it must be satisfied that the agreement is honest. Where there is any doubt its rule is to adhere to the agreement; & the ct. would be just as ready, in favour of salvors, to set aside an agreement, if satisfied that it was wholly inequitable (DR. LUSHINGTON).—THE THEODORE (1858), Sw. 351; 166 E. R. 1163; *sub nom.* THE PILOT *v.* THE THEODORE, 8 L. T. 335.

*Annotations:—As to* (2) **Apprvd.** The Medina (1876), 2 P. D. 5. **Refd.** The Woosung (1876), 1 P. D. 260.

**7241.** —— —— ——.]—A salvage agreement will be upheld, unless proved to be very exorbitant, or to have been obtained by compulsion or fraud.

The principle on which the court acts is, that if satisfied that an agreement has been made, it will carry it into effect unless totally contrary to justice & the equity of the case; but the owner of the ship, against whom the agreement is attempted to be enforced, may show that it was improperly obtained. . . . It is very important to the due administration of justice to bear in mind on whom the burthen of proof falls. The witnesses on the part of the owners have sworn one way, & are directly contradicted by the salvors; the burthen of proof is on the former (DR. LUSHINGTON).—THE HELEN & GEORGE (1858), Sw. 368; 166 E. R. 1170; *sub nom.* THE ARGO *v.* THE HELEN & GEORGE, 8 L. T. 335.

*Annotation:—***Folld.** The Woosung (1876), 1 P. D. 260.

**7242.** ——————.]—THE MACGREGOR LAIRD, [1867] W. N. 308.

**7243.** —— —— ——.]—AKERBLOM *v.* PRICE, No. 6868, *ante.*

**7244.** —— —— ——.] — Defts.' steamship, valued with cargo & freight at £43,748, broke down in the South Atlantic, & her master, in the expectation of getting the engines again to work, signed an agreement with a passing steamer, the first salvors, to pay £500 for half an hour's towage. Just after the expiration of that period, the hawser broke killing the chief officer of the first salvors, injuring two other persons & doing damage. The first salvors thereupon declined to render any further assistance, &, the attempt to get the engines to work having proved unsuccessful, a French mail steamer, the second salvors, which had in the meantime come up, towed the defts.' vessel 255 miles to a place of safety. At the trial defts. objected that no salvage services were rendered by the first salvors, that the towage was without benefit, & the sum claimed exorbitant:—*Held:* the agreement was not manifestly unfair or unjust, &, though defts. had derived no benefit, the stipulated service having been performed, the first salvors were entitled to the agreed sum of £500.

The duration of salvage services in very many cases is not the true criterion of their value (BRUCE, J.).—THE STRATHGARRY, [1895] P. 264; 72 L. T. 900; 11 T. L. R. 382; 8 Asp. M. L. C. 19; 11 R. 783.

*Annotation:—***Distd.** The Altair, [1897] P. 105.

**7245. Effect of change of circumstances—Task of lesser magnitude than expected—Ship refloated before any service rendered.**]—THE TRUE BLUE, No. 7235, *ante.*

**7246.** —— **Task of greater magnitude than expected.**]—THE TRUE BLUE, No. 7235, *ante.*

**7247.** ————.]—(1) An agreement to perform a service of a salvage nature for a specific sum is not to be lightly set aside, either because the weather became tempestuous, or because the vessel was longer in arriving at a port of safety than might reasonably have been anticipated.

(2) The ct. will not favour a claim for salvage by a party originally engaged as a pilot; but at the same time pilots are not to be compensated by mere pilotage remuneration for salvage services. —HALSEY *v.* ALBERTUSZEN, THE JONGE ANDRIES (1857), 11 Moo. P. C. C. 313; Sw. 303; 30 L. T. O. S. 251; 6 W. R. 198; 14 E. R. 714, P. C.

*Annotations:—As to* (1) **Refd.** The Galatea (1858), Sw. 349; The Macgregor Laird, [1867] W. N. 308; The Waverley (1871), L. R. 3 A. & E. 369.

**7248.** —— ——.]—An agreement for salvage services will not, if just at the time when it was made, be subsequently set aside because the services have been of longer duration than the salvors expected at the time when the agreement was entered into.

The *C.* grounded on Shoeburyness sand, & the *T.* agreed for £80 to take her off & up to Gravesend. The services lasted during five tides, & the *T.* also fetched two barges, & on behalf of the *C.* engaged another steam tug *E.*, to assist. The value of the

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the time of the contract.—THE BRITON (1853), 5 Ir. Jur. 170.—**IR.**

p. —— *Duress.*]—CONNOLLY *v.* THE DRACONA (1896), 5 Exch. C. R. 146.—**CAN.**

q. —— ——.]—A ship, while lying in Table Bay, through stress of weather parted both anchors & grounded near the beach. The wind was rising & the ship was in a position of increasing peril. The captain of a tug came to the ship's assistance, but refused aid unless the master agreed to pay £2,000. The master protested, but the captain of the tug threatened to leave unless a clean contract was signed. The master ultimately signed an unconditional promise to pay the amount, saying at the time that, though he did so, the money would never be paid. With the assistance of another tug, which was acting in concert with the first tug, the ship was

property to which the services were rendered was £12,000. £130 was awarded to the *E.* As to *T.*, the sum of £80 tendered was held sufficient.—THE CATO (1866), 35 L. J. Adm. 116.

**7249.** —— ——.]—(1) Where an agreement to fix the amount of the remuneration to be paid for salvage services has been deliberately entered into at the time of the commencement of the danger between perfectly competent parties, the ct. will not allow the agreement to be set aside, merely because the execution of it has turned out more difficult than was anticipated at the time of making the contract.

(2) It is no ground for claiming extra salvage remuneration that the service was prolonged, & became more difficult.—THE WAVERLEY (1871), L. R. 3 A. & E. 369; 40 L. J. Adm. 42; 24 L. T. 713; 1 Asp. M. L. C. 47.

*Annotations:—As to* (1) **Apld.** The Westbourne (1889), 14 P. D. 132. *Generally,* **Refd.** The Medina (1876), 1 P. D. 272.

**7250. Parties not contracting on equal terms.**]—THE RIALTO, No. 7276, *post.*

**7251. Agreement for salvage of ship irrespective of cargo.**]—Agreements for the salvage of the ship, irrespective of the cargo on board at the time, not allowed by the ct.—THE WESTMINSTER (1841), 1 Wm. Rob. 229; 8 L. T. 153; 166 E. R. 558.

*Annotations:—***Refd.** The Diamond (1845), 9 Jur. 694; The Elton, [1891] P. 265.

### (*b*) *Misrepresentation and Fraud.*

#### i. *In General.*

*See, generally,* MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6–84, Nos. 1 *et seq.*

**7252. General rule—Avoidance of agreement.**]—THE MARGARET (1842), 3 L. T. 182.

**7253.** ——.]—THE REPULSE, No. 7224, *ante.*

**7254.** —— ——.]—THE HENRY (1851), 16 L. T. O. S. 553; 15 Jur. 183.

**7255.** —— ——.]—THE HELEN & GEORGE, No. 7241, *ante.*

#### ii. *Particular Instances.*

**7256. Bribery—Of agents of salved vessel.**]—A Portuguese vessel came on shore at Dungeness. The master, not being able to speak English, accepted the services of the district agent of the Portuguese Vice-Consul, who entered into an agreement for the assistance of a steam tug, for the sum of £600, on the condition that £50 should be returned. The steamer got the vessel off & brought her into a place of safety. On the ship being sued in the Admlty. Ct., the owners disputed the agreement, & tendered £250. The Ct. set aside the agreement as corrupt, & pronounced for the tender.—THE CRUS V. (1862), Lush. 583; 167 E. R. 266.

**7257.** —— **Of master of salved vessel.**]—(1) The provision in 25 & 26 Vict., c. 63, s. 49, extending the jurisdiction of the justices in salvage cases to all cases in which the value of the property saved does not exceed £1,000, merely extends & applies the regulations in 17 & 18 Vict., c. 104, s. 464, respecting appeals for claims not exceeding £50 to cases in which the value of the ship & freight is under £1,000; but does not make the appeal depend on the claim being for £50 & upwards, & the value of the property saved being £1,000 & upwards. Salvors claimed before the justices £55 under a written agreement, £5 of which was admitted to be due to them:—*Held:* the "sum in dispute" exceeded £50.

(2) Evidence has been given before this ct., by the master of the *Generous,* that he was bribed by a promise of £10 to sign this agreement. . . . It is not necessary to go into details; but the whole circumstances attending the manufacture of this agreement are fraught with suspicion. I am of opinion that, having regard to these circumstances, the magistrates erred in sustaining this agreement as binding upon the owners of the *Generous* (SIR ROBERT PHILLIMORE).—THE GENEROUS (1868), L. R. 2 A. & E. 57; 37 L. J. Adm. 37; 17 L. T. 552; 16 W. R. 519; 3 Mar. L. C. 40.

*Annotation:—As to* (1) **Refd.** The Caledonia (1869), 42 L. J. Adm. 13, n.

**7258.** —— ——.]—In a case arising out of an alleged agreement for the apportionment of a salvage award, evidence, to some extent conflicting, was given that before the salvage services were rendered an arrangement was made between the master of the vessel to be salved & the salvors that the master should be paid 5 per cent. of the salvage award. *Semble:* if an agreement to this effect were proved, it would amount to misconduct on the part of the salvors, for which in all probability they would forfeit all right to salvage whatever.—THE KOLPINO (1904), 73 L. J. P. 29.

**7259. Dishonesty of master of salved vessel—Excessive reward to salvors.**]—THE THEODORE, No. 7240, *ante.*

#### iii. *Burden of Proof.*

**7260. On party imputing fraud.**]—THE HENRY, No. 7216, *ante.*

### (*c*) *Misstatement and Non-Disclosure.*

**7261. Whether agreement void.**]—THE HENRY (1851), 16 L. T. O. S. 553; 15 Jur. 183.

**7262.** ——.]—THE ASSISTANCE *v.* THE ROBINSONS (1859), 8 L. T. 335, P. C.

**7263.** ——.]—THE MARGARET (1842), 3 L. T. 182.

**7264.** —— **Non-disclosure of slight leak of vessel.**]—The first consideration for the ct. to dispose of is this—was there any such concealment prior to entering into the agreement which would justify the parties who signed that agreement in saying, we laboured under deception practised upon us? That deception is said to consist of two things: first, that the bowsprit had sprung; &, secondly, the quantity of water made. I am clearly of opinion that neither of these circumstances can vitiate the agreement (DR. LUSHINGTON).—THE JONGE ANDRIES (1857), Sw. 226; 166 E. R. 1108; *sub nom.* THE JONGE ANDRIES, HALSEY *v.* ALBERTUSZEN, 30 L. T. O. S. 251; *affd.,* 11 Moo. P. C. C. 313, P. C.

*Annotations:—***Refd.** The Galatea (1858), Sw. 349; The Macgregor Laird, [1867] W. N. 308; The Waverley (1871), L. R. 3 A. & E. 369.

### (*d*) *Supervening Circumstances rendering Performance Impossible.*

**7265. Agreement void.**]—Where the master of a ship has agreed to tow a ship which is in distress to a named port for a fixed sum, such agreement is binding on the parties to it, even though by reason of an increase in the weather the performance of the agreement becomes more onerous than was originally contemplated; but if supervening circumstances are such as to render the performance of the contract nautically impossible,

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towed off & taken to a place of safety. The ct. refused to enforce the written agreement, & awarded the salvors £1,000, as a fair & reasonable reward for their services, being not more than one-fifth of the value of the salved vessel, her cargo & freight.—BLACKBURN *v.* MITCHELL (1897), 14 S. C. 338; 7 C. T. R. 362.—S. AF.

*Sect. 9.—Agreements as to salvage: Sub-sect. 2, A., B. & C.; sub-sect. 3, A. & B.]*

**7290.** ——.]—In cases of salvage, the master of the salving vessel may bind his own interest, & the interest of his employers, by an agreement with the owner of the vessel saved as to the *quantum* of salvage to be paid, but such agreement will not be conclusive upon the rest of the crew if made without their sanction & concurrence.—THE BRITAIN (1839), 1 Wm. Rob. 40; 7 L. T. 224; 166 E. R. 489.

*Annotations:*—**Consd.** The Macgregor Laird, [1867] W. N. 308; The Friesland, [1904] P. 345. **Reld.** The Sarah Jane (1843), 2 Wm. Rob. 110; The City of Calcutta (1898), 79 L. T. 517.

**7291.** ——.]—The master of a ship may bind the owner, in salvage cases, by an agreement; but he cannot bind the crew without their express authority. The court must protect the interest of sailors.—THE SARAH JANE (1843), 2 Wm. Rob. 110; 3 L. T. 182; 166 E. R. 696.

*Annotations:*—**Consd.** The Macgregor Laird, [1867] W. N. 308; The Friesland, [1904] P. 345.

**7292.** ——.]—THE HENRY, No. 7216, *ante*.

**7293.** ——.]—THE AFRICA, No. 7074, *ante*.

**7294.** ——.]—THE NASMYTH, No. 7301, *post*.

**7295.** ——.]—Where the services of a salvor was discontinuous, & an amount was tendered & paid into ct. representing the sums agreed upon, by the master of the salving vessel, with the master of the salved vessel, as the reward to cover valuable services rendered prior to the agreement, as well as the successful services subsequently rendered: —*Held:* the tender must be rejected, & a salvage award made in respect of the services prior to the agreement, as the owner & crew of the salving vessel had acquired vested rights which the master of the salving vessel had no authority to bargain away, but the amount fixed by the agreement must stand in respect of the subsequent services.—THE INCHMAREE, [1899] P. 111; 68 L. J. P. 30; 80 L. T. 201; 8 Asp. M. L. C. 486.

*Annotation:*—**Apld.** The Friesland, [1904] P. 345.

**7296.** —— **Owner easily accessible.**]—(1) Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the Comrs. of Salvage for the Cinque Ports to adjudicate the matter. No notice of the intended meeting was given to any of the salvors, & it was proved that it was not usual to give any such notice.

At the meeting of the Comrs. one set of salvors was unrepresented, but it was proved that they were aware of the meeting, & were at hand. The Comrs. made an award upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, & brought their action in the Admlty. Court:—*Held:* the award was no bar to the action, pltfs. not having been parties to the first decision. *Qu.:* whether the master of a ship is the agent of the owner to compromise a salvage claim, the owner being at hand, & giving no authority.

(2) Although the master of a ship is on land as at sea agent for the crew to bind them by agreement in respect of salvage compensation, I doubt whether he is agent for the owner for that purpose when the owner is at hand & gives him no authority (DR. LUSHINGTON).—THE ELISE (1859), Sw. 436; 166 E. R. 1203.

**7297.** —— **Agreement must be equitable.**]—THE ARTHUR, No. 7234, *ante*.

**7298.** —— **Agreement for life salvage.**]—THE RENPOR, No. 7199, *ante*.

**7299.** —— **Submission to arbitration.**]—THE CITY OF CALCUTTA (1898), 79 L. T. 517; 15 T. L. R. 108; 8 Asp. M. L. C. 442, C. A.

*B. Master and Crew.*

**7300. Authority of master to bind crew.**]—THE ELISE, No. 7296, *ante*.

**7301.** ——.]—The master of a ship rendering salvage services has authority to bind his crew as well as his owners by an agreement with the master of the vessel to which the services are rendered as to the amount to be paid for such services.—THE NASMYTH (1885), 10 P. D. 41; 54 L. J. P. 63; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. L. C. 364.

*Annotation:*—**Consd.** The Friesland, [1904] P. 345.

**7302.** —— **Necessity for express authority.**]—THE BRITAIN, No. 7290, *ante*.

**7303.** —— ——.]—THE SARAH JANE, No. 7291, *ante*.

**7304.** —— **Future as distinct from past salvage services.**]—THE INCHMAREE, No. 7295, *ante*.

**7305. Authority of owner to bind master & crew.**]—In an action for salvage brought by the master & crew of one fishing vessel against the owner of another such vessel deft. sought to prove that pltfs. had, by acquiescence, agreed to be bound by an agreement alleged to have been arrived at by the respective owners, by which all questions of salvage were to be referred to the arbn. of the committee of the mutual insurance clubs in which the vessels were respectively insured. The ct. found that pltfs. had not so agreed to be bound.—THE MARGERY, [1902] P. 157; 71 L. J. P. 83; 86 L. T. 863; 50 W. R. 654; 9 Asp. M. L. C. 304, D. C.

*Annotations:*—**Consd.** The Friesland, [1904] P. 345. **Reld.** The Leon Blum (1915), 85 L. J. P. 1.

**7306.** —— **Future as distinct from past salvage services.**]—The owners of a vessel may bind the master & crew without their assent by an agreement with other parties as to future but not as to past salvage services.—THE FRIESLAND, [1904] P. 345; 73 L. J. P. 121; 91 L. T. 324; 20 T. L. R. 699; 10 Asp. M. L. C. 9.

**7307.** —— **Agreement for arbitration by mutual insurance club.**]—THE ALICE RICHARDSON (1865), 3 Mar. L. C. Digest, p. 68.

**7308.** —— ——.]—THE MARGERY, No. 7305, *ante*.

**7309. Authority of owner's agent to bind master & crew.**]—THE POWERFUL (1860), 8 L. T. 335.

*C. Salvors.*

**7310. Necessity for acceptance of agreement.**]—(1) The owners of boats rendering a salvage service, not having been personally present at the time the service is rendered, are not entitled to sue as salvors.

In order to entitle a person to share as salvor, he must, I conceive, have been personally engaged in the service (DR. LUSHINGTON).

Some remuneration, however, is due to them for the use of their boats, by way of equitable compensation.

It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent & absolute; it will be sufficient if, at the time the assistance is rendered,



t. *General rule.*]—An agreement made with some of the crew of a salving ship, is not binding on the remainder of the crew.—THE SANSONE (1851), 3 Ir. Jur. 258.—IR.

the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered (DR. LUSHINGTON).

(2) No person can be legally bound by any contract unless he has entered into it himself personally or through a duly authorised agent, or has by his own act subsequently ratified that contract. The salvors themselves have repudiated throughout that they ever authorised W. T. to act for them in the matter, & the agreement has never been confirmed or in any matter ratified by them; it must therefore fail for want of authority (DR. LUSHINGTON).—THE CHARLOTTE (1848), 3 Wm. Rob. 68; 6 Notes of Cases, 279; 11 L. T. O. S. 473; 12 Jur. 567; 166 E. R. 888.

*Annotation:—As to* (1) **Consd.** Turnbull *v.* Strathnaver, The Strathnaver (1875), 1 App. Cas. 58.

**7311. Concealment of material fact from salvor.**]—THE ASSISTANCE *v.* THE ROBINSONS (1859), 8 L. T. 335, P. C.

**7312. Right of one salvor to bind another salvor—Necessity for specific authority.**]—THE ASSISTANCE *v.* THE ROBINSONS (1859), 8 L. T. 335, P. C.

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SUB-SECT. 3.—AGREEMENTS FOR APPORTIONMENT.

*A. In General.*

**7313. Whether binding—Must be equitable.**]—THE BEULAH, No. 6939, *ante*.

**7314.** —— ——.]—An agreement between salvors & the agent of the salving ship to leave the amount of their reward to his determination:—*Held:* inequitable & void.—THE ENCHANTRESS (1860), Lush. 93; 30 L. J. P. M. & A. 15; 2 L. T. 574; 167 E. R. 49.

*Annotations:*—**Consd.** The Ganges (1869), L. R. 2 A. & E. 370. **Refd.** The Waverley (1871), L. R. 3 A. & E. 369; The Afrika (1880), 5 P. D. 192; The City of Chester (1884), 9 P. D. 182; The Wilhelm Tell, [1892] P. 337.

**7315.** —— ——.]—Where salvors have entered into an agreement as to the apportionment of salvage, which in the opinion of the Ct. of Admlty. is equitable, & not obtained by coercion, the ct. will uphold the agreement, & apportion the salvage awarded in accordance therewith.

Where the High Ct. of Admlty. has made a decree awarding salvage upon values furnished by the respective owners of the ship, freight, & cargo, & accepted by the salvors, & afterwards it is discovered by the owner of cargo that he has been ordered to pay upon the value of the cargo without deducting the freight due upon delivery, the ct. has power to & will, if it sees fit, reduce the amount of salvage, & vary the proportions payable by the respective owners.—THE JAMES ARMSTRONG (1875), L. R. 4 A. & E. 380; 33 L. T. 390; 3 Asp. M. L. C. 46.

*Annotation:*—**Refd.** The Georg, [1894] P. 330.

**7316.** —— —— **Agreement made prior to time of rendering of service.**]—(1) In apportioning a salvage award, the ct. will not consider itself bound by an agreement made out of ct. between the owners & crew prior to the time when the salvage service was rendered.

A scale of apportionment drawn up under such an agreement overruled, & a fresh apportionment made by the ct.

(2) The owners of fishing vessels are entitled to a more liberal allotment than the owners of other vessels, because their occupation is interrupted, & secondly, because the expense of navigating them is longer than in ordinary cases, so far as regards the wages of the mariners (*per* CUR.).—THE LOUISA (1843), 2 Wm. Rob. 22; 2 Notes of Cases, 149; 166 E. R. 664.

*Annotations:—As to* (1) **Consd.** The Wilhelm Tell, [1892] P. 337. **Refd.** The Enchantress (1860), Lush. 93.

**7317.** —— —— **Effect of fraud or concealment.**]—(1) 17 & 18 Vict. c. 104, s. 182, does not prevent seamen who are entitled to recover salvage remuneration from entering into an arrangement through their solr. for the apportionment of the amount due to them.

(2) Where the owners of a ship have received a lump sum in respect of services rendered by their ship, master & crew, & have paid over to the crew a portion of such sum, which the crew, acting under the advice of their own solr., have accepted in settlement of their claims for salvage, the ct. will not, where the portion so paid over is not extravagantly small, disturb the settlement in the absence of fraud or concealment.—THE AFRIKA (1880), 5 P. D. 192; 49 L. J. P. 63; 42 L. T. 403; 4 Asp. M. L. C. 266.

*Annotation:*—**Refd.** The Wilhelm Tell, [1892] P. 337.

**7318.** —— —— **Protection of seamen from improvident arrangements.**]—THE WILHELM TELL, No. 7324, *post*.

**7319. Additional salvage outside agreement by one party—Whether other party may share in reward.**]—(1) When persons agree to render a salvage service & to apportion the salvage in a particular way, & further salvage services are rendered, not contemplated by the agreement, the whole body of salvors are entitled to share in the reward, & not only those actually engaged in the further salvage operations.

(2) Costs of all parties were ordered to be paid out of fund in ct., except deft.'s, in consequence of his misconduct to his co-salvors.—THE CADIZ & THE BOYNE (1876), 35 L. T. 602; 3 Asp. M. L. C. 332.

**What deductions allowable.**]—*See* Nos. 7324–7327, *post*.

**As to apportionment, generally.**]—*See* Sect. 11, *post*.

*B. Waiver of Claim by Seamen.*

*See* 1894 Act, s. 156 (1), (2).

**7320. General rule—Agreement for waiver not binding.**]—(1) In order to deprive a seaman of his right to share in salvage, neither the agreement for the vessel to be employed in salvage services, nor the stipulation that the seaman shall waive his claim for salvage, need be in writing to satisfy 25 & 26 Vict. c. 63, s. 18, but both must be clearly proved by those who dispute the seaman's right.

(2) By the ancient law of the High Ct. of Admlty. as well as by statute law prior to 25 & 26 Vict. c. 63, s. 18, any stipulation by which a seaman agrees to abandon a claim for salvage was invalid.

(3) The burden of proof is upon those who now assert such an agreement to show, not merely the existence of the agreement, but that the seamen were fully aware of all its consequences.—THE PRIDE OF CANADA (1863), Brown. & Lush. 208;

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**PART XV. SECT. 9, SUB-SECT. 3.—A.**

a. *Whether binding—Repugnant to general principle—Prejudicial to public interest.*]—Special agreements with the owners by the masters of a tug steamer to a percentage on the earnings of the tug, & by seamen to increased wages for foregoing all claims for salvage, will not be upheld by the Ct. of Admlty., as being repugnant to general principle, & prejudicial to the public interest, & as the effect of such agreements would be to take away from the actual salvors the motives of all enterprise & energy.—THE MARYANNE (1863), 16 Ir. Jur. 60; 11 L. T. 85.—**IR.**

**PART XV. SECT. 9, SUB-SECT. 3.—B.**

7320 i. *General rule—Agreement for waiver not binding.*]—THE MARYANNE (1863), 16 Ir. Jur. 60; 11 L. T. 85.—**IR.**

*Sect. 9.—Agreements as to salvage: Sub-sect. 3, B., C. & D. Sect. 10: Sub-sects. 1 & 2, A. & B. (a) & (b).]*

3 New Rep. 93; 9 L. T. 546; 1 Mar. L. C. 406; 167 E. R. 338.

*Annotations:—As to* (1) **Refd.** The Ganges (1869), L. R. 2 A. & E. 370. *As to* (2) **Refd.** The Wilhelm Tell, [1892] P. 337. *Generally,* **Refd.** The Rosario (1876), 2 P. D. 41.

**7321.** —— ——.]—THE ALICE RICHARDSON (1865), 3 Mar. L. C. Digest, p. 68.

**7322.** —— ——.]—(1) Where a vessel carrying cargo was being towed under a contract made between the owners of the tug & the owners of the vessel in tow on the terms of "no cure, no pay, no salvage charges," & before the towage came to an end, the vessel was in danger, & salvage services were rendered by the tug to ship & cargo: —*Held:* the owners of the tug & her master & crew were entitled to maintain an action to recover salvage remuneration from the owners of the cargo.

(2) Even if the seamen had been persuaded to join in the agreement, by which it is said they abandoned or precluded themselves from claiming salvage reward, such an agreement would be wholly inoperative (EVANS, P.).—THE LEON BLUM, [1915] P. 290; 31 T. L. R. 582; 13 Asp. M. L. C. 273, C. A.

**7323. Application of rule—Agreement by solicitor acting for seamen.**]—THE AFRIKA, No. 7317, *ante.*

**7324.** —— **What deductions by owner allowable —Cost of repair.**]—(1) The owners, master & crew of one of these trawlers were awarded the sum of £1,000, &, in accordance with the articles of agreement, the master, mate, & boatswain were entitled respectively to a share of salvage of 10, 7, & 3 per cent.

On motion on behalf of the master, mate, & boatswain for such an apportionment, as to the ct. should seem just, of the £1,000 less unrecovered costs, & for a declaration that appcts. were not bound by the articles to receive only the proportions of salvage set out therein against their respective names:—*Held:* as Merchant Shipping Act, 1854 (c. 104), s. 182, did not prevent seamen entering into an equitable arrangement for the apportionment of salvage, therefore, though the trawler in question was not within s. 18 of the amending Act of 1862, the apportionment of salvage contemplated by the articles was not contrary to law, & being, in the opinion of the ct., equitable, was binding.

The policy of the law is to protect seamen from improvident arrangements (GORELL BARNES, J.).

(2) The master & mate were paid wages on the footing of a share of the fishing profits, but the boatswain received so much per week; & the owners of the trawler, in arriving at the nett sum to be apportioned, claimed to deduct the cost of repairs for damage sustained by the vessel in rendering the salvage services, & as against the boatswain, certain other sums for loss of profits, time, etc.:—*Held:* these deductions could not be allowed, as the agreement for a certain share of the salvage meant a share of the sum awarded less any unrecovered costs in obtaining the award.

*Semble:* the provisions of s. 182 of the Merchant Shipping Act, 1854, & of s. 18 of the amending Act of 1862, do not apply to a master.—THE WILHELM TELL, [1892] P. 337; 61 L. J. P. 127; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. L. C. 329; 1 R. 551.

*Annotation:—As to* (2) **Apld.** The Saltburn (1894), 71 L. T. 19.

**7325.** —— —— **Loss of profits.**]—THE WILHELM TELL, No. 7324, *ante.*

**7326.** —— —— **Unrecovered costs in obtaining award.**]—THE WILHELM TELL, No. 7324, *ante.*

**7327.** —— **Agreement for deductions by owner.**] —(1) An agreement by which a seaman stipulates that he shall be entitled to his proportion of a sum awarded for salvage services, calculated not upon the amount awarded but upon so much of that amount as remains after certain deductions have been made, is inoperative by virtue of 17 & 18 Vict. c. 104, s. 182.

(2) *Semble:* clauses respecting deductions that are to be made inserted in such an agreement, without the consent of all the parties interested, are interlineations & alterations within 46 & 47 Vict. c. 41, s. 22, & are therefore void.—THE SALTBURN (1894), 71 L. T. 19; 7 Asp. M. L. C. 474; 6 R. 702.

**7328.** —— **Agreement by crew of salvage service vessel—Necessity for writing.**]—THE PRIDE OF CANADA, No. 7320, *ante.*

**7329.** —— —— **Burden of proof.**]—THE PRIDE OF CANADA, No. 7320, *ante.*

**7330.** —— ——.]—17 & 18 Vict. c. 104, s. 182, & 25 & 26 Vict. c. 63, s. 18, do not fetter the discretion of the ct. upon the subject of these agreements, but their effect is to render such agreements not illegal, & to place them on the same footing on which they stood before any legislation on the subject.

Pltf. was temporary master of a steam tug in the place of B., & without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The steam tug belonged to a co. whose business it was to render towage & salvage services to vessels in distress. The seamen employed by the company were paid, according to a special agreement, certain fixed wages & a fixed rate of poundage on all towage & salvage money earned by the tug. Pltf. knew that B. was employed under this agreement. Pltf. claimed salvage remuneration independently of the agreement:—*Held:* the agreement, as it did not appear to be inequitable, was valid, & pltf. was bound by it, & therefore could not maintain his claim for salvage. —THE GANGES (1869), L. R. 2 A. & E. 370; 38 L. J. Adm. 61; 22 L. T. 72; 3 Mar. L. C. 342.

*Annotation:*—**Refd.** The Wilhelm Tell, [1892] P. 337.

### *C. Assignment or Sale of Salvage Reward before Accrual.*

*See* 1894 Act, s. 212.

**7331. Whether binding.**]—A cause of distribution of salvage was instituted on behalf of some of the crew of a steamship against the owners of the steamship. The owners of the steamship appeared to defend the suit, & in their statement of defence alleged in effect that, subsequently to the salvage services, but before any amount had been paid in respect of such services, fourteen of pltfs. had by deed, in consideration of sums varying from £1 to 10*s.* paid them by defts., assigned to defts. all their respective shares of salvage reward. Pltfs. demurred to the paragraphs of the statement of

7329 i. *Application of rule—Agreement by crew of salvage service vessel—Burden of proof.*]—A salvage co. salved a vessel under a contract made with the master after the vessel had run on to a reef, the remuneration, payable only if the operation was successful; to be fixed by agreement or arbn. The operation having been successful, & the sum payable to the salvage co. having been fixed by arbn., members of the crew of one of the co.'s tugs which had taken part in the operation brought an action against the co., in which they claimed a share of the sum so fixed:—*Held:* as defenders had failed to prove any agreement with the crew by which the latter abandoned their right to salvage, pursuers, although employed to do salvage work, were entitled to a portion of the sum fixed by the arbiter.—NICHOLSON *v.* LEITH SALVAGE & TOWAGE CO., LTD.,

defence containing these allegations. The ct. sustained the demurrer.—THE ROSARIO (1876), 2 P. D. 41 ; 46 L. J. P. 52 ; 35 L. T. 816 ; 3 Asp. M. L. C. 334.
*Annotation :*—**Refd.** The Wilhelm Tell, [1892] P. 337.

*D. Local and Customary Agreements.*

**7332. Validity—Dependent on equitability.**]—THE SPIRIT OF THE AGE (1858), 8 L. T. 335.

**7333.** ——.]—THE ENCHANTRESS, No. 7314, *ante.*

**7334.** —— **Custom excluding hands in receipt of wages.**]—THE JOHN (1846), 6 L. T. 615 ; 2 Pritchard's Admiralty Dig. 3rd ed. 1890.

**7335.** —— **Custom for apportionment according to rating.**]—(1) Where there is a custom to share in salvage awards in a particular manner according to the ratings of the salvors on board their ship, yet if some of the salving crew have exposed themselves to much greater risks than the rest, the ct. will give them a larger share on equitable principles.

(2) Carrying information to a vessel which enables her to render a salvage service is itself a service in the nature of salvage, & will be rewarded accordingly.—THE SARAH (1878), 3 P. D. 39 ; 37 L. T. 831 ; 3 Asp. M. L. C. 542.
*Annotation :*—*Generally,* **Refd.** The Pasithea (1879), 5 P. D. 5.

**7336.** —— **Custom for equal division between boatmen & tug—Custom not proved.**]—THE SANDSEND (1903), cited in Kennedy on Civil Salvage, 2nd ed. at p. 262.

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SECT. 10.—**THE SALVAGE AWARD.**

SUB-SECT. 1.—IN GENERAL.

**7337. Discretion of court.**] — THE CITY OF CHESTER, No. 6900, *ante.*

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SUB-SECT. 2.—ASSESSMENT BY COURT.

*A. In General.*

**7338. Private inquiry by Court—Of persons having nautical experience & acquainted with locus in quo.**]—THE HARBINGER (1852), 8 L. T. 612 ; 16 Jur. 729.
*Annotation :*—**Mentd.** The Strathnaver (1875), 1 App. Cas. 58.

**7339. Duty of court to assess.**]—MELANIE (OWNERS) *v.* SAN ONOFRE (OWNERS), No. 7132, *ante.*

*B. General Principles.*

*(a) In General.*

**7340. Reward commensurate with services.**]—THE THETIS, No. 6817, *ante.*

**7341.** ——.]—THE MINERVA (1854), 1 Ecc. & Ad. 271 ; 8 L. T. 154 ; 164 E. R. 157.

**7342.** ——.] — THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante.*

**7343. When cargo not before court.**]—THE ALEXANDER ROBERTSON (1842), 8 L. T. 704.

**7344.** ——.]—THE LOUISA *v.* THE JOHN BERTRAM (1858), 8 L. T. 178.

*(b) Encouragement of Salvors.*

**7345. Salvors encouraged.**]—THE THETIS, No. 6817, *ante.*

**7346.** ——.]—THE CASPIAN (1853), 8 L. T. 154.

**7347.** ——.]—THE PERSIA (1853), 1 Ecc. & Ad. 166 ; 8 L. T. 154 ; 164 E. R. 97.

**7348.** ——.]—THE SECRET *v.* THE JUNIATA (1856), 8 L. T. 178.

**7349.** ——.]—THE LINGA (1862), 8 L. T. 178.

**7350.** ——.]—THE CITY OF CHESTER, No. 6900, *ante.*

**7351.** ——.]—THE ENVOY (1888), cited in [1898] P. at p. 102 ; 67 L. J. P. at p. 14.
*Annotation :*—**Apld.** The Glengyle, [1898] P. 97.

**7352.** ——.]—THE GLENGYLE, No. 7375, *post.*

**7353.** —— **In general interests of navigation & commerce.**]—THE SARAH (1800), 1 Ch. Rob. 313, n. ; 165 E. R. 188.
*Annotation :*—**Distd.** The Marquis of Huntley (1835), 3 Hag. Adm. 246.

**7354.** —— ——.]—THE WILLIAM BECKFORD, No. 7362, *post.*

**7355.** —— ——.]—There are many cases in which there is much labour & little to pay for it ; so that the ct. acts upon the principle of giving a larger proportion in cases of small value, than in cases where the property in considerable, as a due encouragement to the interests of the commerce & navigation of the country (LORD STOWELL).—THE MARY ANN (1823), 1 Hag. Adm. 158 ; 166 E. R. 57.
*Annotation :*—**Refd.** The Lustre (1834), 3 Hag. Adm. 154.

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**PART XV. SECT. 10, SUB-SECT. 1.**

**b.** *Appointment of assessors.*] — Assessors will be appointed in salvage cases where necessary. The proper time to apply is on the application to fix date of trial.—VERMONT S.S. Co. *v.* THE ABBEY PALMER (No. 1.) (1904), 10 B. C. R. 380.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 2.—A.**

**c.** *Services rendered by passenger ship.*]—In awarding salvage remuneration to a passenger steamer, the ct. will not take into its consideration the possibility of damages being recovered against its owners for the delay occasioned by the rendering of those services, & will decline to entertain such an uncertainty.—THE ELIZA (1858), 11 Ir. Jur. 58.—**IR.**

**d.** ——.]—The ct., in estimating the amount of salvage to be awarded, will not overlook the fact that the salving vessel was a passenger ship, & was about proceeding on a voyage in the ordinary discharge of her duty, when her services were called into requisition.—THE VANGUARD (1860), 12 Ir. Jur. 364.—**IR.**

**PART XV. SECT. 10, SUB-SECT. 2.—B. (a).**

**e.** *Conditions rendering disaster less probable—Salvage services on the Great Lakes.*]—Owing to conditions rendering disaster less probable there is a difference in the amount to be allowed for salvage services on the Great Lakes & on the high seas.—JOHNSON & MACKAY *v.* THE CHARLES S. NEFF (1918), 18 Exch. C. R. 168 ; 44 D. L. R. 148.—**CAN.**

**f.** *Liberality to salvor combined with justice to owner.*]—The distinguishing circumstances of each particular case of salvage must be carefully examined, to protect shipowners from unjust & unnecessary payments, & to give due encouragement to the owners of towing vessels to afford that assistance which is so highly beneficial to the general interests of commerce.—THE SPHYNX (1858), 11 Ir. Jur. 230.—**IR.**

**PART XV. SECT. 10, SUB-SECT. 2.—B. (b).**

**7345 i.** *Salvors encouraged.*]—Owners should not be shabbily recompensed where their vessels at some hazard have rendered salvage services, nor should masters in time of imminent peril to human life be driven to calculate whether they or their employers, will be properly remunerated for the responsibilities which they are incurring & the risks to which their employers' property is exposed.—THE NORTHAMPTON (1883), 4 N. S. W. Adm. 1.—**AUS.**

**7346 ii.** ——.]—The policy of the law is to encourage salvors by liberal awards.—THE CALEDONIA (1853), 3 Nfld. L. R. 359.—**NFLD.**

**7346 iii.** ——.]—In arriving at the amount that should be awarded to the salvors in a salvage case it is the duty of the ct. to give such a reward as will encourage the saving of human life & property.—AORERE S.S. Co., LTD. *v.* COLONIAL SAILING SHIP CO., LTD. (No. 2) (1906), 26 N. Z. L. R. 259.—**N.Z.**

**7353 i.** —— *In general interests of navigation & commerce.*]—Salvage is not always a mere compensation for work & labour ; various circumstances upon public considerations, the interest of commerce, the benefit & security of navigation, the lives of seamen, render it proper to estimate a salvage reward upon a more enlarged & liberal scale.—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**7353 ii.** —— ——.]—CLAN LINE STEAMERS *v.* THE BALCES (1904), I. L. R. 27 Mad. 187.—**IND.**

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *B.* (*b*), (*c*), (*d*), (*e*), (*f*), (*g*) & (*h*).]

**7356.** —— ——.]—THE HECTOR, No. 7661, *post.*

**7357.** —— ——.]—THE INDUSTRY, No. 7021, *ante.*

**7358.** —— ——.]—THE SALADIN (1843), 1 L. T. O. S. 113.

**7359.** —— ——.]—THE OCEAN (1843), 2 Wm. Rob. 91; 1 L. T. O. S. 58; 166 E. R. 689.

**7360.** —— —— **& for benefit of underwriters.**]—THE JOHANNES, No. 7015, *ante.*

(*c*) *Quantum meruit.*

**7361. How far quantum meruit principle regarded.**]—THE SARAH (1800), 1 Ch. Rob. 313, n.; 165 E. R. 188.

*Annotation:*—**Apld.** The Marquis of Huntley (1835), 3 Hag. Adm. 246.

**7362.** ——.]—The principles on which the Ct. of Admlty. proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation & commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill & dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most is the actual danger which they have incurred. Th value of human life is that which is, & ought to be, principally considered in the preservation of other men's property, & if this is shown to have been hazarded, it is most highly estimated (SIR WILLIAM SCOTT). —THE WILLIAM BECKFORD (1801), 3 Ch. Rob. 355; 165 E. R. 492.

*Annotations:*—**Apld.** The Marquis of Huntly (1835), 3 Hag. Adm. 246; The Glengyle, [1898] P. 97. **Refd.** The Diamond (1845), 9 Jur. 694; The Amérique (1874), L. R. 6 P. C. 468.

**7363.** ——.]—THE MARY ANN, No. 7355, *ante.*

**7364.** ——.]—THE HECTOR, No. 7661, *post.*

**7365.** ——.]—THE INDUSTRY, No. 7021, *ante.*

**7366.** ——.]—THE GENERAL PALMER, No. 7425, *post.*

**7367.** ——.]—Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, & perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid.—AITCHISON *v.* LOHRE (1879), 4 App. Cas. 755; 49 L. J. Q. B. 123; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. L. C. 168, H. L.; *varying* S. C. *sub nom.* LOHRE *v.* AITCHISON (1878), 3 Q. B. D. 558, C. A.

*Annotations:*—**Mentd.** Dixon *v.* Whitworth, Dixon *v.* Sea Insce. (1879), 4 C. P. D. 371; Pitman *v.* Universal Marine Insce. (1882), 9 Q. B. D. 192; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801; Johnston *v.* Salvage Assocn. (1887), 19 Q. B. D. 458; The Mary Thomas, [1894] P. 108; Buchanan *v.* London & Provincial Marine Insce. (1895), 65 L. J. Q. B. 92; The Gas Float Whitton No. 2 (1895), 65 L. J. P. 17; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455; Nourse *v.* Liverpool Sailing Ship Owners' Mutual Protection & Indemnity Assocn., [1896] 2 Q. B. 16; The Solway Prince, [1896] P. 120; Montgomery *v.* Indemnity Mutual Marine Insce., [1901] 1 K. B. 147; Angel *v.* Merchants' Marine Insce., [1903] 1 K. B. 811; Western Assce. of Toronto *v.* Poole, [1903] 1 K. B. 376; Macbeth *v.* Maritime Insce., [1908] A. C. 144; Pyman S.S. Co. *v.* Admiralty Comrs., [1919] 1 K. B. 49.

**7368.** ——.]—THE ENVOY (1888), cited in [1898] P. at p. 102; 67 L. J. P. at p. 14.

*Annotation:*—**Apld.** The Glengyle, [1898] P. 97.

(*d*) *Services rendered by Steamships.*

**7369. Reward liberal.**]—THE LONDON MERCHANT (1837), 3 Hag. Adm. 394; 166 E. R. 451.

**7370.** ——.] — THE OCEAN WITCH (1853), Pritchard's Admiralty Dig. 3rd ed., Vol. II., p. 2093.

**7371.** ——.]—THE SECRET *v.* THE JUNIATA (1856), 8 L. T. 178.

**7372.** ——.]—THE ALFEN, No. 7052, *ante.*

**7373.** ——.]—THE LINGA (1862), 8 L. T. 178.

**7374.** ——.]—THE ENVOY (1888), cited in [1898] P. at p. 102; 67 L. J. P. at p. 14.

*Annotation:*—**Apld.** The Glengyle, [1898] P. 97.

**7375.** ——.]—After a collision between two steamships, outside Gibraltar Bay, one of them commenced to settle down. Her passengers & crew were transferred to the other vessel, & her distress being notified from the signal station, two steamers belonging to pltfs., of the value of £22,000 & £20,000 respectively, specially built, maintained, & equipped, with steam up night & day, for salvage purposes on the basis of no cure no pay, came out of the bay to the assistance of the sinking vessel. By lashing themselves one on each side of her they succeeded in keeping her up for two hours until they had beached her in Getares Bay, where the holes were temporarily patched by the divers carried by the salving steamers, & by means of their powerful pumping gear the water in the vessel was lessened until she floated, when she was towed to Gibraltar. The whole operations lasted three days, with the result, that by the admission of deft. owners of ship, freight, & cargo, this property, of the agreed value as salved, of £76,596, was saved from certain total loss:—*Held:* it was to the general interests of navigation that the ct. should by liberal rewards encourage the maintenance of powerful & efficient steamships kept in constant readiness to assist vessels in distress, &, considering this special element, & the condition in which the salved vessel was at the time together with the value of the salved & salving property, the skill displayed by the salvors, & the serious risk to their lives & property, the owners, masters, & crews of the two steamers were entitled, in equal moieties, to an award of £19,000.—THE GLENGYLE, [1898] P. 97; 67 L. J. P. 48; 78 L. T. 139; 46 W. R. 308; 14 T. L. R. 231; 42 Sol. Jo. 289; 8 Asp. M. L. C. 341, C. A.; *on appeal, sub nom.* GLENGYLE (OWNERS), CARGO & FREIGHT *v.* NEPTUNE SALVAGE CO., THE GLENGYLE, [1898] A. C. 519, H. L.

**7376.** —— **On ground of superior proficiency.**]—This is a case of salvage service performed by the *Monarch* steam packet; & it is the first case in which a compensation has been claimed in this ct. for services of a vessel of this peculiar character: I am, therefore, inclined to give as much encouragement as possible to similar exertions, on account of the great skill, & the great power of vessels of this description. It appears that the ship that was delivered from her perilous situation was . . . of considerable value . . . & though the actual service performed is

**PART XV. SECT. 10, SUB-SECT. 2.—B. (d).**

7376 1. *Reward liberal—On ground of superior proficiency.*]—Steamboats are entitled to a higher rate of salvage reward than other vessels by reason of the promptness with which they are enabled to render services.—*Re* THE LADY JOCELYN (1865), 2 Mad. 355.—**IND.**

*g.* —— *Steamship specially equipped for salvage service.*]—The ct., in distributing a sum awarded for salvage, will award very liberal remuneration to a steam vessel specially built for & devoted to salvage services, inasmuch as she is not employed in general trade for the conveyance of goods & passengers, & depends entirely on her chances for public encouragement & support.—THE MARYANNE (1863), 16 Ir. Jur. 60; 11 L. T. 85.—**IR.**

not to be measured by that value, yet it is not to be left entirely out of consideration; it affords the ct. an opportunity of doing that, which it cannot in many cases, giving an adequate remuneration (LORD STOWELL).—THE RAIKES (1824), 1 Hag. Adm. 246; 166 E. R. 88.

**7377.** ——— ———.]—THE SOPHIA (1840), 9 L. T. 811.

**7378.** ——— ———.]—THE GENERAL PALMER, No. 7425, *post*.

**7379.** ——— ———.]—THE LEDA (1855), 9 L. T. 811.

**7380.** ——— ———.]—THE SPIRIT OF THE AGE, No. 7727, *post*.

**7381.** ——— ———.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante*.

*(e) Services rendered to Passenger Vessels.*

**7382. Reward liberal.**]—Salvage by two smacks, being at anchor, that went out with enterprise & alacrity to a steamer 12 miles from shore, & towed her in, after having taken out & landed her passengers:—*Held:* in assistance to steam vessels with passengers, the reward should exceed a mere proportion of value in ordinary cases.

It is true that the ship & cargo are of no great value, but in cases of steam boats, that is not the consideration: they are a very peculiar species of vessels, making large profits, & they are not merely to pay for services, as if only carrying ballast: humanity requires that every possible encouragement in the way of liberal reward should be given in order to induce a prompt & efficient assistance to them, & the reward must be beyond a mere proportion of value in ordinary cases (SIR JOHN NICHOLL).—THE ARDINCAPLE (1834), 3 Hag. Adm. 151; 8 L. T. 154; 166 E. R. 362.

**7383.** ———.]—THE LONDON MERCHANT (1837), 3 Hag. Adm. 394; 166 E. R. 451.

**7384.** ———.]—(1) In estimating the amount of a salvage remuneration the ct. takes into consideration first, the value of the property saved, & next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded.

(2) The value of the salving ship will not substantially affect the amount of the reward, but the length of time to which she is exposed to additional risks is a material element for consideration.

(3) Having regard to the fact of the large number of passengers on the *Werra* . . . the reward to the salvors should be a liberal one (HANNEN, P.).—THE WERRA (1886), 12 P. D. 52; 56 L. J. P. 53; 56 L. T. 580; 35 W. R. 552; 6 Asp. M. L. C. 115.

*(f) Services rendered to British Vessels by Foreigners.*

**7385. Whether ground for more liberal reward.**]—(1) In cases of civil salvage, the Ct. of Admlty. does not recognise the rule of proportion, but awards as equitable remuneration for the service rendered, though such remuneration is more liberally allotted in cases of large value. Arbitrators having given one-fourth of the ship, viz. £600, the ct. awarded out of the cargo, of the value of £38,000, £1,000 for contingent losses, £1,500 salvage reward; & £200 for the master's particular expenses. Where the property is very large, a smaller proportion may afford adequate remuneration.

(2) In cases of large value, & where the service has been rendered with risk to the property of the owners, the ct., both in maritime & military salvage, allots a portion to the owners.

(3) The crew of another vessel on board the wrecked vessel, rather as passengers than as part of the crew, are entitled to some reward for salvage services.

(4) [I wish to act liberally], more especially in a case relating to the meritorious exertions of a foreign master & crew in the preservation of British interests (SIR CHRISTOPHER ROBINSON).—THE SALACIA (1829), 2 Hag. Adm. 262; 166 E. R. 240.

*Annotations:—As to* (1) **Consd.** Bird *v.* Gibb, The De Bay (1883), 8 App. Cas. 559; The City of Chester (1884), 9 P. D. 182. *As to* (3) **Reld.** The Vrede (1861), Lush. 322.

**7386.** ———.]—THE CATHERINA ANNA HELENA (1839), 8 L. T. 178.

**7387.** ———.]—THE MARIE (1841), 8 L. T. 178.

**7388.** ———.]—L'IMMACULATO (1842), 8 L. T. 178.

*(g) Services rendered to Government Vessels.*

**7389. Reward liberal.**]—THE MARQUIS OF HUNTLY, No. 7177, *ante*.

*(h) Services under Agreement for Remuneration Independently of Success.*

**7390. Reward on reduced scale.**]—(1) A steam trawler made an agreement with a disabled barque to tow her for a given sum to a named port. During the towage the weather became rapidly bad, & the foremast of the barque falling overboard, the wreckage increased the difficulty. Thereupon the master of the steam trawler declined to be bound by the agreed sum; but it was arranged that he should endeavour to tow, & do the best he could, at a remuneration to be settled on shore. The steam trawler proved of insufficient power to tow effectually, &, on the rope breaking the barque was nearly ashore. The trawler, however, made a successful effort to get hold of her again & towed her out of immediate danger; but, being short of coal, subsequently left the barque in a more dangerous position than when she picked her up, though with a second set of salvors in attendance who ultimately towed the barque into port. In an action of salvage against the owners of the barque:—*Held:* the steam trawler was not entitled to salvage, she having conferred no actual benefit on the salved property; but she was entitled to some payment for work done under the agreement to endeavour to tow.

(2) The second set of salvors consisted of two steam trawlers, on board of one of which the crew of the barque went, & there remained throughout the towage by the two trawlers, who, between them, made up a salvage crew to pump & steer the barque whilst towing her to a port of safety. The second set of salvors, by their counsel, claimed salvage remuneration on the high scale usual where the vessel is a derelict:—*Held:* as the crew of the barque were on board her at the time the salvage services commenced, & remained by her throughout the salvage operations, the barque could not, for the purpose of fixing the amount of the salvage reward, be treated as abandoned.

On that agreement [to tow to a definite place] I think I am justified in acting . . . the remuneration cannot be considered on what I may call the strict salvage scale, because one of the main reasons why salvage remuneration is so high is that it involves this, that unless some of the property is saved, no remuneration is obtainable at all (JEUNE, J.).—THE LEPANTO, [1892] P. 122; 66 L. T. 623; 7 Asp. M. L. C. 192.

*Annotation:—As to* (1) **Consd.** S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *C.* (*c*) *i., ii. & iii., & (d) i.*]

to pay less for such services than if they had been rendered by another vessel of less power, & taking a longer time to perform them, &, in all probability, not performing them so successfully.

These are some of the principles on which I consider myself entitled to hold that steamers are to be paid in proportion to the value of the services actually rendered. It is not the mere time occupied, it is not the mere labour, but the real value of the services rendered (DR. LUSHINGTON). —THE GENERAL PALMER (1844), 5 Notes of Cases, 159, n.

**7426.** —— ——.]—The two main ingredients in all salvage services are (*a*) the danger to which the property is exposed; (*b*) the danger encountered by the salvors in the rescue of that property, upon these two particulars depends the measure of the compensation to be awarded (DR. LUSHINGTON). — THE DUKE OF MANCHESTER (1846), 2 Wm. Rob. 470; 4 Notes of Cases, 575; 10 Jur. 863; 166 E. R. 833; *on appeal, sub nom.* SHERSBY *v.* HIBBERT, THE DUKE OF MANCHESTER (1847), 6 Moo. P. C. C. 90, P. C.

*Annotations:*—**Reld.** The Glory (1850), 14 Jur. 676; The Houthandel (1853), 1 Ecc. & Ad. 25; The Charles Adolphe (1856), Sw. 153; The Magdalen (1861), 31 L. J. P. M. & A. 22; The Yan-Yean (1883), 8 P. D. 147.

**7427.** —— ——.]—THE LIBRA (1848), 8 L. T. 612.

**7428.** —— ——.]—(1) The Ct. of Appeal is unwilling to interfere with the judicial discretion in cases of salvage, where the quantum awarded is alone the subject of appeal. Though there is no precedent for the reduction of an amount awarded, yet in principle there can be no difference between increasing & reducing such amounts, both being equally an interference with judicial discretion, & the amount must be reduced on appeal when the sum awarded is exorbitant or manifestly excessive. Therefore, where the judge of the Admlty. Ct., acting upon his own unassisted judgment, greatly overrated the value of the services rendered by the salvors:—*Held:* the amount of his award must be reduced.

(2) In estimating the value of salvage services, circumstances, among others, to be considered by the ct. are, the degree of danger to which the vessel was exposed, & from which she was rescued by the salvors, the mode in which the services of the salvors were applied, & the risk incurred by the salvors in rendering those services.

Salvage is a reward for benefits actually conferred, not for a service attempted to be rendered.—THE DUBLIN, ETC. (OWNERS) *v.* THE CHETAH (OWNERS), THE CHETAH (OWNERS) *v.* THE ANNIE GRANT (OWNERS), THE CHETAH (1868), L. R. 2 P. C. 205; 5 Moo. P. C. C. N. S. 278; 36 L. J. Adm. 1; 19 L. T. 621; 17 W. R. 233; 3 Mar. L. C. 177; 16 E. R. 520, P. C.

*Annotations:*—*As to* (1) **Consd.** The Amérique (1874), L. R. 6 P. C. 468. **Reld.** The Alice & The Princess Alice (1868), L. R. 2 P. C. 245; The Glenduror (1871), 24 L. T. 499. *As to* (2) **Reld.** Woburn Abbey (Owners) *v.* Superb & Conqueror (Owners), The Woburn Abbey (1869), 21 L. T. 707.

**7429.** —— ——.]—THE CITY OF CHESTER, No. 6900, *ante.*

**7430.** —— ——.]—THE WERRA, No. 7384, *ante.*

**7431.** —— ——.] — THE LINDFIELD, THE CHALLENGE & THE COLUMBIA (OWNERS) & THE LADY VITA & THE GRANVILLE (OWNERS) *v.* THE LINDFIELD (OWNERS) (1894), 10 T. L. R. 606, C. A.

**7432.** —— ——.]—THE PORT HUNTER, No. 7698, *post.*

**7433.** —— **Danger to salving vessel.**]—THE DUBLIN, ETC. (OWNERS) *v.* THE CHETAH (OWNERS), THE CHETAH (OWNERS) *v.* THE ANNIE GRANT (OWNERS), THE CHETAH, No. 7428, *ante.*

**7434.** —— ——.]—THE CITY OF CHESTER, No. 6900. *ante.*

**7435.** —— ——.]—THE PORT HUNTER, No. 7698, *post.*

ii. *Nature of Danger.*

**7436. Impending danger—Necessity for strict proof.**]—THE GIACOMO (1836), 3 Hag. Adm. 344; 164 E. R. 433.

**7437. Possibility of danger.**]—THE LEDA (1855), 8 L. T. 704.

**7438.** —— **Prospect of bad weather.**]—THE DENIA (1842), 8 L. T. 153.

**7439.** —— ——.]—The ct. in considering the value of a salvage service, regards not merely the actual state of things, but what they might probably have been at a particular time of year & in a certain state of weather.—THE MONKWEARMOUTH (1845), 9 Jur. 72.

**7440.** —— **Loss of captain.**]—Salvage awarded to owners, master & crew of a vessel whose mate had gone on board another vessel on the high seas, to supply the place of the master of the latter, who had been drowned—THE JANET MITCHELL (1856), Sw. 111; 166 E. R. 1046.

**7441.** —— **Want of fuel.**]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878. *ante.*

**7442. War as well as marine peril.**]—A Swedish vessel, laden with a cargo of munitions for the French Govt., was stopped in the English Channel by a German submarine & the crew were ordered to take to the boats. The submarine was preparing to sink the vessel, but submerged, presumably on sighting two of His Majesty's armed trawlers, & the crew of the vessel were left in their boats. They refused to return, & the two armed trawlers stood by the vessel & eventually towed her to Falmouth. For these services the officers & crews of the trawlers claimed salvage remuneration from the owners of the Swedish vessel & her cargo, but the claim against the cargo was withdrawn. It was argued for deft. shipowners that pltfs. were bound to salve a cargo of munitions for an allied Govt. as part of their public duty; that the saving of the ship was merely incidental to the saving of the cargo; that it was salvage from a war risk, namely, the risk of attack by enemy submarines, & not salvage from a marine risk; & that no salvage remuneration was recoverable:—*Held:* assuming pltfs. were under a duty to salve the cargo, they were under no duty to the Swedish shipowners to salve their vessel; the saving was not only from submarine attack but from maritime perils also; &, there being a salvage service, the whole risk to the salved vessel, war as well as marine risk, should be taken into account in estimating the value of the services.—THE CARRIE,

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**7433 i.** —— *Danger to salving vessel.*]—CANADIAN PACIFIC NAVIGATION CO. *v.* THE C. F. SARGENT (1893), 3 Exch. C. R. 332; 3 B. C. R. 5.—**CAN.**

**7433 ii.** —— ——.]—THE ALICE LYNE (CARGO & FREIGHT) (1881), 6 Nfld. L. R. 282.—**NFLD.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (c) ii.**

**7437 i.** *Possibility of danger.*]—In a suit to recover salvage remuneration, a contingent danger should not enter into the consideration of the ct. in awarding damages; the danger must be existing when the salvage service is rendered; & it is not enough that the place may become dangerous by subsequent circumstances.—THE WILLIAM WARD (1855), 8 Ir. Jur. 336.—**IR.**

**7437 ii.** ——.]—SOUTH AFRICAN RAILWAYS & HARBOURS *v.* THE MUANZA, [1923] E. D. L. 216.—**S. AF.**

[1917] P. 224; 86 L. J. P. 178; 119 L. T. 128; 33 T. L. R. 573; 14 Asp. M. L. C. 321.

**7443. Varying degrees of danger—Separate award against cargo & freight.**]—Where salvage services have been rendered in circumstances in which the danger to a perishable cargo & the freight is much more serious than that to the ship, a separate salvage award may be made against the cargo & freight.—THE VELOX, [1906] P. 263; 75 L. J. P. 81; 95 L. T. 271; 10 Asp. M. L. C. 277.

**7444. Possibility of assistance to be taken into account.**]—THE WERRA, No. 7384, *ante*.

iii. *Derelict.*

**7445. Enhancement of reward.**]—THE JANET COURT, No. 7416, *ante*.

(*d*) *Value of Property Salved.*

i. *In General.*

**7446. Importance as factor determining quantum of reward.**]—THE CLIFTON, No. 7087, *ante*.

**7447.** ——.]—THE TRAVELLER, No. 7399, *ante*.

**7448.** ——.]—THE AURORA (1842), 7 L. T. 165.

**7449.** ——.]—THE CAROLINE (1843), as reported in 8 L. T. 122.

**7450.** ——.]—THE EMMA, No. 7862, *post*.

**7451.** ——.]—THE RESULT (1856), 8 L. T. 705.

**7452.** ——.]—BIRD *v.* GIBB, THE DE BAY, No. 7587, *post*.

**7453.** ——.]—THE CITY OF CHESTER, No. 6900, *ante*.

**7454.** ——.]—THE WERRA, No. 7384, *ante*.

**7455.** ——.]—THE LINDFIELD, THE CHALLENGE & THE COLUMBIA (OWNERS) & THE LADY VITA & THE GRANVILLE (OWNERS) *v.* LINDFIELD (OWNERS), (1894), 10 T. L. R. 606, C. A.

**7456.** ——.]—THE PORT HUNTER, No. 7698, *post*.

**7457.** —— **High value ground for enhanced reward.**]—THE HECTOR, No. 7661, *post*.

**7458.** —— ——.]—THE CASPIAN (1853), 8 L. T. 154.

**7459.** —— ——.]—THE PERSIA (1853), 1 Ecc. & Ad. 166; 8 L. T. 154; 164 E. R. 97.

**7460.** —— ——.]—It must be remembered that, in a case of this description, the ct. gives a greater reward on account of the value of the property, because it is less felt by the owners. According to a principle laid down over & over again by my predecessors, something more should be given, because on many occasions salvors perform great services, where the property is small, without adequate remuneration (DR. LUSHINGTON).—THE EARL OF EGLINTON (1855), Sw. 7; 8 L. T. 178; 166 E. R. 989.

**7461.** —— ——.]—THE HIGHLANDER (1856), 8 L. T. 177.

**7462.** —— **High value no ground for reward disproportionate to services.**]—THE SALACIA, No. 7385, *ante*.

**7463.** —— ——.]—In awarding the amount for salvage services well performed, the ct. holds the shortness of the duration of such services as an element of meritoriousness; & where the amount of property salved is very large, the ct. will not take advantage of the extent of such amount further than to give a liberal reward, according to the meritoriousness of the services actually performed.—THE UNITED KINGDOM, THE HERCULES, THE RESOLUTE & THE RELIEF *v.* THE SYRIAN (1866), 14 L. T. 833; 2 Mar. L. C. 387.

*Annotation:*—**Expld.** The Amérique (1874), L. R. 6 P. C 468.

**7464.** —— ——.]—Although the *quantum* of remuneration to salvors is to some extent to be affected by the value of the property salved, it must not be raised to an amount altogether out of proportion to the services actually rendered. Where the ct. below had awarded an exceptional & excessive amount of remuneration solely from regard to the value of the property salved, their lordships, notwithstanding their general rule of non-interference upon a question of mere discretion, reduced the said amount by two-fifths.

The value of the property salved is, to some extent, to be treated as an ingredient in the calculation of the *quantum* of salvage remuneration (SIR JAMES COLVILLE).—THE AMÉRIQUE (1874), L. R. 6 P. C. 468; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. L. C. 460, P. C.

*Annotations:*—**Consd.** The Carranza (1885), 1 T. L. R. 379. **Refd.** Glengyle Cargo & Freight (Owners) *v.* Neptune Salvage Co., The Glengyle, [1898] A. C. 519.

**7465.** —— ——.]—The value salved is an element—an important element—in considering the amount to be awarded; but the ct. must not be induced by it to award a sum which is out of proportion to the services of the salvors (GORELL BARNES, J.).—THE GLENGYLE, [1898] P. 97; 67 L. J. P. 12; 78 L. T. 139; 14 T. L. R. 97; 8

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**PART XV. SECT. 10, SUB-SECT. 2.—C. (c) iii.**

**7445 i.** *Enhancement of reward.*]—THE REGINA (1871), Y. A. D. 107.—**CAN.**

**7445 ii.** ——.]—R. *v.* THE WINDSOR CASTLE, MEILICAN *v.* THE WINDSOR CASTLE, (1843) 2 Notes of Cases, Supp. liii.; 1 L. T. O. S. 553.—**IR.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (d) i.**

**7446 i.** *Importance as factor determining quantum of reward.*]—In estimating the value of the salvage service, the value of the property is to be considered.—*Re* THE ROYAL WILLIAM (1837), 1 S. V. A. R. 107.—**CAN.**

**7446 ii.** ——.]—*Re* THE ELECTRIC (1855), 5 L. C. R. 53.—**CAN.**

**7446 iii.** ——.]—THE SYLPHIDE (1873), Y. A. D. 137.—**CAN.**

**7446 iv.** ——.]—THE AUGUSTE ANDRE (1877), Y. A. D. 201.—**CAN.**

**7446 v.** ——.]—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**7446 vi.** ——.]—THE GLENIFFER (1892), 3 Exch. C. R. 57.—**CAN.**

**7446 vii.** ——.]—PICKFORD & BLACK S.S. CO. *v.* THE FOSTER RICE (1904), 9 Exch. C. R. 6.—**CAN.**

**7446 viii.** ——.]—BRISTER *v.* THE BJORGVIU (1913), 15 Exch. C. R. 105.—**CAN.**

**7446 ix.** ——.]—In finding the value of salvage services the value of the vessel salved, while important, is not decisive.—JOHNSON & MACKAY *v.* THE CHARLES S. NEFF (1918), 18 Exch. C. R. 168; 44 D. L. R. 148.—**CAN.**

**7446 x.** ——.]—*Re* THE LADY JOCELYN (1865), 2 Mad. 355.—**IND.**

**7446 xi.** ——.]—In fixing a proportion of the value for salvage reward, the Ct. of Admlty. is in the habit of giving a smaller proportion where the property is large, & a higher proportion where the property is small; & for the obvious reason, that where the property is of small value, a small proportion would not hold out a sufficient encouragement, whereas in cases of considerable value, a small proportion would afford an adequate remuneration.—THE MARY STENHOUSE (1862), 15 Ir. Jur. 58.—**IR.**

**7446 xii.** ——.]—THE WILLIAM TUCKER (1856), 4 Nfld. L. R. 99.—**NFLD.**

**7446 xiii.** ——.]—In arriving at the amount of salvage that should be awarded to the salvors in a salvage case the ct. ought to consider the value of the property saved.—ADRERE S.S. CO., LTD. *v.* COLONIAL SAILING SHIP CO., LTD. (No. 2) (1906), 26 N. Z. L. R. 259.—**N.Z.**

**7446 xiv.** ——.]—THE VULCAN (OWNERS) *v.* THE BERLIN (OWNERS) (1882), 9 R. (Ct. of Sess.) 1057; 19 Sc. L. R. 790.—**SCOT.**

**7457 i.** —— *High value ground for enhanced reward.*]—Each case of salvage must rest on its own merits, & a very large value may authorise a large reward in absence of any large amount of danger, labour, or skill in the service, which may also receive a large reward, where the value is not large.—THE BURNS (1869), 21 L. T. 232; 3 I. L. T. Jo. 483.—**IR.**

**7462 i.** —— *High value no ground for reward disproportionate to services.*]—In awarding the amount of salvage service well performed, the ct. holds the shortness of the duration of such services as an element of meritoriousness, & when the amount of property salved is very large the ct. will not take advantage of the extent of such amount further than to give a liberal reward according to the meritoriousness of the services actually performed.—THE SEVERN (1875), 6 Nfld. L. R. 103.—**NFLD.**

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *C.* (*d*) *i. & ii.*, (*e*) *i., ii. & iii., & (f).*]

Asp. M. L. C. 341; *on appeal*, [1898] P. at p. 104, C. A.; *sub nom.* GLENGYLE (OWNERS), CARGO & FREIGHT *v.* NEPTUNE SALVAGE CO., THE GLENGYLE, [1898] A. C. 519, H. L.

**7466.** —— ——.]—THE SUEVIC, No. 7203, *ante.*

**7467.** —— **Small value ground for proportionately high reward.**]—THE MARY ANN, No. 7355, *ante.*

**7468.** —— ——.]—In causes of salvage the ct. gives a larger proportion of the value of the property saved where it is small than where it is large. In estimating salvage reward, the character of the services rendered is the main consideration; large value of property is considered chiefly as furnishing an adequate fund for the fit remuneration of the services.

In causes of salvage involving questions of nautical difficulty, application should be made to the ct. for the assistance of Trinity Masters at the hearing.—THE JAMES DIXON (1860), 2 L. T. 696.

**7469.** —— ——.]—THE CITY OF CHESTER, No. 6900, *ante.*

ii. *Determination of Value.*

**7470. Whether owner's statement conclusive.**]—The value stated by the owners of salved property in proceedings before comrs. is not conclusive upon the salvor, even though assented to at the time.—THE HOPE (1866), 14 W. R. 467.

**7471. Inclusion of seamen's wages.**] — THE ALEXANDER BRANDT (1841), 10 L. T. 913.

**7472. Inclusion of freight.**]—THE ANN (1847), 6 L. T. 868.

**7473.** ——.]—Defts.' vessel was salved whilst on her way in ballast to the Tyne to earn freight under a charter:—*Held:* for the purpose of making an award, the amount of freight, which had been subsequently earned, should be taken into account in estimating the value of the property salved.—THE KAFFIR PRINCE, [1917] P. 26; 31 T. L. R. 296.

**7474. Validity of appraisement—Appraisement at market value—Divergence between market value & value to owner.**]—The principle adopted in *The Harmonides* (1903), P. 1, in the case of a damage action, is applicable to a salvage action, so that if, in the absence of agreement, or of the acceptance of the affidavit of value filed by defts., an appraisement is applied for, the value to her owners in her damaged condition on the completion of the salvage service is the basis on which the appraisement of the salved vessel is to be made, & under ordinary circumstances such an appraisement is conclusive.—THE HOHENZOLLERN, [1906] P. 339; 76 L. J. P. 17; 95 L. T. 585; 22 T. L. R. 778; 10 Asp. M. L. C. 296.

*Annotation:*—**Mentd.** The Consul Olsson, [1920] P. 43.

**7475.** —— —— ——.] — (1) The Admlty. Marshal appraised a salved steamship at the sum of £369,841. On an application to vary or set aside the appraisement on the ground that the ship had been appraised at her market value instead of at her value to her owners, which, owing to the fact that she had been chartered to time charterers at a low rate of hire in 1914 for a period which did not expire until 1930, was less than £160,000:—*Held:* for purposes of appraisement of a salved vessel contractual arrangements between the owners & charterers are immaterial, & the Marshal's valuation was properly arrived at & was based on the right principle.

(2) The general rule is that an appraisement by the Marshal is conclusive, & it is only in very exceptional cases that an application to vary or set aside the appraisement will be allowed.—THE SAN ONOFRE, [1917] P. 96; 86 L. J. P. 103; 116 L. T. 800; 14 Asp. M. L. C. 74.

*Annotation:*—**Refd.** The Consul Olsson, [1920] P. 43.

*Compare, also*, ADMIRALTY, Vol. I., p. 203, No. 1229.

**7476.** ——.]—THE SAN ONOFRE, No. 7475, *ante.*

**7477. Conclusiveness of appraisement.**] — An appraisement made by order of the ct. is binding on both parties. Appeal by the owner to have the property sold & the value so determined, rejected. —THE R. M. MILLS (1860), 3 L. T. 513; 1 Mar. L. C. 5.

*Annotation:*—**Refd.** The San Onofre, [1917] P. 96.

*See, also*, ADMIRALTY, Vol. I., p. 168, Nos. 779, 780.

**7478. How affidavit of value made—By person having actual knowledge of value.**]—The affidavit of value in a salvage action ought not to be made on information & belief, but ought to be made by a person having actual knowledge of the value.—THE ORANGEMOOR (1915), 31 T. L. R. 190.

**7479.** —— **Whether on information & belief.**]—THE ORANGEMOOR, No. 7478, *ante.*

(*e*) *Skill and Knowledge.*

i. *In General.*

**7480. Importance as factor determining quantum of reward.**]—THE CLIFTON, No. 7087, *ante.*

**7481.** ——.]—THE TRAVELLER, No. 7399, *ante.*

**7482.** ——.]—THE LOCKWOODS, No. 7484, *post.*

**7483.** —— **Ground for more liberal reward.**]—Ordinary labour, as applied to a salvage service, implies that labour which may be performed by an individual not possessed of nautical skill, but of mere strength of arm & limb. Such labour when united with nautical skill must be estimated by a somewhat higher value than mere ordinary labour.—THE DUKE OF CLARENCE (1842), 1 WM. ROB. 346; 8 L. T. 153; 166 E. R. 602.

ii. *Standard of Skill or Knowledge.*

**7484. General rule.**]—Success is the main ground upon which a salvage reward is given, & that

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**PART XV. SECT. 10, SUB-SECT. 2.—C. (d) ii.**

l. *Method of executing appraisement.*]—THE REGINA (1871), Y. A. D. 107.—**CAN.**

m. *Matters considered.*]—In assessing value of ship, besides annual depreciation, original construction, & subsequent care, as well as type of vessel, must be considered. Settlements made with other parties not considered.—DUNSMUIR *v.* THE OTTER (1909), 12 Exch. C. R. 258; 18 B. C. R. 435; 10 W. L. R. 380.—**CAN.**

**7477** i. *Conclusiveness of appraisement.*]—Where an appraisement is ordered by the ct. at the instance of the salvors, with a view to a decree, & has been duly made by reliable parties, the ct. will not allow it to be questioned.—THE S. B. HUME (1879), Y. A. D. 228.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (e) i.**

**7480** i. *Importance as factor determining quantum of reward.*]—BINGLE *v.* THE QUEEN OF ENGLAND (1862), 1 N. S. W. S. C. R. (Eq.) 47.—**AUS.**

**7480** ii. ——.]—*Re* THE PALMYRA (1859), 10 L. C. R. 144; 2 S. V. A. R. 4.—**CAN.**

**7480** iii. ——.]—CANADIAN PACIFIC NAVIGATION CO. *v.* THE C. F. SARGENT (1893), 3 Exch. C. R. 332; 3 B. C. R. 5.—**CAN.**

**7480** iv. ——.] — *Re* THE LADY JOCELYN (1865), 2 Mad. 355.—**IND.**

**7480** v. ——.]—In assessing the award for salvage the ct. will take into consideration the skill with which the work was performed.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

**7480** vi. ——.]—THE ROTHSAY CASTLE (1864), 16 Ir. Jur. 360.—**IR.**

**7480** vii. ——.]—THE BURNS (1869), 21 L. T. 232; 3 I. L. T. Jo. 483.—**IR.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (e) ii.**

**7484** i. *General rule.*]—Where salvage services, while without the specially meritorious features of saving human life or danger to the salving & crew,

reward always bears a proportion to the skill & knowledge required & shown, the degree of skill & knowledge expected being according to the station in life of the salvors. Therefore, where the orders given by a lieutenant in the navy in command of a revenue cutter, in rendering assistance to a vessel in distress, were held to be without a knowledge of the danger, or without duly weighing the consequences of such orders, & the measures adopted were unsuccessful & injurious, the ct. pronounced against the claim of salvage.—THE LOCKWOODS (1845), 9 Jur. 1017.

*Annotation:*—**Refd.** The Cape Packet (1848), 6 Notes of Cases, 565.

**7485.** ——.]—THE HOUTHANDEL, No. 6931, *ante.*

**7486.** ——.]—(1) Two smacks & a steamer having for some days rendered salvage services to a derelict vessel, bottom upwards, at length, owing to the state of the weather, lost sight of her. After some ineffectual attempts to find her, the steamer went away, but the smacks continued the search & again fell in with the derelict, & while a man from one of them was upon her, & another in a boat alongside, two powerful govt. steamers came up & took possession:—*Held:* they were entitled to do so, but all the first salvors had nevertheless a right to salvage remuneration. The value of ship & cargo being £2,400, the ct. awarded the first salvors £140, besides £210 expenses, incurred by them in obtaining towing hawsers & other requisites for the service.

(2) In cases of derelict, the High Ct. of Admlty., abandoning the old rule as to a moiety, gives only such a proportion of the value as, under all the circumstances of the case, the ct. deems right & just.

(3) In salvage causes the ct., when it has the assistance of Trinity Masters, will not be guided by the opinions of witnesses skilled in nautical matters.

(4) In performing salvage services, bad faith, an intention not to do the whole duty, or to protract, from improper motives, the duration of the service, are acts of wilful misconduct which forfeit all right to salvage.

(5) Salvors must possess skill & knowledge sufficient to enable them duly to perform the duties which they undertake.

(6) Error not wilful in performing a salvage service operates only in diminution of the amount of remuneration.

(7) A second set of salvors having discovered a derelict vessel, bottom upwards, at sea, near the Eddystone Lighthouse, succeeded, after great exertions during two days & a half, in towing her into Falmouth. They then, in spite of repeated remonstrances, carried on for a month a series of unskilful attempts to right the vessel, in consequence of which attempts she was much strained & injured. Value of ship & cargo £2,400. The ct. awarded £600.—THE MAGDALEN (1861), 31 L. J. P. M. & A. 22; 5 L. T. 807; 1 Mar. L. C. 189.

iii. *Effect of Want of Skill or Knowledge.*

**7487. General rule.**]—Salvors, not possessed of adequate knowledge, have a claim to indulgence only where more efficient persons are not on the spot.

Claims of salvors, fishermen, pronounced against, for erroneous & improper conduct. Persons who assume the character of salvors, when more competent persons are at hand, are entitled to no indulgence.—THE DYGDEN (1841), 1 Notes of Cases, 115.

**7488. On amount of award.**]—THE EUGENIE (1844), 3 Notes of Cases, 430.

**7489. —— Diminution proportionate to amount of ignorance displayed.**]—THE CAPE PACKET, No. 7501, *post.*

**7490. —— Bringing derelict into unsafe harbour.**]—A derelict ship was fallen in with by the *G.* steamer, & towed to Bridlington Bay, but received considerable damage by taking the ground as she was going into the harbour:—*Held:* the salvors were wrong in attempting to carry a vessel of such size into the harbour, & something must be deducted on that score from the salvage they would otherwise have received.

I must now dispose of the case of these foreign seamen [who were passengers], & I decree that they shall share the same as able bodied seamen, with the exception of the foreign master, who shall take a double share (DR. LUSHINGTON).—THE PERLA (1857), Sw. 230; 8 L. T. 612; 166 E. R. 1111.

*Annotation:*—**Refd.** The Yan-Yean (1883), 8 P. D. 147.

**7491.** ——.]—THE ATLAS, No. 6912, *ante.*

**7492.** ——.]—THE ELIZA BENCKE (1863), 8 L. T. 402; 1 Mar. L. C. 341.

**7493.** ——.]—In an action of salvage, the owners of the salved vessel in their defence admitted that some salvage services had been rendered, but counterclaimed for injuries sustained by their vessel through a collision caused by the alleged negligent & bad navigation of the salving vessel, & they asked, not for forfeiture of the reward, but for an allowance in account, the amount of the damages to be ascertained by a reference to the registrar & merchants. At the hearing of the action it was stated by defts. that the amount of the damage was about £400:—*Held:* such want of skill in manœuvring the salving vessel had been proved as went to diminish the award of salvage, & the ct. deducted £400 damages from the sum of £800, intended to have been given to the salvors, & made an award of £400 with costs.—THE DWINA, [1892] P. 58; 61 L. J. P. 71; 66 L. T. 862; 7 Asp. M. L. C. 173.

**7494. Forfeiture of right to reward—Ship broken in two through mismanagement.**]—THE DUCHESS OF KENT (1853), 8 L. T. 30.

**7495. —— Damage due to ignorance of locality.**]—In a cause of salvage, the owners pleaded want of skill & care on the part of the salvors, the officers & crew of one of her Majesty's ships, & that the damages consequent thereon exceeded the value of the services:—*Held:* the facts amounting to mere ignorance of the coast, that ignorance of the locality on the part of salving ships, officers, & crew will not bar the salvors of salvage.

Continuous services rendered to the property on shore, as well as on board, salvage services.—THE ROSALIE (1853), 1 Ecc. & Ad. 188; 18 Jur. 337; 164 E. R. 109.

**Effect of negligence.**]—*See* Sub-sect. 2, C. (*g*), *post.*

(*f*) *Conduct of Salvors.*

*See* Sub-sect. 2, D., *post.*

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were as skilfully conducted as the nature of the case permitted, & valuable:—*Held:* as such they were entitled to corresponding recognition, even though they were of short duration.—DUNSMUIR *v.* THE OTTER (1909), 18 B. C. R. 435; 12 Exch. C. R. 258; 10 W. L. R. 380.—**CAN.**

**7484** ii. ——.]—When a vessel goes to the assistance of another vessel in peril the law does not require the service of the salving vessel to be done in the most seamanlike manner possible but only that what she does should be done in a seamanlike manner.—THE ARRAGONIA *v.* THE HUPEH (1907), 2 Hong Kong L. R. 201.—**HONG KONG.**

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *C.* (*g*), (*h*), (*i*) *i. & ii.*, (*j*) & (*k*).]

(*g*) *Negligence.*

**7496. Effect of negligence—Forfeiture of right to reward.**]—THE LOCKWOODS, No. 7484, *ante.*

**7497.** —— ——.]—THE MEDINA (*circa* 1827), cited 10 Jur. at p. 864.

*Annotation:*—**Apld.** The Duke of Manchester (1846), 2 Wm. Rob. 470.

**7498.** —— ——.]—Acts of negligence, unskilfulness, & great misconduct on the part of salvors will, if such acts result in damage not clearly appearing to be less than the damage which would have ensued if no attempt to salve the property had been made, work a forfeiture of any salvage remuneration otherwise due.

The master & crew of the *Y.*, a vessel in distress, got on board the *K.*, a steamer standing by her. The mate & two of the crew of the *K.* afterwards went on board the *Y.* but refused to take her master back with them. The mate subsequently also refused the services of a steam tug, & finally, having from want of local knowledge anchored the *Y.* in an insecure place, she began to drift, was forsaken by the salvors, & sank. She was subsequently raised by her owners at considerable expense. In an action for salvage the owners of the *Y.* denied that a reward was due, & counterclaimed for damages:—*Held:* (1) the mate was guilty of misconduct in refusing to take the master of the *Y.* on board of her, & to engage the services of the tug; (2) if the *Y.* had been ultimately saved such misconduct would have worked a partial forfeiture of the reward only; (3) as the loss arising from the misconduct of the salvors was probably equal to that from which the *Y.* was first rescued, no salvage reward was due.—THE YAN-YEAN (1883), 8 P. D. 147; 52 L. J. P. 67; 49 L. T. 187; 31 W. R. 950; 5 Asp. M. L. C. 135.

*Annotation:*—*As to* (3) **Reld.** The Camellia (1883), 9 P. D. 27.

**7499.** —— ——.]—SHERSBY *v.* HIBBERT, THE DUKE OF MANCHESTER, No. 7537, *post.*

**7500.** —— **Diminution of reward.**] — THE MEDINA (*circa* 1827), cited 10 Jur. at p. 864.

*Annotation:*—**Apld.** The Duke of Manchester (1846), 2 Wm. Rob. 470.

**7501.** —— —— **Proportionately to amount of negligence displayed.**]—Claim for salvage partially disallowed, upon the ground that the salvors, in the performance of the salvage service had displayed great want of skill, & had brought the vessel into danger & difficulty thereby:—*Semble:* deduction in the amount of the salvage award is to be measured, not by the amount of damage sustained, but in proportion to the *quantum* of negligence or ignorance displayed by the salvors.—THE CAPE PACKET (1848), 3 Wm. Rob. 122; 6 Notes of Cases, 565; 8 L. T. 582.

——.]—*See, also,* Nos. 7564, 7565, *post.*

(*h*) *Value of Salving Property.*

**7502. Importance as factor determining quantum of reward.**]—THE RAIKES, No. 7376, *ante.*

**7503.** ——.]—THE ALEXANDER BRANDT (1841) 8 L. T. 612.

**7504.** ——.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante.*

**7505.** ——.]—THE CITY OF CHESTER, No. 6900 *ante.*

**7506.** ——.]—THE WERRA, No. 7384, *ante.*

**7507.** ——.]—THE PORT HUNTER, No. 7698 *post.*

**7508.** —— **Reward not limited to value of property at risk.**]—BLIGH *v.* SIMPSON, THE FUSILIER, No. 7205, *ante.*

(*i*) *Risk to Salving Property.*

i. *In General.*

**7509. Importance as factor determining quantum of reward.**]—THE TRAVELLER, No. 7399, *ante.*

**7510.** ——.]—Services rendered by a vessel sailing in company with another, not entitled to a large compensation.

Where vessels proceed on the same voyage leaving port nearly together, & where assistance is rendered by one to the other without any great deviation from the proper course, the amount of salvage ought not to be very considerable (Dr LUSHINGTON).—THE GANGES (1841), 1 Notes of Cases, 87.

**7511.** ——.]—THE WERRA, No. 7384, *ante.*

ii. *Particular Risks.*

**7512. Possibility of deviation vitiating insurance.**—THE MEDORA (1839), 6 L. T. 479.

**7513.** ——.]—(1) Where the master of a vessel undertakes the responsibility of deviating from his course, & so imperilling his insurance, for the purpose of rendering salvage service, he is entitled to considerable reward.

(2) The fact that a considerable sum has been awarded to the owners of the salving vessel, does not diminish the amount to which the master & crew are entitled.—THE ALETHEIA (1864), 13 W. R. 279.

**7514.** ——.]—(1) The Judicial Committee is always reluctant to review cases of salvage, which involve the exercise of the discretion of the judge of the ct. below, but, being a final ct. of appeal will, if the justice of the case requires, increase the amount.

(2) The question how far a deviation in a vessel's course, in the voidance of a policy of insurance is not satisfactorily settled, though the risk of such may operate on the judge's mind in determining the amount to be awarded for salvage services.

(3) A moiety of the value of the vessel & cargo in a case of the salvage of a derelict, was formerly the amount awarded, but the maritime cts. now give only such amount as is fit & proper with reference to all the circumstances of the case

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**PART XV. SECT. 10, SUB-SECT. 2.—C. (g).**

**7496 i.** *Effect of negligence—Forfeiture of right to reward.*]—The right to salvage may be wholly or partially forfeited by gross negligence on the part of the salvors.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

**7496 ii.** ——.]—Gross negligence of salvors may cause a forfeiture of all claim.—THE J. L. MAYO (1884), 7 Nfld. L. R. 30.—**NFLD.**

**7500 i.** —— *Diminution of reward.*]—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (h).**

**7502 i.** *Importance as factor determining quantum of reward.*]—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (i) i.**

**7509 i.** *Importance as factor determining quantum of reward.*]—BINGLE *v.* THE QUEEN OF ENGLAND (1862), 1 N. S. W. S. C. R. (Eq.) 47.—**AUS.**

**7509 ii.** ——.]—Any risk which the salving vessel actually runs in going to the assistance of another vessel in peril is a risk properly to be taken into account in estimating the salvage award.—THE ARRAGONIA *v.* THE HUPEH (1907), 2 Hong Kong L. R. 201.—**HONG KONG.**

**7509 iii.** ——.]—CHU TAK LOONG & Co. *v.* BUTTERFIELD & SWIRE & CHINA NAVIGATION CO., LTD. (1908), Hong Kong L. R. 1.—**HONG KONG.**

**7509 iv.** ——.] — THE WILLIAM TUCKER (1856), 4 Nfld. L. R. 99.—**NFLD.**

**7509 v.** ——.] — THE VULCAN (OWNERS) *v.* THE BERLIN (OWNERS) (1882), 9 R. (Ct. of Sess). 1057; 19 Sc. L. R. 790.—**SCOT.**

having regard especially to the value of the property salved.

In a case where the vessel was derelict, & her value, with the cargo on board, exceeded £30,000, was salved by two vessels, one of which, with her cargo on board, was worth £150,000, & the other above £3,000, & a tender of £2,000 for salvage services had been refused, which sum was awarded by the Vice-Admlty. Ct.; the Judicial Committee, looking at the respective values, & taking into consideration the additional risk to the salvors from having to make a deviation in their course, held that sum insufficient, & increased the amount of salvage by £1,000.—KIRBY *v.* SCINDIA (OWNERS), THE SCINDIA (1866), as reported in L. R. 1 P. C. 241, 257; 4 Moo. P. C. C. N. S. 84, 106; 16 E. R. 248, P. C.

*Annotations:*—*As to* (1) **Folld.** Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589. **Refd.** The Chetah (1868), 5 Moo. P. C. C. N. S. 278; The Amérique (1874), L. R. 6 P. C. 468; Allen Thomas (Owners) *v.* Gow (1886), 12 App. Cas. 118. *Generally*, **Refd.** The Clan Sutherland, [1918] P. 332; The Kenora, [1921] P. 90.

**7515.** ——.]—In estimating salvage reward to the owners of the salving vessel, the circumstances that the salving vessel deviating from her course might have initiated the insurance, the possibility of being answerable to the owners of the cargo for such deviation, the exposure to danger of the salving ship in rendering salvage services, are elements to be taken into consideration.—CARMICHAEL *v.* BRODIE, THE SIR RALPH ABERCROMBIE (1867), L. R. 1 P. C. 454; 4 Moo. P. C. C. N. S. 374; 16 E. R. 358, P. C.

*Annotation:*—**Refd.** Scaramanga *v.* Stamp (1880), 5 C. P. D. 295.

**7516. Possibility of incurring penalty—Deviation by steamer carrying mails.**]—Now, a master who commands a ship like the *Tagus*, incurs very great responsibility when he takes upon himself to employ his ship, laden with passengers & mails, in any service than that in which she is engaged. . . . I shall give £400 to the master, for I think that the master, on all these occasions, is a person that ought to be greatly encouraged; because it is upon him that entirely rests the whole responsibility of employing the ship. He has no right to deviate from the usual employment of the ship, except in strong cases of urgent necessity (DR. LUSHINGTON).—THE MARTIN LUTHER (1857), Sw. 287; 166 E. R. 1141.

**7517.** —— **Contractual obligation to owners of cargo.**]—CARMICHAEL *v.* BRODIE, THE SIR RALPH ABERCROMBIE, No. 7515, *ante*.

**7518.** —— ——.]—The Ct. of Appeal will alter an award of salvage made by the ct. below, where there is reason to believe that the court below has not taken into consideration the circumstance that rendering a salvage service to property alone constitutes a deviation in point of law, however small the deviation may be in point of fact.

By deviating from her course she was causing delay & danger to her cargo (BRETT, L.J.).—THE FARNLEY HALL (1881), 46 L. T. 216; 4 Asp. M. L. C. 499, C. A.

**7519. Possibility of incurring censure—Captain under orders to return by particular time.**]—(1) In civil salvage, for mere assistance to ships in distress, there is no fixed proportion applying in all cases—there is a discretion (SIR JOHN NICHOLL).

(2) In derelicts, indeed, there are in practice some limits; where an owner appears, there is, I believe, no instance in which more than half, though seldom less than one third, is given (SIR JOHN NICHOLL).

(3) The steam vessel was on a service requiring dispatch; she was under positive orders to return by a certain time, & it was not until after much consideration & doubt that Captain Evans takes upon himself the responsibility, & sends an excuse to the commodore. But if any untoward accident had happened, this conduct might have deeply involved the captain, & perhaps also his officers; & I think, therefore, that the incurring such a responsibility was equal to a personal risk of life (SIR JOHN NICHOLL).—THE EWELL GROVE (1835), 3 Hag. Adm. 209; 166 E. R. 384.

**7520. Possibility of incurring disciplinary action—Master under instructions not to salve property.**]—THE SILESIA, No. 7274, *ante*.

### (*j*) *Length of Salvage Operation.*

**7521. How far length of services regarded.**]—THE CLIFTON, No. 7087, *ante*.

**7522.** ——.]—THE INDUSTRY, No. 7021, *ante*.

**7523.** ——.]—THE TRAVELLER, No. 7399, *ante*.

**7524.** ——.]—THE GENERAL PALMER, No. 7425, *ante*.

**7525.** ——.]—THE GIPSY (1853), 9 L. T. 811.

**7526.** ——.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante*.

**7527.** ——.]—THE NORTHUMBERLAND *v.* THE ANDALUSIA (1865), 12 L. T. 584; 2 Mar. L. C. 215.

**7528.** ——.]—THE WERRA, No. 7384, *ante*.

**7529.** ——.]—THE STRATHGARRY, No. 7244, *ante*.

**7530.** —— **Time spent in reaching distressed vessel.**]—THE GRACES, No. 7231, *ante*.

**7531.** —— **Whether ground for extra remuneration.**]—THE WAVERLEY, No. 7249, *ante*.

**7532.** —— **Lying alongside salvaged vessel after taking her to anchorage—In readiness to render further assistance.**] — Where a steam tug is engaged to render assistance to a ship aground in the night time, & succeeds in getting her off, & takes her to a safe anchorage for the night, & lies alongside of her till morning, the salvage service does not end on the ship being anchored, but the steam tug is entitled to reward for the time she lies alongside the ship ready to render further assistance if required.—THE PHILOTAXE (1873), 29 L. T. 515; 2 Asp. M. L. C. 141.

### (*k*) *Amount of Labour Involved.*

**7533. How far amount of labour involved regarded.**]—THE RELIANCE, No. 7400, *ante*.

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**PART XV. SECT. 10, SUB-SECT. 2.—C. (j).**

**7521 i.** *How far length of services regarded.*]—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**7521 ii.** ——.] — *Re* THE LADY JOCELYN (1865), 2 Mad. 355.—**IND.**

**7521 iii.** ——.]—The shortness of salvage services may often be taken as showing extraordinary skill & labour.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

**7521 iv.** ——.] — THE WILLIAM TUCKER (1856), 4 Nfld. L. R. 99.—**NFLD.**

**7521 v.** ——.] — In awarding the amount of salvage service well performed the ct. holds the shortness of the duration of such services as an element of meritoriousness.—THE SEVERN (1875), 6 Nfld. L. R. 103.—**NFLD.**

**7521 vi.** ——.] — THE VULCAN (OWNERS) *v.* THE BERLIN (OWNERS) (1882), 9 R. (Ct. of Sess.) 1057; 19 Sc. L. R. 790.—**SCOT.**

**PART XV. SECT. 10, SUB-SECT. 2.—C. (k).**

**7533 i.** *How far amount of labour involved regarded.*]—*Re* ROY & THE ROYAL MIDDY (1862), 12 C. L. R. 309; 2 S. V. A. R. 82.—**CAN.**

**7533 ii.** ——.]—THE MARTHA (1880), Y. A. D. 247.—**CAN.**

**7533 iii.** ——.]—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**7533 iv.** ——.]—*Re* THE LADY JOCELYN (1865), 2 Mad. 355.—**IND.**

**7533 v.** ——.]—THE BURNS (1869), 21 L. T. 232; 3 I. L. T. Jo. 483.—**IR.**

**7533 vi.** ——.] — THE VULCAN (OWNERS) *v.* THE BERLIN (OWNERS) (1882), 9 R. (Ct. of Sess.) 1057; 19 Sc. L. R. 790.—**SCOT.**

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *C.* (*k*) & (*l*), & *D.* (*a*), (*b*) *i.* & *ii.*, (*c*) *i.* & *ii.*, & (*d*).]

**7534.** ——.]—THE GENERAL PALMER, No. 7425, *ante*.

**How far quantum meruit principle regarded.**]—*See* Sub-sect. 2, B. (*c*), *ante*.

(*l*) *Damage or Loss to Salvors.*

*See* Sub-sect. 2, E., *post*.

*D. Conduct of Salvors.*

(*a*) *In General.*

**7535. Effect of misconduct — Forfeiture or diminution of reward.**]—THE SARAH (1845), as reported in 8 L. T. 582.

*Annotation*:—**Mentd.** The Victoria (1848), 6 Notes of Cases, 176.

**7536.** —— ——.]—THE MEDINA (*circa* 1812), cited in 2 Wm. Rob. at p. 477; 166 E. R. 836.

*Annotation*:—**Apld.** The Duke of Manchester (1846), 2 Wm. Rob. 470.

**7537.** —— ——.]—Where a steam tug, after rendering a salvage service to a sailing vessel in the charge of a pilot, was employed to tow the salved vessel to the Downs, &, whilst so towed, the vessel got on shore:—*Held*: the tug had no claim for salvage; in such a case, the master of the tug is not released from all responsibility respecting the direction of the ship towed; but it is the joint duty of the pilot & the master of the tug to do their utmost for the safety of the ship.

However much the licenced pilot may misconduct himself, if the master of the tug, through gross negligence, omits to do what was in his power to keep the ship in a proper direction that she may reach a place of safety, & thereby the ship is lost, or is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited. . . . The very notion of salving a ship supposes that the salvor, instead of merely executing orders, shall perform some extraordinary service, & exert himself to the utmost for the safety of life & property (LORD CAMPBELL).

An attempt was made to separate the towing of the ship from the operation of getting her off the sands, but . . . they cannot be severed (LORD CAMPBELL).—SHERSBY *v.* HIBBERT, THE DUKE OF MANCHESTER (1847), 6 Moo. P. C. C. 90; 5 Notes of Cases, 470; 13 E. R. 618, P. C.

*Annotations*:—**Consd.** The Glory (1850), 14 Jur. 676. **Distd.** The Houthandel (1853), 1 Ecc. & Ad. 25. **Consd.** The Charles Adolphe (1856), Sw. 153; The Magdalen (1861), 31 L. J. P. M. & A. 22. **Apld.** The Yan-Yean (1883), 8 P. D. 147.

**7538.** —— ——.]—THE CHARLES ADOLPHE, No. 6952, *ante*.

**7539. Liability of owners for negligence of salvors.**]—The policies of insurance upon a steam-vessel, the T., & the bill of lading provided that she might "assist & tow vessels in all situations," & in the course of the voyage the *T.*, in attempting to render salvage services to the *S.* damaged the latter so that she sank:—*Held*: the owners of the *T.* were liable for the damage to the *S.* *Semble*: even if there had been no such provision in the policies & bills of lading, the master would have been acting within the scope of his authority in rendering the salvage services, & therefore his owners would be responsible for his negligence in performing them.—THE THETIS (1869), L. R. 2 A. & E. 365; 38 L. J. Adm. 42; 22 L. T. 276; 3 Mar. L. C. 357.

*Annotations*:—**Reld.** The C. S. Butler, The Baltic (1874), 30 L. T. 475. **Mentd.** Bayley *v.* M. S. & L. Ry. (1872), L. R. 7 C. P. 415; The Charkieh (1873), L. R. 4 A. & E. 59.

(*b*) *When Involving Forfeiture of Right to Reward.*

i. *In General.*

**7540. Misconduct wilful.**] — THE MAGDALEN, No. 7486, *ante*.

**7541.** —— **Or criminal.**]—THE ATLAS, No. 6912, *ante*.

ii. *Particular Instances.*

**7542. Fraudulent imposition of services—Enforced absence of master.**]—THE JANE (1845), 6 L. T. O. S. 193.

**7543.** ——.]—THE LAWSONS (1857), 8 L. T. 612.

**7544.** ——.]—THE COSBREGNAM (1858), 8 L. T. 178.

**7545. Disregard of safety of salved property.**]—THE DOSSEITEI, No. 7013, *ante*.

**7546. Conviction for misconduct in same transaction.**]—The ct. will not entertain the claim of parties who have been previously convicted under 9 & 10 Vict. c. 99, by the magistrates for their conduct in the same transaction for which they claim salvage reward.—THE WEAR PACKET (1855), 2 Ecc. & Ad. 256; 164 E. R. 419.

**7547. Fraudulent protraction of length of services.**]—THE MAGDALEN, No. 7486, *ante*.

**7548. Negligent navigation.**]—A screw steamer fell in with a disabled barque in the English Channel, & in answer to signals of distress approached her to render assistance. In rendering salvage services to the barque damage was caused to that vessel by the negligent navigation of the screw steamer, the two vessels coming into collision, on three occasions. To recover for the damages sustained in these collisions, the owners of the barque promoted a cause of damage against the steamer, & subsequently an action for the recovery of salvage remuneration was brought by the owners of the steamer against the barque. On the two causes coming on to be heard together:—*Held*:

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**PART XV. SECT. 10, SUB-SECT. 2.—D. (a).**

**7535 i.** *Effect of misconduct—Forfeiture or diminution of reward.*]—The right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct on the part of the salvors.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), I. L. R. 27 Calc. 860.—**IND.**

**7535 ii.** ——.]—If the conduct of salvors who may have rendered essential service, appears to be directed by motives of an improper description, if they attempt to usurp authority, by depriving the captain & crew of the possession of their ship, or if they use any undue interference with the captain & crew in the discharge of their duties, the ct. will deal harshly with them, & perhaps deprive them of the remuneration that they would otherwise have been legally entitled to.—THE SAN NICHOLA (1853), 6 Ir. Jur. 91.—**IR.**

**7535 iii.** ——.]—If salvors are actuated by selfish views in getting possession of a ship in distress & to carry out these views, take the master & crew on shore, the ct. will mark its disapproval of such conduct by withholding all remuneration or reducing the reward it would otherwise have given.—THE MAGNOLIA (1857), 29 L. T. O. S. 40; 9 Ir. Jur. 235.—**IR.**

**7535 iv.** ——.]—Misconduct of salvors may cause a forfeiture of all claim.—THE J. L. MAYO (1884), 7 Nfld. L. R. 30.—**NFLD.**

**PART XV. SECT. 10, SUB-SECT. 2.—D. (b) i.**

**7540 i.** *Misconduct wilful.*]—THE CHARLES FORBES (1874), Y. A. D. 172.—**CAN.**

**7540 ii.** ——.]—The right to salvage may be wholly or partially forfeited by wilful misconduct on the part of the salvors.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLI *v.* THE DRACHENFELS (1900), 1 L. R. 27 Calc. 860.—**IND.**

**PART XV. SECT. 10, SUB-SECT. 2.—D. (b) ii.**

**n.** *Setting up influenced & exaggerated statement of services.*]—Where salvors, who have a claim for a moderate reward, set up an influenced & exaggerated statement of their services, their claim will be wholly dismissed, & themselves condemned in costs.—THE ALMA (1865), 5 N. S. R. (1 Old.) 789.—**CAN.**

**o.** *Delay in delivery of salved goods*

the owners of the barque were entitled to recover in the damage cause, & the owners of the steamer were entitled to recover in the salvage cause.—THE C. S. BUTLER, THE BALTIC (1874), L. R. 4 A. & E. 178; 43 L. J. Adm. 17; 30 L. T. 475; 22 W. R. 759; 2 Asp. M. L. C. 237.

**7549. Failure to comply with statutory duty with regard to receiver of wreck—Justification.**]—Plts. in a salvage suit claimed salvage for the following services: they found a barge adrift in the river Thames, without any one on board of her, & they restored her to her owners:—*Held:* (1) Merchant Shipping Act, 1854 (c. 104), s. 450, did not apply, & the neglect of pltfs. to deliver the barge to the receiver of wreck of the district did not operate as a forfeiture of their claim to salvage.

(2) The term derelict applies where the vessel has been left *sine spe recuperandi & sine animo revertendi* (SIR ROBERT PHILLIMORE).

(3) A laden barge accidentally breaking loose from her moorings in the river Thames, & drifting about with no one on board, is not derelict, & consequently not "wreck" within Merchant Shipping Act, 1854 (c. 104).—THE ZETA (1875), L. R. 4 A. & E. 460; 44 L. J. Adm. 22; 33 L. T. 477; 24 W. R. 180; 3 Asp. M. L. C. 73.

*Annotations:—As to* (2) **Consd.** Bradley *v.* Newsom, [1919] A. C. 16. *Generally,* **Reld.** The Englishman & The Australia (1894), 70 L. T. 846; The Theta (1894), 71 L. T. 25; The Gas Float Whitton No. 2 (1895), 65 L. J. P. 17.

**7550.** —— ——.]—Where a person renders services in the nature of salvage to a vessel which he at the time *bonâ fide* believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out in fact that the vessel was not his property. The provisions of 17 & 18 Vict. c. 104, s. 450, requiring a person who finds or takes possession of a wreck to give notice to the receiver, are not applicable to the case of a person who takes possession of a stranded vessel under the belief that he is the purchaser thereof, & in such a case these provisions do not operate to deprive him of his right to recover salvage.—THE LIFFEY (1887), 58 L. T. 351; 6 Asp. M. L. C. 255.

**7551.** —— ——.]—Salvors found a derelict ship, with a cargo, off the coast of Pembrokeshire, & beached her, & communicated with the coastguard there, the chief officer of whom was the receiver of wrecks for the district. The salvors then, with the knowledge of the coastguard, emptied her of water & took her into port:—*Held:* the salvors were entitled to salvage, as they had "reasonable cause" for their failure, if there was any failure, to comply with 1894 Act, s. 518, in not delivering the wreck to the receiver of the district.—THE GLYNOERON (1905), 21 T. L. R. 648.

**7552. Bribing master of salved vessel.**]—THE KOLPINO, No. 7258, *ante.*

**7553. Theft.**]—THE CLAN SUTHERLAND, No. 7564, *post.*

**Unjustified retention of possession.**]—*See* Sect. 12, sub-sect. 2, C., *post.*

(c) *When Involving Diminution of Reward.*

i. *In General.*

**7554. Misconduct not wilful.**]—THE MAGDALEN, No. 7486, *ante.*

**7555.** ——.]—THE ATLAS, No. 6912, *ante.*

ii. *Particular Instances.*

**7556. Exorbitant demands.**]—THE JOHN & THOMAS, No. 7561, *post.*

*Compare* ADMIRALTY, Vol. I., p. 162, No. 713; & Sub-sect. 5, *post.*

**7557. Violent & overbearing conduct.**]—Violent & overbearing conduct on the part of salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, will yet operate to induce the ct. to diminish the amount of the reward.—THE MARIE (1882), 7 P. D. 203; 47 L. T. 737; 5 Asp. M. L. C. 27.

**7558. Unskilfulness in rendering of services—Involving damage to ship.**]—THE MAGDALEN, No. 7486, *ante.*

**7559.** —— ——.]—THE ATLAS, No. 6912, *ante.*

**7560.** —— ——.]—THE DWINA, No. 7493, *ante.*

**Unjustified retention of possession.**]—*See* Sect. 11, sub-sect. 7, *post.*

(d) *When Involving Deprivation of Costs.*

**7561. Exorbitant demands.**]—The services in this case were little more than the unsolicited

—*Until salvage amount determined.*]—A salvor who has delayed the delivery of salved goods to the receiver of wrecks for a short time, not with the intention of retaining the goods, but merely for the purpose of having the amount payable to him for salvage determined before giving up possession, does not thereby forfeit his right to salvage, or incur the penalties mentioned in Wrecks & Salvage Act, 1886, s. 27 (now R. S. C. 1906, c. 13, s. 814).—THE MANHATTAN *v.* SULLIVAN (1907), 11 Exch. C. R. 151.—**CAN.**

p. *Undue interference with captain & crew in discharge of their duties.*]—THE SAN NICHOLA (1853), 6 Ir. Jur. 91.—**IR.**

q. *Attempt to usurp authority.*]—THE SAN NICHOLA (1853), 6 Ir. Jur. 91.—**IR.**

r. *Conduct directed by improper motives.*]—THE SAN NICHOLA (1853), 6 Ir. Jur. 91.—**IR.**

t. ——.]—If salvors were actuated by selfish views in getting possession of a ship in distress, &, to carry out their views, take the master & crew on shore, the ct. will mark its disapproval of such conduct by withholding all remuneration, or reducing the reward it would otherwise have given.—THE MAGNOLIA (1857), 29 L. T. O. S. 40; 9 Ir. Jur. 235.—**IR.**

**PART XV. SECT. 10, SUB-SECT. 2.—D. (c) ii.**

**7556 i.** *Exorbitant demands.*]—If the captain of a tug boat makes an intolerable demand for rendering his services as a salvor, the Ct. of Admlty. will, if it can consistently with law & justice, reduce the amount.—THE SAN NICHOLA (1853), 6 Ir. Jur. 91.—**IR.**

**7556 ii.** ——.]—THE ST. CLAIR (OWNERS) *v.* THE AUDNY (OWNERS), [1922] S. C. 85.—**SCOT.**

a. *Unskilfulness in rendering services.*]—If primary salvors, without sufficient reason, reject the services of third parties offered to them at a moment of great hazard, when the success of the enterprise is uncertain, the ct. will hold that they exercised an injudicious discretion, & have, to a certain extent, failed in their duty, & abate their salvage award accordingly.—THE ELIZABETH (1855), 8 Ir. Jur. 340.—**IR.**

b. *Refusal to take ship to nearest port or destination.*]—THE CHARLES FORBES (1874), Y. A. D. 172.—**CAN.**

c. *Taking ship far from home.*]—THE ROWENA (1880), Y. A. D. 255.—**CAN.**

d. *Salvors actuated by selfish views.*]—THE MAGNOLIA (1857), 29 L. T. O. S. 40; 9 Ir. Jur. 235.—**IR.**

e. *Failure to inform master—Master within reach—Knowledge of salvors.*]—Salvors will be deemed guilty of misconduct, if they are aware at the time they enter on the salvage service that the master & crew of the vessel in distress are on shore, & in the immediate neighbourhood, watching her, & only waiting for high water to return to her, if they do not inform them of the danger of the vessel, of their intention of proceeding to her aid, & offer their services. In such a case, even although the ct. is of opinion that valuable salvage services were rendered, & that most probably the vessel in distress would have been totally lost but for the exertions of the salvors, it will mark its sense of the misconduct of the salvors by awarding a very small amount of salvage.—THE LISBON (1867), 1 I. R. Eq. 144.—**IR.**

f. *Suspicion of lack of good faith.*]—Where salvors on getting possession immediately put sail on the vessel, apparently for fear her former crew might come up with her & it was taken to be an evidence pointing to bad faith, the award was reduced.—THE CALEDONIA (1853), 3 Nfld. L. R. 359.—**NFLD.**

**PART XV. SECT. 10, SUB-SECT. 2.—D. (d).**

**7561 i.** *Exorbitant demands.*]—THE ALMA (1865), 5 N. S. R. (1 Old.) 789.—**CAN.**

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *D.* (*d*), (*e*) & (*f*), & *E.* (*a*), (*b*) *i., ii. & iii., & (c).*]

labours of the men, & the attention of their officer; but even services of the highest class might be lessened by subsequent misconduct, & especially by exorbitant demands. . . . Under these particular circumstances the salvors are not entitled to any of their costs (*per* CUR.).—THE JOHN & THOMAS (1822), 1 Hag. Adm. 157, n.; 166 E. R. 56.

*Annotation:*—**Consd.** The Sovereign (1860), 6 Jur. N. S. 832.

**7562. Misconduct to co-salvors.**]—THE CADIZ & THE BOYNE, No. 7319, *ante*.

**Unjustified retention of possession.**]—*See* Sect. 12, sub-sect. 1, A., *post*.

(*e*) *Effect on Rights of Associates.*

**7563. Liability of salvor—Misconduct of agent.**]—THE ATLAS, No. 6912, *ante*.

**7564. Liability of salvors inter se—Negligence.**]—Embezzlement of salved property by the crew of a salving ship affects only those salvors who are party or privy to the thefts, or who by negligence have enabled the thefts to be committed or to be undetected. In general, the consequences as regards those participating in or privy to the thefts is the total forfeiture of salvage, & as regards those guilty of negligence, the forfeiture or diminution of the award.

Property to the value of over £1,000 was stolen by certain members of the crew of one of a number of ships which salved a torpedoed vessel after her crew had left her:—*Held:* (1) as the thefts were on such a large scale that they must have been known to the rest of the crew as well as to the guilty parties, all the crew had forfeited their right to salvage; (2) as the officers had not exercised due diligence to prevent or detect the thefts they also would forfeit their rights; (3) an exception would be made in the case of the first lieutenant & one other officer who rendered extremely valuable services & would accordingly be awarded salvage but diminished amounts.—THE CLAN SUTHERLAND, [1918] P. 332; 88 L. J. P. 26.

*Annotation:*—*Generally*, **Refd.** The Kenora, [1921] P. 90.

**7565. Liability of owner of salving vessel—Misconduct of master & crew—Negligence.**]—The criminal misconduct, larceny of stores & effects, of the master & crew of a vessel engaged in rendering salvage services does not forfeit or diminish the award to the owners of the vessel who have not by their negligence enabled the misconduct to take place & are in no way privy to it.—THE KENORA, [1921] P. 90; 90 L. J. P. 181; 37 T. L. R. 263.

(*f*) *Proof of Misconduct.*

**7566. Necessity for conclusive proof.**]—THE CHARLES ADOLPHE, No. 6952, *ante*.

**7567.** ——.]—THE ATLAS, No. 6912, *ante*.

**7568. Burden of proof.**]—THE DAHLIA (1857), 8 L. T. 612.

**7569.** ——.]—THE COSBREGNAM (1858), 8 L. T. 178.

**7570. When proof of misconduct inadmissible—Effect of tender.**]—THE FOX (1845), 8 L. T. 582.

*E. Damage or Loss to Salvors.*

(*a*) *In General.*

*See* 1894 Act, s. 510.

**7571. Right to reimbursement—Expenses.**]—THE MAGDALEN, No. 7486, *ante*.

**7572.** —— ——.]—BIRD *v.* GIBB, THE DE BAY, No. 7587, *post*.

**7573.** —— ——.]—THE CITY OF CHESTER, No. 6900, *ante*.

**7574.** —— **Damage sustained in rendering service.**]—THE WESTMINSTER (1845), 8 L. T. 335.

**7575.** —— ——.]—THE OTTO HERMANN, THE ALBERT, THE ELLA CONSTANCE, No. 6878, *ante*.

**7576.** —— ——.]—Where a vessel in rendering salvage service sustains damage without negligence on her part, she is entitled to be repaid for such damage, & demurrage during repairs by the owners of the vessel salved.—THE MUD HOPPER No. 4 (1879), 40 L. T. 462; 4 Asp. M. L. C. 103.

*Annotation:*—**Consd.** The City of Chester (1884), 9 P. D. 182.

**7577.** —— ——.]—(1) In an action for salvage, evidence of the loss of earnings by & of the costs of repairing damage done to the salving vessel in consequence of rendering salvage services is admissible.

(2) These sums are to be regarded as elements for consideration in estimating the amount of the salvage reward, but are not to be considered as fixed amounts to be awarded to the salvors in respect of these matters.—THE SUNNISIDE (1883), 8 P. D. 137; 52 L. J. P. 76; 49 L. T. 401; 31 W. R. 859; 5 Asp. M. L. C. 140.

*Annotations:*—*As to* (1) **Apld.** The City of Chester (1884), 9 P. D. 182. *As to* (2) **Consd.** The City of Chester (1884), 9 P. D. 182.

**7578.** —— ——.]—THE CITY OF CHESTER, No. 6900, *ante*.

**7579.** —— ——.]—THE ERATO, No. 6828, *ante*.

**7580.** —— ——.]—(1) Where, the vessel of a salvor has without default on his part been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained & damages consequent thereon; or the salvage may be assessed on a liberal scale, so as to cover the loss & afford an adequate reward for the services rendered.

(2) The presumption is that the injury is caused by the necessities of the services, & the *onus probandi* is on those who allege default by the salvors.

(3) The amount of compensation awarded by

**7561 ii.** ——.]—Where pltf. named an extravagant sum for salvage services in his statement of claim, but the services were meritoriously rendered & deft. did not tender or pay into ct. any moneys to cover the demand, the ct. declined to deprive pltf. of costs although awarding a sum quite disproportionate to the amount claimed.—BRISTER & SON, LTD. *v.* THE URANIUM (1913), 15 Exch. C. R. 102.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 2.—D. (e).**

*g. Liability of salvors inter se.*]—In case of associated service, as all the salvors may be credited with the meritorious acts, so they may be prejudiced by the misconduct of one of their number.—THE CHERUBIM (1868), 19 L. T. 52; 2 I. R. Eq. 172.—**IR.**

*h.* ——.]—Where two ships claimed as salvors of a derelict ship, & it was proved that the master of one of them abstracted goods from the derelict with an evident intention of not restoring or accounting for them:—*Held:* the misconduct of the master so improperly removing goods tainted the whole salvage service of his ship, & deprived his crew as well as himself of all participation in the salvage award.—THE ALICIA ANNIE & THE AMINTA *v.* THE SCINDIA (1865), 2 Mar. L. C. 232.—**S. AF.**

**PART XV. SECT. 10, SUB-SECT. 2.—E. (a).**

**7571 i.** *Right to reimbursement—Expenses.*]—Pltfs., having salved the ship, incurred expenses in navigating her along a dangerous coast at a rough season of the year:—*Held:* besides a salvage reward pltfs. were entitled to expenses to be estimated at a lump sum.—JACOBSEN *v.* THE ARCHER (1894), 3 B. C. R. 374.—**CAN.**

**7571 ii.** —— ——.]—The ct. will award an allowance beyond salvage reward for any exceptional loss or expense incurred by the salving ship, whether for repair or damage, loss of freight or other special matter.—THE SEVERN (1875), 6 Nfld. L. R. 103.—**NFLD.**

**7574 i.** —— *Damage sustained in rendering service.*]—THE SEVERN (1875), 6 Nfld. L. R. 103.—**NFLD.**

the ct. below will not be reduced unless it appears to be grossly in excess of what is right.—BAKU STANDARD (OWNERS) *v.* ANGÈLE (OWNERS), [1901] A. C. 549; 17 T. L. R. 584; *sub nom.* THE BAKU STANDARD, 70 L. J. P. C. 98; 84 L. T. 788; 9 Asp. M. L. C. 197, P. C.

*Annotation :—Generally,* **Refd.** Pyman S.S. Co. *v.* Admiralty Comrs. (1918), 35 T. L. R. 79.

**7581.** —— ——.]—Consideration of the extent to which the ct. in awarding recompense for salvage ought to take account of damage suffered by the salving vessel in the course of the salvage services.—THE MELANIE (1924), 40 T. L. R. 236; 68 Sol. Jo. 404; *subsequent proceedings, sub nom.* MELANIE (OWNERS) *v.* SAN ONOFRE (OWNERS), [1925] A. C. 246, H. L.

**7582.** —— —— **Damage due to salvors default.**]—THE CHAMPION OF THE SEAS (1862), 8 L. T. 335.

**7583.** —— —— ——.]—THE MYSTIC *v.* THE NANNA, C. R., [1911] 2 A. C. 392, P. C.

### (*b*) *Damage.*

#### i. *In General.*

**7584. Prospective damage.**]—THE MARTHA, No. 7421, *ante.*

—— **Loss of fishing.**]—*See* Sub-sect. 2, E. (*c*), *post.*

#### ii. *Particular Instances.*

**7585. Cost of repairs.**]—THE JAMES ARMSTRONG (1875), L. R. 4 A. & E. 380; 33 L. T. 390; 3 Asp. M. L. C. 46.

*Annotation :—***Mentd.** The Georg, [1894] P. 330.

**7586.** ——.]—THE SUNNISIDE, No. 7577, *ante.*

**7587.** ——.]—(1) Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, & in addition the salvor should receive a compensation for his exertions & for the risk he runs of not receiving any compensation in the event of his services proving ineffectual. The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision.

(2) Salvors are entitled to recover for general depreciation in the value of a salving ship in consequence of the damage sustained, & for loss of charterparty if proved.

(3) In the assessment of salvage regard must be had to the value of the property saved.—BIRD *v.* GIBB, THE DE BAY (1883), 8 App. Cas. 559; 52 L. J. P. C. 57; 49 L. T. 414; 5 Asp. M. L. C. 156, P. C.

*Annotations :—As to* (1) **Apld.** The City of Chester (1884), 9 P. D. 182; Baku Standard (Owners) *v.* Angèle (Owners), [1901] A. C. 549. **Refd.** The Saltburn (1894), 71 L. T. 19.

**7588.** ——.]—BAKU STANDARD (OWNERS) *v.* ANGÈLE (OWNERS), No. 7580, *ante.*

**7589.** ——.]—(1) In awarding salvage remuneration to fishing vessels for services rendered to another vessel, loss of the estimated fishing profits caused by the services cannot be allowed as such, though the ct. will take into account the fact of the loss in making its award.

(2) Actual damages incurred were awarded by the ct. as items of salvage remuneration.—THE FAIRPORT, [1912] P. 168; 81 L. J. P. 108; 106 L. T. 382; 12 Asp. M. L. C. 165.

**7590. Salvors encouraged.**]—THE THETIS, No. 6817, *ante.*

**7591. Demurrage during detention for repairs.**]—THE MUD HOPPER, No. 4, No. 7576, *ante.*

#### iii. *Burden of Proof.*

**7592. On parties alleging default of salvors—Presumption that damage not due to default of salvors.**]—Where the salvors' vessel is injured or lost whilst engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, & the burden of proof is on defts. alleging that the loss was caused by the default of the salvors.—THE THOMAS BLYTH (1860), Lush. 16; 167 E. R. 8.

*Annotation :—***Apld.** S.S. Baku Standard *v.* S.S. Angèle, [1901] A. C. 549.

**7593.** —— ——.]—BAKU STANDARD (OWNERS) *v.* ANGÈLE (OWNERS), No. 7589, *ante.*

### (*c*) *Loss of Profits.*

**7594. Loss of fishing.**]—THE SALACIA (1829), 2 Hag. Adm. 262; 166 E. R. 240.

*Annotations :—***Consd.** The City of Chester (1884), 9 P. D. 182. **Refd.** Bird *v.* Gibb, The De Bay (1883), 8 App. Cas. 559. **Mentd.** The Vrede (1861), Lush. 322.

**7595.** ——.]—THE CATHERINA ANNA HELENA (1839), 6 L. T. 615.

**7596.** ——.]—THE EARL GREY (1842), 6 L. T. 615.

**7597.** ——.]—THE DEVERON (1841), as reported in 2 Wm. Rob. at p. 26; 7 Jur. at p. 429; 166 E. R. at p. 665.

*Annotation :—***Folld.** The Louisa (1843), 2 Wm. Rob. 22.

**7598.** ——.]—THE FREDERICK (1844), 6 L. T. 615.

**7599.** ——.]—THE CHARLES WILLIAMS (1846), 6 L. T. 615.

**7600.** ——.]—THE WILLIAM (1849), 6 L. T. 615.

**7601.** ——.]—THE SHAVER (1850), 8 L. T. 440.

**7602.** ——.]—THE HEDWIG, No. 7024, *ante.*

**7603.** ——.]—In considering salvage by fishing vessels, where the property salved is not exposed to imminent danger, the possible profit of the fishing is not to be included in the award for the service.—THE NICOLAI HENRICH (1853), 6 L. T. 615; 17 Jur. 329.

*Annotation :—***Refd.** The Hedwig (1853), 1 Ecc. & Ad. 19.

**7604.** ——.]—THE LINDA FLOR (1857), 8 L. T. 440.

**7605.** ——.]—THE FAIRPORT, No. 7589, *ante.*

**7606.** —— **Vessel taken from actual employment.**]—(1) Where a fishing smack is actually taken off a lucrative employment in order to render a salvage service, the circumstance of her being so diverted from her occupation will form an essential ingredient in the salvage award. Where, however, she is not so engaged at the time, the award of the ct. will not be influenced by the consideration of the earnings she might have gained during her detention in the salvage service.

(2) Where salvage money has been paid into the registry for the purpose of distribution, the ct. has no power to decree from the fund in ct. the payment of advances made to the salvors by their agent.—THE LOUISA (1848), 3 Wm. Rob. 99; 6 Notes of Cases, 531; 8 L. T. 440; 12 Jur. 946; 166 E. R. 900.

*Annotation :—As to* (3) **Consd.** The Petone, [1917] P. 198.

**7607.** —— **Vessel not taken from actual employment.**]—THE LOUISA, No. 7606, *ante.*

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**PART XV. SECT. 10, SUB-SECT. 2. E. (b) ii.**

**7585 i.** *Cost of repairs.*]—Whenever property of the salvor is damaged in effecting the salvage service, the damage is to be repaired, or paid for to the full extent of its actual value, or at the cost price, & not at the trade profit price.—THE AUGUSTA JESSE (1858), 11 Ir. Jur. 227.—IR.

**7585 ii.** ——.]—THE SEVERN (1875), 6 Nfld. L. R. 103.—NFLD.

*Sect.* 10.—*The salvage award: Sub-sect.* 2, *E.* (*c*), (*d*) & (*e*); *sub-sect.* 3, *A.*, *B.* & *C.* (*a*).]

**7608. Loss of freight.**]—THE CAROLINE (1843), as reported in 2 Wm. Rob. 124; 166 E. R. 701.

**7609. Cost of hiring pump men.**] — THE LE JONET, No. 7094, *ante*.

**7610. Penalties for breach of contract—Deviation by mail steamer.**]—THE SILESIA, No. 7274, *ante*.

**7611. Depreciation.**]—BIRD *v.* GIBB, THE DE BAY, No. 7587, *ante*.

**7612. Loss of charterparty.**]—BIRD *v.* GIBB, THE DE BAY, No. 7587, *ante*.

**7613. Increase in insurance premium.**] — THE EDENMORE, No. 7392, *ante*.

**7614. Demurrage.**] — The tank steamship *L.* fell in with the disabled twin-screw steamship *B.*, in the North Atlantic & towed her into Halifax, a distance of about 280 miles. The *B.*'s boat was employed in passing the hawsers & making the vessels fast. No member of the crew of the *L.* performed any special service. On Dec. 1, 1905 the solrs. acting for the owners of the *L.*, without any direct authority from the crew who numbered thirty-six, issued a writ on behalf of the owners, master, & crew of the *L.*, claiming salvage for services rendered to the *B.*, her cargo & freight, & on Dec. 12, 1905 delivered a statement of claim on behalf of the owners, master, & crew of the *L*, to which on Dec. 27 the owners of the *B.* delivered a defence. On Dec. 18 twelve of the crew of the *L*, four able seamen, & eight firemen, gave notice to defts.' solrs. of a change of solrs., & on Jan. 5, 1906, a further statement of claim was delivered on behalf of the twelve, & on Jan. 10 the owners of the *B.* delivered a defence to that claim. On the hearing of the salvage suits the owners, master, & twenty-four of the crew were represented by two counsel, & the remaining twelve of the crew were also separately represented by two counsel. Counsel for the owners, master, & twenty-four of the crew, when asking for an apportionment, stated that if the usual practice was followed of opportioning the salvage among the crew according to their rating, the effect would be that the engineer officers would receive more than the navigating officers, who probably had had harder work in consequence of the salvage than the engineer officers had had:—*Held:* (1) as the navigating officers had not taken any extraordinary part in the salvage service, they were not entitled to an increased share in the award, which would be apportioned amongst the crew according to their rating.

(2) Counsel for the twelve seamen asked for costs. The twelve seaman had recovered salvage, & were entitled to be represented; they had given no retainer to the owner's solrs. to appear for them. The owners of the *B.*, opposed the application on the ground that, as the interests of the twelve seamen were exactly similar to that of the rest of the crew, who were represented by counsel for the owners, there was no necessity for separate representation. The owners of the *B.*, asked that the twelve seamen should be ordered to pay the extra costs to which they had been put by reason of the separate representation:—*Held:* the twelve seamen were not entitled to costs, but they were not to be condemned in costs.

(3) The *L.* by her salvage services, lost between six & seven days, & the result was that she arrived at Philadelphia at a time when she had lost a chartered cargo. She had to wait a longer time than she would otherwise have done to get another cargo, & there is a certain amount of demurrage which has to be considered (BARGRAVE DEANE, J.). —THE BREMEN (1906), 94 L. T. 380; 10 Asp. M. L. C. 229.

**7615. Loss of chartered cargo.**]—THE BREMEN, No. 7614, *ante*.

*(d) Calculation of Damage or Loss.*

**7616. Whether loss or damage matter for precise calculation.**]—THE PINNAS, No. 7858, *post*.

**7617.** ——.]—BIRD *v.* GIBB, THE DE BAY, No. 7587, *ante*.

**7618.** —— **Admissibility of evidence.**]—THE SUNNISIDE, No. 7577, *ante*.

**7619.** —— ——.]—THE CITY OF CHESTER, No. 6900, *ante*.

*(e) Inclusion as Part of Salvage Reward.*

**7620. Discretion of court.**]—THE LE JONET, No. 7094, *ante*.

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SUB-SECT. 3.—AMOUNT OF REWARD.

*A. In General.*

**7621. Limitation of amount recoverable—Value of property saved.**]—THE SCHILLER (CARGO EX), No. 7079, *ante*.

**7622. Whether based on fixed proportion—Discretion of court.**]—THE EWELL GROVE, No. 7519, *ante*.

**7623.** —— ——.]—THE ALLEN (1841), 8 L. T. 154.

**7624.** —— ——.]—THE GENNESSEE (1848), as reported in 2 Pritchard's Admiralty Dig. 3rd ed. 1959.

*Annotation:*—**Reid.** The Hebe (1849), 7 Notes of Cases, Supp. I.

**7625.** —— ——.]—THE DENMARK (1856), 8 L. T. 177.

**7626.** —— ——.]—THE RESULT (1856), 8 L. T. 705.

**7627.** —— ——.]—THE CUBA, No. 7684, *post*.

**7628.** —— ——.]—THE CITY OF CHESTER, No. 6900, *ante*.

**7629. Whether defendants may plead previous payment—To persons assisting in salvage services—Payment by order of court.**]—(1) In a suit instituted on behalf of the owners, master, & crew of a steam tug, to recover salvage reward for salving a disabled vessel & her cargo, it appeared by the petition that persons other than pltfs. in the cause had assisted in the service, & in an article in the answer filed on behalf of the owners of the salved vessel & her cargo, defts. alleged that they had been ordered by a ct. of competent jurisdiction to pay to such other persons the sum of £240 in respect of the assistance so rendered by them.

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**PART XV. SECT. 10, SUB-SECT. 2.—E. (*c*).**

**7608 i.** *Loss of freight.*]—THE SEVERN (1875), 6 Nfld. L. R. 103.—**NFLD.**

**PART XV. SECT. 10, SUB-SECT. 3.—A.**

**7622 i.** *Whether based on fixed proportion—Discretion of court.*]—The amount of salvage reward is in the discretion of the ct.—THE SENECA *v.* MACDONALD, [1923] Exch. C. R. 177.—**CAN.**

**7622 ii.** ——.]—RAFFIN *v.* THE CHILKA (1883), I. L. R. 7 Bom. 196. —**IND.**

**k.** *Rule of Admiralty Court.*]—In actions in the High Ct., salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under & subject to the rule of the Admlty. Ct. limiting the maximum amount of salvage to a moiety of the value of the saved vessel, & cargo, if any, which rule is equally applicable to wrecking cos. as to ordinary vessel owners.—INTERNATIONAL WRECKING & TRANSPORTATION CO. *v.* LOBB (1886), 11 O. R. 408.—**CAN.**

**l.** ——.]—*Held:* following the usual

Pltfs. moved to strike out this article. The ct. holding that the article was relevant to the matters in issue in the suit, rejected the motion.

(2) Work done by labourers in shifting the cargo of a vessel that has been damaged by collision & so forced to run ashore, for the purpose of lightening her & of enabling her to be sufficiently repaired to get to the nearest port, is in the nature of salvage service & entitles the labourers to salvage reward; such a service is, however, of a small character, & does not merit large reward.—THE ANTILOPE (1873), L. R. 4 A. & E. 33; 42 L. J. Adm. 42; 28 L. T. 74; 21 W. R. 464; 1 Asp. M. L. C. 513.

**Salvage agreements.**]—*See* Sect. 9, *ante*.

*B. Claims of Owners.*

**7630. Reduced scale applicable.**]—On salvage the master & crew are strictly the only salvors. The owners claim only under the equitable consideration of the ct. for the risk of their vessel, etc. The ct. is not disposed to allow their claim to any great amount.—THE SAN BERNARDO (1799), 1 Ch. Rob. 178; 165 E. R. 140.

*C. Particular Instances.*

(*a*) *Derelict.*

**7631. Whether ground for special consideration.**]—THE THETIS, No. 6817, *ante*.

**7632. According to merits of case—Proportion discretionary—Abandonment of moiety rule.**]—(1) In a case of complete derelict, one moiety of the value apportioned between various salvors according to their respective services.

By the old law half the value was always given in such cases; but . . . the proportion is discretionary & dependent on circumstances; seldom, however, more than half, or less than one third is given (SIR JOHN NICHOLL).

(2) The first occupants may prevent the interference of others.—THE EFFORT (1834), 3 Hag. Adm. 165; 166 E. R. 367.

**7633.** ——— ——— ———.]—THE CAROLINE (1843), 2 Wm. Rob. 124; 1 L. T. O. S. 293; 7 Jur. 660; 166 E. R. 701.

**7634.** ——— ——— ———.]—THE PARNITZ (1851), 6 L. T. 371.

**7635.** ——— ——— ———.]—THE MINERVA (1854), 1 Ecc. & Ad. 271; 6 L. T. 371; 164 E. R. 157.

**7636.** ——— ——— ———.]—THE MAGDALEN, No. 7486, *ante*.

**7637.** ——— ——— ———.]—THE SPLENDID, THE THOMAS BAILEY, THE QUEEN OF THE EAST, THE MARTIN LUTHER (1865), 12 L. T. 585; 2 Mar. L. C. 216.

**7638.** ——— ——— ———.]—KIRBY *v.* SCINDIA (OWNERS), THE SCINDIA, No. 7514, *ante*.

**7639.** ——— ——— ———.]—THE ARGONAUT (1883), cited in 49 L. T. 204.

*Annotation*:—**Expld.** The Anna Helena (1883), 49 L. T. 204.

**7640.** ——— ——— ———.]—(1) It is not the general rule in causes of salvage of derelicts to give one half the value of the property saved, although in some cases where values are small & the services meritorious, it may be proper to do so.

In a case of salvage of a derelict the ct., having out of the proceeds of ship & cargo, amounting to £608, awarded one half to the salvors of property, awarded £150 to life salvors taking off the crew, together with costs to both pltfs.

(2) I think I do justice by allowing £150 & costs, in which sum the personal representatives of the salvor who lost his life are to share (HANNEN, P.). —THE ANNA HELENA (1883), 49 L. T. 204; 5 Asp. M. L. C. 142.

**7641.** ——— ——— ———.]—THE JANET COURT, No. 7416, *ante*.

**7642.** ——— **Award more than in ordinary salvage.**]—THE SARAH BELL (1845), 4 Notes of Cases, 144; 8 L. T. 440.

*Annotations*:—**Reid.** The Cosmopolitan (1848), 6 Notes of Cases Supp. xvii; Bradley *v.* Newson, [1919] A. C. 16.

**7643. Derelict as ingredient in degree of danger.**]—In a case where a derelict vessel & cargo of the value of £1,452 was salved by a steamer, which, with her cargo, was of the value of £30,000, the Vice-Admlty. Ct. awarded £300 for salvage:—*Held*: under the circumstances, that sum was not sufficient, & same increased to £450.

The proper course . . . is to consider the fact of derelict as being, as it were, an ingredient in the degree of danger in which the property is (DR. LUSHINGTON).—PAPAYANNI *v.* HOCQUARD, THE TRUE BLUE (1866), L. R. 1 P. C. 250; 4 Moo. P. C. C. N. S. 96; 16 E. R. 252, P. C.

*Annotations*:—**Consd.** The Chetah (1868), 5 Moo. P. C. C. N. S. 278; The Amérique (1874), L. R. 6 P. C. 468. **Reid.** Kirby *v.* Scindia (Owners), The Scindia (1866), 4 Moo. P. C. C. N. S. 84; The Thetis (1869), L. R. 2 A. & E. 365; The Scout (1872), L. R. 3 A. & E. 512; Scaramanga *v.* Stamp (1880), 5 C. P. D. 295.

**7644. Award of less than moiety—Rarely less than one-third.**]—THE EFFORT, No. 7632, *ante*.

**7645.** ———.]—THE EWELL GROVE, No. 7519, *ante*.

**7646.** ——— **One-third—Salvage of treasure.**]—In a case of salvage of treasure, by great exertions, from a wreck derelict & sunk under water, one third of the amount saved awarded to the salvors. —THE THETIS (1834), 2 Knapp, 390; 12 E. R. 533, P. C.

*Annotations*:—**Consd.** The Ewell Grove (1855), 3 Hag. Adm. 209. **Distd.** The Amérique (1874), L. R. 6 P. C. 468; The Glengyle, [1898] P. 97. **Reid.** Gore *v.* Bethel, The Inca (1858), 12 Moo. P. C. C. 189; The Schiller (1877), 2 P. D. 145.

**7647.** ——— **Less than one-third.**]—THE AMÉRIQUE, No. 7464, *ante*.

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rule, not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the *res*.—THE GLENIFFER (1892), 3 Exch. C. R. 57.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 3.—C. (a).**

**7632 i.** *According to merits of case—Proportion discretionary — Abandonment of moiety rule.*]—THE BERLIN (1852), 4 Ir. Jur. 11.—**IR.**

**7632 ii.** ——— ——— ———.]—Although the Ct. of Admlty. has power to award a moiety of the value of a ship & cargo, in cases of derelict salvage, it will not always exercise that power, but will, in all instances, award remuneration to salvors on a liberal scale, making due allowance for the danger & hardship incurred in the salvage service.—THE JANE (1853), 5 Ir. Jur. 31.—**IR.**

**7642 i.** ——— *Award more than in ordinary salvage.*]—The ordinary rules of salvage cases apply to a claim for salvage in respect of a derelict, but the dereliction may be relied on as increasing, according to the circumstances of each particular case, the amount of salvage recoverable.—PUTWAIN *v.* ENGLISH, SCOTTISH & AUSTRALIAN BANK, THE GOTHENBURG (1875), 4 Q. S. C. R. 133.—**AUS.**

**7644 i.** *Award of less than moiety—Rarely less than one-third.*]—It appears to be the general sense of the maritime world, that the right of salvage in cases of derelict should not in ordinary cases range below one-third nor above the moiety of the remainder of the property.—*Re* THE MARIE VICTORIA (1865), 2 S. V. A. R. 109.—**CAN.**

m. ——— *One-third.*]—THE TICKLER (1874), Y. A. D. 166.—**CAN.**

n. ——— ———.]—*Re* THE PROGRESS (1882), 9 Q. L. R. 156.—**CAN.**

o. ——— ———.]—THE FOREST QUEEN (1858), 8 L. T. 440.—**IR.**

p. ——— ———.]—THE ORESUND (1862), 8 L. T. 440.—**IR.**

**7647 i.** ——— *Less than one-third.*]—THE CANTERBURY (1850), Y. A. D. 57.—**CAN.**

**7647 ii.** ——— ———.]—THE MARINO (1870), Y. A. D. 51.—**CAN.**

**7647 iii.** ——— ———.]—THE R. ROBINSON (1874), Y. A. D. 168.—**CAN.**

*Sect.* 10.—*The salvage award: Sub-sect.* 3, *C.* (*a*) & (*b*), & *D.*; *sub-sect.* 4, *A.*, *B.* & *C.* (*a*) & (*b*) *i.*]

**7648.** ——.]—It is said, that the master & his crew left the ship with too much precipitation, & that there was no danger. I cannot give credit to such a representation, in opposition to their own conduct. They thought otherwise at the time, & they must be supposed to be the best judges of their own safety. . . . They [the salvors] went out however . . . for the very purpose of saving vessels in distress, a circumstance to which the ct. always pays attention. The subsequent conduct of the salvors appears also to have been perfectly unimpeachable. They brought the vessel immediately into Harwich harbour, & delivered up possession to the officers of the customs. If there had been any considerable danger attending the act of salvage, I should have given what the ct. is in the habit of giving in cases of derelict, an entire moiety. As I think there was not much of that ingredient, I shall give only two fifths (SIR WILLIAM SCOTT).—THE FORTUNA (1802), 4 Ch. Rob. 194; 165 E. R. 582.

**7649.** ——.]—Salvors having by meritorious services rendered at the risk of their lives salved a derelict vessel, her cargo & freight, valued together at £750, the ct. awarded £360 as salvage remuneration.—THE HEBE (1879), 4 P. D. 217.

**7650. Award of moiety.**]—(1) Salvors in possession of a derelict ship have a legal interest which cannot be divested without adjudication in a competent ct., & it is not for the King's officers or any other persons on the ground of superior authority to dispossess them without cause.

(2) Those who claim as salvors & dispossess others who were acting as such, must show an apparent if not an actual necessity for their interference.

(3) In cases of derelict, the ct. not infrequently gives one half of the property saved; & this perhaps was done in all cases of the same kind according to the old law (SIR WILLIAM SCOTT). —THE BLENDEN HALL (1814), 1 Dods. 414; 165 E. R. 1361.

*Annotations:*—*As to* (1) **Consd.** The Kathleen (1874), 31 L. T. 204. **Refd.** The Tubantia, [1924] P. 78. *As to* (2) **Apld.** The Fleece (1850), 3 Wm. Rob. 278. **Consd.** The Samuel (1851), 17 L. T. O. S. 204; The Pickwick (1852), 16 Jur. 669; The Magdalen (1861), 31 L. J. P. M. & A. 22. *As to* (3) **Refd.** The Amérique (1874), L. R. 6 P. C. 468. *Generally*, **Refd.** The Cosmopolitan (1848), 6 Notes of Cases, Supp. XVII.

**7651.** ——.]—THE TWEE GELROEDERS (1838), 3 Hag. Adm. 430, n.; 6 L. T. 370; 166 E. R. 465.

**7652.** ——.]—THE WATT (1843), 2 Wm. Rob. 70; 6 L. T. 371; 166 E. R. 681.

*Annotations:*—**Refd.** Bird *v.* Gibb, The De Bay (1883), 8 App. Cas. 559; The Janet Court (1897), 76 L. T. 172.

**7653.** ——.]—Where a vessel derelict was salved, the ct. considering the services of the salvors to have been of very great merit, awarded to them a moiety of the value of the property salved.—THE PELICAN & THE WAVE *v.* THE MINERVA (1860), 9 W. R. 81.

**7654.** ——.]—The master of a Norwegian brig bound to Cardiff, with a crew of nine men, fell in, in the North Sea, between Heligoland & the Dogger Bank, with a derelict vessel in a very crippled condition, & put his mate & two of his crew on board her. The mate & the two men on board the derelict shortly after they had boarded her, fearing that she was about to founder, endeavoured to leave her, but their boat was swamped, & one of the men drifted astern, & was picked up by a fishing smack. The mate & the other hand succeeded in bringing the derelict safely into the English Channel, & within 3 miles of Dungeness; she was then taken in tow by a steamship & towed to the entrance of Dover Harbour, within which she was subsequently placed in safety. Actions of salvage were instituted by the owners, master, & crew of the brig, & by the owners, master, & crew of the steamship against the derelict vessel & her cargo, & the ct. awarded a moiety of the value of the property proceeded against, & apportioned three fifths of the amount to the owners, master, & crew of the brig.—THE LIVIETTA (1883), 8 P. D. 24; 52 L. J. P. 81; 48 L. T. 799; 31 W. R. 643; 5 Asp. M. L. C. 132.

**7655. Award exceeding moiety—Total proceeds.**] —In derelict property of a very small value, no owner appearing, whole of net value, summarily, awarded.—THE WILLIAM HAMILTON (1834), 3 Hag. Adm. 168; 6 L. T. 371; 166 E. R. 368.

**7656.** —— ——.]—A derelict barque, dismasted & on fire, was towed by a tug some twenty miles into Harwich, where the salvors succeeded in extinguishing the fire & placing the barque in safety. The vessel & her cargo were ultimately sold by the ct., realising £255, less £108 expenses of the marshal. There was also a liability of £88 for the assistance rendered to the salvors by others after the vessel was brought in, & a further liability of £21 7*s.* 9*d.* for dock dues, reducing the net balance to £37 2*s.* 3*d.* In an action against the owners of the barque, her cargo & freight, pltfs., the owner, master & crew of the tug, claimed salvage remuneration, &, judgment having been allowed to go by default, the ct. awarded the total proceeds without a reference. —THE LOUISA, [1906] P. 145; 75 L. J. P. 76; 94 L. T. 558; 10 Asp. M. L. C. 256.

**7657.** ——.]—(1) A ship on a voyage from Melbourne to London fell in with a derelict brigantine 220 miles to the westward of the Lizard, in the month of Feb., & put an officer & three hands on board her who, under circumstances of great difficulty & danger, & after much hardship, brought her in safety to Liverpool. In a salvage suit instituted on behalf of the owners, master, & crew of the ship, the ct., after directing expenses incurred by the salvors to be paid to them out of

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**7647 iv.** —— ——.]—THE ROWENA (1880), Y. A. D. 255.—**CAN.**

**7647 v.** —— ——.]—THE W. G. PUTNAM (1880), Y. A. D. 271.—**CAN.**

**7648 i.** ——.] — THE SCOTSWOOD (1867), Y. A. D. 25.—**CAN.**

**7648 ii.** ——.]—THE S. V. COONAN (1871), Y. A. D. 109.—**CAN.**

**7648 iii.** ——.] — THE MARGARET (1874), Y. A. D. 171.—**CAN.**

**7650 i.** *Award of moiety.*]—*Re* THE MARIE VICTORIA (1865), 2 S. V. A. R. 109.—**CAN.**

**7650 ii.** ——.] — THE ARCHITECT (1871), Y. A. D. 110.—**CAN.**

**7650 iii.** ——.]—*Re* THE PRIDE OF ENGLAND (1872), 2 S. V. A. R. 189. —**CAN.**

**7650 iv.** ——.]—THE IDA BARTON (1879), Y. A. D. 240.—**CAN.**

**7650 v.** ——.] — THE SYLPH (1882), C. L. T. 607.—**CAN.**

**7650 vi.** ——.]—In a highly meritorious case of salvage, the ct. will award a moiety of the net value of a derelict ship & cargo in shares amongst the salvors.—THE ELIZABETH BIBBY (1851), 3 Ir. Jur. 257.—**IR.**

**7650 vii.** ——.]—THE GANANOQUE (1874), 6 Nfld. L. R. 18.—**NFLD.**

**7655 i.** *Award exceeding moiety—Total proceeds.*]—Where no owner appeared to claim goods found derelict & their value was not great:—*Held:* the salvors should have the full amount they realised after payment of necessary costs.—TWO BALES OF COTTON (1872), Y. A. D. 135.—**CAN.**

**7655 ii.** —— ——.]—In a suit instituted by salvors in the case of a derelict, when the proceeds are small, & where the owners do not appear, the Ct. of Admlty. will award the entire of the funds realised by the sale amongst the salvors.—THE CASTLETOWN (1853), 5 Ir. Jur. 378.—**IR.**

**7655 iii.** —— ——.]—THE MILTOWN MALBAY (1853), 5 Ir. Jur. 380.—**IR.**

the proceeds of the salved property, awarded more than a moiety of the residue as salvage reward.

(2) In the circumstances of extraordinary merit & gallantry under which the services were rendered, I shall award as salvage the sum of £3,290; of this sum I shall award to the mate £600; to the three men who went on board the *Rasche* £510 each; to the rest of the crew & officers of the *Scythia* £360; & £500 to the owners. The sum of £360 to be divided among the officers & crew according to their rating, the shares of the runners & apprentices being calculated as if they were able seamen (SIR ROBERT PHILLIMORE).—THE RASCHE (1873), L. R. 4 A. & E. 127; 42 L. J. Adm. 71; 22 W. R. 240.

*Annotations:—As to* (1) **Distd.** The Craigs (1880), 5 P. D. 186. *As to* (2) **Refd.** The Valkyrie, [1910] W. N. 138.

**7658.** ——.]—THE BOILER EX ELEPHANT, No. 7150, *ante*.

*(b) Other Cases.*

**7659. Award exceeding moiety.**]—THE ERATO, No. 6828, *ante*.

**7660.** —— **Total proceeds.**]—In an action by pltfs. claiming salvage remuneration for services rendered to a barque, her cargo, & freight, the ct. awarded to the salvors the total value of the property salved.—THE MERCATOR (1910), 26 T. L. R. 450.

*D. Interest.*

**7661. Right to.**]—The ship was on her voyage from Ceylon to London with a valuable cargo. It was said . . . the value was a circumstance of no importance; but that is not so: the value is uniformly an ingredient, the remuneration being always larger when the property that receives assistance is larger than when it is small (SIR JOHN NICHOLL).

Salvage is not a payment merely for work & labour: other considerations are to be adverted to, the general interests of navigation & the commerce of the country; to encourage exertion, & to excite to risk & peril in the relief of property in danger. . . . The ct. must guard against exorbitant demands & an undue advantage being taken of distress; but when salvors act honestly & fairly, they are to be liberally rewarded, without a minute inquiry into the *quantum* of labour (SIR JOHN NICHOLL).

Considering the larger value of the ship & cargo, the roughness of the night, the service performed, & the view taken of it by the comrs. on the spot, the resistance to the award is improper. . . . If the award had been of long standing, I should have decreed interest (SIR JOHN NICHOLL).—THE HECTOR (1833), 3 Hag. Adm. 90; 166 E. R. 339.

**7662.** ——.]—THE EXPERIMENT (1837), 7 L. T. 76.

**7663.** ——.]—THE SAMUEL (1852), 7 L. T. 76.

**7664.** ——.] — Although execution has not issued, interest upon a salvage award is recoverable from the date of the judgment, & interest on the solr.'s taxed bill of costs from the date of the *allocatur* of the taxing-master. The ct. has no power to refuse interest because the judgment recovered is for salvage.—THE JONES BROTHERS (1877), 46 L. J. P. 75; 37 L. T. 164; 3 Asp. M. L. C. 478.

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SUB-SECT. 4.—RECOVERY OF SALVAGE REWARD.

*A. In General.*

**Jurisdiction of Admiralty Division.**] — *See* ADMIRALTY, Vol. I., pp. 151–153, Nos. 583–613.

**7665. At common law—No right of action—In absence of implied contract.**]—(1) The right to sue in a ct. of common law for salvage must be founded on an implied contract; & therefore, where the facts of the case do not warrant any such inference, the action will not lie.

(2) One of several salvors cannot sue for his share of the salvage.—LIPSON *v.* HARRISON (1853), 22 L. T. O. S. 83; 2 W. R. 10.

**By statute.**]—*See* 1894 Act, s. 565.

**7666. Salvage money paid into court for distribution—Whether court may decree payment of advances made to salvors by their agents.**]—THE LOUISA, No. 7606, *ante*.

**7667. Who may intervene in salvage suit—Party liable for collision necessitating salvage.**]—Where a ship has been found to blame in a cause of collision, & a cause of salvage has been instituted against the other (the injured) ship, the owners of the ship found to blame have a right to intervene in the salvage cause to protect their own interest.—THE DIANA (1874), 31 L. T. 203; 2 Asp. M. L. C. 366.

**7668. Authority of ship's agent to compromise salvage claim.**]—The authority of duly appointed ship's agents under the Naval Agency & Distribution Act, 1864, is not wider than that of a solr.; & if ship's agents settle an action contrary to the express prohibition of their principal they are guilty of a breach of duty & liable in damages for the consequences, even if the settlement be made without negligence & on the advice of counsel & in the *bonâ fide* belief that it is in the principal's interests.—THE HERMIONE, [1922] P. 162; 91 L. J. P. 136; 126 L. T. 701; 15 Asp. M. L. C. 493; *sub nom.* H.M.S. DAFFODIL, 38 T. L. R. 381.

**Hearing of the cause—Conduct of action.**]—*See* ADMIRALTY, Vol. I., p. 196, Nos. 1107–1112.

—— **Evidence.**]—*See* ADMIRALTY, Vol. I., pp. 196, 197, 200, 202, Nos. 1115–1120, 1173–1178, 1216, 1217.

*B. Essentials to Maintenance of Action.*

*See* Sect. 3, *ante*.

*C. Nature of Remedy.*

*(a) In General.*

**7669. May be either in personam or in rem.**]—THE PORT VICTOR (CARGO EX), No. 6905, *ante*.

*(b) In rem.*

i. *In General.*

*See, generally,* ADMIRALTY, Vol. I., pp. 104–105, Nos. 64–73.

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**PART XV. SECT. 10, SUB-SECT. 3.—C. (b).**

q. *Wreck.*]—In case of wreck the claim of the seamen upon the parts saved is a claim for salvage, & the *quantum* is to be regulated by the amount which would have been due for wages.—*Re* THE ISABELLA (1850), 1 S. V. A. R. 281.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 3.—D.**

**7661** i. *Right to.*]—CHU TAK LOONG & CO. *v.* BUTTERFIELD & SWIRE & CHINA NAVIGATION CO., LTD. (1908), 4 Hong Kong L. R. 1.—**HONG KONG.**

**PART XV. SECT. 10, SUB-SECT. 4.—A.**

r. *Joinder of master & crew as co-plaintiffs with owners.*]—PICKFORD & BLACK, LTD. *v.* THE LUX (1912), 14 Exch. C. R. 108; 8 D. L. R. 924.—**CAN.**

**PART XV. SECT. 10, SUB-SECT. 4.—C. (a).**

**7669** i. *May be either in personam or in rem.*]—Salvage may be recovered by a personal action against the owners of the ship saved, as well as by an action *in rem.*—DUNCAN *v.* DUNDEE, PERTH & LONDON SHIPPING CO. (1878), 5 R. (Ct. of Sess.) 742; 15 Sc. L. R. 429.—**SCOT.**

*Sect.* 10.—*The salvage award: Sub-sect.* 4, *C.* (*b*) *ii. & iii., &* (*c*), *& D.* (*a*) *&* (*b*); *sub-sect.* 5, *A. & B.*]

ii. *Possessory Lien.*

*See* XIX., Sect., 3, *post.*

iii. *Maritime Lien.*

**Priority of liens generally.**]—*See* Part XIX., Sect. 4, *post.*

(*c*) *In personam.*

*See* ADMIRALTY, Vol. I., pp. 104, 105, 172–174.

**7670. Jurisdiction of Court of Admiralty.**]—Although salvage suits, in the form of actions *in personam*, are comparatively rare, the Ct. of Admlty. always had jurisdiction, founded apparently on the fiction of an action *in rem* having been brought & the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a corpus of property salved (JEUNE, J.).—THE ELTON, [1891] P. 265; 60 L. J. P. 69; 65 L. T. 232; 39 W. R. 703; 7 T. L. R. 434; 7 Asp. M. L. C. 66.

*Annotations*:—**Dbtd.** The Port Victor, [1901] P. 243. **Mentd.** Firth *v.* De la Rivas & Palmer (No. 2) (1893), 69 L. T. 666; The Duc D'Aumale (1902), 72 L. J. P. 11.

**7671.** ——.]—The right to salvage may arise out of an actual contract, but it does not necessarily do so. . . . [I have come to the conclusion that] the action *in personam* did not arise out of jurisdiction *in rem*, & that the distinction between actions *in personam* & actions *in rem* depended only on whether the person or property of deft. was arrested in the first instance. . . . The law of Admlty. imposes on the owner of property saved an obligation to pay the person who saves it simply because in the view of that system of law it is just he should; & this conception of justice naturally imposes a proportionate obligation on any person whose interest in the property is real, though falling short of that of ownership (JEUNE, P.).—THE PORT VICTOR (CARGO EX), [1901] P. 243; 84 L. T. 363; 49 W. R. 578; 17 T. L. R. 378; 9 Asp. M. L. C. 163; *affd.*, [1901] P. at p. 250, C. A.

*Annotations*:—**Reld.** Pyman S.S. Co. *v.* Admiralty Comrs., [1919] 1 K. B. 49; The Meandros, [1925] P. 61.

**7672. Right to remedy.**]—THE TWO FRIENDS, No. 8219, *post.*

**7673.** ——.]—THE SCHILLER (CARGO EX), No. 7079, *ante.*

**7674. —— Against person with interest only in property salved.**]—THE FIVE STEEL BARGES, No. 6821, *ante.*

**7675.** —— ——.]—THE PORT VICTOR (CARGO EX), No. 7671, *ante.*

**7676. —— Against shipowners for proportion payable in respect of cargo—Special contract.**]—A vessel, the value of which was £3,500, & the cargo of which was worth £14,000, having been for three days on rocks in Castraes Bay, in the Gulf of Tartary, the master entered into an agreement with the salvors to pay them £200 for each day of service, & a further sum of £2,000 in the event of the vessel being got or coming off the rocks during the continuance of the attendance of the salvors:—*Held:* (1) the agreement was fair & reasonable & binding on the owners of the vessel; (2) the owners of the vessel were liable for the whole amount agreed upon without any deduction in respect of the salvage of the cargo.—THE PRINZ HEINRICH (1888), 13 P. D. 31; 57 L. J. P. 17; 58 L. T. 593; 36 W. R. 511; 6 Asp. M. L. C. 273.

*D. Loss of Right of Action.*

(*a*) *Delay.*

*See* Maritime Conventions Act, 1911 (c. 57), s. 8.

**7677. Effect of delay.**]—THE SOUTHAMPTON (1842), 8 L. T. 612.

**7678.** ——.]—(1) A bottomry bond is entitled to priority of payment over a mtge. during the voyage for which the bond was executed; but when due, should be enforced within reasonable time, & a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, & substitutes a contract, over which the Admlty. Ct., at least, has no jurisdiction.

(2) This ct. would be very reluctant to entertain a claim of salvage against a ship purchased without notice, if the salvors had voluntarily postponed their claim, there having been full oppertunity to enforce it (DR. LUSHINGTON).—THE ROYAL ARCH (1857), Sw. 269; 30 L. T. O. S. 198; 6 W. R. 191; 166 E. R. 1131.

*Annotations*:—*As to* (1) **Reld.** London & Midland Bank *v.* Neilson (1895), 1 Com. Cas. 18. *Generally*, **Reld.** The Staffordshire (1871), 25 L. T. 137; The James W. Elwell, [1921] P. 351; The St. George, [1926] P. 217.

(*b*) *Retention of Possession.*

*See* Sect. 12, sub-sect. 2, C., *post.*

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SUB-SECT. 5.—APPEALS.

*A. In General.*

*See, also*, ADMIRALTY, Vol. I., pp. 240, 241, Nos 1660–1681.

**7679. Presumption in favour of award.**]—If the award of magistrates is generally a reasonable reward for salvage services, the ct. will not disturb it in a trifling sum, merely because the apportionment should be in some degree objectionable; it being the duty of the ct. to support such awards, as far as they are not excessive, nor inconsistent with general principles.—THE VESTA (1828), 2 Hag. Adm. 189; 166 E. R. 214.

*Annotation*:—**Apld.** The Brothers (1828), 2 Hag. Adm. 195.

**7680.** ——.]—In an appeal from a magistrates' award in a case of salvage their certificate of value under 1 & 2 Geo. 4, c. 75, s. 9. even if not conclusive is of great weight & the ct. dissenting on no point from the award of the limit of the proceeds affirmed it with costs.—THE BROTHERS (1828), 2 Hag. Adm. 195; 166 E. R. 216.

**7681.** ——.]—THE THOMAS WOOD (1839), as reported in 8 L. T. 612.

*Annotations*:—**Reld.** The Aurora (1842), 1 Wm. Rob. 322; The Generous (1868), L. R. 2 A. & E. 57; The Caledonia (1869), 42 L. J. Adm. 13, n.

**7682.** ——.]—A Ct. of Appeal, in a disputed question respecting the amount of remuneration awarded by the ct. below, for salvage service, is indisposed, except it appears that the judgment is clearly erroneous, to interfere with the compensation which the ct. below, in its discretion, has awarded.—GANN *v.* BRUN, THE CLARISSA (1856), 12 Moo. P. C. C. 340; Sw. 129; 8 L. T. 178; 14 E. R. 940, P. C.

*Annotations*:—**Apld.** Green *v.* Bailey, The Neptune (1858), 12 Moo. P. C. C. 346; Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243. The Chetah (1868), L. R. 2 P. C. 205; The England (1868), L. R. 2 P. C. 253. **Consd.** Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589; The Amérique (1874), L. R. 6 P. C. 468. **Apld.** Thomas Allen (Owners) *v.* Gow, The Thomas Allen (1886), 12 App. Cas. 118. **Mentd.** The Zeta (1875), L. R. 4 A. & E. 460; Bradley *v.* Newsom, [1919] A. C. 16.

**7683.** ——.]—THE ALLANDALE (1858), 8 L. T. 178.

**7684.** ——.]—The ct. will not entertain an appeal from the salvage award of justices upon the mere question of amount, unless plainly exorbitant. On appeal the burden always lies on applt. & especially in cases of this kind where the decision appealed from is a decision of discretion. The amount of salvage reward due is not to be determined by any rules; it is a matter of discretion. . . . It would be therefore very improper to encourage salvage appeals on the mere question of amount (DR. LUSHINGTON).—THE CUBA (1860), Lush. 14; 8 L. T. 335; 6 Jur. N. S. 152; 167 E. R. 8.

*Annotations:*—**Apld.** Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243. **Consd.** The Chetah (1868), L. R. 2 P. C. 205; The Glenduror (1871), 24 L. T. 499. **Apld.** The Amérique (1874), L. R. 6 P. C. 468.

**7685.** ——.]—TRASK *v.* MADDOX, THE CARRIER DOVE, No. 7396, *ante*.

**7686.** ——.]—BLIGH *v.* SIMPSON, THE FUSILIER, No. 7205, *ante*.

**7687.** ——.]—KIRBY *v.* SCINDIA (OWNERS), THE SCINDIA, No. 7514, *ante*.

**7688.** ——.] — The Judicial Committee is reluctant to review salvage awards which involve the exercise of the discretion of the judge below, & will not do so unless the amount awarded differs to the extent of one-third from that which the Judicial Committee thinks adequate.

Case in which salvage remuneration was reduced from 12,000 dollars to 7,500 dollars; their lordships being of opinion that the difference between the sum awarded & that which would be liberal was so large as to require correction.—THOMAS ALLEN (OWNERS) *v.* GOW, THE THOMAS ALLEN (1886), 12 App. Cas. 118; 56 L. T. 285; 3 T. L. R. 188; 6 Asp. M. L. C. 99, P. C.

**7689.** —— **Except in case of very extraordinary character.**]—In a case of salvage service, the amount of compensation to be awarded, is in the discretion of the judge of the Ct. of Admlty., & the Judicial Committee will not interfere with the manner in which that discretion has been exercised, either by diminishing or increasing the amount awarded, except in a case of very extraordinary character.—GREEN *v.* BAILEY, THE NEPTUNE (1858), 12 Moo. P. C. C. 346; 14 E. R. 943, P. C.

*Annotations:*—**Consd.** The England (1868), L. R. 2 P. C. 253; The Amérique (1874), L. R. 6 P. C. 468.

**7690. Whether affidavits of appraisement admitted—Salvors taking no steps in court below—To issue commission of appraisement.**]—COLBY *v.* WATSON, THE ENDEAVOUR, No. 6838, *ante*.

**7691. Appeal from decision of magistrates—Jurisdiction of Court of Admiralty to entertain—Value of property salved under £1,000.**] — THE GENEROUS, No. 7257, *ante*.

**7692.** —— —— **Sum in dispute—Meaning of.**]—THE GENEROUS, No. 7257, *ante*.

—— **Presumption in favour of award.**]—*See* Nos. 7679–7681, 7683, 7684, *ante*.

**7693. Admissibility of fresh evidence upon appeal—Matters sufficiently before court below.**]—KIRBY *v.* SCINDIA (OWNERS), THE SCINDIA, No. 7514, *ante*.

**7694.** —— **Matter subject of application to court below.**]—KIRBY *v.* SCINDIA (OWNERS), THE SCINDIA, No. 7514, *ante*.

**Costs of salvage appeals.**]—*See* ADMIRALTY, Vol. I., pp. 242–243, Nos. 1698–1702, 1703.

*B. When Court will interfere.*

**7695. Error of principle.**]—Where a salvage award is appealed against the Ct. of Appeal adheres to the rule laid down in the Privy Council, & will not alter the sum unless it has been given on wrong principles, or with a misapprehension of the facts, or it is exorbitant & out of reason.—THE LANCASTER (1883), 9 P. D. 14; 49 L. T. 705; 32 W. R. 608; 5 Asp. M. L. C. 174, C. A.

**7696.** ——.]—The Ct. of Appeal will not reduce an amount given by a judge of first instance as salvage, unless the judge, in estimating the amount of remuneration to be awarded, has miscarried by allowing his judgment to be influenced by something which ought not to have influenced it at all, or else either by giving undue consideration or by failing to give due consideration to some circumstance fairly within his consideration.—THE CARRANZA (1885), 1 T. L. R. 379, C. A.

**7697.** ——.]—In reviewing an award for salvage made by the judge of the Admlty. Div. & affirmed by the Ct. of Appeal, this House will not interfere with the amount awarded unless it appears that the established principles have not been satisfactorily applied.

I think it would need a case exceptional & extraordinary to induce this House to interfere with an award made by the learned judge of the Admlty. Ct. & affirmed by the Ct. of Appeal (LORD HERSCHELL).—GLENGYLE (OWNERS), CARGO & FREIGHT *v.* NEPTUNE SALVAGE CO., THE GLENGYLE, [1898] A. C. 519; 67 L. J. P. 87; 78 L. T. 801; 14 T. L. R. 522; 8 Asp. M. L. C. 436, H. L.

**7698.** ——.]—Defts.' steamship, from Adelaide to London with a cargo of wool, broke down in the Red Sea, owing to damage to her propeller. She was picked up by pltf.'s steamship, from Java to Amsterdam with a general cargo, & was towed in six days about 830 miles to a safe anchorage in Suez Roads. The weather was fine except towards the end of the towage, when the usual northerly wind & some sea were encountered, & during part of the towage varying currents were met with. The salving vessel lost three days & incurred some expense. The values were large, that of the salving vessel, cargo & freight, £88,000, & that of the salved vessel, cargo & freight, £269,700. In an action of salvage the sum of £10,000 was awarded. Defts. appealed on the ground that the amount was excessive:—*Held:* the amount awarded could not be supported without doing injustice to those whose property was salved, for, in the ct. below, undue weight had been given to the value of the salved property, & the absence of serious danger, either to the salving or to the salved vessel, had not been sufficiently recognised. The award was, therefore, reduced to £6,000.—THE PORT HUNTER, [1910] P. 343; 80 L. J. P. 1; 103 L. T. 550; 26 T. L. R. 610; 11 Asp. M. L. C. 492, C. A.

**7699. Misapprehension of facts.**]—THE LANCASTER, No. 7695, *ante*.

**7700.** ——.]—The Ct. of Appeal will, in a salvage action, where it appears that the judge below has misapprehended the evidence, & consequently given a wrong award, increase or diminish the award as the justice of the case may require.—THE STAR OF PERSIA (1887), 57 L. T. 839; 6 Asp. M. L. C. 220, C. A.

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**PART XV. SECT. 10, SUB-SECT. 5.—B.**

**7695 i.** *Error of principle.*]—The rule which guides the Ct. of Appeal in dealing with objections to the amount awarded by an Admlty. Ct. of first instance is, that if the ct. cannot say that the judge has misapprehended the facts & cannot say that he has acted contrary to any principle, then if the amount does not seem to be unreasonable it cannot interfere.—BOWRING BROTHERS & KENT *v.* THE GASPESIA (1899), 8 Nfld. L. R. 290.—**NFLD.**

**7699 i.** *Misapprehension of facts.*]—BOWRING BROTHERS & KENT *v.* THE GASPESIA (1899), 8 Nfld. L. R. 290.—**NFLD.**

*Sect.* 10.—*The salvage award: Sub-sect.* 5, *B.; sub-sect.* 6. *Sect.* 11: *Sub-sects.* 1, 2, 3 & 4, *A.*]

**7701. Where reward excessive.**]—THE GENERAL PALMER (1830), 2 Hag. Adm. 323; 166 E. R. 261.

**7702.** ——.]—THE NIMROD (1850), 7 Notes of Cases, 570; 8 L. T. 154; 14 Jur. 942.

**7703.** ——.]—BIRD *v.* GIBB, THE DE BAY, No. 7587, *ante*.

**7704.** ——.]—THE LINDFIELD, THE CHALLENGE & THE COLUMBIA (OWNERS) & THE LADY VITA & THE GRANVILLE (OWNERS) *v.* THE LINDFIELD (OWNERS) (1894), 10 T. L. R. 606, C. A.

**7705.** —— **Excess must be considerable.**]—THE CUBA, No. 7684, *ante*.

**7706.** —— ——.]—The Judicial Committee will not interfere with the discretion exercised by the judge of the Admlty. Ct. in awarding compensation for salvage service, unless the difference between the amount awarded & the amount due in the judgment of the Judicial Committee is very considerable.—THE ENGLAND (1868), L. R. 2 P. C. 253; 5 Moo. P. C. C. N. S. 344; 38 L. J. Adm. 9; 20 L. T. 46; 3 Mar. L. C. 216; 16 E. R. 545, P. C.

*Annotations:*—**Apld.** Woburn Abbey (Owners) *v.* Superb & Conqueror (Owners), The Woburn Abbey (1869), 21 L. T. 707. **Refd.** The Alice & The Princess Alice (1868), 5 Moo. P. C. C. N. S. 333; The Amérique (1874), L. R. 6 P. C. 468.

**7707.** ——.]—THE DUBLIN, ETC. (OWNERS) *v.* THE CHETAH (OWNERS), THE CHETAH (OWNERS) *v.* THE ANNIE GRANT (OWNERS), THE CHETAH, No. 7428, *ante*.

**7708.** —— ——.]—In appeals as to the *quantum* of salvage awarded, the ct. will not interfere with or moderate the amount awarded by the ct. below unless that amount was exorbitant or excessive, though the ct. of appeal may be unable to affirm the principle on which the amount was assessed, or would have awarded a less amount than that given by the ct. below.—THE WOBURN ABBEY (OWNERS) *v.* THE SUPERB & CONQUEROR (OWNERS), THE WOBURN ABBEY (1869), 21 L. T. 707; 3 Mar. L. C. 310, P. C.

*Annotations:*—**Refd.** The Princeton (1878), 3 P. D. 90; The Servia, The Carinthia, [1898] P. 36.

**7709.** —— ——.]—THOMAS ALLEN (OWNERS) *v.* GOW, THE THOMAS ALLEN, No. 7688, *ante*.

**7710.** —— ——.]—THE CHILTONFORD (1901), 45 Sol. Jo. 556, C. A.

**7711.** —— —— **So considerable as to be unjust to owners of salved vessel.**]—THE AMÉRIQUE, No. 7464, *ante*.

**7712.** —— —— ——.]—In salvage cases there is no rule binding a ct. of appeal not to interfere with an award unless the amount is so large, or so small, that no reasonable person could fairly arrive at that sum; but the amount awarded will be diminished or increased if, after a careful consideration of the facts & after giving every possible weight to the view of the judge, the ct. is of opinion that the amount is so large as to be unjust to the owners of the ship which has been in distress, or so small as to be unjust to the salvors.—THE ACCOMAC, [1891] P. 349; 66 L. T. 335; 7 T. L. R. 649; 7 Asp. M. L. C. 153, C. A.

*Annotations:*—**Apld.** The Lindfield, Challenge & Columbia (Owners), Lady Vita & Granville (Owners) *v.* Lindfield (Owners) (1894), 10 T. L. R. 606. **Consd.** The Prince Llewellyn, [1904] P. 83. **Apld.** The Port Hunter, [1910] P. 343.

**7713.** —— —— ——.]—THE PORT HUNTER, No. 7698, *ante*.

**7714.** —— —— **So considerable as to compel court to interfere.**]—THE ELVENES (1924), 20 Lloyd, L. R. 222, C. A.

**7715.** —— **Excessive in sense of being beyond reason.**]—THE LANCASTER, No. 7695, *ante*.

**7716. Where reward inadequate.**] — Services rendered by a steamer to a vessel valued, with cargo & freight, at £11,000; the salvage reward of £250, allotted by the Ct. of Admlty., increased on appeal to £500.—CALEDONIAN STEAM TOWING CO. *v.* HUTTON (1847), 5 Notes of Cases, 156.

**7717.** ——.]—The salvors brought the barge *Harriett* off a dangerous position near the Nore Sand, & claimed £80. The magistrates at Maidstone awarded £15. On appeal:—*Held:* the latter sum was quite inadequate, & gave £40.

The Ct. will discourage suits for small amounts, but must interfere where the magistrates have taken a totally inadequate view of the services. —THE HARRIETT (1857), Sw. 218; 166 E. R. 1104.

**7718.** ——.]—The Ct. of Appeal will hesitate to interfere with the decision of local authorities on a question of salvage, but at the same time is bound to act upon its own judgment if it should be of opinion that the award is wholly inadequate. —THE MESSENGER (1857), Sw. 191; 166 E. R. 1090.

**7719.** ——.]—KIRBY *v.* SCINDIA (OWNERS), THE SCINDIA, No. 7514, *ante*.

**7720.** —— **Inadequacy must be considerable.**]—THE ENGLAND, No. 7706, *ante*.

**7721.** —— ——.]—THE DUBLIN, ETC. (OWNERS) *v.* THE CHETAH (OWNERS), THE CHETAH (OWNERS) *v.* THE ANNIE GRANT (OWNERS), THE CHETAH, No. 7428, *ante*.

**7722.** —— ——.]—Unless the amount awarded by magistrates is wholly inadequate, the Ct. of Admlty. upon appeal, will not disturb the award, even though the ct. is of opinion that the magis-

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**7701 i.** *Where reward excessive.*]—The Ct. of Appeal will not review the award of an inferior ct. on a salvage claim on the ground of excess in value, unless such finding is extravagant or immoderate, even though the Ct. of Appeal would, had they dealt with the matter *in prima instantia*, have awarded a lesser sum than that given by the decision appealed from.—PUTWAIN *v.* ENGLISH, SCOTTISH & AUSTRALIAN BANK, THE GOTHENBURG (1875), 4 Q. S. C. R. 183.—**AUS.**

**7701 ii.** ——.]—The amount of salvage reward is in the discretion of the ct. & unless the same is excessive, an appellate tribunal ought not to interfere.—THE SENECA *v.* MACDONALD, [1923] Exch. C. R. 177.—**CAN.**

**7701 iii.** ——.]—The Ct. of Admlty. has full jurisdiction & will review the decision of magistrates in a salvage case heard before them & may either increase the remuneration awarded below, if insufficient, or decrease it if excessive.—THE AMAZON (1860), 2 L. T. 140.—**IR.**

**7701 iv.** ——.]—SIMMS *v.* ELIAS (1859), 4 Nfld. L. R. 289.—**NFLD.**

**7701 v.** ——.]—BOWRING BROTHERS & KENT *v.* THE GASPESIA (1899), 8 Nfld. L. R. 290.—**NFLD.**

**7705 i.** —— *Excess must be considerable.*]—A Danish schooner of 90 tons was found derelict about 90 miles from Iceland by a steam trawler, which towed it to Aberdeen, 500 miles distant. The salvage was effected without material risk at a cost of £150. The vessel was valued at £800, & the cargo at £300. In an appeal from the sheriff ct., in which the salvage was fixed at £400, the ct., while indicating the opinion that the award was, in the circumstances, very liberal, refused to interfere with it, on the ground that it was not so extravagant as to warrant interference by the Ct. of Appeal.—JORGENSEN *v.* NEPTUNE STEAM FISHING CO., LTD. (1902), 4 F. (Ct. of Sess.) 992; 39 Sc. L. R. 765; 10 S. L. T. 206 —**SCOT.**

**7716 i.** *Where reward inadequate.*]—Amount of salvage award increased from £1,500 to £2,400, in consideration of the great risk incurred by the salvors in rescuing the ship & cargo, which were very valuable from imminent destruction.—*Re* THE CHAMPION (1889), I. L. R. 17 Calc. 84.—**CAN.**

**7716 ii.** ——.]—THE AMAZON (1860), 2 L. T. 140.—**IR.**

**7716 iii.** ——.]—A steamship, valued at £27,837, went aground on a rocky shore, & was salved by a tug from a position where she was in imminent danger of becoming a total wreck. The ct. below awarded £700 in respect of the salvage services. Award increased to £1,200.—STEEL & BENNIE, LTD. *v.* EVANGELISTA, THE CRUISER *v.* THE TAQUARY, [1913] S. C. 1107; 50 Sc. L. R. 839; [1913] 2 S. L. T. 135. —**SCOT.**

trates should have given a somewhat larger sum.—THE JEUNE LOUISE (1868), 37 L. J. Adm. 32.

**7723.** ——.]—Salvage services of a highly meritorious character having been performed by salvors, in saving the lives of the crew, & the ship & cargo, valued at £46,000, the Admlty. Ct. awarded £1,000 as salvage for such services. On appeal:—*Held:* the sum was insufficient, & the remuneration increased to £2,000, in consideration (*a*) of the great danger the salvors incurred; (*b*) the fact of the saving of lives, & the value of the ship & cargo.—ARNOLD *v.* COWIE, THE GLENDUROR (1871), L. R. 3 P. C. 589; 8 Moo. P. C. C. N. S. 22; 24 L. T. 499; 1 Asp. M. L. C. 31; 17 E. R. 221, P. C.

*Annotations:*—**Apld.** Thomas Allen (Owners) *v.* Gow, The Thomas Allen (1886), 12 App. Cas. 118. **Reld.** The Amérique (1874), L. R. 6 P. C. 468.

**7724.** —— —— **So considerable as to be unjust to salvors.**]—THE ACCOMAC, No. 7712, *ante*.

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SUB-SECT. 6.—COSTS.

**Costs of salvage generally.**]—*See* ADMIRALTY, Vol. I., pp. 210–212, Nos. 1322–1358.

**Costs of salvage appeals.**]—*See* ADMIRALTY, Vol. I., pp. 242, 243, Nos. 1698–1782.

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SECT. 11.—**APPORTIONMENT.**

SUB-SECT. 1.—IN GENERAL.

**7725. Whether matter of Admiralty jurisdiction.**]—An action cannot be maintained by one of a ship's crew for his proportion of salvage awarded by justices under Merchant Shipping Act, 1854 (c. 104), the remedy being by a proceeding under that act.—ATKINSON *v.* WOODHALL (1862), 1 H. & C. 170; 31 L. J. M. C. 174; 6 L. T. 361; 26 J. P. 759; 8 Jur. N. S. 720; 10 W. R. 671; 1 Mar. L. C. 224; 158 E. R. 846.

**7726.** —— **Award made by magistrates—Necessity for previous application to magistrates—Time for making application.**]—Construction of Admiralty Court Act, 1846 (c. 65), s. 5, where an award has been made by magistrates in a cause of salvage, the parties are not at liberty to resort to the Ct. of Admlty. for a distribution, unless an application should have been made in the first instance to the magistrates for an order of distribution.

The application to the magistrates must be made either at the time when the award is made, or within fourteen days afterwards.—THE HOPE (1841), 1 Wm. Rob. 265; 1 Notes of Cases 110; 166 E. R. 571.

*Annotation:*—**Reld.** The Waverley (1871), L. R. 3 A. & E. 369.

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SUB-SECT. 2.—BY THE COURT.

*See* 1894 Act, ss. 555, 556.

**7727. When application must be made—Within reasonable time.**]—(1) Steam vessels are important agents in salvage services, & their owners will be adequately rewarded. Where a steam tug had been in considerable danger in performing a salvage service:—*Held:* after deducting a sum for repairs & detention, the owner was not entitled to more than a moiety of the remainder of the whole sum awarded for the salvage service; the other moiety to the master and crew.

(2) A party dissatisfied with the tender made in apportionment of salvage is not precluded from coming here at any reasonable time after salvage decreed (DR. LUSHINGTON).—THE SPIRIT OF THE AGE (1857), Sw. 286; 30 L. T. O. S. 189; 166 E. R. 1141.

*Annotation:*—**Reld.** The City of Chester (1884), 9 P. D. 182.

**7728. How apportionment made—Question of fact.**]—There is not any fixed rule as to apportioning the amount of the award.

The apportionment must in each case depend upon the particular circumstances (LORD ESHER, M.R.).—THE GIPSY QUEEN, as reported in [1895] P. 176, C. A.

*Annotations:*—**Reld.** The Prince Llewellyn, [1904] P. 83; The Toscana, [1905] P. 148.

**7729. When apportionment made—Unjustified claim by owners to shares of apprentices.**]—(1) Apportionment of a tender in a cause of salvage. Claim on behalf of the owners of the salving vessels, to the shares of the apprentices who were on board, overruled. An apportionment to the apprentices directed.

(2) *Semble:* even if a previous contract had been made to that effect, such contract would be null & void, as against equity & public policy.—THE COLUMBINE (1843), 2 Wm. Rob. 186; 166 E. R. 724.

*Annotation:*—*As to* (1) **Reld.** Atkinson *v.* Woodhall (1862), 1 H. & C. 170.

**Agreements for apportionment.**]—*See* Sect. 9, sub-sect. 3, *ante*.

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SUB-SECT. 3.—DECEASED SALVORS.

**7730. Right of personal representatives to share.**]—THE MARQUIS OF HUNTLY, No. 7177, *ante*.

**7731.** ——.]—THE ANNA HELENA, No. 7640, *ante*.

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SUB-SECT. 4.—OWNERS OF SALVING VESSELS.

A. *In General.*

**7732. Basis of apportionment—Degree of danger to which ship exposed.**]—The claim of owners generally is very slight, unless, from the circumstances of the case, their property becomes exposed to danger, or they incur some real loss or inconvenience (SIR CHRISTOPHER ROBINSON).—THE JANE (1831), 2 Hag. Adm. 338; 166 E. R. 267.

*Annotations:*—**Consd.** The Enchantress (1860), Lush. 93; The City of Chester (1884), 9 P. D. 182. **Reld.** Papayanni *v.* Hocquard, The True Blue (1866), L. R. 1 P. C. 250. **Mentd.** Scaramanga *v.* Stamp (1880), 5 C. P. C. 295.

**7733.** —— ——.]—THE EARL GREY (1837), 3 Hag. Adm. 363; 166 E. R. 440.

**7734.** —— ——.]—Where no risk has been incurred by the vessel rendering the assistance, it is not the usual custom for the ct. to decree to the owners any large portion of that reward which more properly belongs to the individuals whose services have effected the safety & preservation of the ship (*per* CUR.).—THE NICOLINA (1843), 2 Wm. Rob. 175; 166 E. R. 720; *sub nom.* R. *v.* THE NICOLENE, 1 L. T. O. S. 411.

**7735.** —— ——.]—THE HIMALAYA (1859), 1 L. T. 307.

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**PART XV. SECT. 11, SUB-SECT. 4.— A.**

*t. Basis of apportionment—Interest in voyage.*]—Salvage award directed to be apportioned amongst the owner & master & crew of the salving schooner upon the principle upon which the proceeds of the fishing voyage would be distributed.—THE CAROLINE BROWN (1872), 5 Nfld. L. R. 477.—**NFLD.**

*a.* —— ——.]—THE CLARA (1872), 5 Nfld. L. R. 480.—**NFLD.**

*b.* —— ——.]—THE GANANOQUE (1874), 6 Nfld. L. R. 18.—**NFLD.**

*c.* —— ——.]—THE SCOTSMAN, DOMINION S.S. CO. *v.* THE NORTHERN LIGHT (1859), 8 Nfld. L. R. 266.—**NFLD.**

*Sect.* 11.—*Apportionment: Sub-sect.* 4, *A. & B.; sub-sect.* 5, *A. & B.* (*a*) *&* (*b*).]

**7736.** —— ——.]—THE PALMYRA, No. 7748, *post.*

—— **Value of salving property.**]—*See* Sect 10, sub-sect. 2 C. (*h*), *ante.*

*B. Amount of Share.*

**7737. Question of fact.**]—THE ALBION (1837), 3 Hag. Adm. 254; 6 L. T. 370; 166 E. R. 400.

*Annotation:*—**Consd.** The Louisa (1843), 2 Wm. Rob. 22.

**7738. Usually three-quarters of total.**]—In a suit instituted to recover salvage reward in respect of services rendered in towing a disabled vessel into safety, the ct. awarded a total sum of £4,000, of which £3,000 was apportioned to the owners.—THE KENMURE CASTLE (1882), 7 P. D. 47; 47 L. T. 661; 30 W. R. 708; 5 Asp. M. L. C. 27.

**7739.** ——.]—THE VALKYRIE, [1910] W. N. 138.

**7740. Circumstances affecting amount—Whether risk of vitiation of insurance taken into account.**]—In apportioning a salvage remuneration between the owners & crew of a salving vessel, the share of the owners will not be increased by the probable vitiation of a policy of assurance effected upon the ship.

In directing an apportionment, the ct. will consider every vessel as uninsured.—THE DEVERON (1841), 1 Wm. Rob. 180; 6 L. T. 479; 166 E. R. 540.

*Annotation:*—**Refd.** The Louisa (1843), 2 Wm. Rob. 22.

**7741.** —— **Deduction of expenses.**]—*Semble:* in apportioning the amount awarded as salvage, the ct. will not allow the owners of the vessel performing the service to deduct any expenses except those claimed in the petition in the salvage suit.—THE WIGTOWNSHIRE (1867), 36 L. J. Adm. 11.

**7742.** —— **Salving vessel also fishing vessel.**]—THE ALBION (1837), 3 Hag. Adm. 254; 6 L. T. 370; 166 E. R. 400.

*Annotation:*—**Consd.** The Louisa (1843), 2 Wm. Rob. 22.

**7743.** —— ——.]—THE LOUISA, No. 7606, *ante.*

*See, also,* Sect. 10, sub-sect. 2, E. (*c*), *ante.*

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SUB-SECT. 5.—MASTER, CREW AND PASSENGERS.

*A. Master.*

**7744. Grounds for special apportionment—Special degree of responsibility.**]—THE EARL GREY (1837), 3 Hag. Adm. 363; 166 E. R. 440.

**7745.** —— ——.]—THE MARTIN LUTHER, No. 7516, *ante.*

**7746.** —— ——.]—THE HIMALAYA (1859), 1 L. T. 307.

**7747.** —— ——.]—A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go, on board the brig, & by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, & the remainder of her crew had to undergo extra labour:—*Held:* not only the two men who went on board the brig, but the master & owners of the ship & the rest of the crew of the ship, were entitled to salvage reward for the services rendered.

The master is also entitled to share, as it was upon his responsibility that the two men were sent on board the *Charles* (SIR ROBERT PHILLIMORE).—THE CHARLES (1872), L. R. 3 A. & E. 236; 26 L. T. 594; 21 W. R. 13; 1 Asp. M. L. C. 596.

**7748.** —— **Personal exertions.**]—In apportioning salvage reward among the owners, master, & crew of a sailing vessel which has rendered salvage services, the Ct. of Admlty. will not allot to the owners the same proportion of the reward as in the case of services rendered by a steamship, usually one-half, unless the circumstances show that the vessel itself, as where the services are effected by steam power, was the chief agent in effecting the salvage.

In apportioning the sum of £1,500, where the services were mainly the personal exertions of the master & crew of a sailing vessel, the ct. awarded £500 to the owners, £650 to the crew, & £350 to the master.—THE PALMYRA (1872), 25 L. T. 884; 1 Asp. M. L. C. 182.

**7749. Duty of master to hand over portion to owners.**]—A master receiving under an award salvage money from the owners of property to which he, the ship & crew have rendered salvage services, is not bound to hand over to his owner the portion he *bonâ fide* conceives to be his own proper share, nor (*semble*) any part of the salvage money; the remedy of the owner is to apply to the Ct. under s. 498 Merchant Shipping Act, for a distribution of salvage.—THE PRINCESS HELENA (1861), Lush. 190; 30 L. J. P. M. & A. 137; 4 L. T. 869; 1 Mar. L. C. 108; 167 E. R. 91.

*Annotations:*—**Consd.** The Arina (1887), 12 P. D. 118. **Mentd.** Jones *v.* Jones (1895), 43 W. R. 656.

*B. Crew.*

(*a*) *In General.*

**7750. Mode of apportionment—According to rating.**]—THE EARL GREY (1837), 3 Hag. Adm. 363; 166 E. R. 440.

**7751.** —— ——.]—THE MARTHA (1838), 3 Hag. Adm. 434; 166 E. R. 466.

*Annotation:*—**Refd.** The City of Chester (1884), 9 P. D. 182.

**7752.** —— ——.]—THE COLUMBIA, No. 6834, *ante.*

**7753.** —— ——.]—THE BEULAH (1842), 1 Wm. Rob. 477; 2 Notes of Cases, 61; 3 L. T. 182; 7 Jur. 207; 166 E. R. 650.

*Annotations:*—**Refd.** The Ganges (1869), L. R. 2 A. & E. 370; The Wilhelm Tell, [1892] P. 337.

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**PART XV. SECT. 11, SUB-SECT. 4.—B.**

d. *Steam power of vessel efficient cause of salvage—Owner entitled to larger share.*]—When the steam power of the salving vessel is the efficient cause of the salvage, the owners are entitled to the larger share of the reward. This is especially the case where the master & crew of the salving vessel incur no risk to life.—RAFFIN *v.* THE CHILKA (1883), I. L. R. 7 Bom. 196.—**IND.**

**PART XV. SECT. 11, SUB-SECT. 5.—A.**

7744 i. *Grounds for special apportionment—Special degree of responsibility.*]—An extra allowance awarded to the captain for the extra care & responsibility thrown upon him in performing the salvage services.—THE SCOTSMAN, DOMINION S.S. CO. *v.* THE NORTHERN LIGHT (1899), 8 Nfld. L. R. 266.—**NFLD.**

e. —— *Interests of commerce & humanity.*]—The reward of the master ought, in the interest of commerce & humanity alike, to be on a liberal scale.—RAFFIN *v.* THE CHILKA (1883), I. L. R. 7 Bom. 196.—**IND.**

f. *Basis of apportionment—Interest in voyage.*]—THE CAROLINE BROWN (1872), 5 Nfld. L. R. 477.—**NFLD.**

g. —— ——.]—THE CLARA (1872), 5 Nfld. L. R. 480.—**NFLD.**

h. —— ——.]—THE GANANOQUE (1874), 6 Nfld. L. R. 18.—**NFLD.**

**PART XV. SECT. 11, SUB-SECT. 5.—B. (a).**

7750 i. *Mode of apportionment—According to rating.*]—THE STEINMAN (1882), 6 Nfld. L. R. 429.—**NFLD.**

k. *Necessity for liberal award—In interests of commerce & humanity.*]—The reward of the crew ought, in the

**7754.** —— ——.]—THE HIMALAYA (1859), 1 L. T. 307.

**7755.** —— ——.]—THE GOLONDRINA (1867), L. R. 1 A. & E. 334.

**7756.** —— ——.]—I award . . . £200 to the boat's crew, the amount to be distributed amongst them according to their rating (SIR ROBERT PHILLIMORE).—THE ANDRINA (1870), L. R. 3 A. & E. 286; 22 L. T. 488; 3 Mar. L. C. 410.

**7757.** —— ——.]—THE CLEOPATRA, No. 7782, *post*.

**7758.** —— ——.]—THE MINNEAPOLIS, No. 7788, *post*.

**7759.** —— ——.]—THE DUNOTTAR CASTLE, [1902] W. N. 70.

**7760.** —— —— **Rating of navigating officers treated as same as that of crew.**]—THE BREMEN, No. 7614, *ante*.

**7761.** —— —— **Rating of navigating officers treated as same as that of engineer officers.**]—On the hearing of a salvage suit brought by the owners, master, & crew of the steamship *E.* to recover salvage for services rendered to the *I.* an apportionment between the owners, master, & crew of the salving vessel was asked for. The navigating officers on the *I.* were rated at a lower rating than the engineer officers, &, if the salvage was distributed among the crew according to their ratings, the navigating officers would have received less than the engineer officers:—*Held*: the salvage should be distributed among the officers as though the navigating officers were rated at the same rate as the engineer officers of the same grade.—THE ITALIA (1906), 95 L. T. 398; 10 Asp. M. L. C. 284.

*Annotation*:—**Reld.** The Lincairn (1906), 22 T. L. R. 682.

**7762.** —— —— ——.]—The ct., in apportioning a salvage award, allowed the navigating officers their share as though they served at the same rating as, & not at a lower rating than, the engineer officers, & though they had done no special service.—THE LINCAIRN (1906), 22 T. L. R. 682.

**7763.** —— —— ——.]—In the apportionment of a salvage award it is now an established rule, as regards the portion awarded to the crew of the salving ship according to their ratings, that is to say, salaries, that the rating of each of the navigating officers shall be treated as equal to that of the corresponding grade of engineer officer, the chief officer's rating being treated as equal to that of the chief engineer, the second officer's to that of the second engineer, & so on.—THE BIRNAM (1907), 76 L. J. P. 28; 96 L. T. 792; 10 Asp. M. L. C. 462.

**7764.** —— —— ——.]—THE VALKYRIE, [1910] W. N. 138.

**7765.** —— —— **Rating of apprentices treated as same as that of able seamen.**]—THE HOPE, No. 7793, *post*.

**7766.** —— —— ——.]—THE DEVERON (1841), 1 Wm. Rob. 180; 3 L. T. 182; 166 E. R. 540.

*Annotation*:—**Apld.** The Louisa (1843), 2 Wm. Rob. 22.

**7767.** —— —— ——.]—THE RASCHE, No. 7657, *ante*.

**7768.** —— —— ——.]—THE VALKYRIE, [1910] W. N. 138.

**7769.** —— —— ——.]—THE PUNTA LARA, No. 7792, *post*.

**7770.** —— —— **Rating of apprentices treated as two-thirds that of able seamen.**]—THE GEORGE DEAN (1857), Sw. 290; 30 L. T. O. S. 220; 6 W. R. 263; 166 E. R. 1143.

*Annotations*:—**Reld.** The Norma (1860), Lush. 124; The Georg, [1894] P. 330.

**7771.** —— —— **Rating of "runners" treated as same as that of able seamen.**]—THE RASCHE, No. 7657, *ante*.

**7772.** —— —— ——.]—A derelict vessel was found in the North Atlantic Ocean, 800 miles from land in a seriously damaged condition, & was navigated into Queenstown by salvors, who incurred great risk & hardship in rendering the service. The value of the derelict was £5,100. The ct. awarded £2,300 as salvage reward.

The £1,550 awarded to those of the crew of the *Teutonia* who volunteered to remain on board the *Craigs* is to be divided amongst them according to their rating, any substitutes amongst them to share as if they had had the rating of A. B.'s (SIR ROBERT PHILLIMORE).—THE CRAIGS (1880), 5 P. D. 186; 29 W. R. 446.

**7773.** —— —— **Rating of "runners" treated as same as that of persons whose places they fill.**]—THE PERSIA, [1902] W. N. 210.

*(b) Special Services.*

**7774. Ground for special reward.**]—THE MINNEAPOLIS, No. 7788, *post*.

**7775.** —— **Superintendence of removal of cargo.**]—THE MARTHA (1838), 3 Hag. Adm. 434; 166 E. R. 466.

*Annotation*:—**Reld.** The City of Chester (1884), 9 P. D. 182.

**7776.** —— **Navigation of ship in dangerous circumstances.**]—THE ACTIVE (1850), 14 Jur. 606.

**7777.** —— ——.]—THE MARY ROGERSON (1863), 8 L. T. 401; 1 Mar. L. C. 339.

**7778.** —— ——.]—THE GOLONDRINA (1867), L. R. 1 A. & E. 334.

**7779.** —— ——.]—THE RASCHE, No. 7657, *ante*.

**7780.** —— —— **Risk of yellow fever.**]—THE SKIBLADNER, No. 6846, *ante*.

**7781.** —— **Boarding vessel in dangerous circumstances.**]—The collier steamer, value £5,000, bound from Newcastle to Seville, with a cargo of pig iron, fell in, in the English Channel, with the *St. Nicholas*, a large American ship, totally disabled by tempest. A boat, at great peril, was sent on board, & the vessel taken in tow, & the next day brought safely into Portland. Value of the property saved, £52,000.

The ct. awarded to the salvors £2,800; £1,500 to the owners, £500 to the master, & £800 to the crew; double shares to the men who boarded in the boat.—THE SAINT NICHOLAS (1860), Lush. 29; 167 E. R. 15.

**7782.** —— ——.]—A ship built on purpose to convey the obelisk known as "Cleopatra's Needle" was, whilst laden with the obelisk, abandoned about 90 miles North East of Ferrol, on the coast

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interest of commerce & humanity alike to be on a liberal scale.—RAFFIN *v.* THE CHILKA (1883), I. L. R. 7 Bom. 196.—**IND.**

l. *Basis of apportionment — Interest in voyage.*]—THE CAROLINE BROWN (1872), 5 Nfld. L. R. 477.—**NFLD.**

m. —— ——.]—THE CLARA (1872), 5 Nfld. L. R. 480.—**NFLD.**

n. —— ——.]—THE GANANOQUE (1874), 6 Nfld. L. R. 18.—**NFLD.**

o. —— ——.]—THE SCOTSMAN, DOMINION S.S. CO. *v.* THE NORTHERN LIGHT (1899), 8 Nfld. L. R. 266.—**NFLD.**

**PART XV. SECT. 11, SUB-SECT. 5.—B. (b).**

p. *Ground for special reward — Additional labour imposed—Absence of hands transferred to distressed ship.* — When a vessel which had received some injury from bad weather, placed several hands on board a derelict:—*Held*: the parties on board a salving vessel were entitled to extra remuneration for the additional labour imposed upon them, in consequence of the absence of the hands transferred to the distressed ship.—THE SANSONE (1851), 3 Ir. Jur. 258.—**IR.**

q. —— *Special degree of risk — Boarding & navigating derelict.*]—Men who went on board a wreck & navigated her to port, having incurred

*Sect.* 11.—*Apportionment: Sub-sect.* 5, *B.* (*b*) *&* (*c*), *& C.; sub-sects.* 6 *&* 7. *Sect.* 12: *Sub-sect.* 1, *A.* (*a*) *&* (*b*).]

of Spain. The *F.* discovered her & lay by her for a night; & the next day four of the crew of the *F.* volunteered & went to the ship, & after much difficulty & at considerable risk succeeded in getting the rudder clear & a hawser attached. The *F.* after towing her for fifty-two hours brought her into port. The ct. appraised the ship & obelisk at £25,000, & awarded £2,000, & apportioned the latter sum as follows, viz., £1,200 to the owners of the *F.*, £250 to her master, & the rest among the officers & crew according to their ratings, as follows, viz., double shares to the chief officer, second engineer & other volunteers, & three shares to the seaman immersed in water while clearing the shackles & tow line, the rest among the others of the crew.—THE CLEOPATRA (1878), 3 P. D. 145; 47 L. J. P. 72.

*Annotation:*—**Refd.** The Gas Float Whitton No. 2, [1896] P. 42.

**7783. —— Seaman engaged in clearing tow line.**]—THE CLEOPATRA, No. 7782, *ante*.

**7784. —— Seamen engaged fighting fire.**]—THE ELISE, [1899] W. N. 54.

**7785. —— Engineers on double watch during operations.**] — THE DUNOTTAR CASTLE, [1902] W. N. 70.

(*c*) *Associate Members of Crew.*

*See, generally*, Sect. 6, sub-sect. 1, B. (*a*), *ante*.

**7786. Mode of apportionmen'—Non-navigating members of crew—One third share according to rating.**]—THE NOORDLAND, [1893] P. 153, n.

*Annotations:*—**Refd.** The Spree, [1893] P. 147; The Minneapolis, [1902] P. 30.

**7787.** ——— ——— ———.]—THE DUNOTTAR CASTLE, [1902] W. N. 70.

**7788.** ——— ——— ———.]—A large steamer crossing the Atlantic with passengers & cargo, & a considerable number of horses & cattle, fell in, during bad weather, with a dismasted barque. After her crew had been taken off, & the wreckage cut away, the barque was towed to the Azores. The owners of the barque settled the salvage claim by payment to the owners of the steamer of the sum of £8,250. In an action for apportionment:—*Held:* the owners of the salving steamer, which had incurred expenses amounting to £2,000, were entitled to £6,175, & the master to £500, with special awards of £150, according to rating, to those of the officers & crew who had effected the transfer of the crew of the barque; £300, according to rating, to those engaged in cutting away the wreckage, £25 to the boat's crew employed during that service, & £75, according to rating, to the boat's crew engaged in passing ropes, leaving £1,025 to be divided amongst the whole crew, but the non-navigating portion, surgeon, purser, cooks, stewards, & stewardess, to share as if rated at one-third of their actual rating, & the horsemen & their foremen, who were in the employ & pay of the owners of the salving steamer, &, having stations assigned to them at the boats, were liable to be called upon to perform duties, to share at one-third of the rating of an A. B.—THE MINNEAPOLIS, [1902] P. 30; 71 L. J. P. 28; 86 L. T. 263; 9 Asp. M. L. C. 270.

*Annotation:*—**Folld.** The Dunottar Castle, [1902] W. N. 71.

**7789.** —— —— **One-half share according to rating.**]—THE SPREE, No. 7043, *ante*.

**7790.** —— —— **Cattle keepers.**]—THE CORIOLANUS, No. 7045, *ante*.

**7791.** —— —— **Horsemen & foremen in employ of owners of salving ship—One-third share of able seamen.**]—THE MINNEAPOLIS, No. 7788, *ante*.

**7792.** —— —— **Master's wife acting as stewardess—No right to share.**]—One of the crew on board a vessel, in favour of which an award for salvage services had been made, was the master's wife, who was on the articles as stewardess & was rated at 1*s.* a month. Another member of the crew was an apprentice in his fourth year:—*Held:* in respect of the salvage remuneration payable to the crew, the apprentice was entitled to share as if he were an ordinary seaman, but the master's wife was not entitled to any share.—THE PUNTA LARA (1910), 26 T. L. R. 268.

*C. Passengers.*

**7793. Mode of apportionment—Same shares as able seamen.**]—Salvage of cargo & crew by transhipment on board a valuable Indiaman from an American ship in a sinking state, about 300 miles eastward of the Cape of Good Hope. Property saved £7,000. Salvage £2,000. Apportionment among owners, officers, passengers, & crew.

The owners had no personal merit, & if they take £850, it is ample. To the £300 proposed for the representatives of the captain, I add £50; & I give £100 to the first, & £50 to the second mate; they each had additional responsibility. Of the £650 that remain I am of opinion that the passengers are entitled to share as able bodied seamen; they were delayed, & experienced some inconvenience. The crew will take in proportion to their wages: they had some extra labour, but only for a few hours: there are also three apprentices, & they will take shares equal with the seamen at the lowest rate (SIR JOHN NICHOLL).—THE HOPE (1838), 3 Hag. Adm. 423; 6 L. T. 479; 166 E. R. 462.

*Annotation:*—**Distd.** The Coriolanus (1890), 15 P. D. 103.

**7794.** —— ——.]—THE PERLA, No. 7490, *ante*.

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SUB-SECT. 6.—OFFICERS AND MEN OF THE ROYAL NAVY.

*See* ROYAL FORCES, Vol. XXXIX., p. 320, Nos. 57, 58.

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SUB-SECT. 7.—SEPARATE SETS OF SALVORS.

*See* Sect. 12, *post*.

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## SECT. 12.—SEPARATE SETS OF SALVORS.

### SUB-SECT. 1.—RIGHTS AS BETWEEN FIRST AND SUBSEQUENT SALVORS.

*A. Possession.*

(*a*) *In General.*

**7795. Right of first salvors to possession—Where further assistance unnecessary.**]—Interference of a third party not justifiable where the salvage is already in the act of performance & under means

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greater risk than the rest of the crew, were awarded a certain proportion of the crew's whole salvage, in addition to their shares.—THE CAROLINE BROWN (1872), 5 Nfld. L. R. 477.—**NFLD.**

r. —— —— ———.]—THE CLARA (1872), 5 Nfld. L. R. 480.—**NFLD.**

**PART XV. SECT. 12, SUB-SECT. 1.—A. (a).**

**7795 1.** *Right of first salvors to possession—Where further assistance unnecessary.*]—Where a second set of salvors take property from original salvors, to justify the taking they must establish an absolute necessity for the interference existing at the time they took the property. The right to the property exists in the original salvors unless it appears that further assistance was necessary for the preservation of the same.—FORSEY *v.* DUCHESNE (1855), 4 Nfld. L. R. 65.—**NFLD.**

sufficient for the purpose.—THE MARIA (1809), Edw. 175 ; 165 E. R. 1073.

*Annotation :*—**Apld.** The Charlotta (1831), 2 Hag. Adm. 361.

**7796.** —— ——.]—THE ROSE IN JUNE (1809), cited in 2 Hag. Adm. at p. 364 ; 166 E. R. 276.

*Annotation :*—**Reld.** The Charlotta (1831), 2 Hag. Adm. 361.

**7797.** —— ——.]—THE CHARLOTTA, No. 7086, *ante*.

**7798.** —— ——.]—THE QUEEN MAB, No. 7808, *post*.

**7799.** —— ——.]—In ordinary cases, when the assistance of one set of salvors has been accepted, & they are competent to fulfil the service which they have undertaken they cannot be dispossessed by subsequent salvors (DR. LUSHINGTON).—THE GLASGOW (OR GLASCOW) PACKET (1844), 2 Wm. Rob. 306 ; 3 Notes of Cases, 107 ; 3 L. T. O. S. 263 ; 8 Jur. 674 ; 166 E. R. 770.

**7800.** —— ——.]—THE TRITONIA, No. 7810, *post*.

**7801.** —— ——.]—(1) Where salvors are in possession of a vessel, & their services have been accepted, & they can discharge what they have undertaken with safety to the vessel, & with facility, it is not competent to any other persons to interfere with them. But in a doubtful case the salvors will not be justified in refusing further assistance.

(2) Where salvors, not employed at the time, prevented further assistance being given, although their services were afterwards accepted, & they salved the ship & cargo, the ct. awarded them £100 instead of £300, & allowed them two-thirds only of their costs.—THE GLORY (1850), 8 L. T. 582 ; 14 Jur. 676.

**7802.** —— ——.]—THE PICKWICK, No. 7051, *ante*.

**7803.** —— ——.]—THE CLARISSE (1856), Sw. 129 ; 8 L. T. 582 ; 166 E. R. 1056 ; *on appeal, sub nom.* GANN *v.* BRUN, THE CLARISSE, 12 Moo. P. C. C. 340, P. C.

*Annotations :*—**Reld.** The Zeta (1875), L. R. 4 A. & E. 460 ; Bradley *v.* Newsom, [1919] A. C. 16. **Mentd.** Green *v.* Bailey, The Neptune (1858), 12 Moo. P. C. C. 346 ; Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243 ; The Chetah (1868), L. R. 2 P. C. 205 ; The England (1868), L. R. 2 P. C. 253 ; Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589 ; The Amerique (1874), L. R. 6 P. C. 468 ; Thomas Allen (Owners) *v.* Gow, The Thomas Allen (1886), 12 App. Cas. 118.

**7804.** —— —— **Burden of proof on subsequent salvors.**]—THE BLENDEN HALL, No. 7650, *ante*.

**7805.** —— —— ——.]—(1) Of two sets of salvors, the first in possession claimed salvage, summarily, before magistrates ; the second, cognisant of such claim, sued here by action :—*Held :* they had failed to prove either an adoption of their services, or incompetency in the first possessors.

(2) The first being in possession, the *onus probandi* is upon those who came afterwards ; they must show, most clearly, either an adoption of their services, or an incompetency in the first occupants to effect the salvage, an absolute necessity for their interference (SIR JOHN NICHOLL). —THE EUGENE (1834), 3 Hag. Adm. 156 ; 166 E. R. 364.

—— **Derelict.**]—*See* Sub-sect. 1, A. (*b*), *post*.

(*b*) *Derelict.*

**7806. Right of first salvors to exclusive possession.**]—THE BLENDEN HALL, No. 7650, *ante*.

**7807.** ——.]—THE EFFORT, No. 7632, *ante*.

**7808.** ——.]—Derelict. After restitution to the owners, the ship was sold ; & of £250—net proceeds—two-fifths—in a case of considerable merit, lasting twenty hours—were given to principal salvors—twenty-four in number ; &—out of the remainder—£30 to a smack for saving the ship's crew ; £5 to a cutter for putting an anchor & cable on board, besides all costs & expenses.

Unless a necessity is shown for further assistance, no party, other than the first in possession—has a right to interfere. The cutter was rather an intruder : the crew were told their assistance was not wanted ; & going on board for the protection of the revenue will not make them salvors (SIR JOHN NICHOLL).—THE QUEEN MAB (1835), 3 Hag. Adm. 242 ; 166 E. R. 395.

*Annotations :*—**N.F.** The Zephyrus (1842), 1 Wm. Rob. 329. **Reld.** The Willem III. (1871), 25 L. T. 386.

**7809.** ——.]—THE DANTZIC PACKET, No. 7849, *post*.

**7810.** ——.]—When once a vessel has been abandoned by her master & crew, in consequence of real danger, for the purpose of saving their lives, then, whatever persons first get possession of that vessel, & are competent to render salvage services, have a right to retain possession of her until she be either voluntarily given up, or they are divested by due course of law. The ct. is always desirous to hold out to salvors, whether the case be one of derelict or of simple salvage, the expediency of not standing by their strict rights, but to deliver over, as soon, as may be, for the convenience & advantage of the owners of the ship & cargo, the property of which they are in charge, provided always that these salvors, in the first instance, have adequate security for that reward to which they may be found ultimately entitled. . . . The original salvors, who get possession of a vessel, more especially a derelict, are entitled to exclude others, provided the services be completely performed. Every salvor is entitled, as a matter of right, to come to this ct. if he think fit ; he is not compelled to enter into a negotiation with the owners of the ship & cargo. It may be beneficial to himself & the owners that he should do so ; but, as a matter of right, especially in a case of derelict, the salvors are entitled to resort here to enforce their demands ; in other words, the law entitles them to say, " We will have the judgment of the High Ct. of Admlty., as to the extent of remuneration which we ought to receive, & we will not negotiate " (DR. LUSHINGTON).—THE TRITONIA (1847), 2 Wm. Rob. 522 ; 5 Notes of Cases, Supp. i ; 8 L. T. 440 ; 166 E. R. 853.

**7811.** ——.]—In the case of a derelict, the salvors have a right to exclusive possession of the vessel ; but unless the vessel has been utterly abandoned, & is in contemplation of law a derelict, the occupying salvors are bound to give up charge to the master, on his appearing & claiming charge ; & the master may then refuse to continue to employ them, & may employ others, & may take what measures he thinks fit for the preservation of the vessel.

A vessel having run on shore, & been got off water-logged & disabled, was anchored, & the master then quitted with all his crew, to obtain steam assistance. On the next day he returned with a steamer, & found that salvors had just taken possession :—*Held :* the vessel was not a derelict & the master was entitled to resume full

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**7804 1.** —— —— *Burden of proof on subsequent salvors.*]—The *onus probandi* lies on the salvors who came to assist those in possession to show an adoption of their services or an incompetency in the first occupant to effect the salvage. —FORSEY *v.* DUCHESNE (1855), 4 Nfld. L. R. 65.—**NFLD.**

**PART XV. SECT. 12, SUB-SECT. 1.—A. (b).**

**7806 1.** *Right of first salvors to exclusive possession.*]—In cases of derelict

*Sect.* 12.—*Separate sets of salvors: Sub-sect.* 1, *A.* (*b*), *& B.*: *sub-sect.* 2, *A., B. & C.*]

authority.—THE CHAMPION (1863), Brown. & Lush. 69; 8 L. T. 401; 1 Mar. L. C. 340; 167 E. R. 303.

**7812.** ——.]—In 1922 pltfs. fitted out an expedition to salve cargo from the wreck of a Dutch steamship which had sunk in 1916 in the North Sea in over 100 feet of water. Pltfs. worked at the scene of the wreck whenever the weather & tides permitted during the summer of 1922 & from Apr. to July, 1923. During that time they had succeeded in cutting a hole into No. 4 hold, had buoyed the wreck, & had extracted some portions of cargo of little value at a cost of over £40,000.

In July, 1923, defts., British subjects & partners in a rival salvage co., arrived on the scene in a British registered ship, &, by sending down their own divers & interfering with pltfs.' diving operations, tried to secure possession of the wreck & cargo, & either prevent further work on the part of pltfs. or establish themselves with pltfs. in concurrent occupation:—*Held:* pltfs. were sufficiently in occupation of the wreck to exclude third parties from interfering with the property.—THE TUBANTIA, [1924] P. 78; 93 L. J. P. 148; 131 L. T. 570; 40 T. L. R. 335; 16 Asp. M. L. C. 346; 18 Lloyd, L. R. 158.

**7813.** —— **Manifest incompetence of first salvors.**]—(1) "Derelict," a term legally applied to a ship which is abandoned & deserted at sea by the master & crew without any intention on their part of returning to her (SIR BARNES PEACOCK).

(2) In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire & absolute possession & control of the vessel, & no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command, he retains the possession of the ship, & it is his province to determine the amount of assistance that is necessary, & the first salvors have no right to prevent other persons from rendering assistance if the master wishes such aid.

So unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning & claiming charge of the vessel to give it up to him (SIR BARNES PEACOCK).—COSSMAN *v.* WEST, COSSMAN *v.* BRITISH AMERICA ASSURANCE CO. (1887), 13 App. Cas. 160; 57 L. J. P. C. 17; 58 L. T. 122; 4 T. L. R. 65; 6 Asp. M. L. C. 233, P. C.

*Annotations:*—*As to* (1) **Refd.** Bradley *v.* Newsom, [1919] A. C. 16. *As to* (2) **Apld.** The Tubantia, [1924] P. 78. *Generally*, **Mentd.** Blairmore Sailing Ship Co. *v.* Macredie, [1898] A. C. 593; Polurrian S.S. Co. *v.* Young, [1915] 1 K. B. 922; Fooks *v.* Smith, [1924] 2 K. B. 508.

*B. Reward.*

**7814. Right of first salvors—Wrongful dispossession by second salvors.**]—THE FLEECE, No. 7174, *ante.*

**7815.** —— ——.]—If first salvors lawfully in possession of a derelict ship are wrongfully & violently dispossessed by second salvors, who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the benefit of the original salvors.—THE KATHLEEN (1874), L. R. 4 A. & E. 269; 31 L. T. 204; 23 W. R. 350; 2 Asp. M. L. C. 367.

*Annotations:*—**Mentd.** The Cito (1881), 7 P. D. 5; Bradley *v.* Newsom, [1919] A. C. 16.

**7816.** —— **Necessary dispossession by second salvors.**]—THE MAGDALEN, No. 7486, *ante.*

**7817.** —— **Unavoidable abandonment of services.**]—THE SAMUEL, No. 6857, *ante.*

**7818.** —— ——.]—Salvors having made great exertions to save a ship & cargo, were at length, with her crew, compelled to abandon her. She was afterwards found, & saved by a steamer:—*Held:* the original salvors were entitled to salvage reward under the circumstances.

The principle of salvage is to reward exertions which have been successful in saving property. Exertions, therefore, however meritorious, which have not been successful in any degree, cannot receive salvage reward.—THE E. U. (1853), 1 Ecc. & Ad. 63; 8 L. T. 582; 164 E. R. 37.

*Annotations:*—**Dbtd.** The Renpor (1883), 8 P. D. 115. **Consd.** The Camellia (1884), 9 P. D. 27. **Refd.** Ocean S.S. Co. *v.* Anderson (1883), 13 Q. B. D. 651; The Kate B. Jones, [1892] P. 366; S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**7819.** —— ——.]—THE SANTIPORE, No. 6911, *ante.*

**7820.** —— **Intervention by second salvors in course of intermittent services by original salvors — Intervention accompanied by force.**] — THE CLARISSE (1856), Sw. 129; 166 E. R. 1056; *on appeal, sub nom.* GANN *v.* BRUN, THE CLARISSE, 12 Moo. P. C. C. 340, P. C.

*Annotations:*—**Refd.** The Zeta (1875), L. R. 4 A. & E. 460; Bradley *v.* Newsom, [1919] A. C. 16. **Mentd.** Green *v.* Bailey, The Neptune (1858), 12 Moo. P. C. C. 346; Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243; The Chetah (1868), L. R. 2 P. C. 205; The England (1868), L. R. 2 P. C. 253; Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589; The Amérique (1874), L. R. 6 P. C. 468; Thomas Allen (Owners) *v.* Gow, The Thomas Allen (1886), 12 App. Cas. 118.

**7821. Right of second salvors—Wrongful dispossession of first salvors—In honest & reasonable belief that dispossession necessary.**]—THE MARIA (1809), Edw. 175; 165 E. R. 1073.

*Annotation:*—**Apld.** The Charlotta (1831), 2 Hag. Adm. 361.

**7822.** —— ——.]—THE FLEECE, No. 7174, *ante.*

**7823.** —— ——.]—THE KATHLEEN, No. 7815, *ante.*

**7824.** —— **Intervention in course of intermittent services by first salvors.**]—THE CLARISSE (1856), Sw. 129; 166 E. R. 1056; *on appeal, sub nom.* GANN *v.* BRUN, THE CLARISSE, 12 Moo. P. C. C. 340, P. C.

*Annotations:*—**Refd.** The Zeta (1875), L. R. 4 A. & E. 460; Bradley *v.* Newsom, [1919] A. C. 16. **Mentd.** Green *v.* Bailey, The Neptune (1858), 12 Moo. P. C. C. 346; Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243; The Chetah (1868), L. R. 2 P. C. 205; The England (1868), L. R. 2 P. C. 253; Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589; The Amérique (1874), L. R. 6 P. C. 468; Thomas Allen (Owners) *v.* Gow, The Thomas Allen (1886), 12 App. Cas. 118.

**7825. Inhibition in appeal by some salvors—Whether bar to receipt of reward by other salvors.**]—*Semble:* an inhibition, in an appeal by some salvors, does not necessarily preclude other distinct salvors, who do not appeal, from receiving their proportionate remuneration.—THE THETIS (1833), 3 Hag. Adm. 98; 166 E. R. 342.

**Ranking of liens for salvage.**]—*See* Part XIX., Sect. 4, sub-sect. 3, *post.*

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the first occupants have exclusive possession.—THE J. L. MAYO (1884), 7 Nfld. L. R. 30.—NFLD.

**7813***i.* —— *Manifest incompetence of first salvors.*]—The master of a steamer will be justified in insisting upon his services being accepted to tow a derelict ship into harbour, if he conscientiously believes that the salvors, who have possession of her, have not means at their disposal to bring her safely into port; & his omitting to do so would be considered a breach of duty by the Ct. of Admlty.—THE GUDRUM (1860), 12 Ir. Jur. 361.—IR.

SUB-SECT. 2.—RELATIONS AS BETWEEN SALVORS AND OWNER OR MASTER.

*A. In General.*

**7826. General rule—Salvors in possession under sufferance.**]—THE DANTZIC PACKET, No. 7849, *post.*

**7827. Duty of salvors to accept further assistance—Doubt of successful issue of services.**]—COSSMAN *v.* WEST, COSSMAN *v.* BRITISH AMERICA ASSURANCE CO., No. 7813, *ante.*

**Duty of salvors to deliver up possession.**]—*See* Sub-sect. 2, B., *post.*

*B. Possession.*

**7828. Delivery up of possession.**]—It is an ill-founded & absurd notion, that unless salvors stick by the ship, they forfeit, or at least impair their title to remuneration. It is very desirable that salvors, generally, should know, that in order to maintain their rights, it is perfectly unnecessary to remain on board the vessel which may have received their assistance (LORD STOWELL).—THE ELEANORA CHARLOTTA (1823), 1 Hag Adm. 156; 166 E. R. 56.

*Annotation:*—**Refd.** The Dantzic Packet (1837), 3 Hag. Adm. 383.

**7829. —— On demand by owners.**]—THE BAREFOOT, No. 7147, *ante.*

**7830. —— —— Retention necessary to secure reward.**]—THE PALINURUS (1842), 8 L. T. 440.

**7831. —— —— ——.**]—THE GLASCOW (OR GLASGOW) PACKET (1844), 2 Wm. Rob. 306; 3 Notes of Cases, 107; 3 L. T. O. S. 263; 8 Jur. 674; 166 E. R. 770.

**7832. —— —— Retention necessary for completion of services.**]—THE PERSIAN (1842), 8 L. T. 582.

**7833. —— —— ——.**]—THE PICKWICK, No. 7051, *ante.*

**7834. —— —— Retention necessary for safety of ship.**]—THE PINNAS, No. 7858, *post.*

**7835. —— —— Retention for purpose of completing repairs.**]—THE PINNAS, No. 7858, *post.*

**7836. —— To master & crew—Abandonment by master & crew.**]—Under the circumstances, the salvors would be justified in keeping possession of the vessel, & taking her into port without delaying to take on board the crew which had abandoned her.—THE ORBONA (1853), 1 Ecc. & Ad. 161; 8 L. T. 582; 164 E. R. 93.

*Annotation:*—**Mentd.** Scaramanga *v.* Stamp (1880), 5 C. P. D. 295.

**7837. —— —— ——.**]—THE ELISE, [1899] W. N. 54.

**7838. —— ——.**]—THE CHAMPION, No. 7811, *ante.*

**7839. —— ——.**]—The ct. will not lay down any general rule, but will be guided by the circumstances of each case in determining whether or no the master of the salvor's vessel is justified in refusing to allow the crew of the salved vessel to return to their own ship before the completion of the salvage.—THE CLEOPATRA (1868), 37 L. J. Adm. 31.

**7840. —— ——.**]—THE YAN-YEAN, No. 7498, *ante.*

**7841. —— ——.**]—COSSMAN *v.* WEST, COSSMAN *v.* BRITISH AMERICA ASSURANCE CO., No. 7813, *ante.*

**7842. —— ——.**]—THE CAPELLA, No. 7845, *post.*

**Retention of possession in case of derelict.**]—*See* Sub-sect. 1, A. (*b*), *ante.*

*C. Effect of Unjustified Retention of Possession on Right to Reward.*

**7843. Forfeiture of reward—Obstruction of additional salvors.**]—THE DANTZIC PACKET, No. 7849, *post.*

**7844. —— ——.**]—Salvors guilty of misconduct in resisting the employment of a steamer:—*Held:* to have forfeited thereby all claim to salvage reward.—THE MARTHA (1859), Sw. 489; 166 E. R. 1226.

**7845. —— Exclusion of master & crew from salved ship.**]—Where salvors having taken possession of a vessel which had got ashore & been temporarily abandoned by her master & crew in order to get tug assistance, refused to allow her master & crew on board, & remained in possession on board whilst the tugs provided by the master towed the ship into a place of safety:—*Held:* there had been such misconduct as to work a total forfeiture of award, although pltfs. had in the absence of the master & crew laid out two anchors which contributed to the vessel's ultimate safety.—THE CAPELLA, [1892] P. 70; 66 L. T. 388; 7 Asp. M. L. C. 158.

**7846. —— Exclusion of master from salved ship—& refusal of services of tug.**]—THE YAN-YEAN, No. 7498, *ante.*

**7847. ——.**]—THE BAREFOOT, No. 7147, *ante.*

**7848. ——.**]—(1) Claim to salvage forfeited by the misconduct of the salvor in retaining possession of & improperly dealing with the property salved.

(2) It is the bounden duty of agents abroad to adopt any means in their power for the preservation of the property of their employers.—THE LADY WORSLEY (1855), 2 Ecc. & Ad. 253; 164 E. R. 417.

**7849. Diminution of reward—Obstruction of additional salvors.**]—(1) Prior salvors have no right in themselves while the master is in command, to interfere with further assistance, & to attempt to exclude subsequent salvors; & such misconduct diminishes their title to salvage.

It is a dangerous error, that salvors going to the assistance of a vessel in distress, acquire the sole management of her; they only act under sufferance & permission (SIR JOHN NICHOLL).

(2) In derelict, the first occupant, if equal to the service, has a right of exclusive possession subject to the rights of the Crown or owners.

(3) The master, so long as he retains the command, is fully entitled to regulate the *quantum* of assistance to be given to his vessel; & he may be extremely blameable if he does not avail himself of all that is at hand, & he may consider necessary (SIR JOHN NICHOLL).—THE DANTZIC PACKET (1837), 3 Hag. Adm. 383; 8 L. T. 582; 166 E. R. 447.

*Annotations:*—*As to* (2) **Consd.** The Kathleen (1874), L. R. 4 A. & E. 269; Bradley *v.* Newsom, [1919] A. C. 16.

**7850. —— Obstruction of master.**]—THE BLACK BOY (1837), 3 Hag. Adm. 386, n.; 166 E. R. 448, n.

**7851. —— ——.**]—THE DOSSEITEI, No. 7013, *ante.*

**7852. —— ——.**]—THE GLORY, No. 7801, *ante.*

**7853. —— ——.**]—THE MAGDALEN, No. 7486, *ante.*

**7854. —— —— Obstruction not affecting ultimate safety of ship.**]—THE YAN-YEAN, No. 7498, *ante.*

**7855. —— Exclusion of master from salved**



7827 i. *Duty of salvors to accept further assistance—Doubt of successful issue of services.*]—THE CAMBRIA (1848), Pritchard's Admiralty Dig., 3rd ed., Vol. II. p. 1822.—IR.

*Sect.* 12.—*Separate sets of salvors: Sub-sect.* 2, *C.; sub-sects.* 3 & 4. *Sect.* 13: *Sub-sect.* 1, *A.*]

**ship—Exclusion not affecting ultimate safety.**]—THE YAN-YEAN, No. 7498, *ante.*

**7856. Deprivation of costs — Obstruction of master.**]—THE BLACK BOY (1837), 3 Hag. Adm. 386, n.; 166 E. R. 448, n.

**7857.** ——— ———.]—THE GLORY, No. 7801, *ante.*

**7858.** ———.]—(1) Where salvors have brought a damaged vessel into a position of safety they are bound, on demand by the owners, to deliver up possession of the salved property, & have no right to retain it for the alleged purpose of completing the repairs:—*Semble:* if the vessel is at the time of the demand in such a critical position that there may be risk of loss or damage to her unless the salvors are allowed to complete their operations, the salvors may be entitled to retain possession pending their performance.

(2) The expenses in this case are items which are to be taken into account in considering what amount of salvage ought to be awarded, & from that point of view I am of opinion that a very considerable number of them cannot be supported. I have accordingly reduced them, in my mind, to a particular figure, & then considered what should be awarded for salvage services (HANNEN, P.).

(3) Having regard to the misconduct . . . I shall not allow pltf. any costs (HANNEN, P.).—THE PINNAS (1888), 59 L. T. 526; 6 Asp. M. L. C. 313.

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SUB-SECT. 3.—MISCONDUCT BY ONE SET OF SALVORS.

**7859. Whether rights of salvors not guilty of misconduct prejudiced.**]—Consolidated action by two sets of salvors consisting of the crews of seven smacks, for salvage rendered to a foreign ship in getting her off the Long Sand. Action dismissed upon the ground that the primary salvors, who had boarded the vessel prior to her striking upon the sand, had acted erroneously & the measures which they adopted had in point of fact caused the vessel to get upon the sand. An application subsequently made to the ct. on behalf of the second salvors, who had come up & rendered assistance after the vessel was upon the sand. Application sustained, no recognition being made by the second salvors of the acts done on board the vessel previous to the commencement of their services.—THE NEPTUNE (1842), 1 Wm. Rob. 297; 8 L. T. 582; 166 E. R. 583.

*Annotation:*—**Reld.** The Duke of Manchester (1846), 2 Wm. Rob. 470.

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SUB-SECT. 4.—APPORTIONMENT.

**7860. How shares determined—Higher apportionment for salvors of both life & property.**]—THE CLARISSE (1856), Sw. 129; 166 E. R. 1056; *on appeal, sub nom.* GANN *v.* BRUN, THE CLARISSE, 12 Moo. P. C. C. 340, P. C.

*Annotations:*—**Reld.** Green *v.* Bailey, The Neptune (1858), 12 Moo. P. C. C. 346; Trask *v.* Maddox, The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243; The Cheetah (1868), L. R. 2 P. C. 205; The England (1868), L. R. 2 P. C. 253; Arnold *v.* Cowie, The Glenduror (1871), L. R. 3 P. C. 589; The Amérique (1874), L. R. 6 P. C. 468; The Zeta (1875), L. R. 4 A. & E. 460; Thomas Allen (Owners) *v.* Gow, The Thomas Allen (1886), 12 App. Cas. 118; Bradley *v.* Newsom, [1919] A. C. 16.

**7861.** —— **Apportionment of tender—Duty of owners of salved property—When cognisant of services rendered by different salvors.**]—A steamship broke down & had to take the assistance of a tug. The tug ran short of coal & had to leave her. A steam trawler & a lifeboat then came up & rendered assistance, & she was brought into safety. Actions for salvage were instituted by the trawler & the lifeboat, & the actions were consolidated. The owners of the salved steamship then tendered a lump sum of £350 to the salvors. The salvors took out a summons asking for an order that defts. should apportion the sum tendered between them. The assistant registrar made an order directing the apportionment. Defts. appealed to the judge:—*Held:* when defts.' servants were present throughout the salvage services & could give the owners of the salved property information as to what was done by the various salvors, it was the duty of the owners of the salved property, if they made a tender, to apportion the sum tendered among the various salvors, though no such duty existed if the owners of the salved property had no means of ascertaining what services were rendered by the different salvors.—THE BURNOCK (1914), 110 L. T. 778; 30 T. L. R. 274; 12 Asp. M. L. C. 490.

*Annotation:*—**Consd.** The Creteforest, [1920] P. 111.

**Conduct of action involving rival salvors.**]—*See* ADMIRALTY, Vol. I., p. 196, Nos. 1107–1110.

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SECT. 13.—**CONTRIBUTION.**

SUB-SECT. 1.—LIABILITY TO CONTRIBUTE.

*A. In General.*

**7862. What interests liable to contribute—Ship cargo & freight—According to value.**]—(1) No distinction is drawn between salvage to the ship & salvage to the cargo. The practice of the ct. is to take the whole value " of both ship & cargo & assess proportionably on the two.

(2) Where the cargo consists of different commodities, no distinction is drawn between one sort & another, except in the case of bullion, for the salvage of which being an article easily preserved, a lower remuneration is granted than for more bulky merchandise.

(3) In assessing salvage remuneration, the ct. looks to the value of the property saved, & not to its quality, or liability to be more or less damaged.

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**PART XV. SECT. 12, SUB-SECT. 4.**

t. *How shares determined.*]—A foreign ship becoming disabled, her crew were taken off by one set of salvors & safely landed at a port. Subsequently another set of salvors fell in with the ship & brought her into an adjoining port. The services in both cases were highly meritorious & rendered while the disabled vessel was about 60 miles from the nearest land:—*Held:* both sets of salvors were entitled to salvage, & a sale of the ship having been effected for $2,560, the ct. awarded the sum of $660 to be divided among the salvors of the crew & $900 among the salvors of the ship.—THE HEINDALL (1872), Y. A. D. 132.—**CAN.**

a. ———.]—A crew of 30 salvors engaged in the salving of a vessel, whilst sailing her to the shore to beach her, were joined by another crew of equal number, who boarded the vessel with or without the consent of the salvors in charge & assisted in working her to the shore:—*Held:* in availing of their assistance the first salvors adopted the interference of the second set, & the latter were entitled to have the award apportioned amongst them, having regard to the value of their respective services. — THE CHIPMAN (1877), 6 Nfld. L. R. 132.—**NFLD.**

b. —— *Derelict first discovered by lighthouse keeper—Salving performed by tug hailed & directed by him.*]—An abandoned vessel was discovered by the keeper of a lighthouse who hailed a steam-tug & directed her to the vessel. The steam-tug then brought her into port. The value of vessel & cargo was agreed upon at $2,250:—*Held:* the steam-tug should receive $450, & the lighthouse keeper $25.—THE AFTON (1873), Y. A. D. 136.—**CAN.**

—THE EMMA (1844), 2 Wm. Rob. 315; 3 Notes of Cases, 114; 4 L. T. O. S. 17; 8 Jur. 651; 166 E. R. 773.

*Annotation:—As to* (2) **N.F.** The Longford (1881), 6 P. D. 60.

**7863.** —— —— ——.] — THE CHARLOTTE WYLIE, No. 7173, *ante*.

**7864.** —— —— ——.]—THE JOHN BUNYAN (1856), 8 L. T. 612.

**7865.** —— —— ——.]—Where steam tugs rendered salvage services by towing a sinking vessel with passengers, cargo, & bullion on board into safety, it was held that the bullion was liable to contribute to the salvage reward in proportion to its value rateably with the other property salved.—THE LONGFORD (1881), 6 P. D. 60; 50 L. J. P. 28; 44 L. T. 254; 29 W. R. 491; 4 Asp. M. L. C. 385.

**7866.** —— —— **Effect of varying degrees of risk.**]—THE VELOX, No. 7443, *ante*.

**7867.** —— ——.]—THE FLEECE, No. 7174, *ante*.

**7868.** —— **Interests benefited.**]—H.M. steamship *Leopard* rendered a salvage service to an English vessel then in the service of the French govt. & laden with a valuable cargo. The suit was entered against the vessel alone, her value being £4,247. The ct., adverting to the difficulty of apportioning salvage where the cargo was not before it, awarded £600 on the value of the vessel.

It is contrary to all principles of justice if a cargo has received & been benefited by the services so rendered, that the whole burden of the salvage remuneration should fall on the ship itself (DR. LUSHINGTON).—THE MARY PLEASANTS (1857), Sw. 224; 166 E. R. 1107.

*Annotations:*—**Refd.** The Raisby (1885), 10 P. D. 114; The Elton, [1891] P. 265.

**7869.** —— ——.]—BLIGH *v.* SIMPSON, THE FUSILIER, No. 7205, *ante*.

**7870.** —— ——.]—THE FIVE STEEL BARGES, No. 6821, *ante*.

**7871.** —— ——.]—A ship was chartered to proceed to a foreign port, there load a cargo & bring it home, the chartered freight being payable on delivery of the cargo. While the ship was proceeding in ballast to her port of loading she grounded, & a general average sacrifice was made. She subsequently continued her voyage, loaded her cargo, delivered it & received the freight:—*Held:* the chartered freight was liable to contribute to the general average sacrifice.

What has to be decided in each case is, there being something saved at the expense of another person, in the case of general average at the expense of one of the persons themselves interested—in the case of salvage of an outsider, what are the elements that have been saved, &, therefore, at whose expense ought the reward for saving to be paid? That involves in the case of salvage just as it does in the case of general average a consideration of what interests are actually at risk & are saved by the sacrifice—viz. in the one case the average sacrifice, in the other the labour & the expenses of the persons salving.—CARISBROOK S.S. CO. *v.* LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., [1902] 2 K. B. 681; 71 L. J. K. B. 978; 87 L. T. 418; 50 W. R. 691; 18 T. L. R. 783; 46 Sol. Jo. 699; 9 Asp. M. L. C. 332; 7 Com. Cas. 235, C. A.

**7872.** —— —— **Liability of shipowner in respect of salvage of cargo.**]—The *G.* fell in with the *R.*, which was in distress. The following agreement was signed by the two captains: "At my request the captain of the *G.* will tow my ship the *R.* to St. Nazaire, that being the nearest port, for repairs. The matter of compensation to be left to arbitrators at home." The *G.* towed the *R.* safely to St. Nazaire. The *R.* discharged her cargo at Dunkirk, & an average bond in the usual form was taken from the consignees of the cargo. The owners of the *G.* brought an action for salvage of the ship & freight against the *R.*, & were awarded salvage. They also brought an action in France for the salvage of the cargo against the cargo owners, but failed in it. They then brought this action *in personam* against the owners of the *R.* to recover salvage in respect of the services to the cargo or, in the alternative, damages from defts., for not taking a proper bond to secure salvage from the cargo owners:—*Held:* defts. were not primarily liable to pay salvage in respect of the cargo, they had not bound themselves by the above agreement to do so, & it was not their duty to obtain a bond from the cargo owners for the proportion of any salvage which might be due.

No primary liability rests on the ship or its owners to pay for the salvage of the cargo. It is laid down in *Abbott on Shipping*, title, Salvage; "With respect to the parties liable to pay salvage, & the interest in respect of which it is payable, the rule is that the property actually benefited is alone chargeable with the salvage recovered" (HANNEN, P.).—THE RAISBY (1885), 10 P. D. 114; 54 L. J. P. 65; 53 L. T. 56; 33 W. R. 938; 5 Asp. M. L. C. 473.

*Annotations:*—**Distd.** The Cumbrian (1887), 57 L. T. 205; The Prinz Heinrich (1888), 13 P. D. 31.

**7873.** —— **Cargo—Bullion.**] — THE JONGE BASTIAAN (1804), 5 Ch. Rob. 323; 165 E. R. 782.

*Annotations:*—**Apld.** The Longford (1881), 6 P. D. 60. **Refd.** The Vesta (1828), 2 Hag. Adm. 189; The Martha (1838), 3 Hag. Adm. 434; The Atlas (1862), Lush. 518; The Killeena (1881), 6 P. D. 193; The Dictator, [1892] P. 304; S.S. Melanie *v.* S.S. San Onofre, [1925] A. C. 246.

**7874.** —— —— ——.]—THE EMMA, No. 7862, *ante*.

**7875.** —— —— ——.]—THE LONGFORD, No. 7865, *ante*.

**7876. Who may be liable to contribute—Charterers.**]—THE PORT VICTOR (CARGO EX), No. 6905, *ante*.

**7877.** —— —— **Admiralty.**]—PYMAN S.S. CO. *v.* ADMIRALTY COMRS., No. 8762, *post*.

**7878.** —— **Owners—Though vessel under requisition at time services rendered.**]—A Greek steamship owned by defts., a Greek co., was requisitioned by the Greek Govt. during the war in 1922 between Greece & Turkey. Under the terms of requisition the possession & control of the vessel passed to the Greek Govt., & the master & crew ceased to be employed by defts. & were conscripted into the Greek forces. At the end of the period of requisition the vessel had to be returned to defts. in the same condition as at the beginning of the period. While under requisition the vessel stranded, & was saved from possible total loss by the services of pltfs.' salvage ship. After the vessel had been returned to her owners she was arrested by pltfs. in an action *in rem*.

Defts. contended that having regard to the terms of requisition the Greek Govt. were to be regarded as temporary owners of the vessel; that the services, therefore, did not give rise to a maritime lien, & that the claim for salvage was not enforceable against defts., who derived no benefit from the services:—*Held:* the terms of requisition did not dispossess defts. of their property in the vessel; the services were of benefit to defts., as thereby they had their vessel instead of merely a claim against the Greek Govt.; as the services were not those of the crew of the Greek vessel, it was immaterial that the crew were the servants of the Greek Govt., & defts. were liable to pltfs. for salvage.—THE MEANDROS, [1925] P. 61; 94

*Sect.* 13.—*Contribution: Sub-sect.* 1, *A., B., C. & D.; sub-sect.* 2, *A. & B.*]

L. J. P. 37; 132 L. T. 750; 41 T. L. R. 236; 16 Asp. M. L. C. 476.

——.]—*Compare* Sect. 11, *ante*, & INSURANCE, Vol. XXIX., p. 237, No. 1903.

*B. As between Cargo Owner and Shipowner.*

**7879. General rule.**]—Ship & cargo must each pay its own share of salvage; neither can be made liable for the salvage due from the other; whether the salvors proceed in the Admlty. Ct., or before the local magistrates.—THE PYRENNEE (1863), Brown. & Lush. 189; 3 New Rep. 250; 167 E. R. 330.

*Annotation:*—**Refd.** The Raisby (1885), 10 P. D. 114.

**7880. When shipowner alone liable—Freight exceeding value of salved cargo.**]—Where a ship was chartered upon a voyage out & home, at £2 10*s.* per ton, register measurement, per month, £2,500 to be paid on clearing outwards, the like sum at the end of twelve months, & the remainder three months after being reported at the custom house on her return; & the ship delivered her outward cargo, & sailed with her homeward cargo, & was captured & recaptured on the homeward voyage, & the ship & cargo were sold by consent of all parties, the owner & charterers having respectively made claim in the Admlty. Ct. to ship & goods, where restitution was decreed to them upon payment of salvage:—*Held:* the charterers, having paid the two sums of £2,500, were not liable to contribute to the shipowner for salvage in respect of their goods, where the proceeds of the goods fell short of the sum due for the residue of the freight, but the shipowner in respect of the freight was liable to the whole salvage: & the charterers having paid such contribution out of the proceeds of the goods, under a security given by them for payment of the salvage, with the assent of the shipowner as far as his liability was concerned.

The principle upon which freight is to contribute in the case of general average is, that it was one of the things in hazard at the time when that sacrifice which produced the general average was made (LORD ELLENBOROUGH, C.J.).—COX *v.* MAY (1815), 4 M. & S. 152; 105 E. R. 791.

*Annotation:*—**Consd.** Briggs *v.* Merchant Traders' Assocn. (1849), 13 Q. B. 167.

**7881. —— Salvage services necessitated by default of shipowner.**]—The owner of a ship sunk by a collision in the Thames admitted it to be his fault, & paid into ct. £8 a ton in a suit to limit his liability. The Thames Conservators having powers under 40 & 41 Vict. c. 16, & Thames Conservancy Acts, raised the ship & delivered the ship & cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—*Held:* the shipowner was bound to deliver the wool to the owner of the wool without claiming from him, by way of contribution to salvage, any part of the expenses of raising the ship & cargo.—PREHN *v.* BAILEY, THE ETTRICK (1881), 6 P. D. 127; 45 L. T. 399; 4 Asp. M. L. C. 465, C. A.

*Annotations:*—**Refd.** Greenshields, Cowie *v.* Stephens, [1908] 1 K. B. 51. **Mentd.** Fulham Vestry *v.* Minter, [1901] 1 K. B. 501.

**7882. —— —— Recovery back of contribution.**]—In a cause *in rem* instituted on behalf of the assignees of a bill of lading petition alleged that whilst the vessel was on a voyage to a British port with the cargo mentioned in the bill of lading on board, the master & sole owner of the vessel wilfully cut down & destroyed parts of the vessel, & wilfully abandoned the vessel on the high seas, & the vessel & cargo were afterwards taken possession of as derelict by certain salvors, & towed by them into a British port, & the cargo never was delivered by deft. to pltfs. in accordance with the terms of the bill of lading, although such non-delivery was not occasioned by any of the perils in the bill of lading excepted, & pltfs. were compelled to pay money to the salvors before they could get possession of the cargo & the delivery of the cargo to pltfs. was delayed. It appeared from the proceedings in the cause that the vessel was a foreign vessel & the master was a foreign subject:—*Held:* the facts disclosed a breach of duty or breach of contract within Admiralty Court Act, 1861 (c. 10), s. 6, in respect of which pltfs. were entitled to institute a cause *in rem*, & it was competent to pltfs. to institute such cause, although no criminal proceedings had been taken against deft.—THE PRINCESS ROYAL (1870), L. R. 3 A. & E. 41; 39 L. J. Adm. 43; 22 L. T. 39; 3 Mar. L. C. 328.

**7883. —— Salvage services necessary for delivery of cargo.**]—Pltfs., under a charterparty, shipped a large quantity of rye on board one of defts.' ships to be carried from the port of Taganrog to the port of Altona. Owing to the negligent navigation of defts.' servants, the ship was cast ashore, & a large quantity of the rye was lost, but a considerable quantity was saved by the Salvage Assocn., who were employed by the underwriters of the cargo with the assent of defts. The average statement was prepared, & the sum assessed was agreed to by pltfs., & the Salvage Assocn. were paid by the underwriters the expenses claimed by them. Pltfs. brought an action on behalf of the underwriters to recover the amount of the salvage expenses so paid by the underwriters. Pltfs. recovered a verdict for an amount to be settled out of court. The question of law involved in the case was reserved for further consideration. Defts. contended that they were not liable, because pltfs. themselves had not paid the expenses, & the payment under the circumstances was voluntary:—*Held:* pltfs. were entitled to recover the amount of the salvage expenses, as, without their being incurred, the remainder of the cargo could not have been sent to its destination, which was for the benefit of defts., & the payment under the circumstances was not voluntary.—SCARAMANGA *v.* MARTIN MARQUAND & CO. (1885), 53 L. T. 810; 5 Asp. M. L. C. 506, C. A.

**7884. Proceeds of sale of ship not sufficient to meet salvage claims—Whether consignees of cargo must bring in balance of freight.**]—Foreign ship having been sold by decree of the ct. in a cause of salvage, the proceeds were insufficient to meet all the claims. The ct. refused, under the circumstances, to enforce a monition against the consignees of the cargo to bring in the balance of freight at the suit of the foreign master, though by the foreign law the master had a lien thereon. Importation of foreign law is in the discretion of the ct. It should never be imported to work injustice.—THE JOHANNES CHRISTOPH (1854). 2 Ecc. & Ad. 93; 6 L. T. 661; 1 Jur. N. S. 192; 164 E. R. 325.

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PART XV. SECT. 13, SUB-SECT. 1.—B.

**7879 i.** *General rule.*]—Where no specific agreement is made for a sum certain, the rule in a salvage action is that the interests in the ship & cargo are only severally liable, each for its proportionate share of the salvage remuneration.—PENINSULAR TUG & TOWING CO., LTD. *v.* THE STEPHIE (1914), 15 Exch. C. R. 124.—CAN.

**7879 ii.** ——.]—THE AUGUSTA JESSE (1858), 11 Ir. Jur. 227.—IR.

*C. Assessment of Value of Salved Property.*

**7885. General rule—Value assessed at place where & time when services concluded.**]—Rule for estimating value where the salvage concluded at one port & the cargo was transhipped & brought to another & there sold; the salvors are only entitled to salvage on the value at the port where their services concluded.

I imagine the strict method to arrive at the value of the cargo at Lisbon would be, not on any assertion of its being unsaleable there, but by putting it at 7 & 8 per cent. less than the proceeds of its sale in London, deducting freight & other charges for the voyage from Lisbon to London, but allowing a *pro rata* freight as far as Lisbon (DR. LUSHINGTON).—THE GEORGE DEAN (1857), Sw. 290; 30 L. T. O. S. 220; 6 W. R. 263; 166 E. R. 1143.

*Annotations:*—**Apld.** The Norma (1860), Lush. 124. **Refd.** The Georg, [1894] P. 330.

**7886.** —— ——.]—(1) Salvors are entitled to salvage upon a value calculated at the place where & the time when their services terminated.

(2) The value of freight salved is to be reckoned *pro rata itineris peracti*, & by the other equities of the case.

(3) A ship bound from Honduras to England was disabled on the voyage & towed into Bermuda, where expenses nearly equal to the whole freight were incurred to refit; the voyage home was afterwards completed & the cargo delivered; the ct. allowed salvage upon one-half of the total gross freight.—THE NORMA (1860), Lush. 124; 3 L. T. 340; 1 Mar. L. C. 7; 167 E. R. 58.

*Annotation:*—*As to* (2) **Consd.** The James Armstrong (1875) L. R. 4 A. & E. 380.

**7887.** —— ——.]—The words in Merchant Shipping Act, Amendment Act, 1862 (c. 63), s. 49, determining the jurisdiction of the ct. by the value of the property saved, mean the value of the property when first brought into safety by the salvors & not its value at any subsequent period.—THE STELLA (1867), L. R. 1 A. & E. 340; 36 L. J. Adm. 13; 16 L. T. 335; 15 W. R. 936; 2 Mar. L. C. 505.

**7888.** —— ——.]—In an action of salvage pltfs. obtained an award of £1,500 upon an appraised value of defts.' ship of £1,250 & of her cargo of £5,004: total £6,254. The ship was subsequently sold by the marshal for £713; the cargo, which was of a nature not readily saleable in this country for £1,649; & the total £2,362 was reduced by fees & disbursements to £1,625. An award of £130 obtained by the pilot & £100 by boatmen in separate actions in respect of the same salvage operations brought the total salvage claims up to £1,730 which more than absorbed the whole proceeds. On motion by defts. to vary the decree by reducing the award of £1,500:—*Held:* the application must be refused as defts. had allowed the ct. to proceed to award salvage upon the basis of the appraisement without taking any exception at the time & beyond the difference between the appraised value & the sum realised by the sale, there was nothing to indicate that the appraisement did not fairly represent the value at the time & place when the property was brought into safety.—THE GEORG, [1894] P. 330; 71 L. T. 22; 7 Asp. M. L. C. 476.

*Annotation:*—**Refd.** The San Onofre, [1917] P. 96.

**7889.** —— ——.]—A steam trawler, having fallen in with a disabled steam vessel in the North Sea, towed her to a position off Aberdeen; but as, in the heavy weather prevailing, the master of the trawler was unwilling to incur the risk, without a pilot, of taking a large disabled vessel into the harbour, signals were made for a pilot & a tug, in response to which a tug came out & offered to pilot & tow the disabled vessel in. The master of the disabled vessel declined to accept her services, & after some delay, the trawler was told to go ahead. The hawser parted, & the disabled vessel drove ashore, involving an expense of £1,150 to float her, & £5,600 for repairs. In an action of salvage brought by the owners, master, & crew of the trawler, it was contended by the owners of the disabled vessel that the award, if any, must be based, not on £8,500, the value of the disabled vessel before she stranded, but on the amount she proved to be worth to them, namely, £1,750:—*Held:* the trawler had done all that could reasonably be expected of her, & was entitled to an award of £750, based on a valuation of £8,500, that being the value of the disabled vessel at the time that she was brought within reach of the tug.—THE GERMANIA, [1904] P. 131; 73 L. J. P. 59; 90 L. T. 296; 9 Asp. M. L. C. 538.

*D. Life Salvage.*

*See* Sect. 8, sub-sect. 3, *ante*.

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SUB-SECT. 2.—VALUES OF SHIP, CARGO AND FREIGHT.

*A. Value of Ship.*

**7890. How value ascertained—Basis of valuation—Value in damaged condition at conclusion of salvage service.**]—THE HOHENZOLLERN, No. 7474, *ante*.

**7891.** —— **Deductions—Wages—Accruing after salvage services.**]—In ascertaining the value of the property forming the fund, a loan on bottomry & wages subsequent to the service are proper deductions, but not wages prior thereto.

I question whether the claim for salvage would not take priority of wages earned before the occurrence took place; whether the salvage must not be paid before the wages, which are a lien on the ship (DR. LUSHINGTON).—THE SELINA (1842), 2 Notes of Cases, 18.

**7892.** —— —— —— ——.]—Wages earned after the ship salved has been brought into port not to be deducted from the freight upon which salvage is decreed.—THE EDINA (1855), 4 W. R. 91.

**7893.** —— —— —— **Accruing before salvage services.**]—THE SELINA, No. 7891, *ante*.

**7894.** —— —— **Bottomry bond—Subsequent to salvage service.**]—THE SELINA, No. 7891, *ante*.

**7895.** —— —— **Expenses of bringing ship into port.**]—THE WATT, No. 7124, *ante*.

**7896.** —— —— **Costs of prosecuting wreckers.**]—THE FLEECE, No. 7174, *ante*.

**7897.** —— —— **Costs of valuation.**]—THE SAMUEL (1852), 10 L. T. 877.

*B. Value of Cargo.*

**7898. How value ascertained—Deductions—Primage.**]—THE CHARLOTTE WYLIE, No. 7173, *ante*.

**7899.** —— —— ——.]—(1) £400 was decreed in pursuance of an agreement for that sum, for salvage service to ship, cargo & freight. The values of ship & freight only were then known. Afterwards the owners of the cargo were proceeded against, & offered to pay their proportion of the £400, upon the net proceeds of cargo:—*Held:* in ascertaining net value of the cargo, 2½ per cent. discount, & certain other items sworn to be accustomed charges might be deducted, but not a gratuity of £5 5*s*. to the master; & costs of the original proceedings must be borne by the owners

*Sect.* 13.—*Contribution: Sub-sect.* 2, *B., C. & D. Part XVI. Sects.* 1, 2 & 3: *Sub-sects.* 1, 2, 3 & 4, *A. & B.*]

of the cargo proportionably with the owners of the ship, though the former were not before the ct. when the decree was made.

(2) The charges on the sale of cargo must be deducted from the gross value.—THE PEACE (1856), Sw. 115; 27 L. T. O. S. 255; 4 W. R. 635; 166 E. R. 1048.

*Annotation:*—*As to* (1) **Apld.** The Elton, [1891] P. 265.

**7900.** —— —— **Customary port charges.**]—THE PEACE, No. 7899, *ante.*

**7901.** —— —— **Charges on sale of cargo.**]—THE PEACE, No. 7899, *ante.*

**7902.** —— —— **Prepaid freight.**]—THE CHARLOTTE WYLIE, No. 7173, *ante.*

**7903.** —— —— ——.]—THE FLEECE, No. 7174, *ante.*

**7904.** —— —— **Insurance.**]—THE CHARLOTTE WYLIE, No. 7173, *ante.*

**7905.** —— —— ——.]—THE FLEECE, No. 7174, *ante.*

*C. Value of Freight.*

**7906. How value ascertained—Basis of valuation—Gross freight.**]—THE LORD GODERICH (1841), 8 L. T. 704.

*Annotation:*—**Reld.** The Annette (1873), L. R. 4 A. & E. 9.

**7907.** —— —— ——.]—THE WESTMINSTER (1841), 1 Wm. Rob. 229; 6 L. T. 868; 166 E. R. 558.

*Annotations:*—**Reld.** The Diamond 1845), 9 Jur. 691; The Elton, [1891] P. 265.

**7908.** —— **Salvage service ending at port other than port of destination—Allowance of pro rata freight to port where service ended—Deduction of freight & charges to port of destination.**]—THE GEORGE DEAN, No. 7885, *post.*

**7909.** —— —— **Subsequent delivery of cargo at port of destination.**]—THE NORMA, No. 7886, *ante.*

**7910.** —— —— **Arrival of cargo at port of destination prevented by cargo-owner.**]—CLEARY *v.* M'ANDREW, THE GALAM (CARGO EX) (1863), 2 Moo. P. C. C. N. S. 216; Brown. & Lush. 167; 3 New Rep. 254; 33 L. J. P. M. & A. 97; 9 L. T. 550; 10 Jur. N. S. 477; 12 W. R. 495; 1 Mar. L. C. 408; 15 E. R. 883, P. C.

*Annotations:*—**Reld.** The Bahia (1864), Brown. & Lush. 292; The Soblomsten (1866), L. R. 1 A. & E. 293; The Daring (1868), L. R. 2 A. & E. 260; Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579; The Veritas, [1901] P. 304; The Sorfareren (1915), 85 L. J. P. 121.

**7911.** —— **Election by cargo-owner to accept delivery at port short of destination—Pro rata freight.**]—THE SOBLOMSTEN, No. 8484, *post.*

**7912. Method of valuation—Whether valued separately from cargo.**]—THE CHARLOTTE WYLIE, No. 7173, *ante.*

**7913.** —— ——.]—THE FLEECE, No. 7174, *ante.*

*Compare* PRIZE LAW, Vol. XXXVII, p. 677, No. 1457.

*D. Finality of Award.*

*See* ADMIRALTY, Vol. I., p. 168, Nos. 779–780.

**7914. Whether court will amend award.**]—An appraisement made by the marshall of the ct. will be held conclusive as to the value of the property salved.—THE VENUS (CARGO EX) (1866), L. R. 1 A. & E. 50; 12 Jur. N. S. 379; 14 W. R. 466.

*Annotations:*—**Consd.** The Georg, [1894] P. 330. **Reld.** The San Onofre, [1917] P. 96; The Consul Olsson, [1920] P. 43.

**7915.** —— **Mistake in valuation — Cargo.**]—THE JAMES ARMSTRONG, No. 7315, *ante.*

**7916.** —— —— **Selling price of salved property less than assessed price.**]—THE GEORG, No. 7888, *ante.*

**7917.** —— **Necessity for exceptional circumstances.**]—THE HOHENZOLLERN, No. 7474, *ante.*

**7918.** —— ——.]—THE SAN ONOFRE, No. 7475, *ante.*

# Part XVI.—Pilotage.

## SECT. 1.—PILOTAGE ORDERS.

*See* Pilotage Act, 1913 (c. 31), s. 7.

**Who may make order for compulsory pilotage—Powers of commander of army of occupation.**]—*See* Sect. 7, sub-sect. 1, *post.*

## SECT. 2.—PILOTAGE AUTHORITIES AND DISTRICTS.

**Meaning of "pilotage authority."**]—*See* Pilotage Act, 1913 (c. 31), s. 8.

**Meaning of "pilotage district."**]—*See* Pilotage Act, 1913 (c. 31), s. 8.

**Meaning of "Trinity House."**]—*See* 1894 Act, s. 742.

**Meaning of "outport."**]—*See* Pilotage Act, 1913 (c. 31), s. 52.

## SECT. 3.—POWERS AND DUTIES OF PILOTAGE AUTHORITIES.

### SUB-SECT. 1.—BYE-LAWS.

*See* Pilotage Act, 1913 (c. 31), ss. 17, 18.

### SUB-SECT. 2.—LICENCES.

*See* Pilotage Act, 1913 (c. 31), ss. 16, 19, 20, 26–29.

**Whether grant of licence imposes liability upon pilotage authority.**]—*See* Pilotage Act, 1913 (c. 31), s. 19.

**7919. Revocation of licence.**]—Where a complaint of being drunk when it was a pilot's turn for duty, was made to the Trinity House, & the Trinity House summoned the pilot to answer, & heard his answer, & after so doing sent down for further information *ex p.*, without giving the

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**PART XVI. SECT. 3, SUB-SECT. 2.**

**7919 i.** *Revocation of licence.*]—*Ex p.* LANGEN (1855), 8 N. B. R. (3 All.) 135.—CAN.

**7919 ii.** ——.]—The pilotage authority in a pilotage district of Canada has not absolute & arbitrary power to cancel a pilot's licence, but can only do so after complaint & inquiry & proof on oath of incapacity. If a pilotage authority, by resolution alone, without complaint, notice or investigation, declares a pilot to be dismissed "for neglect & incapacity" & thus prevents him from performing a pilot's duties, inasmuch as it failed to observe the statutory requirements respecting the proceedings for such dismissal it has not exercised judicial functions & is not protected from liability to an action by the pilot for damages.—MCGILLIVRAY *v.* KIMBER (1915), 52 S. C. R. 146.—CAN.

*c. Order prohibiting engagement of tugs at exorbitant charge.*]—The govt. may prohibit its pilots from allowing any vessels under their pilotage charge to be taken in tow of a steamer, the owners of which will only render their services on exorbitant terms.—

pilot an opportunity of contesting this, &, when received, acted upon such information, & revoked the pilot's licence:—*Held:* the pilot had been heard sufficiently to enable the Trinity House to exercise their jurisdiction of revoking the licence under Merchant Shipping Act, 1854 (c. 104), s. 375, assuming they were bound to hear him at all.—R. *v.* TRINITY HOUSE (MASTER, WARDENS, ETC.) (1855), 26 L. T. O. S. 103; 4 W. R. 124; 19 J. P. Jo. 787.

*See, now,* Pilotage Act, 1913 (c. 31), s. 26.

**Necessity for production of licence.**]—*See* Sect. 5, sub-sect. 1, *post.*

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SUB-SECT. 3.—PILOTAGE CERTIFICATE.

*See* Pilotage Act, 1913 (c. 31), ss. 23–25; Aliens Restrictions (Amendment) Act, 1919 (c. 92), s. 4.

**7920. Grant of certificate—What amounts to.**]—The master of a vessel applied for a certificate, according to Merchant Shipping Act, 1854 (c. 104), s. 340, purporting to enable him to pilot his vessel within certain waters, & submitted to the required examination. The certificate was signed & sealed by the pilotage authority, & was lying in the office to be called for by the master, but he had not applied for it, & was ignorant that it was ready & would be given him on application:—*Held:* the certificate was not "granted to the master," nor "possessed" by him, within Merchant Shipping Act, 1854 (c. 104), ss. 340, 353, so as to enable him to pilot his vessel in the specified waters.—THE KILLARNEY (1861), Lush. 202; 30 L. J. P. M. & A. 41; 5 L. T. 21; 1 Mar. L. C. 121; 167 E. R. 98; *subsequent proceedings* (1862), Lush. 427.

**7921. —— Validity of grant.**]—A pilotage certificate issued to a master under Merchant Shipping Act, 1854 (c. 104), s. 355, describing the ship as the property of a person who was not the owner either at the time of the granting of the certificate or at the time of a collision subsequently occurring is invalid at the time of that collision.—THE EARL OF AUCKLAND (1861), Lush. 164; 30 L. J. P. M. & A. 121; 3 L. T. 786; 1 Mar. L. C. 27; 167 E. R. 77; *on appeal, sub nom.* MALCOMSON *v.* BALDOCK, THE EARL OF AUCKLAND (1862), 15 Moo. P. C. C. 304, P. C.

*Annotations:*—**Consd.** The Bristol City, [1902] P. 10. **Refd.** The Stettin (1863), Brown. & Lush. 199; The Hanna (1866), L. R. 1 A. & E. 283; General Steam Navigation Co. *v.* British & Colonial Steam Navigation Co. (1869), L. R. 4 Exch. 238; The Moselle (1874), 32 L. T. 570; The Vesta (1882), 7 P. D. 240; The Cayo Bonito, [1903] P. 203.

**7922. —— —— Belonging to the same owner.**]—(1) A certificate issued, & annually renewed, by a pilotage authority, under Merchant Shipping Act, 1854 (c. 104), ss. 340, 341 (now embodied in 1894 Act, s. 599), recited that (name) was master of the ship (named) "whereof (name of firm) are the owners," & stated that it was granted "to enable him to pilot said ship or any other ship or ships belonging to the same owners." The named firm never owned the named ship, or the ship to which the master was subsequently transferred, though the firm managed both ships as belonging to the same line of ocean steamers. Individual members of the named firm held shares, along with other parties, in the named ship, & one of those members was registered as managing owner of the named ship, & of the ship to which the master was transferred, of which latter ship that member was registered as holder of all the shares, though in fact he was only trustee for beneficial owners:—*Held:* the certificate was invalid by reason of a misstatement as to the ownership, for it only enabled the holder to pilot the named ship, or any other ship belonging to the same owners, that is, the named firm; but the named firm were not owners of the named ship at the date of the original issue of the certificate, or of either vessel at the date of its last renewal, or at the date of a collision between the ship to which the master was transferred & the pltfs.' vessel.

(2) *Semble:* to satisfy the words "the ship of which he is master or mate, or any one or more ships belonging to the same owner as that ship" in 1894 Act, s. 599, same owners must, at the material times, have held the whole of the shares in the vessel in respect of which the certificate was originally granted as well as hold the whole of the shares in the vessel to which the master is transferred.—THE BRISTOL CITY, [1902] P. 10; 71 L. J. P. 5; 85 L. T. 694; 50 W. R. 383; 18 T. L. R. 101; 9 Asp. M. L. C. 274.

*See, now,* Pilotage Act, 1913 (c. 31), s. 23 (6).

**7923. Renewal of certificate — Discretion of pilotage authority.**]—A pilotage authority have an absolute discretion, under Merchant Shipping Act, 1854 (c. 104), s. 341, to refuse to renew a pilotage certificate granted to the master or mate of a ship under Merchant Shipping Act, 1854 (c. 104), s. 340.—R. *v.* TRINITY HOUSE CORPN. (1887), 35 W. R. 835, D. C.

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SUB-SECT. 4.—PILOTAGE RATES OR DUES.

*A. In General.*

**7924. Nature of charge for compulsory pilotage—Whether differential due within Harbours & Passing Tolls Act, 1861 (c. 47), s. 10.**]—(1) Pilotage is compulsory on a foreign ship carrying passengers & trading between London & ports between Boulogne & the Baltic.

The Order in Council of Feb. 18, 1854, extending the exemptions from compulsory pilotage, applies only to British vessels.

(2) A charge for compulsory pilotage on a foreign ship is not a differential due within above Act, & is therefore not abolished by that Act.—THE VESTA (1882), 7 P. D. 240; 51 L. J. P. 25; 46 L. T. 492; 30 W. R. 705; 4 Asp. M. L. C. 515

*Annotation:*—*As to* (1) **Distd.** The Cayo Bonito, [1903] P. 203.

**7925. Service performed by more than one pilot—Single pilotage service—One set of dues payable.**]—THE RIGBORGS MINDE, No. 8009, *post.*

*B. Liability for.*

*See* Pilotage Act, 1913 (c. 31), s. 49.

**7926. What vessels liable—Collier carrying coal for Navy.**]—1894 Act, s. 741 provides that the Act "shall not, except where specially provided, apply to ships belonging to Her Majesty."

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ROGERS *v.* RAJENDRO DUTT (1860), 2 W. R. P. C. 51; 8 Moo. Ind. App. 103.—**IND.**

**PART XVI. SECT. 3, SUB-SECT. 4.—A.**

**d.** *British ships registered out of Newfoundland—Engaged in Newfoundland fisheries.*]—British ships registered out of Newfoundland but engaged in the fisheries of Newfoundland, the owners of which have resident agents in Newfoundland, &, in regard to the prosecution of the seal fishery, have their place of business in Newfoundland, are on the same footing as regards pilotage & there is no distinction between the treatment to be extended to them & the colonial steamers.—RYAN *v.* STEPHEN (1882), 6 Nfld. L. R. 438.—**NFLD.**

**PART XVI. SECT. 3, SUB-SECT. 4.—B.**

**e.** *What vessels liable—Ship exempt from compulsory pilotage—Signal given for pilot.*]—A ship exempt from compulsory pilotage, making the signal for a pilot, is liable for pilotage, even if she should afterwards refuse a pilot.—PILOTS CORPN. *v.* THE J. A. HORSEY (1884), 10 Q. L. R. 257.—**CAN.**

**f.** —— *Pilotage Act,* 1886, *ss,* 58,

*Sect. 3.—Powers and duties of pilotage authorities: Sub-sect. 4, B., C. & D. Sect. 4: Sub-sects. 1 & 2, A. (a).]*

A vessel owned by the Govt. & entered in the Navy List as employed on harbour service was exclusively employed under the Admlty. by the Devonport Dockyard authorities in carrying coals to ships of the Royal Navy. Her master held a Board of Trade certificate, & neither he nor the crew, who were engaged under articles of agreement, were in the navy. The master employed pilots, & proceedings were taken against him in a ct. of summary jurisdiction under 1894 Act, s. 591, for the recovery of pilotage dues according to a scale imposed by bye-laws made in pursuance of 1894 Act, & a local Act, in which the Crown was not mentioned, under which the pilots were licenced:—*Held:* the vessel was a King's ship, & the master was therefore not liable either under 1894 Act or the local Act to pay pilotage dues on the scale imposed by the bye-laws.—SYMONS *v.* BAKER, [1905] 2 K. B. 723; 74 L. J. K. B. 965; 93 L. T. 548; 54 W. R. 159; 21 T. L. R. 734; 49 Sol. Jo. 714; 10 Asp. M. L. C. 129, D. C.

**7927. —— Fishing vessels—Effect of Admiralty order—For protection of realm.**]—During a state of war between Great Britain & Germany the Admlty. directed that a minefield should be laid in the Humber, & that any vessels wishing to pro ceed up that river should take on board a pilot provided by pltfs. for whose services pilotage fees were charged. Deft. complied with this order, but subsequently refused to pay the pilotage fees: —*Held:* deft. was liable to pay such fees since the order of the Admlty. was *intra vires*, & since he had accepted the pilots' services to enable his vessels to reach their destination.—HUMBER CONSERVANCY BOARD *v.* GRANT (1916), 85 L. J. K. B. 1699; 115 L. T. 213; 32 T. L. R. 510; 13 Asp. M. L. C. 421.

**7928. When vessels liable—Construction of terms —"Berthing" & "waiting for tide."**]—Under Part IV. of the schedule to the Mersey Docks & Harbour Board's Pilotage Bye-laws, 1921, pilotage rates are levied in the lower Mersey for (*a*) "berthing" a vessel at any stage, & (*b*) "for each time a vessel is transported" in the river. But these rates are subject to the proviso that "berthing a vessel for which a charge is made under Part IV. (*a*) "& navigating or moving an outward bound vessel to an anchorage to wait for tide" shall not be deemed "a transporting" for the purpose of these charges:—*Held:* an outward bound vessel which had to leave the Alfred Dock on the flood tide &, owing to the presence of other vessels at the stage, was compelled to come to an anchorage to wait for a berth at the Prince's landing stage, was not within the proviso. The whole transportation from dock to stage could not be regarded as "berthing," & "waiting for tide" did not include moving to an anchorage to wait, because the time of high water had forced the vessel to leave the dock earlier than she would otherwise have done for the mere purpose of getting to the stage. The shipowners, therefore, were liable to the Board for the amount charged for "transporting from the dock to the anchorage."—THE CYCLOPS, [1923] P. 80; 92 L. J. P. 49; 128 L. T. 702; 39 T. L. R. 185; 16 Asp. M. L. C. 155.

**7929. —— Liability under Pilotage Act, 1913 (c. 31), s. 11 (1)—Necessity for offer of services by pilot.**]—(1) On the construction of above sub-sect. navigation without a pilot in a compulsory pilotage area is not absolutely forbidden, but the ship is under a continuing obligation to fly the pilot flag & to take a pilot on board if he offers. If no pilot offers there is no liability upon the owner to pay pilotage dues.

(2) The word "services" in above Act, s. 17 (1) means "services rendered," & a pilotage authority cannot make a bye-law imposing a liability on shipowners to pay pilotage dues other than for such services.—W. H. MULLER & CO. *v.* TRINITY HOUSE (DEPTFORD STROND), [1925] 1 K. B. 166; 94 L. J. K. B. 161; 132 L. T. 663; 16 Asp. M. L. C. 458.

**7930. —— Liability under Pilotage Act, 1913 (c. 31), s. 17 (1)—Meaning of "services"—Services rendered.**]—W. H. MULLER & CO. *v.* TRINITY HOUSE (DEPTFORD STROND), No. 7929, *ante*.

**As to fixing of pilotage dues by bye-laws.**]—*See* Pilotage Act, 1913 (c. 31), s. 17 (1) (*f*).

**Receiving or offering improper rates for pilotage.**]—*See* Pilotage Act, 1913 (c. 31), s. 50.

*C. Recovery of.*

*See* Pilotage Act, 1913 (c. 31), ss. 34, 49–51.

**7931. Right to recover.**]—JONES *v.* BENNETT, No. 8028, *post*.

**7932. —— Action in rem.**]—(1) The High Ct. of Admlty. & its successor, the present Admlty. Divn. of the High Ct. of Justice, have always had

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59.]—*Held:* a vessel which had been wrecked & beached at Newfoundland & condemned & sold, & which could not be navigated, but was brought to Halifax in tow & was sold as old junk, did not come within sect. 58 of the above Act & was not liable for pilotage dues.—HALIFAX PILOT COMRS. *v.* FARQUHAR (1894), 26 N. S. R. (14 R. & G.) 333.—**CAN.**

g. —— ——.]—The expression "every ship which navigates," in sect. 58 of the above Act, means a ship that has in itself some power or means of moving through the waters it navigates, & not a ship that has no such power or means & which must be moved or propelled or navigated by another vessel.—QUEBEC HARBOUR PILOTS CORPN. *v.* THE GRANDEE (1902), 22 C. L. T. 428; 8 Exch. C. R. 79.—**CAN.**

h. —— ——.]—A ship employed on a sealing voyage from Halifax to the Newfoundland seal fisheries & back, calling on her outward voyage at Louisburg for coal, & at a port in Newfoundland for men & supplies, & again at Newfoundland, on her return, to dispose of her catch, is not an exempted ship within sect. 59 (*c*) of the above Act. *Semble:* what was contemplated by the Act, in providing for exemptions, was lines of steamers, or even one steamer, making regular periodical voyages, with *termini* as indicated in the Act, either throughout the year or during a certain season of the year.—FARQUHAR *v.* MCALPINE (1903), 35 N. S. R. 478.—**CAN.**

k. —— ——.]—Resp.'s vessels, about 440 tons each, built for the purpose of carrying coal, & carrying sails so as to be able to run before the wind, but not so as to be safely navigated in the ordinary way as sailing vessels, were towed by a steam tug in & out of the port of St. John. In an action by resps. to recover pilotage dues paid under sects. 58 & 59 of above Act:—*Held:* sect. 58 applied to the said vessels as ships which navigate within the district of St. John, *i.e.* perform voyages into or out of the port of St. John; ships being defined by sect. 2 (*b*) as including "every description of vessel used in navigation not propelled by oars," & sect. 58 not indicating that in the pilotage waters a ship must at the time possess independent practical power of moving herself; they were not exempted under sect. 59 (*c*), since they were not ships propelled wholly or in part by steam, the word "propelled" not including traction within its scope.—ST. JOHN PILOT COMRS. *v.* CUMBERLAND RAILWAY & COAL CO., [1910] A. C. 208, P. C.—**CAN.**

l. *When vessels liable — River craft lost by accident—Pilotage up to day of loss.*]—By the general principle of the contract *de louage mercium vendarum* the captain or owner of a river craft lost by accident is bound to pay the pilot's wages up to the day of the loss.—DELORIER *v.* CHAFFEY, 2 R. de L. 76.—**CAN.**

m. —— *Pilot not used.*]—The payment of pilotage dues in certain cases is compulsory even if a pilot be not used.—LAMARRE *v.* WOODS & QUEBEC HARBOUR COMRS. (1898), Q. R. 14 S. C. 1.—**CAN.**

**PART XVI. SECT. 3, SUB-SECT. 4.—C.**

7931 i. *Right to recover.*]—Each pilot has the right to receive the fees he has earned himself. — QUEBEC PILOTS CORPN. *v.* PAQUET (1917), Q. R. 53 S. C. 220.—**CAN.**

n. —— *Pilot dismissed before expiration of engagement.*]—A pilot who

jurisdiction to entertain an action *in rem* for pilotage dues, & the pilot is not restricted to his right under Pilotage Act, 1913 (c. 31), s. 49, of taking proceedings in a ct. of summary jurisdiction.

(2) *Qu.:* whether there is a maritime lien in respect of pilotage dues.—THE AMBATIELOS, THE CEPHALONIA, [1923] P. 68; 92 L. J. P. 45; 128 L. T. 699; 39 T. L. R. 183; 16 Asp. M. L. C. 120.

**7933. Right to lien.**]—THE AMBATIELOS, THE CEPHALONIA, No. 7932, *ante*.

*Compare* ALIENS, Vol. II., p. 169, No. 376.

*D. Extra Remuneration.*

**7934. Right to—"Lay days"—Whether day of entering & day of leaving quarantine included.**]—Pilots are not entitled to charge as lay days the day on which they enter & on which they leave a place of quarantine.—THE BEE (1822), 2 Dods. 498; 165 E. R. 1559.

*Annotation:*—**Refd.** The Ambatielos, The Cephalonia, [1923] P. 68.

**7935. —— Docking.**]—A ship arriving at the entrance of the West India Docks too late to be received into the docks that tide, is not liable under the table of remuneration to Cinque Port pilots annexed to 6 Geo. 4, c. 125, to an extra charge of pilotage for "docking" on the next tide.—THE ADAH (1830), 2 Hag. Adm. 326; 166 E. R. 262.

*Annotation:*—**Refd.** The Ambatielos, The Cephalonia, [1923] P. 68.

**7936.** ——.]—In extraordinary pilot service, additional pilotage is the proper rate of reward.—THE ENTERPRISE (1828), 2 Hag. Adm. 178, n.; 166 E. R. 209.

*Annotation:*—**Refd.** The General Palmer (1828), 2 Hag. Adm. 176.

**7937.** ——.]—A pilot who brings a ship from Gravesend to the entrance of the Tilbury Docks, & thence into the Docks, is not entitled under the Order in Council of May 17, 1882, to the special charge "for removing a vessel from moorings into a dry or wet dock," or to charge any sum other than the rate from Gravesend to Northfleet.—THE CLAN GRANT (1887), 12 P. D. 139; 56 L. J. P. 62; 57 L. T. 124; 35 W. R. 670; 6 Asp. M. L. C. 144.

*Annotation:*—**Refd.** The Ambatielos, The Cephalonia [1923] P. 68.

**7938.** ——.]—The Mersey Docks & Harbour Board, as the pilotage authority for the port of Liverpool, has, under Mersey Dock Acts Consolidation Act, 1858, s. 221, power to fix, in addition to the ordinary compulsory pilotage rates, a reasonable charge by way of "extra" remuneration for a pilot, licensed by the Board, taking an outward-bound vessel from a dock alongside a landing-stage to complete her loading, as in the case of embarking passengers, their baggage, & the mails. The Board has also power to fix an additional reasonable charge as "extra" remuneration (besides the charge per day for attendance whilst a vessel is necessarily lying in the river in the course of her navigation inward or outward) in the case of an inward-bound vessel taken by a pilot to a landing-stage to land passengers, baggage, & mails, before discharging the rest of her cargo in dock, including the case of vessels disembarking cattle & sheep at certain landing-stages in pursuance of the orders made under the provisions of the Diseases of Animals Act, 1894 (c. 57).—THE SERVIA, THE CARINTHIA, [1898] P. 36; 67 L. J. P. 36; 78 L. T. 54; 46 W. R. 492; 14 T. L. R. 188; 8 Asp. M. L. C. 353.

*Annotations:*—**Expld.** The Mercedes de Larrinaga, [1904] P. 215. **Refd.** The Ole Bull, [1905] P. 52.

**Allowance to licenced pilot taken out of his district.**]—*See* Pilotage Act, 1913 (c. 31), s. 34.

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SECT. 4.—**PILOTS.**

SUB-SECT. 1.—IN GENERAL.

**Meaning of "pilot."**]—*See* 1894 Act, s. 742.

**7939. Liability of owner—For acts of pilot.**]—Owners are responsible for damage occasioned by the mismanagement of a ship though under the care of a regular pilot, & acting in obedience to his directions.—THE NEPTUNE THE SECOND (1814), 1 Dods. 467; 165 E. R. 1380.

*Annotations:*—**Consd.** The Girolamo (1834), 3 Hag. Adm. 169; The Protector (1839), 1 Wm. Rob. 45; Stuart *v.* Isemonger, The Diana (1842), 4 Moo. P. C. C. 12. **Expld.** The Eden (1846), 4 Notes of Cases, 460. **Refd.** The Wild Ranger (1862), Lush. 553; The Halley (1867), L. R. 2 A. & E. 3.

**7940.** —— ——.]—THE GEORGE, No. 5181, *ante*.

**7941.** —— ——.]—Where the vessel doing the damage was in charge of a pilot duly authorised to act as such in the harbour of Cork, where the collision occurred:—*Held:* the owners were not exempted from liability on that ground, as the local Act did not make it compulsory upon the master to take a pilot.—THE EDEN (1846), 2 Wm. Rob. 442; 4 Notes of Cases, 460; 9 L. T. 119; 10 Jur. 296; 166 E. R. 822.

*Annotation:*—**Refd.** The Lion (1869), L. R. 2 P. C. 525.

**7942. Master & crew not discharged from responsibility—When pilot taken on board.**]—THE GEORGE, No. 5181, *ante*.

**7943. When considered as in charge of ship.**]—THE MOBILE (1856), Sw. 69; 166 E. R. 1024; *sub nom.* THE FENIX *v.* THE MOBILE, 7 L. T. 258; *on appeal*, Sw. 127, P. C.

*Annotation:*—**Refd.** Oakley *v.* Speedy (1879), 40 L. T. 881.

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SUB-SECT. 2.—RIGHTS, DUTIES AND LIABILITIES.

*A. Rights.*

(*a*) *In General.*

*See* Pilotage Act, 1913 (c. 31), s. 30.

**7944. Right to assistance from crew.**]—THE EOLIDES (1837), 3 Hag. Adm. 367; 166 E. R. 441.

*Annotation:*—**Refd.** The Maid of Kent (1881), 6 P. D. 178.

**7945.** ——.]—We take it to be the duty of the master & crew to keep a look out in order to assist

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has been dismissed without reason before the time of his engagement has expired, has a right to recover from the captain the total amount of his wages up to the time of the engagement.—LAFRANCE *v.* JACKSON (1881), 12 R. L. O. S. 21.—**CAN.**

o. —— *Set-off—Damage caused by misconduct of pilot.*]—Damage occasioned to the ship by the misconduct of the pilot may be set up against his claim for pilotage.—*Re* THE SOPHIA (1836), 1 S. V. A. R. 96.—**CAN.**

**PART XVI. SECT. 4, SUB-SECT. 1.**

**7939 i.** *Liability of owner—For acts of pilot.*]—THE QUEBEC, *v.* THE CHARLES CHALONER. THE CHARLES CHALONER *v.* THE QUEBEC (1875), 19 L. C. J. 201.—**CAN.**

**7939 ii.** —— ——.]—Pilots are legally considered the agents of the owners of the ship, & the latter are therefore responsible for the acts of the pilot & for his negligence.—BELL TELEPHONE CO. *v.* THE RAPID (1897), Q. R. 12 S. C. 37.—**CAN.**

p. —— —— *Right of owner to set up defence of common employment.*]—THOM *v.* HUTCHISON (J. & P.), LTD., [1925] S. C. 386.—**SCOT.**

**PART XVI. SECT. 4, SUB-SECT. 2.—A. (a).**

q. *Right against pilotage authority——Dismissal without complaint, notice or investigation.*]—MCGILLIVRAY *v.* KIMBER (1915), 52 S. C. R. 146.—**CAN.**

r. —— *Failure to enforce compulsory pilotage.*]—By Pilotage Act,

*Sect. 4.—Pilots: Sub-sect. 2, A. (a), (b) & (c), B. & C. (a).]*

& inform the pilot of anything occurring in the navigation which may require his attention, & cause him to slacken the speed or take other steps which may be necessary (*per* CUR.).—NETHERLANDS STEAM BOAT CO. *v.* STYLES, THE BATAVIER (1854), 9 Moo. P. C. C. 286; 28 L. T. O. S. 129; 14 E. R. 305, P. C.

*Annotation:*—**Refd.** Ballantyre *v.* Mackinnon, [1896] 2 Q. B. 455.

**7946.** ——.]—It is the duty of the crew, by means of a sufficient look out, to give to the pilot the earliest possible information of an approaching vessel, & accurately to describe her position.—THE VELASQUEZ (1867), L. R. 1 P. C. 494; 4 Moo. P. C. C. N. S. 426; 36 L. J. Adm. 19; 16 L. T. 777; 16 W. R. 89; 2 Mar. L. C. 544; 16 E. R. 378, P. C.

*Annotations:*—**Refd.** The General Lee of Dublin (1868), 19 L. T. 750; The Norma (1876), 35 L. T. 418; The Benmohr (1904), 52 W. R. 686; The Benue, [1916] P. 88; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216.

**7947.** ——.]—In order to entitle the owner of a ship having, by compulsion of law, a pilot on board, to the benefit of the exemption contained in Merchant Shipping Act, 1854 (c. 104), s. 388, from liability for damage by default of the pilot, it is not enough to prove that there was fault or negligence on the pilot's part, but the owner must show that there was no default on the part of the master & crew which might have in any degree been conducive to the damage. Where, therefore, there was neglect on the part of the master & crew to keep a good look out, & such neglect conduced to a collision, the owners were held liable for the damage. The duty of the pilot is to attend to the navigation of the ship, & the master & crew to keep a good look out.—THE IONA (1867), L. R. 1 P. C. 426; 4 Moo. P. C. C. N. S. 336; 16 L. T. 158; 2 Mar. L. C. 479; 16 E. R. 344, P. C.

*Annotations:*—**Apld.** The Velasquez (1867), L. R. 1 P. C. 494; The Minna (1868), L. R. 2 A. & E. 97. **Apprvd.** Moss *v.* African S.S. Co. (1868), L. R. 2 P. C. 238. **Consd.** Clyde Navigation Co. *v.* Barclay (1876), 1 App. Cas. 790; The Benue, [1916] P. 88. **Refd.** The Calabar (1868), 19 L. T. 768; The Cynthia (1876), 2 P. D. 52; S.S. Alexander Shukoff *v.* S.S. Gothland, S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216.

**7948.** ——.]—Where a vessel is put under compulsory pilotage the pilot is entitled to have the assistance of a look out & a timely report of any material incident, & the failure to report cannot be excused on the ground that the pilot could have seen such incident for himself. The pilot in such a case is entitled to the same assistance from the look out as would in ordinary course be given to the officers in charge of the vessel.—S.S. ALEXANDER SHUKOFF *v.* S.S. GOTHLAND, S.S. LARENBERG *v.* S.S. GOTHLAND, [1921] 1 A. C. 216; 90 L. J. P. 51; 124 L. T. 355; 37 T. L. R. 132; 65 Sol. Jo. 152; 15 Asp. M. L. C. 242, H. L.

**7949. Right to assistance from master & officers.]**—NETHERLANDS STEAM BOAT CO. *v.* STYLES, THE BATAVIER, No. 7945, *ante*.

**7950.** ——.]—THE IONA, No. 7947, *ante*.

**7951.** ——.]—The pilot in charge of a ship is entitled to the active assistance of the master, not by way of interfering with the navigation, except in cases of manifest incapacity, but in pressing upon his attention such a matter as the nature of the lights of another vessel, about which the pilot has apparently formed a mistaken opinion involving possible risk.—THE TACTICIAN, [1907] P. 244; 76 L. J. P. 80; 97 L. T. 621; 23 T. L. R. 369; 10 Asp. M. L. C. 534, C. A.

*Annotations:*—**Refd.** The Elysia, [1912] P. 152; The Ape, [1916] P. 303; S.S. Alexander Shukoff *v.* S.S. Gothland S.S. Larenberg *v.* S.S. Gothland, [1921] 1 A. C. 216.

**7952.** ——.]—Defts.' steamship, proceeding up the Mersey, ran into & damaged pltfs.' steamship, which was lying at anchor. The defence in substance was that those in charge of pltfs.' steamship improperly allowed a tug in attendance to exhibit a green light on the starboard side of their vessel, thereby leading those in charge of defts.' vessel to believe that pltfs.' vessel was under way; secondly, that if there was any negligence, it was solely that of the pilot in charge by compulsion of law:—*Held:* (1) defts. were liable, as the plea of compulsory pilotage failed, for though the pilot was to blame for faulty navigation, the blame did not rest solely with him, as the master of defts.' vessel, who was, at the material time, on the bridge, acting as part of the look out, had appreciated, in sufficient time, that pltfs.' vessel was at anchor, but had not pressed upon the attention of the pilot that he was navigating the vessel under an erroneous impression as to the meaning of the green light, which properly indicated that the tug was not attached to pltfs.' vessel, but was, in fact, stemming the tide whilst waiting for orders; (2) the collision might have been avoided, if defts.' master had drawn the attention of the pilot to the omission to direct the giving of the appropriate sound signals on each alteration of the helm, as the vessel at anchor would probably then have given some indication by way of warning of the danger defts.' vessel was incurring.—THE ELYSIA, [1912] P. 152; 81 L. J. P. 104; 106 L. T. 896; 28 T. L. R. 376; 12 Asp. M. L. C. 198.

**7953.** ——.]—In an action of damage by collision the ct. below found that both vessels were equally to blame, & that the plea of compulsory pilotage raised by pltfs., by way of defence to defts.' counterclaim, failed on the ground that the English pilot had not received from the Swedish crew the assistance to which he was entitled, for, in particular, the Swedish reports, received from forward, had not been repeated or interpreted to him, nor had the pilot's attention been drawn to the international rules of the road at sea in respect of the reduction of speed in fog:—*Held:* pltfs. were not liable for the damage sustained by defts.' vessel, as interference with the pilot, in the way suggested, was not justifiable except in cases of extreme urgency.—THE APE, [1916] P. 303; 84 L. J. P. 81; 31 T. L. R. 244, C. A.

**Whether doctrine of common employment applicable to pilot.]**—*See* MASTER & SERVANT, Vol. XXXIV., p. 213, No. 1756.

**Right of licenced pilot to supersede unlicenced persons.]**—*See* Pilotage Act, 1913 (c. 31), s. 30.

**7954.** ——.]—*Semble:* a pilot qualified to conduct ships drawing more than 14 feet water would have a right to supersede the pilot in charge who was not so qualified; but the latter would be entitled to a fair proportion of the pilotage fees.—

1913, the employment of pilots & the payment of pilotage dues were made compulsory on all vessels using the port & harbour of D. Defts., the pilotage authority, received the fees, which were pooled & paid to pltfs., licenced pilots, & partly to a fund created for pltfs.' benefit, called the pilots' benefit fund. L., a shipowner who used the port, refused pltfs.' services & refused to pay the pilotage fees:—*Held:* there was a statutory duty upon defts. to enforce compulsory pilotage, & they were liable to pltfs. in damages to the amount of pilotage fees which could have been earned by pltfs. had licenced pilots been carried by L.'s vessels.—HUGHES *v.* DUNDALK HARBOUR COMRS., [1923] 1 I. R. 38.—**IR.**

t. *Right to pension.]*—SMITH *v.* HALIFAX PILOT COMMISSION (1917), 51 N. S. R. 241.—**CAN.**

THE CARL XV., [1892] P. 324; 61 L. J. P. 111; 68 L. T. 149; 7 Asp. M. L. C. 242, C. A.
*Annotation:*—**Refd.** Stafford *v.* Dyer, [1895] 1 Q. B. 566.

(*b*) *Salvage Reward.*

*See* Part XV., Sect. 5, *ante.*

(*c*) *Workmen's Compensation.*

*See* Workmen's Compensation Act, 1906 (c. 58), s. 7; &, *generally*, MASTER & SERVANT, Vol. XXXIV., pp. 238–501.

*B. Duties.*

**7955. General rule.**]—Where a ship in charge of a licensed pilot is anchored within pilotage waters, the pilot determines & is responsible for the length of cable at which the ship rides, & it is the duty of the pilot, when the ship swings to the tide, to superintend that manœuvre, & to regulate the helm, & it is negligence on his part to go below before the ship is fully swung, leaving the helm amidships without orders as to its regulation; & if, through want of length of cable & of regulation of the helm, the ship sheers & so parts from her anchor in swinging during his absence, the pilot will be alone responsible, provided that the watch on deck take the right manœuvre to counteract the sheering.—WOOD *v.* SMITH, THE CITY OF CAMBRIDGE (1874), L. R. 5 P. C. 451; 43 L. J. Adm. 11; 30 L. T. 439; 22 W. R. 578; 2 Asp. M. L. C. 239, P. C.
*Annotations:*—**Consd.** The Servia, The Corinthia, [1898] P. 36. **Refd.** The Princeton (1878), 3 P. D. 90; Sea Insce. *v.* Blogg, [1898] 2 Q. B. 398; Cory *v.* France, Fenwick (1910), 80 L. J. K. B. 341. **Mentd.** The Condoz, Perkins & Homer *v.* S.S. Condor (1879), 48 L. J. P. 33.

**7956. Duty to render prompt service.**]—THE FOX (1845), 7 L. T. 648.

**7957.** ——.]—THE ROSEHAUGH, No. 7032, *ante.*

**7958. Duty to stay by vessel.**]—HAMMOND *v.* ROGERS, THE CHRISTIANA (1850), 7 Moo. P. C. C. 160; 7 Notes of Cases, Supp. xli; 7 L. T. 648; 13 E. R. 841, P. C.; *affg.*, 7 Notes of Cases, 2.
*Annotations:*—**Consd.** The Northampton (1853), 1 Ecc. & Ad. 152. **Foll.** Bates *v.* Sora, The Mobile (1856), 10 Moo. P. C. C. 468. **Apld.** Marshall *v.* Moran, The Ocean Wave (1870), L. R. 3 P. C. 205. **Consd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451. **Refd.** Pollok *v.* M'Alpin, The Lochlibo (1851), 7 Moo. P. C. C. 427; Rodrigues *v.* Melhuish (1854), 10 Exch. 110; The Argo (1859), Sw. 462; North German Lloyd S.S. Co. *v* Elder (1860), 14 Moo. P. C. C. 241; The Schwalbe (1861), Lush. 239; The Iona (1867), L. R. 1 P. C. 426; The Velasquez (1867), L. R. 1 P. C. 494; The Tactician (1907), 76 L. J. P. 80; Cory *v.* France, Fenwick (1910), 80 L. J. K. B. 341; The Benue, [1916] P. 88.

**7959. Duty to attend to navigation of ship.**]—THE IONA, No. 7947, *ante.*

**7960.** —— **Manner of bringing ship into roadstead.**]—THE GEORGE, No. 5181, *ante.*

**7961. Duty to determine rate of speed.**]—It is the province of the pilot in giving directions for the navigation of a steam vessel of which he is in charge, to determine the rate of speed at which she should proceed.—MOSS (JAMES) & CO. *v.* AFRICAN S.S. CO., THE CALABAR (1868), L. R. 2 P. C. 238; 5 Moo. P. C. C. N. S. 291; 19 L. T. 768; 3 Mar. L. C. 195; 16 E. R. 525, P. C.
*Annotation:*—**Mentd.** The Alice & The Princess Alice (1868), L. R. 2 P. C. 245.

**7962. Particular duties—As to anchorage.**]—(1) In the case of a vessel taking up her berth in dock, the time & manner of dropping the anchor is exclusively within the province of the pilot.

(2) The only reason why coasting vessels are exempted from the obligation of taking a pilot is that from their frequent egress & ingress to the particular port, their masters must be presumed to be perfectly acquainted with the locality.

(3) The meaning of the expression "coasting voyage" in that section [sect. 25 of 5 & 6 Geo. 4, c. 75] is to be confined to a trading from one British port to another (DR. LUSHINGTON).—THE AGRICOLA (1843), 2 Wm. Rob. 10; 2 Notes of Cases, 113; 3 L. T. 217; 7 Jur. 157; 166 E. R. 659.
*Annotations:*—*As to* (1) **Refd.** The Gipsey King (1847), 2 Wm. Rob. 537. *As to* (2) **Consd.** Phillips *v.* Born (1905), 93 L. T. 634. **Refd.** The Glanystwyth, [1899] P. 118. *As to* (3) **Consd.** Courtney *v.* Cole (1887), 19 Q. B. D. 447. **Apld.** The Winestead, [1895] P. 170. **Refd.** The Lloyds (or The Sea Queen) (1863), Brown. & Lush. 359. *Generally*, **Refd.** The Eden (1846), 4 Notes of Cases, 460; The Lion (1869), L. R. 2 P. C. 525.

**7963.** —— ——.]—Manner of catting the anchor, preparatory to bringing up a vessel at her anchorage ground, exclusively within the province of a licenced pilot in charge.

Averment of the owners of the damaged vessel, that the collision was occasioned by the anchor of the damaging vessel being improperly catted, and that the blame lay partly, if not entirely, with the crew, overruled; & the owners of the vessel charged with the damage dismissed.—THE GIPSEY KING (1847), 2 Wm. Rob. 537; 5 Notes of Cases, 282; 9 L. T. O. S. 131; 11 Jur. 357; 166 E. R. 858.
*Annotations:*—**Refd.** Hammond *v.* Rogers, The Christiania (1850), 7 Moo. P. C. C. 160; Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451; The Rigborgs Minde (1883), 8 P. D. 132; The Margaret (1886), 5 P. D. 238; The Monte Rosa, [1893] P. 23.

**7964.** —— ——.]—POLLOK *v.* M'ALPIN, THE LOCHLIBO (1851), 7 Moo. P. C. C. 427; 13 E. R. 945, P. C.
*Annotations:*—**Refd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451; The Oakfield (1886), 11 P. D. 31.

**7965.** —— ——.] — A vessel dragging her anchor, & coming into collision with another:—*Held:* this was the fault of the pilot alone, & the owners were therefore not liable.—THE NORTHAMPTON (1853), 1 Ecc. & Ad. 152; 164 E. R. 88.
*Annotation:*—**Refd.** The Woburn Abbey (1869), 38 L. J. Adm. 28.

*C. Liabilities.*

(*a*) *In General.*

*See* Pilotage Act, 1913 (c. 31), s. 30.

**7966. Liability for negligence.**]—A pilot who has the steering of a ship is liable to an action for

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**PART XVI. SECT. 4, SUB-SECT. 2.—B.**

**7955 i.** *General rule.*]—A man who takes on himself the duty of a pilot, ought to render cheerfully & willingly all the aid he can in navigating the vessel he undertakes to bring into port; & all the merit due to him otherwise is merged in the character of pilot, & he is to be remunerated accordingly.—THE WILLIAM WARD (1855), 8 Ir. Jur. 336.—**IR.**

**7955 ii.** ——.]—When a licenced pilot is employed on board a vessel in a place where pilotage is compulsory, it is his duty to insist on having effective control of the vessel or to decline to act as pilot.—GREENOCK TOWING CO. *v.* HARDIE (1901), 4 F. (Ct. of Sess.) 215; 39 Sc. L. R. 151.—**SCOT.**

**7962 i.** *Particular duties — As to anchorage.*]—The mode time & place of bringing a vessel to anchor is within the province of the pilot in charge.—*Re* THE LOTUS (1861), 11 L. C. R. 342; 2 S. V. A. R. 58.—**CAN.**

**PART XVI. SECT. 4, SUB-SECT. 2.—C. (a).**

**7966 i.** *Liability for negligence.*]—If accident happen, occasioned by the mismanagement of the pilot, the vessel is not responsible.—*Re* THE LOTUS (1861), 11 L. C. R. 342; 2 S. V. A. R. 58.—**CAN.**

**7966 ii.** ——.]—ISLAY (OWNER) *v.* PATIENCE (1892), 20 R. (Ct. of Sess.) 224; 30 Sc. L. R. 223.—**SCOT.**

**7966 iii.** ——.]—When a licenced pilot is employed on board a vessel in a place where pilotage is compulsory, it is his duty to insist on having effective control of the vessel or to decline to act as pilot; & if he is ordered by the master to place himself in a position disadvantageous for the effective

*Sect. 4.—Pilots: Sub-sect. 2, C. (a) & (b); sub-sect. 3. Sect. 5: Sub-sects. 1, 2 & 3. Sect. 6.]*

injury done by his personal misconduct although a superior officer is on board.—STORT *v.* CLEMENTS (1792), Peake, 144; 170 E. R. 109, N. P.

**7967.** ——.]—THE ALEXANDER, LOVEDAY *v.* ROSS (1822), 7 L. T. 568.

**7968.** ——.]—CLONEY *v.* POWER (1837), 7 L. T. 648.

**7969.** ——.]—DREW *v.* KNIGHT (1840), 7 L. T. 648.

**7970.** ——.]—GAUNE *v.* LEWIS (1844), 7 L. T. 568.

**7971.** ——.]—SHERSBY *v.* HIBBERT, THE DUKE OF MANCHESTER, No. 7537, *ante*.

**7972.** ——.]—A Trinity House pilot, who, in navigating a vessel, negligently runs against & damages another vessel, is not within the protection of Pilotage Act, 1825 (c. 125), s. 84, which enacts, amongst other things, that all actions brought for anything done in pursuance of the Act, shall be brought in the county where the cause of action arises, & not elsewhere.—LAWSON *v.* DUMLIN (1850), 9 C. B. 54; 19 L. J. C. P. 139; 14 L. T. O. S. 350; 137 E. R. 811.

**7973.** ——.]—THE PRIDE OF THE OCEAN, KEEN *v.* MARTIN (1854), 7 L. T. 648.

**7974.** ——.]—A ship in charge of a compulsory pilot was at high water brought into & anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual & customary place for vessels of her size & draught to anchor in. At low water she grounded, & thereby did damage to an oyster bed. On notice of the existence of the oyster bed being given to the master he took all reasonable means to remove his ship as speedily as possible. In an action by the lessee of the oyster bed against the shipowner & the pilot:—*Held:* the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures—not extraordinary measures—to remove his ship, & this he had done.—THE OCTAVIA STELLA (1887), 57 L. T. 632; 6 Asp. M. L. C. 182.

*Annotations:*—**Apld.** The Swift, [1901] P. 168. **Distd.** The Bien, [1911] P. 40. **Reld.** The Carlgarth, The Otarama, [1927] P. 93.

**7975.** —— **Collision due to defect in ship—Pilot unaware of defect.**]—THE BARON OSY & THE RUBICON, JACKSON *v.* THOMPSON (1855), 7 L. T. 648.

**7976.** —— **Appeal against conviction—Sufficiency of notice of appeal.**]—R. *v.* MOZLEY, *Re* AN APPEAL BY JEAVONS (1861), 10 W. R. 78; *sub nom.* R. *v.* LIVERPOOL RECORDER, 31 L. J. M. C. 127; 5 L. T. 361; 25 J. P. 759.

**7977.** —— **Volunteer pilot.**]—A pilot allowed to be in control of pltfs.' ship by her master for his own convenience negligently ran her ashore off Barry, in the Bristol Channel. The pilot was a volunteer in the sense that he was not to be paid for piloting the ship until she reached Flatholm, which is beyond Barry. In an action brought by the shipowners against the pilot:—*Held:* although the pilot was negligent, the master had no right to give up control of the vessel to an unpaid pilot, & was guilty of contributory negligence in so doing, & the owners therefore could not succeed in their action.—THE BONVILSTON (1914), 30 T. L. R. 311.

—— **Jurisdiction of county court having Admiralty jurisdiction.**]—*See* ADMIRALTY, Vol. I., p. 215, Nos. 1724–1726.

*(b) Limitation of Liability.*

**Limitation to amount of bond.**]—*See* Pilotage Act, 1913 (c. 31), s. 35.

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SUB-SECT. 3.—UNQUALIFIED PERSON ACTING AS PILOT.

*See* Pilotage Act, 1913 (c. 31), ss. 30, 32.

**7978. What amounts to acting as pilot.**]—On a summons against a person for acting as an unqualified pilot, the only evidence was that deft., who was not a pilot or one of the crew of a vessel, when he saw a boat ahead called out "luff," which order was obeyed by the man at the helm, being the proper nautical term:—*Held:* was not sufficient evidence of the offence, & conviction quashed.—ACTON *v.* WALDEN (1862), 26 J. P. 166.

**7979. Whether acting as pilot justified—Burden of proof—Custom.**]—BUCK *v.* TYRREL (1922), 10 Lloyd, L. R. 74, D. C.

**7980. Right to proportion of fee—On supersession by licenced pilot.**]—THE CARL XV., No. 7954, *ante*.

—— ——.]—*See* Pilotage Act, 1913 (c. 31), s. 30 (2).

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SECT. 5.—**OFFENCES.**

SUB-SECT. 1.—BY PILOTS.

*See* Pilotage Act, 1913 (c. 31), ss. 46–48.

**7981. Failure to deliver up licence—Pilotage authority acting capriciously.**]—Under Merchant Shipping Act, 1854 (c. 104), s. 352, a qualified pilot, refusing to deliver up his licence when required to do so by the pilotage authority, is liable to a penalty, & cannot defend himself on the ground that the pilotage authority has acted capriciously in requiring the delivery.—HENRY *v.* NEWCASTLE TRINITY HOUSE BOARD (1858), 8 E. & B. 723; 27 L. J. M. C. 57; 22 J. P. 515; 4 Jur. N. S. 685; 6 W. R. 232; 120 E. R. 269; *sub nom.* R. *v.* HENRY, 30 L. T. O. S. 256.

**7982. Failure to produce licence—Exoneration of master for non-employment of pilot—Master with knowledge of pilot's qualification.**]—The master of a ship is not liable to the penalty imposed by the 6 Geo. 4, c. 125, s. 58, for refusing to employ a pilot, unless the pilot produces his licence as required by sect. 66, although it is not demanded.

This is not rendered unnecessary by the fact of the master having previously known the person

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control of the vessel, & he acquiesces in the arrangement & continues to act as pilot, he will not escape responsibility for damage to another vessel.—GREENOCK TOWING CO. *v.* HARDIE (1901), 4 F. (Ct. of Sess.) 215; 39 Sc. L. R. 151.—**SCOT.**

**PART XVI. SECT. 5, SUB-SECT. 1.**

**a.** *Pilot qualified for part of voyage continuing beyond point to which licence extends—Offer at commencement of voyage by pilot qualified for whole voyage.*]—*Held:* a pilot in charge of a coasting ship, qualified as a pilot for the first part of her voyage, did not commit an offence under Merchant Shipping Act, 1894, s. 598 (1), by continuing in charge of her after she had passed beyond the point to which his licence extended, although a pilot qualified for the whole voyage had offered to take charge of the ship, the offer having been made at the port where the voyage commenced & having been an offer to take charge of the ship for the whole voyage.—BLAIR *v.* WARDEN (1898), 25 R. (Ct. of Sess.) 93; 35 Sc. L. R. 932.—**SCOT.**

**b.** *Notice of prosecution.*]—BLOUIN *v.* ARMSTRONG (1856), 16 L. C. R. 225.—**CAN.**

so offering himself to have been a duly licenced pilot.—HAMMOND *v.* BLAKE (1830), 10 B. & C. 424; L. & Welsb. 157; 5 Man. & Ry. K. B. 361; 8 L. J. O. S. K. B. 140; 109 E. R. 507.

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SUB-SECT. 2.—BY MASTER.

*See* Pilotage Act, 1913 (c. 31), s. 30.

**7983. Duty to employ licenced pilot.**]—The master of a coasting vessel may himself perform the duties of a pilot in the conduct of his vessel; but if he employ another for that purpose, he must employ a licenced pilot.—BEILBY *v.* SCOTT (1840), 7 M. & W. 93; 10 L. J. Ex. 149; 151 E. R. 692.

**7984. Employment of unlicenced pilot after offer by licenced pilot—Master piloting his own vessel.**]—By 6 Geo. 4, c. 125, s. 58, every master who shall act as a pilot on his own vessel, after a duly licenced pilot shall have offered himself, is subject to forfeit double the amount of pilotage. By 6 Geo. 4, c. 125, s. 70, it is enacted, that every person assuming or continuing to act as pilot without being duly licenced, after a duly licenced pilot shall have offered himself, is subject to a penalty of £50. A., the master of a vessel going up the Humber, refused to take on board a duly licenced pilot, & navigated his own ship to her port of destination, on which the pilot sued him under 6 Geo. 4, c. 125, s. 58, & the clerk of the corpn. of the Hull Trinity House sued him under 6 Geo. 4, c. 125, s. 70:—*Held:* 6 Geo. 4, c. 125, s. 70, did not include the cases of masters, notwithstanding the words "every person," & the master was only liable under 6 Geo. 4, c. 125, s. 58.—BEILBY *v.* SHEPHERD (1848), 3 Exch. 40; 18 L. J. Ex. 73; 12 L. T. O. S. 222; 13 J. P. 56.

**7985. —— Offer outside pilotage area.**]—CHANDLER *v.* MONROE (1887), 3 T. L. R. 618, D. C.

**7986. —— Offer by pilot licenced for exempted ships—To master of unexempted ship.**]—By Merchant Shipping Act, 1854 (c. 104), s. 353, it is provided that "Every master of any unexempted ship navigating within any, compulsory, pilotage district who, after a qualified pilot has offered to take charge of such ship, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, & every master of any exempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship, employs or continues to employ an unqualified pilot to pilot her" shall incur a penalty:—*Held:* the expression "qualified pilot" must be understood with reference to the class of ship of which the pilot offers to take charge, & a pilot licenced to pilot exempted ships only is not such a qualified pilot as to render liable to the penalty of the sect. a master of an unexempted ship who, after the said pilot has offered to take charge of her, continues to employ an unqualified person to pilot her.—STAFFORD *v.* DYER, [1895] 1 Q. B. 566; 64 L. J. M. C. 194; 72 L. T. 114; 7 Asp. M. L. C. 568; 15 R. 287, D. C.

**7987.** ——.]—A ship sailing under foreign going articles left Swansea & went to various ports within & without the United Kingdom. She went from Dieppe to Hull in ballast, & at Hull she took in a cargo to be discharged at Bristol, & went from Hull with such cargo to Bristol, where she discharged her cargo, still sailing under the same articles. When on the voyage from Hull to Bristol, the ship was proceeding up the Bristol Channel, & was within the limits of the port of Bristol, within which, by a local Act, s. 9, "the pilotage by a Bristol pilot is compulsory for all vessels except coasting vessels & Irish traders." The master refused to take a compulsory pilot on board, on the ground that the ship during the voyage from Hull to Bristol was a "coasting vessel" within the meaning of the exemption by reason of her having taken in cargo at Hull destined to be discharged at Bristol, both ports being within the United Kingdom:—*Held:* the ship was not a "coasting vessel" at the time in question, & the fact that she took in cargo at Hull, a port in the United Kindgom, which she was going to discharge at Bristol, another port in the United Kingdom, did not make her a "coasting vessel" on the voyage from Hull to Bristol, & the master was properly convicted under 1894 Act, s. 603 (2), for having within a district where pilotage was compulsory refused to take a pilot on board.—PHILLIPS *v.* BORN (1905), 93 L. T. 634; 10 Asp. M. L. C. 131, D. C.

—— **Non-production of licence by pilot.**]—*See* Sub-sect. 1, *ante*.

**What amounts to acting as pilot.**]—*See* Pilotage Act, 1913 (c. 31), s. 30 (5).

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SUB-SECT. 3.—BY OTHER PERSONS.

*See* Pilotage Act, 1913 (c. 31), s. 30 (3).

**7988. Unlicenced pilots—Continuing in charge after licenced pilot has offered.**]—A conviction under Pilot Act, 1825 (c. 125), for continuing in charge of a ship after a licenced pilot has offered to take charge, must show, on the face of it, that deft. knew of the offer; for it is not enough to describe the offence in the words of the statute creating it, without adding facts to show that deft. was a party to it.—CHANEY *v.* PAYNE (1841), 1 Q. B. 712; 1 Gal. & Dav. 348; 10 L. J. M. C. 114; 7 L. T. 568; 6 Jur. 79; 113 E. R. 1304.

*Annotations*:—**Mentd.** Charter *v.* Greame (1849), 13 Q. B. 216; Fuller *v.* Brown (1849), 3 New Mag. Cas. 172.

**7989.** —— —— **Mate of ship.**]—T. was third mate of a ship, & after P., a duly licenced pilot, had offered to take charge, continued to act as pilot. T. was charged under Merchant Shipping Act, 1854 (c. 104), s. 361:—*Held:* the justices rightly convicted T., without regard to his being or not being mate of the ship.—TURNER *v.* PEAT (1888), 53 J. P. 230, D. C.

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SECT. 6.—**APPEALS.**

*See* Pilotage Act, 1913 (c. 31), ss. 27, 28.

**7990. Notice of appeal—Extension of time for giving notice.**]—By r. 1 of the Pilotage Appeal Rules (Stipendiary & Metropolitan Police Magistrates), 1890, notice of appeal to a magistrate from the decision of a pilotage authority is to be given in writing to the magistrate & to the pilotage authority by the person aggrieved within seven days after he shall have received a notification of such decision, "or within such further time as may be allowed by the magistrate":—*Held:* a



c. *Procedure for penalty.*]—The procedure for penalty for breach of the pilotage enactments is not exclusive.—HUGHES *v.* DUND. LE HARBOUR COMRS., [1923] 1 I. R. 38.—IR.

*Sect. 6.—Appeals. Sect. 7: Sub-sect. 1.]*

magistrate has power under the rule to extend the time for appealing, although the prescribed time has expired before the date of the application for the extension.—R. *v.* LEWIS, [1906] 2 K. B. 307; 75 L. J. K. B. 508; 95 L. T. 476; 10 Asp. M. L. C. 270.

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## SECT. 7.—COMPULSORY PILOTAGE.

### SUB-SECT. 1.—IN GENERAL.

*See* Pilotage Act, 1913 (c. 31), s. 11 (1).

**7991. Nature of compulsory pilotage.**]—(1) Compulsory pilotage is not a charge upon vessels, but is a regulation instituted for their benefit.

(2) A vessel having on board a person who did not pay for his passage, who messed with the captain, & who assisted in the work of the ship:—*Held:* to be exempt from compulsory pilotage under Merchant Shipping Act, 1854 (c. 104), s. 379.—THE HANNA (1866), L. R. 1 A. & E. 283; 36 L. J. Adm. 1; 15 L. T. 334; 15 W. R. 263; 2 Mar. L. C. 434.

*Annotations:—Generally,* **Refd.** The Vesta (1882), 7 P. D. 240; The Clymene (1897), 76 L. T. 811; The Columbus (1899), 80 L. T. 203; The Cayo Bonito, [1902] P. 216.

**7992. Creation of compulsory pilotage—Whether power to licence pilots connotes power to make pilotage compulsory.**]—The power to licence pilots does not *per se* render the pilotage compulsory.—THE KILLARNEY (1862), Lush. 427; 6 L. T. 908; 1 Mar. L. C. 238; 167 E. R. 188.

*Annotations:*—**Refd.** Tyne Improvement Comrs. *v.* General Steam Navigation Co. (1866), 15 L. T. 487; General Steam Navigation Co. *v.* British & Colonial Steam Navigation Co. (1869), L. R. 4 Exch. 238; The Hankow (1879), 4 P. D. 197; The Umsinga, [1912] P. 120.

**7993. —— Bye-laws by harbour authority.**]—Pilotage is compulsory in the harbour of Llanelly by virtue of 6 & 7 Vict. c. lxxxviii., & 21 & 22 Vict. c. lxxii., & the bye-laws made thereunder.

It is competent for a harbour authority, which has power to make bye-laws regulating the navigation of their harbour and to appoint pilots, to make pilotage compulsory by means of such bye-laws, & to impose penalties for disobedience to them.—THE RUBY (1890), 15 P. D. 164; 59 L. J. P. 68; 63 L. T. 735; 39 W. R. 42; 6 Asp. M. L. C. 577, C. A.

*Annotation:*—**Distd.** Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364.

**7994. —— Validity of local Act—Until supersession under Pilotage Act, 1913 (c. 31), s. 11.**]—Although s. 32 (2) of above Act provides that "a ship whilst being navigated within any closed dock . . . in a pilotage district shall notwithstanding anything in this Act be deemed to be navigating in a district in which pilotage is not compulsory," yet the effect of s. 59, which provides that "any enactment, order . . . or provision with reference to pilotage affecting any pilotage district in particular . . . shall remain in force . . . until provision is made by Pilotage Order . . . superseding any such enactment . . . or provision," is that any local Act requiring compulsory pilotage remains in force until it has been superseded in accordance with s. 59.—THE PORT HUNTER (1915), 31 T. L. R. 181.

**7995. —— Admiralty order—Protection of realm—Pilotage through minefield.**]—HUMBER CONSERVANCY BOARD *v.* GRANT, No. 7927, *ante*.

**7996. —— Order of Expeditionary Force Commander—Protection of lines of communication.**]—A steamship in charge of a pilot when proceeding up the Shatt-ul-Arab river came into collision with another steamship at anchor. The pilot was in charge in consequence of an order made by the officer commanding the British troops in Mesopotamia. The troops controlled both banks of the river to above the place at which the collision happened. In an action for damage brought by the owners of the steamship at anchor against the owners of the steamship under way, the latter admitted that the collision was caused by the negligence of the pilot, who was in fact in charge & was navigating their vessel, but alleged that he was compulsorily in charge, & that they were not liable for the damage:—*Held:* the officer in command of the troops had authority to issue orders to ensure the safe navigation of the river, which served as one of the chief lines of communication for the army; & as defts. had proved that the pilot was in charge in consequence of that order, & pltfs. had not shown that though the pilot was compulsorily on board his duty was merely to give advice as to the navigation, the plea of compulsory pilotage succeeded, & defts. were not liable for the damage done.

I hold that the pilot was on board the *Andoni* by compulsion of the Army Commander, which was, in my view, compulsion of law (HILL, J.).—THE ANDONI, [1918] P. 14; 87 L. J. P. 28; 119 L. T. 154; 14 Asp. M. L. C. 326.

*Annotation:*—**Apld.** The Arum, [1921] P. 12.

**7997. —— Statutory regulation—Provision for vessel to be "conducted" by pilot.**]—Defts.' vessel was, at the time of a collision with pltfs.' vessel, being "conducted" by a pilot licenced by the London Trinity House, in accordance with Defence of the Realm (Consolidation) Regulations, 1914. The pilot having been found alone to blame:—*Held:* though defts.' vessel was an exempt ship under 1894 Act, & therefore defts. could not have availed themselves of the defence of compulsory pilotage, the pilot actually "conducting" the vessel was, under the new & temporary regulations, compulsorily in charge in the sense that defts. were not liable for his wrongful acts.—THE NORD, [1916] P. 53; 85 L. J. P. 36; 116 L. T. 351; 32 T. L. R. 292; 13 Asp. M. L. C. 606.

*Annotations:*—**Apld.** The Newholm (1917), 86 L. J. P. 131. **Apprvd.** The Mickleham, [1918] P. 166.

**7998. —— —— ——.**]—By reg. 1 of an Order made under reg. 39 of the Defence of the Realm Regulations, all ships (with certain exceptions) "whilst bound from, & whilst navigating in the waters from, the Downs Pilot Station to Gravesend, or *vice versa*, must be conducted by pilots licenced by the London Trinity House":—*Held:* the Order must be construed as if the words were (omitting the words of exception) "all ships bound from the Downs Pilot Station to Gravesend or navigating in the waters which lie between the

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**PART XVI. SECT. 7, SUB-SECT. 1.**

**d.** *Whether pilotage compulsory—Meaning of "carrying passengers."*]—WATSON *v.* GIBSON & CO., [1908] S. C. 1092; 45 Sc. L. R. 821; 16 S. L. T. 238.—**SCOT.**

**e.** ——.]—The master of every vessel leaving the port of Quebec or any port out of the province of Quebec or arriving in the port of Quebec from any port out of the province, is bound to receive on board a branch pilot, & to give him charge of his vessel while within the pilotage limits: but such branch pilot is not entitled to receive charge of the vessel, unless he shall have shown by signal or otherwise his intention to board the vessel & to take charge thereof.—*Ex p.* CHRISLER (1864), 14 L. C. R. 209.—**CAN.**

**f.** ——.]—LAMARRE *v.* WOODS & QUEBEC HARBOUR COMRS. (1898), Q. R. 14 S. C. 1.—**CAN.**

**g.** ——.]—The taking of a steam vessel in a trial trip from Mazagon to the sea & back again is a moving of such vessel for which the employment of a pilot is compulsory.—MUHAMMAD

Downs Pilot Station & Gravesend," & therefore the defence of compulsory pilotage was open to a vessel bound from Spain to Middlesbrough, which, while being conducted by a licenced pilot between the Downs & Yarmouth in compliance with the Order, came into collision in the South Edinburgh Channel through the fault of her pilot.—THE NEWHOLM (1918), 34 T. L. R. 306, C. A.

**7999.** ——— ——— ———.]—(1) Pilotage Act, 1913 (c. 31), s. 14, refers only to areas, & not to particular ships for which at the date of the passing of the Act pilotage was not compulsory, & a vessel which, as a home-trading ship of less than 3,500 tons, was exempt from the obligation to take a pilot in the Downs, but under a Notice to Mariners (No. 228 of 1916) made under Defence of the Realm (Consolidation) Regulations, 1914, had to be conducted by a pilot, was not deprived of the defence of compulsory pilotage provided by 1894 Act, s. 633.

(2) Where a regulation made under the Defence of the Realm Act provides that a vessel must be "conducted" by a pilot, it means that the pilot is compulsorily in charge of the navigation, & not merely that the vessel has to be navigated under his advice.

A regulation having statutory force which provided that a ship is to be conducted by a pilot does not mean that she is to be navigated under his advice; it means that she must be conducted by him, & that makes pilotage compulsory (PICKFORD, L.J.).—THE MICKLEHAM, [1918] P. 166; 87 L. J. P. 165, C. A.

**8000. Whether pilotage compulsory—Construction of Pilotage Act, 1913 (c. 31), s. 11 (1)—"Making use" of port—Calling & waiting off port for twenty four hours for orders.**]—CANNELL & TRINITY HOUSE CORPN. *v.* LAWTHER, LATTA & CO., No. 8030, *post*.

*See, also*, Pilotage Act, 1913 (c. 31), s. 13.

**8001.** ——— ——— **Whether navigation without pilot in compulsory pilotage area absolutely forbidden—Obligation to take pilot on board if he offers.**]—W. H. MULLER & CO. *v.* TRINITY HOUSE (DEPTFORD STROND), No. 7929, *ante*.

**8002.** ——— ——— **"Port"—Lloyds' signalling station.**]—A ship came within a compulsory pilotage district for the purpose of obtaining by signalling orders as to her port of destination from one of Lloyds' signalling stations, & did not take a pilot: —*Held:* the signalling station, although a "place," was not a port within Pilotage Act, 1913 (c. 31), s. 11 (1), as modified by 1894 Act, s. 742, &, consequently, the vessel was not "navigating . . . for the purpose of . . . making use of any port" within above sub-sect., & was not, therefore, obliged to take a pilot.—HUMBER CONSERVANCY BOARD *v.* FEDERATED COAL & SHIPPING CO., [1928] 1 K. B. 492; 97 L. J. K. B. 136; 138 L. T. 334, D. C.

**8003.** ——— **Meaning of "carrying passengers"—Necessity for privity of owners & payment of fare—Person messing with captain & assisting in work of ship.**]—THE HANNA, No. 7991, *ante*.

**8004.** ——— ——— ——— **Relatives of captain.**]—(1) It is not compulsory on a passenger ship to take a licenced pilot on board when she is not carrying passengers; & the owners are responsible for the negligence of the pilot where they were not compellable to put him in charge of their vessel.

(2) The payment of a fare is necessary to constitute a passenger within the meaning of the compulsory pilotage sects. of Merchant Shipping Act, 1854 (c. 104). Where, therefore, the wife & father-in-law of the captain were on board a vessel, usually carrying passengers, but not on a passage voyage at the time, by invitation from the captain, without the privity of the owners, who had neither paid, nor agreed to pay, any fare, before a collision took place; such persons were held not to be passengers within the Act, so as to exonerate the owners from the damage occasioned by the pilot's default.—THE LION (1869), L. R. 2 P. C. 525; 6 Moo. P. C. C. N. S. 163; 38 L. J. Adm. 51; 21 L. T. 41; 17 W. R. 993; 3 Mar. L. C. 266; 16 E. R. 688, P. C.

*Annotations:—As to* (1) **Distd.** The Charlton (1895), 73 L. T. 49. *As to* (2) **Consd.** Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364. **Refd.** The Clymene (1897), 76 L. T. 811. *Generally*, **Refd.** The Winston (1883), 8 P. D. 176.

**8005.** ——— ——— **Whether distressed seamen "passengers."**]—Distressed seamen taken on board a ship to be brought home under the provisions of 1894 Act, are not "passengers" within the meaning of sect. 625 of that Act, & therefore a vessel, which is in other respects within the provisions of that sect., is not by reason of having such persons on board excluded from the exemptions from compulsory pilotage contained therein. —THE CLYMENE, [1897] P. 295; 66 L. J. P. 152; 76 L. T. 811; 46 W. R. 109; 8 Asp. M. L. C. 287.

**8006. Application to foreign ships — Inward bound—Employment of first pilot offering services.**]—A statute imposing in general terms on all inward-bound vessels the obligation to take a pilot at a convenient station beyond three miles from the British shore is binding on foreign vessels, such construction being justified on the grounds of public policy. A foreign vessel inward bound for Liverpool is required by 21 & 22 Vict. c. 92, ss. 129, 130, to make a signal for a licenced pilot on coming to the usual pilot station, & to employ the first pilot offering his services. Every vessel lying in the Mersey inward bound is required by 21 & 22 Vict. c. 92, s. 128, to employ a pilot in removing from the river into dock.—THE ANNAPOLIS, THE JOHANNA STOLL (1861), Lush. 295; 30 L. J. P. M. & A. 201; 4 L. T. 417; 1 Mar. L. C. 69; 167 E. R. 128.

*Annotations:—*Consd. R. *v.* Keyn (1876), 2 Ex. D. 63; The Servia, The Carinthia, [1898] P. 36. **Refd.** General Steam Navigation Co. *v.* British & Colonial Steam Navigation Co. (1869), L. R. 4 Exch. 238; The Lion (1869), L. R. 2 P. C. 525; The Woburn Abbey (1869), 38 L. J. Adm. 28 The Princeton (1878), 3 P. D. 90.

**8007.** ——— **Trading between London & ports between Boulogne & Baltic.**]—THE VESTA, No. 7924, *ante*.

**8008. Removal of ship from river to dock—Mersey.**]—THE ANNAPOLIS, THE JOHANNA STOLL, No. 8006, *ante*.

**8009. Commencement & cessation of compulsory pilotage—Cessation—Change of pilots.**]—A collision occurred in the Humber Dock, Hull, between a fly boat & a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licenced Humber Pilot, who had taken over the charge of the schooner while she was moored at

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YUSUF *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1869), 6 Bom. O. C. 98.—**IND.**

**h.** ———.]—A steam tug, carrying passengers between Kingstown Harbour & the North Wall Dublin, both of which places are, under Dublin Port & Docks Act, 1869, within the limits of the Port of Dublin, is within Merchant Shipping Act, 1854, s. 354, & obliged to carry a pilot.—DUBLIN PORT & DOCKS BOARD *v.* THE SHANNON (1873), I. R. 7 C. L. 116.—**IR.**

**k.** *Failure of pilotage authority to enforce—Liability of authority to pilots.*]—HUGHES *v.* DUNDALK HARBOUR COMRS., [1923] 1 I. R. 38.—**IR.**

**l.** ———.]—RANDALL *v.* RENTON (1902), 5 F. (Ct. of Sess.) 16; 40 Sc. L. R. 273; 10 S. L. T. 495.—**SCOT.**

*Sect. 7.—Compulsory pilotage: Sub-sects. 1 & 2.]*

a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots:—*Held:* the schooner was in charge of a pilot whose employment was compulsory by law.

There has been an attempt made to show that by the change of pilots the compulsory pilotage ceased. But it is a common custom for pilots to divide their duties, one brings a ship up the port, another takes her into dock, & the two performances of their duty by these pilots must be considered as a single pilotage service, so that here there was one act of pilotage, for which one set of pilotage dues was paid. It has also been argued that the compulsory pilotage had ceased because the *Rigborgs Minde* had anchored before she was taken into dock. . . . A temporary anchorage has not this effect. It is not so, unless a vessel is finally anchored at her destination (BRETT, M.R.). —THE RIGBORGS MINDE (1883), 8 P. D. 132; 52 L. J. P. 74; 49 L. T. 232; 5 Asp. M. L. C. 123, C. A.

*Annotation:*—**Refd.** The Monte Rosa, [1893] P. 23.

**8010. —— —— Final not temporary anchorage.**]—THE RIGBORGS MINDE, No. 8009, *ante*.

**8011. —— At what point master entitled to resign or resume control of ship.**]—The Clyde Navigation (Consolidation) Act, 1858 (c. cxlix) makes pilotage compulsory within the area of the river Clyde & fixes the western or outward limit of that area some four miles above Greenock. The Clyde Pilot Board, which under the Act had the sole right of licencing pilots for the navigation of the river & Firth of Clyde, licenced river pilots vessels between Greenock & places in the river area, & by its bye-laws made under the Act provided that such pilots should be remunerated for the whole distance between Greenock & Glasgow & that the pilot when on board should have sole charge of the vessel.

They [the bye-laws] do not purport to extend the area of compulsory pilotage . . . if they did they would be *ultra vires*. . . . There is nothing in those bye-laws to prevent the master of an incoming ship who picks up a pilot at G. from keeping control of his ship till he reaches the compulsory area, nor to prevent the master of an outerbound vessel who has taken a pilot on board . . . from putting the pilot aside & taking command of his own ship as she passes out of the compulsory area (LORD ATKINSON).—BEECHGROVE S.S. CO., LTD. *v.* AKT. FJORD OF KRISTIANIA, [1916] 1 A. C. 364; 85 L. J. P. C. 1; 113 L. T. 1124; 32 T. L. R. 44; 13 Asp. M. L. C. 188, H. L.

*Annotation:*—**Refd.** The Penrith Castle, [1918] P. 142.

SUB-SECT. 2.—COMPULSORY PILOTAGE DISTRICTS.

NOTE.—*In considering these cases regard should be had to the provisions of Pilotage Orders issued under the authority of Pilotage Act*, 1913 (*c.* 31), *s.* 10 (1).

**8012. What is "compulsory pilotage district" —Effect of imposition of pilotage charge whether pilot taken or not.**]—If it had been enacted simply that a pilot should be taken, without providing that in case a pilot was not taken, the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanour in refusing to take him (DR. LUSHINGTON).—THE MARIA (1839), 1 Wm. Rob. 95; 7 L. T. 648; 166 E. R. 508.

*Annotations:*—**Consd.** The Agricola (1843), 2 Wm. Rob. 10; **Apld.** The Bilbao (1860), Lush. 149; The Annapolis, The Johanna Stoll (1861), Lush. 295. **Consd.** Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364. **Refd.** Martin *v.* Temperley (1843), 4 Q. B. 298; The Lion (1869), L. R. 2 P. C. 525; The Penrith Castle, [1918] P. 142.

**8013. —— ——.**]—The Liverpool Pilot Act, 1824, s. 35, provides that in case the master of an outward-bound ship shall proceed to sea, & shall refuse to take on board & employ a pilot, he shall pay to the pilot who first offers his services the pilotage fee, as if he had accepted his services:—*Held:* this sect. made it compulsory on the masters of outward-bound ships to take on board a pilot when proceeding to sea.—RODRIGUES *v.* MELHUISH & JONES (1854), 10 Exch. 110; 2 C. L. R. 1295; 24 L. J. Ex. 26; 23 L. T. O. S. 177; 2 W. R. 518; 156 E. R. 376.

*Annotations:*—**Apld.** The Maria (1867), L. R. 1 A. & E. 358. **Consd.** Wood *v.* Smith, The City of Cambridge (1874), L. R. 5 P. C. 451. **Refd.** The Woburn Abbey (1869), 38 L. J. Adm. 28; The Servia, The Carinthia, [1898] P. 36.

**8014. —— River Thames.**]—Merchant Shipping Act, 1854 (c. 104), s. 354, making pilotage compulsory upon certain vessels, is not to be restricted by the provision of sect. 353, that all existing exemptions from compulsory pilotage should continue in force.

An Irish trader (as described by 6 Geo. 4, c. 125, s. 59) therefore, carrying passengers, is compelled to employ a licenced pilot in the river Thames.—THE TEMORA (1860), Lush. 17; 1 L. T. 418; 167 E. R. 9.

*Annotations:*—**Consd.** The Warsaw, [1898] P. 127. **Refd.** The Hanna (1866), L. R. 1 A. & E. 283; General Steam Navigation Co. *v.* British & Colonial Steam Navigation Co. (1869), L. R. 4 Exch. 238.

**8015. —— Mersey.**]—THE ANNAPOLIS, THE JOHANNA STOLL, No. 8006, *ante*.

**8016. —— River Tyne.**]—Assuming 6 Geo. 4, c. 125, s. 58, would otherwise have made it compulsory on a British vessel to employ a licenced pilot in the Tyne, the case was within sect. 89, & therefore it was not compulsory by law on a British ship to employ a licenced pilot in the Tyne, at the time Merchant Shipping Act, 1854 (c. 104), came into operation; & consequently the owner was not protected by sect. 388 from liability for damage occasioned by the fault of a qualified pilot in charge of a ship.—TYNE IMPROVEMENT COMRS. *v.* GENERAL STEAM NAVIGATION CO. (1866), L. R. 2 Q. B. 65; 8 B. & S. 66; 36 L. J. Q. B. 22; 15 L. T. 487; 31 J. P. 36; 15 W. R. 178; 2 Mar. L. C. 431, Ex. Ch.

**8017. —— —— Vessels carrying passengers between two ports in British Isles.**]—Pilotage is compulsory in the river Tyne for vessels carrying passengers between two ports in the British Islands.—THE WARSAW, [1898] P. 127; 67 L. J. P. 50; 78 L. T. 327; 46 W. R. 638; 14 T. L. R. 275; 8 Asp. M. L. C. 399.

**8018. —— Port of London.**]—The master of a vessel belonging to the Port of London & bound up the Thames, on a voyage from Australia to London with passengers on board, is required by law to employ a licenced pilot within the limits of the port of London.—THE HANKOW (1879), 4 P. D. 197; 48 L. J. P. 29; 40 L. T. 335; 28 W. R. 156; 4 Asp. M. L. C. 97.

*Annotations:*—**Folld.** The Umsinga, [1912] P. 120. **Refd.** Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364.

**8019. —— ——.**]—Defts.' steam vessel, belonging to the port of London, whilst proceeding, in charge of a duly licenced Trinity House pilot, down the river Thames, bound from London to East Africa with cargo & passengers, came into collision, through the fault of the pilot alone, with some tugs & barges of pltfs. in Bugsby's Reach:—

*Held:* defts. were not liable for the damage sustained by pltfs., as pilotage was compulsory, the port of London, within which the collision occurred, being a port in relation to which particular provision, for the appointment of pilots, had been made by charter & by Act of Parliament, within 6 Geo. 4, c. 125, s. 59.—THE UMSINGA, [1912] P. 120; 81 L. J. P. 65; 106 L. T. 722; 28 T. L. R. 212; 56 Sol. Jo. 270; 12 Asp. M. L. C. 174, C. A.

**8020. —— Port of Havre.**]—Although the employment of a pilot by a vessel entering the port of Havre is, by French law, compulsory, such pilot does not as of right, as is the case in England, supersede the master & take charge of the ship, but, according to French decisions, the master remains in charge, the pilot being merely his adviser; hence, though the master may allow such pilot to take charge in fact, the owners are not exempted from liability for damage done to another ship by the negligence of the pilot.—THE AUGUSTA (1887), 57 L. T. 326; 3 T. L. R. 399; 6 Asp. M. L. C. 161, C. A.

*Annotations:*—**Folld.** The Agnes Otto (1887), 56 L. J. P. 45; The Dallington, [1903] P. 77. **Refd.** The Andoni, [1918] P. 14.

**8021. —— River Danube.**]—By arts. 85, 89, & 92 of the International Rules for the Navigation of the Danube, pilotage is compulsory in the case of a vessel navigating the Danube, but the master of such a vessel is not required to give up the navigation of it to the pilot. Where, therefore, the master of such a vessel has in fact given up the navigation of it to a pilot, the owners remain answerable for damage caused by the improper navigation of the pilot.—THE AGNES OTTO (1887), 12 P. D. 56; 56 L. J. P. 45; 56 L. T. 746; 35 W. R. 550; 6 Asp. M. L. C. 119.

**8022. —— Port of Llanelly.**]—THE RUBY, No. 7993, *ante*.

**8023. —— Port of Blyth.**]—Pilotage is compulsory on a foreign vessel resorting to, or coming into, or departing from the port of Blyth, for that port is one of the creeks or members of the port of Newcastle-upon-Tyne unaffected by legislation subsequent to the Newcastle Pilot Act, 1801, s. 6.—THE HOLAR (LATELY THE VADSO), [1901] P. 7; 69 L. J. P. 110; 83 L. T. 436; 49 W. R. 224; 17 T. L. R. 17; 9 Asp. M. L. C. 143.

**8024. —— Port of Bristol.**]—REED *v.* GOLDSWORTHY (1903), 90 L. T. 126; 9 Asp. M. L. C. 529, D. C.

**8025. —— Port of Manchester.**] — Defts.' vessel, inward bound from the sea to Manchester, after anchoring in the Mersey to wait for the tide, was proceeding through the Eastham Channel when she came into collision, near No. 4 buoy, with pltfs.' vessel. In an action of damage by collision, the pilot of defts.' vessel was found alone to blame:—*Held:* pilotage was compulsory, &, therefore, defts. were not liable, for, under the Mersey Dock Acts Consolidation Act, 1858, the master of every vessel other than a coaster in ballast, or under the burthen of one hundred tons, entering the port of Liverpool from the sea, is under an obligation to employ a pilot, &, if the vessel is proceeding to the port of Manchester, *via* the Ship Canal, the duties of the pilot continue until the vessel reaches Eastham.

*Semble:* every vessel, with the same exemptions, outward bound from the Manchester Ship Canal, is under compulsory pilotage on leaving the canal at Eastham.—THE MERCEDES DE LARRINAGA, [1904] P. 215; 73 L. J. P. 65; 90 L. T. 520; 20 T. L. R. 375; 9 Asp. M. L. C. 571.

*Annotations:*—**Refd.** The Sussex (1904), 73 L. J. P. 73; The Ole Bull, [1905] P. 52.

**8026. —— Isle of Wight.**]—Pilotage is compulsory, special exemptions excepted, in the Isle of Wight district on vessels bound inwards to or outwards from Southampton.—THE ASSAYE, [1905] P. 289; 74 L. J. P. 145; 94 L. T. 102; 54 W. R. 203; 21 T. L. R. 677; 10 Asp. M. L. C. 183.

**8027. —— Effect of imposition of penalty.**]—THE RUBY, No. 7993, *ante*.

**8028. —— ——.**]—(1) Where a public local Act, in force before the passing of Merchant Shipping Act, 1854 (c. 104), & regulating a port, imposes a penalty on any unlicenced person taking upon himself to conduct or pilot any ship into or out of a port, pilotage is compulsory.

(2) Pilotage rates, fixed by bye-laws made by trustees under a local Act, & under Merchant Shipping Act, 1854 (c. 104), & duly sanctioned by Her Majesty in Council, may be sued for by a pilot who has rendered service as such.—JONES *v.* BENNETT (1890), 63 L. T. 705; 6 Asp. M. L. C. 596, D. C.

**8029. Extent of compulsory pilotage district—London district—Extends to Gravesend.**]—All vessels coming up the Channel to London, are required by Merchant Shipping Act, 1854 (c. 104), s. 378, to take a pilot on board at Dungeness, & to put him in charge of the ship.

From Dungeness to London Bridge, is, by s. 370, constituted the Trinity House Pilotage district; but no pilot can be licenced to conduct ships both above & below Gravesend; & the pilotage rates are rates from Dungeness to Gravesend, & not to any intermediate place.

Defts.' vessel coming up the Channel to London, took a pilot on board at Dungeness; before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with pltfs.' vessel, through the pilot's negligence. Defts.' vessel belonged to the port of London; if the port extends to Yantlett Creek, she was at the time of the collision within her own port; if it only extends to Gravesend, she was not within her own port:—*Held:* for pilotage purposes the port of London extends only to Gravesend.—GENERAL STEAM NAVIGATION CO. *v.* BRITISH & COLONIAL STEAM NAVIGATION CO., LTD. (1869), L. R. 4 Exch. 238; 38 L. J. Ex. 97; 20 L. T. 581; 17 W. R. 741; 3 Mar. L. C. 237, Ex. Ch.

*Annotations:*—**Refd.** The Hankow (1879), 4 P. D. 197; The Umsinga, [1912] P. 120. **Mentd.** The Lion (1869); L. R. 2 P. C. 525; The Guy Mannering (1882), 7 P. D. 132; The Charlton (1895), 73 L. T. 49; The Servia, The Carinthia, [1898] P. 36; Reed *v.* Goldsworthy (1903), 90 L. T. 126; The Sussex, [1904] P. 236; Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364.

**8030. —— —— Includes port of Dover.**]—A ship, which was not an excepted ship, was directed by her charterers, under the powers given by the charterparty, to proceed to Dover to receive orders as to her port of discharge. She passed Dungeness & proceeded to Dover, where she stopped for half-an-hour about a quarter of a mile outside the end of the Admlty. pier when a boat came alongside out of the port with orders for her to proceed to Hamburg to which port she immediately proceeded. The London pilotage district extends to Dungeness, & the port of Dover is within that district. Neither the master nor the mate of the vessel held a pilotage certificate for the district:—*Held:* the ship, by stopping outside the port of Dover for orders, was making use of that port within Pilotage Act, 1913 (c. 31), s. 11, & was therefore bound while navigating in the London pilotage district, for which pilotage was compulsory, for the purpose of making use of a port in that district to be under the pilotage of a licenced pilot of the district.—CANNELL & TRINITY

*Sect. 7.—Compulsory pilotage: Sub-sect. 4. Part XVII. Sects. 1 & 2: Sub-sects. 1, 2 & 3, A.*

law existed, as it was contrary to principle & authority to hold that an English ct. would enforce a foreign municipal law, & give a remedy in the shape of damage, in respect of an act which, according to its own principles, imposed no liability on the person from whom the damages are claimed.—THE HALLEY (1868), L. R. 2 P. C. 193; 5 Moo. P. C. C. N. S. 262; 37 L. J. Adm. 33; 18 L. T. 879; 16 W. R. 998; 3 Mar. L. C. 131; 16 E. R. 514, P. C.

*Annotations:*—**Distd.** Redpath *v.* Allan, The Hibernian (1872), L. R. 4 P. C. 511. **Consd.** The M. Moxham (1876), 1 P. D. 107; The Guy Mannering (1882), 51 L. J. P. 57. **Distd.** The Augusta (1887), 3 T. L. R. 399. **Consd.** Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364; The Penrith Castle, [1918] P. 142. **Retd.** The Mali Ivo (1869), L. R. 2 A. & E. 356; The Magnet, The Duke of Sutherland, The Fanny M. Carvill (1875), 32 L. T. 129; The Star of India (1876), 1 P. D. 466; The Tasmania (1888), 13 P. D. 110; The Munster (1896), 12 T. L. R. 264; The Mystery, [1902] P. 115; The Dallington, [1903] P. 77; The Arum, [1921] P. 12. **Mentd.** Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; Machado *v.* Fontes (1897), 76 L. T. 588.

**8045.** ——— ——— ———.]—A collision occurred in the Austruweel, below Antwerp, in the river Scheldt, between a British steamship, owned by pltfs., coming down the river with a Belgian govt. pilot on board, & defts.' British steamship at anchor. The ct. found pltf.'s vessel alone to blame, the fault being that of the pilot, & evidence having been given as to the Belgian law on the question of compulsory pilotage:—*Held:* though the employment of the pilot was compulsory in the sense that his fees must be paid, the pilot was by Belgian law the adviser of the master who remained in charge, &, therefore, pltfs. were liable for the damage sustained by deft.'s vessel.—THE DALLINGTON *v.* THE SOCOTRA, [1903] P. 77; 72 L. J. P. 17; 88 L. T. 128; 51 W. R. 607; 19 T. L. R. 250; 9 Asp. M. L. C. 1.

# Part XVII.—Shipping Casualties.

## SECT. 1.—REPORTS OF ACCIDENTS AND LOSS OF SHIP.

**Duty to report loss of ship.**]—*See* Merchant Shipping Act, 1894 (c. 60), s. 426.

**Duty to report floating derelicts.**]—*See* Derelict Vessels (Report) Act, 1896 (c. 12), ss. 2, 3, 4, & Merchant Shipping Convention Act, 1914 (c. 50), s. 2 (5).

## SECT. 2.—INQUIRIES AND INVESTIGATIONS.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, ss. 464–479, & 1906 Act, ss. 66, 67 (1), 68 (2).

**8046. "Near the coasts"—Within territorial waters.**]—I cannot, however, read the words "near the coasts" as covering a place 20 miles off the coasts. The same language is to be found in other sects. [of 1894 Act], particularly sects. 511 & 535; & I am of opinion that when the terms of these sects. are considered the words "near the coasts" do not apply to such a case as that before me. Some limit must be placed on the term, & having regard to all the sects. dealing with wreck & salvage, as at present advised, I think the limit should be the territorial limit, though it is not necessary in this case to express a final opinion upon the point (GORELL BARNES, J.).—THE FULHAM, [1898] P. 206; 67 L. J. P. 78; 79 L. T. 127; 47 W. R. 62; 14 T. L. R. 507; 8 Asp. M. L. C. 425; *on appeal*, [1899] P. 251, C. A.

### SUB-SECT. 2.—PRELIMINARY INQUIRIES.

*See* 1894 Act, s. 465.

### SUB-SECT. 3.—FORMAL INVESTIGATIONS.

#### *A. In General.*

*See* 1894 Act, Sect. 466, Shipping Casualties & Appeals & Rehearing Rules 1907.

**8047. Procedure of court governed by Statutory Rules—Encroachment on rights of shipmasters by local provisions.**]—(1) The Shipping Casualties & Appeals & Rehearing Rules, 1907, made under 1894 Act, govern the procedure in British Wreck Comr.'s cts., & the rights of British shipmasters in such cts. must be ascertained by considering whether the local provisions diminish the safeguards given to British masters by the British Rules. Under r. 3: "When an investigation has been ordered, the Board of Trade may cause a notice, to be called a notice of investigation, to be served upon the owner, master, & officers of the ship. . . . The notice shall contain a statement of the questions which, on the information then in possession of the Board of Trade, they intend to raise on the hearing of the investigation. . . ." Under r. 12: "After the questions for the opinion of the ct. have been stated, the ct. shall proceed to hear the parties to the investigation upon, & determine the questions so stated. . . ."

By 1894 Act, s. 470 (4): "A certificate shall not be cancelled or suspended by a ct., holding a formal investigation into a shipping casualty, unless a copy of the report or a statement of the case on which the investigation or inquiry has been ordered, has been furnished before the commencement of the investigation or inquiry to the holder of the certificate."

Under s. 36 of the Canada Shipping Act, 1908, "A certificate shall not be cancelled or suspended . . . unless the holder of the certificate has had an opportunity of making a defence":—*Held:* the sect. amply protected the rights of British shipmasters & was not repugnant to the provisions of the Merchant Shipping Act & the rules made thereunder.

(2) A British master holding a Board of Trade certificate received a notice of investigation calling upon him to appear before a Wreck Comrs.' ct. at Montreal appointed "to inquire into the causes which led to the casualty (the stranding of his vessel) & into all the facts connected therewith. The notice contained no other statement of the questions intended to be raised, & no charges were

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the engineer's representatives against the shipowners:—*Held:* Pilotage Act, 1913, s. 15 (1), covered loss or damage caused to members of the crew; but the pilot, while navigating the ship, was the servant of the owners, & therefore, the doctrine of collaborateur applied, & the action should be dismissed.—THOM *v.* HUTCHISON (J. & P.), LTD., [1925] S. C. 386.—**SCOT.**

**PART XVII. SECT. 2, SUB-SECT. 1.**

*r. Inquiry condition precedent to action.*]—HAGLUND *v.* RUSSELLS (1882), 9 R. (Ct. of Sess.) 958; 19 Sc. L. R. 720.—**SCOT.**

specifically formulated against the master before or at the inquiry that he was in fault in connection with any of the matters on which he was examined.

The ct. found the master guilty of an error of judgment in taking wrong helm action & in failing to stop & take soundings, & suspended his certificate for three months. The master appealed:—*Held:* the master, having had no notice of the charges on which he had been found in fault, had not had an opportunity of making his defence, & the decision of the Wreck Comr.'s ct. must be quashed & the certificate restored free from suspension.—THE CHELSTON, [1920] P. 400; 90 L. J. P. 77; 124 L. T. 223; 36 T. L. R. 688; 15 Asp. M. L. C. 158, D. C.

**8048. When formal investigation held—Investigation into conduct of captain—Withdrawal of charge by Board of Trade.**]—When an inquiry is instituted under Merchant Shipping Acts into the conduct of a captain, the ct. may proceed with the inquiry, although the Board of Trade have no charge to make against the captain.—*Ex p.* MINTO (1877), 35 L. T. 808; 25 W. R. 251; 3 Asp. M. L. C. 323, D. C.

**8049. Necessity for notice of charges—No opportunity to make defence.**]—THE CHELSTON, No. 8047, *ante*.

*B. Jurisdiction and Powers of Court.*

*See* Merchant Shipping Act, 1894 (c. 60), s. 470.

**8050. Extent of powers—Costs.**]—THE BRITISH STANDARD (1912), Shipping Gazette, Feb. 7th.

**8051. —— Summoning of witnesses.**]—A local marine board, appointed under Merchant Shipping Act, 1854 (c. 104), to inquire into a charge of alleged misconduct against the master or mate of a vessel, has a discretionary power as to granting summonses for witnesses for the defence.

It is a proper course for such ct. before granting the summonses, to inquire who the witnesses are, & what they are expected to prove; & to refuse the summons in respect of any witness who can only speak to matters clearly irrelevant.

The witnesses summoned for the defence are witnesses of the ct., & their expense is borne not by deft. but by the public.—R. *v.* COLLINGRIDGE (1864), 34 L. J. Q. B. 9; *sub nom.* R. *v.* LONDON LOCAL MARINE BOARD, 12 W. R. 1109.

**8052. —— Suspension of master's certificate—Failure to stand by in case of collision—Collision with fishing cable.**]—A collision having occurred off the Yorkshire coast between a steamship & a fishing coble, whereby the latter sank & three men on board were drowned, a coroner's inquest was held, to which the Board of Trade sent a clerk, who took notes of the evidence, & returned them to the Board. Acting thereon, the Board of Trade ordered an investigation into the circumstances of the collision by two justices, who accordingly sat as a ct. of inquiry, summoned the master & mate of the steamship, & other witnesses, & heard a charge preferred against the master & mate on behalf of the Board of Trade, under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 33, which enacts that "in every case of collision between two 'ships' . . . the person in charge of each ship shall render to the other ship, her master, crew, & passengers, if any, such assistance as may be practicable & necessary to save them from danger, & if he fail so to do his certificate may be cancelled or suspended." The coble was a vessel of 10 tons burden, 24 feet in length, decked forward only. She had two movable masts, & a lug sail for each; was accustomed to go 20 miles out to sea, & to remain out twelve hours at a time. She usually sailed, but was sometimes propelled by oars when occasion required. The ct. of inquiry having heard evidence, found that the master & mate of the steamship did not render assistance to save the crew of the coble, & made an order suspending their certificates. On a motion for a *certiorari* to bring up this order for the purpose of quashing it:—*Held:* the justices had jurisdiction, & their proceedings were regular under Merchant Shipping Act, 1854 (c. 104), ss. 241, 242, 432, 433 & Amendment Act, 1862 (c. 63), ss. 23, 33.—*Ex p.* FERGUSON (1871), L. R. 6 Q. B. 280; 40] L. J. Q. B. 105; 24 L. T. 96; 35 J. P. 468; 19 W. R. 746; 1 Asp. M. L. C. 8.

*Annotations:*—**Refd.** The Gauntlet (1871), L. R. 3 A. & E. 381; The C. S. Butler (1874), L. R. 4 A. & E. 238; The Mac (1882), 7 P. D. 126; The Gas Float Whitton No. 2, [1896] P. 42.

**8053. —— —— Stranding—No material damage or loss of life.**]—The Merchant Shipping Act, 1876 (c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within Merchant Shipping Act, 1854 (c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's cerrificate where a ship has merely been stranded without material damage to the ship or loss of life.—*Ex p.* STORY (1877), 3 Q. B. D. 166; 47 L. J. Q. B. 266; 38 L. T. 29; 26 W. R. 329; 3 Asp. M. L. C. 549, D. C.

**PART XVII. SECT. 2, SUB-SECT. 3.—B.**

t. *Extent of powers—Suspension of certificate—Necessity to give notice of charge.*]—A navigation board cannot deprive an engineer of his certificate without giving him notice of the charge against him.—*Re* VICTORIA STEAM NAVIGATION BOARD, *Ex p.* DYKES (1877), 3 V. L. R. (L.) 162.—**AUS.**

a. —— —— ——.]—Appct. who was master of the barque *Wistaria* was summoned by the Marine Board to an inquiry *re* the stranding of the said barque *Wistaria*. He therefore attended & gave evidence, & afterwards the board, without giving him any notice that his conduct as master was to be the subject of inquiry, cancelled his certificate:—*Held:* before a man can suffer penal or other consequences he must have a specific charge brought against him, & the proceedings should have been commenced under Navigation Act, s. 37.—*Re* HUMMEL (1887), 3 Q. L. J. 50.—**AUS.**

b. —— —— ——.]—*Re* BELL, *Ex p.* VICTORIA MARINE BOARD (1892), 18 V. L. R. 432.—**AUS.**

c. —— —— ——.]—The effect of Canada Shipping Act, ss. 801 (3) & 795 is that before a certificate can be suspended there must be, at some time during inquiry proceedings, definite charges formulated, &, after notice of them, an opportunity to meet them afforded.—*Re* BRADLEY (B. C.), [1921] 3 W. W. R. 385.—**CAN.**

d. —— —— Navigation Board of Victoria has no jurisdiction to deal with the certificate of a master of a ship upon an inquiry into misconduct or incompetency causing serious damage to his ship at a place beyond the territorial limits of this colony.—*Re* VICTORIA STEAM NAVIGATION BOARD, *Ex p.* ALLAN (1881), 7 V. L. R. (L.) 248.—**AUS.**

e. —— ——.]—A master, while himself in charge of a steam vessel which was passing through a narrow channel, left the bridge, where the first mate was at the time, to call the second mate, & before his return the vessel ran upon rocks. The master's certificate was suspended by the decision of a Board of Trade Inquiry. In an appeal by the master against this decision:—*Held:* the rule that an officer in such a position must not leave his post except from unavoidable necessity must not be relaxed, & the decision affirmed accordingly.—EWER *v.* BOARD OF TRADE (1880), 7 R. (Ct. of Sess.) 835; 17 Sc. L. R. 604.—**SCOT.**

f. —— —— *Ship lost by abnormally bad weather.*]—WATSON *v.* BOARD OF TRADE (1884), 22 Sc. L. R. 22.—**SCOT.**

g. —— ——.]—BROWN *v.* BOARD OF TRADE (1890), 18 R. (Ct. of Sess.) 291; 28 Sc. L. R. 401.—**SCOT.**

h. —— *Whether to prohibit examination of particular witness.*]—*Ex p.* WEBBER (1886), 7 N. S. W. L. R. (L.) 317; 3 N. S. W. W. N. 10.—**AUS.**

k. —— *Whether to suspend pilotage exemption certificate.*]—The Ct. of Marine Inquiry has no jurisdiction, when dealing with a charge of misconduct against a master of a ship as such, to suspend the pilotage exemption certificate of the master.—R. *v.* COURT OF MARINE INQUIRY (1897), 23 V. L. R. 179.—**AUS.**

l. —— —— *inquire into collision in navigable river.*]—A collision took place in the waters of the River

*Sect.* 2.—*Inquiries and investigations: Sub-sect.* 3, *B. & C. Part XVIII. Sects.* 1 & 2.]

**8054. —— —— "Wrongful act or default"—Necessity for proof.**]—Where a ct. of inquiry into a shipping casualty, held under the eighth part of Merchant Shipping Act, 1854 (c. 104), orders the suspension of a master's certificate, in pursuance of the powers given by Merchant Shipping Act, 1854 (c. 104), s. 242, & Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 23, the Ct. of Appeal, having jurisdiction under 42 & 43 Vict. c. 72, will on appeal consider the evidence on which the judgment of the ct. of inquiry proceeded, & will reverse the judgment if the evidence is insufficient to justify the suspension of the certificate. Where a ct. of inquiry ordered a master's certificate to be suspended, & the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master within Merchant Shipping Act, 1854 (c. 104), s. 242 (2), & on appeal it appeared to the Ct. of Appeal that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Ct. of Appeal reversed the decision, & restored to the master his certificate.—THE ARIZONA (1880), 5 P. D. 123; 49 L. J. P. 54; 42 L. T. 405; 28 W. R. 704; 4 Asp. M. L. C. 269.

*Annotation*:—**Consd.** The Carlisle, [1906] P. 301.

**8055. —— —— —— Error of judgment at moment of difficulty or danger.**]—An error of judgment on the part of the master of a vessel at a moment of great difficulty & danger does not amount to a wrongful act or default, within Merchant Shipping Act, 1854 (c. 104), s. 242, so as to justify the suspension or cancellation of the master's certificate.

The utmost that can be said against the behaviour of the captain of the *Famenoth* is that it manifested an error of judgment at a moment of great difficulty & danger, but that it did not amount to any act of culpable negligence (HANNEN, P.).—THE FAMENOTH (1882), 7 P. D. 207; 48 L. T. 28; 5 Asp. M. L. C. 35.

*Annotation*:—**Consd.** The Carlisle, [1906] P. 301.

**8056. —— —— —— ——.**]—THE KAPUNDA & THE ADA MELMORE (1887), 3 T. L. R. 529.

**8057. —— —— —— Acquiescence in improper ballasting.**]—It was proved at an investigation before the Wreck Comr. into the circumstances attending the loss of a British ship, whose master held a certificate of competency from the Board of Trade, that the loss of the ship was due to improper ballast, taken on board with the sanction of the master at an English port, having been converted into mud, & choking the pumps, so that the vessel foundered. Thereupon the Wreck Comr. suspended the certificate of the master of the vessel for three months:—*Held*: the loss of the ship had been caused by a wrongful act or default of the master within Merchant Shipping Act, 1854 (c. 104), s. 242, & the decision of the Wreck Comr. in suspending the certificate of the master was correct.—THE GOLDEN SEA (1882), 7 P. D. 194; 51 L. J. P. 64; 47 L. T. 579; 30 W. R. 842; 5 Asp. M. L. C. 23.

*Annotation*:—**Refd.** The Famenoth (1882), 7 P. D. 207.

### *C. Rehearing and Appeals.*

*See* 1894 Act, sect. 475*; Shipping Casualties & Appeals & Rehearings Rules, 1907; & ADMIRALTY, Vol. I., pp. 233–234, Nos. 1596–1607.

**Procedure of court governed by statutory rules.**]—*See* No. 8047, *ante*.

# Part XVIII.—Limitation of Liability of Owners and Others.

## SECT. 1.—IN GENERAL.

*See* 1894 Act, ss. 502–509; 1898 Act (c. 14), ss. 1–5; 1900 Act, ss. 1–5; 1906 Act, ss. 69, 70.

**8058. Object of limitation — Abridgment of natural rights for political reasons.**]—The principle of limited liability is, that full indemnity, the natural right of justice, shall be abridged for political reasons (DR. LUSHINGTON).—CAIL *v.* PAPAYANNI, THE AMALIA (1863), 1 Moo. P. C. C. N. S. 471; Brown. & Lush. 151; 32 L. J. P. M. & A. 191; 8 L. T. 805; 1 Mar. L. C. 359; 15 E. R. 778; *on appeal*, 1 Moo. P. C. C. N. S. 479, P. C.

*Annotations*:—**Consd.** The Halley (1867), L. R. 2 A. & E. 3; James *v.* L. & S. W. Ry. (1872), L. R. 7 Exch. 187. **Refd.** The Albert (1863), 3 New Rep. 217; The Halley (1868), L. R. 2 P. C. 193; The Normandy (1870), L. R. 3 A. & E. 152; The Sisters (1875), 32 L. T. 837; The Karo (1887), 13 P. D. 24. **Mentd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; Fanny M. Carvill (Owners) *v.* Peru (Owners), The Fanny M. Carvill (1875), 13 App. Cas. 455, n.

**8059. —— —— Protection of owner against wrongdoing of master.**]—(1) The owners of a ship

Derwent between two steamships owned & registered in Hobart & engaged solely in trading in the Port of Hobart & not then engaged in trade or commerce with other countries or amongst the States. The place at which the collision occurred was a short distance outside the course ordinarily used by ships engaged in such trade or commerce, but the two steamships had traversed part of that course shortly before the collision took place:—*Held*: a Ct. of Marine Inquiry established under Navigation Act, 1912–1925, had no jurisdiction to inquire into the collision.—R. *v.* TURNER, *Ex p.* HOBART MARINE BOARD; STATE OF TASMANIA *v.* COMMONWEALTH (1927), 39 C. L. R. 411; [1927] Argus. L. R. 174; 1 A. L. T. 59.—**AUS.**

m. *Constitution of court.*]—The Ct. of Marine Inquiry, in investigating a charge against a certificated master of a steamship, must be constituted by one or more police magistrates & two skilled members, such skilled members to be certificated masters of steamships.—*Re* FORBES & VICTORIA MARINE BOARD (1898), 24 V. L. R. 502.—**AUS.**

n. *Right of shipmaster to give his statement of facts.*]—When a shipmaster is on trial for charges which may involve the loss of his certificate it is right that questions should be put to him when being examined as a witness as to the several matters which are charged against him & that there should be no attempt to draw inferences from the evidence of other people when he has not had an opportunity of giving his account of the matters of which he has the most intimate knowledge.—WATSON *v.* BOARD OF TRADE (1892), 19 R. (Ct. of Sess.) 1078.—**SCOT.**

o. *Right of master to have his certificate returned—Finding of court of inquiry not supported by facts.*]—TURNER *v.* BOARD OF TRADE (1894), 22 R. (Ct. of Sess.) 18; 32 Sc. L. R. 21; 2 S. L. T. 259.—**SCOT.**

### PART XVII. SECT. 2, SUB-SECT. 3.—C.

p. *Security for costs of appeal—Amount fixed at inquiry—Whether additional security ordered on appeal.*]—The master of a trawler appealed against the decision of a ct. of inquiry cancelling his certificate, & consigned the sum of £80, the amount fixed by the Sheriff-substitute, the judge in the inquiry, in terms of Shipping Casualties & Appeals & Rehearings Rules, 1907, No 975, Rule 20 (c). The Ct. of Session refused to order consignation of an additional sum to meet the expenses of the assessors, but directed that the fund already consigned should be made available *primo loco* for payment of those charges.—THAIN *v.* BOARD OF TRADE, [1923] S. C. 548.—**SCOT.**

claiming in the Ct. of Admlty. to have their liability limited in respect of damages occasioned by collision, to an aggregate amount not exceeding £8 for each ton of the ship's tonnage, are liable to pay interest on such aggregate amount from the date of the collision.

(2) The legislature introduced a new principle, the object of which was to give some protection to the owner against the wrongdoing of his servant, the master of the vessel (SIR ROBERT PHILLIMORE).—THE NORTHUMBRIA (1869), L. R. 3 A. & E. 6; 39 L. J. Adm. 3; 21 L. T. 681; 18 W. R. 188; 3 Mar. L. C. 314; *subsequent proceedings*, L. R. 3 A. & E. 24.

*Annotations:—As to* (1) **Apld.** Smith *v.* Kirby (1875), 24 W. R. 207; The Gertrude, The Baron Aberdare (1887), 12 P. D. 204. **Consd.** The Kate, [1899] P. 165. **Reld.** The Crathie, [1897] P. 178; The Rosalind (1920), 90 L. J. P. 126; The Philadelphia, [1917] P. 101.

**8060. Effect of limitation—Liability for interest—From date of collision.**]—Where a sum is awarded as damages for collision the liability to have paid such sum dates from the time at which the loss is considered to have arisen & the sum awarded bears interest from that date. This liability to interest is not affected by the Limitation Acts.—THE AMALIA (1864), 5 New Rep. 164, n.; 34 L. J. P. M. & A. 21; 13 W. R. 111.

*Annotations:*—**Folld.** Straker *v.* Hartland (1864), 5 New Rep. 163. **Apld.** The Northumbria (1869), L. R. 3 A. & E. 6; Smith *v.* Kirby (1875), 24 W. R. 207. **Consd.** The Racine, [1906] P. 273.

**8061.** —— —— ——.]—Where a ship has damaged another ship, & the latter is in ballast, interest from the time of collision is to be added to the £8 per ton; which by Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54 is the maximum damages payable.—STRAKER *v.* HARTLAND (1864), 2 Hem. & M. 570; 5 New Rep. 163; 34 L. J. Ch. 122; 11 L. T. 622; 10 Jur. N. S. 1143; 2 Mar. L. C. 159; 71 E. R. 584.

*Annotations:*—**Folld.** The Northumbria (1869), L. R. 3 A. & E. 6; Smith *v.* Kirby (1875), 24 W. R. 207; The Crathie, [1897] P. 178.

**8062.** —— —— ——.]—THE NORTHUMBRIA, No. 8059, *ante*.

**8063.** —— ——.]—The owners of a ship, though their liability to damages in respect of the loss of goods owing to a collision is confined, by Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, to an aggregate amount not exceeding £8 per ton of the ship's tonnage, are liable to pay interest on that amount from the date of the collision.—SMITH *v.* KIRBY (1875), 1 Q. B. D. 131; 24 W. R. 207.

*Annotations:*—**Folld.** The Gertrude, The Baron Aberdare (1887), 12 P. D. 204; The Crathie, [1897] P. 178.

**8064.** —— —— ——.]—THE ADA MELMORE (1887), cited in, [1897] P. at p. 183, n.; 76 L. T. at p. 535.

*Annotation:*—**Apld.** The Crathie, [1897] P. 178.

**8065.** —— —— ——.]—**Till payment into court.**]—(1) In actions for limitation of liability for a collision, where loss of life has occurred, the wrongdoer is liable, in addition to the £7 per ton payable in respect of such loss of life, to pay interest thereon from the date of the collision until payment into ct.

(2) Where in the limitation proceedings the fund paid into ct. in respect of loss of ship, goods, etc., amounts to the full £8 per ton of the ship's tonnage, persons who have taken proceedings in respect of those matters in a foreign ct. & received the proceeds of the sale of the wrongdoer's ship in those proceedings, but whose claims have not been thereby satisfied, are not debarred from claiming against the fund in ct. but will be compelled to give credit for any sums they have received in the proceedings abroad.—THE CRATHIE, [1897] P. 178; 66 L. J. P. 93; 76 L. T. 534; 45 W. R. 631; 8 Asp. M. L. C. 256; *sub nom.* THE CRATHIE & THE EBBE, 13 T. L. R. 334.

*Annotations:—As to* (2) **Distd.** The Kronprinz Olav, [1921] P. 52. **Reld.** The Coaster (1922), 91 L. J. P. 145; Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

**8066.** —— **Recovery of cost of raising cargo from cargo & owner.**]—PREHN *v.* BAILEY, THE ETTRICK, No. 7881, *ante*.

**8067.** —— **As against sum due under judgment—In action previous to decree of limitation.**]—JENKINS *v.* GREAT CENTRAL RY. Co. (1912), cited in Halsbury's Laws of England, Vol. XXVI., at p. 614, C. A.

*Annotation:*—**Consd.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

**8068. Exclusion of limitation—Overriding contract.**]—Two yachts were entered by their respective owners for a club race, each owner undertaking with the club to be bound by the club sailing rules. By the rules the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom." One of the yachts in breach of a sailing rule, through improper navigation without the actual fault or privity of the owner, ran into & sank the other yacht:—*Held:* there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other, & upon the true construction of the rules the words "all damages" excluded the operation of Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, which limited the liability to £8 per ton.—CLARKE *v.* DUNRAVEN (EARL), THE SATANITA, [1897] A. C. 59; 66 L. J. P. 1; 75 L. T. 337; 13 T. L. R. 58; 8 Asp. M. L. C. 190, H. L.

*Annotations:*—**Consd.** Nathan *v.* Rouse (1904), 2 L. G. R. 1304. **Apld.** Virginia Carolina Chemical Co. *v.* Norfolk & North American S.S. Co., [1912] 1 K. B. 229.

**8069.** —— **Breach of contract—Damage arising from improper navigation.**]—A steam tug under contract to tow a ship down the River Tyne improperly cast off the towing hawser in order to go to another vessel, & before a second tug had got the ship under proper control the ship came into collision with a pier & received damage. The first tug was held to blame & her owners sought to limit their liability under 1894 Act, s. 503 & 1900 Act, s. 1.

The owners of the tug contended that the damage was caused by the tug's failure to tow & not by improper navigation or management, & that the failure to tow amounted only to a breach of contract in respect of which the tug owners could not limit their liability:—*Held:* the improper casting off of the tow rope was an act of improper navigation within the meaning of s. 503 & the tug owners were entitled to a decree of limitation.—THE VIGILANT, [1921] P. 312; 90 L. J. P. 318; 125 L. T. 636; 37 T. L. R. 709; 15 Asp. M. L. C. 337.

## SECT. 2.—VESSELS TO WHICH PRINCIPLE APPLIES.

*See* 1894 Act, ss. 1, 2, 72, 503, 508; 1898 Act (c. 14), s. 1; 1906 Act, ss. 70, 85.

**8070. Meaning of "ship"—Dredging barge with**

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**PART XVIII. SECT. 2.**

q. *Ships registered as British ships.*] —GEORGIAN BAY TRANSPORTATION CO. FISHER (1880), 5 A. R. 383.—**CAN.**

r. —— .]—It is only ships which are registered as British ships at the time of the accident which are entitled to limit their liability under Merchant Shipping Act, 1862.—SEWELL *v.* BRITISH COLUMBIA TOWING & TRANSPORTATION CO. (1883), 9 S. C. R. 527.—**CAN.**

*Sect. 2.—Vessels to which principle applies. Sects. 3 & 4.]*

**rudder but without means of propulsion.**]—A hopper barge, used for dredging purposes, with a rudder, but without means of propulsion, & when under way, towed to & from her destination, is a "ship" within 1894 Act, s. 742 & her owners are entitled to limit their liability under 1894 Act, s. 503.—THE MUDLARK, [1911] P. 116; 80 L. J. P. 117; 27 T. L. R. 385.

*Annotation:*—**Refd.** Merchants' Marine Insce. *v.* North of England Protecting & Indemnity Assocn. (1926), 42 T. L. R. 724.

**8071.** —— ——.]—Pltfs.' tug with five dumb barges in tow came into collision with deft.'s steamship & damaged her. The negligent navigation causing the damage was that of pltfs.' servants on the tug & on the barges, all of which were British built. The tug & all the barges belonged to pltfs. The steamship was struck by the tug & one of the barges, but another barge, fast to the colliding barge, by her weight & momentum contributed to the damage. Pltfs. sought to limit their liability, in accordance with 1894 Act, to an amount based on the tonnage of the tug, or alternatively on the tonnage of the tug & the colliding barge. The shipowners contended that pltfs. could not limit their liability on the tonnage of any of the barges on the ground that they were not "ships," or that if "ships" they were not registered:—*Held:* (1) the barges, which were fitted with rudders & were not propelled by oars, were "ships" within 1894 Act, ss. 503 & 742; (2) by virtue of 1898 Act (c. 14), s. 1 & 1906 Act, s. 85, sched. II. the barges did not require registration; (3) pltfs. were entitled to a decree of limitation on the combined tonnage of the tug & the two barges.—THE HARLOW, [1922] P. 175; 91 L. J. P. 119; 126 L. T. 763; 38 T. L. R. 375; 15 Asp. M. L. C. 498.

*Annotations:*—*As to* (1) **Refd.** Merchants' Marine Insce. *v.* North of England Protecting & Indemnity Assocn. (1926), 42 T. L. R. 724. *As to* (3) **Expld.** The Alde, [1926] P. 211.

——.]—*See, generally*, Part I., Sect. 2, *ante*.

## SECT. 3.—PERSONS TO WHOM PRINCIPLE APPLIES.

**8072. "Owners"—Whether unregistered as well as registered owners.**]—The word "owners" in Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, which gives limited liability in certain cases to "the owners of any ship" includes unregistered as well as registered owners.

If the loss is occasioned by the actual fault of one of several part owners, his co-owners are not thereby precluded from a right to the limited liability given by Merchant Shipping Act (Amendment) Act, 1862 (c. 63).

On July 24, C. junior, a registered part owner of a vessel, transferred his shares, by bill of sale, to C. senior. This bill of sale was not registered until after Nov. 22 on which day a collision took place, C. junior being on board & in command of the vessel as master. It was not denied that he personally was in fault. On a cause for limited liability being instituted by C. senior, & by all the registered owners of the vessel except C. junior:—*Held:* they were all entitled to the privilege of limited liability given by Merchant Shipping Act (Amendment) Act, 1862 (c. 63).—THE SPIRIT OF THE OCEAN (1865), Brown. & Lush. 336; 5 New Rep. 450; 34 L. J. P. M. & A. 74; 12 L. T. 239; 2 Mar. L. C. 192; 167 E. R. 388.

*Annotations:*—**Apld.** Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359. **Refd.** The Northumbria (1869), L. R. 3 A. & E. 6; The Hopper No. 66, [1906] P. 34; The Yarmouth, [1909] P. 293; Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419.

**8073.** —— ——.]—A vessel at the time of her launch, & before registration, is not a "recognised British ship," & cannot avail herself of the limitation of liability granted by Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, for damage done by her to another vessel.

*Qu.:* whether the limitation of liability clauses apply to the case of a shipbuilder under contract to build & launch safely before delivery.—THE ANDALUSIAN (1878), 3 P. D. 182; 47 L. J. P. 65; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. L. C. 22.

**8074.** —— —— **Validity of pass from Commissioners of Customs—1894 Act, s. 23.**]—The Comrs. purporting to act under above sect., granted a pass to pltfs.' vessel "to make one voyage as a British unregistered vessel from the Port of London to Immingham." While sailing under this pass, the vessel by her bad navigation caused three vessels, which belonged to some of defts., to come into collision whereby all three sustained damage. Pltfs. claimed to limit their liability in respect of this bad navigation of their vessel. Some of defts. alleged that the pass was invalid as no time was mentioned therein in accordance with above sect., so that the vessel could not be recognised as a British ship, & pltfs. could not limit their liability:—*Held:* the pass was valid, having been granted "for the time . . . therein mentioned" within the terms of above sect.—namely, for the time of the voyage, & pltfs. were entitled to limit their liability.—THE WILLS No. 66 (1914), 83 L. J. P. 162; 30 T. L. R. 676.

Exemption from registration, *see* Part II., Sect. 2, *ante*.

**8075.** —— **Railway company—Contract involving land & sea carriage.**]—Two vessels, the *Normandy* & the *Mary*, came into collision. In consequence of the collision the *Normandy* sank at sea, & was lost, together with all her cargo, & some of the crew, & some passengers on board her were drowned; & the *Mary* & her cargo were damaged. A damage suit was instituted in the Ct. of Admlty. by the owners of the *Normandy* against the *Mary*, & bail was given in the suit by the owners of the *Mary* in pursuance of an undertaking contained in a præcipe for a caveat warrant. A cross-suit was instituted in the Admlty. Ct. against the *Normandy* by the owners of the *Mary*, & by the owners of the cargo of the *Mary*; the owners of the *Normandy* paid into ct. the amount in which the cross-suit was instituted. Whilst these suits were pending, the owners of the *Normandy* instituted in the Ct. of Admlty. a suit of limitation of liability, & before the hearing of the damage suits, applied to the ct. for an order to stop all actions pending in relation to their liability for loss occasioned by the

t. —— *Registration in Fishing Boat Register sufficient.*]—A British fishing boat registered only in the Fishing Boat Register under Part IV., & not under Part I. of 1894 Act, was a British ship "registered under this Act" within sect. 2 of the Act, & consequently its owners were entitled to the limitation of liability for injury caused by the fault of the vessel conferred by sect. 503 of the Act.—COUPER *v.* MACKENZIE (1906), 8 F. (Ct. of Sess.) 1202; 43 Sc. L. R. 416; 13 S. L. T. 870.—**SCOT.**

### PART XVIII. SECT. 3.

a. *Owner of tug.*]—SINCENNES MCNAUGHTON LINE, LTD. *v.* MCCORMICK & UNION LUMBER CO., LTD. (Que.) (1919), 19 Exch. C. R. 35; 45 D. L. R. 392; 47 D. L. R. 483.—**CAN.**

b. ——.]—POINT ANNE QUARRIES, LTD. *v.* THE M. F. WHALEN, [1923] 1 D. L. R. 45, P. C.—**CAN.**

collision. The ct. held that it had jurisdiction to entertain the suit for limitation of liability, & granted, upon terms, an order to stay all actions pending in any other ct. relating to the subject-matter of the suit.

The order was served upon M., pltf. in an action at common law brought against the L. & S. W. Ry. Co., who were the owners of the *Normandy* to recover damages for the loss of goods, forming part of the cargo of the *Normandy* which had been received by the co. in London to be carried for M. from London to Jersey. Motion on behalf of M. to dissolve the order so far as it affected M. refused.—THE NORMANDY (1870), L. R. 3 A. & E. 152; 39 L. J. Adm. 48; 23 L. T. 631; 18 W. R. 903; 3 Mar. L. C. 519.

*Annotation:*—**Refd.** James *v.* S. W. Ry. (1872), L. R. 7 Exch. 287.

**8076.** —— —— ——.]—A passenger took a through ticket at a railway station from London to Guernsey. The sea part of the journey was performed in a ship belonging to the railway co., which came into collision with another ship during the passage, causing a considerable delay, & the loss of the passenger's luggage:—*Held:* the co., as shipowners, were within the protection of Merchant Shipping Act, 1854 (c. 104), s. 504, which limits the liability of shipowners.

Injunction accordingly granted to restrain an action at law by the passenger against the co. on the contract for the loss of his luggage.

Other actions had been brought against the co. for damage to goods, for the loss of the ship which was run into & sunk, & for compensation for loss of life under Fatal Accidents Act, 1846 (c. 93):—*Held:* the co. was entitled to injunction to stay these actions.—LONDON & SOUTH WESTERN RY. CO. *v.* JAMES (1872), 8 Ch. App. 241; 42 L. J. Ch. 337; 28 L. T. 48; 21 W. R. 151; 1 Asp. M. L. C. 526, L. C. & L. JJ.

*Annotations:*—**Apld.** Wahlberg *v.* Young (1876), 45 L. J. Q. B. 783. **Consd.** Doolan *v.* Mid. Ry. (1877), 2 App. Cas. 792. **Apld.** S.S. Ruapehu *v.* Green & Silley Weir, The Ruapehu, [1927] A. C. 523.

**8077.** —— **General manager of railway company.**]—A person described on the ship's register as managing owner, who owns no share in the ship & acts as the paid manager of the shareholders, is not one of "the owners" within 1894 Act, s. 503, which allows "the owners" of a ship to limit their liability where damage or loss under certain circumstances takes place without their "actual fault or privity."

When a co., incorporated by Act of Parliament, have a general manager who represents the co. & when the co. own a ship, and have a paid manager for her, who owns no share in her, but is described on her register as managing owner, the proper deponent to make the usual affidavit verifying the statement of claim in an action for limitation of the liability of the co. as the owners of the ship, is the general manager & not the managing owner.—THE YARMOUTH, [1909] P. 293; 79 L. J. P. 1; 101 L. T. 714; 25 T. L. R. 746; 11 Asp. M. L. C. 331.

**8078.** —— **Foreign vessels.**]—The owners of a foreign vessel, which is found to blame for a collision with an English vessel beyond British jurisdiction, are entitled to have their liability limited under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54.—THE ALBERT (1863), 3 New Rep. 217.

**8079.** —— —— **Vessel registered abroad but of English ownership.**]—THE BRINIO (1891), 90 L. T. Jo. 249.

—— ——.]—*See* 1894 Act, s. 503.

**8080.** —— **Charterers by demise.**] — The charterer of a ship by demise who has control over her & navigates her by his own master & crew is "owner" of the ship within 1894 Act, ss. 503, 504, & entitled to the limitation of liability to damages conferred upon "owners" by those sects.—SIR JOHN JACKSON, LTD. *v.* BLANCHE (OWNERS), THE HOPPER NO. 66, [1908] A. C. 126; 98 L. T. 464; 24 T. L. R. 384; 52 Sol. Jo. 334; 11 Asp. M. L. C. 37; *sub nom.* THE STEAM HOPPER NO. 66, 77 L. J. P. 84, H. L.

*Annotation:*—**Refd.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

——.]—*See* 1906 Act, s. 71.

**8081.** —— **Shipbuilders—Ships launched but not registered.**]—THE ANDALUSIAN, No. 8073, *ante*.

.]—*See* 1898 Act (c. 14), s. 1; 1906 Act, ss. 70, 85.

**Dock & canal owners & harbour & conservancy authorities.**]—*See* 1900 Act, s. 2.

**8082.** —— **Dock owners—1900 Act, s. 2—Whether liability incurred must be connected with dock ownership.**]—By the negligence of pltf.'s servants while engaged on work on the steamship *City of Edinburgh* in the Hornby Dock, belonging to the Mersey Docks & Harbour Board, the vessel & her cargo were damaged by fire, & pltfs. were held liable, in damages. Pltfs. sought to limit their liability under above sect. on the ground that they were the owners of a dry dock at Garston:—*Held:* the liability being in no way connected with the fact that pltfs. were dockowners, they were not entitled to a decree of limitation of liability.—THE CITY OF EDINBURGH, [1921] P. 274; 90 L. J. P. 304; 125 L. T. 375; 37 T. L. R. 468; 15 Asp. M. L. C. 234, C.A.

*Annotation:*—**Expld. & Distd.** S.S. Ruapehu *v.* Green & Silley Weir, The Ruapehu, [1927] A. C. 523.

**8083.** —— —— —— ——.]—Resps., ship repairers at Blackwall where they owned a dry dock, sought to limit their liability under 1900 Act, s. 2 (1), in respect of damage caused by a fire which broke out on applt.'s vessel owing to the negligence of resp.'s servants while the vessel was being repaired by them in the dry dock:—*Held:* the right to the limitation of liability conferred by 1900 Act, s. 2 (1), on dock owners by whom damage was caused without their actual fault or privity did not depend upon the quality of the act causing the damage, but upon the area within which the act was done; consequently the right was not confined to acts done by dock owners in their capacity of dock owners, but extended to acts done by them in their capacity of ship repairers.—RUAPEHU (OWNERS) *v.* GREEN (R. & H.) & SILLEY WEIR, LTD., THE RUAPEHU, [1927] A. C. 523; 96 L. J. P. 99; 137 L. T. 353; 43 T. L. R. 402; 71 Sol. Jo. 330; 32 Com. Cas. 323, H. L.

*Annotation:*—**Mentd.** Buerger *v.* New York Life Assce. (1927), 96 L. J. K. B. 930.

**Part owners.**]—*See* 1894 Act, s. 505, *post*.

## SECT. 4.—LOSSES IN RESPECT OF WHICH PRINCIPLE APPLIES.

*See* 1894 Act, s. 503.

**8084. Subject-matter of loss—"Goods, merchandise or other things"—Passenger's personal effects.]**

**PART XVIII. SECT. 4.**

c. *Manner of loss—Collision.*]—The right to limit liability under 31 Vict. c. 58, s. 12, does not apply to cases other than those of collision.—SEWELL *v.* BRITISH COLUMBIA TOWING & TRANSPORTATION CO., (1883), 9 S. C. R. 527.—CAN.

d. —— *Gross negligence of owners—Ship lost by fire—Injury to passenger.*]

*Sect. 4.—Losses in respect of which principle applies.*]

—A shipowner is entitled to limit his liability in respect of the loss of passenger's personal effects.

I hold that "other things" [in 1894 Act, s. 503] includes the personal effects of the passengers on board the ship (BUCKNILL, J.).—THE STELLA (1899), 81 L. T. 235; 8 Asp. M. L. C. 605.

**8085.** —— —— ——.]—The words "or other things whatsoever on board the ship," in 1894 Act, s. 503 (1) (*b*), include passengers' luggage.—THE STELLA, [1900] P. 161; 69 L. J. P. 70; 82 L. T. 390; 16 T. L. R. 306; 9 Asp. M. L. C. 66.

*Annotations:*—**Mentd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; Travers *v.* Cooper, [1915] 1 K. B. 73; Nunan *v.* Southern Ry., [1924] 1 K. B. 223.

**8086. Must be loss to which decree of limitation applicable.**]—The *Bernina*, laden with iron ore under a charterparty, & bound for Cardiff, came into collision with the *Bushire*, & received so much damage that she was obliged to put into Lisbon. As the *Bernina* could not be repaired at Lisbon, her owners, in order to earn their freight, transshipped the cargo into three other steamers, only one of which arrived at her destination, the other two being lost through perils not excepted in the charterparty. Both the *Bernina* & the *Bushire* were to blame for the collision. The owners of the *Bernina* brought an action & obtained a decree for limitation of liability in respect of the collision. In an action by the charterer against the owners of the *Bernina* for the non-delivery of that portion of the cargo which was lost:—*Held:* the decree of limitation of liability did not apply to the loss, & pltf. was entitled to recover.—THE BERNINA (1886), 12 P. D. 36; 56 L. J. P. 38; 56 L. T. 450; 35 W. R. 214; 3 T. L. R. 175; 6 Asp. M. L. C. 112.

*Annotation:*—**Refd.** Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171.

**8087. Manner of loss—Loss due to "improper navigation"—Improper navigation by other than master & crew.**]—The limitation of the shipowner's liability by Merchant Shipping Act (Amendment) Act, 1862 (c. 63), applies to all cases of improper navigation, whether the vessel improperly navigated be a stranger to the vessel injured, or be towing her at the time, or be otherwise connected with her.

This limitation of liability is "a ground of equitable defence" within Jud. Act, 1873 (c. 66), s. 24 (2), & not a mere plea to damage. It is proper & necessary, therefore, to claim relief under the sect. in the statement of defence.—WAHLBERG *v.* YOUNG (1876), 45 L. J. Q. B. 783; 24 W. R. 847; 2 Char. Pr. Cas. 54.

*Annotation:*—**Apld.** The Vigilant, [1921] P. 312.

**8088.** —— —— —— **Person for whom owner responsible.**]—The words "improper navigation" Merchant Shipping Act (Amendment) Act 1862 (c. 63), s. 54 (4), are not to be restricted to the negligent navigation of a vessel by her master & crew, for the statute includes all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action is due to the negligence of a person for whom the owner is responsible. Therefore when a vessel, owing to the negligence of a person on shore in overlooking the machinery, steered so badly that she came into collision with another vessel, & the judge, in an action for limitation of liability, gave a decree in her favour:—*Held:* such judgment was right & the statute applied to such a case.—THE WARKWORTH (1884), 9 P. D. 145; 53 L. J. P. 65; 51 L. T. 558; 33 W. R. 112; 5 Asp. M. L. C. 326, C. A.

*Annotations:*—**Consd.** Canada Shipping Co. *v.* British Shipowners' Mutual Protecting Assocn. (1889), 22 Q. B. D. 727; Smitton *v.* Orient Steam Navigation Co. (1907), 23 T. L. R. 359; The Fanny (1912), 28 T. L. R. 217. **Refd.** Carmichael *v.* Liverpool Sailing Ship Owners' Mutual Indemnity Assocn. (1887), 19 Q. B. D. 242; Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419.

**8089.** —— —— **Improper casting off of tow rope.**]—THE VIGILANT, No. 8069, *ante*.

**8090.** —— —— **Improper use of capstan on stationary vessel.**]—By 1894 Act, s. 503 (1), "Where any loss or damage is caused to any other vessel . . . by reason of the improper navigation of the ship," the owners of the ship, if not guilty of any default or privity, shall not be liable to damages beyond an aggregate amount not exceeding £8 for each ton of their ship's tonnage.

Pltfs., the Port of London Authority, owners of the barge *Alde*, sought to limit their liability to an amount based on the tonnage of the barge in respect of the amount of the damage caused by the *Alde* forcing another barge, the *Tom Tit*, on to the propeller of the steamship *Ascania*. At the trial of the damage action the *Alde* was held to blame, but it was left in doubt whether the man in charge of her did not derive some assistance in giving her the forward movement which did the damage from some men working a capstan on the P. L. A.'s grain sucker *Turbo*. Accordingly, in the present action, the owners of the *Ascania* contended that pltfs. had failed to establish that the damage was solely caused by the improper navigation of the *Alde*, & that therefore they were not entitled to a decree of limitation of liability at all, or, in the alternative, that they could only limit on the combined tonnage of the *Alde* & the *Turbo*:—*Held:* 1894 Act, s. 503, gave relief in respect of improper navigation of a ship, & not in respect of negligence by individuals; the improper use of a capstan on a stationary vessel did not constitute improper navigation on the part of that vessel; & pltfs. were entitled to a decree of limitation of liability based on the tonnage of the *Alde* alone.—THE ALDE, [1926] P. 211; 95 L. J. P. 163; 136 L. T. 187; 42 T. L. R. 721; 17 Asp. M. L. C. 157.

**8091.** —— **Negligence by individuals.**]—THE ALDE, No. 8090, *ante*.

**8092. Loss must be without fault or privity of owner—Scope of exemption.**]—(1) In an action for limitation of liability, where defts. raised an issue which was decided against them, the ct. ordered pltfs. to pay all the costs of the action, except the costs incidental to the raising of such issue, as to which each party was to pay his own costs.

(2) The words "without their actual fault or privity" are used. These seem to show an intention to relieve the shipowner when damage has been caused by the fault of his servants & he himself has not been in any way to blame (BUTT, J.).—THE WARKWORTH (1883), 9 P. D. 20; 53 L. J. P. 4; 49 L. T. 715; 32 W. R. 479; 5 Asp. M. L. C. 194; *on appeal* (1884), 9 P. D. 145, C. A.

*Annotations:*—*As to* (2) **Consd.** Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419. **Refd.** Smitton *v.* Orient Steam Navigation Co. (1907), 96 L. T. 848; The Fanny (1912), 28 T. L. R. 217. *Generally,* ——d. Carmichael *v.* Liverpool Sailing Ship Owners' Mutual Indemnity Assocn. (1887), 19 Q. B. D. 242; Canada Shipping Co. *v.* British Shipowners' Mutual Protecting Assocn. (1889), 22 Q. B. D. 727.

**8093.** —— **Effect on co-owners—Necessity for fault or privity of each.**]—In an action against

—Where, in the circumstances, the only inference to be drawn is that the owners were grossly negligent, the owners of the ship cannot invoke the limitation provided by "Canada Shipping Act," R. S. C. 1906, c. 113, s. 921.—DOMINION FISH CO. *v.* ISBESTER (1910), 43 S. C. R. 637; 31 C. L. T. 198. —CAN.

several defts., as shipowners, for damage sustained by the loss of goods laden on board their ship, it was held that by 53 Geo. 3, c. 159, s. 1, they were not liable in that character beyond the value of the ship & freight due or to grow due, although the loss was occasioned by the misconduct of one of defts., who was both master & part owner.

It seems that the true construction of the clause is this, that if you sue a sole owner, & the fault or privity were in him, he will be excluded from the protection of the statute; but if you sue several owners, then the words applicable to that case are "without the fault or privity of such owners," the fair & true construction of which is, that there must be the fault or privity of each (BAYLEY J.).—WILSON *v.* DICKSON (1818), 2 B. & Ald. 2; 106 E. R. 268.

*Annotations:*—**Apld.** The Volant (1842), 1 Wm. Rob. 383; The Spirit of the Ocean (1865), Brown. & Lush. 336. **Refd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795; Lennard's Carrying Co. *v.* Asiatic Petroleum Co., [1915] A. C. 705. **Mentd.** Cannan *v.* Meaburn (1824), 1 Bing. 465; Dobree *v.* Schroder (1837), 2 My. & Cr. 489; Brown *v.* Wilkinson (1846), 15 M. & W. 391; The Mary Caroline (1848), 3 Wm. Rob. 101; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273.

**8094.** —— —— **Master part owner.**]—WILSON *v.* DICKSON, No. 8093, *ante*.

**8095.** —— —— ——.]—THE VOLANT (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 7 L. T. 509; 6 Jur. 540; 166 E. R. 616.

*Annotations:*—**Consd.** The Dictator, [1892] P. 304. **Refd.** The Mary Caroline (1848), 6 Notes of Cases, 536; The Mellona (1848), 6 Notes of Cases, 62; Harmer *v.* Bell, The Bold Buccleugh (1851), 7 Moo. P. C. C. 267; The Temiscouata (1855), 2 Ecc. & Ad. 208; The Milan (1861), 5 L. T. 590; The St. Olaf (1869), L. R. 2 A. & E. 360; The Freedom (1871), 25 L. T. 392; The Leon (1881), 6 P. D. 148; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273. **Mentd.** The Nostra Senora del Carmine (1854), 1 Ecc. & Ad. 303; The Heinrich Björn (1885), 10 P. D. 44; The Cella (1888), 57 L. J. P. 55; The Africano, [1894] P. 141; Moran, Galloway *v.* Uzielli, [1905] 2 K. B. 555; The Joannis Vatis (No. 2), [1922] P. 213.

**8096.** —— —— ——.]—THE SPIRIT OF THE OCEAN, No. 8072, *ante*.

**8097.** —— —— ——.]—In an action by shipowners to limit their liability in respect of a collision with their vessel, & where it appeared that the master, who was on board at the time of the collision, was a part owner, & the collision occurred without the negligence or privity of the remainder of the owners, they have a right to have their liability limited, with a reservation of any right of action there may be against the master personally in respect of his negligence.—THE CRICKET, THE ENDEAVOUR (1882), 48 L. T. 535; 5 Asp. M. L. C. 53.

**8098.** —— —— —— **Master on board but not in charge.**]—In a cause of limitation of liability under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, arising out of a collision, pltfs. alleged that the collision occurred without their fault or privity. It was proved that the master, who was also part owner of the vessel sued, was on board at the time of the collision, but not on deck, the vessel being then in charge of the second mate & a coasting pilot:—*Held:* under these circumstances there was no obligation upon the master to be on deck; the fact of his being part owner was no reason for chargng the other owners with blame; & the fact of his being on board at the time of the collision was not in itself sufficient to show that it occurred with his "fault or privity."—THE OBEY (1866), L. R. 1 A. & E. 102; 12 Jur. N. S. 817.

*Annotation:*—**Apld.** The Empusa (1879), 5 P. D. 6.

**8099.** —— **Unseaworthiness of ship—Negligent overheating of non-insulated stove.**]—Owing to the negligence of the crew in overheating a stove, a fire broke out on board deft.'s ship, & pltfs.' cargo was damaged. Pltfs. alleged that the ship was unseaworthy in that the stove was placed too near to a bulkhead without any means of insulation, & as deft. must be taken to be "privy" to the position of the stove, he could not rely upon 1894 Act, s. 502 (1), by which the owner of a British seagoing ship is not liable to make good any loss or damage happening "without his actual fault or privity" to goods damaged "by reason of fire on board the ship." Secondly, pltfs. contended that a great part of the damage was due to smoke & to water used to extinguish the fire, which was not damage included in the statute:—*Held:* (1) deft. could claim the statutory exemption from liability, for the stove was perfectly safe if properly used, &, therefore, the vessel was seaworthy & deft. not in fault or "privy" to the negligence of the crew; (2) damage by smoke & by water used in putting out a fire is damage "by reason of fire" within the meaning of the statute.—THE DIAMOND, [1906] P. 282; 75 L. J. P. 90; 95 L. T. 550; 10 Asp. M. L. C. 286.

*Annotation:*—**Refd.** Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B 419.

**8100.** —— —— **Liability for neglect of manager.**]—A collision occurred between the *Fanny* & the *Lily Green* due to the former breaking adrift from her moorings; & in a collision action the *Fanny* was held solely to blame. Pltf., the owner of the *Fanny*, now sought to limit his liability under 1894 Act, s. 503. The judge held that pltf., who was an old man of eighty years of age & had been confined to his house for eight years, was not entitled to limit his liability, on the ground that he was in fault in having appointed an incompetent person as manager. On appeal:—*Held:* there was no evidence that the manager appointed by pltf. was incompetent, & pltf. was entitled to limit his liability.—THE FANNY (1912), 28 T. L. R. 217; 56 Sol. Jo. 289, C. A.

*Annotation:*—**Refd.** Asiatic Petroleum Co. *v.* Lennard's Carrying Co., [1914] 1 K. B. 419.

**8101.** —— —— **Absence of proper ground tackle.**]—An unfinished vessel was sent by pltfs., a firm of shipowners & shipbuilders who built the vessel, from Bristol to Cardiff to have her engines put on board. She had no hawse pipes or windlass, no chain cable, & only one anchor & about 48 fathoms of 4½-inch wire rope. She was sent to Cardiff in tow of two tugs, & pltfs. had arranged for her to be brought back to Bristol in tow of two tugs. The second tug did not arrive, & pltfs.' marine superintendent decided to start with only one tug. The weather was then a moderate gale. After the towage started the weather got worse, the tug's tow rope parted, the one anchor was let go but failed to hold, & the vessel drifted across the bows of a sailing ship at anchor & damaged her. Pltfs. sought to limit their liability for the collision under 1894 Act, s. 503, which provides that where without the actual fault or privity of the shipowners damage is caused to another vessel by reason of the improper navigation of the ship, they shall not be liable to damages beyond an aggregate amount not exceeding £8 for each ton of their ship's tonnage:—*Held:* although pltfs. contemplated that the voyage would be made with two tugs, the vessel ought not to have been sent across without hawse pipes or proper ground tackle, & the absence of proper ground tackle was the real cause of the collision; as pltfs. were shipowners as well as builders, they must be taken to have had knowledge as to what constitutes seaworthiness: they had not therefore discharged

*Sect. 4.—Losses in respect of which principle applies. Sect. 5: Sub-sects. 1, 2, 3, 4 & 5.]*

the *onus* upon them of establishing that the collision happened without their actual fault or privity; &, accordingly, they were not entitled to a decree of limitation of liability.—THE BRISTOL CITY, [1921] P. 444; 91 L. J. P. 6; 126 L. T. 80; 37 T. L. R. 901; 15 Asp. M. L. C. 390, C. A.

**8102. —— —— Non-latent defect.**]—Pltfs. chartered from defts. a steamer to carry sugar from Java to the United Kingdom, a clause in the charterparty providing that defts. should not be answerable for any loss or damage arising from any latent defects in machinery or hull not resulting from want of due diligence by the owners of the ship. Before the voyage defts. sent the ship to repairers for overhaul, & a representative of defts. watched the repairs, but on the voyage water got into the hold through a corroded valve & damaged the sugar. In an action for damages owing to unseaworthiness:—*Held:* in fact the ship was unseaworthy, the defect was not latent within the meaning of the above clause, &, even if it was latent, it could have been discovered by due diligence, & the clause was no protection, but defts. were entitled to have their liability limited under 1894 Act, s. 503.—LONDON RANGOON TRADING CO., LTD. *v.* ELLERMAN LINES, LTD. (1923), 39 T. L. R. 284; 14 Lloyd, L. R. 497.

*Annotation:*—**Reld.** Angliss (Australia) Proprietary *v.* Peninsular & Oriental Steam Navigation Co., [1927] 2 K. B. 456.

**8103. —— —— Unseaworthiness avoidable with special precaution.**]—A ship of the 'turret" type was chartered for a voyage from New York to China under a charterparty which incorporated the Harter Act of the United States. That Act provided that if the owners exercised due diligence to make the vessel in all respects seaworthy & properly manned they should not be held responsible for loss resulting from faults or errors in navigation or in the management of the ship. The charterers shipped a cargo under bills of lading which incorporated the Harter Act & also contained a clause exempting the owners from loss occasioned by "accidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the . . . master . . . not resulting, however, in any case from want of due diligence by the owners of the ship."

Shortly after leaving New York the master ordered two water tanks to be emptied, with the result that the ship capsized & sank. Nine years previously, after the loss of a sister ship by capsizing, the builders had sent to the owners a series of instructions for loading the ship, including an instruction that when she was loaded with a homogeneous cargo, as on the voyage in question, the water ballast tanks were to be filled. The owners had never communicated these instructions to the master, who was a competent seaman with long experience of turret ships:—*Held:* (1) the ship was inherently unseaworthy in certain not improbable conditions unless special precautions were taken, which it was the duty of the owners to enjoin as being required by the structure of their ship, & the owners were therefore liable for the loss of the cargo; (2) the owners were not entitled to the limitation of liability prescribed by 1894 Act, s. 503, as they had failed to prove that the loss occurred without their actual fault or privity.—STANDARD OIL CO. OF NEW YORK *v.* CLAN LINE STEAMERS, LTD., [1924] A. C. 100; 93 L. J. P. C. 49; 130 L. T. 481; 40 T. L. R. 148; 68 Sol. Jo. 234; 16 Asp. M. L. C. 273; 29 Com. Cas. 75, H. L.

*Annotation:*—**Reld.** Rio Tinto Co. *v.* Seed Shipping Co. (1926), 134 L. T. 764.

*See, also,* 1894 Act, ss. 506, 508.

## SECT. 5.—STATUTORY LIMITS OF LIABILITY.

### SUB-SECT. 1.—IN GENERAL.

*See* 1894 Act, s. 503 (1); 1900 Act, s. 1.

*See* ADMIRALTY, Vol. I., pp. 228–230, Nos. 1535–1553.

### SUB-SECT. 2.—DOCK AND CANAL OWNERS AND HARBOUR AND CONSERVANCY AUTHORITIES.

*See* 1900 Act, s. 2.

**8104. Dock owner acting as ship repairer—Damage caused by negligence as repairer.**]—RUAPEHU (OWNERS) *v.* GREEN (R. & H.) & SILLEY WEIR, LTD., THE RUAPEHU, No. 8083, *ante.*

### SUB-SECT. 3.—PILOTS.

*See* 1894 Act, s. 620; Pilotage Act, 1913 (c. 31), s. 35, & Part XVI., Sect. 4, sub-sect. 2, C. (*b*), *ante.*

### SUB-SECT. 4.—DISTINCT

**8105. Necessity for separate act of negligence—Collision with two vessels one after the other—First collision substantial cause of second.**]—Where a ship comes into collision with two vessels one after the other, there being a short interval between the two collisions, the shipowner will be entitled to limit his liability to £8 per ton, there being no loss of life, if the first collision is the substantial & efficacious cause of the second, & there is no separate act of negligence on the part of those in charge of pltfs.' ship in respect of the second collision.—THE CREADON (1886), 54 L. T. 880; 5 Asp. M. L. C. 585.

*Annotation:*—**Apprvd.** The Schwan, The Albano, [1892] P. 419.

**8106. —— —— ——.**]—By reason of the improper navigation of a steamship she ran into & damaged a ship, & immediately afterwards ran into & sank a steam tug which was near the ship & about to take the ship in tow. In a suit for limitation of liability instituted on behalf of the owner of the steamship:—*Held:* the whole of the damage so caused by such improper navigation as aforesaid to the ship & steam tug & goods on board the ship & steam tug was caused substantially at same time & on same occasion, & pltf., who was entitled to have his liability limited according to Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, was entitled to have his liability in respect of the whole of such damage limited to an amount not exceeding £8 per ton for each of his steamship's tonnage.—THE RAJAH (1872), L. R. 3 A. & E. 539; 41 L. J. Adm. 97; 27 L. T. 102; 21 W. R. 14; 1 Asp. M. L. C. 403.

**8107. —— —— Second collision due to improper navigation.**]—The steamship *S.*, having negligently starboarded across the bows of the steamship *A.*, continued under her starboard helm & collided with the *D.*, & by her starboarding caused the *A.* to collide with the *M.* The *S.* limited her liability in respect of the damage caused by her improper navigation on the occasion of the collision between

her & the *D.*, & sought to make the owners of the *A.* claim against the fund in the limitation action on the ground that both collisions were caused by the same improper act of navigation, viz. the starboarding:—*Held:* the *S.* had time & opportunity to correct the starboarding before striking the *D.*, & the damage to the *D.* happened on a distinct occasion from the damage to the *A.* by collision with the *M.*, & therefore the *S.* was separately liable over & above the fund paid into ct. in the limitation action.—THE SCHWAN, THE ALBANO, [1892] P. 419; 69 L. T. 34; 8 T. L. R. 425; 7 Asp. M. L. C. 347, C. A.

*Annotations:*—**Refd.** The Merchant Prince (1892), 8 T. L. R. 430; The Benue, [1916] P. 88.

SUB-SECT. 5.—CALCULATION OF TONNAGE.

*See* 1894 Act, ss. 79–84, 503 (2); 1906 Act, s. 69; 1907 Act, s. 1.

**8108. Conclusiveness of register.**]—The owners of a German steam vessel instituted an action under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, to limit their liability for damages occasioned by a collision. The vessel had three decks, & her crew were berthed below the spar deck. By Order in Council dated June 26, 1873, made under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 60, it was directed that German steamships measured after Jan. 1, 1873, should be deemed to be of the tonnage mentioned in their registers in the same manner, & to the same extent, as the tonnage denoted in the certificate of registry of British ships was deemed to be their tonnage. In the register of this ship the crew space was deducted:—*Held:* (1) the Order in Council of June 26, 1873, did not make the certificate of registry conclusive evidence of the tonnage or of the propriety of deducting the space solely appropriated for berthing the crew; (2) under Merchant Shipping Act, 1854 (c. 104), s. 21 (4), a closed in space solely appropriated to the berthing of the crew is to be excepted in estimating the tonnage only when it is on the upper deck & not when it is between the spar deck & the tonnage deck; (3) the crew space cannot in the case of a foreign, any more than of a British ship, be deducted under "Merchant Shipping Act, 1867 (c. 124)," s. 9, unless the provisions of that sect. as to inspection by a surveyor appointed by the Board of Trade, & the other conditions therein contained, have been complied with, therefore, as in the present case these conditions have not been complied with, the space appropriated for berthing the crew must not be deducted.—THE FRANCONIA (1878), 3 P. D. 164; 39 L. T. 57; 27 W. R. 128; 4 Asp. M. L. C. 1, C. A.

*Annotations:*—*As to* (2) **Expld.** The Zanzibar, [1892] P. 233. *As to* (3) **Expld.** The Palermo (1884), 10 P. D. 21. **Consd.** The Petrel, [1893] P. 320. **Apld.** The Cathay (1900), 69 L. J. P. 89. *Generally*, **Mentd.** The Georg (1894), 71 L. T. 22.

**8109.** ——.]—In an action for limitation of liability, the gross tonnage in the case of a British vessel will be taken as shown by her certificate of registry, or in the case of a foreign vessel, to which an Order in Council made under 1894 Act, s. 84 (1), applies, by her certificate of registry or other national papers, without any necessity for adducing a certificate under sect. 81 respecting the double bottom for water ballast.—THE CORDILLERAS, [1904] P. 90; 73 L. J. P. 13; 89 L. T. 673; 9 Asp. M. L. C. 506.

**8110.** —— **At time of collision.**]—In a suit of limitation of liability in respect of damage arising from a collision, the shipowners claimed deductions on account of crew space which appeared on the register of their vessel at the time of their application for a decree:—*Held:* they were not entitled to the benefit of any deductions not appearing on the register in force at the time of the collision.—THE JOHN MCINTYRE (1881), 6 P. D. 200; 30 W. R. 276.

**8111.** —— ——.]—The tonnage in respect of which shipowners are entitled to limit their liability under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, is the tonnage appearing on the ship's register which was in force at the time of collision.—THE DIONE (1885), 52 L. T. 61; 5 Asp. M. L. C. 347.

**8112.** —— **Admission of evidence to prove incorrectness.**]—In an action for limitation of liability the ct. admitted evidence to prove that the tonnage of pltf.'s ship was greater than appeared from her register.—THE RECEPTA (1889), 14 P. D. 131; 58 L. J. P. 70; 61 L. T. 698; 6 Asp. M. L. C. 433.

*Annotation:*—**Mentd.** Brierley *v.* Brierley & Williams (1918), 34 T. L. R. 458.

**8113. Deductions from gross tonnage—Whether crew space deducted.**]—THE FRANCONIA, No. 8108, *ante*.

**8114.** —— ——.]—THE JOHN MCINTYRE, No. 8110, *ante*.

**8115.** —— ——.]—The owners of a foreign ship with a closed in space on the upper deck solely appropriated to the berthing of the crew, are entitled, in limiting their liability, to deduct such space under Merchant Shipping Act, 1854 (c. 104), s. 21, sub-s. 4, though the provisions of the Merchant Shipping Act, 1867 (c. 124), s. 9, have not been complied with.—THE PALERMO (1884), 10 P. D. 21; 54 L. J. P. 46; 52 L. T. 390; 33 W. R. 643; 5 Asp. M. L. C. 369.

*Annotations:*—**Consd.** The Zanzibar, [1892] P. 233; The Petrel, [1893] P. 320. **Expld.** The Cathay (1900), 69 L. J. P. 89.

**8116.** —— ——.]—If the requirements of Merchant Shipping Act, 1867 (c. 124), s. 9, are complied with, shipowners in limiting their liability are entitled to deduct crew space from the gross tonnage.—THE PETREL, [1893] P. 320, 62 L. J. P. 92; 70 L. T. 417; 9 T. L. R. 566; 7 Asp. M. L. C. 434; 1 R. 651.

*Annotations:*—**Mentd.** Young *v.* Hoffman Manufacturing Co. (1907), 76 L. J. K. B. 993; Coldrick *v.* Partridge, Jones (1909), 78 L. J. K. B. 452.

**8117.** —— - ——.]—The effect of the words "certified under the regulations scheduled to this Act with regard thereto" in 1894 Act, s. 503 (2) (*a*), is, in cases of limitation of liability, to limit the right to deduct crew space from the gross tonnage of the ship, whose owners are seeking to limit their liability, to cases where the certificate mentioned in the third paragraph of the Sixth Schedule to the Act has been given by a surveyor of ships under the Act to the Collector of Customs, at the time

**PART XVIII. SECT. 5, SUB-SECT. 5.**

**8113** *i. Deductions from gross tonnage—Whether crew space deducted.*]—In estimating the "gross tonnage" as prescribed by Merchant Shipping Amendment Act, 1862, s. 54, the owner of the vessel in fault is entitled to deduct the berthage of the crew.—BURRELL *v.* SIMPSON & CO. (1877), 4 R. (Ct. of Sess.) 177.—**SCOT.**

*e.* —— —— *Foreign ship with foreign certificate of measurement.*]—The owners of a Danish vessel with a Danish certificate setting forth her measurements, including the tonnage taken up by crew space, were not entitled in ascertaining the tonnage of the vessel for the purpose of 1894 Act, s. 503, to deduct the tonnage set forth in the certificate as taken up by crew space, in respect that the space so set forth had not been certified by one of the surveyors under the Act as required by Sched. VI.—DET FORENDE DAMPSKIPS SELSKAB *v.* SOMERVILLE & VAN EIJCK & ZOON (1905), 7 F. (Ct. of Sess.) 739; 42 Sc. L. R. 439; 12 S. L. T. 812.—**SCOT.**

*f.* —— *Whether engine room space deducted.*]—WALDIE BROTHERS, LTD.

*Sect. 5.—Statutory limits of liability: Sub-sect. 5. Sect. 6: Sub-sects. 1, 2 & 3.]*

when the ship is registered or re-registered as a British ship.—THE CATHAY (1900), 69 L. J. P. 89; 82 L. T. 823; 16 T. L. R. 381; 9 Asp. M. L. C. 100.

**8118. —— Whether navigation spaces deducted —Steamship.**]—In an action for limitation of liability, the owner of a steamship, in calculating the gross tonnage upon which his statutory liability in damages, under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, is based, cannot deduct the navigation spaces mentioned in Merchant Shipping (Tonnage) Act, 1889 (c. 43), s. 3 (*b*), (i), (ii).—THE UMBILO, [1891] P. 118; 60 L. J. P. 7; 64 L. T. 328; 39 W. R. 336; 7 Asp. M. L. C. 26.

*Annotations:*—**Distd.** The Zanzibar, [1892] P. 233. **Consd.** The Petrel, [1893] P. 320. **Distd.** The Pilgrim, [1895] P. 117.

**8119. —— —— Sailing ship.**]—In an action for limitation of liability:—*Held:* the owner of a sailing ship, in calculating the registered tonnage upon which his statutory liability in damages under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, is based, can deduct the navigation spaces mentioned in Merchant Shipping (Tonnage) Act, 1889 (c. 43), s. 3 (1) (*a*) (*b*) (i), (ii).—THE PILGRIM, [1895] P. 117; 64 L. J. P. 78; 11 R. 718.

*See, now,* 1894 Act, s. 503 (2) (*a*).

**8120. —— Double bottom for water ballast.**]—In an action for limitation of liability, the owner of a ship which is constructed with a double bottom for water ballast is entitled, in calculating the gross tonnage upon which his statutory liability in damages is based, to avail himself of the provisions of Merchant Shipping (Tonnage) Act, 1889 (c. 43), s. 5, & measure to the upper side of the inner plating of the double bottom, so as to exclude the space between the inner & outer plating.—THE ZANZIBAR, [1892] P. 233; 61 L. J. P. 81; 68 L. T. 297; 40 W. R. 702; 7 Asp. M. L. C. 258.

*Annotation:*—**Consd.** The Cordilleras, [1904] P. 90.

**8121. —— ——.**]—THE CORDILLERAS, No. 8109, *ante.*

## SECT. 6.—PROCEDURE.

### SUB-SECT. 1.—IN GENERAL.

*See, generally,* ADMIRALTY, Vol. I., pp. 228–230.

**How proceedings begun.**]—*See* 1894 Act, s. 504; 1900 Act, s. 2 (3).

**Jurisdiction of court.**]—*See* ADMIRALTY, Vol. I., pp. 149–151, Nos. 571–582.

**8122. Contents of writ—Description of owners.**]—In an action for limitation of liability, though strictly the names of all pltfs. who are seeking to limit their liability should be stated in the writ, it is sufficient in the writ to describe pltfs. as the owners of the vessel, provided that the affidavit made in support of the claim & the certified copy of the ship's register exhibited thereto show clearly who are the owners at the date of the collision.—THE BLANCHE (1904), 21 T. L. R. 145.

**8123. —— ——.**]—Where the owners of a vessel seek to limit their liability in respect of a collision under 1894 Act, ss. 503, 504, it is not sufficient to describe pltfs. on the writ as "The owners of the ship or vessel," for, the action being one for personal relief, the names of the owners of the vessel at the time of the collision should be set out on the face of the writ.—THE INVENTOR (1905), 93 L. T. 189; 10 Asp. M. L. C. 99.

### SUB-SECT. 2.—ADMISSION OF LIABILITY.

*See* 1894 Act, s. 504; 1900 Act, s. 2 (3).

**8124. Necessity for.**]—In a bill filed under the provisions of the Merchant Shipping Act, 1854 (c. 104), to stay actions in other cts. for damage occasioned by a collision with pltf.'s ship, & to have the alleged damage ascertained, pltf. must aver that he has incurred liability in respect of some damage.—HILL *v.* AUDUS (1855), 1 K. & J. 263; 3 Eq. Rep. 422; 24 L. J. Ch. 229; 24 L. T. O. S. 251; 3 W. R. 230; 69 E. R. 456.

*Annotations:*—**Refd.** The Amalia (1863), Brown. & Lush. 151; The Normandy (1870), L. R. 3 A. & E. 152; James *v.* S. W. Ry. (1872), L. R. 7 Exch. 287.

**8125. ——.**]—Defts. in a collision cause in which their ship was under arrest, having instituted a suit for limitation of liability, the ct., upon the motion of pltfs. in the limitation suit, ordered the ship to be released, on payment into ct. in that suit of the aggregate amount of £15 per ton of the registered tonnage of the ship, & of a sum to cover interest & costs, & did not require that pltfs. in the limitation suit should admit liability before ordering the release.—THE SISTERS (1875), 32 L. T. 837; 2 Asp. M. L. C. 589; *subsequent proceedings* (1876), 1 P. D. 281.

**8126. ——.**]—WAHLBERG *v.* YOUNG, No. 8087, *ante.*

**8127. ——.**]—Defts. admitted liability in respect of damage to property & loss of life, but no claim had been asserted in respect of loss of life. The ct. ordered all proceedings against the ship to be stayed upon defts. paying in the value of the ship at the rate of £8 per ton, & giving bail for the rest of the value at £15 per ton.—THE CLUTHA (1876), 45 L. J. P. 108; 35 L. T. 36; 3 Asp. M. L. C. 225.

### SUB-SECT. 3.—DISTRIBUTION OF PROCEEDS.

*See* 1894 Act, s. 503; 1900 Act, s. 1.

**8128. Whether distribution stayed — Pending ascertainment of claim.**]—In Feb. 1917, two Norwegian vessels, the *C.* & the *K. O.*, came into collision & the *C.* sank. In Mar. 1917, the owners of the cargo laden on board the *C.* began an action against the owners of the *K. O.* in the Admlty. Ct. The action was heard in May, 1919, when both vessels were pronounced to blame, & accordingly it was adjudged that pltfs. were entitled to receive a moiety of the amount of their damage from defts. Thereupon defts., the owners of the *K. O.*, commenced a limitation action against the owners of the *C.*, the owners of her cargo, & all persons claiming to have received damage by reason of the collision. This action was heard in Feb. 1920, when a decree was pronounced limiting the liability of the owners of the *K. O.* to £8 per ton on the registered tonnage of the *K. O.* calculated in accordance with the provisions of 1894 Act.

*v.* FULLUM & FITZGERALD (1909), 12 Exch. C. R. 325.—**CAN.**

*g. Registered tonnage—With "engine room space"—Meaning of "engine room space."*]—*Held:* the words "engine-room space" in R. S. C. 1906, c. 113, as amended by 13–14 Geo. V. c. 35, s. 9, are wide enough to cover the boilers appurtenant to the engines whether they are actually in the same compartment or not, which arrangement is primarily one of convenience & would vary according to the size & construction of the vessel.—EAST ASIATIC CO., LTD. *v.* THE CHILCOT [1925] Exch. C. R. 172; [1925] 2 W. W. R. 543.—**CAN.**

**PART XVIII. SECT. 6, SUB-SECT. 3.**

*h. Priority among claimants—Claims pari passu—Underwriters of ship, cargo owners & seamen.*]—BURRELL *v.* SIMPSON & Co. (1877), 4 R. (Ct. of [illegible].) 177.—**SCOT.**

The decree provided that all claims were to be brought in within three months & that claims not so brought in would be excluded from sharing in the limitation fund. Claims were filed by the owners of the cargo on the *C.*, but although the owners of the *C.* entered an appearance they took no further steps in the limitation proceedings. Meanwhile, however, in Feb. 1919, the owners of the *C.* had commenced an action in Norway against the owners of the *K. O.* & in June, 1920, when the reference was held in the limitation proceedings & the registrar made his report, the trial of the Norwegian action was still pending. The owners of the *K. O.* accordingly took out a summons asking that the report be not confirmed & that they might have leave to file a claim against the fund in respect of any liability they might incur under the Norwegian proceedings. The judge declined to postpone the distribution of the fund & dismissed the summons. Pltfs., the owners of the *K. O.*, appealed:—*Held:* (1) pltfs. had no absolute right under the limitation sects. of 1894 Act to have the distribution of the fund stayed & to bring forward a claim when ascertained; (2) limitation proceedings do not contemplate claims by pltfs., & the owners of the *K. O.* could not file a claim against the fund in their own right; (3) had an application been made in proper form the ct. would have had a discretion to extend the time before distributing the fund, in order to allow pltfs. to ascertain their liability under the pending Norwegian judgment & to apply to the ct. to adjust the distribution of the fund so that pltfs. might obtain credit for the amount payable under the Norwegian judgment; (4) having regard to the lapse of time & to the fact that limitation proceedings contemplate that claims shall be brought in promptly & the distribution of the fund not be unreasonably delayed, the ct. had rightly exercised its discretion in refusing to postpone the distribution of the fund.—THE KRONPRINZ OLAV, [1921] P. 52; 90 L. J. P. 398; 125 L. T. 684; 15 Asp. M. L. C. 312, C. A.

*Annotation:—As to* (1) **Reld.** The Coaster (1922), 91 L. J. P. 145.

**8129. Priority among claimants—Life claims & claims for goods—Assessment of life claims as if liability unlimited.**]—Where the owner of a vessel which has wrongfully occasioned the loss of several of the crew of another vessel institutes proceedings under Merchant Shipping Act, 1854 (c. 104), s. 514, that the amount of their liability may be determined, the damages sustained by the families of the deceased seamen are to be ascertained in the same way as if the liability of the owners were unlimited; & if that amount exceeds the liability of the owner in respect of the tonnage of the ship, then the whole amount of his liability is to be distributed rateably among them. The statutory limit of £30 as the amount of damages payable in respect of each family by sect. 510 of the Act, applies only to damages assessed under inquiries instituted by the Board of Trade.—GLAHOLM *v.* BARKER (1866), L. R. 2 Eq. 598; 35 L. J. Ch. 657; 14 L. T. 880; 12 Jur. N. S. 764; 14 W. R. 1006; 2 Mar. L. C. 380.

**8130.** —— ——.]—Pltfs. in an action to limit their liability paid into ct. the sum of £7,862 0*s.* 10*d.*, being the amount of their statutory liability at the rate of £15 per ton. The amount so paid into ct. being insufficient to satisfy in full claims against pltfs. in respect of loss of life & loss of goods, the registrar, by his report, found that the claimants in respect of loss of life were entitled to be paid out of the sum in ct. an amount equal to £7 per ton, & that they & the claimants in respect of loss of goods should rank *pari passu* against the balance representing £8 per ton. On objection to the report:—*Held:* the report was right, as the ct. had power to marshal the assets, & the claimants in respect of loss of goods had no right in priority to the claimants in respect of loss of life against the sum representing £8 per ton; & in the special circumstances of the case, the costs of objection to the report must be borne by pltfs.—THE VICTORIA (1888), 13 P. D. 125; 57 L. J. P. 103; 59 L. T. 728; 37 W. R. 62; 6 Asp. M. L. C. 335.

*Annotation:*—**Consd.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

**8131.** —— —— **Where no proceedings for limitation taken—1894 Act, ss. 503, 504.**]—Unless a shipowner has taken proceedings under 1894 Act, s. 504, to limit his liability, s. 503 of that Act does not affect the rights *inter se* of claimants in respect of loss of life & personal injuries, & claimants in respect of damage to property.

A Norwegian ship of 6,028 gross registered tons, which was held to be alone to blame for a collision, was sold for 125,000 dollars & the proceeds paid into ct. in Canada. Claims amounting to 3,069,483 dollars, of which 469,467 dollars were in respect of loss of life & personal injuries, were proved against the shipowners, who had taken no proceedings to limit their liability. The Supreme Ct. of Canada made an order giving to the claimants in respect of loss of life & personal injuries a prior right over seven-fifteenths of the proceeds of sale:—*Held:* the order was wrongly made, & the proceeds should be divided amongst all the claimants *pro rata*.—CANADIAN PACIFIC RY. CO. *v.* S.S. STORSTAD, [1920] A. C. 397; 89 L. J. P. C. 52; 122 L. T. 440; 36 T. L. R. 114; 14 Asp. M. L. C. 530, P. C.

*Annotation:*—**Reld.** The Countess, [1922] P. 41.

**8132.** —— **Claims pari passu—In respect of moiety of respective losses.**]—In an action of collision in the Admlty. Div., where both ships have been injured & both ships have been held to blame, & have accordingly been condemned to pay the moiety of each other's damage, & either of the parties to the collision has applied to have his liability limited under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, no set-off is allowed between the two amounts for which they are liable in damages, until the limitation of liability imposed by that statute has been applied.

The *S.* & *V.* came into collision, both ships were damaged, but the *V.* was sunk, with her cargo, & lost. In an action by the owners of the *V.*, & counterclaim by the owners of the *S.*, both ships were held to blame & condemned to pay the moiety of each other's damage. Under this judgment the damage payable by the *S.* was £14,000, & that payable by the *V.* was £2,000. The owners of the *S.* then brought an action in the Ch. Div. for limitation of their liability, & paid into ct. £5,212, the aggregate amount of £8 a ton of her registered tonnage:—*Held:* the owners of the *V.* & the owners of the cargo, or the underwriters in their place, & the master & crew of the same ship, must prove *pari passu* against the fund in ct. in respect of the moiety of their respective losses.—CHAPMAN *v.* ROYAL NETHERLANDS STEAM NAVIGATION CO. (1878), 4 P. D. 157; 48 L. J. Ch. 449; 40 L. T. 433; 4 Asp. M. L. C. 107; *revsd.* (1879), 4 P. D. at p. 165, C. A.

*Annotations:*—**Apprvd.** Stoomvaart Maatschappij Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795. **Reld.** The Ettrick (1881), 6 P. D. 127.

**8133.** —— **Effect of delay in submitting claims—Application of Maritime Conventions Act, 1911**

*Sect.* 6.—*Procedure: Sub-sects.* 3 & 4.]

(c. 57), s. 8.]—A decree of limitation of liability under 1844 Act, ss. 503, 504, under which all claims against the limitation fund are ordered to be brought in within a certain time, usually three months, does not override the provisions of Maritime Conventions Act, 1911 (c. 57), s. 8, & rival claimants to the limitation fund are entitled to object, if more than two years have elapsed since the cause of action, to the claims of persons who have not commenced proceedings within the statutory period of two years provided for in Maritime Conventions Act.

Generally speaking, however, if the cause for not issuing a writ in respect of the damage sustained has been the fact that limitation proceedings are pending, that would be sufficient ground for the exercise of the discretion vested in the ct. under sect. 8 to extend the time for the issue of a writ notwithstanding that the period of two years has expired.—THE DISPERSER, [1920] P. 228; 89 L. J. P. 257; 123 L. T. 683; 36 T. L. R. 578; 15 Asp. M. L. C. 112.

**8134. Claims against fund in court.**]—In an action of collision in the Admlty. Div., where both ships have been injured & both ships have been held to blame, & have accordingly been condemned to pay the moiety of each other's damage, & either of the parties to the collision has applied to have his liability limited under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, no set-off is allowed between the two amounts for which they are liable in damages, until the limitation of liability imposed by that statute has been applied. The *S.* & *V.* came into collision, both ships were damaged, but the *V.* was sunk, with her cargo, & lost. In an action by the owners of the *V.*, & counterclaim by the owners of the *S.*, both ships were held to blame & condemned to pay the moiety of each other's damage. Under this judgment the damage payable by the *S.* was £14,000, & that payable by the *V.* was £2,000. The owners of the *S.* then brought an action in the Ch. Div. for limitation of their liability, & paid into ct. £5,212, the aggregate amount of £8 a ton on her registered tonnage:—*Held:* the owners of the *V.* must prove for £14,000 against the fund in in ct., & must pay the £2,000 in full to the owners of the *S.*—CHAPMAN *v.* ROYAL NETHERLANDS STEAM NAVIGATION CO. (1879), 4 P. D. 157; 48 L. J. Ch. 449; 40 L. T. 433; 27 W. R. 554; 4 Asp. M. L. C. 107, C. A.

*Annotations:*—**Overd.** Stoomvaart Maatschappij Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795. **Refd.** The Ettrick (1881), 6 P. D. 127.

**8135.** ——.]—Two ships, *V.* & *K.*, having come into collision, the owners of the *V.* brought an action *in rem* in the Admlty. Div. against the owners of the *K.* who counterclaimed, & both ship were held to blame. The owners of the *K.* brought an action in the Admlty. Div. to limit their liability order the Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 554, & paid the amount of their liability into ct. The damage to the *V.* was greater than that to the *K.* & the fund in ct. was not sufficient to satisfy all the claims for which the owners of the *K.* were answerable in damages:—*Held:* the owners of the *V.* were entitled to prove against the fund for a moiety of their damage, less a moiety of the damage sustained by the *K.* & to be paid in respect of the balance due to then after such deduction, *pari passu* with the other clamants out of such fund.—STOOMVAART MAATSCHAPPIJ NEDERLAND *v.* PENINSULAR & ORIENTAL STEAM NAVIGATION CO. (1882), 7 App. Cas. 795; 52 L. J. P. 1; 47 L. T. 198; 31 W. R. 249; 4 Asp. M. L. C. 567, H. L.

*Annotations:*—**Distd.** The Hector (1883), 8 P. D. 218. **Consd.** London Steamship Owners' Insce. *v.* Grampian S.S. Co. (1890), 24 Q. B. D. 663. **Refd.** Hettihewage Siman Appu *v.* Queen's Advocate (1884), 9 App. Cas. 571; The Gertrude, The Baron Aberdare (1888), 13 P. D. 105; The Dictator, [1892] P. 304; The Englishman & The Australia, [1895] P. 212; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

**8136.** —— **By Crown.**]—The Crown may claim against a fund paid into ct. by the owners of a ship in order to limit their liability under Merchant Shipping Acts, 1854 & 1862, by the general law, & also under Admiralty Suits Act, 1868 (c. 78), s. 3. A claim against a fund paid into ct. in a suit for limitation of liability under Merchant Shipping Acts, 1854 & 1862, is not necessarily excluded by the fact that the time fixed by the order of the ct. for entering claims has elapsed.—THE ZOE (1886), 11 P. D. 72; 55 L. J. P. 52; 54 L. T. 879; 35 W. R. 61; 5 Asp. M. L. C. 583.

*Annotations:*—**Refd.** The Kronprinz Olav, [1921] P. 52; Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

**8137.** —— **Effect of delay.**]—THE ZOE, No. 8136, *ante.*

**8138.** —— **Time for submitting.**]—In an action for limitation of liability the usual advertisements were issued, intimating to all persons having any claim in respect of loss of life or damage to property that, if they did not come in & enter their claims within three months from the date of the decree, they would be excluded from sharing in the amount of £15 per ton standing in ct. to the credit of the action.

The claims entered in respect of loss of property more than exhausted the statutory liability of £8 per ton; but only six out of a possible eleven claims in respect of loss of life were entered within the limit of time, & these absorbed only a small portion of the statutory liability of £7 per ton:—*Held:* the ct. having exercised the power given by 1894 Act, s. 504, of fixing the time within which claimants should come in, the unappropriated balance of the fund must be paid back to pltfs. in the limitation suit, notwithstanding that all the possible life claims had not been entered, & the year had not elapsed within which, under Lord Campbell's Act, 1846 (c. 93), s. 3, an action in respect of such a claim could be commenced.—THE ALMA, [1903] P. 55; 72 L. J. P. 21; 88 L. T. 64; 51 W. R. 415; 19 T. L. R. 149; 9 Asp. M. L. C. 375.

**8139.** —— **By cargo-owners—In respect of settlement made out of court.**]—Defts.' vessel came into collision with & sank another vessel carrying cargo belonging to pltfs. Actions were commenced by pltfs. & by the owners of the carrying vessel but in the action between the latter & defts.' vessel, the parties filed in the registry an agreement to a decree that both vessels were to blame & for the usual reference as to the damages. Defts. then brought an action for the limitation of their liability, & paid into ct. the amount of their liability under Merchant Shipping Acts. In their statement of claim they referred to the above-mentioned agreement, & in terms admitted that the collision was "in part caused by the improper navigation of their vessel." Pltfs., in their defence, did not notice this admission, or otherwise refer to the cause of the collision. The usual decree was made for limitation of liability, & the staying of pltfs.' action:—*Held:* (1) the agreement between the owners of the two vessels having been filed in the registry was, under R. S. C., Ord. 52, r. 23, equivalent to a decree of the ct., & the owners of the

carrying vessel were not entitled to have such agreement rescinded for the purpose of proving against the fund in ct. for more than half the damage sustained by them; (2) there was no admission on the pleadings by pltfs. as defts. in the limitation action which precluded them from claiming to prove against the fund for the whole amount of the damage sustained by them, & in support of their proof an issue might be directed between them & the owners of the carrying vessel to determine whether defts.' vessel was alone to blame for the collision.—THE KARO (1887), 13 P. D. 24; 57 L. J. P. 8; 58 L. T. 188; 6 Asp. M. L. C. 245.

*Annotation:—As to* (1) **Consd.** The Drumlanrig (1910), 79 L. J. P. 100.

**8140. —— By claimants partially satisfied—Under order of foreign court.**]—THE CRATHIE, No. 8065, *ante*.

**8141. —— —— In respect of payment enforced by action in foreign court.**]—Pltf. in an action of limitation of liability, who has paid to claimants a sum in satisfaction of a liability arising out of the collision, is under 1894 Act, s. 503, entitled in respect of such payment, to share rateably with other claimants in the distribution of the limitation fund; even though such payment has been enforced by action in a foreign ct.—THE COASTER (1922), 91 L. J. P. 145; 127 L. T. 153; 38 T. L. R. 511; 15 Asp. M. L. C. 560.

**8142. —— Whether claim barred—Order for discontinuance.**]—An action having been brought by the owners of ship *K.* against the owners of ship *A.* for damages arising out of a collision, an agreement was drawn up between the parties that the action be "discontinued without costs on the ground of inevitable accident," & an order in those terms was drawn up in the Admiralty Registry. The owners of the cargo of ship *K.* having afterwards brought an action against the owners of ship *A.* for damages arising out of the same collision, both ships were held to blame, & the cargo owners were held entitled to half their damages. The owners of ship *A.* having obtained a decree limiting their liability, & having paid a sum into ct. the cargo owners filed their claim in the limitation action. The owners of ship *K.* having afterwards, with the consent of the owners of ship *A.*, obtained a rescission of the order for discontinuance, claimed against the fund in the limitation action. The cargo owners having objected to this claim:—*Held:* the agreement & order for discontinuance, upon their true construction, did not amount to a release of all claims, & the owners of ship *K.* were not precluded from claiming against the fund. — KRONPRINZ (CARGO OWNERS) *v.* KRONPRINZ (OWNERS), THE ARDANDHU (1887), 12 App. Cas. 256; 56 L. J. P. 49; 35 W. R. 783; *sub nom.* THE KRONPRINZ, 56 L. T. 345; 6 Asp. M. L. C. 124, H. L.

### SUB-SECT. 4.—STAY OF PROCEEDINGS IN OTHER COURTS.

**8143. Whether court will stay proceedings.**]—(1) Merchant Shipping Act, 1854 (c. 104), s. 504, limiting the liability of a shipowner to the value of his ship & freight; & Merchant Shipping Act, 1854 (c. 104), s. 514, giving the ct. of Ch. jurisdiction to stop actions & suits pending in any other ct. in relation to the same subject-matter, are applicable, notwithstanding the circumstance that an adverse claimant has obtained a definitive sentence or judgment of the Ct. of Admlty., condemning the ship; & the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share rateably with the other claimants in the value of the ship & freight.

(2) This ct. has no control over the ship itself, & cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, & retaining out of the proceeds such costs as he may be entitled to retain under the order of the Admlty. Ct.

(3) Subject, however, as above mentioned, the shipowner is entitled to an injunction, under Merchant Shipping Act, 1854 (c. 104), s. 514, restraining the party who has obtained such a judgment from proceeding further in the Ct. of Admlty.—LEYCESTER *v.* LOGAN (1857), 3 K. & J. 446; 26 L. J. Ch. 306; 29 L. T. O. S. 74; 5 W. R. 334; 69 E. R. 1184.

*Annotations:—As to* (1) **Consd.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345. *As to* (2) **Reld.** The Europa (1863), 9 L. T. 781. *As to* (3) **Apld.** Cope *v.* Doherty (1858), 4 K. & J. 367. *Generally,* **Reld.** General Iron Screw Colliery Co. *v.* Schurmanns (1860), 8 W. R. 732; The Coaster (1922), 91 L. J. P. 145.

**8144. ——.**]—Merchant Shipping Act, 1854 (c. 104), s. 514, enables the Ct. of Ch., in cases where any liability has been, or is alleged to have been, incurred by the owner of a ship in respect of (*inter alia*) damage to, or loss of goods, & several claims are made or apprehended with regard to such liability, to entertain proceedings at the owner's suit to determine & distribute among the various claimants the amount of such liability with power to stop all actions or suits in relation to the same subject matter. Admiralty Court Act, 1861 (c. 10), s. 13, confers a similar power on the Ct. of Admlty. That ct. acting under the last-mentioned statute, made an order in certain Admlty. proceedings, at the instance of defts., stopping the present action, which was brought against them to recover damages for loss of the pltfs.' goods in consequence of the sinking of a ship belonging to defts. Defts. thereupon applied to this ct. for a rule to stay, but the ct. declined to interfere, being of opinion that the Common Law Procedure Act, 1852 (c. 76), s. 226, was not applicable to any case except where an order stopping an action or suit had been issued by a "superior ct. of law or equity," & seeing no reason to exercise their discretionary power at common law of staying proceedings.—MILBURN *v.* LONDON & SOUTH WESTERN RY. CO. (1870), L. R. 6 Exch. 4; 40 L. J. Ex. 1; 23 L. T. 418; 19 W. R. 105; 3 Mar. L. C. 491.

**8145. ——.**]—LONDON & SOUTH WESTERN RY. CO. *v.* JAMES, No. 8076, *ante*.

**8146. ——.**]—THE CLUTHA, No. 8127, *ante*.

**8147. ——.**]—In a collision case, although deft. is entitled, upon admission of liability & payment into ct. of the amount of his liability under Merchant Shipping Act (Amendment) Act, 1862 (c. 63), s. 54, to a stay of proceedings as against himself, pltf.'s having separate interests may, at deft.'s cost, proceed to a reference to settle the respective amounts due to them, & may tax their costs.—THE EXPERT (1877), 36 L. T. 258; 3 Asp. M. L. C. 381.

**8148. ——.**]—Where owners of cargo have recovered judgment in a collision action brought by them, & the owners of the ship carrying the cargo subsequently bring an action against same ship to recover damages in respect of the same collision, & the damages in both actions would exceed the value of defts.' ship at £8 per ton, & the damage in the cargo action alone would not exceed that amount, the ct. will not stay proceedings in the cargo's action until after judgment in the ship's action on the ground that

*Sect. 6.—Procedure: Sub-sects. 4, 5, 6 & 7. Part XIX. Sect. 1: Sub-sect. 1.]*

without such stay defts. have to institute a limitation of liability action, which would be unnecessary if defts. obtained judgment in the ship's action.—THE ALNE HOLME (1882), 47 L. T. 309; 4 Asp. M. L. C. 593.

**8149. —— Claims settled out of court.**]—In an action for limitation of liability, where it appeared that all the claims in respect of loss of life had been settled, the ct. ordered that upon payment in of £8 per ton, all persons having any claim, either in respect of loss of life or damage to ship, goods, or merchandise, should be restrained from bringing any action in respect of the collision.—THE FOSCOLINO (1885), 52 L. T. 866; 5 Asp. M. L. C. 420.

**8150. —— Proceedings under Fatal Accidents Act, 1846 (c. 93).**]—In an action of limitation of liability pltfs. claimed a stay of proceedings in respect of claims for damage to ship & goods, & in respect of claims for personal injuries & loss of life, on paying into ct. a sum representing £8 per ton in respect of damage to ship & goods & on giving security for the difference between £8 & £15 in respect of claims for personal injuries & loss of life:—*Held:* the stay of proceedings might be ordered in respect of the claims for damages to ship & goods, but not in respect of the claims for personal injuries, & loss of life.—THE NEREID (1889), 14 P. D. 78; 58 L. J. P. 51; 61 L. T. 339; 37 W. R. 688; 6 Asp. M. L. C. 411.

*Annotation:*—**Folld.** Roche *v.* L. & S. W. Ry., [1899] 2 Q. B. 502.

**8151. Whether court will transfer proceedings—Proceedings under Fatal Accidents Act, 1846 (c. 93).**]—Where an action under Fatal Accidents Act, 1846 (c. 93), was brought in the Q. B. Div. by a widow against shipowners for the loss of her husband through the negligent management of their ship by defts.' servants, & defts. had obtained a decree in the Admlty. Div. for limitation of their liability in accordance with 1894 Act, s. 503:—*Held:* the action in the Q. B. Div. ought not to be transferred to the Admlty. Div.—ROCHE *v.* LONDON & SOUTH WESTERN RY. CO., [1899] 2 Q. B. 502; 68 L. J. Q. B. 1041; 81 L. T. 315; 48 W. R. 1; 15 T. L. R. 514; *sub nom.* ROCHE *v.* LONDON & SOUTH WESTERN RY. CO., THE STELLA, 8 Asp. M. L. C. 588, C. A.

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SUB-SECT. 5.—EVIDENCE AND INTERROGATORIES.

**8152. Evidence—Sufficiency of affidavit—Loss of life or injury occasioned.**]—Where the owners of a vessel seek to limit their liability in respect of a collision under 1894 Act, ss. 503, 504, & the evidence in support of their claim is given by affidavit, the affidavit as to whether loss of life or personal injury was occasioned by the collision should be made by some person having knowledge of the facts, & the certified copy of the register proving the ownership of the vessels should be a certified copy of the register at the date of the collision.—THE ROSSLYN (1904), 92 L. T. 177; 10 Asp. M. L. C. 24.

**8153. —— —— Measurement of ship.**]—THE CORDILLERAS, No. 8109, *ante*.

**8154. —— —— By general manager of railway company.**]—THE YARMOUTH, No. 8077, *ante*.

**8155. —— Waiver of affidavit.**]—In an action of limitation under 1894 Act, s. 503, pltfs. did not file the usual affidavit verifying their statement of claim. The owners & crew of the vessel injured in the collision, in respect of which judgment had been given against pltfs. in the previous action, & some cargo owners appeared by counsel at the trial & consented to a decree of limitation. The ct. granted a decree without requiring pltf. to file the usual affidavit.—THE COIMBRA (1923), 130 L. T. 512; 16 Asp. M. L. C. 288.

**8156. —— Proof of ownership—Certified copy of register.**]—THE ROSSLYN, No. 8152, *ante*.

**8157. —— Proof of value of ship—Action by cargo owner—Findings in collision action.**]—The finding of value in a collision action between the owners of two ships is not conclusive on the owners of cargo in ulterior proceedings.—VAN EIJCK & ZOON *v.* SOMERVILLE, [1906] A. C. 489; 75 L. J. P. C. 67; 95 L. T. 161; 22 T. L. R. 715; 10 Asp. M. L. C. 263, H. L.

**8158. Interrogations—What interrogations allowed—As between rival claimants.**]—The owners of the steamship *Nedenes*, one of two ships found jointly to blame in a collision action, limited their liability & paid the amount into ct. Claims against the fund were in due course filed by the owners of the *Nedenes* & the owners of the other ship, the *Severini*, & also by the owners of cargo on the *Severini*. The same solrs. presented the claims on behalf of the owners of both ships. The owners of cargo on the *Severini*, who were not parties to the collision action, then sought leave to administer four interrogatories to the owners of the *Severini*. Nos. 1 & 2 asked whether there had been, as between the owners of the two ships, a mutual abandonment of claim or a settlement on other terms. No. 3 inquired whether there had been any assignment of the claim of the owners, master, & crew of the *Severini*; & No. 4 asked by whom the particular solrs. were instructed to present the claim of the owners of the *Severini*. The registrar allowed Nos. 1 & 2, but disallowed Nos. 3 & 4. On appeal by both sides:—*Held:* the first three interrogatories were necessary either for disposing fairly of the cause or matter or for saving costs, within R. S. C., Ord. 31, r. 2, & must be allowed. No. 4 was not pressed.—THE NEDENES (1924), 41 T. L. R. 243.

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SUB-SECT. 6.—RELEASE ON BAIL.

*See, generally,* ADMIRALTY, Vol. I., pp. 168–170.

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SUB-SECT. 7.—COSTS.

**8159. By whom payable—Party seeking relief—Costs of issue arising on claims of rival claimants.**]—In a suit instituted by a shipowner under Merchant Shipping Act, 1854 (c. 104), s. 514, to determine the amount of his liability in respect of the losses there mentioned, to have such distributed rateably amongst the several claimants, & to stop action at law in relation to the same subject-matter, there being no adverse litigation amongst claimants themselves, nor any other special circumstance occasioning an increase of costs, & over which pltf. has no control, pltf., as the party eased by the proceedings, pays all the costs of all claimants whose claims are established, including the costs of actions at law commenced by any of such claimants, but stayed by injunction in the suit.—AFRICAN S.S. Co. *v.* SWANZY (1856), 2 K. & J. 660; 25 L. J. Ch. 870; 27 L. T. O. S. 248; 4 W. R. 692; 69 E. R. 947.

*Annotations:*—**Apld.** General Iron Screw Colliery Co. *v.* Schurmanno (1860), 1 John & H. 180. **Reid.** Leycester *v.* Logan (1857), 3 K. & J. 446; Nixon *v.* Roberts (1861), 1 John. & H. 739; Grainger *v.* Martin (1862), 2 B. & S. 456; The Northumbria (1869), L. R. 3 A. & E. 6.

**8160.** —— —— ——.]—In a limitation suit the costs of deciding a point of law arising on the claims of two rival claimants to the same fund not allowed as against pltf., each claimant; ordered to pay his own costs.—THE EMPUSA (1879), 5 P. D. 6; 48 L. J. P. 36; 41 L. T. 383; 28 W. R. 263; 4 Asp. M. L. C. 185.

*Annotation:*—**Refd.** The Victoria (1888), 37 W. R. 62.

**8161.** —— —— ——.]—THE WARKWORTH, No. 8092, *ante*.

**8162.** —— —— **Costs of objection to report.**]—THE VICTORIA, No. 8130, *ante*.

**8163.** —— —— **Discretion of registrar.**]—In a limitation of liability suit pltfs. objected to certain items of defts.' claim for damage to cargo sustained in consequence of the collision, upon the ground that a large proportion of the damage was owing to defts.' failure to use due diligence after the collision to minimise the damage. The registrar found that pltfs.' objections were well founded & allowed only a portion of defts., claim, & ordered each party to pay their own costs of the reference. From this order defts. appealed by motion:—*Held:* though there is a general rule of practice that pltf. in a limitation of liability suit must pay the costs, that practice is not invariable; the registrar has discretion in a proper case to make such order as to costs as he thinks just; & his order was right.—THE RIJNSTROON (1899), 80 L. T. 422; 8 Asp. M. L. C. 538.

**8164.** —— ——.]—S.S. PONCE (1879), 4 Asp. M. L. C. 185, n.

**8165.** —— ——.]—THE KATHLEEN (1925), [1927] P. 63, n.; 69 Sol. Jo. 574.

**8166.** —— **Effect of tender—Tender more than sufficient—Costs before & after tender.**]—A tug, under an engagement to tow defts.' vessel, claimed salvage for services rendered whilst the towage contract was interrupted, & a second tug, which assisted the first, besides suing for salvage, claimed compensation for damage sustained in a collision with defts.' vessel. By their defence, defts. did not admit that either of pltf. tugs had rendered any salvage service. The also set up an agreement by the second tug for £20, & alleged that any damage sustained by that tug was due to her own negligence. Finally they tendered as follows: "Defts. denying liability for more than £20, part thereof for the second tug, bring into ct. £100 for the second tug, & £50 for the first tug." The ct. found that both tugs had rendered salvage services; that there was no agreement with the second tug; that the damage that tug had sustained was due to her own negligence; & that each tug was entered to an award of £50. The ct., therefore, ordered the balance of £50 out of the tender to the second tug to be repaid to defts. under Ord. 22, r. 6 (*c*), & on the question of costs:—*Held:* pltfs. were entitled to their costs up to payment into ct.; defts. were entitled to those subsequent to that date, & pltfs., were entitled to any severable costs, subsequent to payment into ct., in respect of the issues on which they had succeeded.—THE BLANCHE, [1908] P. 259; 77 L. J. P. 99; 99 L. T. 249; 11 Asp. M. L. C. 75.

**8167.** —— **Costs of reference.**]—THE EXPERT, No. 8147, *ante*.

*Compare* ADMIRALTY, Vol. I., p. 242, No. 1694.

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# Part XIX.—Liens on Ship, Freight and Cargo.

## SECT. 1.—MARITIME LIEN.

### SUB-SECT. 1.—IN GENERAL.

**8168. Nature—Distinguished from possessory lien.**]—(1) A Scottish steamer ran down an English vessel in the Humber. An action was commenced in the Ct. of Admlty. in England, by the owners of the English vessel, against the owners of the steamer, & a warrant of arrest issued against the ship; but, before the ship could be arrested, she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer, in the Ct. of Sessions in Scotland, for the damage, & the steamer was arrested under process of that ct., but subsequently released upon bail. Afterwards, & pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the Ct. of Session were still pending, when the steamer having come within the jurisdiction of England, was again arrested under process of the High Ct. of Admlty. in England, & an action for damage commenced in that ct., for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the Ct. of Session. The owner of the steamer appeared under protest in the Admlty. Ct., & pleaded, that he was a purchaser for value without notice:—*Held:* as, by the civil law, a maritime lien does not include or require possession, but being the foundation of proceedings *in rem*, a process requisite only to perfect a right inchoate from the moment the lien attaches, such lien travels with the thing into whosesoever possession it may come, & when carried into effect by a proceeding *in rem*, relates back to the period when it first attached; the steamer was liable for the damage committed by her, though in the hands of a purchaser without notice of the damage, or the proceedings instituted against her.

A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in cts. of common law, in which case there could be no lien where there was no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession (JARVIS, C.J.).

(2) *Semble:* such lien arising out of damage is not indelible, but may be lost by negligence or delay, where the right of third parties are compromised.

(3) A maritime lien & a proceeding *in rem* are correlative; wherever a proceeding *in rem* is

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**PART XVIII. SECT. 6, SUB-SECT. 7.**

**8164 i.** *By whom payable—Party seeking relief.*]—THE OLGA (OWNERS) *v.* THE ANGLIA (OWNERS), [1907] S. C. 1045; 12 S. L. T. 812.—**SCOT.**

**k.** —— *Party opposing relief.*]—Resp. in a petition for limitation of liability under 1894 Act, s. 504, who unsuccessfully opposed the petition on the ground that petitioner was not entitled to the benefit of limitation, held liable to petitioner in expenses, in so far as caused by resp.'s contention that petitioner was not entitled to proceed under the petition.—COOPER *v.* MACKENZIE (1906), 8 F. (Ct. of Sess.) 1202.—**SCOT.**

**PART XIX. SECT. 1, SUB-SECT. 1.**

**1.** *Recognition out of England—Law of Scotland.*]—The maritime law of Scotland being the same as that of England, the law of Scotland recognises a maritime lien in cases of collision.—CURRIE *v.* M'KNIGHT, [1897] A. C. 97.—**SCOT.**

*Sect.* 1.—*Maritime lien: Sub-sects.* 1 & 2, *A.*]

competent, a lien exists, & *vice versâ*.—HARMER *v.* BELL, THE BOLD BUCCLEUGH (1852), 7 Moo. P. C. C. 267; 19 L. T. O. S. 235; 13 E. R. 884, P. C.

*Annotations*:—*As to* (1) **Consd.** Simpson *v.* Fogo (1860), 1 John. & H. 18; The Halley (1867), L. R. 2 A. & E. 3; The Feronia (1868), L. R. 2 A. & E. 65; The St. Olaf (1869), L. R. 2 A. & E. 360; The Two Ellens (1871), L. R. 3 A. & E. 345; The City of Mecca (1881), 6 P. D. 106; The Dictator, [1892] P. 304. **Apprvd.** Currie *v.* M'Knight, [1897] A. C. 97. **Consd.** The Ripon City, [1897] P. 226; The Veritas, [1901] P. 304; The Tervaete, [1922] P. 259; The Stream Fisher, [1927] P. 73. **Reid.** Cammell *v.* Sewell (1860), 6 Jur. N. S. 918; The Ella A. Clark (1863), Brown. & Lush. 32; The Northumbria (1869), 39 L. J. Adm. 3; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795; The Tasmania (1888), 13 P. D. 110; The Africano, [1894] P. 141; The Marie Glaeser, [1914] P. 218; The Goulandris, [1927] P. 182. *As to* (2) **Apld.** The Europa (1863), Brown. & Lush. 89. **Consd.** The Charles Amelia (1868), L. R. 2 A. & E. 330. **Apld.** The Fairport (1882), 8 P. D. 48. *Generally*, **Reid.** Place *v.* Potts (1853), 21 L. T. O. S. 130; Harris *v.* Willis (1855), 3 C. L. R. 609; The Bengal, The John & Mary (1859), 5 Jur. N. S. 1085; Imrie *v.* Castrique (1860), 8 C. B. N. S. 405; Nelson *v.* Couch (1863), 15 C. B. N. S. 99; The Mary Ann (1865), L. R. 1 A. & E. 8; The Mali Ivo (1869), L. R. 2 A. & E. 356; The Parlement Belge (1880), 5 P. D. 197; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; The Christiansborg (1885), 10 P. D. 141; Northcote *v.* Henrich Bjorn (Owners), The Henrich Bjorn (1886), 11 App. Cas. 270; The Burns, [1907] P. 137; The Russland, [1924] P. 55. **Mentd.** Tatham *v.* Andree (1863), 1 Moo. P. C. C. N. S. 386.

**8169. —— Correlative with proceeding in rem.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8170. —— Attaches to res—Irrespective of possession.**]—By the civil law there is also a lien upon the ship following her in the hands of purchasers in different countries for different periods.—HUSSEY *v.* CHRISTIE (1807), 13 Ves. 594; 33 E. R. 417, L. C.; *subsequent proceedings* (1808), 9 East, 426.

*Annotation*:—**Reid.** *Ex p.* Halkett (1814), 3 Ves. & B. 135.

**8171. —— —— ——.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8172. —— —— Exclusion of contractual liability.**]—THE EQUATOR (1921), 56 L. J. C. C. 76; 152 L. T. Jo. 259, D. C.

**8173. —— Relates back to period when first attaching.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8174. Concurrent jurisdiction of Equity & Admiralty.**]—ALLPORT *v.* THOMAS (1725), Gilb. Ch. 227; 25 E. R. 158.

*Annotation*:—**Mentd.** Hoare *v.* Contencin (1779), 1 Bro. C. C. 27.

**8175. Recognition out of England—By all civilised nations.**]—All civilised nations recognise the validity of maritime lien, & will enforce it when it has been declared by a foreign ct.; but it is essential that it should appear from the proceedings of the foreign ct. that the object of the suit was the sale of the ship, & not a personal remedy against the captain or owners.

Pltfs. brought an action & obtained judgment in the Tribunal of Commerce at Lisbon against the captain & owners of a British ship for damages for injury caused by a collision with pltf.'s ship. The Portuguese cts. recognise no distinction between actions *in personam* & actions *in rem*. Deft.'s ship having come into a British ct., pltfs. commenced an action *in rem* against the ship, claiming to enforce the judgment of the Portuguese ct. against it, & arrested the ship:—*Held*: the action in the Portuguese ct. was a personal action, & the writ in the present action & all proceedings under it must be set aside, the ct. having no jurisdiction to enforce a judgment in a personal action by proceedings *in rem*.—THE CITY OF MECCA (1881), 6 P. D. 106; 50 L. J. P. 53; 44 L. T. 750; 4 Asp. M. L. C. 412, C. A.

*Annotation*:—**Reid.** The Nautik, [1895] P. 121.

**8176. Implied authority to subject vessel to claims.**]—THE RIPON CITY, No. 8298, *post*.

**8177. Whether assignable.**]—(1) Persons in the position of volunteers who make payments in discharge of seaman's wages & master's disbursements do not thereby acquire the maritime lien which the seaman & master had in respect thereof.

(2) *Qu.*: whether, apart from the case of bottomry, a contractual assignment of a debt or claim supported by a maritime lien can carry with it the benefit of the lien.—THE PETONE, [1917] P. 198; 86 L. J. P. 164; 119 L. T. 124; 33 T. L. R. 554; 14 Asp. M. L. C. 283.

*Annotation*:—*Generally*, **Reid.** The Sylvan Arrow, [1923] P. 14.

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SUB-SECT. 2.—DAMAGE.

*A. In General.*

**8178. Nature & extent of lien.**]—The successful suitor in a cause of damage has a lien upon the property condemned, to the full extent of the owner's interest in the vessel. His lien in paramount to the claim of a mtgee. or bondholder prior to the period when the damage is done & also extends in case of a deficiency of proceeds, to subsequent accretions in the value of the ship arising from repairs effected at the expense of the owner. *Aliter*, where money has been advanced & repairs effected by a stranger, & a bottomry bond has been *bonâ fide* given for the amount of such repairs. *Semble*: in such case the subsequent bondholder would have a lien upon the proceeds to the extent of the increased value of the vessel arising from the repairs.—THE ALINE (1839), 1 Wm. Rob. 111; 166 E. R. 514.

*Annotations*:—**Apld.** Harmer *v.* Bell, The Bold Buccleugh (1850), 7 Moo. P. C. C. 267. **Consd.** The Benares (1850), 14 Jur. 581; Simpson *v.* Fogo (1860), 29 L. J. Ch. 657; The Dictator, [1892] P. 304; The Ripon City, [1897] P. 226; The Stream Fisher, [1927] P. 73. **Reid.** The Grecia (1850), 7 Notes of Cases, 410; The Halley (1867), L. R. 2 A. & E. 3; The Veritas, [1901] P. 304; The Russland, [1924] P. 55.

**8179. ——.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8180. —— Liability of ship—Primâ facie liability—Capable of rebuttal.**]—THE TASMANIA, No. 8210, *post*.

**8181. —— —— Whether independent of liability of owners.**]—UTOPIA (OWNERS) *v.* PRIMULA (OWNERS & MASTER), THE UTOPIA, No. 8215, *post*.

**8182. —— —— ——.**]—(1) In order to render a ship liable to a maritime lien for injury caused the ship itself must be the instrument which causes the damage.

(2) It is a reasonable & salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame the owners of the injured craft should have a remedy against the corpus of the offending ship & should not be restricted to a personal claim

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**8177 i.** *Whether assignable.*]—Where an assignment was made by salvors of a sum due to them for salvage:—*Held*: their lien on the ship was personal & inalienable, & it did not vest in their assignees so as to enable them to proceed against the ship.—THE CITY OF MANITOWOC (1879), 5 Q. L. R. 108.—**CAN.**

**8177 ii.** ——.]—The holder of a maritime lien cannot transfer the same, & the assignee of a claim for master's wages has no right of action *in rem* against the ship.—RANKIN *v.* THE ELIZA FISHER (1895), 4 Exch. C. R. 461.—**CAN.**

**m.** *Lien for wharfage—Wharf leased to shipowner.*]—A contract by which the owner of a wharf leased it to the owner of a steamboat, for a fixed rental, does not give the lessor a maritime lien for the rental, as wharfage, on the steamboat.—DEMERS *v.* BAKER & ROSS (1891), 17 Q. L. R. 140.—**CAN.**

against her owners (LORD WATSON).—CURRIE *v.* M'KNIGHT, [1897] A. C. 97; 66 L. J. P. C. 19; 75 L. T. 457; 13 T. L. R. 53; 8 Asp. M. L. C. 193, H. L.

*Annotations:—As to* (2) **Consd.** The Veritas, [1901] P. 304. **Apld.** The Burns, [1907] P. 137. **Consd.** The Tervaete, [1922] P. 259. *Generally*, **Refd.** The Ripon City, [1897] P. 226; Blairmore Sailing Ship Co. *v.* Macredie, [1898] A. C. 593.

**8183. —— Liability of subsequent owners.**]—THE DRUID (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 9 L. T. 119; 6 Jur. 441; 166 E. R. 619.

*Annotations:*—**Refd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220; The Seine (1859), Sw. 411; The Ida (1860), Lush. 6; The James Seddon (1866), 35 L. J. Adm. 117; The Charkieh (1873), L. R. 4 A. & E. 59; The Lemington (1874), 32 L. T. 69; The Leon (1881), 6 P. D. 148; The Tasmania (1888), 13 P. D. 110; The Longford (1889), 60 L. T. 373; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; The Ripon City, [1897] P. 226; The Sylvan Arrow, [1923] P. 220.

**8184. —— ——.**]—(1) In a cause of damage, where the bail to answer the action had been accepted by pltf., the amount of which proved less than the reported amount of the damage, & pltf. alleged that the value of the vessel condemned in the damage was greater than the amount of the bail, & claimed the full amount of his loss:—*Held:* the amount of the bail was the true value of the vessel, & the extent of defts.' liability.

(2) *Qu.:* whether, where there has been a change of ownership between the cause of action & the arrest, the freight on board the vessel condemned in the damage can be called in.

It is, I apprehend, perfectly clear, that, as regards the vessel arrested in this case, the powers of this ct. may be enforced against the owners to the full extent of the ship & its appurtenances, & this without reference to any question that may be raised whether the owners of the vessel, at the time of the arrest, were or were not the owners when the damage was committed (DR. LUSHINGTON).—THE MELLONA (1848), 3 Wm. Rob. 16; 6 Notes of Cases, 62; 11 L. T. O. S. 182; 12 Jur. 271; 166 E. R. 869.

*Annotation:—As to* (1) **Expld.** The Temiscouata (1855), 2 Ecc. & Ad. 208.

**8185. —— ——.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8186. —— ——.**]—A maritime lien for damages caused by a collision follows the ship causing the damage into whosesoever hands she may go, & can be enforced at any time, provided there has been no improper delay, or laches, in enforcing such lien.

Circumstances in which it was held, that a delay of three years to arrest the ship was not an unreasonable delay, the owners of the damaged vessel having used reasonable diligence to discover her whereabouts.—DEAN *v.* RICHARDS, THE EUROPA (1863), 2 Moo. P. C. C. N. S. 1; Brown. & Lush. 89; 15 E. R. 803, P. C.

*Annotations:*—**Apld.** The Fairport (1882), 8 P. D. 48. **Refd.** The Charles Amelia (1868), L. R. 2 A. & E. 330; The Two Ellens (1871), L. R. 3 A. & E. 345; The Joannis Vatis (No. 2), [1922] P. 213.

**8187. —— ——.**] — UTOPIA (OWNERS) *v.* PRIMULA (OWNERS & MASTER), THE UTOPIA, No. 8215, *post*.

**8188. —— In respect to place where damage occurs.**]—A foreign steam vessel, with engines broken down, after being safely towed into the Mersey by salvors, was run into by another vessel, &, to prevent her sinking in deep water, second salvors endeavoured to beach her, with the result that she came in contact with, & damaged, a landing stage belonging to the Mersey Dock Board. As a wreck obstructing the navigation, the Board, under their statutory powers, took possession of her, raised, & sold her, paying the net proceeds into ct. after deducting expenses. The proceeds were insufficient to meet the claims of the two salvors & the claim of the Dock Board for the damage done to the landing stage.

On the question of priorities:—*Held:* (1) the claim of the Dock Board came first, then that of the second salvors, & lastly that of the first salvors, for, as between the Dock Board & the salvors, the Board had a maritime lien for the damage done, & whether the Board had a maritime lien or not, the right of the Board to proceed *in rem* overrode the prior lien of the salvors, as being based on a claim against the wrong doing vessel *ex delicto*, involving no option in the sufferer, whereas the salvors in voluntarily undertaking to render services incurred the risk of subsequent claims attaching; (2) as between the two salvors, the ordinary rule applied giving the claim of the second salvors precedence on the ground that their exertions tended to preserve the *res* for the benefit of earlier claimants.

(3) There is a maritime lien for this kind of damage if it had occurred on the high seas & it seems to follow that it was intended the law should be the same as to damage done by a ship elsewhere; & therefore whether the damage . . . was done in the body of a county or not is immaterial (GORELL BARNES, J.).

(4) There is a right to arrest a ship to obtain reparation for damage done by her which is not affected by prior claims against her arising from hypothecation (GORELL BARNES, J.).—THE VERITAS, [1901] P. 304; 70 L. J. P. 75; 85 L. T. 136; 50 W. R. 30; 17 T. L. R. 721; 45 Sol. Jo. 708; 9 Asp. M. L. C. 237.

*Annotations—As to* (1) **Refd.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345. *Generally*, **Refd.** The Stream Fisher, [1927] P. 73.

**8189. —— Liability of foreign ship.**]—Damage occasioned by collision with a foreign state-owned vessel does not impose a maritime lien upon the vessel, & if the vessel be subsequently sold into private ownership she is not then liable to arrest in an action *in rem*.—THE TERVAETE, [1922] P. 259; 91 L. J. P. 213; 128 L. T. 176; 38 T. L. R. 825; 67 Sol. Jo. 98; 16 Asp. M. L. C. 48, C. A.

*Annotations:*—**Consd.** The Stream Fisher, [1927] P. 73. **Refd.** The Colorado, [1923] P. 102; The Meandros, [1925] P. 61; The Goulandris, [1927] P. 182.

**8190. —— —— Requisition during war.**]—While under requisition by, & manned & operated by, the United States Govt., defts.' steamship was in collision with & did damage to pltfs.' steamship. After the vessel had been released from requisition pltfs. commenced an action *in rem* for their collision damage. In that action defts. pleaded (*inter alia*) that "at the time when the collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control & management of the Govt. of the United States & was being navigated by persons who were the servants of the Govt. & for whose negligence defts. were & are in no wise responsible. . . . Defts. say that the action is not maintainable *in rem* by reason of the facts set out" above. On the hearing of this question as a preliminary point of law:—*Held:* defts. had surrendered their vessel to the United States Govt. under compulsion, in no sense could it be said that the master & crew derived their authority from defts., & in the circumstances no maritime lien attached to the vessel by reason of the collision, & her owners were not, either through their vessel or otherwise, liable to pltfs.—THE SYLVAN ARROW, [1923] P. 220; 92 L. J. P. 119; 130 L. T. 157; 39 T. L. R. 655; 15 Asp. M. L. C. 244.

*Sect. 1.—Maritime lien: Sub-sect. 2, B. & C.*]

*B. To What Property Attaching.*

**8191. The property condemned—To full extent of owner's interest.**]—THE ALINE, No. 8178, *ante.*

**8192.** —— ——.]—THE MELLONA, No. 8184, *ante.*

**8193. Appurtenances—Fishing stores.**] — The fishing stores of a vessel engaged in the Greenland fisheries held liable to contribute in compensation for damage done to another British ship; such stores being considered appurtenances within 53 Geo. 3, c. 159, notwithstanding that the first clause of the Act mentions only ship & freight.—THE DUNDEE (1823), 1 Hag. Adm. 109; 166 E. R. 39.

*Annotations:*—**Consd.** Langton *v.* Horton (1842), 5 Beav. 9; The Milan (1861), Lush. 388. **Distd.** *Re* Salmon, & Woods, *Ex p.* Gould (1885), 2 Morr. 137. **Consd.** The Dictator, [1892] P. 304. **Refd.** The Girolamo (1834), 3 Hag. Adm. 169; The John Dunn (1840), 1 Wm. Rob. 159; Cope *v.* Doherty (1858), 31 L. T. O. S. 173; The Duna (1861), 5 L. T. 217; The Wild Ranger (1862), Lush. 553; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795; Coltman *v.* Chamberlain (1890), 25 Q. B. D. 328.

**8194.** ——.]—THE MELLONA, No. 8184, *ante.*

**8195. Subsequent accretions in value of ships—Initial deficiency of proceeds.**]—THE ALINE, No. 8178, *ante.*

**8196. Whether cargo liable.**]—TOMLINSON *v.* VOGUEL (1733), Burrell, 313; 167 E. R. 588; *on appeal, sub nom.* VOGUEL *v.* TOMLINSON, Burrell, 314.

**8197.** —— **Liability of shipowner for improper detention.**]—The cargo laden on board a vessel at the time of collision is in no case liable to be sued for the damage.

Where cargo is improperly detained under arrest, the owner is entitled to costs & damages.—THE VICTOR (1860), Lush. 72; 29 L. J. P. M. & A. 110; 2 L. T. 331; 167 E. R. 38.

*Annotations:*—**Consd.** The Volant (1864), Brown. & Lush. 321; The Roecliff (1869), 17 W. R. 745; The Princess Royal (1870), L. R. 3 A. & E. 41; The Mullingar (1872), 26 L. T. 326. **Refd.** The Dictator, [1892] P. 304.

**8198.** ——.]—A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board; at the time of the arrest a portion only of such cargo remained on board. The vessel & cargo belonged to the same owner:—*Held:* on motion for release of the cargo remaining on board, the freight due upon the whole cargo must be paid into ct. before the portion on board at the time of arrest could be released.—THE ROECLIFF (1869), L. R. 2 A. & E. 363; 38 L. J. Adm. 56; 20 L. T. 586; 17 W. R. 745; 3 Mar. L. C. 243.

*Annotation:*—**Refd.** The Kaleten (1914), 30 T. L. R. 572.

**8199.** —— **Only to secure lien on freight—Owner of cargo liable pro rata.**]—The owner of cargo on board a ship sued for collision is only compellable to pay into ct. the freight due from him to the shipowner. In computing the amount of such freight, deductions, as by charter, from gross freight, will be allowed; & if the cargo is delivered at a place short of destination by reason of the collision, such reasonable reduction as may have been agreed upon between the shipowner & the owner of cargo. Costs of paying freight into ct. may also be deducted.—THE LEO (1862), Lush. 444; 31 L. J. P. M. & A. 78; 6 L. T. 58; 1 Mar. L. C. 200; 167 E. R. 198.

*Annotations:*—**Consd.** The Roecliff (1869), 17 W. R. 745. **Refd.** Stewart *v.* Rogerson (1871), L. R. 6 C. P. 424.

**8200.** —— ——.]—Pltf. in a cause of collision suing ship & freight may always arrest the cargo for freight & if freight be not due, will not therefore incur costs & damages; but on affidavit that no freight is due, & that he is ready to carry on to destination, deft., owner of the ship sued, is entitled to have the cargo released.—THE FLORA (1866), L. R. 1 A. & E. 45; 35 L. J. Adm. 15; 14 L. T. 192; 2 Mar. L. C. 325.

*Annotations:*—**Consd.** The Brothers *v.* The Fingal (1869), 21 L. T. 621. **Refd.** The Dictator, [1892] P. 304.

**8201. Freight—Computation of freight.**]—THE LEO, No. 8199, *ante.*

**8202.** ——.]—THE ROECLIFF, No. 8198, *ante.*

**8203.** ——.]—Where a vessel, proceeding to a loading port under a charterparty, comes into collision with another vessel, a maritime lien for the damage attaches to the freight which she may earn under her charterparty.—THE ORPHEUS (1871), L. R. 3 A. & E. 308; 40 L. J. Adm. 24; 23 L. T. 855; 3 Mar. L. C. 531.

**8204. Vessel without masts—Propelled by pole.**]—THE SARAH (1862), Lush. 549; 167 E. R. 248.

*Annotations:*—**Consd.** Purkis *v.* Flower (1873), L. R. 9 Q. B. 114. **Expld.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273. **Consd.** Mersey Docks & Harbour Board *v.* Turner, The Leta, [1893] A. C. 468. **Refd.** The Englishman & The Australia, [1894] P. 239; Davidsson *v.* Hill, [1901] 2 K. B. 606; The Veritas, [1901] P. 304.

**8205. Proceeds of sale—In hands of trustee in bankruptcy.**]—In Nov. 1866, the smack *Emerald* & the smack *Welcome* came into collision & the *Emerald* was lost. S., the owner of the *Emerald*, afterwards commenced proceedings against C., the owner of the *Welcome*, in the Ct. of Admlty., for the recovery of damages, but negotiations having been entered into between the parties S., on Jan. 17, 1867, received a bill of exchange accepted by C., & payable three months after date, for £216, "for statutory loss sustained through the collision." In the same month of Jan. S. arrested the *Welcome* in the suit he had commenced in the Ct. of Admlty. to enforce his lien, but after retaining possession for about seventeen days, he withdrew, & upon C.'s application the proceedings were dismissed with costs. On Apr. 20, C. executed a deed of assignment of all his estate to trustees for creditors, & the bill of exchange, accepted by C., was dishonoured upon presentation. In the following month the *Welcome* was sold by C. without the direction of the trustees who, however, received the proceeds:—*Held:* S. had not a lien on the proceeds of the sale in the hands of the trustees.—*Re* CLARKE, *Ex p.* SNELL (1867), 16 W. R. 307.

**8206. Wreck.**]—UTOPIA (OWNERS) *v.* PRIMULA (OWNERS & MASTER), THE UTOPIA, No. 8215, *post.*

*C. In respect of Whose Acts.*

**8207. Wilful damage by master.**]—THE DRUID (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 9 L. T. 119; 6 Jur. 441; 166 E. R. 619.

*Annotations:*—**Distd.** The Seine (1859), Sw. 411. **Consd.** The Tasmania (1888), 13 P. D. 110. **Refd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220; The Ida (1860), Lush. 6; The James Seddon (1866), 35 L. J. Adm. 117; The Charkieh (1873), L. R. 4 A. & E. 59; The Lemington (1874), 32 L. T. 69; The Leon (1881), 6 P. D. 148; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; The Ripon City, [1897] P. 226; The Sylvan Arrow, [1923] P. 220.

**8208. Charterer—Right not lost by contract of owners with third parties.**]—By the maritime law there is a right of proceeding *in rem* against the vessel doing the damage, which cannot be taken away by any voluntary contract of the owners with a third party.—THE TICONDEROGA (1857), Sw. 215; 4 L. T. 774; 166 E. R. 1103.

*Annotations:*—**Apld.** The Lemington (1874), 32 L. T. 69. **Consd.** The Tasmania (1888), 13 P. D. 110; The Ripon City, [1897] P. 226; The Hopper No. 66, [1906] P. 34; The Sylvan Arrow, [1923] P. 220. **Refd.** The Mary (1879), 5 P. D. 14; The Jacob Christensen, [1895] P. 281; The Seacombe, The Devonshire, [1912] P. 21; The Penrith Castle, [1918] P. 142.

**8209.** ——.]—The owners of a steam wherry, which had been arrested in a cause of damage, intervened as defts., & obtained a release of their vessel on bail. Subsequently an answer was filed on their behalf which (*inter alia*), alleged that at the time of the collision with respect to which the suit was brought the wherry was hired to a charterer, under an arrangement whereby one-fifth of the vessel's earnings was to be paid to defts., but all expenses connected with her employment were to be borne by such charterer, who had absolute control over her management, & during the continuance of the agreement acted on his own behalf, & not in any way as agent or servant of the defts. The answer then further alleged that the wherry was not under the management or control of defts. so as to render them liable for any loss or damage sustained by pltfs. in the collision. On a motion to reject the paragraphs of the answer containing these allegations:—*Held:* the wherry was liable *in rem* for the damage proceeded for, & the answer must be amended in accordance with the motion.—THE LEMINGTON (1874), 32 L. T. 69; 23 W. R. 421; 2 Asp. M. L. C. 475.

*Annotations:*—**Consd.** The Tasmania (1888), 13 P. D. 110; The Ripon City, [1897] P. 226; The Hopper, No. 66, [1906] P. 34; The Sylvan Arrow, [1923] P. 220. **Reld.** The Jacob Christensen, [1895] P. 281; The Sarpen, [1916] P. 306.

**8210.** ——.]—The maritime lien resulting from collision is not absolute. It is a *primâ facie* liability of the ship, which may be rebutted by showing that the injury was done by the act of some one navigating the ship not deriving the authority from the owners; & that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners, so as to make the ship liable for the negligence of the charterers, who are *pro hac vice*, owners (HANNEN, P.).—THE TASMANIA (1888), 13 P. D. 110; 57 L. J. P. 49; 59 L. T. 263; 6 Asp. M. L. C. 305.

*Annotations:*—**Consd.** The Ripon City, [1897] P. 226; The Hopper, No. 66, [1906] P. 34; The Sylvan Arrow, [1923] P. 220.

**8211. Agent for sale.**]—The yacht of deft. was entrusted for reward to yachting agents for sale, & by their servants, moored in the winter season without striking her top gear, whereby, on a gale occurring the yacht drifted & fouled another yacht:—*Held:* deft.'s yacht was liable in a proceeding *in rem* in the Ct. of Admlty.—THE RUBY QUEEN (1861), Lush. 266; 167 E. R. 119.

*Annotations:*—**Reld.** The Dictator, [1892] P. 304; The Jacob Christensen, [1895] P. 281; The Ripon City, [1897] P. 226.

**8212.** —— **Consignee for sale asserting independent right.**]—In a cause of damage in the Admlty. Ct., alleged to have been done by, & imputable to the acts of the owners, & their servants, of the vessel proceeded against, a general denial was pleaded in answer, & a special defence that the damage complained of was the same as had already been adjudicated upon in a ct. of law, & judgment obtained & satisfied; at the hearing in the Admlty. Ct., it was proved by a witness, who was the principal deft. in the action at law, that the damage proceeded for was occasioned by acts done by him on his own responsibility, & in the assertion of a right claimed by him as consignee for sale of the vessel in question, & not as the agent on behalf of the owners; whereupon the judge of the Ct. of Admlty. held, that the suit could not be maintained, but, inasmuch as the defence thus disclosed had not been specifically pleaded, declined to give defts. their costs, or to go into the special defence, though his judgment thereon was asked for by the deft.'s counsel.—YEO *v.* TATEM, THE ORIENT (1871), L. R. 3 P. C. 696; 8 Moo. P. C. C. N. S. 74; 40 L. J. Adm. 29; 24 L. T. 918; 20 W. R. 6; 1 Asp. M. L. C. 108; 17 E. R. 241, P. C.

*Annotations:*—**Consd.** The Ripon City (1897), 66 L. J. P. 110; Campbell *v.* Pollak, [1927] A. C. 732. **Reld.** The Tasmania (1888), 13 P. D. 110; The Dictator, [1892] P. 304; The Joannis Vatis (No. 2), [1922] P. 213. **Mentd.** Rieken *v.* Yorke Peninsula JJ., Keam *v.* Adelaide Licensing JJ., [1908] A. C. 454.

**8213. Person acting without authority of owner—Compulsory pilotage.**]—She cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot (BRETT, L.J.).—THE PARLEMENT BELGE (1880), 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp M. L. C. 234, C. A.

*Annotations:*—**Consd.** Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38. **Apprvd.** S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492. **Reld.** The Longford (1889), 14 P. D. 34; The Dictator, [1892] P. 304; The Ripon City, [1897] P. 226; The Burns, [1907] P. 137; The Tervaete, [1922] P. 259; The Sylvan Arrow, [1923] P. 220. **Mentd.** Strousberg *v.* Costa Rica Republic (1880), 44 L. T. 199; The Newbattle (1885), 10 P. D. 33; Chalmers *v.* Scopenich (1892), 66 L. T. 348; Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149; Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352; South African Republic *v.* Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190; The Jassy, [1906] P. 270; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; The Broadmayne, [1916] P. 64; The Crimdon (1918), 35 T. L. R. 81; *Re* Suarez, Suarez *v.* Suarez, [1918] 1 Ch. 176; The Gagara, [1919] P. 95; West Russian S.S. Co. *v.* S.S. Gagara (1919), 35 T. L. R. 259; The Porto Alexandre, [1920] P. 30; Aksionairnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 3 K. B. 532; The Edna, [1921] 1 A. C. 735; The Mogileff (No. 2), [1922] P. 122; *Re* Bjornstad & Ouse Shipping Co., [1924] 2 K. B. 673; Compania Mercantil Argentina *v.* United States Shipping Board (1924), 93 L. J. K. B. 816; Duff Development Co. *v.* Kelanton Government, [1924] A. C. 797; The Jupiter (1924), 93 L. J. P. 156; The Jupiter (No. 3) (1927), 137 L. T. 333.

**8214.** ——.]—THE TASMANIA, No. 8210, *ante*.

**8215.** ——.]—Where the owners of a wreck remained in possession thereof, but the part authority undertook & neglected the duty of indicating its position so as to secure ships entering the harbour where she lay from the danger of collision with her:—*Held:* neither the owners nor the wreck were liable for a collision which ensued. The control & management thereof had been legitimately transferred by the owners to the part authority, acting within the apparent scope of its powers, & in the absence of negligence by the owner no maritime lien arose.

It was suggested in argument that, as the action against the *Utopia* is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their lordships to be contrary to principles of maritime law now well recognised. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, & that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, & if that be not proved no lien comes into existence, & the ship is no more liable than any other property which the owners at the time of collision may have possessed (SIR FRANCIS JEUNE).—UTOPIA (OWNERS) *v.* PRIMULA (OWNERS & MASTER), THE UTOPIA, [1893] A. C. 492; 62 L. J. P. C. 118; 70 L. T. 47; 9 T. L. R. 542; 7 Asp. M. L. C. 408; 1 R. 394, P. C.

*Annotations:*—**Consd.** The Ripon City, [1897] P. 226. **Apld.** The Snark, [1900] P. 105. **Consd.** The Sylvan Arrow, [1923] P. 220. **Reld.** Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Tervaete, [1922] P. 259; The Manorbier Castle (1923), 129 L. T. 31.

*Sect. 1.—Maritime lien: Sub-sect. 2, D.; sub-sects. 3 & 4, A. (a).]*

*D. In respect of What Damage.*

**8216. Damage to pier.**]—The owners of a pier, who are undertakers within the meaning of Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), acquire, under sect. 74 of that Act, a maritime lien in respect of any damage done to their pier by a ship, & may proceed *in rem* to recover that damage in the High Ct. of Admlty., & the ship-owners are debarred by sect. 74, from setting up the defence of inevitable accident.—THE MERLE (1874), 31 L. T. 447 ; 2 Asp. M. L. C. 402.

*Annotations:*—**Refd.** River Wear Comrs. *v.* Adamson (1877), 26 W. R. 217 ; The Veritas, [1901] P. 304 ; The Mostyn, [1927] P. 25.

**8217.** ——.]—THE VERITAS, No. 8188, *ante*.

*See, also,* ADMIRALTY, Vol. I., pp. 141, 142, Nos. 484–502.

**8218. Ship itself must be instrument.**]—CURRIE *v.* M'KNIGHT, No. 8182, *ante*.

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SUB-SECT. 3.—SALVAGE.

**8219. General rule.**]—(1) Salvage is a question of the *jus gentium*, & materially different from the question of a mariner's contract, which is a creature of the particular institutions of each country, to be applied & construed & explained by its own particular rules (SIR WILLIAM SCOTT).

(2) Every person assisting in rescue has a lien on the thing saved. He has . . . an action *in personam* also ; but his first & his proper remedy is *in rem* (SIR WILLIAM SCOTT).—THE TWO FRIENDS (1799), 1 Ch. Rob. 271 ; 1 Eng. Pr. Cas. 130 ; 165 E. R. 174.

*Annotations:*—*As to* (1) **Consd.** The Johann Friederich (1839), 1 Wm. Rob. 35. **Refd.** The Cosmopolite (1801), 3 Ch. Rob. 333. *Generally,* **Mentd.** Bedreechund *v.* Elphinstone (1830), 2 State Tr. N. S. 379 ; The Ida (1860), Lush. 6 ; The Roumanian, [1916] 1 A. C. 124.

**8220.** ——.]—(1) When a shipwright has received a vessel into his yard & repaired her, his rights are subject to all existing obligations then complete & due against the vessel.

(2) Claims for salvage take precedence of a shipwright's lien in respect of subsequent repairs to the vessel.

(3) The shipwright's lien is postponed to masters' & seamen's wages earned prior, but not to such wages earned subsequent to the time when the vessel, entered the shipwright's yard.

(4) The seamen & master are, in the case of a foreign vessel, entitled to an allowance for return to their own country, & this right takes priority also of such shipwright's claim.

(5) The shipwright's lien takes precedence of all claims in respect of necessaries supplied subsequent to the time when the vessel entered the shipwright's yard.

(6) Necessaries do not *ab origine* give a lien but only a statutory remedy against the ship.

(7) From the earliest times, salvage has been deemed a lien on the ship (DR. LUSHINGTON).—THE GUSTAF (1862), Lush. 506 ; 31 L. J. P. M. & A. 207 ; 6 L. T. 660 ; 1 Mar. L. C. 230 ; 167 E. R. 230.

*Annotations:*—*As to* (2) **Refd.** The Russland, [1924] P. 55. *As to* (3) **Folld.** The Immacolata Concezione (1883), 9 P. D. 37 ; The Tergeste, [1903] P. 26. *As to* (4) **Folld.** The Livietta (1883), 8 P. D. 209. *As to* (5) **Refd.** The Stream Fisher, [1927] P. 73. *As to* (6) **Apld.** The Livietta (1883), 8 P. D. 209. **Refd.** The Heinrich Bjorn (1885), 10 P. D. 44. *Generally,* **Refd.** The Markland (1871), L. R. 3 A. & E. 340 ; Simpson *v.* Blues (1872), L. R. 7 C. P. 290.

**8221.** ——.]—THE SCHILLER (CARGO EX), No. 7079, *ante*.

**8222. In respect of losses to salvage ship—Losses must be actual.**]—THE MARTHA, No. 7421, *ante*.

**8223. To what property attaching—Ship.**]—THE GUSTAF, No. 8220, *ante*.

**8224.** —— **Passengers' effects.**]—THE WILLEM III., No. 7189, *ante*.

**8225. Lien of shipowner on cargo—For contribution from owners of goods—After payment by shipowner to release ship.**]—A shipowner who has paid a sum of money under 9 & 10 Vict. c. 99, in order to release the ship & cargo from a claim for salvage, has a lien on the cargo for the proportion of those expenses payable to him by the owners of the goods, & an insurable interest in the cargo in respect of such lien.

The owners of goods on board a ship are bound to contribute to the salvage of the ship & cargo as in a case of general average.—BRIGGS *v.* MERCHANT TRADERS' SHIP LOAN & INSURANCE ASSOCN. (1849), 13 Q. B. 167 ; 18 L. J. Q. B. 178 ; 13 L. T. O. S. 68 ; 13 Jur. 787 ; 116 E. R. 1227.

*Annotation:*—**Mentd.** King *v.* Accumulative, etc. Insce. (1857), 30 L. T. O. S. 119.

**8226. Person employed on stranded vessel—To save cargo—Services in nature of salvage.**]—Where a person has been employed by the master of a stranded vessel to do various acts for the purpose of saving the cargo, such person has a lien on the cargo for his charges, the services being in the nature of salvage, & the charges payable by particular average.—HINGSTON *v.* WENDT (1876), 1 Q. B. D. 367 ; 45 L. J. Q. B. 440 ; 34 L. T. 181 ; 3 Asp. M. L. C. 126 ; *sub nom.* KINGSTON *v.* WENDT, 24 W. R. 664, D. C.

*Annotations:*—**Refd.** Prehn *v.* Bailey (1881), 45 L. T. 399 ; The Gas Float Whitton, No. 2, [1895] P. 301.

**8227. Effect of contract with underwriter—Not dependent on success—Right lost.**]—Pltfs., with the knowledge & assent of her owners, undertook to lift a sunken vessel, under a contract with the insurers, who advanced to pltfs. before the work commenced 40 per cent. of the amount for which the vessel was insured. The vessel was successfully raised, but the operation of lifting proved more costly than was anticipated, & some of the underwriters in the meantime became insolvent. In an action of salvage brought by pltfs. against defts. as owners of the vessel :—*Held :* the contract with the underwriters, which was not dependent on success, precluded pltfs. from asserting a maritime lien on the vessel, & claiming salvage remuneration from her owners.—THE SOLWAY PRINCE, [1896] P. 120 ; 65 L. J. P. 45 ; 74 L. T. 32 ; 12 T. L. R. 184 ; 8 Asp. M. L. C. 128.

*Annotations:*—**Distd.** The Goulandris, [1927] P. 182. **Refd.** The Leon Blum, [1915] P. 90.

**8228.** —— **" No cure no pay "—Right retained.**]—Pltfs., a firm of salvage contractors, rendered salvage services in the Bosphorus to the steamship *G.* under Lloyd's standard form of salvage agreement known as " No cure no pay." The agreement provided that pending completion of security the contractors should have a maritime lien on the property salved. The agreement was signed by the master on behalf of the owner of the ship

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**PART XIX. SECT. 1, SUB-SECT. 3.**

n. *To what property attaching—Goods saved.*]—Salvors have a right to retain the goods saved, until the amount of the salvage may be adjusted, & tendered to them.—*Re* THE ROYAL WILLIAM (1837), 1 S. V. A. R. 107.—**CAN.**

o. *Vessel salved by charterers.*]—A wrecking co. chartered a steam tug from the owners. Through the negligence of the co.'s servants the vessel was sunk, & the co. raised her :—*Held :* they were entitled to a lien for the salvage.—THE CONQUEROR (1885), 5 C. L. T. 332.—**CAN.**

p. *Lien of receiver of droits—For fees.*]—COATESWORTH *v.* WALSH (1853), 3 I. C. L. R. 93.—**IR.**

& the owners of the cargo. The *G.* was taken to Constantinople, where no security being forthcoming, she was arrested in the Turkish Cts. She was, however, released on the terms that if she was allowed to sail to Alexandria she should be rearrested there, & accordingly an order was obtained by pltfs. for a *saisie conservatoire* of the ship on her arrival at Alexandria. After the arrest at Constantinople had been taken off the owner of the *G.* became bkpt., & when the ship arrived at Alexandria she was seized by the trustee in bkpcy. Pltfs. proceeded to arbn. in London under the terms of the agreement & obtained an award against both ship & cargo, but the cargo owners only were represented at the arbn. Shortly afterwards the trustee in bkpcy., with the approval of the Mixed Tribunal of Commerce, sold the ship to defts. & guaranteed that she was free of all charges on the part of creditors of the bkpt. owner. Under the Egyptian Code Civil Mixte there is no right *in rem* or maritime lien for salvage. Pltfs. claimed in the bkpcy. proceedings the amount of the salvage award, but the trustee in bkpcy. took up the position that the master had no authority to sign the arbn. agreement & referred the claim to the Egyptian Ct. When the ship came to this country pltfs. issued a writ *in rem* & defts. gave an undertaking for bail to avoid the arrest of the ship & moved to set the writ aside:—*Held:* (1) as the services were rendered under "no cure no pay" terms they gave rise to a maritime lien; (2) the sale under the authority of the Egyptian Ct. was not equivalent to a sale in an action *in rem* but was a sale *cum onere;* (3) pltfs.' rights were not merged in the unperformed award; & (4) as the claim in the bkpcy. proceedings afforded only a partial remedy, if any, & was entirely different from the relief obtainable in England, there was nothing inequitable or vexatious in allowing pltfs. to enforce their rights *in rem* against the ship in the present action.—THE GOULANDRIS, [1927] P. 182; 96 L. J. P. 85; 137 L. T. 90; 43 T. L. R. 308; 17 Asp. M. L. C. 209.

**8229. Life salvage—Statutory not maritime lien.**]—NOURSE *v.* LIVERPOOL SAILING SHIP OWNERS' MUTUAL PROTECTION & INDEMNITY ASSOCN., [1896] 2 Q. B. 16; 65 L. J. Q. B. 507; 74 L. T. 543; 44 W. R. 500; 12 T. L. R. 406; 1 Com. Cas. 323, 388; 8 Asp. M. L. C. 144, C. A.

——.]—*See* 1894 Act, s. 544.

**Possessory lien.**]—*See* Sect. 3, *post.*

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SUB-SECT. 4.—WAGES AND DISBURSEMENTS.

*A. Wages.*

*(a) Of Master.*

*See* 1894 Act, ss. 164–167.

**8230. Right to lien.**]—A captain of a ship has no lien upon the ship for wages, stores, or repairs done in England.—WILKINS *v.* CARMICHAEL (1779), 1 Doug. K. B. 101; 99 E. R. 70.

*Annotations:*—**Apld.** Smith *v.* Plummer (1818), 1 B. & Ald. 575. **Refd.** Cowell *v.* Simpson (1809), 16 Ves. 275; The Neptune (1833), 3 Hag. Adm. 129; The Windsor Castle (1841), 7 L. T. 225; The Araminta (1856), Sw. 81; Bristow *v.* Whitmore (1858), John. 96.

**8231.** ——.]—The master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo.—SMITH *v.* PLUMMER (1818), 1 B. & Ald. 575; 106 E. R. 213.

*Annotations:*—**Apld.** Atkinson *v.* Cotesworth (1825), 3 B. & C. 647. **Distd.** Bristow *v.* Whitmore (1861), 9 H. L. Cas. 391. **Folld.** Morgan *v.* Castlegate S.S Co., The Castlegate, [1893] A. C. 38. **Refd.** The Mary Ann (1865), L. R. 1 A. & E. 8; Japp *v.* Campbell (1887), 57 L. J. Q. B. 79.

**8232.** ——.]—A master of a ship has no lien on the ship or freight for wages or for any expenditure he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal & agent, where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses; if the owner adopts the benefit of that contract, he must, in equity, also bear its burthens.

Where, therefore, the master of an ordinary seeking ship entered into a charterparty, under seal, to carry troops from the Mauritius to England, & stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship, in order to enable him to carry the troops, & at the Cape of Good Hope entered into another charterparty, not under seal, to a similar effect, & made the specified alterations, & paid money, & drew bills to meet the expenses necessary to the making of these alterations, & the voyage was performed:—*Held:* in equity, the master was first entitled out of the freight earned under these charterparties to be repaid the sums advanced, & to be indemnified against the bills, & the owner, or his mtgee., was only entitled to the net freight after deducting these charges.—BRISTOW *v.* WHITMORE (1861), 9 H. L. Cas. 391; 31 L. J. Ch. 467; 4 L. T. 622; 8 Jur. N. S. 291; 9 W. R. 621; 1 Mar. L. C. 95; 11 E. R. 781, H. L.; *revsg.* (1859), 4 De G. & J. 325, L. C.

*Annotations:*—**Folld.** The Red Rose (1866), L. R. 2 A. & E. 80, n.; The Feronia (1868), L. R. 2 A. & E. 65. **Distd.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Refd.** Lyall *v.* Hicks (1859), 27 Beav. 616; Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209; The Orienta, [1894] P. 271; El Argentino (1909), 101 L. T. 80. **Mentd.** Tooth *v.* Hallett (1869), 4 Ch. App. 242; Cox *v.* Barker, Barker *v.* Cox (1876), 3 Ch. D. 359.

**8233.** —— **Bankruptcy of majority of interests in vessel.**]—*Semble:* where the majority of interests in a vessel becomes bkpt. or insolvent the master may proceed against the ship for the

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**PART XIX. SECT. 1, SUB-SECT. 4.—A. (a).**

**8230 i.** *Right to lien.*]—The master has no right against the owners to detain the ship or freight for wages, or any disbursements made by him on account of the ship.—LAND *v.* MALDEN (1849), 5 U. C. R. 309.—**CAN.**

**8230 ii.** ——.]—A captain of a vessel has no lien for his wages on the vessel. —JASMIN *v.* LAFANTASIE (1863), 7 L. C. J. 119; 13 L. C. R. 226.—**CAN.**

**8230 iii.** ——.]—Any legal claim of master for his wages would under 17 & 18 Vict. c. 104, s. 191, constitute a maritime lien on the ship.—OXLEY *v.* SPEARWATER (1867), 7 N. S. R. (1 G. & O.) 144.—**CAN.**

**8230 iv.** ——.]—The master or captain of a vessel has no lien or privilege on the vessel for his wages.—DELISLE *v.* LÉCUYER (1871), 15 L. C. J. 262.—**CAN.**

**8230 v.** ——.]—*Held:* the master had a maritime lien for his wages, as well as for disbursements actually & necessarily made, & liability incurred in connection with the proper working & management of the ship.—REIDE & HAYES *v.* THE QUEEN OF THE ISLES (1892), 3 Exch. C. R. 258.—**CAN.**

**8230 vi.** ——.]—The master of a ship has a lien upon the ship for the recovery of wages due.—*Re* THE ANNE (1863), 2 Hyde, 273.—**IND.**

**8230 vii.** ——.]—*Re* THE PERSIA, *Ex p.* GARDNER (1869), 6 Bom. O. C. 138. —**IND.**

**8230 viii.** ——.]—*Re* THE PORTUGAL (1870), 6 B. L. R. 323.—**IND.**

**8230 ix.** ——.]—*Re* THE GWYDYR CASTLE (1920), 41 N. L. R. 231.—**S. AF.**

**q.** —— *Master of barge.*]—Under the common law in force in Lower Canada, a captain of a barge has a lien upon it for his wages, so long as he remains on board; & that right includes the right of seizure before judgment, without the formality of an affidavit.—DUBEAULT *v.* ROBERTSON (1864), 8 L. C. J. 334.—**CAN.**

**r.** —— ——.]—The captain of a

*Sect.* 1.—*Maritime lien: Sub-sect.* 4, *A.* (*a*) & (*b*).]

recovery of wages.—THE SIMLAH (1851), 18 L. T. O. S. 35; 15 Jur. 865.

*Annotation:*—**Refd.** The Albion (1872), 27 L. T. 723.

**8234.** —— **Whatever municipal law of colony.**]—Merchant Shipping Act, 1854 (c. 104), applies to the colonies; & by Merchant Shipping Act, 1854 (c. 104), s. 191, a master has a lien for his wages in the Vice-Admlty. Ct., whatever may be the municipal law of the colony.—THE RAJAH OF COCHIN (1859), Sw. 473; 166 E. R. 1223.

*Annotation:*—**Refd.** The Yuri Maru, The Woron, [1927] A. C. 906.

**8235.** —— **Admiralty Court Act, 1861 (c. 10), s. 10.**]—Admiralty Court Act, 1861 (c. 10), s. 10, the master has a maritime lien both for his wages & disbursements, & his claim is therefore to be preferred to the claim of a mtgee.—THE MARY ANN (1865), L. R. 1 A. & E. 8; 35 L. J. Adm. 6; 13 L. T. 384; 12 Jur. N. S. 31; 14 W. R. 136; 2 Mar. L. C. 294.

*Annotations:*—**Apld.** The Daring (1868), L. R. 2 A. & E. 260; The Harriet (1868), 18 L. T. 804. **Folld.** The Feronia (1868), L. R. 2 A. & E. 65. **Consd.** The Panthea (1871), 25 L. T. 389. **Folld.** The Hope (1873), 28 L. T. 287. **Apld.** The Fairport (1882), 8 P. D. 48. **Consd.** Laws *v.* Smith, The Rio Tinto (1884), 9 App Cas. 356. **Apld.** The Ringdove (1886), 11 P. D. 120. **Overd.** Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209. **Consd.** Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38. **Distd.** The Orienta, [1895] P. 49. **Refd.** The Ripon City, [1897] P. 226; The Marie Glaeser, [1914] P. 218.

**8236.** —— ——.]—*Qu.:* has a master under Admiralty Court Act, 1861 (c. 10), s. 10, a maritime lien for his wages & disbursements?—THE BEESWING (1885), 53 L. T. 554; 5 Asp. M. L. C. 484, C. A.

*Annotation:*—**Refd.** The Turgot (1886), 11 P. D. 21.

**8237.** —— **Master of foreign ship—Lex fori.**]—(1) In a suit by a foreign master against the freight for his wages, the question whether the freight is liable is a question of remedy & not of contract, & is therefore to be determined by the *lex fori*.

(2) Merchant Shipping Act, 1854 (c. 104), notwithstanding sect. 109, extends to the masters of foreign ships, & gives them a remedy against ship & freight for their wages.—THE MILFORD (1858), Sw. 362; 31 L. T. O. S. 42; 4 Jur. N. S. 417; 6 W. R. 554; 166 E. R. 1167.

*Annotations:*—*As to* (1) **Dbtd.** The Halley (1867), L. R. 2 A. & E. 3. **Consd.** Poll *v.* Dambe, [1901] 2 K. B. 579. **Folld.** The Tagus, [1903] P. 44. **Apld.** The Colorado, [1923] P. 102. **Refd.** Davidsson *v.* Hill, [1901] 2 K. B. 606. *As to* (2) **Apprvd.** The Jonathon Goodhue (1859), Sw. 524. *Generally*, **Refd.** The Nina (1867), 17 L. T. 391; R. *v.* Stewart, [1899] 1 Q. B. 964. **Mentd.** Salt Union *v.* Wood (1893), 41 W. R. 301.

**8238.** —— —— ——.]—In proceedings *in rem* by the foreign master of an Argentine vessel in an English port, the claim of the master consisted of (*a*) wages as supercargo, & afterwards as master; (*b*) disbursements whilst acting as supercargo, & afterwards as master. On the question of priority as against a mtgee. intervening:—*Held:* (1) though by the *lex loci* the master could only claim his wages & disbursements for the last voyage as a "privileged debt" in priority to the mtgee., the question was one of remedy, & therefore the *lex fori* applied, under which, by reason of the maritime lien conferred by 1894 Act, s. 167, he could claim, in priority, the whole of his wages & disbursements whilst master; (2) he was also entitled to add thereto his wages as a seaman whilst acting as supercargo, & such disbursements as he had then made by way of advances to the crew on account of their wages.—THE TAGUS, [1903] P. 44; 72 L. J. P. 4; 87 L. T. 598; 19 T. L. R. 82; 9 Asp. M. L. C. 371.

*Annotations:*—*As to* (1) **Apld.** The Colorado, [1923] P. 102. *As to* (2) **N.F.** The Petone, [1917] P. 198.

**8239.** —— **Master hired by person fraudulently obtaining possession.**]—(1) The fact that the master was hired by one who had fraudulently obtained possession of the ship will not prevent the master having a lien upon the ship for his wages & disbursements, if he has discharged his duties in ignorance of the fraud.

(2) The master's lien under Admiralty Court Act, 1861 (c. 10), s. 10, for disbursements on ship's account, does not include a lien for mere liabilities, as upon a bill of exchange drawn by him upon the owner & dishonoured.—THE EDWIN (1864), Brown. & Lush. 281; 4 New Rep. 382; 33 L. J. P. M. & A. 197; 10 L. T. 658; 12 W. R. 992; 2 Mar. L. C. 36; 167 E. R. 365.

*Annotations:*—*As to* (1) **Consd.** The Red Rose (1866), L. R. 2 A. & E. 80, n.; The Ripon City, [1897] P. 226. *As to* (2) **Consd.** The Fairport (1882), 8 P. D. 48. *Generally* **Refd.** The Feronia (1868), L. R. 2 A. & E. 65; The Sara (1887), 12 P. D. 158.

**8240.** —— **Master part owner.**]—THE FERONIA, No. 8289, *post*.

**8241. What may be recovered—Monthly sum for purchase of cabin stores.**]—In a suit for wages brought by the master under 7 & 8 Vict. (c. 112) an item of £6 per month for supplying cabin stores in the agreement for wages directed to be struck out of the alleged agreement, as being in the nature of a special contract.—THE TECUMSEH (1850), 3 Wm. Rob. 144; 6 Notes of Cases, 658; 13 L. T. O. S. 8; 13 Jur. 131; 166 E. R. 916.

*Annotation:*—**Refd.** The Enterprise (1861), 5 L. T. 29.

**8242.** —— **Wages earned on that ship.**]—The master's lien on a vessel when the owner is bkpt., is limited to services in that vessel. A balance due from the owner to the master for services in another vessel disallowed.—THE JULINDUR (1853), 1 Ecc. & Ad. 71; 11 L. T. 113; 164 E. R. 42.

**8243.** —— —— **Some duties performed ashore.**]—A master is entitled to sue the ship for wages as "earned on board the ship" within Admiralty Court Act, 1861 (c. 10), s. 10, if he performed the duties of master, although during his service he did not sleep on board the ship, & many of his duties were performed on shore.

He may also sue for disbursements made by him during such service on the ship's account, but not for mere liabilities incurred.

I have no doubt that the master is entitled to the lien he claims both for wages & disbursements (DR. LUSHINGTON).—THE CHIEFTAIN (1863), Brown. & Lush. 104; 2 New Rep. 528; 32 L. J. P. M. & A. 106; 8 L. T. 120; 9 Jur. N. S. 388; 11 W. R. 537; 1 Mar. L. C. 327; 167 E. R. 316.

*Annotations:*—**Apld.** The Edwin (1864), Brown. & Lush. 281. **Consd.** The Red Rose (1866), L. R. 2 A. & E. 80, n.; The Feronia (1868), L. R. 2 A. & E. 65; The Fairport (1882), 8 P. D. 48; The Orienta, [1894] P. 271. **Refd.** The Ruby (No. 2), [1898] P. 59.

**8244.** —— **Not damages for wrongful dismissal.**]—(1) A shipmaster or seaman suing under Admiralty Court Act, 1861 (c. 10), on a special contract of service has no maritime lien in respect of damages for wrongful dismissal, inasmuch as

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barge has no right or privilege of conservatory process on the barge for his wages.—DAGENAIS *v.* DOUGLAS (1871), 16 L. C. J. 109.—**CAN.**

t. —— *Vessel navigating inland waters—Lien for six months.*]—GOULET *v.* DANSEREAU (1897), Q. R. 12 S. C. 15.—**CAN.**

s. *Set-off against maritime lien.*]—There is no set-off against a maritime lien except in the case of masters' wages under the Merchant Shipping Act, 1854.—THE CONQUEROR (1885), 5 C. L. T. 332.—**CAN.**

such a suit could not have been brought under the ancient jurisdiction of the High Ct. of Admlty.

(2) *Semble:* the maritime lien which a seaman suing under the ordinary mariner's contract has in respect of wages is not limited to the wages earned while actually on board the ship, but extends to wages due after a wrongful determination of the contract of service.—THE BRITISH TRADE, [1924] P. 104; 93 L. J. P. 33; 130 L. T. 827; 40 T. L. R. 292; 16 Asp. M. L. C. 296.

**8245. Allowing balance to remain in owners' hands—At interest—Loss of right.**]—A master who, after receiving a portion of his wages from the managing owners, elects to allow the balance to remain in their hands at interest, by so doing loses his lien, & cannot recover the balance *in rem*, but if he had no opportunity of receiving his wages, or has been refused payment of them on demand, the mere fact of his allowing them to remain in the managing owners' hands after they become due will not deprive him of his remedy.—THE RAINBOW (1885), 53 L. T. 91; 5 Asp. M. L. C. 479.

**8246. —— No opportunity of receiving—Right not lost.**]—THE RAINBOW, No. 8245, *ante*.

*Compare* ADMIRALTY, Vol. I., pp. 131–133, Nos. 363–388.

(*b*) *Of Seamen.*

*See* 1894 Act, ss. 164–167.

**8247. General rule—Indelible & perpetual lien—Following ship wherever she goes.**]—This question arises on the admission of a defensive allegation offered by the owners of this vessel, in answer to a petition for wages. It appears that at the time this person entered into the service of the ship at New York as a mariner, she was the property of American owners, but that the vessel has been since transferred to British subjects. Now although it is a settled principle for the protection of mariners generally, that wages form an indelible & perpetual lien on the ship, & follow her wherever she goes, it is easy to see the great inconvenience that might arise from carrying this principle to its full extent in the case of foreign purchases. Where an English ship is purchased by English merchants, the purchasers have an opportunity of becoming acquainted with all the circumstances of the antecedent history of the vessel; but in making purchases of this description, it is scarcely possible for them to inform themselves of all the transactions, regular or irregular, in which she may have been engaged. . . . To what country claimant belongs is not stated. As a British subject he could not regularly embark in such an undertaking under this military commander without the authority of his govt.; & if he is an American, his own govt. had prohibited such an engagement by public proclamation. If he is a subject of some other country, the general objection holds that the expedition itself was the unauthorised act of a private person, out of which no legal claims can arise. For that part of the voyage which was legal, it is admitted that the wages had been paid in advance, & I am clear therefore that if this allegation is proved, it is of a nature to bar the claim which is set up, especially against the present holders of the vessel, who come in as innocent successors to the former owners, & knowing nothing of her antecedent history (SIR WILLIAM SCOTT).—THE LEANDER (1808), Edw. 35; 165 E. R. 1024.

**8248. Effect of payment to master—Ship remains liable.**]—Payment to the master is not payment to the seamen, but the ship itself is liable for their wages (*per* CUR.).—MADDOX *v.* —— (1701), 12 Mod. Rep. 526; 88 E. R. 1495.

*Annotation:*—**Refd.** Mills *v.* Long (1754), Say. 136.

**8249. What may be recovered—Subsistence.**]—Mariners' wages take precedence of bottomry bonds. Subsistence part of wages. In cases of Greek navigation mariners to be subsisted till conveyed back to their own country.

Is the subsistence of these men to be considered as part of their wages? I think it is so to be considered (SIR WILLIAM SCOTT).—THE MADONNA D'IDRA (1811), 1 Dods. 37; 165 E. R. 1224.

*Annotations:*—**Consd.** The Golubchick (1840), 1 Wm. Rob. 143. **Refd.** The Union (1860), 30 L. J. P. M. & A. 17.

**8250. —— ——.**]—Several actions were brought by different pltfs. against a foreign ship, which was sold at the instance of one of pltfs. & the proceeds brought into ct.:—*Held:* (1) pltf., at whose instance the proceeds were so made available for the other claimants, was entitled to be paid his costs out of the fund in ct., up to & inclusive of the sale of the ship, in priority to other claimants; (2) the lien of seamen takes priority over the common law possessory lien of a shipwright, for wages earned before the shipwright's lien attached, for subsistence money from the date of leaving the service of the ship till the return home of the seamen, & for the cost of their passage home.—THE IMMACOLATA CONCEZIONE (1883), 9 P. D. 37; 52 L. J. P. 19; 50 L. T. 539; 32 W. R. 705; 5 Asp. M. L. C. 208.

*Annotations:*—*As to* (2) **Apld.** The Tagus, [1903] P. 44. **Folld.** The Russland, [1924] P. 55. **Refd.** The Tergeste, [1903] P. 26. *Generally*, **Consd.** The Titia (1891), 64 L. T. 148.

**8251. —— Viaticum—Foreign seamen.**]—THE GUSTAF, No. 8220, *ante*.

**8252. —— —— ——.**]—THE IMMACOLATA CONCEZIONE, No. 8250, *ante*.

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**PART XIX. SECT. 1, SUB-SECT. 4.—A. (b).**

b. *Right to lien.*]—DUBEAULT *v.* ROBERTSON (1864), 8 L. C. J. 334.—**CAN.**

c. —— *During possession of ship.*]—*Held:* the men preserved their privilege upon the vessel for their wages & materials furnished only so long as they retained possession of the ship.—FRÉCHETTE *v.* GOSSELIN (1851), 1 L. C. R. 145.—**CAN.**

d. —— *Caretaker of ship.*]—The caretaker of a ship not in commission is not a "seaman," & has no lien for his wages.—BROWN *v.* THE FLORA (1898), 6 Exch. C. R. 133.—**CAN.**

e. —— —— *Part-owner remaining on board during repairs.*]—JORGENSEN *v.* THE CHASINA, [1926] 1 D. L. R. 1193; [1926] Exch. C. R. 110; [1926] 1 W. W. R. 632; 37 B. C. R. 24.—**CAN.**

f. —— *Musician.*]—In the absence of a contract to pay him wages a musician is not a "seaman" within the meaning of the Merchant Shipping Act, & therefore is not entitled to a maritime lien for his services.—MCELHANEY *v.* THE FLORA (1897), 6 Exch. C. R. 129.—**CAN.**

g. —— *Layman on boat for fishing purposes.*]—A layman who does not sleep on a boat, but who fishes from & takes part in working the boat, is a seaman & entitled to a maritime lien.—MORRISETTE *v.* THE MAGGIE (1916), 34 W. L. R. 39; 10 W. W. R. 21.—**CAN.**

**8249 i.** *What may be recovered—Subsistence.*]—A brigantine, bound from Genoa to Limerick, having been shipwrecked off the coast of Galway, the master entered into a bottomry bond upon the ship, freight, & cargo to pay for salvage, repairs, & storage of cargo, a sale having been directed at the suit of the bondholder:—*Held:* although the fund realised was deficient, the crew had a valid claim upon it for their wages, for kettle-money or subsistence pending their suit, &, according to the custom of Italian seamen, to wine-money in lieu of their allowance of wine, but not either for increased wages from the time of their leaving the Mediterranean, or for conduct-money to take them home.—THE COSTANTE (1851), 18 L. T. O. S. 20.—**IR.**

**8251 i.** —— *Viaticum—Foreign seamen.*]—THE COSTANTE (1851), 18 L. T. O. S. 20.—**IR.**

h. —— *Wine-money—Italian seamen.*]—THE COSTANTE (1851), 18 L. T. O. S. 20.—**IR.**

*Sect.* 1.—*Maritime lien: Sub-sect.* 4, *A.* (*b*) & (*c*), & *B.* (*a*).]

**8253. —— Victualling allowance.**]—THE TERGESTE, No. 8421, *post.*

**8254. —— Damages for wrongful dismissal.**]—THE BRITISH TRADE, No. 8244, *ante.*

**8255. —— Wages after wrongful dismissal.**]—THE BRITISH TRADE, No. 8244, *ante.*

**8256. Wages earned on unauthorised expedition —Not legally recoverable.**]—THE LEANDER, No. 8247, *ante.*

**8257. Seamen engaged for foreign going ship—Voyage not prosecuted — Engagement not in writing.**]—Seamen engaged by the owners or their agent for a voyage upon a foreign going ship, which does not proceed upon the voyage, are entitled to a lien for their wages upon the ship, & the proceeds of sale thereof, although the engagement of the seamen has not been in writing. —*Re* GREAT EASTERN S.S. CO., WILLIAMS' CLAIM (1885), 53 L. T. 594; 5 Asp. M. L. C. 511.

*Annotations:*—**Apld.** Vickerson *v.* Crowe, [1914] 1 K. B. 462; Haws *v.* Brown (1917), 81 J. P. 300. **Refd.** R. *v.* City of London Court Judge & Michigan (Owners) (1890), 6 T. L. R. 364; Palace Shipping Co. *v.* Caine, [1907] A. C. 386; The British Trade [1921] P. 104.

**8258. "Ship's husband"—No lien as seaman.**]—(1) A ship's husband, not being a "seaman" claiming "wages earned by him on board the ship" within Admiralty Court Act, 1861 (c. 10), s. 10, has no maritime lien upon which he can found an action *in rem* for "wages" under County Courts Admiralty Jurisdiction Act, 1868 (c. 71), s. 3 (2).

(2) The purchaser of a ship sold by the high bailiff of a county ct. under the decree of a county ct. having admlty. jurisdiction made in an action *in rem*, takes the ship free from all antecedent liens, mtges., & liabilities.—THE RUBY (No. 2), [1898] P. 59; 67 L. J. P 28; 78 L. T. 235; 46 W. R. 687; 14 T. L. R. 184; 8 Asp. M. L. C. 421.

*Annotation:*—*As to* (1) **Refd.** The Ambaticlos, The Cephalonia, [1923] P. 68.

**Right of person paying off claims against ship.**]—*See* Nos. 8469–8473, *post.*

*(c) To What Property Attaching.*

*See* 1894 Act, ss. 164–167.

**8259. Freight—Lien of master.**] — SMITH *v.* PLUMMER, No. 8231, *ante.*

**8260.** —— ——.]—(1) The master of a ship has no lien on the certificate of registry, either for his wages or for moneys disbursed by him for the use of the ship; nor have the ship brokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship.

(2) The master of a ship has no claim on the accruing freight, either for his wages or for moneys disbursed by him for the use of the ship.

(3) Ship brokers advancing moneys to the owner of a ship for the ship's use, having at the same time notice, by an indorsement on the certificate of registry, of a prior mtge. on the ship, are not entitled to be repaid their advances out of the freight in priority to the mtge., although the mtgee. does not take possession of the ship until after she has entered the docks from her homeward voyage.—GIBSON *v.* INGO (1847), 6 Hare, 112; 67 E. R. 1103.

*Annotations:*—*Generally*, **Refd.** The Celtic King, [1894] P. 175. **Mentd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421.

**8261. —— Lien of seamen.**]—A warrant of arrest at the instance of foreign seamen, shipped at Ancorna by the master, who stipulated to procure them a passage back with wages, decreed against the freight & master, the ship being gone & the claims of the men admitted; & upon the return of the ship to England, held also, the claims being unsettled, that the ship was liable for the whole demand, wages & costs.—THE MARGARET (1835), 3 Hag. Adm. 238; 166 E. R. 394.

**8262. Part of vessel—Lien of seamen.**]—THE NEPTUNE, No. 8320, *ante.*

**8263.** —— ——.]—THE RELIANCE, No. 7400, *ante.*

**8264. Cargo—Lien of seamen—Whether confined to cargo as freight.**]—A ship, designed on a trading voyage from Liverpool to Africa & back, sailed with goods for barter, & on her voyage home was, with her cargo, totally destroyed: the ship & cargo were the property of the same owner, & were insured. In an action for wages against the owner:—*Held:* in conformity with the general rule of law, freight is the mother of wages, the summary petition was inadmissible. A mariner has no lien for wages on the cargo, as cargo; his lien is upon the ship & freight. *Qu.:* whether if any cargo were saved it could be held to represent the freight.—THE LADY DURHAM (1835), 3 Hag. Adm. 196; 166 E. R. 378.

*Annotation:*—**Distd.** The Riby Grove (1843), 2 Wm. Rob. 52.

**8265.** —— —— ——.]—THE RIBY GROVE (1843), 2 Wm. Rob. 52; 2 Notes of Cases, 205; 10 L. T. 913; 7 Jur. 586.

*Annotation:*—**Refd.** The Kaleten (1914), 30 T. L. R. 572.

**8266.** —— ——.]—A foreign vessel had been sold under a decree of the ct. to meet money advanced on a bottomry bond. The proceeds, together with the freight, would be exhausted thereby. A considerable sum was due for wages. The cargo had been arrested in a suit for those wages. The owners of the cargo contended that the cargo was not liable:—*Held:* on the principle that seamen have a general lien on the ship, & according to the terms of the contract, the cargo was liable.—THE LOUISA BERTHA (1850), 16 L. T. O. S. 216; 14 Jur. 1006.

**8267. Certificate of registry—Lien of master.**]—GIBSON *v.* INGO, No. 8260, *ante.*

**8268. Proceeds of sale—Ship sold in foreign port—Lien of seamen.**]—THE CATHARINA (1851), 11 L. T. 113; *sub nom.* THE CATHARINA (FORMERLY THE CROXDALE), 17 L. T. O. S. 43; 15 Jur. 231.

*Annotation:*—**Mentd.** Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516.

*B. Disbursements.*

*(a) In General.*

*See* 1894 Act, s. 167.

**8269. Right to lien.**]—WILKINS *v.* CARMICHAEL, No. 8230, *ante.*

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k. —— *Increased wages.*]—THE COSTANTE (1851), 18 L. T. O. S. 20.—**IR.**

l. *Effect of delay in enforcement.*]—*Re* THE HAIDEE (1860), 10 L. C. R. 101; 2 S. V. A. R. 25.—**CAN.**

**PART XIX. SECT. 1, SUB-SECT. 4.—A. (c).**

**8266** i. *Cargo—Lien of seamen.*]—A mariner has no lien upon the cargo, as cargo, for wages & disbursements; & cargo in respect of which all freight has been prepaid is exempt from any proceedings for the recovery of such wages & disbursements.—HANSEN *v.* THE GUY C. GOSS., [1926] N. Z. L. R. 445.—**N.Z.**

m. "*Tackle, apparel & furniture.*"]—Spare spars, canvas, boats, & surplus stores for ship's use, held to be included in the words "ship's tackle, apparel, & furniture," & therefore within the seamen's lien for wages.—THE PRINCE REGENT (1857), 9 L. T. 302.—**AUS.**

**PART XIX. SECT. 1, SUB-SECT. 4.—B. (a).**

n. *Right to lien—Master—Before registration.*]—In a suit by a master for

**8270.** ——.]—The captain of a ship, who has entered into engagements on account of the ship, thereby acquires a lien on the goods & on the freight to the extent of his engagements.—WHITE *v.* BARING (1801), 4 Esp. 22; 170 E. R. 628, N. P.

**8271.** ——.]—The master of a ship has no lien on it for money expended or debts incurred by him for repairs done to it on the voyage.—HUSSEY *v.* CHRISTIE (1808), 9 East, 426; 103 E. R. 636.

*Annotations:*—**Distd.** Bristow *v.* Whitmore (1861), 9 H. L. Cas. 391. **Refd.** Smith *v.* Plummer (1818), 1 B. & Ald. 575.

**8272.** ——.]—THE CHIEFTAIN, No. 8243, *ante*.

**8273.** ——.]—THE MARY ANN, No. 8235, *ante*.

**8274.** ——.]—Certain necessaries having been supplied to a ship in a foreign port, they were paid for by the usual agents at that port, the master indorsing the accounts to the agents, when sent to him, with a request to them to pay, & signing them. The master was accredited to the agents by his owners, & the former were to draw bills on the owners for the amounts advanced. No money passed through the master's hands. When the ship arrived in England the mtgees. took possession of her & the freight:—*Held:* as the master became personally liable for the amounts so paid, he had a right to proceed *in rem* against the ship.—THE MARCO POLO (1871), 24 L. T. 804; 1 Asp. M. L. C. 54.

*Annotations:*—**Refd.** The Fairport (1882), 8 P. D. 48; The Sara (1887), 12 P. D. 158.

**8275.** —— **Master hired by person fraudulently in possession.**]—THE EDWIN, No. 8239, *ante*.

**8276.** —— **Master part owner.**]—THE FERONIA, No. 8289, *post*.

**8277.** —— **Admiralty Court Act, 1861 (c. 10), s. 10.**]—THE BEESWING, No. 8236, *ante*.

**8278.** —— ——.]—Under above sect. the master of a ship has a maritime lien on it for disbursements & his claim has priority over that of a purchaser.—THE RINGDOVE (1886), 11 P. D. 120; 55 L. J. P. 56; 55 L. T. 552; 34 W. R. 744; 2 T. L. R. 811; 6 Asp. M. L. C. 28.

*Annotation:*—**Overd.** Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209.

**8279.** —— ——.]—Above Act does not give the master a maritime lien on the ship for disbursements.—HAMILTON *v.* BAKER, THE SARA (1889), 14 App. Cas. 209; 58 L. J. P. 57; 61 L. T. 26; 38 W. R. 129; 5 T. L. R. 507; 6 Asp. M. L. C. 413, H. L.

*Annotations:*—**Refd.** The Orchis (1890), 59 L. J. P. 31; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; The Orienta, [1894] P. 271; The Mecca, [1895] P. 95; The Ripon City, [1897] P. 226; The Veritas (1901), 70 L. J. P. 75; The Tagus, [1903] P. 44; The British Trade, [1924] P. 104. **Mentd.** Winstanley *v.* North Manchester Overseers, [1910] A. C. 7; West Kent Main Sewerage Board *v.* Dartford Assmt. Com., [1911] A. C. 171.

**8280.** —— **Master of foreign ship—Lex fori.**]—THE TAGUS, No. 8238, *ante*.

**8281. To what property attaching—Freight.**]—WHITE *v.* BARING, No. 8270, *ante*.

**8282.** —— ——.]—SMITH *v.* PLUMMER, No. 8231, *ante*.

**8283.** —— ——.]—GIBSON *v.* INGO, No. 8260, *ante*.

**8284.** —— ——.]—BRISTOW *v.* WHITMORE, No. 8232, *ante*.

**8285.** —— —— **Only when lien on ship.**]—(1) Merchant Shipping Act, 1889 (c. 46), does not give the master of a ship a maritime lien on ship for disbursements for which he has no authority to pledge the shipowner's credit.

(2) Where there is no maritime lien on ship there can be no lien on freight in respect of the same debt.

By a charterparty for the hire of a steamship it was agreed that the charterers should provide & pay for coals. In the course of a voyage it became necessary to procure coals to enable the ship to prosecute the voyage & earn freight. The master, who had notice of the terms of the charterparty, obtained the coals & drew on the charterers for the value. The bill having been dishonoured the master was sued on it, & then instituted a cause of disbursements in the Ct. of Admlty. against ship & freight:—*Held:* as the shipowner was not personally liable for the disbursements the master had no maritime lien on ship, & although his claim for payment out of the freight was supported by considerations of equity, he had no lien on freight, since by the practice of the Admlty. Cts., there cannot be a maritime lien on freight, where there is no lien on ship in respect of same debt.—MORGAN *v.* CASTLEGATE S.S. CO., THE CASTLEGATE, [1893] A. C. 38; 62 L. J. P. C. 17; 68 L. T. 99; 41 W. R. 349; 9 T. L. R. 139; 7 Asp. M. L. C. 284; 1 R. 97, H. L.

*Annotations:*—*As to* (1) **Distd.** The Ripon City, [1897] P. 226. **Refd.** The Orienta, [1894] P. 271. *As to* (2) **Refd.** The Kaleten (1914), 30 T. L. R. 572. *Generally*, **Refd.** S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492; S.S. Devonshire *v.* Leslie (Owners), [1912] A. C. 634; The Tervaete, [1922] P. 259; The Sylvan Arrow, [1923] P. 220; The British Trade, [1924] P. 104.

**8286.** —— **Proceeds of sale.**]—A ship at sea was mtged. by the owner to pltf. The ship having become unseaworthy, it was condemned & sold in a foreign port. The purchaser drew, upon a person in England, a bill of exchange for the proceeds, & indorsed & delivered it to the captain. The captain claimed a lien upon, or a right of set-off against, the amount of the bill, for disbursements which he had made on account of the ship, & threatened to bring an action against the acceptor for the money due on the bill. The ct. granted an injunction to restrain the action.—LISTER *v.* PAYN (1840), 11 Sim. 348; 59 E. R. 908.

**8287.** —— **Certificate of registry.**]—GIBSON *v.* INGO, No. 8260, *ante*.

**8288.** —— **Cargo.**]—Where a master of a ship in order to preserve cargo takes measures such as a wise & prudent man would think most conducive to the benefit of all concerned, the cargo is subject to a lien for expenses so incurred & may be enforced by suit *in rem* by County Courts Admiralty Jurisdiction (Amendment) Act, 1869 (c. 51).—THE ARGOS (CARGO EX) (1873), L. R. 4 A. & E. 13; *on appeal, sub nom.* THE ARGOS (CARGO EX),

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wages & disbursements, the promoter cannot recover for disbursements made by him before he was registered as the master, even though there was a previous arrangement between him & the owner that he should be master.—THE ALBION (1873), 3 V. R. (Adm.) 1.—**AUS.**

o. —— ——.]—The master has no right against the owners to detain the ship or freight for any disbursements made by him on account of the ship.—LAND *v.* MALDEN (1849), 5 U. C. R. 309.—**CAN.**

p. —— ——.]—*Held:* the master had a maritime lien for disbursements actually & necessarily made, & liability incurred in connection with the proper working & management of the ship.—REIDE & HAYES *v.* THE QUEEN OF THE ISLES (1892), 3 Exch. C. R. 258.—**CAN.**

q. —— ——.]—THIRD NATIONAL BANK OF DETROIT *v.* SYMES (1895), 4 Exch. C. R. 400.—**CAN.**

r. —— ——.]—MCBRIDE *v.* THE AMERICAN. & DARRELL (JOHN S.) & CO. (N. S.), [1924] Exch. C. R. 227.—**CAN.**

t. —— ——.]—*Held:* the liabilities incurred by the master while the vessel was away from her home port entitled him to a maritime lien over the ship.—THE MAGIC (1906), 26 N. Z. L. R. 273.—**N.Z.**

a. —— *Ship's agent.*]—MCCULLOUGH *v.* S.S. SAMUEL MARSHALL, [1923] Exch. C. R. 110.—**CAN.**

b. —— ——.]—Agents at Quebec receiving captain's bill on owners for funds advanced to disburse accounts at that port of those who are material men:—*Held:* not to have a lien on ship entitling them to arrest & sell her by Admlty. Ct. process on arrival in this country.—THE MOFFAT (1858), 7 L. T. 135.—**IR.**

*Sect.* 1.—*Maritime lien: Sub-sect.* 4, *B.* (*a*) & (*b*); *sub-sect.* 5.]

GAUDET *v.* BROWN, THE HEWSONS, GEIPEL *v.* CORNFORTH, L. R. 5 P. C. 134, P. C.

*Annotations:*—**Consd.** G. N. Ry. *v.* Swaffield (1874), L. R. 9 Exch. 132. **Mentd.** Purkis *v.* Flower (1873), 43 L. J. Q. B. 33; Flower *v.* Bradley (1874), 44 L. J. Ex. 1; Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65; The Alina (1880), 5 Ex. D. 227; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; The Rona (1882), 7 P. D. 247; R. *v.* Southend County Court Judge (1884), 13 Q. B. D. 142; The County of Durham, [1891] P. 1; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273; The Theodora, [1897] P. 279.

**Right of person paying off claims against ship.**]—*See* No. 8177, *ante*.

*(b) What Are Disbursements.*

**8289. General rule—All proper expenditure upon ship—Whether articles obtained by immediate or promised payment.**]—(1) The master's maritime lien on the freight for his wages & disbursements in priority to the claims of the mtgees. is not affected by the fact of his being also part owner of the vessel.

(2) Disbursements made by the master include all proper expenditure made by him upon the ship, whether the particular articles be obtained by immediate or promised payment; therefore, liabilities incurred by him for articles expended for the benefit of the ship are to be considered as disbursements, & will be allowed where the ct. has a fund in its custody legally liable for all necessaries.

(3) In a suit by a master, who was also part owner, against ship & freight for wages & disbursements, the ct. confirmed the registrar's report allowing the master's claim, in priority to the mtgees. in possession, for his wages & the following disbursements, viz.: (*a*) for tobacco & slops supplied to seamen, who afterwards deserted, on the ground that, these being a part of seamen's wages, the master was entitled to be reimbursed for them, notwithstanding the fact that he might have made a small profit in supplying them; (*b*) for certain items which had not been paid, but which the registrar allowed, with a recommendation that no order for the payment thereof be made until the master deposited in the registry vouchers for the payment, or gave satisfactory evidence that the accounts had been paid; (*c*) for a bill of exchange drawn by the master, of the dishonour of which he had received no notice, & for which it was contended he was therefore no longer liable, on the ground that, as the whole principle of notice of dishonour is founded upon the notion of benefiting the drawer, & as in this case the drawer had not only not been injured by the absence of notice, but had taken no such objection as a defence, it was not competent to defts., mtgees. in possession representing the acceptor, to set up an objection on the ground of want of notice, & to contend that the drawer was no longer liable on the bill.—THE FERONIA (1868), L. R. 2 A. & E. 65; 37 L. J. Adm. 60; 17 L. T. 619; 16 W. R. 585; 3 Mar. L. C. 54.

*Annotations:*—*As to* (1) **Apld.** The Daring (1868), L. R. 2 A. & E. 260; The Marco Polo (1871), 24 L. T. 804. **Expld.** The Jenny Lind (1872), L. R. 3 A. & E. 529. **Apld.** The Fairport (1882), 8 P. D. 48. **Dbtd.** Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209. **Apld.** The Elmville (No. 2), [1904] P. 422. **Reld.** The Hope (1873), 28 L. T. 287; *Re* Rio Grande do Sul S.S. Co. (1877), 5 Ch. D. 282; The Ringdove (1886), 11 P. D. 120; The Orienta, [1894] P. 271; The Ripon City, [1897] P. 226; The Marie Glaeser, [1914] P. 218. *Generally*, **Mentd.** Glamorgan Coal Co. *v.* Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. *v.* Same, [1916] 2 K. B. 206.

**8290. Disbursements in England.**]—WILKINS *v.* CARMICHAEL, No. 8230, *ante*.

**8291. Premium to procure cargo.**]—SMITH *v.* PLUMMER, No. 8231, *ante*.

**8292. Not mere liabilities.**]—THE CHIEFTAIN, No. 8243, *ante*.

**8293. —— Bill of exchange drawn on owner.**]—THE EDWIN, No. 8239, *ante*.

**8294. Payments within scope of authority—Adoption by owner of ultra vires contract.**]—BRISTOW *v.* WHITMORE, No. 8232, *ante*.

**8295. ——.**]—The master of a vessel, although aware that his vessel was chartered under a charter-party whereby the charterer had undertaken to provide & pay for all coal to be supplied to the vessel, drew a bill upon his owners without any authority from them for (*inter alia*) the price of certain coal supplied to his vessel abroad. The bill was not accepted & judgment on it was recovered against the master. Subsequently the master brought an article of wages & disbursements against the vessel in this ct., & sought therein to recover the amount of the judgment against him:—*Held:* so much of the amount of the bill as represented the price of the coal was not a disbursement recoverable in the action.—THE TURGOT (1886), 11 P. D. 21; 54 L. T. 276; 34 W. R. 552; 5 Asp. M. L. C. 548.

*Annotations:*—**Apprvd.** Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38. **Distd.** The Ripon City, [1897] P. 226.

**8296. ——.**]—MORGAN *v.* CASTLEGATE S.S. CO., THE CASTLEGATE, No. 8285, *ante*.

**8297. —— Ordinary course of employment.**]—(1) Defts., shipowners in London, contracted with a coal merchant for the supply of bunker coal to their vessel then lying in the port of London, & about to sail on a voyage to the Mediterranean. As part of the contract payment was to be made by bill of exchange drawn by the master on the defendants in favour of the coal merchants. The bill so drawn by the master was accepted by defts. but dishonoured at maturity; & pltf., the master of the vessel, thereupon issued a writ *in rem*, arrested the ship, & claimed the amount of the bill, notarial charges, & the costs of an action against him as drawer. Defts. did not appear; but on the intervention of prior mtgees. of the vessel:—*Held:* the liability of pltf. as drawer of the bill of exchange was not a liability "properly incurred by him (as master) on account of the ship" within Merchant Shipping Act, 1889 (c. 46), s. 1, & therefore, no lien had been created in his favour to the prejudice of the mtgees.

(2) It is common knowledge that a master has only authority to pledge his owner's credit if it is necessary that the goods should be supplied to the ship, & if the master can not communicate with the owners before ordering the goods. The disbursements, therefore, in respect of which the master had a lien on the ship were those disbursements which he made or made himself liable for on account of necessaries for the ship for the purposes of navigation, which necessaries he must obtain immediately if he was to carry out his duties as master, the shipowners not being there to give the order, & the master not being able to communicate with them (LORD ESHER, M.R.).—THE ORIENTA, [1895] P. 49; 64 L. J. P. 32; 71 L. T. 711; 11 T. L. R. 116; 39 Sol. Jo. 165; 7 Asp. M. L. C. 529; 11 R. 687, C. A.

*Annotations:*—*As to* (1) **Distd.** The Ripon City, [1897] P. 226. *As to* (2) **Apld.** The Elmville (No. 2), [1904] P. 422.

**8298. —— ——.**]—Defts., owners of a steamship, transferred the possession of it to a Glasgow firm subject to conditions in a contract of sale, by which defts. were to remain registered owners, & in effect to become mtgees. until payment of the

purchase-money. The Glasgow firm appointed pltf. master, & he, whilst on a voyage to the river Plate on account of that firm, & not having notice of the contract of sale, drew two bills of exchange on the Glasgow firm for bunker coal supplied to the vessel at the time the bills were drawn, but in pursuance of a coaling contract previously made in this country between the Glasgow firm & the coal merchants. The bills were dishonoured at maturity, &, the Glasgow firm having suspended payment, defts., as unpaid vendors, retook possession of the vessel. They then settled with pltf. an action *in rem* brought, in the name of pltf. by the coal merchants, under an irrevocable mandate, executed by pltf. authorising them to exercise, in his name, the right of lien, which he claimed under 1894 Act, s. 167, against the vessel in respect of his liability as drawer of the two bills of which the coal merchants were the holders:—*Held:* (1) the settlement of the action was void as against the coal merchants to whom pltf. was liable on the bills, & this liability having been incurred by pltf. as master in the ordinary course of his employment on account of the ship, within the meaning of the statute, he had a valid maritime lien, which could be enforced against the vessel, though the coals were supplied on the credit of the Glasgow firm, & not of defts., whose property the ship was.

(2) As maritime liens are recognised by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her (GORELL BARNES, J.).—THE RIPON CITY, [1897] P. 226: 66 L. J. P. 110; 77 L. T. 98; 13 T. L. R. 378; 8 Asp. M. L. C. 304; *subsequent proceedings*, [1898] P. 78.

*Annotations:—As to* (1) **Folld.** The Elmville, [1904] P. 319. **Consd.** Pocahontas Fuel Co. (Incorporated) *v.* Ambatielos (1922), 27 Com. Cas. 148. **Distd.** The Sylvan Arrow, [1923] P. 220. *As to* (2) **Consd.** The St. George, [1926] P. 217. **Refd.** The Marie Glaeser, [1914] P. 218; The Tervaete, [1922] P. 259; The Goulandris, [1927] P. 182; The Stream Fisher, [1927] P. 73. *Generally*, **Refd.** The Snark, [1899] P. 74; The Hopper, No. 66, [1906] P. 34; The Sarpen, [1916] P. 306; The Colorado, [1923] P. 102.

**8299. Articles expended for benefit of ship.**]—THE FERONIA, No. 8289, *ante*.

**8300. Tobacco & slops for seamen.**]—THE FERONIA, No. 8289, *ante*.

**8301. Liabilities on bill of exchange.**]—THE FERONIA, No. 8289, *ante*.

**8302. —— Payment for coal.**]—In Apr. & May, 1880, the master of a steamship obtained at a British colonial port coals for the ship, & paid for them by bills of exchange drawn on the charterers of the ship. The bills were dishonoured by the charterers, & in Aug. 1880, the master was served with a writ in an action brought to recover the amount of the bills. Judgment in this action was recovered against the master in July, 1881. In Oct. 1881, the steamship was sold, & the master in Nov. 1882, instituted an action of disbursements against her & her freight. The purchasers appeared & put in bail. At the hearing of the action the judgment recovered against pltf. in Aug. 1881, remained still in force & unsatisfied, & pltf. claimed to recover as a disbursement the amount for which he was liable under it:—*Held:* (1) the liability of pltf. to satisfy the judgment against him must be considered as a disbursement in respect of which a maritime lien existed under Admiralty Court Act, 1861 (c. 10), s. 10; (2) the right to enforce such lien had not been lost by any want of reasonable diligence on the part of pltf., & that his claim must be pronounced for.—THE FAIRPORT (1882), 8 P. D. 48; 52 L. J. P. 21; 48 L. T. 536; 31 W. R. 616; 5 Asp. M. L. C. 62.

*Annotations:—As to* (1) **Apprvd.** The Sara (1887), 12 P. D. 158. **Refd.** The Ringdove (1886), 11 P. D. 120; The Ripon City, [1897] P. 226.

**8303.** —— ——.]—THE TURGOT, No. 8295, *ante*.

**8304.** —— ——.]—THE ORIENTA, No. 8297, *ante*.

**8305.** —— ——.]—THE RIPON CITY, No. 8298, *ante*.

**8306.** —— ——.]—A master drew bills on his owners in favour of coal merchants who had supplied coals to the ship he commanded. The bills were accepted, but were dishonoured on presentation, & the coal merchants then sued the master as the drawer of the bills. The coal merchants issued a writ *in personam* in the Admlty. Div. against the master, & on a summons for directions it was ordered that the cause should be set down for trial as a short cause, & that evidence might be given by affidavit:—*Held:* the master was liable, but he had a lien against his ship for his disbursements.—THE CAIRO, WATSON & PARKER *v.* GREGORY (1908), 99 L. T. 940; 11 Asp. M. L. C. 161.

**8307.** —— —— **For which charterers liable.**]—MORGAN *v.* CASTLEGATE S.S. CO., THE CASTLEGATE, No. 8285 *ante*.

**8308.** —— **Dishonoured bill—Unsuccessful defence of action.**]—THE FAIRPORT, No. 8302, *ante*.

**8309.** —— —— ——.]—(1) The term "wages" in 1894 Act, s. 167, will include a bonus of £50 promised to a master by his owners during a voyage, in addition to his agreed wages, on condition that he remained with the vessel, & satisfied his owners that he had done all in his power to promote the interests of the ship.

(2) The costs incurred by a master in unsuccessfully defending an action on a dishonoured bill of exchange drawn by him on his owners for the price of coals supplied to the ship will not be deemed "liabilities properly incurred by him (as master) on account of the ship" within 1894 Act, s. 167, unless the defence was reasonably necessary in the interests of the ship.

Being the master, he drew the bill by way of payment for the coals which he knew the ship had received, & in considering the question whether he was justified in defending the action or making the ship liable for the costs of that defence, I have to consider whether it was necessary in the interests of the ship to have defended that action. There my difficulty arises, because I do not see why it was. He might perfectly well have allowed judgment to go by default, knowing that he could recover from the ship, & that he had a lien (JEUNE, P.).—THE ELMVILLE (No. 2). [1904] P. 422; 74 L. J. P. 69; 91 L. T. 330; 53 W. R. 287; 20 T. L. R. 783; 10 Asp. M. L. C. 23.

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SUB-SECT. 5.—TOWAGE SERVICES.

**8310. No maritime lien.**]—There is no maritime lien for ordinary towage services rendered to a

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**PART XIX. SECT. 1, SUB-SECT. 5.**

c. *Right to lien.*]—CHAFFEY *v.* SCHOOLEY (1876), 40 U. C. R. 165.—**CAN.**

d. ——.]—In the absence of proof of general custom to the contrary, maritime lien will attach to a ship for towage services.—LEARMONTH *v.* THE YUBA (1888), 14 Q. L. R. 132.—**CAN.**

e. ——.]—Under British & Canadian law a claim for ordinary towage does not give a maritime lien upon the ship towed nor one superior or prior to a mtge. existing upon it at the time

*Sect.* 1.—*Maritime lien: Sub-sects.* 5, 6 *&* 7, *A. & B.*]

ship.—WESTRUP *v.* GREAT YARMOUTH STEAM CARRYING CO. (1889), 43 Ch. D. 241; 59 L. J. Ch. 111; 61 L. T. 714; 38 W. R. 505; 6 T. L. R. 84; 6 Asp. M. L. C. 443.

*Annotations:*—**Refd.** The Veritas, [1901] P. 304; The Ambaticlos, The Cephalonia, [1923] P. 68.

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SUB-SECT. 6.—BOTTOMRY AND RESPONDENTIA BONDS.

**8311. Loan creating personal obligation only—No hypothecation of cargo—Whether lien created.**]—In a *respondentia* bond, the condition, after reciting that the money was lent upon the goods laden & to be laden on board a certain ship on her voyage out & home, was, that if the ship should proceed on her voyage & return within thirty-six months (the dangers of the seas excepted), & if the borrower, within thirty days after her arrival should pay to the lender the sum agreed on, or if in the voyage & within thirty-six months the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out & acquired during the voyage which should be saved, then the obligation to be void:—*Held:* this was no more than a personal obligation from the borrower to the lender, & did not give the latter any specific pledge or lien on the home cargo or the proceeds thereof.—BUSK *v.* FEARON (1803), 4 East, 319; 1 Smith, K. B. 103; 102 E. R. 853.

**8312.** ——.]—Lien on a ship for repairs done abroad without hypothecation. *Qu.:* as to advances for any other purposes.—*Ex p.* HALKETT (1814), 3 Ves. & B. 135; 35 E. R. 430; *sub nom. Re* MAYOR, *Ex p.* HALKETT, 2 Rose, 194, L. C.; *subsequent proceedings* (1815), 2 Rose, 229, L. C.

**8313. Advance to pay bottomry bond—In consideration of brokerage & prepaid freight.**]—(1) A firm in England, having accepted & paid a bill of exchange drawn on them by the master of a foreign ship abroad to procure necessaries, may sue the ship in the Admlty. Ct., as for necessaries within 3 & 4 Vict. c. 65, s. 6.

(2) An advance of money, to pay off a bottomry bond for which the ship is arrested, being made under a contract to pay off claims outstanding on the ship, & outfit her for a new voyage, in consideration of receiving brokerage & the prepaid freight for the new voyage, is not within 3 & 4 Vict. c. 65, & cannot be recovered in the Admlty. Ct.—THE ONNI (1860), Lush. 154; 3 L. T. 447; 1 Mar. L. C. 6; 167 E. R. 75.

*Annotations:*—*As to* (1) **Apld.** The Anna (1876), 1 P. D. 253. **Refd.** Pocahontas Fuel Co. *v.* Ambaticlos (1922), 27 Com. Cas. 148. *As to* (2) **Consd.** The Mogileff, [1921] P. 286. *Generally,* **Refd.** The Panthea (1871), 25 L. T. 389; The Riga (1872), L. R. 3 A. & E. 516.

**8314. Bond without time for repayment—Invalid as indefinite lien.**]—Advances were made on the terms of the following document relied on as a bottomry bond:—"Sept. 30, 1919. Bond of bottomry between A., master of American schooner *James W. Elwell* . . . & American Express Co. . . . I, A. . . . do hereby agree to bond & lien schooner together with her furniture, sails, gear & future earnings to the amount of 20,000 francs for value received, American Express co. to have absolute lien upon vessel until said loan is repaid together with interest accrued & all other charges relating thereto. . . ." Signed, etc.:—*Held:* as neither the voyage on which the maritime risk was to be run, nor the time when the loan was to become repayable, was stated, the bond was not a valid contract of bottomry, & gave the lenders no maritime lien.—THE JAMES W. ELWELL, [1921] P. 351; 90 L. J. P. 355; 125 L. T. 796; 37 T. L. R. 835; 15 Asp. M. L. C. 418.

**Bottomry bonds generally.**]—*See* Part IV., Sect. 3, *ante.*

**Hypothecation of cargo.**]—*See* Part VII., Sect. 6, sub-sect. 5, *ante.*

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SUB-SECT. 7.—MATERIALS AND NECESSARIES SUPPLIED TO SHIP.

*A. In General.*

**8315. Whether lien on ship.**]—ALLPORT *v.* THOMAS (1725), Gilb. Ch. 227; 25 E. R. 158.

*Annotation:*—**Mentd.** Hoare *v.* Contencin (1779), 1 Bro. C. C. 27.

**8316.** ——.]—No lien on a ship, or proceeds from sale of it, for repairs done, except in course

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the claim arose.—CAROW TOWING CO. *v.* THE EDWARD MCWILLIAMS (Ont.) (1919), 18 Exch. C. R. 470; 46 D. L. R. 506.—**CAN.**

f. ——.]—There is no maritime lien for the towage, only a statutory lien, in the form of a right to seize the tow in satisfaction of the claim.—NEVILLE CANNERIES, LTD. *v.* THE SANTA MARIA (P. E. I.) (1917), 16 Exch. C. R. 481; 36 D. L. R. 619.—**CAN.**

g. ——.]—A claim for towage rendered necessary by the creditor, or position, of the vessel towed constitutes a maritime lien, even though the vessel at the time be in the hands of charterers. — MACGREGOR-HASELTON'S CLAIM (1876), 14 N. S. W. S. C. R. (L.) 107.—**AUS.**

**PART XIX. SECT. 1, SUB-SECT. 7.—A.**

**8315 i.** *Whether lien on ship.*]—*Held:* persons furnishing supplies to ships in this country, technically called material men, had no lien upon ships for such supplies.—*Re* THE MARY JANE (1848), 3 R. de L. 436.—**CAN.**

**8315 ii.** ——.]—There is no maritime lien on a ship for necessaries supplied, whether at the instance of the owners, captain or other special or general agents of the ship.—*Re* THE GASPESIA *v.* THE GASPESIA & COMMERCIAL TRUST, LTD. (1899), 8 Nfld. L. R. 309.—**NFLD.**

**8315 iii.** ——.]—Goods, in the nature of ship's supplies, were furnished by applts. to the charterers of certain ships while in the possession of the charterers. The goods were not supplied on the credit of the ships, but were charged to the charterers in applts.' books, & accounts therefor were, in the first instance, made out to the charterers:—*Held:* applts. could not assert a lien for necessaries against the ships.—UPSON WALTON CO. *v.* THE BRIAN BORU, THE SHAUGHRAUN, THE MONROE DOCTRINE, THE RECIPROCITY (1907), 27 C. L. T. 341; 11 Exch. C. R. 109.—**CAN.**

**8315 iv.** ——.]—There is a privilege upon a steamer for coal supplied to her on her last voyage by the order of the master & of the charterers through their agent, without the knowledge or participation of the owners who incur no personal liability therefor. Such a privilege may be enforced by attachment of the vessel before judgment, & the owners may be made parties to the suit.—INVERNESS RAILWAY & COAL CO. *v.* CANADIAN LINES, LTD. (1906), Q. R. 29 S. C. 151.—**CAN.**

**8315 v.** ——.]—INVERNESS RAILWAY & COAL CO. *v.* JONES & DAVEY (1908), 40 S. C. R. 45; 5 E. L. R. 1.—**CAN.**

**8315 vi.** ——.]—A claim for the supply of necessaries to a ship does not constitute a maritime lien thereon.—CIE DES BOIS DU NORD *v.* THE ST. LOUIS (1920), 20 Exch. C. R. 232.—**CAN.**

**8315 vii.** ——.]—*Held:* there is no maritime lien, either at common law or under 1894 Act, s. 167 (2), for necessaries supplied to a Scottish ship in a Scottish port.—CLYDESDALE BANK, LTD. *v.* WALKER & BAIN, [1926] S. C. 72.—**SCOT.**

**8315 viii.** ——.]—PARRY, LEON & HAYHOE, LTD. *v.* STORMVOGEL WHALING CO., [1914] C. P. D. 837.—**S. AF.**

h. —— *Goods supplied to charterer.*]—Where a ship is chartered & supplies are furnished to the charterer with a knowledge of his position with regard to the ship, no maritime lien attaches to the ship.—UPSON WALTON CO. *v.* THE BRIAN BORU, THE SHAUGHRAUN, THE MONROE DOCTRINE, THE RECIPROCITY (1906), 10 Exch. C. R. 176; 7 O. W. R. 310; 27 C. L. T. 341; *affd.* (1907), 11 Exch. C. R. 109.—**CAN.**

k. —— *Goods supplied by order of charterer's foreman.*]—The orders of a foreman of the charterers, not being the captain of a vessel, cannot create a maritime lien against such vessel.—

of a voyage.—BUXTON *v.* SNEE (1748), 1 Ves. Sen. 154; 27 E. R. 952, L. C.

*Annotations:*—**Folld.** The Neptune (1835), 3 Knapp, 94. **Refd.** The Gratitudine (1801), 3 Ch. Rob. 240; James *v.* S. W. Ry. (1872), L. R. 7 Exch. 287. **Mentd.** Stevens *v.* Praed (1795), 2 Ves. 519; Green *v.* Briggs (1848), 17 L. J. Ch. 323.

**8317.** ——.]—THE HARMONIA (1817), 3 Knapp. 111, n.; 3 Hag. Adm. 148, n.; 12 E. R. 590, n.

*Annotation:*—**Refd.** The Neptune (1835), 3 Knapp, 94.

**8318.** ——.]—THE BOMBAY (1832), 3 Hag. Adm. 148, n.; 166 E. R. 361.

**8319.** ——.]—THE UNITY (1832), 3 Hag. Adm. 149, n.; 166 E. R. 361.

**8320.** ——.]—Material men have no lien for supplies furnished in England on the proceeds remaining in the Registry of the Ct. of Admlty. of a ship sold under a decree of that ct. for the payment of seaman's wages.—THE NEPTUNE (1835), 3 Knapp, 94; 12 E. R. 584, P. C.

*Annotations:*—**Consd.** James *v.* L. & S. W. Ry. (1872), L. R. 7 Exch. 287. **Apld.** Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356. **Refd.** The New Eagle (1846), 2 Wm. Rob. 441; The Wataga (1856), 28 L. T. O. S. 192; The Comtesse de Frègeville (1861), Lush. 329; The Pacific (1864), Brown. & Lush. 243; The Dowse (1870), L. R. 3 A. & E. 135; Johnson *v.* Black, The Two Ellens (1872), L. R. 4 P. C. 161; The Riga (1872), L. R. 3 A. & E. 516; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270; The Petone, [1917] P. 198; The Mogileff, [1921] P. 236. **Mentd.** Imrie *v.* Castrique (1860), 8 C. B. N. S. 405.

**8321.** ——.]—THE GUSTAF, No. 8220, *ante*.

**8322.** ——.]—THE SKIPWITH (1864), 10 L. T. 43; 10 Jur. N. S. 445; 2 Mar. L. C. 20.

*Annotations:*—**N.F.** The Pacific (1864), Brown. & Lush. 243. **Refd.** The Harriet (1868), 18 L. T. 804; The Two Ellens (1871), L. R. 3 A. & E. 345; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356.

**8323.** ——.]—Under Admiralty Court Act, 1861 (c. 10), s. 5, the material man acquires not maritime lien, but only a right to sue the ship; his claim against the ship accrues only upon his institution of the suit, & is therefore subject to any registered mtge. at that time subsisting on the ship.—THE PACIFIC (1864), Brown. & Lush. 243; 3 New Rep. 709; 33 L. J. P. M. & A. 120; 10 L. T. 541; 10 Jur. N. S. 1110; 2 Mar. L. C. 21; 167 E. R. 356.

*Annotations:*—**Consd.** The Troubadour (1866), L. R. 1 A. & E. 302. **Folld.** The Harriet (1868), 18 L. T. 804. **Apprvd.** Johnson *v.* Black, The Two Ellens (1872), L. R. 4 P. C. 161. **Consd.** Giovanni Dapueto *v.* Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; The Heinrich Bjorn (1885), 10 P. D. 44. **Apprvd.** Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209. **Refd.** The Mary Ann (1865), L. R. 1 A. & E. 8; The Scio (1867), L. R. 1 A. & E. 353; The Lion (1870), 26 L. T. 716; The Cella (1888), 36 W. R. 540; The Mecca, [1895] P. 95. **Mentd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290; Allen *v.* Garbutt (1880), 6 Q. B. D. 165.

**8324.** ——.]—An advance of freight to enable a master to pay his ship's disbursements before sailing does not give the charterer a claim against the ship, which will take precedence of the claim of a mortgagee; nor dies an advance for a similar purpose made by an insurance co.—THE TURLIANI (1875), 32 L. T. 841; 2 Asp. M. L. C. 603.

**8325.** ——.]—No maritime lien attaches to a ship in respect of coals or other necessaries supplied to it.—LAWS *v.* SMITH, THE RIO TINTO (1884), 9 App. Cas. 356; 53 L. J. P. C. 54; 50 L. T. 461; 5 Asp. M. L. C. 224, P. C.

*Annotations:*—**Apld.** Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270. **Consd.** Foong Tai *v.* Buchheister, [1908] A. C. 458. **Refd.** The Ringdove (1886), 55 L. T. 552; The Mogileff, [1921] P. 236.

**8326.** —— **Sale of ship—No delay in enforcement.**]—(1) The lien on ship for necessaries supplied continues, notwithstanding the sale of the ship, if there has been no *laches* in forcing the lien.

(2) Coals supplied to a foreign steamer for several voyages may be recovered as necessaries.

(3) The agent for a foreign ship, being also part owner, may recover against the ship for necessaries supplied.—THE WEST FRIESLAND (1859), Sw. 454; 5 Jur. N. S. 658; 166 E. R. 1213; *revsd.* on other grounds (1860), Sw. 456, P. C.

*Annotations:*—*As to* (2) **Refd.** The Riga (1872), L. R. 3 A. & E. 516; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356. *As to* (3) **Consd.** The Underwriter (1868), 25 L. T. 279. **Refd.** The Mogileff, [1921] P. 236; The Stream Fisher, [1927] P. 73. *Generally*, **Consd.** Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270. **Mentd.** The El Salto (1908), 25 T. L. R. 99; Foong Tai *v.* Buchheister, [1908] A. C. 458.

**8327.** —— —— **Vendor foreigner resident abroad—Purchaser British.**]—A liability for the supply of necessaries before transfer follows the ship into the hands of an innocent owner. It makes no difference that the transferee is a foreigner resident abroad & the purchaser a British resident.—THE ELLA A. CLARK (NOW THE GOLDEN AGE) (1863), Brown. & Lush. 32; 1 New Rep. 525; 32 L. J. P. M. & A. 211; 8 L. T. 119; 9 Jur. N. S. 312; 11 W. R. 534; 1 Mar. L. C. 325; 167 E. R. 283.

*Annotations:*—**Consd.** The Two Ellens (1871), L. R. 3 A. & E. 345; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356. **Dbtd.** Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270. **Refd.** The Anna (1876), 1 P. D. 253; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; The Mecca, [1895] P. 95.

**8328.** —— ——.]—The statement of claim in an action of necessaries *in rem* alleged that in Nov. 1874, pltf. had supplied to the owners of the vessel proceeded against certain stores necessary for her equipment; that in Sept. 1876, whilst the amount due in respect of the said stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to deft. in the action with knowledge & notice of pltf.'s claim; that pltf. became owner of the shares subject to such claim; & that the value of the shares was increased by reason of the equipment, & the owners of the vessel had derived benefit therefrom:—*Held:* the statement of claim showed no right of action in respect of the vessel as against deft.—THE ANEROID (1877), 2 P. D. 189; 47 L. J. P. 15; 36 L. T. 448; 3 Asp. M. L. C. 418.

——.]—*See, further*, ADMIRALTY, Vol. I. pp. 126–130, Nos. 318–357.

### *B. Foreign Ships.*

*See* Admiralty Court Acts, 1840 (c. 65), 1861 (c. 10).

**8329. In port in this country—Owners having agent in port—Onus of proof of agency.**]—THE HELENA SOPHIA (1850), 3 Wm. Rob. 265; 7 Notes of Cases, 492; 7 L. T. 340; 166 E. R. 961.

**8330.** ——.]—An American ship supplied with necessaries at Cape of Good Hope by an English firm having an establishment there, on her arrival in port of London was arrested at suit of merchant who supplied the necessaries, &, with the consent of the owner, sold. Payment to him out of the proceeds was opposed by the mtgees. of the vessel, but the ct. held that, under Admiralty Court Act, 1840 (c. 65), s. 6, it had jurisdiction on a claim for

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UPSON WALTON CO. *v.* THE BRIAN BORU, THE SHAUGHRAUN, THE MONROE DOCTRINE, THE RECIPROCITY (1906), 10 Exch. C. R. 176; 7 O. W. R. 310; 27 C. L. T. 341; *affd.* (1907), 11 Exch. 109.—**CAN.**

l. —— *Supplies for "last voyage."*]—ST. AUBIN *v.* THE CANADA (1910), 13 Exch. C. R. 463.—**CAN.**

m. —— *Supplies to ship not on voyage.*]—THE CHARLES MOLLOY, REID *v.* CROZIER (1855), 7 L. T. 340.—**S. AF.**

*Sect.* 1.—*Maritime lien: Sub-sect.* 7, *B. Sects.* 2 & 3: *Sub-sects.* 1 & 2.]

necessaries supplied to a foreign vessel in colonial as well as in British ports, & decreed payment accordingly.—THE WATAGA (1856), Sw. 165; 28 L. T. O. S. 192; 5 W. R. 155; 166 E. R. 1075.

*Annotations:*—**Folld.** The Anna (1876), 1 P. D. 253. **Refd.** The India (1863), 2 New Rep. 42; The Feronia (1868), L. R. 2 A. & E. 65; The Henrich Björn (1885), 10 P. D. 44; The Mecca, [1895] P. 95.

**8331.** ——.]—The master of a foreign ship, on concluding a voyage in the port of London the ship being arrested at the suit of a bondholder, applied to B., merchant of that city, to advance money to enable him to pay the balance of wages due to certain seamen. B. advanced such moneys, & entered a suit against the proceeds of the ship remaining in the registry, to recover such moneys as necessaries under Admiralty Court Act, 1840 (c. 65). The ct. on motion, other parties interested not opposing, directed the moneys to be paid out of proceeds in the registry, but stated that such order was not to be taken as a precedent. —THE HENRY REED (1858), 32 L. T. O. S. 166; 7 W. R. 180.

**8332.** —— **Necessaries out of proceeds of sale.**]—THE MASONIC (1861), 5 L. T. 460; 1 Mar. L. C. 169.

**8333.** —— **Right against purchaser of ship.**]—3 & 4 Vict. c. 65, s. 6, does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port.

Pltfs. advanced to the part owner of a foreign ship then at Liverpool money for necessaries for the ship. The part owner having sold his interest in the ship to defts. pltfs. brought an action *in rem* for the amount of the advances:—*Held:* the action could not be maintained.—NORTHCOTE *v.* HENRICH BJÖRN (OWNERS), THE HENRICH BJÖRN (1886), 11 App. Cas. 270; 55 L. J. P. 80; 55 L. T. 66; 2 T. L. R. 498; 6 Asp. M. L. C. 1, H. L.; *affg.* S. C. *sub nom.* THE HEINRICH BJORN (1885), 10 P. D. 44.

*Annotations:*—**Consd.** Westrupp *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241; The André Théodore (1904), 93 L. T. 184. **Refd.** The Beeswing (1885), 53 L. T. 554; The Ringdove (1886), 11 P. D. 120; The Lyons (1887), 57 L. T. 818; The Sara (1887), 12 P. D. 158; The Cella (1888), 13 P. D. 82; The Dictator, [1892] P. 304; The Africano, [1894] P. 141; The Orienta, [1894] P. 271; The Mecca, [1895] P. 95; The Veritas, [1901] P. 304; Moran, Galloway *v.* Uzielli, [1905] 2 K. B. 555; Foong Tai *v.* Buchheister, [1908] A. C. 458; The Petone, [1917] P. 198; The Mogileff, [1921] P. 236; The Ambatielos, The Cephalonia, [1923] P. 68; The Stream Fisher, [1927] P. 73.

**8334. In port abroad.**]—THE WATAGA, No. 8330, *ante.*

**8335.** ——.]—THE ONNI, No. 8313, *ante.*

**8336.** ——.]—The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries for the ship. The bill of exchange was accepted & paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill: —*Held:* the ct. had jurisdiction to entertain the action.—THE ANNA (1876), 1 P. D. 253; 46 L. J. P. 15; 34 L. T. 895; 3 Asp. M. L. C. 237, C. A.

*Annotations:*—**Refd.** The Mecca, [1895] P. 95; The Mogileff, [1921] P. 236; Pocahontas Fuel Co. *v.* Ambatielos (1922), 27 Com. Cas. 148.

**8337. Claims by several parties—Settlement pro rata—Proceeds insufficient.**]—A foreign ship was arrested in a suit for necessaries; no appearance being given for the owners, the ct. put pltf. in possession of her by a first decree after the usual defaults. She was subsequently arrested by three other parties in similar suits, & the proceeds were not sufficient to meet the total claims. The ct., on motion, by interlocutory judgment, decreed a *pro rata* division between all parties.—THE DESDEMONA (1856), Sw. 158; 28 L. T. O. S. 192; 5 W. R. 167; 166 E. R. 1072.

*Annotations:*—**Refd.** The Africano, [1894] P. 141; The Stream Fisher, [1927] P. 73.

**8338. Primâ facie liability.**]—Where necessaries are supplied for the use & benefit of a foreign ship the presumption is that the ship is liable.—THE PERLA (1858), Sw. 353; 7 L. T. 397; 4 Jur. N. S. 741; 166 E. R. 1164.

*Annotations:*—**Refd.** The Heinrich Björn (1883), 8 P. D. 151; Foong Tai *v.* Buchheister, [1908] A. C. 458; The Mogileff, [1921] P. 236.

**8339.** ——.]—*Primâ facie*, persons who have advanced money for necessaries on behalf of a foreign ship are entitled to sue *in rem*; &, although it may be inferred from the course of business between the principal & agent that the agent has agreed to look to the personal liability of the principal, & that the advances must be treated as items of a mercantile account to be adjusted in accordance with the terms of the agency agreement between the parties, the mere fact that pltfs. are the shipowners' regular agents does not deprive them of their rights *in rem* under the Admiralty Court Acts 1840 (c. 65) & 1861 (c. 10). The test to apply in each case is whether at the date of the suit pltf. could maintain an independent action in *assumpsit* in the subject-matter of the claim.—THE MOGILEFF, [1921] P. 236; 90 L. J. P. 329; 37 T. L. R. 549; 65 Sol. Jo. 581.

*Annotation:*—**Refd.** Pocahontas Fuel Co. *v.* Ambatielos (1922), 27 Com. Cas. 148.

**8340. Right of ship's agent.**] — THE WEST FRIESLAND, No. 8326, *ante.*

**8341. What included in necessaries—Coals.**]—THE WEST FRIESLAND, No. 8326, *ante.*

*See, further*, ADMIRALTY, Vol. I., pp. 126–130, Nos. 318–357.

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## SECT. 2.—STATUTORY RIGHTS IN REM.

*See* ADMIRALTY, Vol. I., pp. 158–172, Nos. 667–832; Supreme Court of Judicature Consolidation Act, 1925 (c. 49), s. 22.

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## SECT. 3.—POSSESSORY LIEN.

### SUB-SECT. 1.—IN GENERAL.

**8342. Necessity for possession—To retain lien.**]—A person who repairs a ship has no specific lien, if delivered to bkpt.; if repaired in a foreign port, while out upon a voyage, it would have been otherwise.—*Ex p.* SHANK (1754), 1 Atk. 234; 26 E. R. 151, L. C.

*Annotation:*—**Consd.** The Neptune (1835), 3 Knapp, 94.

**8343.** —— ——.]—*Re* STRICKLAND, *Ex p.* BLAND, No. 8361, *post.*

**8344. Sufficiency of possession — Graving flat alongside—Tools on board vessel.**]—Mtgees. of a ship are entitled to payment in priority to material men, who at the time of supplying the materials were not in such actual possession of the ship as to give them a possessory lien over her.

On behalf of H. [the material man] it is deposed that at the time of the arrest his graving flat lay

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**PART XIX. SECT. 1, SUB-SECT. 7.—B.**

**8334.** *In port abroad.*]—In order to succeed in an action for repairs, the authority to make the contract must be clear, & when repairs have been made on a foreign ship in a foreign port & by foreign contractors the law of the foreign State as to the existence of a lien therefor must govern.—REID WRECKING CO., LTD. *v.* THE JOHN B. KETCHAM 2ND (1911), 13 Exch. C. R. 413.—CAN.

between the quay & the vessel, & was attached to the vessel by chain & rope painters, & was floated close to her to enable the workmen to execute the external repairs about the hull. Also, that there were on board of the vessel, chisels, chains, & other implements & materials belonging to H. These statements are disputed; but supposing them to be true, I think them quite inadequate to establish that the vessel was in the possession of H. so as to give him a possessory lien over her (DR. LUSHINGTON).—THE SCIO (1867), L. R. 1 A. & E. 353; 16 L. T. 642; 2 Mar. L. C. 527.

**8345. —— Master & crew remaining on board.**]—THE TERGESTE, No. 8421, *post.*

**8346. —— Vessel in public dock—Ship's officers on board.**]—Shipowners handed over their vessel to ship repairers for the purpose of repairs, but during a part of the time kept certain officers on board. The repairers had on board a number of workmen during working hours, & also employed a watchman, who was, however, frequently absent. The vessel was at first placed in a public dock, the dues for which were paid by the repairers, but later she was moved into the repairers' own yard. On a summons adjourned into ct. for argument:—*Held:* a ship may be under the control & in the possession of a repairer in a public dock, & on the facts the owners had handed over the possession & control to the repairers, who were entitled to maintain a possessory lien.—THE RELLIM (1922), 39 T. L. R. 41.

**8347. What amounts to loss of possession—Transfer from dock—Temporary removal to public dock.**]—BARR *v.* COOPER, [1875] W. N. 67, H. L.

**8348. —— —— From dry to wet dock.**]—THE GAUPEN, [1925] W. N. 138.

**8349. —— Vessel taken by receiver—Liquidation of shipowner.**]—*Re* WESTLAKE, *Ex p.* WILLOUGHBY, No. 8367, *post.*

**8350. Rights as against Court of Admiralty—Ship in possession of officer of court.**]—The right of a tradesman to retain the materials of a ship left in his possession for the purpose of repairs until the repairs are paid for, does not extend against the authority of the Ct. of Admlty., when the ship is in possession of its officer under a warrant of the Ct.—THE HARMONIE (1841), 1 Wm. Rob. 178; 166 E. R. 539.

*Annotation:*—**Reid.** The Tergeste (1902), 72 L. J. P. 18.

**8351. Lien arising through operation of statutory powers—Under private dock Act—Whether lien affected by provisions for Limitation of liability—Mersey Docks.**]—By the Mersey Dock Acts Consolidation Act, 1858 (c. xcii), s. 94, when damage is done to any lock or other work of the Mersey Docks & Harbour Board through the negligence of those on board of any vessel, the vessel may be detained until such damage is paid or a deposit is made of the amount claimed by the Board, which deposit the Board are authorised to retain until the whole amount of the damage shall have been ascertained & paid, & provision is made for the application of the deposit in satisfaction of the claim.

1894 Act, s. 503, limits the liability of shipowners where, without their actual fault or privity, loss or damage is caused to any other vessel by the improper navigation of the ship to £8 per ton; & s. 504 provides that in the case of several claims the owner of the ship which has caused the damage may apply to the High Ct. "& that Ct. may determine the amount of the owner's liability & may distribute that amount rateably among the several claimants."

1900 Act, s. 1, extends the limitation of liability set by s. 503 of 1894 Act to all cases where, without the actual fault or privity of the shipowners, loss or damage is caused to property of any kind, whether on land or on water, by the improper navigation of the ship.

The steamship *Countess*, which was lying in a dock belonging to the Board, negligently went ahead instead of astern & crashed through the dock gates into the river, carrying with her a number of barges, some of which were sunk. The *Countess* was holed & had to be beached, & the Board's assistant marine surveyor having certified that she was a danger to the safe navigation of the port, the Board took charge of her under the powers of Mersey Docks & Harbour Act, 1912, & repaired her at a cost of £1,000. The damage done to the Board's dock amounted to £10,000 & the damage done to the barges to £55,000. The statutory amount of the *Countess's* liability under the Merchant Shipping Acts at £8 per ton was £4,468. The Board detained the *Countess* under their statutory powers in respect of the damage done to the dock. Numerous actions having been commenced by the barge owners, the shipowners commenced a limitation action in which they claimed to limit their liability to the amount ascertained under the Merchant Shipping Acts & to have that amount distributed rateably among the claimants, & in that action an order was made staying the barge-owners' actions. They also commenced an action against the Board for delivery up of the vessel & damages for detention. Ultimately the vessel was released on payment by the shipowners into Ct. of £5,500, representing (*a*) the statutory amount of their liability, & (*b*) the expenses incurred by the Board in connection with the repair & detention of the vessel. No question arose as to the latter sum. The Board claimed payment of their claim for damages, up to the limit of the shipowners' statutory liability, out of the fund in ct. in priority to the claims of the barge owners by virtue of their right to detain the vessel, & the sum representing the vessel, under their private Act of 1858. The bargeowners claimed that the fund ought to be distributed rateably among the several claimants, including the Board, according to the amounts of their claims:—*Held:* (1) the exercise by the Board of their statutory power to detain the ship conferred on them a possessory lien; (2) 1900 Act, s. 1, of which impliedly incorporated s. 504 of 1894 Act, neither expressly nor by implication affected the lien of the Board, beyond limiting the amount for which the lien could be exercised; (3) the ct., in distributing the statutory amount of the shipowners' liability rateably among the claimants, ought to have regard to the priorities as well as to the amounts of the claims; consequently, the whole of the fund should be paid out to the Board.—MERSEY DOCKS & HARBOUR BOARD *v.* HAY, THE COUNTESS, [1923] A. C. 345, 490; 92 L. J. P. 65; 129 L. T. 325; 39 T. L. R. 302; 67 Sol. Jo. 481; 16 Asp. M. L. C. 161, H. L.

**8352. Declaration preserving lien—After loss of possession—No power in court to make.**]—THE GAUPEN, [1925] W. N. 138.

**Agents lien.**]—*See* AGENCY, Vol. I., pp. 547–556, Nos. 1984–2054.

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SUB-SECT. 2.—IN RESPECT OF WHAT MATTERS.

**8353. Salvage.**]—A man entitled to salvage has a lien for it upon the thing saved. A man who



**8353 i.** *Salvage.*]—Salvage confers a lien independent of possession.—THE J. L. MAYO (1884), 7 Nfld. L. R. 30.—**NFLD.**

*Sect.* 3.—*Possessory lien: Sub-sect.* 2. *Sect.* 4: *Sub-sect.* 1.]

rescues goods from a ship on fire at the hazard of his life is entitled to salvage.—HARTFORT *v.* JONES (1698), 1 Ld. Raym. 393; 2 Salk. 654; 3 Salk. 366; 91 E. R. 1161.

*Annotations:*—**Distd.** Nicholson *v.* Chapman (1793), 2 Hy. Bl. 254. **Consd.** The Gas Float Whitton No. 2, [1896] P. 42. **Reld.** Dean *v.* Hornby (1854), 3 E. & B. 180; Aitchison *v.* Lohre (1879), 4 App. Cas. 755; The Fulham, [1899] P. 251.

**8354.** ——.]—THE FOX (1845), 8 L. T. 440.

**8355. Goods supplied or work done.**]—THE GAUNTLET (1848), 3 Wm. Rob. 82; 6 Notes of Cases, 370; 7 L. T. 134; 166 E. R. 893.

**8356.** —— **Discharging & storing cargo.**]—A vessel having gone ashore with a cargo on board, pltf., a ship agent, was put in possession of the ship & cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. Pltf. did work & expended money in discharging the cargo, & brought it to a place of safety, where he took possession of it. The hull broke up, & became a wreck. The expenditure by pltf. was not for the purpose of enabling the shipowner to perform his contract & to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo:—*Held:* pltf. had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage.—HINGSTON *v.* WENDT (1876), 1 Q. B. D. 367; 45 L. J. Q. B. 440; 34 L. T. 181; 3 Asp. M. L. C. 126; *sub nom.* KINGSTON *v.* WENDT, 24 W. R. 664. D. C.

*Annotations:*—**Reld.** Prehn *v.* Bailey (1881), 45 L. T. 399; The Gas Float Whitton No. 2, [1895] P. 301.

**8357. Shipwright's lien.**]—A shipwright has a lien upon a ship for repairs.—FRANKLIN *v.* HOSIER (1821), 4 B. & Ald. 341; 106 E. R. 962.

*Annotations:*—**Consd.** The Neptune (1833), 3 Hag. Adm. 129. **Apld.** *Re* Westlake, *Ex p.* Willoughby (1881), 16 Ch. D. 604.

**8358.** ——.]—Pltfs., mtgees. of a ship, having permitted the mtgor. to remain in possession for upwards of four years, & during that time to use & navigate the ship for his own profit, the latter, without the knowledge of the pltfs., delivered her to deft., a shipwright, for the purpose of having reasonable & necessary repairs done to her, which deft. did; pltfs. having demanded possession of deft., the latter refused to deliver her up until his bill for the repairs was paid:—*Held:* pltfs. must be taken to have impliedly authorised the mtgor. to keep the vessel in an efficient state, & for that purpose to order necessary repairs to be done, upon the ordinary terms, one of which was, that the shipwright should have his lien upon the ship for the repairs.—WILLIAMS *v.* ALLSUP (1861), 10 C. B. N. S. 417; 30 L. J. C. P. 353; 4 L. T. 550; 8 Jur. N. S. 57; 1 Mar. L. C. 87; 142 E. R. 514.

*Annotations:*—**Consd.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Folld.** Jowitt *v.* Union Cold Storage Co., [1913] 3 K. B. 1. **Reld.** The Scio (1867), L. R. 1 A. & E. 353; The Harriet (1868), 18 L. T. 804; The Ripon City, [1897] P. 226; Green *v.* All Motors, [1917] 1 K. B. 625.

**8359.** —— **Work done on river Thames—Distinguished from work done abroad.**]—On a ship's being repaired in the river Thames & fitted out there with new rigging & apparel, the ship itself is not liable, but the owners. *Secus* if repaired or fitted out at sea, where the master alone may hypothecate.—WATKINSON *v.* BERNADISTON (1726), 2 P. Wms. 367; 24 E. R. 769.

*Annotations:*—**Apld.** Buxton *v.* Snee (1748), 1 Ves. Sen. 154. **Consd.** Hussey *v.* Christie (1807), 13 Ves. 594. **Dbtd.** The Orienta, [1894] P. 271. **Reld.** The Neptune, Hodges *v.* Sims (1835), 3 Knapp, 94.

**8360.** —— —— **Effect of transaction for ready money.**]—A shipwright in the river Thames has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose, credit being given by the usage of trade to the owner of the ship for the repairs.

*Aliter*, where a shipwright deals for the ready money.—RAITT *v.* MITCHELL (1815), 4 Camp. 146; 171 E. R. 47.

*Annotations:*—**Reld.** The Alan Ker, How *v.* Kirchner (1857), 30 L. T. O. S. 296; *Re* Westlake, *Ex p.* Willoughby (1881), 16 Ch. D. 604.

**8361.** —— **Repairs in English port.**]—(1) Where the repairs are executed in a port in this country, the vessel, till parted with, is specifically chargeable with their amount, but the lien is lost with the possession (LORD ELDON, C.).

(2) Where the repairs are ordered by the master, he, in the first place, incurs a personal liability; & considering him in general as the servant or agent of the owners, in the employment & management of the ship, they also become responsible for his orders, unless they are expressly excluded by the terms of the contract (LORD ELDON, C.).

(3) The same observation applies to the case where a part owner gives the order; the liability attached against them all, unless it be expressly provided against (LORD ELDON, C.).—*Re* STRICKLAND, *Ex p.* BLAND (1814), 2 Rose, 91, L. C.

*Annotation:*—*As to* (3) **Expld.** Brodie *v.* Howard (1855), 25 L. J. C. P. 57.

**8362.** —— **Right to add cost of dock hire.**]—A shipowner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "The cost of use of graving dock for the job will be from 120 to 150 guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright who claimed & enforced his lien on the ship for payment, urged the removal of the ship, saying that it was unnecessarily occupying his dock, that he had other ships waiting to go in, & finally, that from a certain day he should charge £21 a day for the use of the dock:—*Held:* these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge.—SOMES *v.* BRITISH EMPIRE SHIPPING CO. (1860), 8 H. L. Cas. 338; 30 L. J. Q. B. 229; 2 L. T. 547; 6 Jur. N. S. 761; 8 W. R. 707; 11 E. R. 459; *affg.* S. C. *sub nom.* BRITISH EMPIRE SHIPPING CO. *v.* SOMES (1859), E. B. & E. 367, Ex. Ch.

*Annotations:*—**Consd.** Miedbrodt *v.* Fitzsimon, The Energie (1875), 32 L. T. 579. **Reld.** Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570. **Mentd.** Bruce *v.* Everson (1883), Cab. & El. 18; Ivens *v.* G. W. Ry. (1889), 53 J. P. 148; Assets Development Co. *v.* Close (No. 2) (1901), 46 Sol. Jo. 12.

**8363.** —— **Work not completed.**]—THE TERGESTE, No. 8421, *post.*

**8364. Work expended for person without title.**]—PUMFREY *v.* HAWKINS (1850), 14 L. T. O. S. 446; *previous proceedings, sub nom.* POMFRAY *v.* HAWKINS (1849), 14 L. T. O. S. 134.

**8365. Contractor's lien—For price—Unpaid instalment.**]—A. contracts with B. to build a ship,

**8355 i.** *Goods supplied or work done.*]—ROSS & DUNCAN *v.* BAXTER & CO. (1885), 13 R. (Ct. of Sess.) 185; 23 Sc. L. R. 123.—**SCOT.**

**8357 i.** *Shipwright's lien.*]—MONTREAL DRY DOCKS & SHIP REPAIRING CO. *v.* HALIFAX SHIPYARDS, LTD. (1920), 60 S. C. R. 359.—**CAN.**

**8357 ii.** ——.]—BARR & SHEARER *v.* COOPER (1875), 2 R. (Ct. of Sess.) 14 (H. L.); 12 Sc. L. R. 406.—**SCOT.**

**8357 iii.** ——.]—GARSCADDEN *v.* ARDROSSAN DRY DOCK CO. LTD., [1910] S. C. 178.—**SCOT.**

& furnish her with every requisite for sea, the price to be paid by four instalments, two to be paid in the progress of the work, & the others when the vessel was finished & launched; the first two instalments were paid at the respective times stipulated; when the hull was ready for launching the ship was measured & surveyed with the privity of the builder; & the master, who had been previously appointed, entered into the usual bond for the delivery of the register to the custom house, the ship was then registered in the name of the purchaser, & all the requisites of the register Acts were complied with. The builder then received the third instalment. Before the ship was launched the purchaser advertised for freight, & chartered her for a voyage & hired a crew with the privity of the builder. The ship was not, in fact, launched as stated in the register, but remained in the builder's yard, & his men were at work upon her until July 3. From the early part of June to June 30 an apprentice of the master was employed in the ship, & on July 1 his bedding was put on board. On June 30 the builder committed an act of bkpcy., & on July 8 a commission issued against him. On July 2 the purchaser took possession of the vessel whilst she remained on the builder's wharf, & took away a rudder & cordage & on July 4 she was launched & afterwards equipped for sea at the purchaser's expense, the fourth instalment remaining unpaid:—*Held:* the assignees were entitled to such portion of the fourth instalment as would remain due after satisfying the expenses of completing the vessel for sea according to the contract, & for which bkpt. would have had a lien upon the vessel.—WOODS *v.* RUSSELL (1822), 5 B. & Ald. 942; 1 Dow. & Ry. K. B. 587; 106 E. R. 1436.

*Annotations:*—**Consd.** Carruthers *v.* Payne (1828), 2 Moo. & P. 429. **Apld.** Clarke *v.* Spence (1836), 4 Ad. & El. 448. **Consd.** Laidler *v.* Burlinson (1837), 2 M. & W. 602; Wood *v.* Bell (1856), 6 E. & B. 355; Seath *v.* Moore (1886), 11 App. Cas. 350; *Re* Blyth Shipbuilding & Dry Docks Co., Forster *v.* Blyth Shipbuilding & Dry Docks Co., [1926] Ch. 494. **Refd.** Holderness *v.* Rankin (1860), 28 Beav. 180; Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271; *Re* Lindsay, *Ex p.* Lambton (1875), 10 Ch. App. 405; Clarke *v.* Milwall Dock Co. (1885), 53 L. T. 316. **Mentd.** Bishop *v.* Crawshay (1824), 3 B. & C. 415; Atkinson *v.* Bell (1828), 8 B. & C. 277; Beale *v.* Mouls (1847), 10 Q. B. 976; Acraman *v.* Morrice (1849), 14 L. T. O. S. 292; Turley *v.* Bates (1863), 2 H. & C. 200; Banbury & Cheltenham Direct Ry. *v.* Daniel (1884), 54 L. J. Ch. 265.

**8366.** —— —— ——.]—The deposit of the builder's certificate created a good equitable mtge. of the unfinished ship, including the engines which were being built for her but subject as to the engines to any lien for unpaid purchase-money which the engine builders might be entitled.—*Re* SOFTLEY, *Ex p.* HODGKIN (1875), L. R. 20 Eq. 746; *sub nom. Re* SOFTLEY, *Ex p.* WINTER, 44 L. J. Bcy. 107; 33 L. T. 62; 24 W. R. 68.

*Annotations:*—**Mentd.** *Re* Wincham Shipbuilding Boiler & Salt Co., Poole, Jackson & Whyte's Cases (1878), 26 W. R. 588; Bulteel & Colmore *v.* Parker & Bulteel Trustee in Bankruptcy (1916), 32 T. L. R. 661.

**8367.** —— —— **Effect of agreement for payment by bills.**]—Engineers contracted with debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock co., for the price of £1,050, to be paid by approved bills; one at three months for £260 when the boiler & engine should be placed in the vessel, one at three months for £260, & one at six months for £530, when the vessel should have made a trial trip. The vessel having been taken to the docks, was there entered in the name of one of the engineers; &, whilst shipwrights & other agents of debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid £360, partly in cash, & partly by debtor's acceptance, which they discounted. On the day appointed for the trial trip debtor filed a liquidation petition, & a receiver took possession of the vessel. A few days afterwards debtor's acceptance was dishonoured:—*Held:* the lien of the engineers for the unpaid price for the machinery & their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted debtor's acceptance.—*Re* WESTLAKE, *Ex p.* WILLOUGHBY (1881), 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 934.

*Annotation:*—**Refd.** The Rellim (1922), 39 T. L. R. 41.

**8368. Damage to premises of dock authority.**]—MERSEY DOCKS & HARBOUR BOARD *v.* HAY, THE COUNTESS, No. 8351, *ante*.

**Freight.**]—*See* Part VII., Sect. 13, sub-sect. 3, A., *ante*.

**General average.**]—*See* Part VII., Sect. 14, sub-sect. 3, D. (*b*), *ante*.

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## SECT. 4.—RANKING OF LIENS.

### SUB-SECT. 1.—IN GENERAL.

**8369. Liens accruing after mortgage security—Priority over mortgage.**]—That the ship, in whosoever hands she may be, or whoever has an interest in her, is liable to liens subsequently accruing, there can be no doubt, such liens as salvage, bottomry bonds, & seamen's wages; they are liens on the ship in the strictest sense, & those who take such security must take it subject to such incumbrances as the law may impose upon it for the benefit of third persons (DR. LUSHINGTON).—THE DOWTHORPE (1843), 2 Wm. Rob. 73; 2 Notes of Cases, 264; 3 L. T. 341; 7 Jur. 609; 166 E. R. 682.

*Annotations:*—**Refd.** The Fortitude (1813), 2 Wm. Rob. 217; The Mary Ann (1845), 9 Jur. 94; The Constancia (1846), 4 Notes of Cases, 512; Place *v.* Potts (1853), 8 Exch. 705; The Priscilla (1859), Lush. 1; The Harriet (1868), 18 L. T. 804; The Montrosa, [1917] P. 1; The Ambatielos, The Cephalonia, [1923] P. 68.

**8370. Determined by lex fori.**]—(1) Questions of the precedence of liens upon ships are to be determined by the *lex fori*.

(2) Seamen's wages earned before the giving of a bond are to be preferred to the bond.

Bond on ship freight & cargo ship & freight insufficient to pay the same, suit by seamen against ship & freight for wages—the owners of the cargo allowed to appear & defend because having an interest in the administration of the fund but the claim of the seamen ultimately pronounced for as superior to that of the bondholder & therefore to that of the owners of the cargo deriving through him.—THE UNION (1860), 1 Lush. 128; 30 L. J. P. M. & A. 17; 3 L. T. 280.

*Annotations:*—*As to* (2) **Refd.** The Daring (1868), L. R. 2 A. & E. 260; The Hope (1873), 28 L. T. 287; The Stream Fisher, [1927] P. 73.

**8371. Maritime liens—Inter se.**]—(1) Maritime liens, being in the nature of rewards for services rendered, rank against the fund out of which they

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**PART XIX. SECT. 4, SUB-SECT. 1.**

n. *Pilot's wages.*]—A pilot has a privilege for his wages upon a vessel, although she may have changed owners in the interval between the performance of the pilotage & the institution of the action.—*Re* THE PREMIER (1851), 6 L. C. R. 493.—**CAN.**

o. *Passengers' valuables.*]—WARD *v.* MCNEIL (1897), Q. R. 11 S. C. 501.—**CAN.**

*Sect. 4.—Ranking of liens: Sub-sects.* 1, 2, 3, 4 & 5.]

are to be paid in the inverse order of their attachment on the *res*, & the last in time should be the earliest in payment.

(2) The claim of a master for his wages earned & disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the claim of the bondholder.

(3) A bottomry bondholder is entitled to priority over the claim of a master for wages earned on voyages previous to that during which the bond is given.

(4) A master's claim for wages & disbursements, whenever earned or made, takes priority over the claims of mtgees.—THE HOPE (1873), 28 L. T. 287; 1 Asp. M. L. C. 563.

*Annotation:—As to* (1) **Consd.** The Stream Fisher, [1927] P. 73.

**8372. —— —— Liens ex contractu.**]—THE VERITAS, No. 8188, *ante*.

**8373. —— Ex delicto—Priority over liens ex contractu.**]—THE VERITAS, No. 8188, *ante*.

**Priority of person paying off claims on ship.**]—*See* Sect. 5, *post*.

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SUB-SECT. 2.—DAMAGE.

**8374. As against mortgagee.**]—THE ALINE, No. 8178, *ante*.

**8375. ——.**]—THE VERITAS, No. 8188, *ante*.

**8376. As against bottomry bond.**]—THE ALINE, No. 8178, *ante*.

**8377. As against wages.**]—The *H.* & her cargo were damaged by grounding on the anchor of the *M.* which was unbuoyed. The owners of the *H.* & her cargo obtained a decree against the *M.* & for the amount of their loss & against T. the master. T. & the mariners of the *M.* after the arrest of the *M.* sued her for their wages & obtained a decree for the amount due to them. The decrees in both suits against the *M.* went by default. By a subsequent decree it was held that T. & the mariners to be paid their wages out of the proceeds of the *M.* (which had been sold in T.'s suit in priority to *M.* & his co-owners of the *H.* & her cargo.—TILLS *v.* THE MARY, MUNDAY *v.* THE MARY (1703), Burrell, 284; 167 E. R. 575.

*Annotation:—***Refd.** Mersey Docks & Harbour Board *v.* Turner, The Zeta, [1893] A. C. 468.

**8378. ——.**]—Where the damage in which the vessel proceeded against was condemned exceeded in amount the value of the ship & freight, & her owners claimed to make deductions for wages, etc., out of the freight:—*Held:* the whole of the gross freight without deductions, was liable for the damage.—THE BENARES (1850), 7 Notes of Cases, Supp. 50; 5 L. T. 185; 14 Jur. 581.

*Annotations:—***Apld.** The Elin (1883), 8 P. D. 129. **Refd.** The Duna (1861), 5 L. T. 217; The Veritas, [1901] P. 304.

**8379. —— Crew—Of ship in fault.**]—THE CHIMERA (1852), 11 L. T. 113.

*Annotations:—***Folld.** The Linda Flor (1857), Sw. 309. **Refd.** The Duna (1861), 5 L. T. 217; The Elin (1883), 8 P. D. 129.

**8380. —— —— Foreign ship.**] — Where a foreign ship is condemned in damage arising from a collision, & the proceeds of the sale are not more than sufficient to meet that damage, her crew have no prior right against the ship for their wages.—THE LINDA FLOR (1857), Sw. 309; 30 L. T. O. S. 234; 4 Jur. N. S. 172; 6 W. R. 197; 166 E. R. 1150.

*Annotations:—***Refd.** The Thuringia (1872), 41 L. J. Adm. 44; The Elin (1883), 8 P. D. 129; The Stream Fisher, [1927] P. 73.

**8381. —— —— —— Earned since collision.**]—The maritime lien for damages, arising out o damage done by a foreign vessel in a collision for which she is to blame, takes precedence of the maritime lien of the seamen for wages earned by them since the collision on board such vessel.—THE ELIN (1883), 8 P. D. 129; 52 L. J. P. 55; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. L. C. 120, C. A.

*Annotations:—***Refd.** The Veritas, [1901] P. 304; The Stream Fisher, [1927] P. 73.

**8382. —— Master.**]—THE PANTHEA, No. 8462, *post*.

**8383. As against purchaser without notice.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8384. As against lien for necessaries.**]—Where after judgment against a ship in a damage action, where bail has been given & the ship released, judgment is given against the same ship in a necessaries action in which the ship is sold & the proceeds of the sale of the ship paid into ct., pltfs. in the damage action cannot be paid out of the proceeds to the prejudice of other claimants still having maritime liens upon the proceeds.—THE FALK (1882), 47 L. T. 308; 4 Asp. M. L. C. 592.

**8385. Liens for damage inter se—Pari passu.**]—Where there has been more than one collision with the same vessel the maritime liens arising thereout, apart from *laches*, rank *pari passu* & not in the order of the dates of the respective collisions.—THE STREAM FISHER, [1927] P. 73; 96 L. J. P. 29; 136 L. T. 189; 17 Asp. M. L. C. 159.

**As against salvage.**]—*See* Nos. 8394, 8395, *post*.

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SUB-SECT. 3.—SALVAGE.

*See* 1894 Act, s. 544.

**8386. General rule—Indefeasible priority.**]—THE GUSTAF, No. 8220, *ante*.

**8387. —— —— Over prior claims ex contractu.**]—THE VERITAS, No. 8188, *ante*.

*See, also*, No. 8397, *post*.

**8388. As against Crown's right of seizure—Forfeitable offence under Revenue Laws.**]—A judicial sale of a vessel found at sea & brought into port as derelict, under an order of the Instance Ct. of the Admlty., on the part of the salvors & claimant, without fraud, is available against the Crown's right of seizure for a previous forfeiture incurred by the ship having been guilty of a forfeitable offence against the revenue laws; although the Crown was not a party to the proceedings in the Admlty. Ct., other than by the King's Procurator General claiming the vessel as an Admlty. droit; & although no decision of droit, or no droit was awarded & the sale took place *pendente lite*, under an interlocutory order. The Crown should have claimed before the Ct., either as against the ship in the first instance or subsequently against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale or have moved a prohibition. The warrant for arresting a ship by the Admlty., & the process of citation is notice to all the world of the subsequent proceedings.—A.-G. *v.* NORSTEDT (1816), 3 Price, 97; 146 E. R. 203.

*Annotations:—***Refd.** The Segredo (otherwise The Eliza Cornish) (1853), 1 Ecc. & Ad. 36; The Veritas, [1901] P. 304.

**8389. As against wages—Earned prior to occurrence.**]—THE SELINA, No. 7891, *ante*.

**8390. —— ——.**]—*Semble:* salvage remuneration is to be calculated on the value of the ship & cargo, without any previous deduction for wages

due at the time when the salvage service was rendered.

The wages of seamen constitute a lien on the ship. Supposing that I came to the conclusion that the sum demanded for wages is *bonâ fide* due, still the salvors have rescued the ship, the *corpus* on which the lien attaches. I am strongly inclined to hold that the claim of the salvors is entitled to priority (DR. LUSHINGTON).—THE SABINA (1842), 7 Jur. 182.

**8391. —— Earned subsequently to occurrence.**]—THE SELINA, No. 7891, *ante*.

**8392.** —— ——.]—THE EDINA, No. 7892, *ante*.

**8393. —— Of master.**]—THE PANTHEA, No. 8462, *post*.

**8394. As against lien for damage.**] — THE VERITAS, No. 8188, *ante*.

**8395. —— Wreck raised by Thames Conservancy.**]—As the result of a collision in the Thames between a barque & a steamship, the latter sank with her cargo. The Thames Conservators, under their statutory powers, raised the vessel, &, after she was beached, she was arrested by the Admlty. Marshal in an action of damage by collision instituted by the owners of the barque. On the question of priority as between the Thames Conservancy in respect of their expenses, & the owners of the barque in respect of their lien attaching to the vessel for the damage sustained by them: —*Held:* as the rest had been preserved through the instrumentality of the Conservators, their claim ranked first, &, therefore, they would be at liberty to sell the vessel & her cargo, reimbursing themselves for their expenses & costs, in the first instance, out of the proceeds of the cargo, & then out of the proceeds of the vessel, paying the surplus, if any, of proceeds into ct. for the benefit of the parties entitled thereto.—THE SEA SPRAY, [1907] P. 133; 76 L. J. P. 48; 96 L. T. 792; 10 Asp. M. L. C. 462.

*Annotation:*—**Refd.** The Stream Fisher, [1927] P. 73.

**8396. Claims of salvors inter se—In inverse order of attachment.**]—THE VERITAS, No. 8188, *ante*.

**As against bottomry.**]—*See* No. 7891, *ante*.

**As against shipwright.**]—*See* No. 8463, *post*.

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SUB-SECT. 4.—BOTTOMRY.

**8397. General rule—Subject only to seamen's wages.**]—If the hypothecation be valid, it has a preference to all other liens, except seamen's wages (SIR JOHN NICHOLL).—THE HERSEY (1837), 3 Hag. Adm. 404; 166 E. R. 455.

*Annotations:*—**Refd.** The Ariadne (1842), 1 Wm. Rob. 411; The Karnak (1868), L. R. 2 A. & E. 289; The St. George, [1926] P. 217.

**8398.** —— ——.]—(1) Where there are several claims on a ship, & the proceeds are insufficient to pay all, a wages claim is preferred to a bottomry bond previously pronounced for, the bond having been given before the wages were earned.

(2) A claim by a person having paid wages to the ship's crew at the request of the master on account of the ship, is in the nature of a wages claim, & entitled to the same priority.

(3) A bottomry bond is preferred to a claim of necessaries previously pronounced for, the necessaries having been supplied before the bond.

(4) Where one only of several pltfs. in different causes of necessaries has obtained a decree of the ct., he is entitled to be paid in priority; the others being *in pari conditione*, share rateably.

(5) A bond is entitled to precedence over all claims except wages, or a subsequent bond or salvage claim. Seamen's wages, however, come first of all, according to the established practice of the ct. (DR. LUSHINGTON).—THE WILLIAM F. SAFFORD (1860), 1 Lush. 69; 29 L. J. P. M. & A. 109; 2 L. T. 301; 167 E. R. 37.

*Annotations:*—*As to* (2) **Consd.** The Panthea (1871), 25 L. T. 389. *As to* (4) **Refd.** The Markland (1871), L. R. 3 A. & E. 340; The Africano, [1894] P. 141; The Stream Fisher, [1927] P. 73. *As to* (5) **Refd.** The Hope (1873), 28 L. T. 287. *Generally*, **Consd.** The Petone, [1917] P. 198. **Refd.** The St. Lawrence (1880), 5 P. D. 250; The Lyons (1887), 57 L. T. 818.

**8399. As against pilotage.**]—Where a bond of bottomry is given upon the ship alone, & another bond is likewise given upon the cargo only, demands for pilotage, towages & seamen's wage, must be satisfied *pro rata* out of the proceeds of the ship & the freight.—LA CONSTANCIA (1846), 2 Wm. Rob. 460; 4 Notes of Cases, 512; 11 L. T. 113; 10 Jur. 845; 166 E. R. 829.

*Annotations:*—**Consd.** Westrupp *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241; The Ambatielos, The Cephalonia, [1923] P. 68. **Refd.** The Benares (1850), 14 Jur. 581; The Arab (1859), 5 Jur. N. S. 417.

**8400. As against towage.**]—LA CONSTANCIA, No. 8399, *ante*.

**8401. As against mortgagee.**]—Mtgee. of a ship & freight held to have priority over parties claiming in respect of sums advanced for the necessary expenses of the ship, so far as such advances were not secured by a bottomry bond; in so far as such advances were secured by a bottomry bond, the parties claiming held to be entitled in priority to the mtgee., with interest at 4 per cent.—DOBSON *v.* LYALL (1847), 3 L. T. 825; 11 Jur. 641.

**8402.** ——.]—THE ROYAL ARCH, No. 7678, *ante*.

**8403. As against salvage.**]—THE SELINA, No. 7891, *ante*.

**8404. —— Services in nature of salvage.**]—THE GALAM (CARGO EX), No. 4075, *ante*.

**As against freight.**]—*See* No. 4075, *ante*.

**As against damage.**]—*See* No. 8178, *ante*.

**As against master's wages.**]—*See* Nos. 8407–8413, *post*.

**As against seamen's wages.**]—*See* Nos. 8426–8434, *post*.

**As against necessaries.**]—*See* Nos. 8444–8446, *post*.

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SUB-SECT. 5.—MASTER'S LIEN FOR WAGES AND DISBURSEMENTS.

**8405. General rule—Next after salvage.**]—THE GUSTAF, No. 8220, *ante*.

**8406. —— —— & damage.**]—THE PANTHEA, No. 8462, *post*

**8407. As against bottomry bond.**]—A master, being sole owner, having given a bottomry bond, binding himself, ship & freight, cannot claim his wages to the prejudice of the bondholder.—THE WILLIAM (1858), Sw. 346; 31 L. T. O. S. 345; 6 W. R. 871; 166 E. R. 1161.

**8408.** ——.]—The master of a foreign ship having, in the terms of a bottomry bond, bound himself as well as the ship & freight, cannot enforce

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**PART XIX. SECT. 4, SUB-SECT. 5.**

**8407 i.** *As against bottomry bond.*]—THE WOODMAN (1859), cited in 2 L. T. at p. 140.—**IR.**

**8407 ii.** ——.]—A master who gives a bottomry bond, binding himself, ship & freight for a payment of advances, cannot afterwards claim his wages to the prejudice of the bond.—THE EMMA (1863), 4 Nfld. L. R. 723.—**NFLD.**

**8407 iii.** ——.]—Master & crew entitled to payment of wages & kettle-money in priority to a bottomry bondholder.—THE HENDRIKA GAZINA (1860), 4 L. T. 179.—**IR.**

*Sect. 4.—Ranking of liens: Sub-sects. 5 & 6.*]

his lien for wages against the claim of the bondholder.

*Semble:* a mariner's wages, earned before the execution of a bottomry bond, postponed to the bond.—THE JONATHAN GOODHUE (1859), Sw. 524; 3 L. T. 825; 166 E. R. 1246.

*Annotations:*—**Consd.** The Union (1860), Lush. 128. **Distd.** The Salacia (1862), Lush. 545. **Consd.** The Hope (1873), 28 L. T. 287. **Reld.** The Troubadour (1866), L. R. 1 A. & E. 302; The Edward Oliver (1867), L. R. 1 A. & E. 379; The Halley (1867), L. R. 2 A. & E. 3.

**8409.** ——.]—(1) It is an established rule, so ancient that its origin is unknown, that the seamen may recover their wages by action against the master.

(2) Seamen are entitled to be paid their wages in priority to the master's claim, either for his own wages, or for advances made by him to the seamen in respect of their wages.

(3) As a general rule payment of master's wages takes precedence of the claim of a bottomry bondholder.

By a bottomry bond the master covenanted, amongst other things, that he had authority to charge the vessel, & that the said vessel, & cargo with the freight should at all times after the said voyage be liable for the payment of the amount due under the bond:—*Held:* this covenant did not affect the master's right to be paid his wages in priority to the bondholder.—THE SALACIA (1862), 1 Lush. 545; 32 L. J. P. M. & A. 41; 7 L. T. 440; 9 Jur. N. S. 27; 11 W. R. 189; 1 Mar. L. C. 261.

*Annotation:*—*Generally*, **Consd.** The Hope (1873), 28 L. T. 287.

**8410.** ——.]—The general rule that a master who has bound himself as well as ship & freight for the payment of a bottomry bond is not entitled to payment of his own claims in priority will not be acted upon where the bottomry bondholder will not be prejudiced by the master being paid before him. Where a master gave bonds on ship, freight, & cargo, binding himself, & the bonds would exhaust ship & freight thus defeating the master's claim:—*Held:* the master's claim should have priority over the claims of the bondholders, thus marshalling the assets between them.—THE EDWARD OLIVER (1867), L. R. 1 A. & E. 379; 36 L. J. Adm. 13; 16 L. T. 575; 2 Mar. L. C. 507.

*Annotations:*—**Apld.** The Daring (1868), L. R. 2 A. & E. 260. **Folld.** The Eugénie (1873), L. R. 4 A. & E. 123. **Consd.** The Hope (1873), 28 L. T. 287. **Expld.** The Chioggia, [1898] P. 1. **Reld.** The Sara (1887), 56 L. J. P. 100.

**8411.** —— **Master part owner.**]—Where a master being also part owner of a vessel, had bound himself by a bottomry bond on ship, freight, & cargo:—*Held:* that the owners of part of the cargo could not oppose his right to be paid his wages & disbursements in priority to the bondholder.—THE DARING (1868), L. R. 2 A. & E. 260; 37 L. J. Adm. 29.

*Annotation:*—**Mentd.** The Marpessa, [1891] P. 403.

**8412.** —— **Earnings before & after bond distinguished.**]—THE HOPE, No. 8371, *ante*.

**8413.** ——.]—The master of a French lugger executed bottomry bonds on ship, freight, & cargo, & bound himself personally by the bonds. The ship arrived at her port of destination, & the bonds were indorsed to the owners of the cargo, who instituted a suit against ship, freight, & cargo, to enforce payment of the bonds. The master afterwards instituted a suit against the ship & freight for wages. The proceeds of the ship were insufficient to pay the bonds; but the proceeds of the ship, together with the freight & the value of the cargo, were sufficient to pay the bonds as well as the wages of the master:—*Held:* the master was entitled to have his wages paid out of the proceeds of the ship before any portion of that fund was appropriated to the payment of the amount due on the bonds.—THE EUGÉNIE (1873), L. R. 4 A. & E. 123; 29 L. T. 314; 21 W. R. 957; 2 Asp. M. L. C. 104.

**8414. As against mortgagee.**]—THE MARY ANN, No. 8235, *ante*.

**8415.** ——.]—THE HOPE, No. 8371, *ante*.

**8416.** —— **Payment guaranteed by master.**]—THE RED ROSE (1866), L. R. 2 A. & E. p. 80, n.

*Annotations:*—**Consd.** The Feronia (1868), L. R. 2 A. & E. 65. **Reld.** The Fairport (1882), 8 P. D. 48; The Orienta, [1894] P. 271.

**8417.** —— ——.]—While a master's lien for wages against his ship takes precedence of an ordinary claim by mtgees., it does not take priority of any part of the mortgage debt, the payment of which the master has personally guaranteed to the mortgagees.—THE BANGOR CASTLE (1896), 74 L. T. 708; 8 Asp. M. L. C. 156.

**8418.** —— **Master part owner.**]—THE FERONIA, No. 8289, *ante*.

**8419.** —— **Master of foreign ship.**]—THE TAGUS, No. 8238, *ante*.

—— ——.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 400–401, Nos. 718–719.

**8420. As against purchaser.**]—THE RINGDOVE, No. 8278, *ante*.

**8421. As against shipwright's lien—Lien of master displaced from entry into dry dock.**]—Seamen on board an Italian vessel were engaged to serve at 40 lire per man per month with a further sum of 40 lire per month in lieu of victualling. They remained by the vessel after she was taken into a shipwright's dry dock for extensive repairs, &, whilst there, the master, on behalf of himself & the crew, arrested the vessel in an action for wages & disbursements. The vessel was sold by order of the ct., & the crew sent back to their country; but the proceeds proved insufficient to meet the claim of the master & crew for wages, etc., & the claim of the shipwright for repairs. On the question of priority:—*Held:* (1) the victualling allowance was equivalent to wages, carrying a maritime lien, &, therefore, the total claim of the master & crew for wages & disbursments up to the date of the vessel entering the dry dock, together with the cost of subsistence from the time of leaving the vessel until leaving the country, & the cost of repatriation ranked first, with costs, including in such costs such sum as the registrar should allow by way of subsistence money from the date of the writ to the time of leaving the vessel; (2) the common law possessory lien of the shipwright, based on his control over

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**8414 i.** *As against mortgagee.*]—On a contestation of the distribution of the proceeds of a vessel sold by judicial authority:—*Held:* the master had a privilege to the amount of his wages against the vessel, preferable to a party claiming under a transfer by way of mtge., but that the men preserve their privilege upon the vessel for their wages & materials furnished only so long as they retained possession of the ship.—FRÉCHETTE *v.* GOSSELIN (1858), 1 L. C. R. 145.—**CAN.**

**8414 ii.** ——.]—The master's lien for disbursements & liabilities of this character is preferred to the claim of a mtgee. taking possession after such disbursements had been made & such liabilities incurred.—THIRD NATIONAL BANK OF DETROIT & PENINSULAR SAVINGS BANK OF DETROIT *v.* SYMES (1895), 4 Exch. C. R. 400.—**CAN.**

**8414 iii.** ——.]—*Held:* the master & mate of the ship, having personally guaranteed payment of the mtge., their claim for arrears of wages should not be preferred or given priority as against that of the mtgee.—STONE *v.* THE ROCHEPOINT (1921), 21 Exch. C. R. 143; [1921] 2 W. W. R. 701.—**CAN.**

**p.** *As against necessaries.*]—Mariners' wages take precedence of all

the vessel, displaced the maritime lien of the master & crew from the time of entry into the dry dock, & gave the shipwright priority in respect of his claim & costs, although the master & crew remained on board, & though the repairs ordered had not been completed.—THE TERGESTE, [1903] P. 26; 72 L. J. P. 18; 87 L. T. 567; 19 T. L. R. 63; 9 Asp. M. L. C. 356.

*Annotations:—As to* (2) **Apld.** The Rellim (1922), 39 T. L. R. 41. *Generally,* **Refd.** The Russland, [1924] P. 55.

**8422. As against dock dues—River Mersey.**]—A local Act which provides that while any dock tonnage rates remain unpaid in respect of any vessel liable thereto the Mersey Docks & Harbour Board may cause such vessel to be detained, until all such rates have been paid, gives the board a paramount right to detain a vessel until the dock tonnage rates due in respect of her are paid, notwithstanding that the master & crew of the vessel have a maritime lien upon her for wages due before she entered the dock.—THE EMILIE MILLON, [1905] 2 K. B. 817; 75 L. J. K. B. 31; 93 L. T. 692; 10 Asp. M. L. C. 162, C. A.

*Annotation:*—**Apld.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345.

**8423. As against seizure by sheriff—Writ of fieri facias.**]—A vessel seized under a sheriff's writ of *fi. fa.* was subsequently arrested & sold by the Admlty. marshal at the instance of the master in an action *in rem* for wages & disbursements. The sums claimed by the master, which exhausted the proceeds, were owing before the date of the seizure by the sheriff. The master moved for judgment & payment out of the proceeds. The sheriff intervened & claimed that his fees & expenses should be a first charge on the proceeds: —*Held:* the master having a maritime lien in respect of his claim, the sheriff could only seize the vessel subject to that lien; the master's claim accordingly had priority over the claim of the sheriff; & the sheriff must look to the execution creditors for payment of his fees & expenses.—THE ILE DE CEYLAN, [1922] P. 256; 91 L. J. P. 222; 128 L. T. 154; 38 T. L. R. 835; 16 Asp. M. L. C. 23.

**As against damage.**]—*See* No. 8462, *post.*

**As against salvage.**]—*See* No. 8462, *post.*

**As against seamen's wages.**]—*See* No. 8409, *ante.*

**As against necessaries.**]—*See* Nos. 8449, 8450, *post.*

**As against solicitors.**]—*See* No. 8465, *post.*

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SUB-SECT. 6.—SEAMEN'S LIEN FOR WAGES.

**8424. General rule—Next after salvage.**]—THE GUSTAF, No. 8220, *ante.*

**8425. —— Priority over possessory common law lien.**]—THE IMMACOLATA CONCEZIONE, No. 8250, *ante.*

**8426. As against bottomry bond.**]—THE AMITY'S DESIRE (1786), Burrell, 331; 167 E. R. 595.

**8427.** ——.]—THE MADONNA D'IDRA, No. 8249, *ante.*

**8428. —— Wages of deceased seaman.**]—THE DUNVEGAN CASTLE (1836), 3 Hag. Adm. 329; 166 E. R. 427.

**8429.** ——.]—THE REPULSE (1845), 2 Wm. Rob. 398; 4 Notes of Cases, 166; 7 L. T. 225; 9 Jur. 738; 166 E. R. 805; *subsequent proceedings* (1847), 5 Notes of Cases, 348.

*Annotation:*—**Apld.** The Tecumseh (1850), 3 Wm. Rob. 144.

**8430.** ——.]—LA CONSTANCIA, No. 8309, *ante.*

**8431.** ——.]—THE LOUISA BERTHA, No. 8266, *ante.*

**8432. Earned before date of bond.**]—THE JANET WILSON, No. 8471, *post.*

**8433.** —— ——.]—THE UNION, No. 8370, *ante.*

**8434.** ——.]—THE WILLIAM F. SAFFORD, No. 8398, *ante.*

**8435. As against mortgagee.**]—The hypothecation of a ship cannot deprive the seaman of his right to wages.—THE SYDNEY COVE (1815), 2 Dods. 11; 165 E. R. 1399.

*Annotations:*—**Refd.** The Mona (1840), 1 Wm. Rob. 137; The Riby Grove (1843), 2 Wm. Rob. 52.

**8436.** ——.]—THE DUNVEGAN CASTLE (1836), 3 Hag. Adm. 329; 166 E. R. 427.

**8437. As against wages of master.**]—THE SALACIA, No. 8409, *ante.*

**8438. Viaticum—As against bottomry bond.**]—The master & crew of a foreign ship arrested in this country are entitled to priority over a bottomry bondholder in respect of their expenses home.—THE CONSTANCIA (1866), 15 W. R. 183.

**8439. —— As against solicitor's costs.**]—Salvage actions were brought against an Italian vessel, & she was sold by order of the ct. After the salvors had been remunerated, the balance of the fund in ct. was insufficient to satisfy the costs of the solrs. who had appeared in the above actions for the parties interested in the ship, & who sought to enforce their claim for such costs by virtue of Solicitors Act, 1860 (c. 127), s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses & the keep of the master & crew ranked next to the salvage payments:—*Held:* the claim of the Italian consul had priority to that of the solrs.—THE LIVIETTA (1883), 8 P. D. 209; 52 L. J. P. 81; 49 L. T. 411; 5 Asp. M. L. C. 151.

**8440. As against towage.**]—Seamen have a maritime lien on freight due from subcharterers to the

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claims for necessaries.—THE QUEEN (No. 2) (1869), 19 L. T. 706.—**IR.**

q. ——.]—The master & seamen of a ship have liens over the ship for their wages, but such liens rank after liens for the supply of necessaries to the ship.—*Re* THE MANGORO (1913), 31 N. L. R. 67.—**S. AF.**

**PART XIX. SECT. 4, SUB-SECT. 6.**

**8435 i.** *As against mortgagee.*]—*Held:* the rights of the wage-earners holding maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the ct., & they were entitled to recover their claims out of the fund realised upon the sale of the ship in priority to the mtgee.—*Re* FORT GEORGE LUMBER & NAVIGATION CO., TRADERS BANK OF CANADA *v.* LOCKWOOD (1913), 48 S. C. R. 593; 18 B. C. R. 473; 16 D. L. R. 175; 26 W. L. R. 884; 5 W. W. R. 982.—**CAN.**

**8435 ii.** ——.]—The lien of the mate of a vessel for wages cannot be preferred against the claim of a mtgee. where the payment of the mtge. has been guaranteed by the mate.—STONE *v.* THE ROCHEPOINT (B. C.), [1921] 2 W. W. R. 701; 21 Exch. C. R. 143.—**CAN.**

**8437 i.** *As against wages of master.*]—THE ANGLO INDIAN (1868), 8 N. S. W. S. C. R. (L.) 102.—**AUS.**

r. *As against necessaries.*]—The maritime lien of the seamen for unpaid wages takes precedence of a claim for necessaries supplied on the order of the master of the ship.—GARRICK *v.* THE EXCELSIOR (OWNERS), CUSTOMS COLLECTOR *v.* CORBETT & HUNT (1869), Udal, 340.—**FIJI.**

t. ——.]—Seamen's wages have priority over necessaries.—THE AURORA (1914), 20 B. C. R. 92; 7 W. W. R. 5.—**CAN.**

a. ——.]—The master & seamen of a ship have liens over the ship for their wages, but such liens rank after liens for the supply of necessaries to the ship.—*Re* THE MANGORO (1913), 34 N. L. R. 67.—**S. AF.**

b. *As against damages.*]—THE CARLOTTA (1852), 4 Ir. Jur. 237.—**IR.**

c. *As against building, equipping or repairing charges.*]—Seamen's wages have priority over a statutory lien for building, equipping or repairing a ship under the Admiralty Court Act, 1861, s. 4.—THE AURORA (1914), 20 B. C. R. 92; 7 W. W. R. 5.—**CAN.**

d. *As against collector of customs.*]—*Held:* after payment of certain costs & charges, the statutory lien of the Collector of Customs for expenses incurred under Customs Regulation Ordinance, 1895, s. 49, takes precedence of the maritime lien of the seamen for unpaid wages.—GARRICK *v.* THE EXCELSIOR (OWNERS), CUSTOMS COLLECTOR *v.* CORBETT & HUNT (1869), Udal, 340.—**FIJI.**

*Sect. 4.—Ranking of liens: Sub-sects. 6, 7 & 8.]*

charterers of a ship, & can arrest the cargo for the purpose of enforcing such lien. The lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, & the light dues & dock dues.—THE ANDALINA (1886), 12 P. D. 1; 56 L. T. 171; 35 W. R. 336; 6 Asp. M. L. C. 62.

*Annotation:*—**Consd.** The Petone, [1917] P. 198.

**8441. As against light & dock dues.**]—THE ANDALINA, No. 8440, *ante*.

**8442. As against shipwright's lien.**]—THE TERGESTE, No. 8421, *ante*.

**As against damages.**]—*See* Nos. 8377-8381, *ante*.

**As against salvage.**]—*See* Nos. 8389, 8390, *ante*.

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SUB-SECT. 7.—NECESSARIES.

**8443. General rule.**]—(1) Admiralty Court Act, 1861 (c. 10), s. 5, does not create a maritime lien for necessaries at the time the necessaries are supplied, & a ship does not become chargeable with a debt for necessaries until a suit is actually instituted. All valid charges on the ship to which any person other than the owner is liable are entitled to take precedence of such debt.

(2) A British colonial vessel was mortgaged by her owners to B. The mtge. was duly registered under the Merchant Shipping Act, 1854 (c. 104). In Feb. 1868, whilst lying in the port of London, applts., on the order of the master, did work & furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, B. executed an instrument transferring the mtge. to resp. This transfer was without valuable consideration, & was not registered, being made to enable resp. to take charge of the ship for B., the mtgee. In the same month resp. took possession of the ship. Applts. having instituted a suit against the ship to recover the amount due to them for the work & supplies, resp. intervened. At the time of the institution of the suit the ship was under the arrest of the ct., at the instance of two of her crew who had instituted a cause of wages; the owners of the ship were domiciled in Nova Scotia. The ship having been sold, the proceeds were found insufficient to satisfy the claim of applts., the material men, & the mtge. debt:—*Held:* resp., the assignee of the mtgee., was entitled to have his mtge. debt satisfied before applts. were paid the amount of their claim.—JOHNSON *v.* BLACK, THE TWO ELLENS (1872), L. R. 4 P. C. 161; 8 Moo. P. C. C. N. S. 398; 41 L. J. Adm. 33; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. L. C. 208; 17 E. R. 361, P. C.

*Annotations:*—*As to* (1) **Apld.** The Aneroid (1877), 2 P. D. 189; Laws *v.* Smith, The Rio Tinto (1884), 9 App. Cas. 356; The Cella (1888), 13 P. D. 82. **Refd.** Giovanni Dapueto *v.* Wyllie, The Pieve Superiore (1874), L. R. 5 P. C. 482; Northcote *v.* Henrich Björn (Owners), The Henrich Björn (1886), 11 App. Cas. 270; Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209; The Mecca, [1895] P. 95; The Veritas, [1901] P. 304. *As to* (2) **Refd.** Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359; The Colorado, [1923] P. 102.

**8444. As against bottomry bond.**]—THE WILLIAM F. SAFFORD, No. 8398, *ante*

**8445. ——.**]—A broker, procuring necessaries to be supplied to a ship & paying for them, gives credit to the master & owners, & stands in a different position from a tradesman supplying; his claim therefore does not take precedence of a claim under a bottomry bond.—THE FLOR DE FUNCHAL (1865), 35 L. J. Adm. 119; 13 W. R. 1000.

**8446. —— Money advanced to pay dock dues.**]—Pltfs., in an action of necessaries against a foreign ship, having at the request of the master advanced money to pay dock dues for the ship at the port of discharge, were held to be entitled to have the amount they had so advanced paid out of the proceeds of the ship in priority to the claim of a bottomry bondholder who had advanced money on bottomry at the port of loading.—THE ST. LAWRENCE (1880), 5 P. D. 250; 49 L. J. P. 82.

*Annotations:*—**Distd.** The Lyons (1887), 57 L. T. 818. **Consd.** The Petone, [1917] P. 198; Pocahontas Fuel Co. *v.* Ambatielos (1922), 27 Com. Cas. 148. **Refd.** Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241.

**8447. Priority inter se.**]—Pltfs. instituted in the High Ct. an action *in rem* for necessaries against the owners of a foreign steamship, & arrested the vessel the same day.

Three other actions for necessaries were subsequently commenced against the owners of the same vessel in a county ct., &, after judgment in these actions had been obtained by consent, pltfs. obtained judgment by default for the amount of their claim, with interest & costs, but without prejudice to other claims against the vessel, & reserving all questions as to priorities

The vessel was sold, with the consent of pltfs., in a wages action, which admittedly had priority, the proceeds paid into ct., the three county ct. actions transferred to the High Ct., & the question of priorities referred to the registrar.

Pltfs., in respect of the balance of the proceeds, which was insufficient to meet all the claims, & as against the other necessaries actions, claimed priority on the ground that they held security by reason of the relation back of their judgment to the date of the institution of the action & of the arrest:—*Held:* the claimants in the necessaries actions were entitled to be paid out of the balance of the proceeds *pro rata*, for, in such cases, the ct. holds the property, not only for first pltf., but also for, at least, all creditors of the same class, who assert their claims before any unconditional decree is pronounced. *Semble:* a decree in unconditional terms would so long as the funds remained in the hands of the ct., be modified so as to let in others, who, without laches, put forward claims of a like character.—THE AFRICANO, [1894] P. 141; 63 L. J. P. 125; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. L. C. 427; 6 R. 767.

*Annotations:*—**Consd.** Mersey Docks & Harbour Board *v.* Hay, [1923] A. C. 345; The Stream Fisher, [1927] P. 73. **Refd.** The Veritas, [1901] P. 304; The James W. Elwell, [1921] P. 351.

**8448. —— Supplies while ship under arrest—No priority over other necessaries.**]—In distributing the proceeds of a vessel sold under the order of the ct., the claims of a necessaries man who has supplied ballast to the ship will not be preferred to other necessaries claims, notwithstanding that the vessel could not have been discharged or sold had not the ballast been supplied.—THE RENE (1922), 128 L. T. 96; 38 T. L. R. 790; 16 Asp. M. L. C. 24.

**8449. As against master's wages & disbursements.**]—A master & part owner of a foreign ship ordered necessaries for the ship. The necessaries were supplied, & the master became liable for the payment of same:—*Held:* the persons who supplied the necessaries were entitled to be paid for the necessaries out of the proceeds of the ship & freight in priority to a claim of the master for wages & disbursements.—THE JENNY LIND (1872), L. R. 3 A. & E. 529; 41 L. J. Adm. 63; 26 L. T. 591; 20 W. R. 895; 1 Asp. M. L. C. 294.

*Annotation:*—**Apld.** The Eva, [1921] P. 454.

**8450. —— Foreign ship—Master part owner.**]—When the master of a foreign ship is also a part owner his claim for wages & disbursements is postponed to the claim of persons who have supplied necessaries to the ship.—THE EVA, [1921] P. 454; 91 L. J. P. 17; 126 L. T. 223; 37 T. L. R. 920; 15 Asp. M. L. C. 424.

**8451. As against mortgagee—Material man not in possession.**]—THE SCIO, No. 8344, *ante*.

**8452. ——.**]—JOHNSON *v.* BLACK, THE TWO ELLENS, No. 8443, *ante*.

**8453. ——.**]—THE TURLIANI, No. 8324, *ante*.

**8454. ——.**]—THE PACIFIC, No. 8323, *ante*.

**8455. —— Right of mortgagee to costs.**]—Where a mtgee. brings an action to realise his security, & material men with a common law possessory lien on the ship intervene, & the ship, by order of the ct., is sold, & the proceeds are only sufficient to satisfy the claim of the material men, the mtgee. is still entitled to be paid his taxed costs, up to the date of the sale, out of the proceeds of the sale of the ship in priority to the material men.—THE SHERBRO (1883), 52 L. J. P. 28; 48 L. T. 767; 5 Asp. M. L. C. 88.

**8456. —— Necessaries including wages of crew—Paid at request of owner.**]—(1) A claim by pltf. in an action for necessaries brought under Admiralty Court Act, 1861 (c. 10), sect. 4 (or, *semble*, under sect. 5), even though it includes wages paid to the ship's crew at the request of the owner, is not entitled to precedence of a mtgee.'s claim.

(2) *Semble*: precedence might have been gained by obtaining prior permission from the ct. to make the payment.—THE LYONS (1887), 57 L. T. 818; 6 Asp. M. L. C. 199.

*Annotation*:—*As to* (1) **Consd.** The Petone, [1917] P. 198.

**8457. —— French hypothèque.**]—The question of priority as between a claim by a necessaries man & a claim under a French hypothèque on a French ship arrested & sold in an action *in rem* in this country, must be determined according to the law of this country. But the nature of the right created by the French hypothèque must be determined according to French law, & the ct. will, in the absence of clear evidence that, according to French law, the right created by a French hypothèque is no higher than the mere right to proceed *in rem*, assume that the hypothèque does give a higher right & will postpone the claim of a necessaries man, who has no possessory lien on the ship, to the claim under the French hypothèque.—THE COLORADO, [1923] P. 102; 92 L. J. P. 100; 128 L. T. 759; 39 T. L. R. 216; 67 Sol. Jo. 383; 16 Asp. M. L. C. 145, C. A.

*Annotation*:—**Mentd.** Republica de Guatemala *v.* Nunez, [1927] 1 K. B. 669.

**8458. As against purchaser—Necessaries supplied on credit—By vendor.**]—In an action *in rem* against a ship under Admiralty Court Act, 1861 (c. 10), s. 5, for necessaries supplied to B. on the credit of the ship, it appeared that the registered owners were trustees mainly for defts. as purchasers who had paid to B. nearly the whole of the purchase-money before the necessaries were supplied, B.'s interest being to the extent of a small balance of purchase-money & subject to the obligation of delivery of the ship to applts. according to his contract:—*Held*: pltfs. were entitled to recover, their claim against the ship was paramount to that of defts. for the delivery thereof under their contract with B.—FOONG TAI & CO. *v.* BUCHHEISTER & CO., [1908] A. C. 458; 78 L. J. P. C. 31; 99 L. T. 526; 11 Asp. M. L. C. 122, P. C.

*Annotations*:—**Refd.** The El Salto (1908), 25 T. L. R. 99; The Mogileff, [1921] P. 236.

**As against damage.**]—*See* No. 8384, *ante*.

**As against shipwright.**]—*See* Nos. 8460, 8461, *post*.

**As against solicitor.**]—*See* Nos. 8464, 8465, *post*.

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SUB-SECT. 8.—SHIPWRIGHT'S LIEN.

**8459. General rule—After master & seamen.**]—THE GUSTAF, No. 8220, *ante*.

**8460. As against necessaries.**] — THE PERSEVERANTE (*circa* 1860), cited in Lush. at p. 508; 167 E. R. at p. 232.

*Annotation*:—**Refd.** The Gustaf (1862), Lush. 506.

**8461. ——.**]—THE GUSTAF, No. 8220, *ante*.

**8462. As against ship's agent.**]—(1) The master of a ship has a maritime lien on her for his wages & disbursements, & his claim takes priority over all other claims, save claims for salvage & damage by collision.

(2) A ship's agent was appointed by the master on his arrival at B. He had no previous knowledge of either master or owner, but made no inquiries as to how he was to be repaid his advances for necessaries. He allowed the vessel to be placed in the hands of a shipwright to be repaired, & when her value was by this means increased, caused her to be arrested:—*Held*: he was not entitled to be paid his claim in priority to the shipwright.

(3) Where there are several claimants against the proceeds of a vessel in the registry, & she has been sold at the suit of one, the costs of such sale will be paid before all claims, as such sale was for the benefit of all.—THE PANTHEA (1871), 25 L. T. 389; 1 Asp. M. L. C. 133.

*Annotation*:—**Refd.** The Mogileff, [1921] P. 236.

**8463. As against salvage.**]—A vessel which had stranded on rocks & sustained heavy damage got off with the assistance of various salvors & was placed in dock for temporary repairs. In respect of these services various salvage actions & an action by the ship repairers for salvage &/or necessaries were instituted. No defence was put in, but in the first action an appearance was entered & an undertaking given to put in bail for ship, cargo & freight in the sum of £1,000. The cargo & freight were valued at £327. Before the other actions were instituted the cargo had been landed & dispersed. After some temporary repairs had been effected the vessel was sold by the marshal. She only realised £889. The ship repairers, whose claim for salvage was disallowed, claimed that the amount expended by them should be allowed as against the other salvors:—*Held*: a ship repairers' claim ranks after maritime liens already accrued, & although all the salvors had benefited, there was no principle by which the ship repairers' claim could be preferred to those of the salvors.—THE RUSSLAND, [1924] P. 55; 93 L. J. P. 18; 130 L. T. 763; 40 T. L. R. 232; 68 Sol. Jo. 324; 16 Asp. M. L. C. 288.

**As against master's wages.**]—*See* No. 8421, *ante*.

**As against seamen's wages.**]—*See* No. 8421, *ante*.

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**PART XIX. SECT. 4, SUB-SECT. 7.**

**8452 i.** *As against mortgagee.*]—At common law he who furnishes labour or material, or money for the supply of either, for the necessary repair or preservation of a vessel has over that vessel a privileged tacit hypothec, & all the privileges of such creditors have this in common, that the least of them gives the preference before creditors who are only such in writing or by mortgage.—*Re* THE MANGORO (1913), 34 N. L. R. 67.—**S. AF.**

*Sect.* 4.—*Ranking of liens: Sub-sect.* 9. *Sects.* 5, 6 & 7.]

SUB-SECT. 9.—SOLICITOR'S LIEN FOR COSTS.

*See* Solicitors Act, 1860 (c. 127), s. 28.

**8464. As against necessaries—Incurred since salvage.**]—(1) A ship & cargo were salved on Oct. & arrested in the salvage suit on Oct. 7. The ship, which was not worth the dock dues, was abandoned to the dock authorities on Oct. 24, & the cargo, which had not been released, was, after notice to the owners, sold on Dec. 16:—*Held:* the abandonment of the ship by the master was not a repudiation by him of his contract to carry the goods to the place of their destination; the owners of cargo by not procuring its release waived their right to have the cargo transhipped; & therefore the owners of the ship were entitled to *pro rata* freight.

(2) After payment of the amount awarded for salvage & costs, deft.'s proctor has against the property salved a lien in priority to average expenses or necessaries incurred since the salvage.—THE SOBLOMSTEN (1866), L. R. 1 A. & E. 293; 36 L. J. Adm. 5; 15 L. T. 393; 15 W. R. 591; 2 Mar. L. C. 436.

*Annotations:—As to* (1) **Refd.** The Teutonia (1871), L. R. 3 A. & E. 394; Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613. *As to* (2) **Refd.** The Livietta (1883), 8 P. D. 209. *Generally,* **Mentd.** The Mogileff, [1921] P. 236.

**8465.** ——.]—The freight & proceeds of sale of a ship were insufficient to pay the following claims:—(*a*) solr.'s costs of succe sfully defending the ship in the first action, for breach of contract; (*b*) necessaries supplied before & after the first suit; (*c*) money advanced to pay harbour dues, etc.; (*d*) wages of master, also part owner:—*Held:* the solrs.' lien had priority to the necessaries supplied after, but not to those furnished before, the institution of the first suit, & to the claim for wages, but not to the claim for moneys advanced for harbour dues, etc.—THE HEINRICH (1872), L. R. 3 A. & E. 505; 41 L. J. Adm. 68; 26 L. T. 372; 20 W. R. 759; 1 Asp. M. L. C. 260.

*Annotation:—***Consd.** The Livietta (1883), 8 P. D. 209.

**8466. As against claim for master's wages.**]—THE HEINRICH, No. 8465, *ante.*

**8467. As against claim for moneys advanced for harbour dues.**]—THE HEINRICH, No. 8465, *ante.*

**8468. As against mortgage.**]—After the termination of an action *in rem* against the owners of a ship for wages & disbursements in which pltf. was partially successful, & after the release of the ship from arrest & its transfer to a limited co., the solrs. of original deft. owners applied *ex p.* & obtained, under Solicitors Act, 1860 (c. 127), s. 28, a charging order upon the ship for their costs in the action. For the enforcement of this charge they also obtained, on notice to mtgees. to whom the vessel had been mtged. by the limited co., a further order for the appointment of a receiver of freight, &, conditionally, for the sale of the vessel. Both orders were subsequently set aside, & the solrs. admitting that the charging order must be postponed to the mtge., appealed as against the limited co.:—*Held:* (1) the charging order was wrong in form & bad in substance, &, together with the consequential order, must be set aside, for at the most, the property, if any, preserved by the exertions of the solrs. was limited to the interest of those who instructed them to oppose the claims of the master in respect of his lien on the barque, & the vessel had not only ceased to be under the control of the ct., but had changed hands, & become subject to a mtge., before the charging order was applied for; (2) the co. to whom the vessel was transferred could not be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solrs., even though the actual vendor & the promoter of the co. were one & the same person.—THE BIRNAM WOOD, [1907] P. 1; 76 L. J. P. 1; 96 L. T. 140; 23 T. L. R. 58; 51 Sol. Jo. 51; 10 Asp. M. L. C. 325, C. A.

**As against viaticum.**]—*See* No. 8439, *ante.*

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## SECT. 5.—RIGHT OF PERSONS PAYING OFF CLAIMS AGAINST SHIP.

**8469. Wages—Payment by bottomry bondholder—Priority of lien.**]—A bottomry bondholder permitted to have a priority of lien upon the proceeds of the ship, to secure the reimbursement of his advances to the crew.—THE KAMMERHEVIE ROSENKRANTS (1822), 1 Hag. Adm. 62; 166 E. R. 23.

*Annotations:—***Consd.** The Petone, [1917] P. 198. **Refd.** The Adolph (1835), 3 Hag. Adm. 249.

**8470.** —— —— **Sanction of court—Necessity for application.**]—The ct. will not, unless upon application being made to it, sanction the repayment of wages, etc., to bondholders out of the proceeds of the sale of a ship.—THE CORNELIA HENRIETTA (1866), L. R. 1 A. & E. 51; 12 Jur. N. S. 396; 14 W. R. 502.

*Annotation:—***Consd.** The Petone, [1917] P. 198.

**8471.** —— **Payment by shipowner—Without leave of court—No recovery on sale under bottomry bond.**]—(1) W. a shipowner, paid certain wages & other necessary disbursements after a bottomry bond had been given on the ship; the ship was sold at the suit of the bondholder. W. applied to be reimbursed the above payments out of the proceeds in the registry, which, if W.'s application had been granted, would not have been sufficient to meet the bond:—*Held:* for such payments made without application to & leave from the ct., W. was not entitled to be reimbursed.

(2) I have very great doubt in my own mind whether, where wages have been earned prior to the time when a bottomry bond has been given, a mariner has a right at all to come to this ct. & say, "Let me have a preferential payment over the person who holds the bottomry bond" (DR. LUSHINGTON).—THE JANET WILSON (1857), Sw. 261; 30 L. T. O. S. 22; 6 W. R. 329; 166 E. R. 1127.

*Annotations:—As to* (1) **Consd.** The Petone, [1917] P. 198. *As to* (2) **Consd.** The Hope (1873), 28 L. T. 287. **Refd.** The Union (1860), Lush. 128.

**8472.** —— **Payment by volunteer—At request of master.**]—THE WILLIAM F. SAFFORD, No. 8398, *ante.*

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**PART XIX. SECT. 5.**

**8472 i.** *Wages—Payment by volunteer—At request of master.*]—A person who at the request of the master makes advances for wages of seamen & necessaries of a ship, & the master's action being ratified by the owners, is entitled to the benefit of the master's statutory lien in respect of such advances.—RHIND *v.* ZITA, [1924] N. Z. L. R. 369.—**N.Z.**

e. —— —— *At request of owners.*]—CLARK *v.* BOWRING & CO., [1908] S. C. 1168; 45 Sc. L. R. 879; 16 S. L. T. 326.—**SCOT.**

f. —— ——.]—Persons in the position of volunteers who make payments in discharge of seamen's wages do not thereby acquire the maritime lien which the seamen had in respect thereof.—DUNN & CO. *v.* ASSOUAN S.S. CO. (1921), 42 N. L. R. 33.—**S. AF.**

g. —— *Payment by engineer.*]—An engineer who has paid certain seamen cannot claim a lien for such advances against the ship, the law giving no one but the master the right to sue for wages paid to other members of the crew.—BONHAM *v.* THE SARNOR (1921), 21 Exch. C. R. 183.—**CAN.**

h. —— *Payment by master.*]—THE DUNA (1861), 5 L. T. 217.—**IR.**

k. —— *Payment by salvors.*]—

**8473.** —— —— ——.]—THE PETONE, No. 8177, *ante*.

**8474. Prior charges—Payment by bondholders—With leave of court.**]—The ct. granted leave to bondholders to pay prior charges, & to have a lien on the ship, cargo, & freight, in respect of such payments, which were small in amount, on an affidavit specifying the charges to be paid.—THE FAIR HAVEN (1866), L. R. 1 A. & E. 67; 14 W. R. 821.

*Annotation*:—**Refd.** The Petone, [1917] P. 198.

**8475. Dock dues—Payment by plaintiff in action for necessaries—Priority over bottomry bondholder.**]—THE ST. LAWRENCE, No. 8446, *ante*.

**8476. Disbursements—Payment by master while acting as supercargo.**]—THE TAGUS, No. 8238, *ante*.

**8477.** —— **Payment by volunteer—At request of master.**]—THE PETONE, No. 8177, *ante*.

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## SECT. 6.—ENFORCEMENT OF LIENS.

*See* LIEN, Vol. XXXII., pp. 224–226, Nos. 87–98.

**8478. Enforcement by action in rem.**] — HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante*.

**8479.** ——.]—The lien of pltf. in an action *in rem* under Admiralty Court Act, 1861 (c. 61), s. 4, takes effect from the moment of the arrest of the ship. Where, therefore, such an action was commenced against a vessel belonging to a limited co., & the co. after a warrant of arrest had been served was ordered to be wound up:—*Held*: the official liquidator had no claim to the proceeds of the vessel in the hands of the ct. as against pltf.

As regards a maritime lien the Admlty. Ct., & now the Admlty. Div. of the High Ct. enforces it in an action *in rem* by seizing the ship (LORD ESHER, M.R.).—THE CELLA (1888), 13 P. D. 82; 57 L. J. P. 55; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. L. C. 293, C. A.

*Annotations*:—**Expld.** The Africano, [1894] P. 141. **Consd.** The James W. Elwell, [1921] P. 351.

——.]—*See, further*, ADMIRALTY, Vol. I., pp. 104, 105, 158–172, Nos. 65–72, 667–832.

**Damage—Collision.**]—*See* ADMIRALTY, Vol. I., pp. 139–145, Nos. 467–523.

—— **To cargo.**]—*See* ADMIRALTY, Vol. I., pp. 146–149, Nos. 524–570.

**Salvage.**]—*See* ADMIRALTY, Vol. I., pp. 152, 153, Nos. 593–613.

**Wages & disbursements.**]—*See* ADMIRALTY, Vol. I., pp. 131–139, Nos. 363–466.

**Towage.**]—*See* ADMIRALTY, Vol. I., p. 130, Nos. 358–362.

**Bottomry & respondentia.**]—*See* ADMIRALTY, Vol. I., pp. 121–126, Nos. 267–317.

**Necessaries.**]—*See* ADMIRALTY, Vol. I., pp. 126–130, Nos. 318–357.

**Judgment of foreign court.**]—*See* CONFLICT OF LAWS, Vol. XI., p. 464, Nos. 1197–1198.

**Vessel belonging to company in liquidation.**]—*See* COMPANIES, Vol. X., p. 971, Nos. 6682–6684.

**8480. Possessory lien—No power of sale—Shipbuilder.**]—Where shipbuilders had built a ship according to contract, & retained her by virtue of their lien for the balance of price unpaid, & had in an action obtained by consent a judge's order for the amount with a stay of execution, in case defts. should pay half & give a mtge. on the ship for the remainder to a bill alleging these facts, & the retainer of the ship involved great expense & praying a sale, or specific performance of the conditions of the judge's order, a demurrer was allowed.—THAMES IRON WORKS CO. *v.* PATENT DERRICK CO. (1860), 1 John. & H. 93; 29 L. J. Ch. 714; 2 L. T. 208; 6 Jur. N. S. 1013; 8 W. R. 408; 70 E. R. 676.

*Annotations*:—**Mentd.** Lievesley *v.* Gilmore (1866), L. R. 1 C. P. 570; Aitken *v.* Bachelor (1893), 62 L. J. Q. B. 193.

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## SECT. 7.—EXTINCTION OF LIEN.

*See, generally*, LIEN, Vol. XXXII., pp. 229–238.

**Delay.**]—*See, now*, Maritime Conventions Act, 1911 (57), s. 8.

**8481.** —— **Bottomry bond—Necessity for active diligence.**]—Bottomry bond put in suit originally on the part of a French merchant in 1792: suspended during the last war; not enforced during peace, but now attempted to be farther prosecuted on the part of the British merchant to whom it was indorsed; not allowed to be put in execution under the original proceedings.

In questions of bottomry, more especially the ct. is bound to expect particular vigilance; because, although bonds of this kind are to be supported with a high hand, when clear & simple, they are, in many respects, things to be narrowly watched. Bottomry is a transaction which affords great opportunities of collusion; &, therefore, on the very account of the importance given to these bonds, they are to be pursued with exact attention, & with very active diligence, in order that the ct. may have the opportunity of considering them in their recent origin, & with a view

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*Held*: where the wages of the crew of a ship which has been salved are paid by the salvors, a lien therefor attaches, & can be enforced against the salved ship.—CANADIAN DREDGING CO., LTD. *v.* THE MIKE CORRY (Ont.) (1919), 19 Exch. C. R. 61; 47 D. L. R. 495.—**CAN.**

l. *Advances to shipbuilders.*]—REID *v.* ROGERSON (1830), C. R. 1 A. C. 8; Stuart, K. B. 412; 1 Knapp, 362; 1 R. J. R. Q. 330; 12 E. R. 357.—**CAN.**

### PART XIX. SECT. 6.

m. *Filing of vouchers with registrar—Before payment of lienholder by court.*]—SYMES *v.* THE CITY OF WINDSOR (1895), 4 Exch. C. R. 362.—**CAN.**

n. *Joinder of action by seamen—Liability for costs—On failure of claim.*]—Merely because various seamen take advantage of the convenient practice to join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise, with resulting liens on different ships, it does not follow that each claimant is liable for costs consequent upon the failure of another claimant to establish a specific lien which the former never set up.—MORRISETTE *v.* THE MAGGIE (1916), 31 W. L. R. 120; 10 W. W. R. 228.—**CAN.**

o. *Enforcement against innocent purchaser of ship—Effect of delay.*]—A.-G. FOR BRITISH COLUMBIA *v.* S.S. BERMUDE, [1923] 2 D. L. R. 272; [1923] Exch. C. R. 107; 32 B. C. R. 76; [1923] 1 W. W. R. 956.—**CAN.**

p. *Special application by petition—Power to arrest.*]—Where special application by petition is made by a person averring that he has a maritime lien over a ship, it is competent for the Lord Ordinary on the Bills to grant warrant to arrest the ship.—*Re* M'CONNACHIE, [1914] S. C. 853; 51 Sc. L. R. 716; [1914] 2 S. L. T. 71.—**SCOT.**

q. *Time for enforcement.*]—There seems to be no fixed limit to the duration of a maritime lien, but it must be enforced within an equitable period, considering the nature of the lien & the charges of interest.—*Re* THE HERCYNA (1849), 1 S. V. A. R. 274.—**CAN.**

r. —— *Extension of time—When granted.*]—*Re* DORIE S.S. CO., LTD., [1923] S. C. 593; 60 Sc. L. R. 357.—**SCOT.**

### PART XIX. SECT. 7.

t. *Mortgage to lienholder—Fraud of mortgagor.*]—A maritime lien is not lost by the holder taking a mtge. for his debt, when, by the fraud of the mtgor. the mtgee. is deprived of the benefit of the mtge.—THE ALBION (1873), 3 V. R. (Adm.) 1.—**AUS.**

a. *Acceptance of invalid promissory note.*]—The fact that the master has accepted a promissory note from two co-owners in the vessel for wages due to him, which note was not paid, does not take away his lien although the vessel has been sold to a *bonâ fide*

*Sect. 7.—Extinction of lien. Part XX. Sects.* 1 & 2.]

to all the circumstances on which their honest validity may depend (SIR WILLIAM SCOTT).—THE REBECCA (1804), 5 Ch. Rob. 102; 165 E. R. 712.

*Annotation:*—**Consd.** The Royal Arch (1857), Sw. 269.

**8482. —— —— Action within reasonable time.**]—THE ROYAL ARCH, No. 7678, *ante*.

**8483. —— Damage—Necessity for diligence.**]—Owners of a damaged vessel & part of the cargo, who had obtained a decree of the ct. in a cause of damage, entitled to have the proceeds of the damaging vessel paid out of the registry to satisfy the amount of their damage, in preference to the owners of the remaining portion of the cargo, who had not brought their action until after the decree of the first suit had been pronounced. Prayer of the owners of the remaining portion of the cargo, that the proceeds might be applied *pro rata* to satisfy the two actions, rejected.

The law . . . clearly favours those who are most active in seeking its aid & assistance (DR. LUSHINGTON).—THE SARACEN (1846), 2 Wm. Rob. 451; 4 Notes of Cases, 498; 7 L. T. O. S. 469; 10 Jur. 396; 166 E. R. 826; *on appeal, sub nom.* BERNARD *v.* HYNE, THE SARACEN (1847), 6 Moo. P. C. C. 56, P. C.

*Annotations:*—**Consd.** The Clara (1855), Sw. 1; The Markland (1871), L. R. 3 A. & E. 340. **Reld.** The Mellona (1848), 6 Notes of Cases, 62; The Desdemona (1856), Sw. 158; The Africano, [1894] P. 141; The Stream Fisher, [1927] P. 73. **Mentd.** The Tecumseh (1848), 6 Notes of Cases, 666, n.

**8484. —— —— ——.**]—DEAN *v.* RICHARDS, THE EUROPA, No. 8186, *ante*.

**8485. —— —— What amounts to laches—Ship allowed to proceed.**]—A collision having occurred between a foreign vessel, the *C. A.*, & an English vessel, the *R.*, the master of the *C. A.* admitting his liability, gave, in satisfaction of the damage, a bill of exchange, payable on the arrival of the *C. A.* at S., her port of destination in Scotland. The master of the *C. A.*, however, took her to France, where, her owner becoming bkpt., she was sold by the assignees of his estate to defts., who brought her to England, where she was arrested by the owners of the *R.* in respect of the collision, the bill of exchange never having been paid:—*Held:* pltfs. had not lost their lien for damage by reason of laches, or by the subsequent sale of the vessel.—THE CHARLES AMELIA (1868), L. R. 2 A. & E. 330; 38 L. J. Adm. 17; 19 L. T. 429; 17 W. R. 624; 3 Mar. L. C. 203.

*Annotation:*—**Consd.** The Goulandris, [1927] P. 182.

**8486. —— —— —— Depends on circumstances of each case.**]—In 1878 a collision occurred, in the North Sea, between a Norwegian steamer & a British vessel, in which the latter was sunk. The name & place of business of the Norwegian co. owning the steamer were known to the owners of the British vessel, & for one or more days, on forty-seven occasions during the following eleven years, the Norwegian steamer put into ports in the United Kingdom. During the same period there were changes in the capital & in the shareholders of the Norwegian co.

In 1889 pltfs., the owners of the British vessel, instituted an action *in rem* against the Norwegian steamer. The owners of the Norwegian steamer, as defts., pleaded, in bar of the action, that the claim of pltfs., their rights, if any, & their maritime lien, if acquired, had been lost by laches, & it would be otherwise inequitable to allow the action to proceed, as there had been changes of interest in the ownership of the steamer, the rights of third parties had intervened, & the greater part of the crew of the steamer were not now available to give evidence:—*Held:* pltfs. were entitled to prosecute their claim for damages, for in each case the particular circumstances must be looked at to see whether it would be inequitable to entertain the suit, considering the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witnesses, the loss of evidence, & the change of property, & in this case, though defts. would be entitled to every presumption which could fairly be made in their favour by reason of the absence of any witness, defts. had failed to show that the merits could not be gone into.—THE KONG MAGNUS, [1891] P. 223; 63 L. T. 715; 6 Asp. M. L. C. 583; *subsequent proceedings*, 65 L. T. 231.

*Annotations:*—**Reld.** The Joannis Vatis (No. 2), [1922] P. 213. **Mentd.** The Rosalind (1920), 90 L. J. P. 126.

**8487. —— —— Effect of Maritime Conventions Act, 1911 (c. 57), s. 8—Discretion of court.**]—Circumstance in which the ct., in the exercise of its discretion, allowed an action for damages to a ship to proceed although more than two years had elapsed from the date of the collision.—THE CAMBRIC (1912), 29 T. L. R. 69.

**8488. —— —— —— Damage to His Majesty's ship.**]—The provisions of above Act, do not bind the Crown, & an action by the Lords Comrs. of the Admiralty in respect of damage to one of His Majesty's ships need not be instituted within two years from the date of the damage as provided by s. 8 of that Act.—THE LOREDANO, [1922] P. 209; 91 L. J. P. 158; 127 L. T. 158; 38 T. L. R. 516; 15 Asp. M. L. C. 565.

**8489. —— Necessaries.**]—THE WEST FRIESLAND, No. 8326, *ante*.

**8490. —— Master's wages.**] — (1) A master does not lose his lien upon a ship for wages due by delaying to enforce such lien for ten months after his discharge, notwithstanding he has had an opportunity to do so; but he may enforce it even against persons who, as mtgees., have in the interim become interested in the ship without notice of the lien.

(2) The release by the master of his personal claim against the shipowner for wages does not operate as a release of the ship from his lien for such wages.—THE CHIEFTAIN (1863), Brown. & Lush. 212; 3 New Rep. 251; 167 E. R. 340.

*Annotations:*—*As to* (1) **Reld.** The Hope (1873), 28 L. T. 287. *Generally*, **Reld.** The Acacia (1879), 41 L. T. 564.

**8491. —— Disbursements — Reasonable diligence.**]—THE FAIRPORT, No. 8302, *ante*.

**8492. Assignment of vessel—Sale by order of court.**]—THE CATHARINA (FORMERLY THE CROXDALE) (1851), 17 L. T. O. S. 43; 15 Jur. 231.

*Annotation:*—**Reld.** Stephens *v.* Broomfield, The Great Pacific (1869), L. R. 2 P. C. 516.

**8493. —— —— In action in rem.**]—THE RUBY (No. 2), No. 8258, *ante*.

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purchaser.—THE AURA (1870), Y. A. D. 54.—**CAN.**

b. *Collusive sale to defeat lien.*]—A schooner was in tow of a tug, & through the fault of the latter collided with another vessel & was sunk. To defeat the lien for damage for which proceedings had been taken in a foreign ct., the owner of the tug allowed the engineer's wages to run in arrear, & thus procured a petition to be filed in the maritime ct. & the schooner to be sold to a nominal purchaser:—*Held:* the proceedings were an abuse of the process of the ct.—THE JEROME (1886), 6 C. L. T. 263.—**CAN.**

c. *Payment by agent.*]—Payment by the agent of the owner satisfies & discharges any lien in respect to the original claim of workmen or supply men to the extent of such payments.—WILLIAMS & LAKE ERIE & DETROIT RIVER RY. CO. *v.* THE FLORA & THE ROSE, D. BROWN (1897), 6 Exch. C. R. 137.—**CAN.**

d. *Loss of ship.*]—The rights of seamen entitled to maritime liens are not affected by the loss of the ship after it was sold by a liquidator in a winding-up of the co. owning it.—*Re*

**8494. —— Maritime lien not affected.**]—HARMER *v.* BELL, THE BOLD BUCCLEUGH, No. 8168, *ante.*

**8495. —— ——.**]—DEAN *v.* RICHARDS, THE EUROPA, No. 8186, *ante.*

**8496. —— —— Sale abroad.**]—THE CHARLES AMELIA, No. 8485, *ante.*

**8497. —— Necessaries—Sale.**] — THE WEST FRIESLAND, No. 8326, *ante.*

**—— Lien for damage.**]—*See* Nos. 8183–8187, *ante.*

**8498. Giving of bail.**]—Pltfs., the owners of the German vessel *J.*, commenced an action *in rem* against the Danish vessel *C.* in an Admlty. Ct. in Holland, in respect of a collision on the high seas, & the *C.* was arrested in this action. Pltfs.' agent in Holland & the Dutch Ct. allowed the *C.* to be released on the underwriters of the *C.* guaranteeing to the parties interested to the amount of 175,000 gulden, for the compensation which *C.* might eventually have to pay by legal decision in Holland. While these proceedings were pending in Holland, pltfs. began an action *in rem* in England in respect of the same collision, & the *C.* was arrested in the English action.

The result of the giving of bail is the release of the ship. What is the meaning of releasing a ship under the circumstances. It appears to me that the meaning of it is that she is released from all rights & claims against her in respect of the collision which is the cause for which her owners have been compelled to give the bail (FRY, L.J.).—THE CHRISTIANSBORG (1885), 10 P. D. 141; 54 L. J. P. 84; 53 L. T. 612; 1 T. L. R. 634; 5 Asp. M. L. C. 491, C. A.

*Annotations:*—**Consd.** The Reinbeck (1889), 60 L. T. 209; The Dictator, [1892] P. 304; The Jasep (1896), 12 T. L. R. 434; The Mannheim, [1897] P. 13; The Gemma, [1899] P. 285; The Juno (1922), 128 L. T. 671; The Golaa [1926] P. 103. **Refd.** Mutrie *v.* Binney (1887), 35 Ch. D. 614; The Hagen, [1908] P. 189; The Goulandris, [1927] P. 182. **Mentd.** *In the Goods of* Bryan, Board of Education *v.* Reubell (1903), 20 T. L. R. 290.

**8499. ——.**]—The owners of the British ship *R.* & the owners of her cargo sued the German steamship *R.* in the German Consular Ct. at Constantinople for damages for injury to the cargo caused by collision between the two vessels. An order was made therein for the arrest of the *R.*, or for bail, subject to pltfs. giving security for a certain sum. The action was proceeded with, but pltfs. never gave the required security, & consequently the *R.* was never arrested. The *R.* left Constantinople during the pendency of the action & came to England, where she was arrested in the present action *in rem* instituted by the owners of cargo in respect of the same cause of action. Previously to the institution of the present action defts. had given bail in the action at Constantinople to which port the *R.* was a constant trader, although pltfs. in that action had never given the required security. The limit of defts.' liability in the German Consular Ct. was the value of the *R.*, a sum considerably less than the limit of their liability in this country. Upon motion by defts. to release the *R.* without giving bail, or to stay the action:—*Held:* bail having been given without pltfs. having deposited the required security, was given voluntarily & not under compulsion, & pltfs. were not proceeding vexatiously in instituting a second action in this country, & the ship ought not to be released.—THE REINBECK (1889), 60 L. T. 209; 6 Asp. M. L. C. 366, C. A.

*Annotation:*—**Refd.** The Mannheim, [1897] P. 13.

**Loss of possession.**]—*See* Nos. 8343, 8347–8349, *ante.*

# Part XX.—Lighthouses.

## SECT. 1.—DEFINITIONS.

**Lighthouses.**]—*See* 1894 Act, ss. 642, 742.

**Buoys & beacons.**]—*See* 1894 Act, s. 742.

## SECT. 2.—LIGHTHOUSE AUTHORITIES.

*See* 1894 Act, ss. 634, 643, 652–657, 668, 742.

**8500. Liability for negligence—Whether exempted as servants of Crown.**]—(1) The Corpn. of Trinity House are not by virtue of Merchant Shipping Act, 1854 (c. 104), constituted servants of the Crown so as to exempt them from liability to an action for negligence in the performance of their duties.

(2) A beacon vested in the Corpn. of Trinity House having become partially destroyed, they licenced G. to remove it, & in so doing he negligently left an iron stump sticking up under the water. In an action to recover damages caused thereby to pltf.'s ship:—*Held:* defts. were liable for G.'s negligence.—GILBERT *v.* TRINITY HOUSE CORPN. (1886), 17 Q. B. D. 795; 56 L. J. Q. B. 85; 35 W. R. 30; 2 T. L. R. 708, D. C.

*Annotations:*—*As to* (1) **Consd.** Mackenzie-Kennedy *v.* Air Council, [1927] 2 K. B. 517. **Refd.** Metropolitan Meat Industry Board *v.* Sheedy, [1927] A. C. 899. *As to* (2) **Apld.** McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118. *Generally*, **Consd.** Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213.

**8501. —— Of servants or agents—Damage to sea wall.**]—Defts.' vessel, owing to the negligence of their servants, struck on a sand bank, & becoming from that cause unmanageable, was driven by wind & tide upon a sea wall of pltfs.' which it damaged. Having regard to the state of the weather & tide it was impossible to prevent this, the ship having once struck:—*Held:* affirming the judgment of the ct. below, that defts. were liable for the damage caused to the wall.—ROMNEY MARSH (LORDS BAILIFF-JURATS) *v.* TRINITY HOUSE CORPN. (1872), L. R. 7 Exch. 247; 41 L. J. Ex. 106; 20 W. R. 952, Ex. Ch.; *affg.* (1870), L. R. 5 Exch. 204; 39 L. J. Ex. 163; 22 L. T. 446; 18 W. R. 869; 3 Mar. L. C. 398.

*Annotations:*—**Apld.** The George & Richard (1871), L. R. 3 A. & E. 466; Gilbert *v.* Trinity House Corpn. (1886), 17 Q. B. D. 795.

**8502. —— —— Incomplete removal of beacon.**]—GILBERT *v.* TRINITY HOUSE CORPN., No. 8500, *ante.*

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FORT GEORGE LUMBER & NAVIGATION CO., TRADERS BANK OF CANADA *v.* LOCKWOOD (1913), 48 S. C. R. 593; 18 B. C. R. 473; 16 D. L. R. 175; 26 W. L. R. 884; 5 W. W. R. 982.—**CAN.**

*e. Relinquishment of possession.*]—A lien is destroyed if the party entitled to it gives up his right to the possession of the goods.—RUMELY *v.* THE VERA M. & WESTERN MACHINE WORKS, LTD., [1923] 2 D. L. R. 867; 31 B. C. R. 472; [1923] 1 W. W. R. 253.—**CAN.**

*f. Arrest of ship.*]—The possessory lien of material men is not determined by the arrest of the vessel by warrant of the High Ct. of Admlty., in a suit by them for equipment & repair.—HAMILTON *v.* HARLAND & WOLFF, THE ACACIA (1880), 4 Asp. M. L. C. 254.—**IR.**

*g. Lien for repairs—Ship in private patent slip—Effect of removal to public dock.*]—BARR & SHEARER *v.* COOPER (1875), 2 R. (Ct. of Sess.) (H. L.) 14; 12 Sc. L. R. 406.—**SCOT.**

SECT. 3.—**CONSTRUCTION OF LIGHTHOUSES.**

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 77 & 78; 1894 Act, ss. 638–641.

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SECT. 4.—**EXEMPTIONS OF PROPERTY FROM RATES, TAXES, ETC.**

*See* 1894 Act, ss. 731, 732.

**8503. Lighthouses vested in Trinity House.**]—(1) The lighthouses which are exempted from rating by Merchant Shipping Act, 1854 (c. 104), s. 430, are those only the superintendence & management of which is by Merchant Shipping Act, 1854 (c. 104), s. 389, vested in the Trinity House, the Comrs. of Northern Lighthouses, & the Port of Dublin Corpn., & not lighthouses under the control & management of local authorities, such as the Mersey Docks & Harbour Board.

(2) The Mersey Docks & Harbour Board were possessed of a tower used as a lighthouse & also as a telegraph station, in respect of which they received tolls from vessels using their docks or entering the port of Liverpool, which tolls were directed by the statutes under which the board derived their authority to be so fixed, that, with the other receipts of the board applicable to conservancy purposes, they should not be higher than were necessary to meet the conservancy expenditure:—*Held:* inasmuch as the tower was incapable of profitable occupation, it was not rateable to the relief of the poor.

(3) Two dwelling-houses adjoining the tower were used by the lightkeepers, & if not so used in connection with the lighthouse might be let to tenants at a rent, & the rent would be enhanced by the fact that they had been built in the neighbourhood of the tower:—*Held:* the rateable value of the dwelling-houses must be ascertained with reference to the fact that they had been built in the neighbourhood of the tower.—MERSEY DOCKS & HARBOUR BOARD *v.* LLANEILIAN OVERSEERS (1884), 14 Q. B. D. 770; 54 L. J. Q. B. 49; 52 L. T. 118; 49 J. P. 164; 33 W. R. 97; 5 Asp. M. L. C. 358, C. A.

*Annotations:*—*As to* (2) **Dbtd.** L. C. C. *v.* Erith Churchwardens, etc. & Dartford Union Assmt. Com., West Ham Churchwardens, etc. *v.* L. C. C., St. George's Union Assmt. Com. *v.* L. C. C., [1893] A. C. 562. *Generally,* **Refd.** Gilbert *v.* Trinity House Corpn. (1886), 17 Q. B. D. 795; Grand Junction Waterworks Co. *v.* Davies, [1897] 2 Q. B. 209; Lancaster Port Comrs. *v.* Barrow-in-Furness Overseers, [1897] 1 Q. B. 166. **Mentd.** Burton-upon-Trent Corpn. *v.* Burton-upon-Trent Union Assmt. Com., Burton-upon-Trent Corpn. *v.* Eggington & Burton-upon-Trent Overseers (1889), 24 Q. B. D. 197.

**8504. Lighthouses vested in Commissioners of Northern Lighthouses.**]—MERSEY DOCKS & HARBOUR BOARD *v.* LLANEILIAN OVERSEERS, No. 8503, *ante.*

**8505. Lighthouses under control of "local lighthouse authorities"—Rateable value—Assessment.**]—MERSEY DOCKS & HARBOUR BOARD *v.* LLANEILIAN OVERSEERS, No. 8503, *ante.*

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SECT. 5.—**LIGHT DUES.**

*See* 1894 Act, ss. 77–81, 84, 85, 643, 647, 649–651, 671, 672, 693, sched. II.; 1898 Act, ss. 2, 5, sched. II.; Statutory Rules & Orders Revised, Vol. VIII., p. 303; Statutory Rules & Orders, 1919, No. 1108; 1927, No. 426.

**8506. What ships liable—Ship receiving no benefit.**]—A ship must have an equivalent to be charged for lighthouse duties.

The duty is payable for the advantages received. But this ship received no benefit from the harbour (*per* CUR.).—MATSON *v.* SCOBEL (1768), 4 Burr. 2258; 98 E. R. 177.

**8507. —— Ships belonging to Crown—Vessel temporarily chartered to Crown.**]—Where deft. chartered his ship to the Comrs. of the Transport Service on behalf of the Crown, to be employed as a transport, & the ship in the course of such employment made several voyages from Deptford to foreign ports & back:—*Held:* by the terms of the charterparty, coupled with the nature of the service, a temporary ownership passed to the Crown, so that deft. during the time of such service, was not to be considered as owner within the charters granted to the Trinity House, which impose lighthouse duties, & for buoyage & beaconage, on the masters & owners of ships.—TRINITY HOUSE MASTER *v.* CLARK (1815), 4 M. & S. 288; 105 E. R. 841.

*Annotations:*—**Apld.** Smithett *v.* Blythe (1830), 1 B. & Ad. 509. **Consd.** Weir *v.* Union S.S. Co., [1900] A. C. 525; The Sarpen, [1916] P. 306. **Refd.** Saville *v.* Campion (1819), 2 B. & Ald. 503; Christie *v.* Lewis (1821), 2 Brod. & Bing. 410; Hamilton *v.* Stone (1822), 1 Dow. & Ry. K. B. 274; Hodgkinson *v.* Fernie (1857), 2 C. B. N. S. 115. **Mentd.** Dean *v.* Hogg (1834), 3 L. J. C. P. 113.

**8508. —— —— Post office packet.**]—3 Geo. 2, c. 36, confirmed a patent formerly granted for taking tolls in respect of a lighthouse. There was a proviso, that nothing in the Act should extend to charge any of the King's ships of war with the duties granted by the Act or patent. At the time of passing this Act the post office packets were not ships owned by the Crown:—*Held:* the exception of His Majesty's ships of war did not, by implication, render the King's other ships chargeable; & post office packets, the property of the Crown, were not subject to toll.—SMITHETT *v.* BLYTHE (1830), 1 B. & Ad. 509; 9 L. J. O. S. K. B. 39; 109 E. R. 876.

*Annotations:*—**Refd.** Hornsey U. C. *v.* Hennell, [1902] 2 K. B. 73. **Mentd.** Chare *v.* Hart (1918), 88 L. J. K. B. 833.

**8509. —— Vessels not touching at English port.**]—British ships in passing by the Eddystone & other lighthouses in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the lighthouse duties to the Trinity House.—TRINITY HOUSE *v.* SORSBIE (1790), 3 Term Rep. 768; 100 E. R. 849.

**8510. —— Vessel calling for necessaries—As result of casualty.**]—NEPTUNE STEAM NAVIGATION CO. *v.* TRINITY HOUSE CORPN. (1888), 4 T. L. R. 289, C. A.

**8511. —— —— Coal — Ship also landing passengers—Passengers not paying passage money.**]—The master of a ship took on board at Malta three persons who wished to return to England. These persons paid no passage money, & the master provided & paid for their food for which they paid the master £4 each. The vessel touched at a port in England to obtain bunker coal, & the three persons were there landed:—*Held:* the landing of these persons did not deprive the ship of the exemption from light dues at that port which the ship would otherwise be entitled to.—HAY *v.* TRINITY HOUSE CORPN. (1895), 65 L. J. Q. B. 90; 73 L. T. 471; 44 W. R. 188; 40 Sol. Jo. 148; 8 Asp. M. L. C. 77; 1 Com. Cas. 193.

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**PART XX. SECT. 5.**

h. *What ships liable—Ship arriving at any port in Australia—Meaning of "port."*]—COMMONWEALTH *v.* HUON CHANNEL & PENINSULAR S.S. CO., LTD. (1918), 24 C. L. R. 385.—**AUS.**

**8512. How calculated—Tonnage measurement—Inclusion of deck cargo.**]—A steamship leaving a port in England carried besides the coal in her bunkers, 100 tons of bunker coal on the awning deck for use in the ship's boiler fires, & this coal was during the voyage out transferred to the bunkers & used in the boiler fires. Light dues were claimed in respect of the space occupied by the 100 tons of coal carried on deck:—*Held:* "deck cargo" in 1894 Act, s. 85, was not limited to freight earning cargo; the words "stores or other goods" included bunker coal; & the tonnage of the space on deck occupied by the 100 tons of coal must be added to the ship's registered tonnage to ascertain the light dues payable.—CAIRN LINE OF STEAMSHIPS, LTD. *v.* TRINITY HOUSE CORPN., [1908] 1 K. B. 528; 77 L. J. K. B. 363; 98 L. T. 86; 24 T. L. R. 212; 10 Asp. M. L. C. 602; 13 Com. Cas. 175, C. A.

**8513. Priority of seaman's claim for wages.**]—THE ANDALINA, No. 8440, *ante*.

SECT. 6.—**INSPECTION AND CONTROL OF LOCAL LIGHTHOUSES.**

*See* 1894 Act, ss. 652–654.

SECT. 7.—**EXPENSES.**

*See* 1894 Act, ss. 659–665; 1898 Act, ss. 1, 2, 7, sched. III.; 1920 Act.

SECT. 8.—**LIGHTHOUSE BOOKS.**

**Admissibility in evidence.**]—*See* EVIDENCE, Vol. XXII., p. 317, Nos. 3101–3104.

# Part XXI.—Harbours, Docks and Piers.

SECT. 1.—**IN GENERAL.**

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27); General Pier & Harbour Act, 1861 (c. 45); & General Pier & Harbour Act, 1861 (Amendment) Act, 1862 (c. 19); Ministry of Transport Act, 1919 (c. 50).

**8514. Entrance to dock—Whether public highway.**]—(1) On Mar. 28, 1907, defts.' vessel by negligence damaged the dock gates of a dock. The gates were used on Mar. 29, 30, 31. On Apr. 1, the gates were closed for repairs, & remained closed on Apr. 1, 2, & 3. On Apr. 1, pltfs.' vessel arrived outside the dock, & was prevented from entering the dock to load a cargo then waiting therein. By statute the dock co. were obliged upon payment of certain rates & subject to certain conditions to keep the dock "open to all persons for the shipping & unshipping of goods, & the embarking & landing of passengers." In an action by pltfs. against defts. to recover damages for the detention of the vessel so caused by defts.:—*Held:* although the dock co. were under a statutory obligation to allow all persons to use the dock upon payment of dock dues, that did not make the entrance to the dock a public highway.

(2) The obligation on the dock co. was similar to that of an innkeeper, who has to receive guests, or a common carrier, who is obliged to carry goods tendered for carriage.

(3) Defts.' negligence was too indirectly related to the alleged interference with pltfs.' rights & their loss to constitute a good cause of action by pltfs. against defts.

*Semble:* where a shipowner has been obstructed in the exercise of his right to navigate his ship in a public navigable channel—a highway for ships—& had thereby suffered actual loss & damage by detention of the ship an action lies.—ANGLO-ALGERIAN S.S. CO., LTD. *v.* HOULDER LINE, LTD., [1908] 1 K. B. 659; 77 L. J. K. B. 187; 98 L. T. 440; 24 T. L. R. 235; 11 Asp. M. L. C. 45; 13 Com. Cas. 187.

*Annotation:*—*As to* (1) **Refd.** South Wales & Liverpool S.S. Co. *v.* Nevill's Dock & Ry. Co., Nevill's Dock & Ry. Co. *v.* Maatschappij S.S. Bestevaer Rotterdam (1913), 18 Com. Cas. 124.

**8515. —— Obstruction through negligent navigation—Detention of other vessel arriving during continuance of obstruction—Right of other vessel to damages from negligent vessel.**]—ANGLO-ALGERIAN S.S. CO., LTD. *v.* HOULDER LINE, LTD., No. 8514, *ante*.

**8516. —— Free water clause—"Lighter barge or other like craft."**]—BURHAM BRICK, LIME & CEMENT CO. *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1899), cited in [1912] 2 K. B. at p. 590; 81 L. J. K. B. at p. 1037.

*Annotation:*—**Refd.** Smeed, Dean *v.* Port of London Authority (1912), 81 L. J. K. B. 1031.

**8517. Right of public to use water of harbour—Extent of right.**]—DENABY & CADEBY MAIN COLLIERIES, LTD. *v.* ANSON, No. 8617, *post*.

**8518. Wrongful occupation of berth—Liability to dock company for trespass—Damages for detention of vessel entitled to berth.**]—SOUTH WALES & LIVERPOOL S.S. CO., LTD. *v.* NEVILL'S DOCK & RY. CO., LTD., NEVILL'S DOCK & RY. CO., LTD. *v.* MAATSCHAPPIJ S.S. BESTEVAER, ROTTERDAM, No. 8659, *post*.

**8519. —— Action by rightful occupant against dock company—Liability of trespasser for costs of defending action.**]—SOUTH WALES & LIVERPOOL S.S. CO., LTD. *v.* NEVILL'S DOCK & RY. CO., LTD., NEVILL'S DOCK & RY. CO., LTD. *v.* MAATSCHAPPIJ S.S. BESTEVAER, ROTTERDAM, No. 8659, *post*.

**8520. Occupation of berth at invitation of party not being dock authority—Duty of party to warn shipmaster—As to condition of berth—Damage through defective berth.**]—A person who invites the ship of another to go to a berth, which is neither owned nor occupied by the person so inviting, owes no duty to warn the shipmaster that he has

**PART XXI. SECT. 1.**

**k.** *Unauthorised construction of wharf—Statutory ratification.*]—*Held:* although the statute 10 Geo. 4, c. 11, did not expressly authorise the Cobourg Harbour Co. to build a wharf in front of the street in question, the recognition of the right in subsequent statutes was sufficient.—STANDLY *v.* PERRY (1877), 2 A. R. 195.—**CAN.**

**l.** *Whether public harbour.*]—*Held:* a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground & little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act.—MCDONALD *v.* LAKE SIMCOE ICE & COLD STORAGE CO. (1899), 26 A. R. 411.—**CAN.**

**m.** *Whether foreshore part of harbour.*] — By British North America Act, 1867, s. 108, public harbours in

*Sect.* 1.—*In general. Sects.* 2 & 3.]

taken no steps to ascertain the condition of the berth & is not liable for any damage which the ship sustains by reason of hidden defects in the berth of which neither of the parties knew or had any reason to suspect.—THE EMPRESS, [1923] P. 96; 92 L. J. P. 42; 39 T. L. R. 201.

**Crown in relation to ports & harbours.**]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 556, Nos. 564–568.

**Application of Factories Acts.**]—*See* FACTORIES & SHOPS, Vol. XXIV., pp. 915–919, Nos. 104–138.

**Assessment of dockyards to land tax.**]—*See* LAND TAX, Vol. XXX., p. 303, No. 37.

**Rateability.**]—*See* RATES & RATING, Vol. XXXVIII., pp. 473–474, 483–484, 560–564, Nos. 342–343, 407–422, 986–1023.

**Contracts by authorities—Necessity for being under seal.**]—*See* CORPORATIONS, Vol. XIII., pp. 388, 390, Nos. 1150, 1152, 1160.

**Authorities as ferry owners—Employment of ferry boats—Acts ultra vires.**]—*See* FERRIES, Vol. XXIV., p. 974, No. 63.

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## SECT. 2.—CONSTRUCTION OF HARBOURS, DOCKS AND PIERS.

*See* Harbours Docks & Piers Clauses Act, 1847 (c. 27), ss. 3–15, 20–23, 25, 26, 33; General Pier & Harbour Act, 1861 (c. 45), ss. 2–4, 10–14, 15–17; General Pier & Harbour Act, 1861 (Amendment) Act (c. 19), ss. 3, 7–12, 19, 25, sched. B.; Public Works Loans Acts, 1875 (c. 89), 1882 (c. 62), 1887 (c. 37), 1892 (c. 61); Fishery Harbours Act, 1915 (c. 48).

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## SECT. 3.—DUTY OF HARBOUR AUTHORITIES.

**8521. Duty analogous to that of innkeeper or common carrier.**]—ANGLO-ALGERIAN S.S. CO., LTD. *v.* HOULDER LINE, LTD., No. 8514, *ante*.

**8522. To permit user of docks—To persons paying dues.**]—ANGLO-ALGERIAN S.S. CO., LTD. *v.* HOULDER LINE, LTD., No. 8514, *ante*.

**8523. To take care.**]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *post*.

**8524. —— To provide safe docks & berths.**]—Pltfs. were owners of a ship, & defts. the proprietors of docks & a basin connected therewith, with power to charge tolls for their use, & they advertised that the docks were fit for the reception of vessels of 1,000 tons burthen & upwards. The dock was connected with a tidal river by a basin, which was still incomplete & in a state of excavation. A channel of about 540 feet in length had been cut to about the depth of the dock sill of the width of seventy feet from the dock to the entrance to the river, a bank being left on either side. At high water the whole of the basin was covered, & no public notice of its state had been given, nor had the channel been marked by buoys or otherwise. Pltfs.' vessel, a barque of 674 tons, entered the deck unladen, & having taken a cargo of coals she was attempting to come out at high spring tide, when she grounded on one of the banks of the channel; a pilot was in charge, & there was no mismanagement on the part of the crew:—*Held:* it was the duty of defts. to take reasonable care that their dock & basin were kept so free from obstruction as that those using them might do so without danger to their lives or property; they had under the above circumstances been guilty of a negligent breach of such duty, & were liable in an action brought against them by pltfs. for the loss of their ship.—THOMPSON *v.* NORTH EASTERN RY. CO. (1862), 2 B. & S. 119; 31 L. J. Q. B. 194; 6 L. T. 127; 8 Jur. N. S. 991; 10 W. R. 404; 1 Mar. L. C. 207; 121 E. R. 1017, Ex. Ch.

*Annotations:*—**Consd.** The Excelsior (1868), L. R. 2 A. & E. 268. **Mentd.** Wyatt *v.* G. W. Ry. (1865), 6 B. & S. 709; Lax *v.* Darlington Corpn. (1879), 5 Ex. D. 28.

**8525. —— ——.**]—(1) Pltfs.' ship was injured & sunk by striking against a sunken wreck in Piel Channel, a channel leading into Barrow harbour. Deft. co. had, under local Acts, power to remove wrecks & obstructions from the channel in question. They were also, by virtue of those Acts, the harbour authority within Removal of Wrecks Act, 1877 (c. 16). Defts. had taken possession of the wreck a few days before pltfs.' vessel struck upon it. & had partially removed it when the accident happened. Pltfs. sued deft. co. for the damages caused by the accident, & it was admitted that, if responsible, they were guilty of negligence. *Semble:* defts. were not responsible for the damage occasioned under Removal of Wrecks Act, 1877 (c. 16), s. 4, as the language of the sect. is permissive, & could not be read as imposing a duty upon harbour authorities; nor had they rendered themselves responsible by taking possession of the wreck.

(2) By one of the local Acts defts. were empowered to receive a certain proportion of the light dues from ships entering Piel Channel, & those dues were to be applied for maintaining, improving, regulating, & buoying the channel:—*Held:* this cast upon defts. an obligation to remove the obstruction, & to take the necessary means for warning vessels away from it, upon the principle of *Mersey Board* v. *Gibbs*, No. 8665, *post*, & on this ground pltfs. were entitled to recover.—DORMONT *v.* FURNESS RY. CO. (1883), 11 Q. B. D. 496; 52 L. J. Q. B. 331; 49 L. T. 134; 47 J. P. 711; 5 Asp. M. L. C. 127.

*Annotation:*—*As to* (2) **Refd.** The Ella, [1915] P. 111.

**8526. —— ——.**]—THE BURLINGTON, No. 8687, *post*.

**8527. —— ——.**]—THE BEARN, No. 8690, *post*.

**8528. —— ——.**]—Dock owners owe a duty to use reasonable care that their docks & berths are reasonably fit for the ships they invite to use them.

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each province are within the legislative powers of the Dominion Parliament, & where a foreshore is used for a harbour it must be regarded as part of a harbour.—A.-G. FOR BRITISH COLUMBIA *v.* CANADIAN-PACIFIC RY. (1906), 75 L. J. P. C. 38.—**CAN.**

### PART XXI. SECT. 2.

n. *Right of Harbour Trust Commissioners—To authorise erection of structure in bed of harbour below high water mark.*]—A.-G. *v.* MOSMAN MUNICIPAL COUNCIL (1910), 11 S. R. N. S. W. 133; 28 N. S. W. W. N. 41.—**AUS.**

o. *Courts' power to review Authority of Minister of Works.*]—The Minister for Works, as the constructing authority under Sydney Harbour Bridge Act, 1922, has a discretion as to what incidental works are necessary in connection with the work authorised by that Act, & for the purpose of carrying out such works has the necessary power to resume any lands required therefor; the ct. will only interfere with this discretion where it is not exercised *bonâ fide* or where the decision of the Minister that a work is incidental & necessary is one to which no reasonable man could have come.—DORN *v.* MINISTER FOR PUBLIC WORKS (1925), 42 N. S. W. W. N. 8.—**AUS.**

### PART XXI. SECT. 3.

8523 l. *To take care.*]—EBERT & CO. *v.* PORT ELIZABETH HARBOUR BOARD (1904), 18 E. D. C. 225.—**S. AF.**

p. *To keep bed of harbour free from obstructions.*]—NEW RIVER HARBOUR

There is not an absolute warranty on their part that their docks & berths are safe.

Where a vessel picked up with her propeller a quantity of wires & ropes from the bottom of a dock & it appeared that they might have been discovered & removed by efficient dredging, the owners of the dock were held liable for the damage sustained by the vessel.—THE DEVON (1923), 130 L. T. 448; 40 T. L. R. 136; 16 Asp. M. L. C. 268.

**8529. —— Safe access to ship—Gangway.**]—SMITH *v.* LONDON & ST. KATHARINE DOCKS CO., No. 8709, *post.*

**8530. —— Unobstructed access & egress to & from dock—Depth of water.**]—BEDE S.S. CO. *v.* RIVER WEAR COMRS., No. 8677, *post.*

**8531. —— Suitability of quays for cargo.**]—Pltfs. were the owners of ox hides which arrived on board a general ship at the docks at Liverpool belonging to the Mersey Docks & Harbour Board. The cargo was unloaded on to the quay by master porters, whose duty it was to unload ships in the docks & who were licenced for that purpose by the dock board. The hides were damaged when on the quay owing to some powdered barilla ore, which had been unloaded from a ship on to the same quay a few weeks before, having got into the interstices between the stones forming the flooring of the quay. In an action against the dock board & the master porters to recover damages for the injury to the hides the jury found that the board were negligent in allowing the quay to be used for the hides whilst in its then condition, but that the master porters were not negligent. The board contended that they owed no duty in that respect to pltfs., the duty being imposed by the board's Acts & regulations made under those Acts on the master porters alone:—*Held:* there was nothing in the Acts or regulations which relieved the board from the duty to take reasonable care that the quay was fit to receive the hides, & therefore the board were liable.—LIEBIG'S EXTRACT OF MEAT CO. *v.* MERSEY DOCKS & HARBOUR BOARD & NELSON (WALTER) & SON, [1918] 2 K. B. 381; 87 L. J. K. B. 1133; 119 L. T. 94; 34 T. L. R. 388, C. A.

**8532. To maintain & repair.**] — BURT *v.* VICTORIA GRAVING DOCK CO., LTD. & LONDON & ST. KATHERINE'S DOCK CO., No. 8678, *post.*

**8533. —— Only works within undertaking.**]—The trustees having enlarged & reconstructed the piers of Erskine ferry, one of the piers was damaged by a ship, & the proprietor brought an action for a declaration that the trustees were bound to repair the pier as part of their undertaking. The trustees denied liability unless for damage done by their works:—*Held:* the ferry was not part of the undertaking of the trustees, & they were not bound to repair the damage.—CLYDE NAVIGATION TRUSTEES *v.* BLANTYRE (LORD), [1893] A. C. 703, H. L.

**8534.** ——.]—The Witham Outfall Board was by a local Act constituted for the purpose of excavating, forming & maintaining a new cut for the improvement of the river Witham from the port & docks of Boston to the sea so as to enable ships of larger tonnage to proceed to the docks. By another local Act, the Boston Corpn. was given power to construct a new dock on the river Witham, & by s. 9 of that Act it was provided that the corporation, in exercising the powers of the Act, in relation to the construction, maintenance, & use of the dock, the widening & embanking of the river, & other works therein described, should observe & be bound by certain regulations & restrictions contained therein of which (5) was to the effect that any damage or injury done by any steamer or other vessel to the fascine or other works under the jurisdiction of the board should be made good by the corpn. to the reasonable satisfaction of the engineer of the board.

In 1922 a steamer proceeding down the river from the dock at Boston, took ground on the left bank of the river & swung round to the right bank, thereby causing damage & becoming a serious obstruction to navigation. The owners having abandoned her, the corpn. raised her & sold her for a sum much less than the amount of the damage caused. The Witham Board claimed the cost of repairs to their works from the corpn.:—*Held:* so long as the corpn. exercised the powers given to them as the navigation authority for the harbour & port of Boston, they were bound by the regulations contained in second Act, s. 9, so that under regulation 5 the damage caused by a steamer that had used the dock to the banks of the river fell to be made good by the corpn.—WITHAM OUTFALL BOARD *v.* BOSTON CORPN. (1927), 138 L. T. 382; *sub nom.* BOSTON CORPN. *v.* WITHAM OUTFALL BOARD, 92 J. P. 1, H. L.

**8535. To provide bridges—Of sufficient capacity to carry traffic—Bridges insufficient to carry increased burden of traffic.**]—A dock co. being required by statute to build such good & substantial bridges for carriages, horses, & passengers over their cuts as they should deem necessary, & for ever to keep the same in good repair, built bridges sufficient to carry the traffic of the district as it then existed. Subsequently manufactories were established on a tract of land inclosed by their cuts, in which large boilers & engines of 20 tons weight & upwards were constructed, which the bridges were insufficient to carry:—*Held:* the statute did not impose upon the co. the duty of providing bridges sufficient to carry such traffic.—R. *v.* EAST & WEST INDIA DOCK CO. (1888), 60 L. T. 232; *sub nom. Re* EAST & WEST INDIA DOCK CO., 5 T. L. R. 151, D. C.

*Annotation:*—**Distd.** Birmingham Canal Co. *v.* Hickman (1891), 7 T. L. R. 646.

**8536. To provide person in authority—To act on behalf of dock owners.**]—APOLLO (OWNERS) *v.* PORT TALBOT CO., THE APOLLO, No. 8711, *post.*

**8537. No duty to trespassers.**]—By regulation 9 of the First Schedule of the Dockyard Port of Dover Order in Council of June 10, 1912, all vessels other than His Majesty's ships are forbidden to use the eastern entrance to the Admlty Harbour between one hour after sunset & one hour before sunrise, without the special authority of the King's Harbour Master. While using the said entrance during the prohibited hours without the authority of the King's Harbour Master pltf.'s yacht ran upon the wreck of H.M.S. *Glatton*, which was said to have been unlighted at the time:—*Held:* pltf. was in effect a trespasser, & even assuming the wreck was at the time of the collision unlighted, deft., the King's Harbour Master, owed no duty to make the harbour safe for people who were using it at hours when they had no right to use it at all.—H.M.S. GLATTON, [1923] P. 215; 93 L. J. P. 12; 39 T. L. R. 690.

**Liability for negligence.**]—*See* Sect. 12, subsect. 2, *post.*

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BOARD *v.* MCLEOD CAMPBELL & RITCHIE (1884), 2 N. Z. L. R. 290.—**N.Z.**

**q.** *To provide lights.*]—BRUCE *v.* AITON (1885), 13 R. (Ct. of Sess.) 358; 23 Sc. L. R. 222.—**SCOT.**

**r.** *To provide labour for loading cargo—Or permit shipowner to employ labour.*]—MILLIGAN & CO., LTD. *v.* AYR HARBOUR TRUSTEES, [1915] S. C. 937; 52 Sc. L. R. 748; [1915] 2 S. L. T. 69.—**SCOT.**

SECT. 4.—POWER TO MAKE BYE-LAWS.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 83–90; 1894 Act, s. 362.

**Bye-laws of corporations generally.**] — *See* CORPORATIONS, Vol. XIII., pp. 325–338.

**8538. Validity—Ultra vires or unreasonable—Restraint of trade—Use of meter.**]—Under a local Harbour Act the corpn. of P. had power to make bye-laws regulating their officers in the affairs of the wharf, & for regulating porters, carmen, etc. By a bye-law, if any other than the meters appointed by the corpn. weighed coals, etc., unladen from the wharf, he shall incur a penalty of 40*s.*:—*Held:* the bye-law was too extensive, inasmuch as it compelled third parties buying & selling to accept the corpn. meter for weighing of goods.—ALDRIDGE *v.* WHITING (1866), 30 J. P. 309.

**8539. —— —— —— Marine store dealing.**]—A bye-law under a local harbour Act, which incorporated Harbours & Docks & Piers Clauses Act, 1847 (c. 27), declared that no person shall deal in marine stores in or about the docks without first obtaining permission of the dock co. An engineer of a steamer in dock sold to C. some old iron bars & worn-out fittings within the dock without such permission:—*Held:* the bye-law was *ultra vires* & unreasonable, being in restraint of trade.—CHAMBERLAIN *v.* CONWAY (1888), 53 J. P. 214; 5 T. L. R. 44, D. C.

**8540. —— —— Restriction of employment of lumpers.**]—By Harbours Docks & Piers Clauses Act, 1847 (c. 27), s. 83, the undertakers authorised by any special Act to construct a dock may from time to time make such bye-laws as they shall think fit for, amongst other purposes, regulating the shipping, unshipping & removing of all goods within the limits of the dock, & for regulating the duties & conduct of all persons, as well the servants of the undertakers as others, employed in the dock. A dock co., who were the undertakers under a special Act, made bye-laws that no lumpers should be allowed to work on board any vessel in the dock, but such as were authorised by the co., unless permission in writing had been previously obtained from the superintendent of the dock, & that servants of the co. only should be allowed to work within the dock premises, whether on ship, lighter or shore:—*Held:* the bye-laws were in excess of the power conferred upon the dock company by s. 83, & were therefore invalid.—DICK *v.* BADART (1883), 10 Q. B. D. 387; 48 L. T. 391; 47 J. P. 422; 5 Asp. M. L. C. 49.

*Annotation:*—**Apld.** Pidler *v.* Berry (1888), 59 L. T. 230.

**8541. —— —— Appropriation of portion of pilotage rates—To masters of pilot boats.**]—HUGHES *v.* MERSEY DOCKS & HARBOUR BOARD (1888), 4 T. L. R. 428, C. A.

**8542. —— —— Control of use of fire arms.**]—A port authority was authorised by its local Act to make bye-laws (*inter alia*) "for the regulation of prevention of the use of firearms in the Haven . . . & on the piers of the Haven or on the rivers or from the quays or banks thereof over the Haven . . . or rivers or any part thereof." The port authority made a bye-law as follows: "No person shall, while using or while in or upon or about the rivers or the banks or shores thereof or any land of the Comrs., do or cause or incite any other person to do any of the acts specified in the following sub-sects. of this bye-law . . . (*d*) Use any firearm or airgun; provided always that this sub-sect. shall not affect the rights of riparian owners of land on either side of the rivers":—*Held:* the bye-law was not *ultra vires*, & not unreasonable, & therefore applt., who stood in the stern of a boat against the bank of a river within the area governed by the port authority, & fired a double-barrelled sporting gun at a coot crossing the river, was properly convicted of an offence against the bye-law.—SMITH *v.* GREAT YARMOUTH PORT & HAVEN COMRS. (1919), 88 L. J. K. B. 1190; 83 J. P. 193; 35 T. L. R. 517; 17 L. G. R. 477, D. C.

**8543. —— Persons entitled to dispute validity—Trade protection association.**]—A dock co. having, under its special Act & Harbours, Docks & Piers Act, 1847 (c. 27), s. 83, power to make regulations & bye-laws, issued a compulsory code of regulations for shipowners using the docks; but these regulations were not confirmed as "bye-laws" in manner prescribed by sect. 85 of the general Act. Certain accommodation provided for by the regulations, such as the appropriation of particular berths at the option of any shipowner upon certain specified terms, were in excess of what was required by statute to be provided by the dock co., & certain rates & charges imposed by them were beyond the co.'s statutory powers. A firm of shipowners which, prior to the issue of the regulations, had been in the habit of using the docks & having particular berths appropriated for their ships, finding that the terms imposed by regulations for such accommodation caused them inconvenience & increased expense, brought an action, by themselves as individuals, against the dock co., for a declaration that the regulations were altogether invalid until confirmed as required by statute, & also an injunction by way of consequential relief; a trade protection assocn. of shipowners, of which the firm & other shipowners were members, but which owned no ships themselves, being made co-pltfs.:—*Held:* (1) pltf. assocn. had no *locus standi*, not being themselves shipowners, & not being entitled to sue as agent for their members; (2) pltf. firm, suing as individuals, & not by the A.-G. as representing the public, were bound to prove special damage by the issue of the regulations, & this they had failed to do, inasmuch as any accommodation provided by the dock co. beyond the statutory requirement must be a matter of agreement between the firm & the dock company; (3) under R. S. C. 1883, Ord. 25, r. 5, a declaration was made, notwithstanding the abandonment of the claim for consequential relief, that the regulations, not having been confirmed as bye-laws, as required by

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**PART XXI. SECT. 4.**

t. *Validity—Ultra vires or unreasonable—Regulation of approach of carters to wharves.*]—SMITH *v.* LESLIE (1914), 10 Tas. L. R. 111.—**AUS.**

a. —— —— *Regulation of hawkers on wharf.*]—HARRIS *v.* HOSKING, [1917] S. A. L. R. 81.—**AUS.**

b. —— —— *Licensing of passenger boats.*]—LONDONDERRY HARBOUR COMRS. *v.* LONDONDERRY BRIDGE COMRS., [1894] 2 *I.* R. 384.—**IR.**

c. —— *Regulation of handling of cargo in transit sheds & wharves—Licence.*]—MCGOWAN *v.* BURNS, [1914] V. L. R. 158.—**AUS.**

d. —— *Imposition of penalty for breach of regulation—Ashes dropped from lighter into harbour.*]—FERRIER *v.* WILSON (1906), 4 C. L. R. 785.—**AUS.**

e. —— —— *Non-payment of wharfage dues.*]—*Re* HAGAMAN & CHISHOLM & OWEN SOUND CORPN. (1861), 20 U. C. R. 583.—**CAN.**

f. —— —— *Incumbering wharf.*]—A provision that any person incumbering, injuring, or fouling any public wharf, should be liable to a penalty named, & in default of payment or sufficient distress to imprisonment "for not less than ten nor more than thirty days":—*Held:* bad, twenty-one days being the limit authorised by 36 Vict. c. 48, s. 372 (13). —*Re* MCLEOD & PEMBERTON & KINCARDINE CORPN. (1876), 38 U. C. R. 617.—**CAN.**

g. —— *Storage charges—Goods detained by Customs for examination.*]—*Held:* the bye-law was invalid so far as it attempted to charge the importer with storage on goods detained by the Customs for examination beyond the four days in sheds set apart for that

statute, were not binding on pltf. firm save so far as they agreed to be bound by the same; & they were not entitled to have berths appropriated to their ships, or any other special accommodation or conveniences except upon such terms as might be agreed on between them & the dock co.—LONDON ASSOCN. OF SHIPOWNERS & BROKERS *v.* LONDON & INDIA DOCKS JOINT COMMITTEE, [1892] 3 Ch. 242; 62 L. J. Ch. 294; 67 L. T. 238; 8 T. L. R. 717; 7 Asp. M. L. C. 195; 2 R. 23, C. A.

*Annotations:—As to* (2) **Refd.** Barraclough *v.* Brown, [1897] A. C. 615. *As to* (3) **Refd.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536. *Generally*, **Mentd.** *Re* Clay, Clay *v.* Booth, *Re* A Deed of Indemnity, [1919] 1 Ch. 66.

**8544. —— —— Persons suffering special damage.**]—LONDON ASSOCN. OF SHIPOWNERS & BROKERS *v.* LONDON & INDIA DOCKS JOINT COMMITTEE. No. 8543, *ante*.

**8545. Confirmation of regulation by bye-law—Necessity for — Before regulation binding.**]—LONDON ASSOCN. OF SHIPOWNERS & BROKERS *v.* LONDON & INDIA DOCKS JOINT COMMITTEE, No. 8543, *ante*.

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## SECT. 5.—RATES AND TOLLS.

### SUB-SECT. 1.—IN GENERAL.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 25, 26, 33, 47.

**8546. Right to levy—How arising.**]—That a port duty may be created within time of memory, there can be no doubt. The King may grant to a subject the franchise of creating a port, & may confer upon the person who thus dedicates his land to the public, & incurs the obligation of repairing the port, a compensation from those who use the port, in the dues paid in respect of the various commodities imported. It is well established law, that it is unnecessary to show that these payments have been made from time immemorial (PARKE, B.).—JENKINS *v.* HARVEY (1835), 1 Cr. M. & R. 877; 5 Tyr. 326; 1 Gale, 23; 5 L. J. Ex. 17; 149 E. R. 1336.

*Annotations:*—**Consd.** Brune *v.* Thompson (1843), 4 Q. B. 543. **Apld.** Newcastle-upon-Tyne Master, Pilots & Seamen *v.* Hamond (1848), 12 L. T. O. S. 151. **Consd.** Newcastle upon Tyne Master & Pilots *v.* Bradley (1851), 2 E. & B. 428, n. **Refd.** Mills *v.* Colchester Corpn. (1867), 36 L. J. C. P. 210; Northumberland *v.* Houghton (1870), 22 L. T. 491. **Mentd.** Benjamin *v.* Andrews (1858), 5 C. B. N. S. 299; Shephard *v.* Payne (1861), 16 C. B. N. S. 132; Bryant *v.* Foot (1868), L. R. 3 Q. B. 497; Norfolk *v.* Arbuthnot (1879), 4 C. P. D. 290; Brocklebank *v.* Thompson, [1903] 2 Ch. 344.

**8547. —— ——.**] — NEWCASTLE-UPON-TYNE MASTER PILOTS & SEAMEN *v.* HAMOND (1848), 12 L. T. O. S. 151; *subsequent proceedings* (1849), 4 Exch. 285.

**8548. —— —— Proof of title.**]—(1) Where a party suing for port duties as owner of a port, gave no other evidence of title than the continual payment of a certain duty, which the jury found to be unreasonable in amount:—*Held:* he could not have a verdict for a less amount found by the jury to be reasonable.

(2) *Semble:* where the duty is claimed under a grant from the Crown, which appears on the evidence to be enrolled of record, but is not produced by pltf., the jury ought not to be directed to presume such grant upon mere evidence of usage.

(3) *Qu.:* whether the Crown can grant, with the franchise of a port, the power to take tolls of undefined amount through the limits of the port & beyond the grantee's own land.

(4) *Qu.* whether ancient port duties can be made to apply to new articles of export or import.—BRUNE *v.* THOMPSON (1843), 4 Q. B. 543; 1 Dav. & Mer. 221; 12 L. J. Q. B. 251; 1 L. T. O. S. 107; 114 E. R. 1003; *sub nom.* BROWNE *v.* THOMSON, 7 Jur. 395.

*Annotation:—As to* (2) **Refd.** Newcastle-upon-Tyne Pilots *v.* Bradley (1852), 21 L. J. Q. B. 196.

**8549. —— Sufficiency of consideration—Obligation to keep port in repair.**]—An obligation on the corpn. of a borough, which is also a port, to keep the port in repair, is a sufficient obligation to support a toll on all goods brought into the port.—JENKINS *v.* HARVEY (1835), 2 Cr. M. & R. 393; 1 Gale, 454; 5 Tyr. 871; 150 E. R. 169.

*Annotations:*—**Consd.** Newcastle upon Tyne Master & Pilots *v.* Bradley (1851), 2 E. & B. 428, n. **Refd.** Mills *v.* Colchester Corpn. (1867), 36 L. J. C. P. 210; Bryant *v.* Foot (1868), L. R. 3 Q. B. 497. **Mentd.** Brecon Markets Co. *v.* Neath & Brecon Ry. (1872), L. R. 7 C. P. 555; Norfolk *v.* Arbuthnot (1879), 4 C. P. D. 290.

**8550. —— Goods imported into Sunderland—Construction of charter.**]—A charter of 1687 granted to the corpn. of the master, pilots & seamen of Newcastle upon Tyne primage, described in the charter as an ancient duty, upon goods brought by ship into the Tyne, or any of the creeks of Newcastle, of which Sunderland was one, to be rated & accounted "in manner & form following: that is to say," aliens & strangers born, & all other persons arriving with ships in Newcastle within any of the creeks & not belonging to same, to pay before they departed with their ships; & every free merchant & inhabitant of Newcastle, arriving in the Tyne with a ship, within ten days after landing the goods. The charter also granted to the corpn. all other perquisites, ancient duties & profits which they had theretofore lawfully had & enjoyed; & also provided that the sums granted by the charter should be in lieu of all other duties theretofore received:—*Held:* (1) the charter was not inconsistent with the claim of primage in respect of goods imported into Sunderland by merchants resident there; (2) evidence of usage was admissible in support of the claim.—BRADLEY *v.* NEWCASTLE PILOTS (1853), 2 E. & B. 427; 23 L. J. Q. B. 35; 18 Jur. 240; 1 W. R. 394; 118 E. R. 826; *sub nom.* NEWCASTLE-ON-TYNE MASTER PILOTS & SEAMEN *v.* BRADLEY, 1 C. L. R. 479; 22 L. T. O. S. 291, Ex. Ch.

**8551. —— Ad valorem duty—On goods not mentioned in schedule—Or of similar nature, value or quality.**]—The Southampton Dock Co. are impowered by their Act, to charge for the landing of goods in their dock the several sums mentioned in the schedule thereto annexed, & for articles not therein particularised such sums as shall be equal to the sums affixed on goods, etc., "of a similar nature, package, value, & quality," in the schedule. All the charges mentioned in the schedule were of small fixed

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purpose under Harbours Act, 1878, ss. 71, 215 (7).—WELLINGTON HARBOUR BOARD *v.* YOUNG (1903), 23 N. Z. L. R. 230.—**N.Z.**

**h.** —— *Regulation of tug & tow.*]—TABLE BAY HARBOUR BOARD *v.* BUCKNALL S.S. LINES (1904), 21 S. C. 220; 14 C. T. R. 351.—**S. AF.**

**PART XXI. SECT. 5, SUB-SECT. 1.**

**k.** *Wharfage rates having been paid previously.*]—MELBOURNE HARBOUR TRUST COMRS. *v.* COLONIAL SUGAR REFINING CO., LTD., [1926] V. L. R. 140; 48 A. L. T. 3.—**AUS.**

**l.** *Right to levy.*]—Where the question was, whether the harbour was in a fit state to shelter vessels, until which time toll could not be exacted according to 2 Will. 4, c. 15, & the judge directed the jury that if the harbour were fit to shelter empty vessels, toll could be demanded:—*Held:* no misdirection.—JENKINS *v.* PORT BURWELL HARBOUR CO. (1840), 4 Ont. Dig. 7323.—**CAN**

**m.** —— *Under* 15 *Vict. c.* 34, *s.* 12.]—The above sect. gives the Lieutenant-Governor-in-Council control of Minchin's Point wharf, with power to establish rates of wharfage for vessels, & to make such rules & regulations as he may think fit. By an

*Sect. 5.—Rates and tolls: Sub-sects. 1 & 2, A. & B.*]

sums, none being *ad valorem* except the charge for "sculptured marble" & marble slabs. At the end was a note, "Goods not included in the foregoing schedules to be charged in proportion to the rates therein specified according to size & weight":—*Held:* the co. were not entitled to make an *ad valorem* charge for the landing of goods not enumerated, or at all approaching, in "nature, value, & quality," to any of those enumerated in the schedule.—SOUTHAMPTON DOCK CO. *v.* HILL (1864), 16 C. B. N. S. 567; 4 New Rep. 178; 10 L. T. 462; 12 W. R. 806; 143 E. R. 1249, Ex. Ch.

**8552. —— Goods carried in Upper Mersey.**]—By Upper Mersey Dues Act, 1860 (c. cxxv), s. 17, the right to collect "town dues" was transferred from the Mersey Docks & Harbour Board to a separate body of trustees in respect of all goods "carried or conveyed upon, over, or along any part of the Upper Mersey" as therein defined:—*Held:* Upper Mersey Dues Act, 1860 (c. cxxxv), s. 17, applied to goods carried over any part of the Upper Mersey in the ordinary course of a voyage, not only to goods landed at some port in the Upper Mersey.—MERSEY DOCKS & HARBOUR BOARD *v.* HUNTER, CRAIG & CO. (1899), 80 L. T. 96; 15 T. L. R. 213; 8 Asp. M. L. C. 489; 4 Com. Cas. 142, H. L.

**8553. —— Quay space used for manipulation of goods—Where agreement for permanent berths at tonnage rates.**]—Defts. agreed with pltfs. to appropriate for the use of plt.s.' steamers three permanent quay berths at Tilbury Dock on payment of tonnage rates:—*Held:* the agreement did not impliedly prevent defts. from charging pltfs. for the use of quay space for the manipulation of goods, nor was there anything in the Dock Co.'s Act of 1882 to prevent it.—ORIENT STEAM NAVIGATION CO., LTD. *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1901), 17 T. L. R. 436.

**8554. —— Piers purchased under statutory powers — Amount of toll stated in schedule.**]—Under two special Acts the G. Pier co. was authorised to make & maintain a pier, & to take certain rates, duties, & tolls prescribed by those Acts. W. Pier was constructed as a private undertaking, & a long lease of the pier became vested in the T. S. co., which made certain charges for the use of the pier. Under the powers given to them by Thames River Steamboat Service Act, 1904 (c. cciii), pltfs. purchased from the G. Pier co. the pier & the undertaking of the co. & the right to levy tolls, rates, & duties, & all other rights, privileges, authorities, & powers vested in or exercisable by the co., & all other the property, estates, rights, & privileges of the co., & also purchased the lease of the W. Pier from the T. S. co. By Thames River Steamboat Service Act, 1904 (c. cciii), s. 15, pltfs. were authorised to "charge & levy in respect of vessels calling at the piers & landing places a toll not exceeding the amount stated in the schedule":—*Held:* pltfs. had no power to charge any tolls in respect of either pier except those authorised by Thames River Steamboat Service Act, 1904 (c. cciii), s. 15; & they were not entitled to charge in respect of G. Pier the tolls prescribed by the special Act of the G. Pier co., or in respect of W. Pier the same charges as the T. S. co. might have charged.—LONDON COUNTY COUNCIL *v.* GENERAL STEAM NAVIGATION CO. (1907), 97 L. T. 863, C. A.

**8555. Public notice of rates authorised—Rates in force for time being—Not maximum allowed by statute.**]—A pier co. were authorised by Act of Parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the Act, but they could only demand them so long as "the rates for the time being authorised to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent sect. power was given to lower the tolls or to raise them to such sums as the company should think proper, not exceeding the sums authorised by the Act. The co. lowered some of the rates, but put up a board showing the tolls contained in the schedule to the Act:—*Held:* the Act required the actual tolls in force for the time being, & not the maximum tolls authorised by the Act, to be painted on the board.—GREGSON *v.* POTTER (1879), 4 Ex. D. 142; 48 L. J. M. C. 86; 27 W. R. 840.

**8556. Variation of amount—Authority to vary—Presumption of legality.**]—PHILLIPS *v.* WILLIAMS (1903), 19 T. L. R. 233, C. A.

**8557. —— Who entitled to vary.**] — Under sects. 78 & 79 of a local Act, the harbour co. are entitled to levy quay dues on goods landed in the harbour, which are not specified in a schedule to the Act, at the rate of 1*s.* per ton, or at the option of the co. to fix quay dues at a sum not exceeding one-tenth part of the freight so that such rate does not exceed 1*s.* per ton. Under sect. 83 of the Act the co. only, & not the lessee of the rates, can raise & reduce the rates.—MILLMAN *v.* RENWICK, WILTON & CO., LTD. (1905), 22 T. L. R. 168.

**8558. —— According to ownership of goods—Prize cargoes.**]—By the Bristol Docks Acts the Bristol Corpn. acquired certain docks & were empowered to charge reasonable warehouse rates & rents, Bristol Docks Act, 1881 (c. clxxvii), s. 8, providing that all rates on same description of articles should be charged without partiality & without regard to the person to whom they belonged. The Acts incorporated the Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), which by sect. 30 makes it illegal for the corpn. to differentiate their warehouse rates & rents as between various owners or persons interested in cargoes:—*Held:* each of the above provisions precluded the corpn. from charging higher warehouse rates & rents in the case of prize grain cargoes taken into store under the order of the Board of Trade or the Admlty. Marshal than in respect of same description of goods belonging to other persons.—THE CLARISSA RADCLIFFE (1914), 31 T. L. R. 98.

**8559. —— According to destination—True destination.**]—Pltfs.' steamer was chartered to take a cargo of coal to Alexandria, & she loaded the

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order under this sect. it was provided that any boat or vessel used by any one but the licensed ferrymen in ferrying passengers or landing or taking off the same from the wharf should pay 1*s.* for each passenger landed or taken off; also 2*s.* 6*d.* for each time such boat or vessel should touch at or land passengers on the wharf, to be paid by the persons owning or working such boat or vessel. A boat of deft.'s used in ferrying without hire, on May 16, touched several times at the wharf & sixty passengers embarked in the boat from the wharf:—*Held:* the Act is one abridging a public right & must be strictly construed & it did not give power to impose such rates.—BOURKE *v.* MURPHY (1856), 1 P. E. I. 126.—CAN.

n. —— *Top wharfage.*]—Pltf. & defts., owners of lots which extended side by side from St. John street to low water mark, in the harbour of St. John, by deed made a common passage-way twelve feet wide along the length of each lot, on which each was bound to build & keep in repair a wharf, & each conveying to the other the right of way over the wharf, pltf.'s right of wharfage on the north side of the street being reserved. Afterwards pltf. obtained from the corpn. of St. John the right to erect a wharf beyond low water mark, extending from the end of said passage-way for the public use, in the

cargo in defts.' dock. Pltfs. intended that after discharge at Alexandria she should proceed in ballast to Calcutta. When she entered defts.' dock the master described her as bound for Calcutta *via* Alexandria, but the clearance request stated that she was bound for Alexandria, though this was afterwards altered to "Calcutta *via* Alexandria." The dock rate chargeable by defts. for vessels "departing for" Alexandria was less than for vessels "departing for" ports outside Europe:—*Held:* Alexandria was the destination of the vessel when she left the dock, & pltfs. were therefore liable to pay the lower rate only.—BARRY RY. CO. *v.* INVERIC S.S. CO., LTD. (1921), 37 T. L. R. 954, H. L.; *revsg.* S. C. *sub nom.* INVERIC S.S. CO., LTD. *v.* BARRY RY. CO. (1920), 36 T. L. R. 548.

**8560. Effect of payment—Right of owner of steam trawlers—To employ own tug—For moving trawlers about dock.**]—The owners of steam trawlers are not entitled under Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 33, & Manchester, Sheffield, & Lincolnshire Ry. Co. Act, 1849 (c. lxxxi), s. 247, to have one of their own tugs in the Grimsby Docks for the purpose of moving the trawlers to different parts of the dock as required.—GREAT CENTRAL RY. CO. *v.* NORTH-EASTERN STEAM FISHING CO., LTD. (1906), 22 T. L. R. 520.

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SUB-SECT. 2.—LIABILITY.

*A. In General.*

*See* Harbour Docks & Piers Clauses Act, 1847 (c. 27), s. 32; Shipping Dues Exemption Act, 1867 (c. 15).

**8561. "Owner" of goods—Who included in "owner"—Gratuitous bailee—Right to tolls derived from charter.**]—A charter of James II. granted to the master pilots & seamen of Newcastle-upon-Tyne certain dues, to be paid "by all persons being owners of any goods which should be brought in any ship from beyond the seas into the river Tyne," in manner following "that is to say, aliens & strangers born, & other such persons who, with their ships, should arrive within the said port, & not belong to the same, before they depart with their said ships from the said port, should pay the duties aforesaid, & every free merchant & other inhabitant of Newcastle, arriving with their said ships within the river Tyne, should pay the duties aforesaid within ten days after the landing of the goods as aforesaid, upon lawful demand." The duties had always been paid by the importer:—*Held:* a person who gratuitously landed, entered, & warehoused goods for the owners, who resided in London, was an "owner" within the meaning of the charter, & liable to the dues.—NEWCASTLE-UPON-TYNE MASTER PILOTS & SEAMEN *v.* HAMMOND (1849), 4 Exch. 285; 18 L. J. EX. 417; 14 L. T. O. S. 223; 154 E. R. 1219.

*Annotation:*—**Refd.** Ribble Navigation Co. *v.* Hargreaves (1856), 17 C. B. 385.

**8562. Vessels seeking refuge in harbour.**]—SHUTE *v.* PALMER (1875), 39 J. P. Jo. 789.

**8563. In respect of loaded barge remaining in dock after specified period—When barge considered loaded.**] — OLIVER *v.* KINGSTON-UPON-HULL DOCK CO. (1888), 4 T. L. R. 493, C. A.

**8564. Alleged misapplication of toll by harbour authority—"General toll."**]—A harbour authority were given by their special Act power to levy a toll on every vessel lying within the limits of their harbour for more than one tide. They were also empowered by the same Act to raise a sum of £2,500 to be spent on buoys, beacons, lights, & moorings, & a similar sum on other harbour works; they had in fact borrowed & spent £5,000, but all except £370 of this sum had been spent on works of the second class. They had, however, spent a substantial sum out of revenue on buoys, lights, etc. In an action to recover tolls in respect of certain sailing barges:—*Held:* the toll was a general toll, payable by every vessel sheltering in the harbour as above, & the fact of the whole £2,500 not having been applied to buoys, lights, etc., afforded no defence to the action.—QUEENBOROUGH CORPN. *v.* SMEED, DEAN & CO., LTD. (1904), 68 J. P. 244; 20 T. L. R. 279.

*B. Geographical Limits of Liability.*

**8565. Meaning of "port"—Whether used in popular sense—Kingston-upon-Hull.**]—The port of Kingston-upon-Hull is mentioned in Acts of Parliament, charters, & other documents, in two senses; first, according to the popular understanding, as denoting a particular place; &, secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, & of which Kingston-upon-Hull is the chief. 14 Geo. 3, c. 56, s. 42, which gives the Hull Dock Co. a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, & the co.'s basin or docks within the port of Kingston-upon-Hull, or unlading or lading any of their cargo within the said port, must be construed as using the term "port" in the popular sense; & not, therefore, as extending the burden of dock duties to places which, in point of local description, are without the port of Hull; as Goole, on the river Ouse.—KINGSTON-UPON-HULL DOCK CO. *v.* BROWNE (1831), 2 B. & Ad. 43; 109 E. R. 1059.

*Annotations:* **Apld.** Farrand *v.* Cooper (1862), 12 C. B. N. S. 283. **Consd.** The Killarney (1862), Lush. 427;

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same manner as the part already built. Subsequently an Act was passed allowing the owners of wharves to collect top wharfage on goods landed on them:—*Held:* defts. were entitled to pay pltf. top wharfage on goods landed by them on the wharf built by pltf. below low water mark.—COLLINS *v.* HALL & FAIRWEATHER (1870), 13 N. B. R. (2 Han.) 90.—**CAN.**

o. —— *Additional charge—When goods in unfit state for handling mechanically.*]—WILSONS & CLYDE COAL CO. *v.* NORTH BRITISH RY. CO., [1923] S. C. 68.—**SCOT.**

**PART XXI. SECT. 5, SUB-SECT. 2.—A.**

**8562 i.** *Vessels seeking refuge in harbour.*]—A vessel which, owing to stress of weather, puts back to a port which she has left, & where she has already paid tonnage dues, is liable to pay them again.—PALGRAVE *v.* DUBLIN PORT & DOCKS BOARD (1881), 15 I. L. T. Jo. 310.—IR.

p. *Persons using Port Credit Harbour.*]—Under 4 Will. c. 32, s. 5, persons receiving benefit from the Port Credit Harbour, in its unfinished state, must pay the tolls prescribed.—PORT CREDIT HARBOUR CO. *v.* JONES (1848), 5 U. C. R. 144.—**CAN.**

q. *Of marshal in whose custody ship is.*]—The arrest of a vessel puts an end to any contract for repairs which she may be undergoing at the time, & the marshal in whose custody she remains is responsible for subsequent dock dues. He may, therefore, include in his account a charge for the dock dues from the arrest until the sale.—CANADA SHIPPING CO. *v.* THE CHRYSOLITE (1888), 14 Q. L. R. 341.—**CAN.**

r. *Right to compensation under Shipping Dues Exemption Act, 1867.*]—NEW DUMBARTON STEAMBOAT CO., *v.* CLYDE NAVIGATION TRUSTEES (1870), 8 Macph. (Ct. of Sess.) 850.—**SCOT.**

t. *Rights of Harbour Commissioners on undue preference being proved.*]—If Harbour Comrs. failed to exact the statutory rates from certain traders, other traders from whom the Comrs. sought to exact these rates were not entitled to escape payment on the ground of an undue preference having been granted, but the Comrs. would be bound to recover the full rates from those traders who had hitherto been undercharged.—FRASERBURGH HARBOUR COMRS. *v.* WILL, [1916] S. C. 107.—**SCOT.**

*Sect. 5.—Rates and tolls: Sub-sect. 2, B., C. & D.*]

Assheton Smith v. Owen, [1906] 1 Ch. 179. **Refd.** R. v. Bristol Dock Co. (1841), 5 Jur. 911; Stockton Ry. v. Barrett (1844), 11 Cl. & Fin. 590; R. v. Kingston-upon-Hull Dock Co. (1845), 9 Jur. 444; Nicholson v. Williams (1871), L. R. 6 Q. B. 632; Garston Sailing-Ship Co. v. Hickie (1885), 15 Q. B. D. 580. **Mentd.** Barrett v. Stockton & Darlington Ry. (1840), 2 Man. & G. 134; Portsmouth Floating Bridge Co. v. Nance (1843), 6 Scott, N. R. 823; Newmarket Ry. v. Foster (1854), 2 C. L. R. 1617; Pryce v. Monmouthshire Canal & Ry. Cos. (1879), 4 App. Cas. 197.

**8566. —— —— Fiscal port—Carnarvon.**]—By two private Acts trustees were authorised to levy rates & duties upon ships loading or unloading "within the limits of the port of Carnarvon":—*Held:* the words used meant the wider limits of the fiscal port, & not the limits of the local or popularly understood port of Carnarvon.—ASSHETON SMITH *v.* OWEN, [1907] A. C. 124; 76 L. J. Ch. 308; 96 L. T. 478; 23 T. L. R. 385; 51 Sol. Jo. 356; 10 Asp. M. L. C. 411, H. L.

**8567. Vessel outside territorial waters—Onus of proof of exemption—On party claiming exemption.**]—Sentence of the Vice-Admlty. Ct. of Sierra Leone, condemning goods & boats seized for breach of the Customs Ordinances of the Colony, reversed, with damages & costs: it being proved, that the vessel from which the goods were unshipped, though off the harbour of Freetown, was not within three miles (the limit of jurisdiction) from the shore at the time of the unloading, & consequently not liable to the harbour dues payable under the Customs Ordinances.

Where goods were unshipped in the immediate precincts of the harbour, the *onus* of proving that the vessel was not actually within the harbour lies on the party claiming exemption from harbour dues.—ROLET *v.* R. (1866), L. R. 1 P. C. 198; 4 Moo. P. C. C. N. S. 41; 12 Jur. N. S. 715; 15 W. R. 233; 16 E. R. 232, P. C.

*Annotation:*—**Mentd.** *Re* Letters Patent No. 139, 207, *Re* Carbonit Akt., [1924] 2 Ch. 53.

### *C. According to Vessel.*

*See* Harbour Docks & Piers Clauses Act, 1847 (c. 27), ss. 25–30; Harbours & Passing Tolls etc. Act, 1861 (c. 47); Shipping Dues Exemption Act, 1867 (c. 5); 1894 Act, ss. 87, 732.

**8568. Exemptions—Vessels in His Majesty's service—Vessel hired by Post-Master-General to carry mails.**]—An Act of Parliament, imposing a tonnage duty on vessels coming into the harbour of Dover, contained an exception of all vessels employed in His Majesty's service:—*Held:* a vessel hired by the Post-Masters-General to carry the mails & Govt. dispatches to & from Dover to Calais, etc., the master of which was permitted to carry passengers & their luggage, & bullion, upon freight, is a vessel coming within the exception.—HAMILTON *v.* STOW (1822), 5 B. & Ald. 649; 1 Dow. & Ry. K. B. 274; 106 E. R. 1328.

**8569. —— —— Vessel carrying goods for government works.**]—Where a local Act of Parliament gave a right to the corpn. of W. to demand & take certain wharfage duties for stone brought into the harbour of W. in any ship or vessel, & certain stone was brought by a barge into the said harbour, for the use only of H.M. Govt. works there, & delivered there to persons in the employment of such Govt. for the use of the said works:—*Held:* no duties were payable in respect thereof.—WEYMOUTH CORPN. *v.* NUGENT (1865), 6 B. & S. 22; 5 New Rep. 302; 34 L. J. M. C. 81; 11 L. T. 672; 29 J. P. 451; 11 Jur. N. S. 465; 13 W. R. 338; 2 Mar. L. C. 163; 122 E. R. 1106.

*Annotation:*—**Apld.** Hornsey U. C. v. Hennell, [1902] 2 K. B. 73.

**8570. —— Open boats, lighters, or barges without decks—Not within term "ship or vessel."**]—The Pier & Harbour Order Confirmation (No. 3) Act, 1891, making alterations in the rates for goods shipped or unshipped to or from any ship or vessel in the harbour of Poole, has not abolished the exclusion from rates allowed by the Poole Harbour Act, 1756, in respect of goods brought or conveyed in open boats, lighters, or barges without decks to or from Poole & places within a certain locality.—POOLE HARBOUR COMRS. *v.* PIKE (1902), 18 T. L. R. 289, C. A.

**8571. —— Lighter—Bonâ fide engaged in discharging or receiving goods—Vessel unable to receive goods.**]—KNIGHT, BEVAN & STURGE *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (*circa* 1896), cited in 95 L. T. at p. 510; 22 T. L. R. at p. 637, D. C.

*Annotations:*—**Consd.** London & India Docks Co. v. Thames Steam Tug & Lighterage Co., [1908] 1 K. B. 786.

**8572. — —— —— ——.**]—By West India Docks Act, 1831 (c. lii), s. 83, it was enacted that "all lighters & craft entering into the docks, basins, locks or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as such lighter or craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid, & also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever." Sect. 76 gave the dock co. power to take in respect of every lighter, barge, or craft entering into any of the docks such reasonable rate, not exceeding a specified amount, as the directors should from time to time appoint.

Two lighters entering the docks with goods for the purpose of discharging them into a vessel lying in the docks, but, owing to the vessel being unable from want of space to receive the goods, left the docks without being able to discharge:—*Held:* according to the true construction of sect. 83 the lighters were not exempt from the payment of rates.—LONDON & INDIA DOCKS CO. *v.* THAMES STEAM TUG & LIGHTERAGE CO., LTD., [1909] A. C. 15; 78 L. J. K. B. 90; 99 L. T. 590; 24 T. L. R. 834; 52 Sol. Jo. 713; 11 Asp. M. L. C. 162; 14 Com Cas. 32, H. L.

*Annotation:*—**Refd.** McDougall & Bonthron v. London & India Docks Co., Page, Son & East v. Same, [1908] 2 K. B. 175.

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**PART XXI. SECT. 5, SUB-SECT. 2.—C.**

*a. Exemptions — Vessels in His Majesty's service—Vessel hired by Post-Master-General to carry mails—Extension of services outside contract.*]—By sect. 116, sub-s. 1 of the Harbours Act, 1908, "Nothing in this Act shall charge with any dues . . . (d.) Any steamship carrying mails under any contract made with the Postmaster-General, in cases where it is provided by the terms of such contract that such steamships shall be exempt therefrom." By a contract made between applt. co. & the Post-Master-General of New Zealand the co. was bound to carry mails between New Zealand & San Francisco, & the contract provided that no charge was to be made or levied under Harbours Act, 1908, at New Zealand Ports "for any of the steamships employed in the services under this contract." Under a clause of the contract the co. obtained leave to extend their service from New Zealand to Australia, but they were not paid by the Post-Master-General for this extended service:—*Held:* a steamship employed on the extended service between Australia & New Zealand was not employed under the contract, & was not entitled to exemption from harbour dues; but that a ship was "carrying mails" under the contract, so as to be entitled to exemption, as soon as she was ready & willing to receive the outgoing mails on board, subject only to coaling & necessary repairs.—UNION S.S. CO. OF NEW ZEALAND *v.* WELLINGTON HARBOUR BOARD (1915), 84 L. J. P. C. 169.—**N.Z.**

*b. —— ——.*]—A vessel belonging to a private co. chartered by Govt. to carry troops, considered not liable for harbour dues at Guernsey.—THE CLYDE, THE STATES *v.* HENDERSON (1856), 10 L. T. 791.—**GUERNSEY.**

**8573. —— —— —— Remaining in dock after discharge.**]—LONDON & INDIA DOCKS CO. *v.* UNION LIGHTERAGE CO. (*circa* 1900), cited in 95 L. T. at p. 510; 22 T. L. R. at p. 637, D. C.

*Annotation:*—**Consd.** London & India Docks Co. *v.* Thames Steam Tug & Lighterage Co. (1906), 95 L. T. 506.

**8574. —— —— —— Presence not reasonably necessary.**]—By the London & St. Katherine Docks Act, 1864 (c. clxxviii), s. 136, lighter entering the docks to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as the lighter is *bonâ fide* engaged in so discharging or receiving the ballast or goods. Under this sect. a lighter is engaged in discharging or receiving not merely while the goods are being removed, but also during her entrance to the dock, her departure from it & any other operation reasonably required in order that she may discharge or receive. But she is not exempt if she is in the dock when her presence is not reasonably necessary for the operations.—LONDON & INDIA DOCKS CO. *v.* MCDOUGALL & BONTHRON, LTD., LONDON & INDIA DOCKS CO. *v.* PAGE, SON & EAST, LTD., [1909] A. C. 25; 78 L. J. K. B. 157; 99 L. T. 590; 24 T. L. R. 834; 52 Sol Jo. 713, 714; 11 Asp. M. L. C. 162; 14 Com. Cas. 71, H. L.; *revsg.* S. C. *sub nom.* MCDOUGALL & BONTHRON, LTD. *v.* LONDON & INDIA DOCKS CO., PAGE, SON & EAST, LTD. *v.* SAME, [1908] 2 K. B. 175, C. A.

**8575. —— Coasting vessel.**]—Deft. who was sued for duties under 32 Geo. 3, c. 74, A, was the owner of a vessel which several times in the year sailed in ballast to Jersey, & brought from thence oysters, which deft. purchased of fishermen there, & which he deposited in beds at Milton:—*Held:* pltf.'s vessel was not a "coasting vessel" or "fisherman" within sect. 14, of above Act.—SHEPHERD *v.* HILLS (1855), 11 Exch. 55; 25 L. J. Ex. 6; 4 L. T. 742; 156 E. R. 743.

*Annotations:*—**Mentd.** St. Pancras Vestry *v.* Batterbury (1857), 2 C. B. N. S. 477; Lamplough *v.* Norton (1889), 58 L. J. Q. B. 279; Lowe *v.* Dorling, [1906] 2 K. B. 772; Cohen *v.* Hall, [1922] 2 K. B. 37; Aylott *v.* West Ham Corpn., [1927] 1 Ch. 30.

**8576. —— ——.**]—The 32 Geo. 3, c. 74, s. 14, which exempts coasting vessels from payment of duty to Ramsgate Harbour oftener than once in a year, includes coasting vessels carrying only coal.—SHEPHERD *v.* MOORE (1856), 1 H. & N. 125; 27 L. T. O. S. 275; 4 W. R. 570, n.; 156 E. R. 1144; *sub nom.* MOORE *v.* SHEPHERD, 25 L. J. Ex. 264; 2 Jur. N. S. 617, Ex. Ch.

**8577. —— Vessel of fisherman.**]—SHEPHERD *v.* HILLS, No. 8575, *ante*.

*D. According to cargo.*

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 25–50; Shipping Dues Exemption Act 1867 (c. 15).

**8578. "Metals"—Whether gold or silver included.**]—An Act for keeping in repair a harbour, imposed certain duties enumerated in a schedule annexed, on goods exported & imported. In the schedule, under the head "metals," certain specified duties were imposed on copper, brass, pewter, & tin; & on all other metals not enumerated, for every £10 value 10*d.*:—*Held:* the latter words did not include gold & silver; &, therefore, that the comrs. were not entitled to demand for *specie* or bullion, 10*d.* for every £10 value.—CASHER *v.* HOLMES (1831), 2 B. & Ad. 592; 9 L. J. O. S. K. B. 280; 109 E. R. 1263.

*Annotations:*—**Mentd.** Gunnestad *v.* Price, Fullmore *v.* Walt (1875), L. R. 10 Exch. 65; Bolam *v.* Allgood (1913), 108 L. T. 461.

**8579. Cargo from "beyond seas"—Cargo from Ireland.**]—(1) By Bristol Dock Act, 48 Geo. 3 (c. xi), s. 38, certain duties are imposed, "on goods, wares, & merchandise, imported from parts beyond the seas, & not brought by inland navigation into the Port of Bristol":—*Held:* goods imported from Ireland, were brought from parts beyond the seas.

(2) By another branch of the statute, other duties are imposed "on goods, wares, & merchandise, brought coastwise into the said port, of foreign growth or importation, but not of British growth or manufacture":—*Held:* Irish linens imported to Bristol from Dublin, were not brought coastwise.—BATTERSBY *v.* KIRK (1836), 2 Bing. N. C. 584; 1 Hodg. 451; 3 Scott, 11; 5 L. J. C. P. 166; 132 E. R. 228.

*Annotations:*—*As to* (1) **Consd.** Ruckmaboye *v.* Lulloobhoy Mottichund (1852), 8 Moo. P. C. C. 4. *As to* (2) **Consd.** Port of London Authority *v.* British Oil & Cake Mills, [1915] A. C. 993. *Generally*, **Mentd.** Whyte *v.* Rose (1842), 3 Q. B. 493; Kirkdale Burial Board *v.* Liverpool Corpn., [1904] 1 Ch. 829.

**8580. —— Goods transhipped at home port.**]—Goods, shipped from Singapore for carriage to Liverpool, were transhipped at London & forwarded to Liverpool in a steamer bound on a voyage from London to Liverpool and thence to China:—*Held:* the goods were liable to the dock rates imposed on "goods imported from parts beyond the seas . . . into the port of Liverpool" by Mersey Dock Acts Consolidation Act, 1858 (c. xcii), s. 234.—MERSEY DOCKS & HARBOUR BOARD *v.* TWIGGE (1898), 67 L. J. Q. B. 604; 14 T. L. R. 371; 42 Sol. Jo. 490; 3 Com. Cas. 176.

**8581. Cargo carried "coastwise."**]—BATTERSBY *v.* KIRK, No. 8579, *ante*.

**8582. Goods exported or for exportation—Meaning of "exported" or "exportation."**]—The words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense; that is, a carrying out of port.

A Railway Act empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, "not exceeding the sum of 4*d.* per ton per mile." It then went on thus: "& for all coal which shall be shipped on board any vessel, etc., in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one-halfpenny per ton per mile":—*Held:* with respect to coals shipped for exportation, this was

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c. —— *Whether steam-boats.*]—The magistrates of Glasgow having been authorised to levy one penny from "all ships, barges, lighters, & boats" brought to the Broomielaw quay:—*Held:* this included steam-boats carrying passengers, & they were liable for each time they came to the quay, although more than once in the day.—NAPIER *v.* GLASGOW MAGISTRATES (1821), 1 Sh. (Ct. of Sess.) 165.—**SCOT.**

d. —— ——.]—Steam-boats carrying passengers merely with their luggage fall within the description of "passage boats," & are liable to pay rate only as such.—M'FARLANE *v.* EDINBURGH MAGISTRATES (1827), 5 Sh. (Ct. of Sess.), 665.—**SCOT.**

e. —— ——.]—Steam-boats carrying only passengers & their baggage fell within the description of "ferry boats or passage boats" in 28 Geo. 3, c. 58, & relative tables regulating the dues exigible at Leith & the adjacent bounds, & are liable only to pay rates as such.—BRUCE *v.* SANDEMAN (1830), 4 Wils. & S. 76; 5 Sh. (Ct. of Sess.) 668; 23 Fac. Coll. 478.—**SCOT.**

**PART XXI. SECT. 5, SUB-SECT. 2.—D.**

f. *Burden of proof of exemption.*]—Where by an Act of Parliament a wharfage rate is imposed on all goods, except those described by names, coming from abroad & landed at a wharf & in an action to recover the rate on certain goods, it is alleged by deft. that they come within the exception, the burden of proving that allegation is on deft.—CUMING SMITH & CO., LTD. *v.* MELBOURNE HARBOUR TRUST COMRS. (1905), 2 C. L. R. 735.—**AUS.**

*Sect. 5.—Rates and tolls: Sub-sect. 2, D. & E.*]

not a cumulative but a substituted toll.—STOCKTON & DARLINGTON RY. CO. *v.* BARRETT (1844), 11 Cl. & Fin. 590; 7 Man. & G. 870; 8 Scott, N. R. 641; 8 E. R. 1225, H. L.; *subsequent proceedings, sub nom.* BARRETT *v.* STOCKTON & DARLINGTON RY. CO. (1847), 1 H. L. Cas. 18, H. L.

*Annotations:*—**Refd.** Medway Navigation *v.* Brook (1876), 33 L. T. 843; Pryce *v.* Monmouth Canal *v.* Ry. Cos. (1879), 4 App. Cas. 197; McDougall & Bonthron *v.* London & India Docks Co., Page & East *v.* Same, [1908] 2 K. B. 175. **Mentd.** Gulliver *v.* Cosens (1845), 1 C. B. 788; Newmarket Ry. *v.* Foster (1854), 2 C. L. R. 1617; Bristol Grdns. *v.* Bristol Waterworks Co., [1912] 1 Ch. 846.

**8583.** —— ——.]—By the Tyne Coal Dues Act, 1872 (c. xiii), the old coal dues are abolished, & the Comrs. are empowered to levy dues (*inter alia*), one penny per ton on coals "exported from the port":—*Held:* in the absence of anything in the Act to the contrary, "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port"; & therefore included coals taken out of the port in a steamer to be consumed on board during a distant voyage.—MULLER *v.* BALDWIN (1874), L. R. 9 Q. B. 457; 43 L. J. Q. B. 164; 30 L. T. 864; 38 J. P. 709; 22 W. R. 909; 2 Asp. M. L. C. 304.

*Annotation:*—**Apld.** Fox *v.* Kooman (1919), 83 J. P. 239.

**8584. Duty on tonnage or on each package.**]—A harbour Act authorised certain Harbour Comrs. to charge a sum not "exceeding 1*d.* for every ton or less quantity than a ton, & for every package & parcel of goods, wares, merchandise, etc., exported or imported over the bars of certain rivers." Tin plates were exported, packed in wooden boxes for shipment, & such boxes formed part of & composed one entire quantity or shipment in one vessel, under one bill of lading, & to the same consignee, & at an uniform rate of freight on all the tin plates so shipped, such freight being paid on the quantity of tons weight:—*Held:* that the Comrs. were entitled to charge 1*d.* per package, & were not bound to charge 1*d.* per ton weight.—JONES *v.* PHILLIPS (1851), 7 Exch. 85; 21 L. J. Ex. 6; 16 J. P. 394; 155 E. R. 866.

**8585. Goods imported—What amounts to importation.**]—By 48 Geo. 3, c. civ, it was recited that the harbour of Berwick upon Tweed had gone to decay for want of funds, & that it was expedient that the duties on goods should be fixed, & vested in Comrs., to be by them applied for the purposes of the Act: & Comrs. were appointed for carrying the Act into execution, & empowered to rebuild the pier of the harbour, to deepen the harbour, to remove obstacles, to set up, within the harbour, jetties, posts, etc., for carrying on the navigation & rendering the harbour more commodious, & for other works & conveniences as they should think fit; & to make & repair quays, wharfs & docks, for the better accommodation of shipping. Duties, to be paid to the Comrs., were imposed, according to a schedule, on goods "imported into or exported from the said harbour." It was enacted that the harbour should be deemed to extend down the Tweed & its shores, from the bridge over the Tweed to the sea. A vessel brought goods from sea into the harbour, made some use of the posts erected therein by the Comrs., & passed, without otherwise using the harbour, under the bridge, up the river, & landed the goods at a point above the bridge, within the flow of the tide, where there was no harbour:—*Held:* the goods were not imported into the harbour, and therefore not liable to duty. Although the schedule of duties spoke of "goods imported & shifted to another vessel for exportation, & not landed."—WILSON *v.* ROBERTSON (1855), 4 E. & B. 923; 24 L. J. Q. B. 185; 1 Jur. N. S. 755; 119 E. R. 343.

**8586. Goods landed—Goods left on shore until shipped for exportation.**]—Defts. were empowered by a local Act to levy tolls on all goods landed within their harbour. In pursuance of a practice which had continued for many years, stones brought along the coast into the harbour were shot from pltf.'s boats on to the shore, below high water mark, & remained on the spot where they were deposited till they were shipped for exportation from the harbour:—*Held:* the stones were not landed within the meaning of the Act.—HARVEY *v.* LYME REGIS CORPN. (1869), L. R. 4 Exch. 260; 38 L. J. Ex. 141; 21 L. T. 227; 17 W. R. 892; 3 Mar. L. C. 287.

**8587. Timber—Shipped or unshipped—Towing timber to store ponds.**]—Where a statute gave trustees appointed for the improvement of a navigable river & harbour power to charge dues on all timber "shipped or unshipped within the harbour or river":—*Held:* to attach a tow rope to a log of timber or a number of logs loosely connected at one of the ends for the purpose of towing them is not to "ship" those logs, & to cast off the tow rope is not to "unship" them.—CLYDE NAVIGATION TRUSTEES *v.* LAIRD (1883), 8 App. Cas. 658, H. L.

*Annotations:*—**Mentd.** Micklethwait *v.* Vincent (1893), 69 L. T. 57; N. E. Ry. *v.* Hastings, [1900] A. C. 260; A.-G. & Settle R. D. C. *v.* Lunesdale R. D. C. (1902), 86 L. T. 822; Assheton, Smith *v.* Owen, [1906] 1 Ch. 179; Goldsmith's Co. *v.* Wyatt, [1907] 1 K. B. 95; Sadler *v.* Whiteman, [1910] 1 K. B. 868; Lord Advocate *v.* Walker Trustees, [1912] A. C. 95; Associated Newspapers *v.* London Corpn., [1916] 2 A. C. 429; Bourne *v.* Keane, [1919] A. C. 815; Watcham *v.* East Africa Protectorate, [1919] A. C. 533.

**8588.** —— **Weighing impracticable—Adoption of "rule of thumb" calculation—Application to particular species of wood.**]—Under the shipping & docking rates fixed by the Port of London Authority under their statutory powers given by Port of London Act, 1908 (c. 68), "vessels with part cargoes of wood & carrying no other cargo" are charged "3*d.* per ton on the net register & on the deck cargo space, if any, occupied, & 10*d.* per ton on the weight of the wood discharged," plus an authorised additional war charge of 150 per cent. To ascertain the weight of the wood discharged, it being impracticable to weigh it, the Port Authority adopted a "rule of thumb" calculation on a space basis—namely, that a standard of 165 cubic feet of sawn deals weighs 2½ tons.

Defts.' consignment of soft round wood, together with other consignments of timber, was discharged from pltfs.' ship in the Surrey Commercial Docks. Under the terms of the charterparty incorporated in the bill of lading, "if discharged in a dock in London the consignees to pay two-thirds of the dock dues." Pltfs., having paid the Port Authority £77 4*s.* 7*d.* the sum demanded by them in respect of dock dues, claimed from defts. £24 3*s.* 10*d.* as the proportion of that amount attributable to their consignment. Round wood admittedly weighs less than sawn wood, & defts. contended that their proper proportion of dues, worked out on a weight basis & not on the space basis adopted by the Port Authority, was not more than £20 6*s.* which they paid into ct.:—*Held:* the Port Authority had no power to levy dues on a formula which, applied to round wood, was manifestly erroneous; each consignee was only liable to the shipowners for his exact proportion of two-thirds of the dues calculated, as regards the 10*d.* rate, on a weight basis; & that accordingly the amount paid into ct. was sufficient.—THE HAMLET, [1924] P. 224; 94 L. J. P. 1;

132 L. T. 472 ; 40 T. L. R. 819 ; 16 Asp. M. L. C. 404, C. A.

**8589. " Grain brought in for sale "—Construction of local Act.**]—The Metage on Grain (Port of London) Act, 1872 (c. c.), s. 4, which entitles the corpn. of London to a duty " in respect of all grain brought into the port of London for sale," applies only to grain brought in for sale as grain, & not to grain brought in to be ground into meal, or manufactured into other articles of commerce, & then sold.—COTTON *v.* VOGAN & Co., [1896] A. C. 457 ; 65 L. J. Q. B. 486 ; 74 L. T. 598 ; 61 J. P. 36 ; 12 T. L. R. 429 ; 40 Sol. Jo. 544, H. L.

**8590. Goods for transhipment only—" Shipped again as soon as practicable."**]—Pltfs. received in the Port of London from beyond the seas a large quantity of oil in bulk by their ocean tank steamer *Narragansett*. When that steamer was reported at the custom house pltfs. intended to tranship to various ports in the United Kingdom specific quantities of the oil she brought, & they accordingly delivered to defts. inwards port rates exemption certificates under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910, showing the quantity in tons they intended to tranship to each port. The oil from the *Narragansett* was discharged into pltfs.' tanks at Purfleet, some of which were empty at the time, & some contained oil intended for distribution in the London district & also oil discharged from previous steamers. From these tanks pltfs. subsequently loaded the various quantities of oil mentioned in the inwards port rates exemption certificates, & conveyed them by small tank steamers to the ports mentioned in those certificates. Pltfs. then delivered to defts. outwards port rates exemption certificates for the oil so transhipped, & claimed exemption from the payment of port rates in respect thereof. Defts. refused to admit pltfs.' claim for exemption on the ground (*inter alia*), that as the oil brought by the *Narragansett* had been mixed in the tanks with other oil not intended for transhipment, the identity of the oil transhipped with that imported could not be certified & proved so as to comply with s. 9 of the Port of London (Poor Rates on Goods) Provisional Order Act, 1910 :—*Held :* (1) the oil transhipped had been sufficiently identified with that certified for transhipment, & therefore pltfs. were entitled to the exemption claimed ; (2) the expression " shipped again as soon as practicable " in s. 9 means shipped again in the ordinary course of navigation & having regard to the facilities of the port, & does not mean shipped again as soon as practicable having regard to the convenience of the merchant's business.—ANGLO-AMERICAN OIL CO., LTD. *v.* PORT OF LONDON AUTHORITY, [1914] 1 K. B. 14 ; 83 L. J. K. B. 125 ; 109 L. T. 862 ; 30 T. L. R. 14 ; 12 Asp. M. L. C. 419 ; 19 Com. Cas. 23.

**8591.** ——.]—Goods belonging to pltfs. were imported by steamer into the Port of London from beyond the seas, & pltfs. delivered to the collector of the Port Authority a certificate under Port of London Poor Rate on Goods Provisional Order, s. 9, stating that the goods were intended for transhipment to the port of Rochester on the river Medway, by sailing craft. Rochester was within the Reculvers line but not within the Port of London. The Port Authority declined to accept the certificate, & pltfs. paid the port rates on the goods under protest. The goods were put over the side from the steamer into a sailing barge & conveyed to Rochester :—*Held :* these goods were goods imported for transhipment only within the meaning of s. 9 of the Provisional Order & were therefore within the exemption.—PORT OF LONDON AUTHORITY *v.* BRITISH OIL & CAKE MILLS, LTD., [1915] A. C. 993 ; 84 L. J. K. B. 1849 ; 113 L. T. 789 ; 31 T. L. R. 511 ; 59 Sol. Jo. 577 ; 13 Asp. M. L. C. 156 ; 21 Com. Cas. 94, H. L. ; *affg.* S. C. *sub nom.* BRITISH OIL & CAKE MILLS, LTD. *v.* PORT OF LONDON AUTHORITY, [1914] 3 K. B. 1201, C. A.

*Annotation :*—**Refd.** Anglo-American Oil Co. *v.* Port of London Authority, [1914] 1 K. B. 14.

*E. According to Voyage.*

**8592. " Voyage out & home "—Effect of intermediate loading & unloading.**]—Under a clause in an Act of Parliament exempting ships from the payment of the same port or toll duties " more than once for the same voyage bout out & home, notwithstanding such ship or vessel might go out & return with a loading of goods of merchandises " : —*Held :* a vessel having cleared out of port at Hull, with a cargo of goods for Mogadore, on the coast of Africa, which she discharged, & there took in another cargo for London, discharged the same at London, & took in cargo for Hull, with which she arrived at Hull, made two distinct voyages, & not within the exemption.—KINGSTON-UPON-HULL DOCK CO. *v.* HUNTINGTON (1790), 2 Chit. 597.

**8593.** —— ——.]—Under the Liverpool Dock Acts of 8 Ann. & 2 Geo. 3, tonnage duties are payable to the dock co. on all vessels sailing with cargoes outwards or inwards, which rate varies according to the several descriptions of voyages in the Acts, one of which is to & from America generally ; so as no ship shall be liable to pay more than once for the same voyage out & home : —*Held :* a voyage out from Liverpool with a cargo to Halifax in North America, where the ship delivered it, & took in another cargo there for Demarara in South America, & after delivering that, returned to Liverpool with a cargo from Demarara, was all the same voyage out & home within the meaning of the Acts, & chargeable only with one tonnage rate for the use of the docks.—GILDART *v.* GLADSTONE (1810), 12 East, 439 ; 104 E. R. 171 ; *subsequent proceedings*, 12 East, 668.

**8594.** —— ——.]—By the Liverpool Dock Act, 51 Geo. 3, c. 143, a ship which cleared outwards from that port to St. Domingo, where she discharged her cargo, reloaded for London, & there discharged that cargo, loaded again for Liverpool, & arrived there with the last-mentioned cargo, was held liable to pay a dockage rate according to the rate payable from London only, & not from St. Domingo.—LIVERPOOL DOCKS TRUSTEES *v.* GLADSTONE (1816), 5 M. & S. 328 ; 105 E. R. 1071.

**8595. Vessel trading outwards—Arriving in ballast—What amounts to arrival in ballast.**]—An Act of Parliament provided that a vessel trading inwards to the Port of Liverpool should pay dock rates, according to a fixed scale, proportioned to the distance of the port from which she was trading, & that a vessel arriving in ballast, but trading outwards, should pay in proportion to the distance of the port to which she was trading.

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**PART XXI. SECT. 5, SUB-SECT. 2.—E.**

**g.** *Vessels sailing from Cork to Dublin through St. George's Channel.*]—Vessels sailing from Cork to Dublin through St. George's Channel, are not subject to the toll given by the 3 Geo. 2, c. 36, to the proprietor of the Skerries lighthouse.—BOYCE *v.* JONES (1842), 4 I. L. R. 231.—**IR.**

**h.** *Vessel arriving from port in United Kingdom—& discharging at Foynes.*]—LIMERICK HARBOUR COMRS. *v.* KANE (1878), 2 L. R. Ir. 473.—**IR.**

*Sect.* 5.—*Rates and tolls: Sub-sect.* 2, *E.; sub-sects.* 3, 4, 5, 6 & 7. *Sect.* 6.]

A vessel that had discharged her cargo at a port in England & taken on board ballast, being about to sail to Liverpool for the purpose of loading a cargo for the West Indies, took on board a bale of cotton & a few other articles admittedly in order that she might pay dock rates as a vessel trading inwards from the port where she took on board such articles, & not as a vessel arriving in ballast:—*Held:* she was a vessel arriving in ballast within the meaning of the Act.—DE GARTEIG *v.* MERSEY DOCKS & HARBOUR BOARD (1877), 37 L. T. 411; 3 Asp. M. L. C. 500, D. C.

**8596.** ——.]—Vessels took in part of their cargo at Glasgow, sailed to Liverpool, entered applts.' docks & there completed their loading but discharged no cargo: they then proceeded to a port in India, there discharged & loaded a complete cargo, thence sailed to Liverpool, entered applts.' docks & there discharged the whole or part of their cargo, & then returned with the remainder of their cargo or in ballast to Glasgow:—*Held:* under Mersey Dock Acts Consolidation Act, 1858 (c. xcii), s. 230, such vessels using applts.' docks as aforesaid on their way to India were liable to dock tonnage rates, not as vessels "trading inwards" from Glasgow, but as vessels "trading outwards" to India; & such vessels using the docks as aforesaid on their return voyage from India were liable to rates as vessels "trading inwards" from India.—MERSEY DOCKS & HARBOUR BOARD *v.* HENDERSON BROTHERS (1888), 13 App. Cas. 595; 58 L. J. Q. B. 152; 59 L. T. 697; 37 W. R. 449; 4 T. L. R. 703; 6 Asp. M. L. C. 338, H. L.; *revsg.* S. C. *sub nom.* HENDERSON BROTHERS *v.* MERSEY DOCKS & HARBOUR BOARD (1887), 19 Q. B. D. 123.

*Annotations:*—**Refd.** The Rutland (1896), 65 L. J. P. 91; Mersey Docks & Harbour Board *v.* Twigge (1898), 67 L. J. Q. B. 601. **Mentd.** Walker *v.* York Corpn., [1906] 1 K. B. 724.

**8597. Vessel trading inwards.**]—MERSEY DOCKS & HARBOUR BOARD *v.* HENDERSON BROTHERS, No. 8596, *ante*.

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SUB-SECT. 3.—DUTIES OF MASTER OF VESSEL.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 35–38.

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SUB-SECT. 4.—DUTIES OF OWNER OF GOODS.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 39, 42, 43.

**8598. Meaning of "owner"—Vendor delivering goods on board vessel.**]—One who delivers goods on board a vessel provided by the purchaser is not the "owner" or the "shipper" within Ribble Navigation Act, 1853 (c. clxx) & Harbours, Docks & Piers Clauses Act, 1847 (c. 27), so as to be liable to an action for the tolls imposed by Ribble Navigation Act, 1853 (c. clxx), s. 71.—RIBBLE NAVIGATION CO. *v.* HARGREAVES (1856), 17 C. B. 385; 25 L. J. C. P. 97; 26 L. T. O. S. 259; 139 E. R. 1122.

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SUB-SECT. 5.—ENFORCEMENT.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 42–46, 48.

**Distress.**]—*See* DISTRESS, Vol. XVIII., p. 427, Nos. 1648–1653.

**8599. Action — Against master.**] — LONDON CORPN. *v.* HUNT (1681), 3 Lev. 37; 83 E. R. 565, Ex. Ch.

*Annotations:*—**Apld.** Jenkins *v.* Harvey (1835), 2 Cr. M. & R. 393. **Refd.** Nottingham Corpn. *v.* Lambert (1738), Willes, 111; Stafford Corpn. *v.* Till (1827), 4 Bing. 75. **Mentd.** Fishmonger's Co. *v.* Robertson (1843), 5 Man. & G. 131.

**8600. —— In name of clerk to commissioners.**]—Where, by a navigation Act, certain rates & duties were imposed on coals, etc., landed within a certain district, to be paid to comrs. therein named; & the comrs. were empowered to sue in the name of their clerk for the time being for "any penalty or sum of money due or payable by virtue of the Act":—*Held:* an action of debt might be brought in the name of the clerk for arrears of rates & duties; although, by another clause, a power was given of detaining & selling the vessel & goods in case of neglect or refusal to pay the rates & duties.—GOODY *v.* PENNY (1842), 9 M. & W. 687; 11 L. J. Ex. 289; 152 E. R. 290.

*Annotations:*—**Consd.** Smith *v.* Cartwright (1851), 6 Exch. 927. **Refd.** Phillips *v.* Williams (1901), 18 T. L. R. 223.

**8601. —— Although other remedy available—By sale of vessel & goods.**]—GOODY *v.* PENNY, No. 8600, *ante*.

—— **Limitation.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 395, No. 755.

**8602. Wrongful seizure of rigging by harbour master—Liability to attachment.**]—An attachment decreed against a harbour master for seizing & carrying off for non-payment of harbour dues portions of the rigging of the ship whilst in the custody of the officer of the ct.—THE HARMONIE (1841), 1 Wm. Rob. 179; 6 L. T. 915; 166 E. R. 540.

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SUB-SECT. 6.—DISPUTES.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 40, 41, 46.

**8603. Agreement with railway company—Right to use pier on payment of statutory tolls—Whether**

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**PART XXI. SECT. 5, SUB-SECT. 5.**

k. *Summary proceedings.*]—The half yearly harbour & light rate imposed on all registered ships by Navigation Act, 1901, s. 61, may be recovered against the owner by summary proceedings before justices under sect. 168. —*Ex p.* BROWN (1913), 13 S. R. N. S. W. 540; 30 N. S. W. W. N. 162.—**AUS.**

l. *Top wharfage—What must be proved.*]—In order to recover top wharfage, pltf. must aver & prove affirmatively that the wharf was "properly planked or timbered on the surface," & this is not proved by evidence that the wharf was in good order.—MCLEOD *v.* YEATES (1861), 10 N. B. R. (5 All.) 168.—**CAN.**

m. *Action should be in corporate name.*]—A harbour & road joint stock co. by its charter, 16 Vict. c. 141, had power to levy tolls on goods landed or shipped within certain prescribed limits; & the harbour, roads, wharves, & all the real estate were to be vested in the co. & their successors for ever. The co., finding it necessary to mtge. the harbour, tolls, etc., did so under authority of their charter, & the mtgee. foreclosed the security, entered into possession, & leased to pltf., who sued deft., owner of a wharf within the statutable limits of the harbour, for toll on goods shipped or landed on such wharf:—*Held:* pltf. could sue only in the corporate name; & a nonsuit was therefore directed.—WHITESIDE *v.* BELLCHAMBER (1872), 22 C. P. 241.—**CAN.**

n. *Right to maintain action as well as distress.*]—By 3 Vict. c. 33, pltfs. were incorporated, & were declared to be capable of contracting & being contracted with, suing & being sued, etc. They were also authorised to construct a harbour, to impose charges for the use thereof, & to demand & recover such charges. It was further enacted that if any person should neglect or refuse to pay the tolls or dues, pltfs. might detain the goods on which the tolls or dues were due & payable, until such tolls should be paid:—*Held:* pltfs. were not confined to the remedy by way of distress, but could also maintain an action.—BRONTE HARBOUR CO. *v.* WHITE (1873), 23 C. P. 164.—**CAN.**

**PART XXI. SECT. 5, SUB-SECT. 6.**

o. *Right to recover overpayment.*]—Where pltf. agreed with a harbour co.

**injunction granted to restrain obstruction.**]—The proprietor of a pier erected under the powers of an Act of Parliament, which were to be exercised during a certain limited period, was authorised by the act to demand certain specified tolls for the use of the pier when completed. By an agreement between him & a railway co., he agreed to complete his pier at a considerably earlier time than he was bound to do by the Act, & the co. agreed to complete a branch railway to the pier by the same time; but the agreement contained no stipulations as to opening the pier or railway, or as to the terms on which the pier was to be used. The owner of the pier completed it accordingly, but refused to permit the railway co. to use it, except upon terms to which the co. declined to accede. The ct. refused to grant on motion an injunction restraining the owner of the pier from obstructing the use of it by the co. at the statutory tolls.—FURNESS RY. CO. *v.* SMITH (1847), 1 De G. & Sm. 299; 63 E. R. 1076.

**8604. Agreement with purchaser—Construction.**]—TENNANT *v.* SWANSEA HARBOUR TRUSTEES (1886), 3 T. L. R. 128; *on appeal* (1887), 4 T. L. R. 174, C. A.

**8605. Rates revised under invalid regulations—Action to recover excess—Whether maintainable.**]—By defts.' Acts of Parliament, all vessels entering into or leaving their docks are liable, according to the tonnage burden thereof, & are compelled to pay certain fixed dues to defts. By Merchant Shipping Act, 1854 (c. 104), s. 26, whenever the tonnage of any ship has been ascertained & registered in accordance with the provisions of that Act, same shall thenceforth be deemed to be the tonnage of such ship, & be repeated in every subsequent registry thereof, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; & in either of such cases such ship shall be remeasured, & the tonnage determined & registered according to the rules in that Act contained. By sect. 27 remeasurement may be made upon desire of the shipowner. By sect. 29, the Comrs. of Customs are empowered to make certain modifications & alterations in the tonnage rules prescribed by the Act. Under that sect. the Comrs. of Customs in 1860 made regulations, which had the effect of increasing the registered tonnage of pltf.'s ships. In 1865 these regulations were, by the Exch. Chamber, declared to be contrary to the Act of Parliament, & invalid. This action was brought to recover the excess of rates paid in accordance with these invalid regulations, over the amount which would have been due under Merchant Shipping Act, 1854 (c. 104):—*Held:* the action could not be maintained.—MOSS *v.* MERSEY DOCKS & HARBOUR BOARD (1872), 26 L. T. 425; 20 W. R. 700; 1 Asp. M. L. C. 274.

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### SUB-SECT. 7.—MORTGAGE OF RATES AND TOLLS.

**8606. Appointment of receiver—Rights of judgment creditor.**]—An order made in a mtgee.'s suit, appointing the chairman of the trustees of the Birkenhead Docks receiver of the rates, tolls, & property, with powers to defray the expenses of carrying on the undertaking, following the form in *Potts* v. *Warwick & Birmingham Canal Co.* (1853), Kay, 142, supported; & a judgment creditor of the trustees restrained from proceeding against the rates & tolls due to the trustees by attachment & execution under C. L. P. Act, 1854 (c. 125), ss. 60–67.—AMES *v.* BIRKENHEAD DOCK TRUSTEES (1855), 20 Beav. 332; 24 L. J. Ch. 540; 25 L. T. O. S. 121; 1 Jur. N. S. 529; 3 W. R. 381; 52 E. R. 630.

*Annotations:*—**Refd.** G. S. & W. Ry. *v.* Corry & Turquand (1867), 15 W. R. 650; *Re* Manchester & Milford Ry., *Ex p.* Cambrian Ry. (1880), 14 Ch. D. 645; Davies *v.* Thomas, [1900] 2 Ch. 462.

**8607. Rates & tolls altered subsequently to mortgage—Whether rights of mortgagees affected.**]—By virtue of an Act of Parliament certain mtges. were granted by harbour trustees of the tonnage rates & duties of the harbour. By subsequent Acts of Parliament the rates & dues had been altered & changed in substitution of the rates & duties so mortgaged:—*Held:* the present rates & dues were virtually mortgaged; the subsequent Acts of Parliament not extinguishing the mtgees.' rights or remedies, & decree for account & payment of principal & interest accordingly.—POSTLETHWAITE *v.* MARYPORT HARBOUR TRUSTEES (1869), 20 L. T. 138.

**Whether assignment "land"—Within Mortmain Act.**]—*See* CHARITIES, Vol. VIII., p. 270, Nos. 349, 350.

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### SECT. 6.—PROVISION FOR MANAGEMENT OF HARBOUR.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 71, 73, 83.

**8608. Emptying ballast—19 Geo. 2, c. 22.**]—To unload the ballast of a ship in haven, into a hopper, that it may be conveyed out, & cast into the ocean, penal by above Act.—BRUCKLEBANK *v.* SMITH (1758), 2 Keny. 358; 2 Burr. 656; 96 E. R. 1209.

**8609. Obstruction—On harbour side—Boats.**]—By a local Act, any person who shall place etc., on any space of ground immediately adjoining to the haven, & within the space of 10 feet from high water mark any goods, materials, or articles whatsoever so as to obstruct the free & commodious passage through & over the same, shall forfeit & pay any sum not exceeding, etc. Applt. placed three boats on the space of ground immediately adjoining the haven & within the space of 10 feet from high water mark, so as to obstruct the free & commodious passage, through & over the same. There was no public right of passage over the space of ground, & it was occupied by applt.:—*Held:* applt. could not be convicted, as the provision could only apply to cases where a public right of passage existed.—HARROD *v.* WORSHIP (1861), 1 B. & S. 381; 30 L. J. M. C. 165; 25 J. P. 581; 8 Jur. N. S. 153; 9 W. R. 865.

*Annotation:*—**Consd.** A.-G. & Great Yarmouth Port & Haven Comrs. *v.* Harrison (1920), 85 J. P. 54.

**8610. —— —— Private railway.**]—By a special Act of 1840 trustees were appointed for the management of a certain harbour.

Sect. 53 of the Act authorised the lord of the manor, or the owner of land situate within or adjoining to the harbour, amongst other things, to lay down railways over the quays, roads, & works, but so as all such railways should be constructed of such height & in such form as should not in any manner impede or interrupt the general

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for the admission into their harbour of certain property of pltf. for a fixed sum, less than the toll which they might have claimed under their charter, but they afterwards refused to allow the property to be removed without the payment of their usual harbour dues:—*Held:* pltf. might recover back the overplus.—MARSH *v.* PORT HOPE HARBOUR CO. (1840), 6 O. S. 100.—CAN.

*Sect. 6.—Provision for management of harbour. Sects. 7 & 8: Sub-sects. 1 & 2, A.*]

public traffic of the port, or the free passage to & from the same; & railways so to be erected or made were, subject to the aforesaid restriction, to be wholly excluded from the jurisdiction of the trustees, & be the private property & for the sole & exclusive use of the person or persons upon whose land the same should stand or be placed, & his or their assigns. The lord of the manor was the owner of lands adjoining the south side quay of the harbour.

Tenants of the lord of the manor having proceeded to lay down two lines of railway from their works along the south side quay, an action was brought by the trustees of the harbour to restrain them from constructing such railway, on the ground that they would impede the general public traffic of the port:—*Held:* the main object of the Act was to benefit the persons frequenting the harbour; & any railway laid on the south side of the quay must be constructed in such a way as not by its construction, or its natural & necessary user, in any manner to impede the fair public traffic of the port.—LOWTHER *v.* CURWEN (1887), 58 L. T. 168; 4 T. L. R. 118; *affd.* (1888), 4 T. L. R. 633, C. A.

**8611. —— —— Boundary fence.**]—A local Act forbade the making of any "building or erection" on any wharf in a certain haven or within ten feet of the head of the wharf:—*Held:* a boundary fence erected along the side of the wharf was not a "building or erection" within the meaning of the Act.—A.-G. & GREAT YARMOUTH PORT & HAVEN COMRS. *v.* HARRISON (1920), 89 L. J. Ch. 607; 85 J. P. 54; 18 L. G. R. 740, C. A.

**8612. —— Outside harbour—Mooring vessel—Sufficiency of notice to remove obstruction.**]—By West India Docks Act, 1831 (c. lii), s. 101, a penalty is imposed on every master or person in charge of any ship, lighter, etc., who places or suffers it to remain in the river Thames within 200 yards of any of the dock entrances, unless for the purpose of coming into or going out of the docks; & every master, etc., of any ship, barge, etc., so placed within such distance who does not immediately remove it from within such distance "on being thereunto required by the dockmaster or dockmasters" is made liable to a fine for every hour that "such obstruction shall remain after such requisition made."

Notices requiring the removal of vessels from within the prohibited distance were signed beforehand in blank by the dockmaster, &, upon a vessel mooring within that distance, the date & the name of the vessel were filled up by the lockman, who, if the person in charge refused to move, served him with the notice without consulting the dockmaster as to the removal of that particular vessel:—*Held:* (1) the notice, although only signed in blank by the dockmaster & filled in by his subordinate, was a good requisition by the dockmaster; (2) in order to constitute an offence under the sect. there need not be an actual or imminent obstruction to any particular ship or to the traffic generally, a vessel moored within the prohibited distance constituting, if not removed upon notice, an obstruction within the meaning of the sect.—DUCKHAM *v.* GIBBS, [1900] 1 Q. B. 394; 69 L. J. Q. B. 127; 48 W. R. 239; 44 Sol. Jo. 103, D. C.

**8613. —— —— —— Necessity for actual or imminent obstruction of traffic.**]—DUCKHAM *v.* GIBBS, No. 8612, *ante*.

**—— Removal of wreck.**]—*See* Part XIV., Sect. 5, *ante*.

**8614. Emptying refuse—What amounts to refuse—Mersey Docks.**]—By sect. 85 of the Mersey Dock Acts Consolidation Act, 1858 (c. xcii) it is an offence for any person to throw or empty any ballast, rubbish, dust, ashes, shingle, stones, or other refuse or things into any dock, or to do any other act to prejudice any of the works of the Mersey Dock Board.

An information was laid by resp. against applt. under the above sect. on the ground that applt., the master of a steamship which was berthed in a dock at B., had pumped from the engine room bilges into the dock water mixed with common petroleum. The justices who heard the information convicted applt.:—*Held:* the justices were right in holding that the word "refuse," as used in sect. 85 of the Act, was not confined to solid matter of a character similar to those things specifically mentioned in the sect., but included matter of any kind, solid, or liquid, which might be prejudicial to the works of the docks.—GRAY *v.* HEATHCOTE (1918), 88 L. J. K. B. 358; 119 L. T. 84; 82 J. P. 211; 16 L. G. R. 557, D. C.

**Provision against discharge of oil in harbours.**]—*See* Navigable Waters Act, 1922 (c. 39).

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## SECT. 7.—BUOYS, LIGHTS, BEACONS, ETC.

*See* Harbours, Docks, & Clauses Act, 1847 (c. 27), ss. 16–19, 77, 78; Harbours Transfer Act, 1862 (c. 69), s. 5.

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## SECT. 8.—MANAGEMENT OF VESSELS IN HARBOURS.

### SUB-SECT. 1.—IN GENERAL.

*See* Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), ss. 59–61.

**8615. Mooring vessel — Head rope must be fastened to shore—Not to head of another vessel.**]—THE ATLAS (1846), 7 L. T. 286.

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**PART XXI. SECT. 7.**

p. *Right of harbour authority—To remove lights & close harbour.*]—SWEENEY *v.* PORT BURWELL HARBOUR COMRS. (1869), 19 C. P. 376.—**CAN.**

q. *Anchor of dredge placed in public harbour—Duty to place buoy to mark it.*]—By the first count of the declaration, it was alleged that the master of a Govt. dredge placed the anchor of the dredge in the main channel of a public harbour, with the fluke of the anchor sticking up, & so left it for an unreasonable length of time without placing any proper buoy or signal to mark the place of the anchor, & without taking any proper means to guard against accidents to vessels navigating the harbour, & that pltf.'s mariners having occasion to pass out of the said harbour with pltf.'s vessel, without any default on their part, ran upon the anchor & injured the vessel:—*Held:* the count described a good cause of action, that the master of the dredge should have placed a buoy to the anchor to warn vessels navigating the harbour.—LUNT *v.* LLOYD (1881), 21 N. B. R. (5 P. & B.) 202.—**CAN.**

r. *Government letting use of floating dock—Liability as to safety of access—Placing of buoy—Concealed danger outside buoy—Implied warranty.*]—If a Govt. lets for hire the use of a floating dock approachable by an ample fairway, & in the same bay in which the dock is moored places a buoy to mark a shoal, there is not thereby created any contractual guarantee on its part to the owner of a vessel proceeding to the dock for repairs against a danger such as an unknown concealed rock which though lying outside the buoy is not in proximity to or in the ordinary line of approach to the dock.—SCRUTTON SONS & CO. *v.* A.-G. FOR TRINIDAD, [1921] 1 W. W. R. 386, P. C.—**CAN.**

t. *Liability of harbour authorities—Misleading system of buoying used.*]—ANCHOR LINE *v.* DUNDEE HARBOUR TRUSTEES, THE CIRCASSIA, ELLERMAN LINES *v.* DUNDEE HARBOUR TRUSTEES, THE CITY OF NAPLES, [1922] S. C. (H. L.) 79; 58 Sc. L. R. 440; [1922] S. L. T. 137.—**SCOT.**

**PART XXI. SECT. 8, SUB-SECT. 1.**

a. *Obstructing navigation—Rights o. vessels lying at wharves.*]—The S.S.

**8616. —— Supercession of private & local rights —By statutory provisions.**]—Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 63, which imposes a penalty upon the master of any vessel who shall without the permission of the harbour master moor same in the entrance, or within the prescribed limits, of any dock or harbour, & who shall not remove same upon notice, overrides & extinguishes all local & private rights of property therein.—GARDNER *v.* WHITFORD (1858), 4 C. B. N. S. 665; 23 J. P. 358; 140 E. R. 1253.

**8617. —— Claim as of right—As member of public.**]—The right of the public to the use of the waters of a navigable harbour is limited to user for the purposes of navigation & fishery & matters incidental thereto, & any right of navigation claimed over such waters must be a right incidental to the navigation of the person claiming it, & not a right incidental to the navigation of others.

A claim by colliery owners of a right as members of the public to moor in a public harbour a coal hulk for the purpose of supplying coals therefrom to merchant vessels entering the harbour is a claim of a right not incidental to navigation & is bad in law.—DENABY & CADEBY MAIN COLLIERIES, LTD. *v.* ANSON, [1911] 1 K. B. 171; 80 L. J. K. B. 320; 103 L. T. 349; 26 T. L. R. 667; 54 Sol. Jo. 748; 11 Asp. M. L. C. 471, C. A.

**—— Authority of harbour master.**]—*See* No. 8714, *post*.

**8618. Allowing vessel to remain unattended—Penalty—Dumb barge—Whether "vessel" within private docks Act.**]—A "dumb barge," a river craft which is simply propelled by means of oars, & having no rigging or other equipment is not a "vessel" within the London & St. Katherine Docks Act, 1864 (c. clxxviii), ss. 100 & 101, notwithstanding the definition of the word "vessel" in Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 3, & consequently, the owner is not liable to a penalty for allowing her to remain in the docks regulated by the former Act without any person on board.—HEDGES *v.* LONDON & ST. KATHARINE DOCKS CO. (1885), 16 Q. B. D. 597; 55 L. J. M. C. 46; 54 L. T. 427; 50 J. P. 580; 34 W. R. 503; 2 T. L. R. 167; 5 Asp. M. L. C. 539.

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SUB-SECT. 2.—THE HARBOUR MASTER.

*A. Authority.*

*See* Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), ss. 2, 52, 53, 56–59, 62–65, 68, 83.

**8619. Duty of vessels to obey order of harbour master.**]—By the regulations relating to Falmouth harbour, "masters & persons in charge of vessels are to cast off & remove them whenever required, & in the event of neglect or refusal to do so, they will be removed by the dockmaster. Vessels are to strike their yards & masts, if required." The master of a vessel which had been moored at the eastern pier was desired by the dockmaster to remove her to the western pier, & to strike his top gallant masts, etc. On the master's refusal to obey the order, he having left the vessel with only three persons on board, the dockmaster removed her to the western pier, where during a gale she broke from her moorings & did considerable damage to the wharf:—*Held:* (1) by the regulations the dockmaster had a discretion to exercise for the welfare of all ships entering the harbour, & the master was bound to obey the order & assist in the removal of his ship, even though if the interests of the ship alone were to be considered, such removal were injudicious; (2) as a matter of fact, the damage was caused by the negligence of the master, & his refusal to obey the orders of the dockmaster; &, consequently, the vessel was liable for such damage.—THE EXCELSIOR (1868), L. R. 2 A. & E. 268; 37 L. J. Adm. 54; 19 L. T. 87; 3 Mar. L. C. 151.

*Annotations:—Generally*, **Mentd.** Turner *v.* Mersey Docks & Harbour Board, The Zeta, [1892] P. 285; The Normandy, [1904] P. 187.

**8620. ——.**]—The *T.*, a screw steamer, was approaching a lock leading from a basin into a dock at the time when two paddle tugs were coming out. The first tug passed out safely. The master of the second thought that there was not room to pass between the *T.* & the lock wall, & stopped. The harbour master, whose orders he was bound to obey, ordered him to go ahead, & at the same time ordered the *T.* to go astern. The *T.* reversed her engines, but only sufficiently to keep her stationary, as the wind & tide were drifting her towards the lock. A collision took place between the port sponson of the tug & the port bow of the *T.*:—*Held:* the tug was not to blame, because (*a*) an incoming ship should give way to an outgoing ship; (*b*) the master of the tug was bound to obey the order of the harbour master to go ahead; (*c*) the *T.* had disobeyed the order to go astern.—TAYLOR *v.* BURGER (1898), 78 L. T. 93; 14 T. L. R. 228; 8 Asp. M. L. C. 364, H. L.

*Annotation:*—**Refd.** The Kaiser Wilhelm der Grosse, [1907] P. 259.

**8621. —— Or his deputy or assistants.**]—THE MYSTERY, No. 8713, *post*.

**8622. —— Disregard of orders—When justified.**]—RENEY *v.* KIRKCUDBRIGHT MAGISTRATES, No. 8670, *post*.

**8623. Limitation of authority—Disregard of orders—Persons on vessel more familiar with local circumstances.**] — RENEY *v.* KIRKCUDBRIGHT MAGISTRATES, No. 8670, *post*.

**8624. Authority to order ship to leave.**]—A steam vessel, ready to proceed to sea, was stopped by the dock officials in the entrance to the Prince's Dock, Liverpool, & then told by the dock master she might go, but warned to look out for a tow & her tugs coming down the river. The steam vessel came into collision with the tow & one of her tugs. In an action by the owners of the tow against the owners of the steam vessel for the damage sustained, & by the owners of the steam vessel against

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*M. A. Starr*, while proceeding down the harbour of Halifax, came into collision with the schooner *Edith Wier*. The schooner was lying at a wharf in such a position that the bowsprit & jibboom projected some 25 feet beyond the end of the wharf, thereby violating the Harbour regulations. The collision would probably not have occurred but for another schooner which had been lying outside the *Edith Wier*, & which, just previous to the collision, had broken ground & thus narrowed the channel down which the steamer had to pass:—*Held:* nevertheless that as the *Edith Wier's* position was contrary to the harbour regulations, she should be liable for all damages to the *M. A. Starr*, with costs of suit.—THE EDITH WIER (1879), Y. A. D. 237.—**CAN.**

b. —— ——.]—A vessel lying at a wharf is bound to use reasonable exertions to allow another vessel, lying at an inside berth, to get into the stream when she has completed loading. On failure to do so damages are recoverable for the delay caused.—MCNEIL *v.* JONES (1894), 26 N. S. R. (14 R. & G.) 299.—**CAN.**

c. *Right of portwardens to examine hatches.*]—Portwardens appointed by the city of St. John have no exclusive right to examine hatches of vessels arriving at the port so as to entitle them to fees for the services paid to an outside person.—ST. JOHN PORT WARDENS *v.* MCLAUGHLIN (1905), 26 C. L. T. 385; 3 N. B. Eq. Rep. 175.—**CAN.**

d. *Duty to preserve vessel's loading turn.*]—LIVINGSTONIA S.S. CO., LTD. *v.* CLYDE NAVIGATION TRUSTEES, [1928] S. C. 270.—**SCOT.**

e. ——.]—STAG LINE *v.* TABLE BAY HARBOUR BOARD (1905), 22 S. C. 619; 16 C. T. R. 615; 2 Buch. A. C. 325.—**S. AF.**

*Sect. 8.—Management of vessels in harbours: Sub-sect. 2, A. & B. Sect. 9.]*

the dock board for negligence in ordering the vessel to proceed out into the river when the dock officials knew or ought to have known that it was not safe for her to do so:—*Held:* the action against the dock board failed, for, though under Mersey Dock Act, 1858, s. 49, a dock master may order a ship to leave the premises of the dock board, he had not exercised that power.—THE SUNLIGHT, [1904] P. 100; 73 L. J. P. 25; 90 L. T. 32; 9 Asp. M. L. C. 509.

*Annotations:*—**Refd.** The Llanelly, [1914] P. 40; The Gulf of Suez (1921), 125 L. T. 653.

**8625. Place & method of mooring vessels.**]—EAST LONDON HARBOUR BOARD *v.* CALEDONIA LANDING, SHIPPING & SALVAGE CO., LTD., EAST LONDON HARBOUR BOARD *v.* COLONIAL FISHERIES CO., LTD., No. 8714, *post.*

**8626. Validity of directions.**]—The clerk to the Fowey Harbour Comrs. served formal directions of the harbour master on pltfs., who were the owners of a number of vessels in respect of which pilotage was not compulsory; & the masters of several of these vessels, on arrival in the harbour, were served by the harbour master with copies of these directions, which provided that between sunrise & sunset the vessels should not proceed up the harbour at a pace exceeding three miles per hour; that between sunset & sunrise they should anchor in a certain defined position; that they should not at any time proceed above a place in the harbour known as Prime Cellars without the sanction of the harbour master; & that they should not at any time be moved within the limits without previously notifying the harbour master; unless in any of the four cases they had a qualified pilot on board.

Pltfs. claimed a declaration that the directions were invalid & unenforceable:—*Held:* although there might be circumstances under which a harbour master could give directions under Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 52, operative for more than the specific occasion, the directions in question constituted an indirect attempt to render pilotage compulsory, &, taken as a whole, were in the nature of general directions which could only be made by bye-law under sect. 83, & subject to confirmation in the manner prescribed for bye-laws; & accordingly they were invalid & unenforceable.—HUGHES (RICHARD) & CO. *v.* FOWEY HARBOUR COMRS., THE GUELDER ROSE, [1927] P. 1; 96 L. J. P. 42; 136 L. T. 226; 17 Asp. M. L. C. 178, C. A.

### *B. Liability for Accident.*

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 52–83.

**8627. Liability of harbour master—Negligence in conducting ship into harbour.**]—By 2 Will. 4, c. 67, the co. of proprietors of the H. Wet Docks were empowered to appoint such officers as to them should seem meet, & to remove ballast from & out of ships entering the port of H., demanding & taking payment for every ton of ballast so removed; & by the same Act power was given to any person appointed, in pursuance of the Act, to act as dock master, to regulate & direct the placing & mooring of ships in the docks, & a penalty is imposed on all persons refusing or resisting the orders of the dock master:—*Held:* where a Dutch ship was moved by a steam tug, under the directions of the harbour master, & such ship, the ballast having been taken out by order of the harbour master, fell over & sunk the tug, the owners of the Dutch ship were not responsible for the damage.—THE DRAGON *v.* THE BROEDER TROUW (1852), 6 L. T. 915; *sub nom.* THE BROEDER TROW, 17 Jur. 94.

**8628. —— Unsafe entrance to dock.**]—THE EAGLE, WRIGHT *v.* PEARN (1859), 6 L. T. 915.

**8629. —— Damage through grounding—Misrepresentation by captain as to type of ship.**]—In an action against a harbour master for loss of the cargo of a foreign merchant vessel, caused by injury to the vessel through her "heeling over" upon "taking the ground" in the harbour, it being admitted that the master brought her in in order to "take the ground;" & that, being sharply built, she could not safely do so, unless there was mud of a sufficient depth & strength to support her, & the case for pltf. being, that at a certain spot there was such mud, but that the vessel took the ground before she could get there, owing to there not being sufficient depth of water for a vessel of her draught:—*Held:* the question of negligence on the part of deft. would depend upon the knowledge or information he had of the build & draught of the vessel, &, in the absence of knowledge on his part, it was the duty of the captain to inform him, &, as it was materially misrepresented to him by the captain, he was not responsible for the result.—LLOYD *v.* IRON (1865), 4 F. & F. 1011.

**8630. —— Change of berth—Action of harbour master not proximate cause of damage.**]—After loading a cargo at a crane berth in Ayr Harbour on a Dec. evening, the master of a steamship, influenced by a falling barometer & an increasing gale from the East South East, with rain, resolved to remain in harbour all night. As the loading berth was required by another vessel, the harbour master ordered him to remove, & supplied him with a berth in the dock basin, which was safe except from a storm from the West or North West. According to the experience of the past there was a probability that under the existing conditions of the weather the wind would veer to the West. During the night it did so veer & blew a gale of extraordinary severity, which resulted in damage to the steamship, & to most of the other vessels in the harbour.

In an action of damages by the owners of the steamship against the harbour trustees, on the ground that the harbour master had wrongfully directed the removal of the vessel to a berth which was known to be unsafe:—*Held:* the damage was due to the extraordinary violence of the storm, & not to any fault on the part of the harbour master in fixing the berth, & the defenders were not liable.—NIVEN *v.* AYR HARBOUR TRUSTEES (1897), 25 R. (Ct. of Sess.) (H. L.) 42.

**8631. Liability of ship—Accident resulting from obedience to order of harbour master—Ship bound to obey harbour master.**]—THE DOLPHIN *v.* THE ECONOMY (1855), 6 L. T. 915.

**8632. —— ——.**]—Where the master & crew are bound by statute to obey the directions of a harbour master in going into dock, & a collision

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**PART XXI. SECT. 8, SUB-SECT. 2.—B.**

**8632 i.** *Liability of ship—Accident resulting from obedience to order of harbour master.*]—The captain of a ship, not registered in Sydney, is not liable for damage done to another vessel by an anchor placed in the fairway, to which the ship has been moored by the direction of the Harbour Master, in the execution of his duty, under Port Act.—PATERSON *v.* KNIGHT (1849), 1 Legge, 497.—**AUS.**

**8632 ii. —— ——.**]—If the captain of a vessel is obliged to take up any position in harbour which the harbour-master may think proper to point out, in the event of a collision with another vessel he will not be held liable for the

is occasioned by the ship being conducted according to the harbour master's directions, the ship is not liable in the Admlty. Ct.—THE BILBAO (1860), Lush. 149; 3 L. T. 338; 1 Mar. L. C. 5; 167 E. R. 72.

*Annotations*:—**Distd.** The Cynthia (1876), 2 P. D. 52. **Apld.** The Mystery, [1902] P. 115. **Mentd.** Everard *v.* Kendall (1870), L. R. 5 C. P. 428; The Vera Cruz (No. 2) (1884), 9 P. D. 96.

**8633. —— Refusal to obey harbour master.**]—THE EXCELSIOR, No. 8619, *ante*.

**8634.** —— ——.]—TAYLOR *v.* BURGER, No. 8620, *ante*.

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## SECT. 9.—METERS AND WEIGHERS AND MASTER PORTERS.

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 82, 83.

**8635. Duty of lessee of wharf—To employ meter of harbour authority.**]—The Mayor & Corpn. of Portsmouth were, under an Act of Parliament passed in 1839, entitled to the right to take certain dues in respect of vessels lading or unlading upon or from the wharves of the harbour; a subsequent Act passed in 1868, giving the corpn. additional powers, & conferring upon them the exclusive appointment & regulation of meters & weighers within the harbour, & incorporating Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 81, 82. The corpn. thereupon made certain bye-laws for the appointment, government, & payment of meters. In 1807 the corpn. granted a lease to B., through whom resp. claimed, for nine hundred & ninety-nine years of certain premises, in which there was a proviso that all such goods, wares, & merchandise as shall be proved to be *bonâ fide*, the sole property of B., his exors., administrators, or assigns, who shall be legally & beneficially entitled to the premises when such goods, etc., shall be landed, shipped, or unshipped, brought to, carried, or laden to upon, or from certain premises in the harbour mentioned shall be freed & discharged from all wharfage, cranage, petit customs, & other duties usually paid at any time or times heretofore, or which at any times hereafter during the respective terms shall become due or payable to the mayor, aldermen, or burgesses. Resp. unloaded a cargo of coals at the premises in the harbour in question, for his own use, & did not employ a corpn. meter: —*Held*: he was under no legal obligation to employ such meter.—WHITING *v.* CARPENTER (1871), 24 L. T. 576; 35 J. P. 597.

**8636. Metage performed aboard or on shore—Liability for expenses.**]—By charterparty it was agreed that a ship should load a cargo of oats, & proceed to a safe port on the East coast of Great Britain, etc., & there "deliver same always afloat on being paid freight," at certain rates per quarter of oats discharged. "The cargo to be brought to & taken from alongside at charterer's expense & risk." The ship sailed to Rochester, & discharged her cargo within that port. The mayor & corpn. of the city of Rochester, as owners of the port, are entitled to an ancient fee, toll, due, or reward of 1*d.* per quarter upon corn brought by water to, & unloaded within, the port, payable by the person bringing such corn, for the weighing of the corn, or being ready & willing to weigh same. This due having been paid by the captain, the shipowners' agent brought an action in the county ct. to recover the amount from the consignees of the cargo as & for money paid for them at their request. Judgment was given for pltf. On appeal, the ct. being of opinion that the question of liability arising between the shipowners & consignees depended upon whether the due was in ancient times a payment for actual metage service done by the mayor & corpn. before a cargo was put over the side of a ship, or afterwards, remitted the case to the judge below in order that he might ascertain the fact:—*Held*: having regard to the terms of the charterparty, if the due in its origin was for metage to be performed on board, the shipowners must bear it; but, if the metage was to be done ashore, then the charge should fall on the consignees, who would in that case be liable to repay to the shipowners the amount disbursed for same.—WOODHAM *v.* PETERSON (1871), 25 L. T. 26; 1 Asp. M. L. C. 93.

**8637. Exclusive right of harbour authority to provide weighing machines.**]—Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 81, 82, which upon certain conditions give the undertakers the exclusive right of weighing & measuring goods loaded or discharged in their docks, do not give them the exclusive right of providing the weighing machines.—PORT OF LONDON AUTHORITY *v.* CAIRN LINE OF STEAMSHIPS, LTD., [1913] 1 K. B. 497; 82 L. J. K. B. 340; 108 L. T. 217; 29 T. L. R. 229; 12 Asp. M. L. C. 293; 18 Com. Cas. 72.

**8638. Liability of master porter — Injury to goods.**]—By Mersey Dock Acts the cargo of any ship from a foreign or colonial port using certain ports must be received, weighed & loaded off by one set of porters under the direction of a master porter:—*Held*: these Acts relate to the possibility of injury in the receiving, weighing & loading off the goods, & do not alter the legal liability prior to their delivery to the master porter.—THE

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consequences, even although the Act of Parliament, giving the harbour-master absolute authority, does not contain a special clause removing the common law liability, if it appear upon the evidence that he implicitly obeyed the directions given to him; but if after taking the position so assigned to him by the harbour-master, he shall be guilty of any wilful neglect, & a collision ensues, he will then be held answerable in damages at the suit of the owner of the injured vessel.—THE INSUPERABLE (1853), 5 Ir. Jur. 380. —**IR.**

**8632 iii.** —— ——.] — TOWARD (OWNERS) *v.* TURKISTAN (OWNERS) (1885), 13 R. (Ct. of Sess.) 342.—**SCOT.**

**8632 iv.** —— ——.]—CRAIG *v.* ABERDEEN HARBOUR COMRS., [1909] S. C. 736; 46 Sc. L. R. 508; [1909] 1 S. L. T. 314.—**SCOT.**

**8632 v.** —— ——.]—While a vessel was leaving her berth in a harbour, to which she had gone at the request of the harbour-master, her propeller, which was working, became entangled in a wire cable stretched between the pier & an anchor lying in the harbour. The wire cable was completely submerged, & was at a depth which made it a source of danger to any vessel using her propeller. The captain of the vessel did not know, & could not reasonably have been expected to know, of the existence of the cable, the only indication of its presence being a manilla rope attaching the shore end of the cable to the pier:—*Held*: the harbour-master was negligent in failing to warn the captain of the presence of the cable, & the owners of the harbour were liable for the damage sustained by the vessel.—ROBERTSON *v.* PORTPATRICK & WIGTOWNSHIRE JOINT COMMITTEE, [1919] S. C. 293; 56 Sc. L. R. 173; [1918] 2 S. L. T. 56.—**SCOT.**

**8633 i.** —— *Refusal to obey harbour-master.*]—An action was brought by the owner of the ship *Storm King* for damage occasioned by collision in the harbour of Quebec:—*Held*: if any person having the charge or command of any ship or vessel coming into the harbour of Quebec refuses or neglects to obey the directions of the harbour-master in respect to the berth to be taken by such ship or vessel, or in respect to the moving or fastening, shifting or removing the same, & if any loss be incurred by reason of such refusal or neglect, then such ship or vessel shall bear such loss.—*Re* THE NEW YORK PACKET (1854), 4 L. C. R. 343.—**CAN.**

### PART XXI. SECT. 9.

**8637 i.** *Exclusive right of harbour authority to provide weighing machines.*]—NICOL *v.* M'CALLUM (1876), 3 R. (Ct. of Sess.) (J.) 34; 13 Sc. L. R. 608. —**SCOT.**

*Sect. 9.—Meters and weighers and master porters. Sects. 10, 11 & 12: Sub-sect. 1.]*

EMILIEN MARIE (1875), 44 L. J. Adm. 9; 32 L. T. 435; 2 Asp. M. L. C. 514.

*Annotation:*—**Refd.** Parsons *v.* New Zealand Shipping Co. (1900), 69 L. J. Q. B. 419.

**8639. —— Loss of goods—Effect of execution of bond.**]—Deft. was a master porter, & had entered into a bond for £500 under Mersey Docks (Corporation Purchase) Act, 1861 (c. clxxxviii), s. 12, & pltfs. sought to make him liable under his bond & the statute for the loss of a case of tobacco which had been landed at Liverpool on Dec. 17, 1924, & was pilfered by a gang of roughs at the docks on that day:—*Held:* the effect of the bond & the statute was to secure the proper discharge of his existing duties & obligations by the master porter. The bond did not increase the master porter's obligations, & did not make him an insurer. In the absence of negligence or breach of duty on the part of the master porter, the claim against him on the bond failed.—BRITISH-AMERICAN TOBACCO CO., LTD. *v.* JONES (1925), 134 L. T. 405; 90 J. P. 66; 42 T. L. R. 236; 24 L. G. R. 152, D. C.

**8640. Right of master porter to charges—Trucking goods—Where all round charge made.**]—These charges [charges for trucking from the shed & piling in transit shed] were not included in the all round charge made by the master porters under Mersey Docks Acts & the bye-laws of the Mersey Docks & Harbour Board.—CARDIFF S.S. CO., LTD. *v.* JAMESON (1903), 88 L. T. 87; 19 T. L. R. 159; 9 Asp. M. L. C. 367, D. C.

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SECT. 10.—**REMOVAL OF WRECK.**

*See* Part XIV., Sect. 5, *ante*.

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SECT. 11.—**DAMAGE TO HARBOUR OR WORKS CONNECTED THEREWITH.**

*See* Harbours, Docks & Piers Clauses Act, 1847 (c. 27), ss. 74–76; Pilotage Act, 1913 (c. 31), s. 15.

**8641. Liability of shipowner irrespective of negligence — Inevitable accident.**] — Under Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 74, the owner of a vessel doing damage to the piers or works of a harbour is liable to make good the damage, although the accident be the result of inevitable accident from stress of weather, without any default of those in charge.—DENNIS *v.* TOVELL (1872), L. R. 8 Q. B. 10; 42 L. J. M. C. 33; 27 L. T. 482; 37 J. P. 263; 21 W. R. 170; 2 Asp. M. L. C. 402, n.

*Annotations:*—**Folld.** The Merle (1874), 31 L. T. 447. **Distd. & Dbtd.** River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743. **Consd.** G. W. Ry. *v.* Mostyn (Owners), The Mostyn, [1928] A. C. 57.

**8642.** —— ——.]—THE MERLE, No. 8216, *ante*.

**8643. —— Act of God or force majeure.**]—(1) A vessel was driven aground by a violent storm, & after the master & crew had been obliged to abandon her, was forced by the wind & waves against a pier, whereby serious damage was occasioned:—*Held:* the owners of the ship were not liable under Harbours, Docks & Piers Act, 1847 (c. 27), s. 74.

(2) The exemption from obligation to make good losses or injuries caused by the "act of God" applies to liabilities created by Harbours, Docks & Piers Act, 1847 (c. 27), s. 74, no less than to those existing before the passing of the Act.—RIVER WEAR COMRS. *v.* ADAMSON (1877), 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 42 J. P. 244; 26 W. R. 217; 3 Asp. M. L. C. 521, H. L.; *affg.* (1876), 1 Q. B. D. 546, C. A.; *revsg.* (1873), 20 L. T. 530.

*Annotations:*—*As to* (1) **Distd.** Eglinton *v.* Norman (1877), 46 L. J. Q. B. 557. **Consd.** Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508. **Expld. & Distd.** Witham Outfall Board *v.* Boston Corpn., (1926), 136 L. T. 756; G. W. Ry. *v.* Mostyn (Owners), The Mostyn, [1928] A. C. 57. **Refd.** The Merle (1874), 31 L. T. 447. *Generally*, **Refd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Jackson *v.* Blanche (Owners), The Hopper No. 66, [1908] A. C. 126; The St. Nicolai (1925), 133 L. T. 640. **Mentd.** Western Counties Ry. *v.* Windsor & Annapolis Ry. (1882), 7 App. Cas. 178; Eastman Photographic Materials Co. *v.* Comptroller-General of Patents, [1898] A. C. 571; A.-G. *v.* Gas Light & Coke Co. (1902), 18 T. L. R. 517; Metropolitan Water Board *v.* New River Co. (1904), 20 T. L. R. 687; Badische Anilin & Soda Fabrik *v.* Hickson, [1906] A. C. 419; *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465; G. N., Picc. & Brompton Ry. *v.* A.-G. (1908), 98 L. T. 731; Jones *v.* Hulton, [1909] 2 K. B. 444; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428; O'Grady *v.* Wilmot, [1916] 2 A. C. 231; Broken Hill Proprietary Co. *v.* Peninsular & Oriental Steam Navigation Co., [1917] 1 K. B. 688; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; G. W. Ry. & Mid. Ry. *v.* Bristol Corpn. (1918), 87 L. J. Ch. 414; Valentine *v.* Hyde, [1919] 2 Ch. 129; Hudson's Bay Co. *v.* Maclay (1920), 36 T. L. R. 469; Nicolle *v.* Nicolle, [1922] 1 A. C. 284; Rhondda's Claim, [1922] 2 A. C. 339; *Re* Burnyeat, Burnyeat *v.* Ward, [1923] 2 Ch. 52; Gayler & Pope *v.* Davies, [1924] 2 K. B. 75; Postmaster-General *v.* Beck & Pollitzer, [1924] 2 K. B. 308; Abraham *v.* MacFisheries, [1925] 2 K. B. 18; British-American Tobacco Co. *v.* Jones (1925), 134 L. T. 405.

**8644.** —— ——.]—Pltfs., the harbour authority of Workington, sued defts., the owners of a steamship, for damage to their jetty situate at the junction of, & between, the river Derwent & the harbour. The defence in substance was that pltfs. invited defts.' vessel, which was in charge of a compulsory pilot, to enter the harbour at a time when there was one foot less water than shown by the tide table, so that, when approaching the entrance, with only two feet of water under her, the head of the vessel was canted to port towards the jetty by a freshet, on her port quarter, of two knots running down the river, whilst a strong breeze was acting on her starboard side, with the result that, though the pilot ordered the engines to be put full speed astern & the order was obeyed, with hand reversing gear, in twenty-two seconds, the way was not taken off in time to prevent the stem of the vessel striking the jetty:—*Held:* defts. were not liable, as they had discharged the *onus* of proof by rebutting the *primâ facie* case of negligence against them, for the damage complained of arose from a combination of circumstances consisting of less water than usual, a strong breeze, & a freshet, which together amounted to *force majeure*.—THE BOUCAU, [1909] P. 163; 78 L. J. P. 87; 100 L. T. 617; 25 T. L. R. 265; 11 Asp. M. L. C. 240.

**8645. —— Provided vessel under control of owner or agents.**]—Under Harbours, Docks &

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**PART XXI. SECT. 11.**

**8641 i.** *Liability of shipowner irrespective of negligence—Inevitable accident.*]—BOAK *v.* THE BADEN (1903), 8 Exch. C. R. 343.—**CAN.**

**8641 ii.** —— ——.]—BRITISH & FOREIGN MARINE INSURANCE CO. & CONLON *v.* R. (1905), 9 Exch. C. R. 478; 25 C. L. T. 146.—**CAN.**

**8641 iii.** —— ——.]—CANADIAN ELECTRIC CO. *v.* THE CROWN OF ARAGON (1910), 13 Exch. C. R. 399.—**CAN.**

**f.** ——.]—It is no answer to a claim by the owner of a pier for damages caused to the same by a ship lying at the pier, that the pier was incomplete, unfinished, unfit for mooring, & that it might have been constructed upon better principles. The owner of a pier has a right to construct the same according to his own plans & ideas.—NEWFOUNDLAND RY. CO. *v.* PYMAN (1882), 6 Nfld. L. R. 416.—**NFLD.**

Piers Clauses Act, 1847 (c. 27), s. 74, the owner of a vessel doing damage to a harbour, dock, or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under control of the owner or his agents.—GREAT WESTERN RY. CO. *v.* MOSTYN (OWNERS), THE MOSTYN, [1928] A. C. 57; 97 L. J. P. 8; 138 L. T. 403, H. L.; *revsg.*, [1927] P. 25, C. A.; [1926] P. 46.

*Annotation:*—**Refd.** Witham Outfall Board *v.* Boston Corpn. (1926), 136 L. T. 756.

**8646. Liability where negligence proved—Vessel unmanageable.**]—ROMNEY MARSH (LORDS BAILIFF-JURATS) *v.* TRINITY HOUSE CORPN., No. 8501, *ante*.

**8647. —— Damage to pier.**]—GREEN & BURLEIGH *v.* GOODYEAR & GENERAL STEAM NAVIGATION CO. (1884), 6 Asp. M. L. C. 281, n.

**8648. —— —— Vessel got off shore after grounding in bad weather.**]—Owing to negligent navigation defts.' vessel went ashore in bad weather in a position about half a mile from pltfs.' pier. It was held at the trial that the master could & ought to have been aware of the position of the pier. Subsequently she was got off, but she drove against the pier, doing damage, & finally went ashore again in the vicinity of the pier, where she was abandoned by her master & crew, & subsequently broke up. Pieces of the wreckage drifted against the pier doing further damage:—*Held:* (1) the damage caused on the first contact was a consequence of the failure of the master to take reasonable care to prevent his vessel from doing injury to the pier; (2) defts. were also liable for the damage done on the second occasion, since the weather conditions prevailing after the second grounding were not abnormal, but were such as were likely to be encountered in the locality.—THE ST. NICOLAI (1925), 133 L. T. 640; 10 Asp. M. L. C. 534.

**8649. —— —— —— Weather conditions of ordinary nature in locality.**]—THE ST. NICOLAI, No. 8648, *ante*.

**8650. —— Loss of dredger by collision.**]—THE RUTLAND (1886), [1896] P. 195, n.; 80 L. T. 177, n.

*Annotation:*—**Expld.** The Greta Holme, [1897] A. C. 596.

**8651. —— Emptying waste water into adjoining barge.**]—Pltfs. were the owners of a quantity of quillaya bark, which in the process of unloading had been placed in a barge in a dock. A steamship belonging to defts. arrived in the dock, & during the night, when her engines were being worked for keeping the electric light going & other purposes, the waste water from the condensers poured into the barge & damaged pltfs.' goods. When defts.' steamship had taken up her berth for the night no barges were alongside, but during the night the barge in question, which by direction of the port authority had been fastened to a liner, was set adrift by the liner's departure & drifted down to defts.' steamship. In an action for negligence:—*Held:* in the circumstances defts. ought to have anticipated that barges would be in proximity to their steamship during the night, & therefore were under a duty to take precautions, & pltfs. were entitled to recover.—BERG & SON *v.* ROTTERDAMSCHE LLOYD (1918), 34 T. L. R. 272.

**Liability when acting under harbour master's authority.**]—*See* Sect. 8, sub-sect. 2, B., *ante*.

**8652. Recovery of damage—Right in rem.**]—THE MERLE, No. 8216, *ante*.

**8653. —— ——.**]—THE VERITAS, No. 8188, *ante*.

**8654. —— Limitation of amount recoverable.**]—The steamship *Countess*, which was lying in a dock belonging to the Board, negligently went ahead instead of astern & crashed through the dock gates into the river, carrying with her a number of barges, some of which were sunk. The *Countess* was holed & had to be beached, &, the Board's assistant marine surveyor having certified that she was a danger to the safe navigation of the port, the Board took charge of her under the powers of the Mersey Docks & Harbour Act, 1912, & repaired her at a cost of £1,000. The damage done to the Board's dock amounted to £10,000 & the damage done to the barges to £55,000. The statutory amount of the *Countess's* liability under the Merchant Shipping Acts at £8 per ton was £4,468. The Board detained the *Countess* under their statutory powers in respect of the damage done to the dock. Numerous actions having been commenced by the barge owners, the shipowners commenced a limitation action, in which they claimed to limit their liability to the amount ascertained under the Merchant Shipping Acts, & to have that amount distributed rateably among the claimants, & in that action an order was made staying the barge owners' actions. They also commenced an action against the Board for delivery up of the vessel & damages for detention. Ultimately the vessel was released on payment by the shipowners into ct. of £5,500, representing (*a*) the statutory amount of their liability, & (*b*) the expenses incurred by the Board in connection with the repair & detention of the vessel. No question arose as to the latter sum. The Board claimed payment of their claim for damages, up to the limit of the shipowners' statutory liability, out of the fund in ct. in priority to the claims of the barge owners, by virtue of their right to detain the vessel, & the sum representing the vessel, under their private Act of 1858. The barge owners claimed that the fund ought to be distributed rateably among the several claimants, including the Board, according to the amounts of their claims:—*Held:* (1) the exercise by the Board of their statutory power to detain the ship conferred on them a possessory lien; (2) 1900 Act, s. 1, of which impliedly incorporated 1894 Act, s. 504, neither expressly nor by implication affected the lien of the Board, beyond limiting the amount for which the lien could be exercised; (3) the Ct., in distributing the statutory amount of the shipowners' liability rateably among the claimants, ought to have regard to the priorities as well as to the amounts of the claims; (4) consequently, the whole of the fund should be paid out to the Board.—MERSEY DOCKS & HARBOUR BOARD *v.* HAY, THE COUNTESS, [1923] A. C. 345, 400; 92 L. J. P. 65; 129 L. T. 325; 39 T. L. R. 302; 67 Sol. Jo. 481; 16 Asp. M. L. C. 161, H. L.

**8655. —— Priorities of claims—Rights of third parties injured.**]—MERSEY DOCKS & HARBOUR BOARD *v.* HAY, THE COUNTESS, No. 8654, *ante*.

**8656. —— —— As against salvors.**]—THE VERITAS, No. 8188, *ante*.

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## SECT. 12.—LIABILITIES OF HARBOUR AUTHORITIES.

### SUB-SECT. 1.—IN GENERAL.

**8657. Delivery of cargo — Injunction against authorities to restrain delivery—Costs.**]—By one

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**PART XXI. SECT. 12, SUB-SECT. 1.**

*g. Liability for costs of calling out militia to preserve peace.*]—GORDON ÈS-QUAL *v.* THE CITY OF MONTREAL (1903), Q. R. 24 S. C. 465.—**CAN.**

*h. Quay six inches above sea level—Right of shipowners to damages for collision with quay.*]—HÂVRE DE MONTRÉAL COMMISSAIRES *v.* MONTREAL

*Sect. 12.— Liabilities of harbour authorities: Subsects. 1 & 2, A.]*

of the printed regulations of the London Dock Co. it is provided, that "orders for delivery cannot be acted upon unless signed by the party in whose name the goods stand in the co.'s books, or by a person duly authorised, in writing under the hand of the principal, to sign them." Wine was entered in the books of the co. in the name of S., clerk to W., but the bills of lading were in the hands of H., the consignee of the wine. The wine not having been approved by W., H. agreed to take it back, & applied to W. to return a part of it: but W. refused to do so until his acceptance for the wine should be returned to him. H. then exhibited the bills of lading to the dock co., who informed W. that they would deliver the wine to H. unless they should be restrained from so doing. W. & S. thereupon filed a bill against the co. & H. for an injunction to restrain the co. from delivering the wine to H. without the written order of W. & S., or one of them, & praying that the co. & H. might be ordered to pay the costs of the suit:—*Held:* as the legal title to the wine was in H. by virtue of the bill of lading, the co. were entitled to their costs, which, under the circumstances of the case, were ordered to be paid equally by pltfs. & H., pltfs. & H. also bearing their own costs equally.—WRIGHT *v.* LONDON DOCK CO. & HEALEY (1859), 32 L. T. O. S. 364; 5 Jur. N. S. 1411, C. A.

**8658. Entrance to dock obstructed—Damage to vessel while lying outside.**]—WILSON *v.* NEWPORT DOCK CO. (1866), L. R. 1 Exch. 177; 4 H. & C. 232; 35 L. J. Ex. 97; 14 L. T. 230; 12 Jur. N. S. 233; 14 W. R. 558; 2 Mar. L. C. 313.

*Annotations:*—**Refd.** The San Onofre, [1922] P. 243. **Mentd.** Barratt *v.* L. B. & S. C. Ry. (1877), De Colyar's County Court Cases, 195.

**8659. Agreement giving preferential right to berth—Breach of agreement—Wrongful occupation of berth by other vessel—Whether accident beyond control of dock company.**]—A shipping co. had a preferential right to occupy a certain berth in a dock on Wednesday & Saturday in each week & were not entitled to use any other berth in the same port. The berth was situated at a wharf in a channel which was partly natural & partly artificial. The agreement between the two cos. provided that in the event of any accident beyond the control of the dock co. which caused loss or delay to the shipping co. the latter should be entitled to use some other berth, the dock co. being under no liability to make good or pay compensation for such loss or delay. On Oct. 28, 1911, the shipping co.'s steamer *P.* arrived in the port, & found that the particular berth to which she should have gone was occupied by the steamship *B.*, belonging to a Dutch co., which had gone to the berth & remained there contrary to the orders of the dock co. Owing to shortness of water in the dock the *B.* could not be moved to admit of the *P.* occupying the berth, & the *P.* accordingly went into an inner dock by the direction of the dock co., & by reason of shortness of water was detained there for a week, & consequently lost a complete round voyage. A portion of her cargo was shut out, & taken on by the next steamer of the line. The shipping co. claimed from the dock co. damages for the delay suffered by the *P.* & the dock co. in turn sued the owners of the *B.* to recover any damages they might be called upon to pay to the shipping co.:—*Held:* the dock co. were liable to the shipping co., as they had not in fact used their best endeavours to ensure that the shipping co. should have the use of the berth, & the wrongful action of the owners of the *B.* was not an accident beyond the "control of the dock co." within the agreement; (2) the owners of the *B.* being guilty of a trespass, were liable to pay damages to the dock co. but not in respect of the whole detention of the *P.*, as she did not go into the inner dock at the order of the master of the *B.*; & (3) the owners of the *B.* were not liable to pay the dock co.'s costs in defending the action brought by the shipping co., because it was unreasonable for the dock co. to defend the action.—SOUTH WALES & LIVERPOOL S.S. CO., LTD. *v.* NEVILL'S DOCK & RY. CO., LTD., NEVILL'S DOCK & RY. CO., LTD. *v.* MAATSCHAPPIJ S.S. BESTEVAER, ROTTERDAM (1913), 108 L. T. 568; 29 T. L. R. 301; 12 Asp. M. L. C. 328; 18 Com. Cas. 124.

**8660. Exception from liability clause—Damage due to defective apparatus—Supplied by dock company.**]—Defts. were the owners of a graving dock, which pltfs.' ship used under a contract for reward. By the terms of the contract defts. supplied the necessary blocks for supporting the vessel while in the dock. The contract also provided that "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the co. are not to be responsible for any accident or damage to a vessel . . . whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Owing to the negligence of defts. the blocks upon which the keel of pltfs.' ship rested were uneven in height, whereby she suffered damage:—*Held:* even assuming that the obligation of defts. to provide blocks & block caps was a fundamental obligation of the contract, the language of the exemption clause was such that it must be read as covering failure to perform any such obligation & as covering negligence arising from want of care in the performance of such obligation, & consequently defts. were exempted from liability.—PYMAN S.S. CO. *v.* HULL & BARNSLEY RY. CO., [1915] 2 K. B. 729; 84 L. J. K. B. 1235; 112 L. T. 1103; 31 T. L. R. 243; 13 Asp. M. L. C. 64; 20 Com. Cas. 259, C. A.

*Annotations:*— **Refd.** Travers *v.* Cooper, [1915] 1 K. B. 73; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; Reynolds *v.* Boston Deep Sea Fishing & Ice Co. (1921), 38 T. L. R. 22.

**8661. Liability while exercising statutory powers—Damage to works of neighbouring undertakers—Construction of private Acts.**]—By a private Act of Parliament passed in 1880 the Witham Outfall Board was constituted for the purpose of making & maintaining for navigation a new cut of the river Witham from Boston to the sea, to enable larger vessels to reach Boston. About the same time the corpn. of Boston was authorised to construct new docks on the Witham at Boston by the Boston Dock Act, 1881. The Act contained provisions for the protection of the Witham Outfall Board & other bodies, & by sect. 9 thereof the corpn. "in exercising the powers of the Act in relation to the construction, maintenance & use of the dock & the widening & embanking of the river & other works," was to observe & be bound by certain regulations. One of these regu-

GRAIN ELEVATING CO. (1907), Q. R. 17 K. B. 385.—**CAN.**

k. *Duty to buoy harbour—Liability for negligent performance of that duty.*] —Trustees, whose statutory duty it was to buoy the estuary of the Clyde, would be liable for damage done to a ship navigating the estuary in consequence of negligent performance of that duty.—BUCHANAN *v.* CLYDE LIGHTHOUSES TRUSTEES (1884), 11 R. (Ct. of Sess.) 531; 21 Sc. L. R. 374.—**SCOT.**

l. *Duty to allow shipowners to supply own labour—On failure to supply labour.*]—MILLIGAN & CO., LTD. *v.* AYR HARBOUR TRUSTEES, [1915] S. C. 937; 52 Sc. L. R. 748; [1914] 2 S. L. T. 82.—**SCOT.**

lations was: "Any damage or injury done at any time to the fascine works or other works under the jurisdiction of the board shall be made good by the corpn. to the reasonable satisfaction of the engineer of the board." In 1922 a steamer passing out of the port of Boston down the new cut grounded on the bank causing much damage & becoming an obstruction to navigation. The steamer having been abandoned by the owners was sold by the Boston Corpn., but before she could be got off caused more damage, & the cost of getting her off the bank greatly exceeded the price obtained for the vessel:—*Held:* (1) the expression "in exercising the powers" of the Act must be construed "so long as the powers of the Act in relation to the construction, maintenance & use of the dock are exercised," &, therefore, the corpn. was liable to the board to make good the damage to the banks of the river; (2) the reference to the "fascine or other works under the jurisdiction of the board" included not only the original works constructed after the passing of the Act, but all subsequent works for the time being controlled by the board; the "damage" referred to could not be limited to actionable damage, & the board were not limited by the Act to a particular remedy contained in the regulations to the Act. The sect. should be construed as a statutory contract between the parties.—WITHAM OUTFALL BOARD *v.* BOSTON CORPN. (1926), 136 L. T. 756; 91 J. P. 98; 25 L. G. R. 171, C. A.

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SUB-SECT. 2.—NEGLIGENCE.

*A. In General.*

**8662. Duty to take reasonable care.**]—Where the Executive Govt. possessed the control & management of a tidal harbour with authority to remove obstructions in it, & the public had a right to navigate therein, subject to the harbour regulations & without payment of harbour dues, the staiths & wharves belonging to the Executive Govt. which received wharfage & tonnage dues in respect of vessels using them:—*Held:* there was a duty imposed by law upon the Executive Govt. to take reasonable care that vessels using the staiths in the ordinary manner might do so without damage to the vessel. Reasonable care is not shown when after notice of danger at a particular spot, no inquiry is made as to its existence & extent, & no warning is given.—R. *v.* WILLIAMS (1884), 9 App. Cas. 418; 53 L. J. P. C. 64; 51 L. T. 546, P. C.

*Annotations:*—**Distd.** Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30. **Refd.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310.

**8663. What is reasonable care—Failure to make inquiries—After notice of danger.**]—R. *v.* WILLIAMS, No. 8662, *ante.*

**8664. —— Failure to give warning of danger.**]—R. *v.* WILLIAMS, No. 8662, *ante.*

**8665. Liability & right to levy tolls complementary.**]—Persons who have a duty to perform, & who may be made responsible for injuries if they know of causes of mischief which in the discharge of that duty they ought to remedy, are equally responsible if they negligently remain ignorant of those causes of mischief, & so leave them unremedied.

A private person, or a co., having a right to levy tolls in respect of the performance of a particular work, will be liable in damages for injuries occasioned by performing it improperly.

A corporate body authorised to perform such a work, & receiving tolls in respect of it, though obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work & the possible future benefit of the public, is equally responsible for injuries arising from the improper performance of such work, & the funds thus obtained must discharge that liability.

G., the owner of a cargo which was damaged by reason of the ship's stranding on a mud bank negligently left at the entrance of a harbour vested in the Mersey Board by statute, sued the board for damage. The defence was that the board acted under a statute; that they derived no personal benefit from the management of the docks; that they took no part personally in the management, but merely appointed servants & officers in discharge of their public duty, & that the negligence was not theirs, but was solely that of one of their servants:—*Held:* the case of public statutory trustees, if not servants of the Crown, did not differ from that of absolute owners levying tolls for their own benefit, & the board were liable in damages to G.—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW (1866), L. R. 1 H. L. 93; 11 H. L. Cas. 686; 35 L. J. Ex. 225; 14 L. T. 677; 30 J. P. 467; 12 Jur. N. S. 571; 14 W. R. 872; 2 Mar. L. C. 353; 11 E. R. 1500, H. L.; *affg.* S. C. *sub nom.* GIBBS *v.* LIVERPOOL DOCKS TRUSTEES (1858), 3 H. & N. 164, Ex. Ch.

*Annotations:*—**Consd.** Ruck *v.* Williams (1858), 3 H. & N. 308. **Distd.** Metcalfe *v.* Hetherington (1860), 5 H. & N. 719. **Consd.** Holliday *v.* St. Leonard, Shoreditch Vestry (1861), 11 C. B. N. S. 192. **Apld.** Thompson *v.* N. E. Ry. (1862), 2 B. & S. 119. **Consd.** Stiles *v.* Cardiff Steam Navigation Co. (1864), 33 L. J. Q. B. 310. **Apld.** Coe *v.* Wise (1866), L. R. 1 Q. B. 711. **Consd.** A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146. **Apld.** Foreman *v.* Canterbury Corpn. (1871), L. R. 6 Q. B. 214. **Consd.** Clowes *v.* Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 125. **Apld.** Winch *v.* Thames Conservators (1874), L. R. 9 C. P. 378; A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 24 W. R. 817; Goslin *v.* Agricultural Hall Co. (1876), 1 C. P. D. 482. **Consd.** Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116. **Apld.** Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517; Dormont *v.* Furness Ry. (1883), 11 Q. B. D. 496. **Distd.** R. *v.* Williams (1884), 9 App. Cas. 418. **Apld.** Lowther *v.* Curwen (1887), 58 L. T. 168; Tucker *v.*

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**PART XXI. SECT. 12, SUB-SECT. 2.—A.**

**8662 i.** *Duty to take reasonable care.*]—The declaration shows the harbour to have been constructed by defts., an incorporated co., alike for the benefit of the public & the profit of the stockholders, under authority of the Act, though not so stated in the declaration, 12 Vict. ch. 160; & having availed themselves of the privileges conferred, it was their duty to take reasonable care, so long as they kept the harbour open for their own benefit, to maintain it in such a condition that it might be used by the public, or more strictly speaking by persons navigating vessels of the class which the harbour was calculated to require without danger of loss of life or property.—BERRYMAN *v.* PORT BURWELL HARBOUR CO. (1864), 24 U. C. R. 34.—**CAN.**

**8662 ii.** ——.]—Although the trustees of a natural harbour are under no obligation to mark the navigable channel by means of buoys, yet if they chose to do so they are bound to exercise reasonable care to ensure that the buoys should be kept in position.—ARKT. DAMPSKIBET FORTO *v.* ORKNEY HARBOUR COMRS., [1915] S. C. 743; 52 Sc. L. R. 537.—**SCOT.**

**8662 iii.** ——.]—A statutory body, such as the Port Elizabeth Harbour Board who receive delivery of cargo at the ship's side & are paid by the consignees for their services, should use reasonable diligence in the discharge of their duties. Where a case can, by handling it, easily & at once be ascertained to be so light as to either indicate that it is empty or does not contain what, from its external appearance, it may reasonably be supposed to contain, it is incumbent on those handling the case & receiving delivery to remark upon & notify the light condition of the case.—EBERT & CO. *v.* PORT ELIZABETH HARBOUR BOARD (1904), 18 E. D. C. 225.—**S. AF.**

**m.** *Knowledge of master of causes of mischief—Defendant not liable.*]—THE LIVINGSTONIA *v.* DOMINION COAL CO., LTD., [1925] Exch. C. R. 151.—**CAN.**

**n.** *General allegation of negligence in statement of claim—Omission to state whether docking contract oral or written—Effect of.*]—SHAW, SAVILL & ALBION CO., LTD. *v.* AUCKLAND HARBOUR

*Sect.* 12.—*Liabilities of harbour authorities: Sub-sect.* 2, *A. & B.* (*a*).]

Axbridge Highway Board (1888), 53 J. P. 87. **Consd.** Gibraltar Sanitary Comrs. *v.* Orfila (1890), 15 App. Cas. 400. **Apld.** R. *v.* Selby Dam Drainage Comrs., [1892] 1 Q. B. 348; Crossfield *v.* Manchester Ship Canal Co. (1903), 19 T. L. R. 398; The Bearn, [1906] P. 48. **Consd.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310. **Apld.** Queens of the River S.S. Co. *v.* Easton, Gibb & Thames River Conservators (1907), 96 L. T. 901; Ryan *v.* Tipperary North Riding County Council (1914), 8 B. W. C. C. 415; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; The Devon (1923), 130 L. T. 448. **Reld.** Southampton & Itchin Bridge Co. *v.* Southampton L. B. (1858), 8 E. & B. 801; Walker *v.* Goe (1859), 4 H. & N. 350; Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Brownlow *v.* Metropolitan Board of Works & Aird (1863), 13 C. B. N. S. 768; Waller *v.* S. E. Ry. (1863), 32 L. J. Ex. 205; Ohrby *v.* Ryde Comrs. (1864), 5 B. & S. 743; Birch *v.* Marylebone Vestry (1869), 17 W. R. 1014; White *v.* Hindley L. B. (1875), L. R. 10 Q. B. 219; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Holborn Union Grdns. *v.* St. Leonard, Shoreditch, Vestry (1876), 2 Q. B. D. 145; Weir *v.* Barnett & Bell (1878), 38 L. T. 929; Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433; The Moorcock (1889), 14 P. D. 64; Taff Vale Ry. *v.* Amalgamated Society of Ry. Servants, [1901] A. C. 426; Hackney Corpn. *v.* Lee Conservancy Board, [1904] 2 K. B. 541; Tozeland *v.* West Ham Union, [1907] 1 K. B. 920; Hillyer *v.* St. Bartholomew's Hospital Governors, [1909] 2 K. B. 820; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118; Papworth *v.* Battersea B. C. (1914), 79 J. P. 105; Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; The Ella, [1915] P. 111; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Baker *v.* James, [1921] 2 K. B. 674; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147; Silverman *v.* Imperial London Hotels (1927), 137 L. T. 57. **Mentd.** Worral Waterworks Co. *v.* Lloyd (1886), L. R. 1 C. P. 719; Jersey *v.* U bridge R. S. A., [1891] 3 Ch. 183.

**8666. Absence of personal profit immaterial.**]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *ante*.

**8667. Knowledge of causes of mischief—Direct knowledge.**]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *ante*.

**8668. —— Negligent ignorance of causes.**]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *ante*.

**8669. Discharge of liability out of tolls received.**]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *ante*.

**8670. Contributory negligence of master of ship.**]—When a vessel is within the jurisdiction of the harbour master by law empowered to give compulsory orders, & he is giving his orders as to the place of anchorage or otherwise, it is only in the last resort, when the danger of following such orders is fully obvious that those on board are at liberty to disregard the orders, even though they may be under the impression that the harbour master is making a mistake.

The sailing ship *Janets & Ann* was coming into Kirkcudbright Dock when she ran on a bank at the West pier, which was covered with water, & was damaged. At the time of the accident the vessel was within the jurisdiction of the harbour master, & was coming in under his orders. The master of the ship was at the helm in charge of the ship, & was assisted in the navigation by two local fishermen, who were aware of the bank; but the master was ignorant of it. The harbour master stood on the west pier & ordered the ship to "come on," being unaware it was then an ebb tide, when to sail into the dock was a dangerous operation. The master in obeying the order ported the helm, & the ship gradually approached the shore One of the fishermen hailed the harbour master, "Be sure to tell us when to let go the anchor." The order again was "Come on"; & then, too late to avoid the grounding, the harbour master perceived his mistake, & ordered the anchor to be let go. It was admitted by the harbour master that his intention was to bring the ship into the dock by sailing without warping; & that he did not know the tide was ebbing until after the ship had grounded:—*Held*: the harbour master was alone to blame, & there was no contributory negligence on the part of the master who was in charge of the ship; & the failure of the persons on board who knew of the danger to inform the master did not absolve the harbour master from the consequence of his negligence.—RENEY *v.* KIRKCUDBRIGHT MAGISTRATES, [1892] A. C. 264; 61 L. J. P. C. 23; 67 L. T. 474; 7 Asp. M. L. C. 221, H. L.

*Annotations*:—**Consd.** Taylor *v.* Burger (1898), 78 L. T. 93. **Distd.** Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30. **Reld.** East London Harbour Board *v.* Calodonia Landing, Shipping & Salvage Co., East London Harbour Board *v.* Colonial Fisheries Co., [1908] A. C. 271.

**Liability for acts of servants.**]—*See* Sub-sect. 4, *post*.

*B. Particular Instances.*

(*a*) *In General.*

**8671. Unsafe condition of dock—Hidden obstruction.**]—THOMPSON *v.* NORTH EASTERN RY. CO., No. 8524, *ante*.

**8672.** —— ——.]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *ante*.

**8673.** —— ——.]—DORMONT *v.* FURNESS RY. CO., No. 8525, *ante*.

**8674.** —— ——.]—The first action was brought by the owners of a steamship bound from Calcutta to Dundee against the Dundee Harbour Trustees to recover the damage alleged to have been caused to the ship by a collision in the spring of 1919 with a submerged wreck at the mouth of the estuary of the Tay, of which the trustees were the harbour authority, by reason of the negligence of the trustees in not taking reasonable steps to secure the attendance of pilots for vessels coming up the Tay & in failing to have the estuary properly buoyed so as to apprise vessels coming in of the presence of the wreck. The trustees denied negligence & pleaded that the faulty navigation of the ship contributed to the collision. The second was a similar action by the owners of another ship & was met by a similar plea. The third action was brought by the owners of the cargo on board the latter ship in respect of damage sustained in consequence of the collision of the ship:—*Held*: in each action the damage was solely caused by the negligence of the trustees in both the particulars mentioned.—ANCHOR LINE (HENDERSON BROTHERS), LTD. *v.* DUNDEE HARBOUR TRUSTEES, ELLERMAN LINES, LTD. *v.* SAME, THOMSON, SHEPHERD & CO., LTD. *v.* SAME (1922), 38 T. L. R. 299, H. L.

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BOARD (1907), 26 N. Z. L. R. 829.—N.Z.

o. *Reclamation of land—Area of water unfenced—Liability of harbour commissioners for death of child by drowning.*]—Harbour comrs. in reclaiming land from a river bed in the immediate vicinity of the harbour left a piece of water about half an acre in extent & in some parts over six feet deep unfenced at a place to which the public had full access. As a boy of sixteen was amusing himself at this place by floating a raft which he had made he fell into the water & was drowned. In an action of damages raised by the boy's father against the harbour comrs.:—*Held*: no fault had been proved on the part of defenders & therefore they were not liable in damages.—FORBES *v.* ABERDEEN HARBOUR COMRS. (1888), 15 R. (Ct. of Sess.) 323; 25 Sc. L. R. 239.—SCOT.

**8675.** ——.]—THE BEARN, No. 8690, *post.*

**8676. Insufficient depth of water—Advertisement as to depth—Whether amounting to warranty.**]—The trustees of a dock, being about to open a new one under the authority of Parliament, issued a notice, addressed to shipowners, merchants & others, describing the accommodation which their new dock would afford to shipping, & containing a statement that the depth of water on the dock side was 26 feet & 23 feet at the highest spring tides, & 15 feet at the lowest neaps:—*Held:* (1) this amounted to a warranty that there was an available depth of water in the entrance channel approximating that mentioned in the notice; (2) the trustees were responsible to the owners of a ship, who, trusting to the representation contained in the notice, entered the dock to load, & were delayed & put to expense in consequence of the insufficiency of water in the channel to enable her to complete her loading in the dock. —WILLIAMS *v.* SWANSEA HARBOUR TRUSTEES (1863), 14 C. B. N. S. 845; 143 E. R. 675.

*Annotation:—As to* (1) **Consd.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310.

**8677.** —— —— ——.]—Where harbour comrs., who are authorised & required by statute to execute works of improvement & maintenance in a harbour, & are empowered to make & maintain docks in connection therewith, & to take harbour & dock tolls & dues in respect of the use of the harbour & docks, advertise that there is a certain depth of water on the sill of a dock belonging to them, they thereby incur, towards shipowners who send their ships to the dock on the faith of that advertisement, the obligation of at least using reasonable care to provide for an access from & to the sea to & from the dock with a sufficient depth of water under the normal conditions of the time of year for all ships of such draught as to enable them to pass over the dock sill.

Therefore, where in such a case the comrs. had not used such care, but had allowed silt to accumulate at the entrance of their harbour, & a ship had consequently been detained for four days in the dock:—*Held:* the comrs. were liable to the shipowners in damages for the detention of their ship.

*Semble:* a warranty of the accessibility of a dock may be implied from such an advertisement, for ships of such draught, as before mentioned, so far as that accessibility depends on the condition of places within the harbour works or so situated that their condition is within the comrs.' powers of inspection & control.—BEDE S.S. CO. *v.* RIVER WEAR COMRS., [1907] 1 K. B. 310; 76 L. J. K. B. 434; 96 L. T. 370; 10 Asp. M. L. C. 370, C. A.

*Annotations:*—**Refd.** Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381. **Mentd.** Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596.

**8678. Failure to maintain works—Defence of Act of God.**]—The Victoria Dock co., a co.nc cor porated by Act of Parliament, in pursua e of their powers, in 1858 demised a portion of their dock wall, or bank, to the Thames Graving Dock co., the lessees covenanting to construct a graving dock on land of their own, & make & at all times maintain a channel through the demised part of the wall into such graving dock. The Graving Dock co. constructed their dock & the channel in accordance with the covenants in the lease. The undertaking of the Thames Graving Dock co. was afterwards acquired by the Victoria Graving Dock co. The Victoria Docks co was afterwards amalgamated with the London & St. Katherine's Dock co. On Jan. 18, 1881, there was an unusually high tide & a strong gale, which was at the height at the highest point of the tide. The high tide & gale combined forced the water in the graving dock, which had entered it through the channel demised by the said lease, over the banks & flooded pltf.'s land. Pltf. sued both cos. for damages. The ct. came to the conclusion, upon the evidence, that the banks of the graving dock had not been properly maintained at the height required by the Dagenham Comrs. who are the comrs. of sewers for the district:—*Held:* neither the height of the tide nor the force of the wind, nor the coincidence of their happening together, could be considered as the Act of God in the sense which would discharge the Graving Dock co. from liability; the St. Katherine's Dock co., being under a liability to maintain their own wall, & having leased it with a covenant which bound the lessees to make an opening in it, were in the same position as if it had been cut by a contractor employed by them, & were liable for any damage resulting from their lessees' neglect in taking proper precautions against the natural results of such opening.

I have come to the conclusion that there was in every way want of care which destroys any protection or excuse by the Act of God, & a want of care which at common law would certainly render the Graving Dock co. liable. I think the St. Katherine's Dock co. are liable, because I think they had the duty imposed upon them of maintaining the wall round the entrance to the lift cut, & if they cut away that wall they were bound to substitute another (FIELD, J.).—BURT *v.* VICTORIA GRAVING DOCK CO., LTD. & LONDON & ST. KATHERINE'S DOCK CO. (1882), 47 L. T. 378, D. C.

**8679. Insufficient mooring—Sufficiency question of fact.**]—MACCANN *v.* LONDON & ST. KATHARINE DOCKS, LTD. (1887), 3 T. L. R. 618, C. A.

**8680. Non-feasance.**]—Defts. owed no duty to pltf., by statute or by contract, but there was evidence of a course of conduct on the part of defts., which pltf. knew. Defts. interrupted that course of conduct, & pltf. in consequence met with an accident. There was no evidence that pltf. on the faith of the expectation that defts. would continue their course of conduct was misled by their discontinuance:—*Held:* defts. were not liable. *Qu.:* if there had been evidence that pltf. had been so misled, defts. would have been liable. —LOADER *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1891), 56 J. P. 165; 7 T. L. R. 5, C. A.

**8681. Vessel grounding on entering harbour.**]—RENEY *v.* KIRKCUDBRIGHT MAGISTRATES, No. 8670, *ante.*

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**PART XXI. SECT. 12, SUB-SECT. 2.—B. (a).**

**8675 1.** *Unsafe condition of dock.*]—Under the authority conferred by Municipal Act, R. S. O. c. 223, s. 562, defts., a municipal corpn., built a dock on the Detroit river, & passed a bye-law providing for the collection of wharfage fees from those using the dock, one item of the tariff of fees being ten cents per thousand for loading & unloading bricks; a period of 48 hours was allowed for removing freight placed on the dock, & fifty per cent. was to be added if that period was exceeded. Pltf. unloaded 34,000 bricks from a vessel upon a dock, whereupon the dock being by reason of some defect incapable of sustaining such a weight, collapsed, & the greater part of the bricks were sunk & lost to pltf.:—*Held:* defts., having placed the dock in such a position as invited any vessel owner desiring to unload a cargo to do so, if prepared to pay the dock charges, which the statute gave defts. authority to levy, & having passed a bye-law establishing tolls for the use of it, thereby invited the public to make use of it for such purposes as public docks are ordinarily used for, &, if they wished to limit the use of it, they should have made that known in some public way; &, the evidence showing that the mode adopted in this case of unloading & piling the bricks was that usually adopted at public docks, defts. were liable for the loss.—THOMPSON *v.* SANDWICH CORPN. (1901), 1 O. L. R. 407; 21 C. L. T. 206.—**CAN.**

**8681 1.** *Vessel grounding on entering harbour.*]—BRITISH PETROLEUM CO. *v.*

*Sect.* 12.—*Liabilities of harbour authorities: Subsect.* 2, *B.* (*a*), (*b*) & (*c*).]

**8682. Damage to oyster fishery.**]—Pltf., lessee of an oyster bed, brought an action against the conservators of the river Medway to recover the damage sustained by him owing to their harbour master having placed, & kept for the purpose of repair, a brig which had foundered in the fairway, on the land comprised in the fishery, & the owner of the brig was added as deft., pltf. alleging that he was a party to the wrongful act of the harbour master:—*Held:* the harbour master had notice of the existence of the fishery, & in selecting that place, without necessity, he was guilty of negligence for which deft. conservators were liable, as they could not ignore their lease & rely upon their powers to remove sunken vessels; but deft. owner of the brig, although he had notice of the oyster bed, was not liable for the further damage occasioned by keeping the vessel there for the purpose of repair, as he acted in pursuance of the directions, & under the continuing authority, of the harbour master, for whose further negligence the conservators were liable.—THE BIEN, [1911] P. 40; 80 L. J. P. 59; 104 L. T. 42; 27 T. L. R. 9; 11 Asp. M. L. C., 558.

**8683. Damage in dry dock—Insufficient blocks—Vessel of unusual construction—No inquiry made by dock company.**]—While in defts.' dry dock pltfs.' steamship, which had a forward overhang of about 62 feet, fell to port & damaged her side owing to there being an insufficient number of blocks at the forward end. In an action by pltfs. against defts. for negligence, defts. contended that the blocks would have been sufficient for a normally constructed vessel of same size, but that the vessel was of unusual construction & pltfs. ought to have warned them of the hidden danger. A substantial number of ships of the same type had previously docked from time to time in defts.' dock:—*Held:* defts., in accepting the ship without any inquiry & without demur, must be held to be liable for the damage.—THE LANCASTRIAN 1916), 32 T. L. R. 655, C. A.

*Annotation*:—**Reid.** Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381.

**8684. Dangerous access to dock—Buoys marking shoal—Whether guarantee of safety.**]—A dock authority had placed a line of three buoys to mark the presence of a shoal near the entrance to a floating dock:—*Held:* the dock authority did not thereby guarantee that there was absolute safety outside the line of the buoys, & was not liable for an injury to a ship, intending to enter the dock, which passed close outside the line of the buoys & struck a concealed rock of the existence of which the dock authority was not aware.—SCRUTTON SONS & CO. *v.* A.-G. FOR TRINIDAD (1920), 90 L. J. P. C. 30; 124 L. T. 257; 37 T. L. R. 29; 15 Asp. M. L. C. 133, P. C.

*Annotation*:—**Reid.** British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147.

(*b*) *Improper Berths.*

**8685. Authorities liable.**]—THE FIVE SISTERS, THE GOODYER *v.* LLANELLY RAILWAY & DOCK CO. (1851), 6 L. T. 557.

**8686.** ——.]—THE JOHN & HENRY, COBBOLD *v.* TUNNO (1852), 3 L. T. 448.

**8687.** ——.]—By a private Act of Parliament defts. were appointed as guardians of the port & harbour of Wisbech, with prescriptive rights to receive tolls to be applied to improving the harbour & port, & provision was made for the appointment of one or more harbour masters for regulating the placing & mooring of vessels, & for preventing & removing obstructions. A later Act gave defts. the same rights over a channel called the New Cut, which had been constructed partly for better drainage & partly in place of the old channel forming part of the port & harbour, & was vested in comrs. A vessel was berthed in the New Cut, under the direction of defts.' harbour master, & sustained damage to her bottom owing to the unfit state of the berth. In an action brought by the shipowners against the harbour authority:—*Held:* defts. were liable for the damage arising from the neglected state of the channel.—THE BURLINGTON (1895), 72 L. T. 890; 11 T. L. R. 528; 8 Asp. M. L. C. 38, C. A.

**8688. Action of harbour master.**]—METCALFE *v.* HETHERINGTON, No. 8712, *post.*

**8689. Government dockyard—Common law liability—In default of statutory liability—Common law principle of invitation.**]—A barge belonging to pltfs. was moored in Chatham Dockyard at a berth pointed out by the foreman, & the barge was there damaged. In an action to recover the amount of the damage from the Port Admiral, the Admiral Superintendent, & the Queen's Harbour Master of Chatham Dockyard, being the officials in charge of the dockyard, the jury found that the berth was unsafe, & gave a verdict for pltfs.:—*Held:* there being no Act of Parliament & no Order in Council rendering defts. liable, their liability must be decided on common law principles, & the doctrine of *respondeat superior* does not apply in such a case, but the doctrine of invitation does apply, & as there was no evidence that defts. invited pltf. to moor the barge where they did, defts. were not liable, & judgment must be for them.—WRIGHT & SON *v.* LETHBRIDGE (1890), 63 L. T. 572; 7 T. L. R. 125; 6 Asp. M. L. C. 558, C. A.

**8690. Failure to examine berth.**]—In an action by the owners of a steamship against trustees, in whom a harbour was vested by statute with

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A.-G. FOR CEYLON, [1926] A. C. 147, P. C.—**CEYLON.**

p. *Dangerous access to dock—Obstruction on private property.*]—HOOD *v.* TORONTO HARBOUR COMRS. (1872), 34 U. C. R. 87; *affd.* (1876), 37 U. C. R. 72.—**CAN.**

q. *Negligent buoying.*]—Trustees, whose statutory duty it was to buoy the estuary of the Clyde, would be liable for damage done to a ship navigating that estuary in consequence of negligent performance of that duty.—BUCHANAN *v.* CLYDE LIGHTHOUSES TRUSTEES (1884), 11 R. (Ct. of Sess.) 531; 21 Sc. L. R. 374.—**SCOT.**

r. *Negligence of pilot.*]—Under Harbours Act, 1878, a harbour board is not responsible for the negligence of a duly licensed pilot appointed by the Board.—OTAGO HARBOUR BOARD *v.* CATES (1883), 2 N. Z. L. R. 123.—**N.Z.**

**PART XXI. SECT. 12, SUB-SECT. 2.—B. (*b*).**

**8685 i.** *Authorities liable.*]—BURRELL *v.* TUOHY, [1898] 2 I. R. 271.—**IR.**

**8685 ii.** ——.]—A vessel sustained injuries while lying grounded on a tidal river at a quay under the control of the harbour comrs. The harbour comrs. had laid the berth at a quay with skids in the form of a grid on which vessels would rest at low tide. The injuries were due to the berth having been allowed to become defective by the skids not being in a uniform gradient, & by several of them, at the part where the forward portion of the vessel would rest as she was berthed, being wanting. The defects could have been ascertained by the harbour comrs. by the exercise of reasonable care:—*Held:* the harbour comrs. were bound to use reasonable diligence to keep the berth safe, & they had failed to use such reasonable diligence, consequently they were liable to the shipowners for the injuries sustained by their vessel.—S.S. FULWOOD, LTD. *v.* DUMFRIES HARBOUR COMRS., [1907] S. C. 456, 735; 44 Sc. L. R. 320; 14 S. L. T. 680.—**SCOT.**

**8688 i.** *Action of harbour master.*]—MACKENZIE *v.* STORNOWAY PIER & HARBOUR COMMISSION, [1907] S. C. 435.—**SCOT.**

**8690 i.** *Failure to examine berth.*]—R. *v.* CANADA STEAMSHIP LINES, LTD.,

the usual rights as to tolls, & duties as to maintenance, & against a railway co., owners of a wharf, to recover the amount of damage sustained by their vessel by reason of the defective condition of a berth alongside the wharf in the harbour, the defence on the part of the trustees substantially was that as they had not received any report from the local pilots, upon whom the duty was imposed by their bylaws of making periodical inspections & taking soundings, they had not been negligent in being unaware of the defective condition of the berth. Secondly, that the defect was due to the wrongful act of those in charge of a steamer throwing the stokehold refuse overboard immediately prior to the arrival of pltf.'s vessel, &, therefore, it was not reasonably possible for the trustees to be aware of the defect, as periodical inspections would not have detected it. The defence on the part of the railway co. was that the responsibility of keeping the berth in proper condition rested with the trustees, who they knew employed the pilots to take the necessary soundings, they were not negligent in being unaware of a defect due to a breach of the harbour byelaws by persons unknown:—*Held:* (1) both defts. were liable—the trustees because they had negligently omitted to perform the duty laid down in *Mersey Docks Trustees* v. *Gibbs*, No. 8665, *ante*, of taking reasonable care to see whether the harbour, including the berth in question, was in a fit condition, & they could not shift this duty on to the local pilots who were not their servants, & whose duty to sound was for the purpose of enabling them efficiently to navigate the vessels employing them; (2) assuming without evidence that the defect had been caused so shortly before pltf.'s vessel came in that periodical examinations would not have detected it, this defence was not open to them, because they had not performed their duty of examination of the berth by their servants, &, therefore, could not be heard to say that if they had done their duty the defect would not have been detected. The railway co. was liable under the rule in *The Moorcock* (1889), 14 P. D. 64, because as owners of the wharf they had invited pltf.'s vessel alongside for profit to themselves, & could not rely upon the pilots performing the duty cast upon them by the trustees, for, in their capacity as wharf owners, the railway co. had the opportunity of ascertaining the condition of the berth, & should, therefore, have either satisfied themselves that it was reasonably fit, or warned those in charge of the vessel that they had not done so.—THE BEARN, [1906] P. 48; 75 L. J. P. 9; 94 L. T. 265; 22 T. L. R. 165; 10 Asp. M. L. C. 208, C. A.

*Annotations:—As to* (1) **Reld.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; The Empress, [1923] P. 96; Great Lakes S.S. Co. *v.* Maple Leaf Milling Co. (1924), 41 T. L. R. 21. *As to* (2) **Reld.** The Grit, [1924] P. 246.

**8691. Reasonable precautions not taken.**]—THE BEARN, No. 8690, *ante*.

**8692.** ——.]—THE DEVON, No. 8528, *ante*.

**8693. Failure of pilots to sound.**]—THE BEARN, No. 8690, *ante*.

### (c) *Towing Vessels.*

**8694. Damage by tugs employed by dock company.**]—By an Act for improving & maintaining a harbour, the comrs. were empowered to build or provide steam tugs for towing vessels into or out of the harbour, & to receive for the use of such vessels such reasonable compensation as they should fix. The comrs. entered into an arrangement with the proprietors of certain steam vessels to perform this duty for them at certain specified rates of charge; the comrs. paying them in addition a certain sum annually, & the vessels being placed under the direction & control of the harbour master. A vessel having sustained damage in consequence of the negligence & want of skill of the master & crew of a tug, whilst being towed into the harbour, the owner brought an action in the county ct. against the harbour comrs., &, under the direction of the judge, recovered a verdict. The ct., on appeal, set aside the verdict, holding that the decision of the judge could not, upon any inference which could legitimately be drawn from the facts before him, be correct in point of law.—CUTHBERTSON *v.* PARSONS (1852), 12 C. B. 304; 21 L. J. C. P. 165; 19 L. T. O. S. 297; 16 J. P. 474; 16 Jur. 860; 138 E. R. 921.

*Annotation:*—**Mentd.** G. W. Ry. *v.* Goodman (1852), 16 Jur. 862.

**8695.** —— **Acting under directions of harbour master.**]—A steamship was brought from the entrance of a dock to her berth by two tugs, & was made fast; but was unable to haul on her winches, so as to get completely into position alongside the quay, owing to a barge, attached to a buoy, being in the way. The dockmaster sent a man from each of the tugs to loosen the barge's headfast, & directed a third tug to tow the barge away; but, in so doing, the barge was negligently allowed to come into contact with the propeller of the steamship & sustained such damage that she sank with her cargo. In an action of damage by collision brought by the barge owners against the dock owners, the dock owners admitted liability, but brought in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners & a firm of ship repairers who had undertaken to bring the vessel from their yard to her berth at their risk. By the towage contract the dock owners were to supply tugs to assist in transporting the steamship within the dock on condition that the masters & crews of the tugs should cease to be under the dock owners' control in connection with the towage, & become subject to the orders & control of the master or person in charge of the vessel, & be the servants of the owners thereof:—*Held:* the steamship owners were not liable, as third parties, to indemnify the dock owners, for, whether the contract to supply the two tugs was made with the ship repairers or with the steamship owners, that contract was at an end, &, therefore, the men from the two tugs, directed by the dockmaster to loosen the headfast, had resumed their position as servants of the dock owners, & the action of the third tug, under the direction of the dockmaster, was independent of the transporting contract which applied only to the two tugs.—THE KATE, [1907] P. 296; 76 L. J. P. 134; 97 L. T. 502; 10 Asp. M. L. C. 510, C. A.

**8696. Moving during gale—After ship already berthed.**]—HARDIE (J.) & Co. *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1897), 13 T. L. R. 478.

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[1927] 1 D. L. R. 991; [1927] S. C. R. 68.—**CAN.**

t. *Reasonable precautions against accidents taken by trustees.*]—After a vessel had left its moorings in a tidal harbour the keel & bottom were found to have sustained injuries. A stone was found fixed in the mud at the spot where the vessel had rested:—*Held:* assuming the stone had caused the injuries the harbour trustees were not liable in damages, as they had taken all reasonable means to make the harbour safe, & no fault or negligence of themselves or their servants had been established.—THOMSON *v.* GREENOCK HARBOUR TRUSTEES (1875), 3 R. (Ct. of Sess.) 1194; 13 Sc. L. R. 155.—**SCOT.**

a. ——.]—MAIR *v.* ABERDEEN HARBOUR COMRS., [1909] S. C. 721; 46 Sc. L. R. 491; [1909] 1 S. L. T. 253.—**SCOT.**

*Sect.* 12.—*Liabilities of harbour authorities: Sub-sect.* 2, *B.* (*c*) & (*d*); *sub-sects.* 3 & 4.]

**8697. Damage through delay.**]—Applts., a port & harbour authority, undertook the towage of resps.' vessel up their river by a particular tide. Resps.' vessel was preceded by two smaller vessels each in charge of a tug, & the leading tug, from some cause not explained by applts., was so long in accomplishing the journey that resps.' vessel was stranded & damaged by reason of the fall in the tide. The tugs were hired for the purpose by applts. The time & order of departure of the several vessels were arranged by the harbour master, the servant of applts.:—*Held:* applts. were liable for the damage caused to resps.' vessel. —PRESTON CORPN. *v.* BIORNSTAD, THE RATATA, [1898] A. C. 513; 67 L. J. P. 73; 78 L. T. 797; 47 W. R. 156; 14 T. L. R. 500; 8 Asp. M. L. C. 427, H. L.

*Annotations:*—**Consd.** Lohne, etc. Owners of Barque Ydun & Skibs Assce. Forening Protector *v.* Preston Corpn., The Ydun (1899), 81 L. T. 10; The West Cock, [1911] P. 208. **Refd.** The Maréchal Suchet, [1911] P. 1.

**8698. Indemnification of dock company—Under towage contract—Third party notice.**]—THE KATE, No. 8695, *ante*.

(*d*) *Personal Injuries.*

**8699. Sufficiency of evidence of negligence—Plaintiff invitee—Insecure gangway.**]—SMITH *v.* LONDON & ST. KATHARINE DOCKS CO., No. 8709, *post*.

**8700. —— Plaintiff licencee—Defective staging round ship.**]—Deft., a dock owner, supplied & put up a staging outside a ship in his dock under a contract with the shipowner. Pltf. was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of the ship, & in order to do the painting pltf. went on & used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by deft. broke, & by reason thereof pltf. fell into the dock & was injured:—*Held:* pltf., being engaged on work on the vessel in the performance of which deft. as dock owner, was interested, deft. was under an obligation to him to take reasonable care that at the time he supplied the staging & ropes they were in a fit state to be used, & for the neglect of such duty deft. was liable to pltf. for the injury he had sustained.—HEAVEN *v.* PENDER (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357; 47 J. P. 709; 27 Sol. Jo. 667, C. A.

*Annotations:*—**Apld.** Elliott *v.* Nailstone Colliery Co. (1885), 34 W. R. 16; Cann *v.* Willson (1888), 39 Ch. D. 39. **Distd.** O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453; Le Lievre *v.* Gould, [1893] 1 Q. B. 491. **Consd.** Hopkins *v.* G. E. Ry. (1895), 60 J. P. 86. **Distd.** Cale. Ry. *v.* Mulholland, [1898] A. C. 216. **Consd.** Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272. **Refd.** Elliott *v.* Hall (1885), 15 Q. B. D. 315; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; Tolhausen *v.* Davies (1888), 57 L. J. Q. B. 392; Dennes *v.* Gould (1893), 9 T. L. R. 243; Scholfield *v.* Londesborough (1894), 10 T. L. R. 518; Mowbray *v.* Merryweather, [1895] 2 Q. B. 640; Hawkins *v.* Smith (1896), 12 T. L. R. 532; Lane *v.* Cox (1896), 66 L. J. Q. B. 193; Marney *v.* Scott, [1899] 1 Q. B. 986; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540; Cavalier *v.* Pope, [1905] 2 K. B. 757; Earl *v.* Lubbock, [1905] 1 K. B. 253; Jackson *v.* Watson (1909), 78 L. J. K. B. 587; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Bates *v.* Batey, [1913] 3 K. B. 351; Latham *v.* Johnson, [1913] 1 K. B. 398; Baker *v.* James, [1921] 2 K. B. 674. **Mentd.** Witted *v.* Galbraith (1893), 9 T. L. R. 300.

**8701. —— Plaintiff member of public—Insecure stanchion.**]—KEEBLE *v.* EAST & WEST INDIA DOCK CO. (1889), 5 T. L. R. 312, C. A.

**8702. —— Lowering chains.**]—DE JASSAUD *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1897), 13 T. L. R. 464.

**8703. —— Defendants knowledge of dangerous condition.**]—MOORE *v.* RANSOME'S DOCK COMMITTEE (1898), 14 T. L. R. 539, C. A.

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SUB-SECT. 3.—NUISANCE.

**8704. Duty to abate nuisance—Accumulation of seaweed.**]—A harbour was made under statutory authority, & by the action of the sea, & no act or default of the comrs., the sea weed accumulated to such an extent as to become a nuisance:—*Held:* the harbour authorities were bound to abate such nuisance, & an order was properly made on them under 18 & 19 Vict. c. 121, s. 12.—MARGATE PIER & HARBOUR CO. OF PROPRIETORS *v.* MARGATE TOWN COUNCIL (1869), 20 L. T. 564; 33 J. P. 437.

*Annotations:*—**Refd.** Thames Conservators *v.* Port of London Sanitary Authority (1893), 69 L. T. 803; A.-G. *v.* Tod Heatley, [1897] 1 Ch. 560.

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SUB-SECT. 4.—ACTS OF SERVANTS AND THIRD PARTIES.

**8705. Servants—Liability although no personal profit derived—No personal share in management.**]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 8665, *ante*.

**8706. —— —— Unloading cargo.**] — The London Dock co. are liable for the negligence of their servants in unloading goods, although the co. derive no profit from their labour.—GIBSON *v.* INGLIS (1814), 4 Camp. 72; 171 E. R. 23.

**8707. —— Failure of servant to perform duty.**]—HARDIE *v.* SUNDERLAND DOCK CO. (1858), 6 L. T. 557.

**8708. —— Sufficiency of evidence of contract of service.**]—In an action against wharfingers for an injury caused by negligence in the course of discharging a cargo; the fact that they were paid by the merchant for the discharge:—*Held:* no evidence that the men actually engaged in the work were in their employ.—WOODWARD *v.* PETO (1862), 3 F. & F. 389.

*Annotation:*—**Refd.** Innocent *v.* Peto (1864), 4 F. & F. 8.

**8709. —— Servants' knowledge of danger.**]—Defts., a dock co., provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to defts. & managed by their servants. Pltf. went on board a ship in the dock at the invitation of one of the ship's officers, & while he was on board, defts.' servants, for the purposes of the business of the

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**PART XXI. SECT. 12, SUB-SECT. 2.—B. (d).**

b. *Sufficiency of evidence of negligence—Failure to see deck of vessel clear.*]—CRAIG *v.* ABERDEEN HARBOUR COMRS., [1909] S. C. 736; 46 Sc. L. R. 508; [1909] 1 S. L. T. 314.—**SCOT.**

**PART XXI. SECT. 12, SUB-SECT. 3.**

c. *Duty to remove obstructions.*]—CAMPBELL *v.* HORNSBY (1873), I. R. 7 C. L. 540.—**IR.**

d. ——.]—Harbour comrs. cannot be sued for not cleansing, deepening, or removing obstructions from the harbour, if they have not funds to enable them to do so.—GRANT *v.* SLIGO HARBOUR COMRS. (1877), I. R. 11 C. L. 190.—**IR.**

**PART XXI. SECT. 12, SUB-SECT. 4.**

e. *Servants — Liability of Government—Negligence of Marine Board's officers.*]—The Govt. has not such "control & supervision" of the Marine Board as to render it liable for damage caused by the negligence of the Board's officers.—NIPPER *v.* WATSON (1882), 3 N. S. W. L. R. (L.) 168.—**AUS.**

f. —— *Harbour master acting as pilot.*]—Resp. harbour board, as constituted by Timaru Harbour Act, 1876, & Harbours Acts, 1878, had no authority under the statutes or the rules thereunder made to enter into pilotage contracts, but only to license pilots.

dock, moved the gangway, so that it was, & to their knowledge, insecure. Pltf., in ignorance of its insecurity, returned along it to the shore: the gangway gave way, & he was injured:—*Held:* there was a duty on defts. towards pltf. to keep the gangway reasonably safe, & he was entitled to recover damages from them for the injuries he received.—SMITH *v.* LONDON & ST. KATHARINE DOCKS CO. (1868), L. R. 3 C. P. 326; 37 L. J. C. P. 217; 18 L. T. 403; 16 W. R. 728; 3 Mar. L. C. 66.

*Annotations:*—**Consd.** Heaven *v.* Pender (1883), 11 Q. B. D. 503. **Distd.** O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453. **Refd.** Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817; Mowbray *v.* Merryweather, [1895] 1 Q. B. 857; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. **Mentd.** King *v.* G. W. Ry. (1871), 24 L. T. 583; Miller *v.* Hancock, [1893] 2 Q. B. 177; Hargroves, Aronson *v.* Hartop (1905), 74 L. J. K. B. 233; Huggett *v.* Miers, [1908] 2 K. B. 278; Lucy *v.* Bawden, [1914] 2 K. B. 318; Elliott *v.* Roberts (1915), 32 T. L. R. 71; Brackley *v.* Mid. Ry. (1916), 114 L. T. 1150; Dunster *v.* Hollis, [1918] 2 K. B. 795; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74.

**8710. —— Servant acting within scope of authority—Harbour master.**]—It being within the scope of the authority of the harbour master of Falmouth Harbour, upon the proper construction of the Acts relating thereto to regulate the place & manner of beaching a vessel therein for repairs, an order given by him to those in charge of a vessel to let go their anchor in such a way that the vessel sits upon it in beaching & is thereby injured, is negligence, for which, the Harbour Comrs., as his employers, are liable.

Where a vessel is, in obedience to bye-laws, being beached in a harbour under the directions of the harbour master, & in order to reach the place of beaching selected by the harbour master she is properly passing through waters outside the limits of the authority of the Harbour Comrs., whose servant the harbour master is, & while outside such limits damage is occasioned to her by the negligence of the harbour master in giving an improper order, the Harbour Comrs. are liable for the damage thereby occasioned.—THE RHOSINA (1885), 10 P. D. 131; 54 L. J. P. 72; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. L. C. 460, C. A.

**8711. —— —— ——.**]—A ship entered a dock to load. While crossing the dock her propeller got foul of a rope so that the shaft was jammed & the engines could not be worked. There being no dry dock the ship was with the assent of the harbour master put into a lock which served as the entrance to the dock in order that the water might be drawn off & the propeller cleared, the harbour master representing to the captain of the ship that the bottom of the lock was level, & that the ship might easily ground there. When the ship took the ground, being then heavily laden, she sustained serious injury, owing to the existence of a sill which projected several inches above the level of the bottom across the middle of the lock. The dock was regulated by statute which empowered the owners to take tolls for ships entering the dock, & required persons in command of vessels within the dock to place them as the harbour master should direct, under penalties. Vessels had on previous occasions been grounded in the lock under similar circumstances. The owners of the ship having brought an action against the dock owners to recover damages for the injury to the ship:—*Held:* the harbour master in informing the captain of the ship where she might safely ground & in permitting the ship to use the lock for the above purpose was acting within the scope of his authority; he was guilty of a breach of duty in giving that permission & making the representations he did, when he knew, or ought to have known, of the existence of the sill; & the dock owners were liable to the owners of the ship for damages for the injury.

I quote JERVIS, C.J., in *Giles* v. *Taff Vale Railway Co.* (1853), 2 E. & B., p. 829: "I am of opinion that it is the duty of the co., carrying on a business, to leave upon the spot some one with authority to deal on behalf of the co. with all cases arising in the course of their traffic as the exigency of the case may demand (LORD HALSBURY, C.).—APOLLO (OWNERS) *v.* PORT TALBOT CO., THE APOLLO, [1891] A. C. 499; 61 L. J. P. 25; 65 L. T. 590; 55 J. P. 820; 7 T. L. R. 699; 7 Asp. M. L. C. 115, H. L.

*Annotation:*—**Refd.** The Burlington (1895), 72 L. T. 890.

**8712. —— No evidence of negligence—Harbour master.**]—A local Act for better preserving the harbour of Maryport, & for lighting & otherwise improving the township of Maryport, sect. 7, appoints trustees to carry the Act into execution. By sect. 21, they may elect a harbour master, who, by sect. 47, may direct any person having the command of any vessel entering into or being within the harbour to anchor & place the same in such situation within the harbour as he shall direct. After the passing of the Act some coals were shot into a berth in the harbour which rendered it dangerous. The trustees at a board meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed, & the coals were accordingly partly, but not sufficiently removed at their expense. After this, the harbour master, without the knowledge of the trustees, directed pltf. to place his vessel in the berth. He did so, & the vessel while lying there sustained damage in consequence of the berth being unsafe. The harbour master knew that the berth had been unsafe, & what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed pltf. to place his vessel in it:—*Held:* there was no evidence to warrant a verdict against the trustees.—METCALFE *v.* HETHERINGTON (1860), 5 H. & N. 719; 2 L. T. 806; 24 J. P. 788; 8 W. R. 475; 157 E. R. 1367, Ex. Ch.

**8713. —— Lock foreman—Assistant to dock master.**]—Under No. 2 of the bye-laws, & Nos. 10 & 17 of the regulations of the London & India Docks Co., issued under the London & India Docks Amalgamation Act, 1900, which incorporates the Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), the expression "dock-master" includes his duly authorised deputies & assistants, & vessels are to be moved by the persons in charge under the direction of the dock-master, who may also give any other directions.

Pltfs.' steam vessel was entering defts.' dock under the direction of the dock master, who was

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Consequently it could not be held responsible for the default of its harbour master, who was acting not as harbour master but as pilot engaged by applts. for their vessel, at the time when vessel & cargo were lost.—SHAW, SAVILL & ALBION CO. *v.* TIMARU HARBOUR BOARD (1890), 15 App. Cas. 429, P. C. —N.Z.

g. —— *Pilots.*]—When harbour trustees, who are appointed "a pilotage authority" within M. S. Act, 1854, do not license pilots under the powers conferred on them by Part V of that Act, but employ unlicensed pilots at stated wages to pilot vessels into their harbour, & themselves receive the pilotage dues, & apply them to harbour purposes, they are liable for the fault of the pilots so employed by them.—HOLMAN *v.* IRVINE HARBOUR TRUSTEES (1877), 4 R. (Ct. of Sess.) 406; 14 Sc. L. R. 307.—SCOT.

h. —— *Harbour master.*]—A sailing ship about to enter a harbour was hailed by the harbour-master, who then gave steering orders. She stranded on a bank of sand & received injuries:—*Held:* after a proof that she was under the charge of the harbour-master from the time when he began to give orders, & the approximate cause of the accident was fault committed

*Sect.* 12.—*Liabilities of harbour authorities:* '*Subsect.* 4. *Sect.* 13. *Part XXII. Sect.* 1.]

standing on one of the pier-heads. At the same time an official of the dock co., a lock foreman in uniform, standing on the other pier ordered a ketch, belonging to the other defts., & lying within the prescribed limits of the authority of the dock co., to swing round for the purpose ofentering the dock. By a second & as it was found improper order, the lock foreman directed some barges, to which the ketch was fast, also to swing, with the result that the ketch, being unable to check herself by the rope which was fast to the barges, without any negligence in those in charge of her, came into collision with pltfs.' steam vessel:—*Held:* (1) deft. dock co. was alone liable for the damage sustained by pltfs.' vessel, as the lock foreman was a deputy or assistant of the dock master within the meaning of rule 2 of the bye-laws, whose orders those in charge of the ketch were bound, under Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), to obey, & as the relationship of master & servant did not exist between the dock official & the owners of the ketch, they were not responsible for his negligent order; (2) pltfs. acted reasonably in joining both parties as defts., & as deft. dock co. threw the blame on the other defts., but were themselves alone to blame, pltfs.' costs against both defts., & the costs of the owner of the ketch, both in the ct. below & on appeal, must fall on the dock co. —THE MYSTERY, [1902] P. 115; 71 L. J. P. 39; 86 L. T. 359; 50 W. R. 414; 9 Asp. M. L. C. 281, C. A.

*Annotations:*—*As to* (1) **Apld.** The Penrith Castle, [1918] P. 142. *As to* (2) **Apld.** The Hopper No. 21, [1903] W. N. 114; The Esrom & The Hopper Wills No. 66, [1914] W. N. 81. **Refd.** The Millwall (1904), 91 L. T. 695.

**8714. —— Servant acting under statutory & compulsory provisions.**]—The authority of a port captain or harbour master with respect to the mooring of vessels within his jurisdiction is absolute, & the board, whose servant he is, must be held responsible for his acts & those of any other official in the board's employment; & in case of damage ensuing from the negligence of one of the board's officers its liability is not taken away by the circumstance that such officer is a pilot acting under statutory & compulsory provisions.—EAST LONDON HARBOUR BOARD *v.* CALEDONIA LANDING, SHIPPING & SALVAGE CO., LTD., EAST LONDON HARBOUR BOARD *v.* COLONIAL FISHERIES CO., LTD., [1908] A. C. 271; 77 L. J. P. C. 111; 98 L. T. 682; 24 T. L. R. 516; 11 Asp. M. L. C. 59, P. C.

**8715. —— Exception from liability clause—Extending to lock connecting with dock.**]—Defts., who were the owners of Chelsea Dock & of a lock connecting it with the River Thames, received pltfs.' barge into the dock on the condition that "All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." While the barge was in the lock on its way out from the dock to the river, it was damaged through the negligence of defts.' servants:—*Held:* (1) the words of the condition were adequate to exempt defts. from liability for the negligence of their servants; (2) the word "dock" in the above condition must be interpreted as including the lock, & therefore defts. were exempt from liability. —FORBES, ABBOTT & LENNARD, LTD. *v.* GREAT WESTERN RY. CO. (1927), 44 T. L. R. 97, C. A.

——.]—*See, also,* Nos. 8670, 8682, 8686, 8687, 8694, 8698, *ante.*

**8716. Third parties—Dock master—Where independent officer.**]—BROWN *v.* NEWPORT DOCK CO. (1857), 28 L. T. O. S. 252.

**8717. —— Lessee of harbour authorities.**]—BURT *v.* VICTORIA GRAVING DOCK CO., LTD., & LONDON & ST. KATHERINE'S DOCK CO., No. 8678, *ante.*

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## SECT. 13.—ACTIONS AGAINST HARBOUR AUTHORITIES.

**8718. Right to protection as public authorities—Limitation of time for action.**]—By an Act of Parliament, a co. was established for making & maintaining certain docks & basins, & was authorised to appoint a dock master, who was to have power to direct the mooring, unmooring, moving, & removing of all vessels into or being in the docks, & to have the control over the space of one hundred yards of the entrances into the docks, so far as related to the transporting of vessels coming in or going out; & the co. was to be sued in the name of their treasurer; & if any action should be brought against any person for anything done in pursuance of the Act, such action should be commenced within six calendar months after the fact committed. An action having been brought against the treasurer for an injury done to a vessel, within one hundred yards of the entrance of the docks, by reason of improper directions having been given by the dock master in transporting her into the docks:—*Held:* the giving of such directions was a thing done in pursuance of the Act of Parliament, & the action ought therefore to have been brought within six calendar months after such directions were given.—SMITH *v.* SHAW (1829), 10 B. & C. 277; L. & Welsb. 98; 5 Man. & Ry. K. B. 225; 8 L. J. O. S. K. B. 111; 109 E. R. 453.

*Annotations:*—**Refd.** Joule *v.* Taylor (1851), 7 Exch. 58· **Mentd.** Fletcher *v.* Greenwell (1835), 5 Tyr. 316; Palmer *v.* Grand Junction Ity. (1839), 3 Jur. 559.

**8719. —— —— Limitation of Actions & Costs Act, 1842 (c. 97).**]—The Ramsgate Harbour Acts are Acts of a local & personal nature, & are therefore within the meaning of above Act, which gives a period of two years for the bringing of actions for anything done under the authority of such Acts.—SHEPHERD *v.* SHARP (1856), 1 H. & N. 115; 25 L. J. Ex. 254; 27 L. T. O. S. 274; 20 J. P. 676; 4 W. R. 570; 156 E. R. 1140; *sub nom.* SHARP *v.* SHEPHERD, 2 Jur. N. S. 617, Ex. Ch.

*Annotation:*—**Refd.** R. *v.* L. C. C., [1893] 2 Q. B. 454.

**8720. —— —— Public Authorities Protection Act, 1893 (c. 61), s. 1.**]—Pltfs., owners of a barque, issued a writ, on Nov. 14, 1898, in an Admlty. action, against defts. for damages sustained by the grounding of their vessel on Sept. 13, 1893, in the river Ribble within the port & harbour of Preston, through the alleged negligence of defts. in inviting the vessel to come up when there was

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by him in giving many steering orders, & therefore the proprietors of the harbour, his employers, were responsible for the damage.—PARKER *v.* NORTH BRITISH RY. CO. (1898), 25 R. (Ct. of Sess.) 1059; 35 Sc. L. R. 842; 6 S. L. T. 79.—**SCOT.**

**k.** —— *Craneman.*]—AINSLIE *v.* LEITH DOCK COMRS., [1919] S. C. 678; [1919] 2 S. L. T. 180.—**SCOT.**

**PART XXI. SECT. 13.**

**8718** 1. *Right to protection as public authorities—Limitation of time for action.*]—An action must be brought against a Harbour Board within three months from the date of the doing of the injury, & not from the time of its discovery.—WATERSTON *v.* NEW RIVER HARBOUR BOARD (1885), 4 N. Z. L. R. 102.—**N.Z.**

1. *Necessity for notice of action.*]—An action against the Sydney Harbour Trust Comrs. is an action brought against a "person" within Sydney Harbour Trust Act, 1901, s. 26. The comrs. are therefore entitled to notice of intention to bring an action against them in accordance with the requirements of sect. 26.—RYAN *v.* SYDNEY HARBOUR TRUST COMRS. (1912), 12

not sufficient water in the channel leading to the docks:—*Held:* defts. were acting in pursuance of their public duties, so that above sect. applied, &, as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of.—THE YDUN, [1899] P. 236; 68 L. J. P. 101; 81 L. T. 10; 15 T. L. R. 361; 8 Asp. M. L. C. 551, C. A.

*Annotations:*—**Apld.** A.-G. *v.* Margate Pier & Harbour Co. of Proprietors, [1900] 1 Ch. 749; Parker *v.* L. C. C., [1904] 2 K. B. 501; Lyles *v.* Southend-on-Sea Corpn., [1905] 2 K. B. 1. **Consd.** The Johannesburg, [1907] P. 65. **Refd.** Ambler *v.* Bradford Corpn., [1902] 2 Ch. 585; Sharpington *v.* Fulham Grdns., [1904] 2 Ch. 449; R. *v.* James & Mid. Ry., *Ex p.* Bath R. C., [1908] 1 K. B. 958; Bradford Corpn. *v.* Myers, [1916] 1 A. C. 242; R. *v.* Southampton Income Tax Comrs., *Ex p.* Singer, [1916] 2 K. B. 249. Bowling *v.* Camp (1922), 128 L. T. 342. **Mentd.** Chamberlain & Hookham *v.* Bradford Corpn. (1900), 83 L. T. 518; R. *v.* Chandra Dharma, [1905] 2 K. B. 335; Welby *v.* Parker, [1916] 2 Ch. 1.

**8721.** —— —— ——.]—A co. incorporated by Act of Parliament, not only for the performance of duties of public utility, but also for the purpose of earning profits, is not entitled to the benefit of above Act.—A.-G. *v.* MARGATE PIER & HARBOUR CO. OF PROPRIETORS, [1900] 1 Ch. 749; 69 L. J. Ch. 331; 82 L. T. 448; 64 J. P. 405; 48 W. R. 518; 44 Sol. Jo. 393.

*Annotations:*—**Distd.** The Johannesburg, [1907] P. 65. **Refd.** Parker *v.* L. C. C., [1904] 2 K. B. 501; Bradford Corpn. *v.* Myers, [1916] 1 A. C. 242. **Mentd.** Ambler *v.* Bradford Corpn., [1902] 2 Ch. 585; Sharpington *v.* Fulham Grdns. (1904), 52 W. R. 617.

——.]—*See, generally,* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 101–136.

**8722. Costs—Scale of taxation.**]—Pltfs., owners of a steamship, brought an action in the Admlty. Divn. of the High Ct., claiming damages against defts., a port & harbour authority, for injuries sustained by the vessel owing to the alleged negligence of the servants of defts. in not keeping the bed of the harbour in a proper & fit state for the vessel to ground upon at low water. Defts. by their defence alleged (*inter alia*) that the damage was occasioned by the inherent weakness & unfitness of the vessel to take the ground with the cargo she had on board. The trial of the action lasted the greater part of four days, & owing to the nature of the defence set up, several engineers & surveyors were called on both sides, who produced plans in support of their respective views as to the strength & construction of the vessel. Judgment was given for pltfs. on the ground that the damage sustained by the vessel was due to a ridge of gravel left in the bed of the harbour by the negligence of the servants of defts. On the question of costs:—*Held:* pltfs. were entitled to an order for costs on the higher scale inasmuch as the case was special in its nature, involving the calling of a number of scientific witnesses, the preparation of plans, & had been so presented as greatly to facilitate its trial.—THE ROBIN, [1892] P. 95; 67 L. T. 298; 7 Asp. M. L. C. 194.

**8723.** —— —— **Public Authorities Protection Act, 1893 (c. 61), s. 1 (b).**]—In an action by the owners of a steamship against the Tyne Improvement Commission for the amount of the damage occasioned to the vessel by a fire which originated on one of defts.' coal staiths, judgment was given in favour of defts., on the ground that they, as owners of the staith, had not been guilty of negligence. Defts. thereupon claimed, under above sub-sect., 1893, to recover from unsuccessful pltfs. their costs as between solr. & client:—*Held:* defts. were a public authority, & as such entitled to have their costs so taxed, for in the erection & working of the staith they must be taken to have acted in "intended" execution of a public duty within the meaning of the Act, although the staith, & the line of railway connected with it, might not have been constructed in strict conformity with their statutory powers, the question of deviation from deposited plans being for the parties affected thereby, such as the neighbouring owners, & not for pltfs.—THE JOHANNESBURG, [1907] P. 65; 76 L. J. P. 67; 96 L. T. 464; 10 Asp. M. L. C. 402.

**8724.** —— **Liability for collision.**] — THE MYSTERY, No. 8713, *ante*.

# Part XXII.—Marine Authorities.

## SECT. 1.—THE BOARD OF TRADE AND AUTHORITIES UNDER CONTROL THEREOF.

*See* 1894 Act, ss. 63, 244–246, 251, 271–286, 289–363, 422, 457–486, 503, 566, 635, 636, 640, 660, 713–733, 737–742; 1906 Act, ss. 74–75; 1919 Act, ss. 1, 2; Pilotage Act, 1913 (c. 31).

**8725. The Board of Trade—Transfer thereto of personal liabilities of shipping controller—Liability of Board to be sued—Service of writ.**]—Pltfs. in 1922 brought an action against the Board of Trade for money had & received. The money which it was sought to recover was alleged to have been wrongfully extorted from pltfs. in 1919 by the Shipping Controller under colour of his office, & it was alleged that, on pltfs. electing to waive the tort, he would have been personally liable to refund the money as having been received to their use. By the Ministry of Shipping (Cessation) Order, 1921, it was provided that the office of Shipping Controller should cease to exist, & that "All . . . liabilities . . . incurred by the Shipping Controller . . . shall be transferred to the Board

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S. R. N. S. W. 91; 29 N. S. W. W. N. 15.—**AUS.**

m. ——.]—The Comptroller-General of Customs is an "office" within Customs Acts, 1901–1910, ss. 221 & 225, & therefore notice must be given of an action to be brought against him & the action must be begun within six months from the cause of action.—LACHARIASSEN *v.* THE COMMONWEALTH, [1917] 24 C. L. R. 166.—**AUS.**

n. ——.]—*Held:* an action against the Melbourne Harbour Trust Comrs. was an action brought against a "person" within Melbourne Harbour Trust Act, s. 46, & notice in writing thereof complying in form or in substance with the requirements of the sect. was necessary.—UNION S.S. CO. OF NEW ZEALAND, LTD. *v.* MELBOURNE HARBOUR TRUST COMRS. (1884), 9 App. Cas. 365, P. C.—**N.Z.**

o. *Wreck of vessel—Nonfeasance of harbour company.*]—Action against a harbour co., pltf.'s vessel having been wrecked upon a sand bar about 200 feet outside of the piers, & the cargo lost. It appeared that this sand bar was of a shifting nature, disappearing & forming at different times, but defts., who had commenced to receive tolls, some weeks before the accident had begun to remove it, & had not gone on with the work. The jury having found that the loss was caused by deft.'s negligence:—*Held:* defts. were liable, & a verdict for the value of pltf.'s cargo was upheld.—WEBB *v.* PORT BRUCE HARBOUR CO. (1860), 19 U. C. R. 615.—**CAN.**

### PART XXII. SECT. 1.

p. *Right of Board of Trade—To issue instructions to surveyors—Sufficiency of vessel's hull.*]—The Board of Trade under the powers conferred by M. S. Act, 1857, & subsequent statutes, is entitled to issue instructions to the surveyors of passenger ships appointed under sect. 305 of that Act, controlling their judgment with

*Sect.* 1.—*The Board of Trade and authorities under control thereof. Sects.* 2, 3 & 4. *Parts XXIII., XXIV. & XXV. Sects.* 1 & 2.]

of Trade." The "Board of Trade" is the name given by statute to an unincorporated committee of the Privy Council. On an application to strike out the writ on the ground that the Board of Trade, as a department of the Crown, could not be sued: —*Held:* the intention of the Order was to transfer to the Board of Trade as a govt. department the personal liabilities, if any such there were, of the Shipping Controller for any wrongful acts committed by him in his office, & the Board was liable to be sued in respect of those acts notwithstanding that it was an unincorporated body.

Although the Board of Trade may in the above-mentioned circumstances be sued as a govt. department, service of the writ must, unless the solr. to the Board accepts service on their behalf, be effected upon the individual constituent members of the Board personally.—MARSHAL SHIPPING CO. *v.* BOARD OF TRADE, [1923] 2 K. B. 343; 92 L. J. K. B. 901; 129 L. T. 644; 39 T. L. R. 415; 67 Sol. Jo. 639; 16 Asp. M. L. C. 210, C. A.

*Annotations:*—**Distd.** Bristol Channel Steamers *v.* R. (1924), 131 L. T. 608. **Refd.** Brocklebank *v.* R., [1924] 1 K. B. 647; G. S. & W. Ry. Co. of Ireland *v.* R., [1924] 2 K. B. 450.

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SECT. 2.—**LOCAL MARINE BOARDS.**

*See* 1894 Act, ss. 94, 202, 204, 244, 245, 471, 487, 713, Sched. VII.; 1906 Act, s. 74; 1914 Act (c. 42), s. 1 (3).

**8726. Inquiry by local marine board—Alleged misconduct—Summons of witness for defence—Discretionary power.**]—R. *v.* COLLINGRIDGE, No. 8051, *ante.*

**8727. —— —— —— Procedure prior to summons.**]—R. *v.* COLLINGRIDGE, No. 8051, *ante.*

**8728. —— —— —— Witness is witness of court.**]—R. *v.* COLLINGRIDGE, No. 8051, *ante.*

**8729. —— —— —— Expenses.**] — R. *v.* COLLINGRIDGE, No. 8051, *ante.*

**8730. —— Perjury of witness—Summons of witness for defence.**]—Wilful & corrupt false swearing before a local marine board lawfully constituted upon a matter material to an inquiry then being lawfully investigated by them in pursuance of Merchant Shipping Act, 1854 (c. 104), is perjury, & indictable as such.—R. *v.* TOMLINSON (1866), L. R. 1 C. C. R. 49; 36 L. J. M. C. 41; 15 L. T. 188; 30 J. P. 788; 12 Jur. N. S. 945; 15 W. R. 46; 10 Cox, C. C. 332, C. C. R.

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SECT. 3.—**MERCANTILE MARINE OFFICES.**

*See* 1894 Act, ss. 115, 118, 122, 230, 246, 247, 249, 387; 1906 Act, ss. 74, 85, Sched. II.

**8731. Superintendent of mercantile marine office—Power of deputy superintendent.**]—1894 Act, s. 387 (1), provides that a superintendent of a mercantile marine office shall inquire into, hear, & determine any dispute between the owner of a fishing boat & any seaman of the boat concerning (*inter alia*) the seaman's discharge, if any party to the dispute calls on him to decide it.

Sect. 247 (2), provides that any act done by a deputy duly appointed shall have the same effect as if done by a superintendent:—*Held:* deputy superintendent has power to adjudicate upon disputes unders. 387.—MAYHEW *v.* TRIPP, [1914] 2 K. B. 455; 83 L. J. K. B. 778; 110 L. T. 1002; 12 Asp. M. L. C. 505, D. C.

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SECT. 4.—**REGISTRATION AUTHORITIES.**

*See* 1894 Act, ss. 251–258, 339, 694, 695, 719, 721.

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# Part XXIII.—Pleasure Yachts.

*See* 1894 Act, ss. 3, 690; Customs Consolidation Act, 1876 (c. 36), s. 175; Pilotage Act, 1913 (c. 31), s. 11; Statutory Rules & Orders Revised, Vol. VIII., p. 303; Statutory Rules & Orders, 1908, p. 647.

**8732. Yacht race—Collision—Limitation of liability.**]—CLARKE *v.* DUNRAVEN (EARL), THE SATANITA, No. 8068, *ante.*

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reference to the various requirements compliance with which is necessary in order to their granting a declaration as to the sufficiency of the hull of the vessel, which declaration is required by the Act as a necessary condition of the issue of a certificate by the Board, & in the event of shipowners feeling aggrieved at the refusal of the surveyor to issue a declaration, or of the Board to grant a certificate, the proper remedy is an appeal under M. S. Act, 1876, s. 14, to a Ct. of Survey or a scientific referee.—DENNY & BROTHERS, ETC. *v.* BOARD OF TRADE (1880), 7 R. (Ct. of Sess.) 1019; 17 Sc. L. R. 694.—**SCOT.**

q. —— *To cancel or suspend certificate.*]—The Board of Trade has no power to cancel or suspend a certificate except on the ground that the holder of it has been "convicted" of an offence.—LORD ADVOCATE (BOARD OF TRADE) *v.* HUTCHINGS (LEITH LOCAL MARINE BOARD) (1896), 24 R. (Ct. of Sess.) 177; 4 S. L. T. 167.—**SCOT.**

**PART XXII. SECT. 2.**

r. *Power to make regulations—As to steamers following boat race.*]—Appct. was convicted of a break of the following regulation, made by the Marine Board, to be observed at boat races—"only two steamers will be permitted to follow any race, viz. one authorised by the Marine Board to convey the members of the Press, the other to carry the umpire." Appct. being the master of a steamer not authorised by the Board followed the race:—*Held:* the regulation was not *ultra vires*, & the conviction was right.—*Ex p.* WATERHOUSE (1879), 2 N. S. W. S. C. R. N. S. (L.) 194.—**AUS.**

t. —— *That "every harbour & river steamer shall be divided by transverse water-tight bulkheads."*]—JEANNERET *v.* HIXSON (1890), 11 N. S. W. Eq. 1; 6 N. S. W. W. N. 118.—**AUS.**

a. *Duty of board to place buoys.*]—NIPPER *v.* HIXSON (1884), 5 N. S. W. L. R. (L.) 118.—**AUS.**

b. *Liability for detention of vessel —Allegation that foremast rotten.*]—AUSTRALIAN BANKING CO. *v.* BURNS (1889), 11 N. S. W. L. R. (L.) 6; 6 N. S. W. W. N. 19.—**AUS.**

c. *One charge allowed for continuous services.*]—A vessel entered a harbour in a leaky condition. She was first beached, then shifted several times, & finally taken into deep water & anchored, all these operations being performed under the charge of the harbour-master & pilot of the local harbour board:—*Held:* all these successive movements of the vessel made a chain of continuous services, for which the harbour board could only charge as one act from the time of her beaching until her final mooring at the anchorage.—NAPIER HARBOUR BOARD *v.* TYSER LINE, LTD. (1904), 24 N. Z. L. R. 59.—**N.Z.**

**PART XXIII.**

d. *Validity of conviction for offence against Lord's Day Act.*]—R. *v.* DAUGETT, R. *v.* FORTIER (1882), 1 C. R. 537.—**CAN.**

# Part XXIV.—Naval and Marine Courts.

*See* 1894 Act, ss. 480–490.
**Naval court martial.**]—*See* ROYAL FORCES, Vol. XXXIX., p. 341, No. 270.

# Part XXV.—Requisition of Ship by Government.

## SECT. 1.—IN GENERAL.

**Authority to requisition.**]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 549, Nos. 520–523.

**8733. What amounts to requisition—Effective positive control—Constituted by definite order.**]—By Regulations made under Emergency Powers Act, 1920 (c. 55), the Govt. was empowered to requisition ships, to prohibit the unloading of ships, & to take possession of (*inter alia*) stocks of coal. The Regulations further made provision for the assessment of "the compensation payable in respect of any property which is requisitioned or of which possession is taken under these Regulations."

During a coal strike in 1921, when the Regulations were in force, suppliants' vessel arrived in the Thames on Apr. 2, with a cargo of coal for certain consignees. On the same day a Customs officer boarded the vessel, & acting on instructions told the chief officer that "in no circumstances is the vessel to discharge without permission." The vessel accordingly lay with the coal on board till Apr. 21, on which date the Govt. requisitioned the coal, & on Apr. 22 the vessel was ordered by a Govt. department to proceed to Erith & discharge there, which she accordingly did, the discharge being completed on Apr. 23. Suppliants, contending that the vessel had been requisitioned &/or that possession of her had been taken by the Govt., claimed compensation under the Regulations, or, alternatively, at common law, for her detention from Apr. 2 to Apr. 23:—*Held:* (1) the word "requisition" in the Regulations meant some effective & positive dominion or control constituted by a definite order given under the Regulations; no such effective & positive dominion or control was exercised till the vessel was directed to proceed to Erith & discharge her cargo there; & therefore under the Regulations suppliants were entitled to compensation in respect of two days only, Apr. 22 & 23; (2) assuming that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation, that rule can only apply, if it does apply, to a case where property is actually taken possession of or used by the Govt., or where, by the order of a competent authority, it is placed at the disposal of the Govt.; a mere negative prohibition, though it involves interference with an owners' enjoyment of property, does not, merely because it is obeyed, carry with it at common law any right to compensation; & therefore that suppliants had no right at common law to claim in respect of the period up to Apr. 22, & as regards the two days, Apr. 22, 23, they could not be in a better position than the Regulations which superseded any common law right if such otherwise existed.—FRANCE FENWICK & CO. *v.* R., [1927] 1 K. B. 458; 96 L. J. K. B. 144; 43 T. L. R. 18; 32 Com. Cas. 116; *sub nom.* FENWICK (W. F.) & CO. *v.* R., 136 L. T. 358.

**8734. Agreement to reimburse owner—Actual cost of maintaining organisation—What included therein.**]—CUNARD S.S. CO., LTD. *v.* BOARD OF TRADE (1923), 155 L. T. Jo. 322.

**Vessels under time charters—Whether requisition frustration of adventure.**]—*See* Part VII., Sect. 2, sub-sect. 22, D., *ante*.

## SECT. 2.—COMPENSATION FOR REQUISITION.

**8735. Right to compensation—Negative prohibition to deal with ship & cargo.**]—In Oct. 1920, the steamship *Norburn*, which was on time charter to suppliants, not by demise, was loading coal in Barry docks for carriage to Nantes. The coal strike was then in progress, & the naval transport officer at Cardiff, acting for the Admlty. & within the scope of his authority, ordered the master of the *Norburn* to leave the docks & take the vessel into the roads to await further orders. The *Norburn* was kept waiting for eighteen days & was then allowed to proceed on her voyage. Suppliants were obliged to pay the chartered hire for those eighteen days & now claimed by petition of

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**PART XXIV.**

*e. Duty to submit question of law to Supreme Court.*]—When a question of law has been requested to be reserved by the Ct. of Marine inquiry, such Ct. should reserve such question for the opinion of the Supreme Ct. before giving its decision.—*Re* MEDLEY (1902), 28 V. L. R. 475.—**AUS.**

**PART XXV. SECT. 1.**

*f. Contract of hiring ceases—On vessel becoming total loss.*]—A vessel which was requisitioned by the Govt. under a contract of hire stranded on Sept. 6, 1917, & the owners claimed payment of hire to Oct. 25, 1917. In an action brought to enforce the claim it was admitted by all parties that (1) the stranding took place owing to a miscalculation of the navigating officer; (2) on Sept. 8 all attempts to salve the vessel were abandoned; (3) after Sept. 8 salvage was impossible; (4) the vessel was a total loss as at Sept. 9, at & from which date salvage operations were restricted to her armament; (5) no notice was given until Oct. 25, 1917, by defenders to pursuers that salvage operations had been abandoned; & (6) no notice was at any time given that the vessel had been discharged from Govt. service:—*Held:* even though the loss of the vessel might be due to the fault of the lessees the contract of hire terminated on Sept. 9, at which date the vessel became a total loss.—LONDON & EDINBURGH SHIPPING CO. *v.* THE ADMIRALTY [1920] S. C. 309; 57 Sc. L. R. 252.—**SCOT.**

**PART XXV. SECT. 2.**

*g. Amount of compensation—Reasonable amount.*]—L.'s steam tug (gross tonnage 47·58 & registered tonnage 17·82) was, on Nov. 2, 1918, requisitioned by the Crown for war purposes & remained under requisition for 15 days, when the period of requisition was terminated by the close of the war:—*Held:* in view of the short period for which the tug was held, the sum of $30·00 per diem, was a fair & reasonable compensation or rental for such a tug.—LEMAY *v.* R. (1922), 68 D. L. R. 489; 21 Exch. C. R. 364.—**CAN.**

*h.* —— ——.]—Inasmuch as conditions prevailing in Canada are more like those in the United States than in Britain, the rate of compensation for requisition allowed in the United States affords a safer comparative guide than the English rate, in establishing a just & reasonable rate for Canada.—*Re* GASTON, WILLIAMS & WIGMORE OF CANADA, LTD. & GASTON,

*Sect. 2.—Compensation for requisition.*]

right to recover from the Crown that sum or a sum by way of compensation for the loss they had sustained :—*Held :* the claim failed inasmuch as the instructions given to the master by the naval transport officer was an order justified under regulation 39 B. B. B. of Defence of the Realm Regulations Consolidated, which order did not give rise to an implied promise by the Crown to indemnify suppliants against the loss they had sustained ; & even if the instructions given to the master constituted a request & the obedience of the master an assent, the request was to the master as having control of the vessel for his owners & gave no right as against the Crown by suppliants as charterers.—FEDERATED COAL & SHIPPING CO. *v.* R., [1922] 2 K. B. 42 ; 91 L. J. K. B. 534 ; 127 L. T. 303 ; 38 T. L. R. 497 ; 66 Sol. Jo. 489 ; 15 Asp. M. L. C. 604 ; 27 Com. Cas. 291.

*Annotations :*—**Reld.** Dominion Coal Co. *v.* Maskinongo S.S. Co., [1922] 2 K. B. 132 ; France Fenwick *v.* R., [1927] 1 K. B. 458.

**8736.** —— ——.]—FRANCE FENWICK & CO. *v.* R., No. 8733, *ante*.

**8737.** —— **Only where property possessed & used.**]—FRANCE FENWICK & CO. *v.* R., No. 8733, *ante*.

**8738.** —— **As between owners & charterers—Time charter.**]—By a time charter entered into in June, 1914, the use of the ship was let to the charterers for a period of eight years, but it was provided that if she was lost the hire was to cease on the day of her loss. In Jan. 1917, the ship was requisitioned by the Admlty. on the terms that, in the event of her being lost by war risks, they would pay compensation of her ascertained value. Shortly afterwards, & while the ship was so under requisition, she was sunk by the enemy :—*Held :* the compensation money payable by the Admlty. on the loss of the ship belonged wholly to the owners, & the charterers had no right to share in in.—LONDON-AMERICAN MARITIME TRADING CO. *v.* RIO DE JANEIRO TRAMWAY LIGHT & POWER CO., [1917] 2 K. B. 611 ; 86 L. J. K. B. 1470 ; 116 L. T. 725 ; 33 T. L. R. 493 ; 14 Asp. M. L. C. 101 ; 22 Com. Cas. 359.

*Annotation :*—**Apld.** Dominion Coal Co. *v.* Maskinongo S.S. Co., [1922] 2 K. B. 132.

**8739.** —— **Owners agreeing to bear marine risks.**]—A steamer belonging to claimants was requisitioned by the Admlty. in Jan. 1916, under a Proclamation issued in Aug. 1914, & after a first voyage she was sent with a cargo of ore & pyrites to a firm of American munition makers whose contract provided that they should be bound to supply only if the ore was sent to them at a certain rate of freight. The ship was sent at this rate of freight, which was lower than the current market rate. On the voyage the ship was severely damaged by marine risks, &, in an arbn. between the owners & the Admlty., the arbitrators found that the owners were bound by the form of charter known as T.99, which expressly threw the burden of marine risks on the owners. A case was stated by the arbitrators for the opinion of the ct. on the following questions : (*a*) Whether the Admlty. had the right to employ the ship on a voyage earning freight payable to the Admlty., & whether claimants were entitled to receive any & what extra payment & compensation in respect thereof ; (*b*) whether the Admlty. were liable to compensate the owners for damage received on the voyage ; & (*c*) whether marine risks should be deemed to be borne by the Admlty. or by the owners :—*Held :* (1) the Admlty. had a right to requisition the ship under the Proclamation in the national emergency which existed in Jan. 1916, & to employ her on the voyage in question & the owners were not entitled to extra compensation as the fact that freight was payable to the Admlty. was not material ; (2) there was evidence to support the arbitrators' finding that the owners agreed to bear the marine risks ; (3) consequently the Admlty. were not liable to compensate the owners for damage received on the voyage.—CROWN OF LEON (OWNERS) *v.* ADMIRALTY COMRS., [1921] 1 K. B. 595 ; 90 L. J. K. B. 417 ; 124 L. T. 348 ; 37 T. L. R. 65 ; 15 Asp. M. L. C. 145, D. C.

**8740.** —— **At common law—Interference with trade of ship.**]—By Indemnity Act, 1920 (c. 48), s. 2 (1) (*b*), any person not being the owner of a ship, who has " incurred or sustained any direct loss or damage by reason of interference with his . . . business . . . through the exercise . . . during the war of any . . . power under any enactment relating to the defence of the realm . . . shall be entitled to payment or compensation in respect of such loss or damage."

By Indemnity Act, 1920 (c. 48), s. 2 (2) (iii) (*b*), if claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in Part II. of the schedule to the Act.

A towage & salvage co. hired the use of a tug for the purposes of their business by a charterparty which entitled them to the services of the tug for as long as they pleased & enabled them to terminate the hiring by a fourteen days' notice. During the currency of the charterparty the tug was requisitioned by the Admlty. :—*Held :* (1) the loss of the average net earnings of the tug during the period of the requisition was a " direct loss or damage " by reason of interference with the charterers' business within Indemnity Act, 1920 (c. 48), s. 2 (1) (*b*), & they were entitled to compensation ; (2) the charterers would apart from the Act have no legal right to compensation ; (3) in accordance with Indemnity Act, 1920 (c. 48), s. 2 (2) (iii) (*b*), compensation must be assessed as directed by Part II. of the schedule to the Act.—ELLIOTT STEAM TUG CO. *v.* SHIPPING CONTROLLER, [1922] 1 K. B. 127 ; 91 L. J. K. B. 294 ; 126 L. T. 158 ; 15 Asp. M. L. C. 406, C. A.

*Annotations :*—*As to* (1) **Expld.** Black *v.* Admiralty Comrs., [1924] 1 K. B. 661. **Distd.** Moss S.S. Co. *v.* Board of Trade, [1924] A. C. 133. *As to* (2) **Apld.** Federated Coal & Shipping Co. *v.* R., [1922] 2 K. B. 42. **Reld.** Dominion Coal Co. *v.* Maskinongo S.S. Co., [1922] 2 K. B. 132.

**8741.** —— **Under Indemnity Act, 1920 (c. 48).**]—By above Act, s. 1, it was provided that the general prohibition contained in that sect. against the institution in any ct. of law of legal proceedings, including a petition of right, for any act, matter or thing done during the war, if done in good faith & in the public interest, by any person holding office in the service of the Crown should not prevent the institution of proceedings for breaches of contract, except in cases where a claim for payment or compensation could be brought under above Act, s. 2.

By above Act, s. 2 (1) (*a*), the owner of a ship requisitioned by the Govt. during the war was to be entitled to payment for its use, which payment was to be assessed by a tribunal called the " Board of Arbn." & upon the principles set out in the

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WILLIAMS & WIGMORE STEAMSHIP CORPN. *v.* R. (1922), 66 D. L. R. 242 ; 21 Exch. C. R. 370.—**CAN.**

**k.** *Right to compensation—For loss of right to profits.*]—The charterer of a ship which is not demised is not entitled to compensation under War Measures Act, s. 7, for loss of his rights & profits under the charterparty.—WARNER QUINLAN ASPHALT CO. *v.* R., [1924] 2 D. L. R. 853 ; [1924] S. C. R. 236.—**CAN.**

schedule to the Act. According to those principles the payment was to be based upon what were known as the "Blue Book rates," "subject to such increases or modifications thereof as may have been agreed to before Jan. 1, 1920," or, in cases where those rates had not been applied, on some other estimate of the profits which the owner could have made if there had been no war, & was to be assessed without reference to the increase in the market value of tonnage due to the war.

Certain ships were requisitioned in 1918, in respect of which the Admlty. had previously agreed with their owner that if they were requisitioned they should be paid for at the market rate & not at the Blue Book rates. The owner claimed in a petition of right to be paid the free market rate. The Admlty. claimed that the rates payable were fixed by an Order known as the Limitation of Freights (French Ports) Order, 1918, & that in any event the matter was not within the jurisdiction of the ct. On the plea to the jurisdiction of the ct.:—*Held:* the terms of the Admlty. agreement were not a modification of the Blue Book rates within the meaning of the schedule, that the principles of the schedule being inconsistent with those terms were not applicable to suppliant's claim, that his claim for payment consequently did not come within above Act, s. 2 (1) (*a*); & the jurisdiction of the ct. to deal with the matter was not transferred to the Board of Arbn.—BROOKE *v.* R., [1921] 2 K. B. 110; 90 L. J. K. B. 521; 125 L. T. 183; 37 T. L. R. 375; 15 Asp. M. L. C. 205.

*Annotation:*—**Distd.** A.-G. *v.* Royal Mail Steam Packet Co., [1922] 2 A. C. 279.

**8742.** —— ——.]—Above Act, s. 1 (1), provides that no action or legal proceeding, which includes a petition of right, shall be instituted in respect of any act done during the war before the passing of the Act, if done in good faith & in the public interest by or under the authority of an official in the service of the Crown, & that if any such proceeding has been instituted before the passing of the Act it shall be discharged & made void: "Provided that, except in cases where a claim for payment or compensation can be brought under section two of this Act, this sect. shall not prevent: . . . (*b*) the institution . . . of proceedings in respect of any rights under, or alleged breaches of, contract," if the proceedings are brought within the prescribed time.

Above Act, s. 2 (1), provides that, notwithstanding anything in the foregoing sect. restricting the right of taking legal proceedings—(*a*) the owner of a ship which has been requisitioned at any time during the war "shall be entitled to payment or compensation for the use of the same & for services rendered during the employment of the same in Govt. service, & compensation for loss or damage thereby occasioned"; such payment or compensation to be assessed on the principles & by the tribunal thereinafter mentioned.

In Mar. 1915, a steamship was requisitioned by the Admlty. & was taken under a charterparty known as Form B. which fixed the rate of hire, gave the Admlty. the right of purchase at a certain price, & rendered them liable for all risks & expenses of the ship. The ship, whilst in the employment of the Admlty., was sunk by a heavily armed German vessel, & the owners, by petition of right, claimed compensation against the Admlty. for her loss. Before the petition came on for trial above Act came into force, & the Crown pleaded that by virtue of this Act the petition should be discharged, & this point was tried as a preliminary question of law:—*Held:* (1) the case fell within above Act, s. 1 (1); (2) it was excepted from the benefit of paragraph (*b*) of the proviso to that sub-sect., inasmuch as the claim came within above Act, s. 2 (1) (*a*), & the petition of right should be discharged.—A.-G. *v.* ROYAL MAIL STEAM PACKET CO., [1922] 2 A. C. 279; 91 L. J. K. B. 635; 127 L. T. 533; 38 T. L. R. 658; 15 Asp. M. L. C. 574, H. L.; *revsg.* S. C. *sub nom.* ROYAL MAIL STEAM PACKET CO. *v.* R. (1921), 37 T. L. R. 897, C. A.

*Annotations:*—*Generally*, **Refd.** Reader *v.* S. E. & C. Ry. & L. & N. W. Ry., Van den Berghs *v.* G. W. Ry. (1921), 38 T. L. R. 14; Brocklebank *v.* R., [1925] 1 K. B. 52. **Mentd.** Ruffy-Arnell, etc. Co. *v.* R., [1922] 1 K. B. 599.

**8743.** —— ——.]—A shipping co., whose ordinary business it was to run a line of steamers to the Mediterranean, chartered a ship on a time charter for the purpose of its being employed on that business. The charterparty provided that if during the currency of the charter the ship was directed by the Govt. for some voyage the direction was to be for the charterer's account. During the currency of the charter the Govt. directed the ship to go on a voyage to Cuba. That voyage resulted in a loss to the charterers, who also lost the profits which they would have made if the ship had been used for the Mediterranean trade. The charterers claimed as compensation under the Act, (*a*) a sum representing the net loss sustained by them as the result of the directed voyage, & (*b*) a sum representing the profit they would have made by the voyage intended to be made in the Mediterranean:—*Held:* claimants were not entitled to compensation under the Act.—MOSS S.S. CO. *v.* BOARD OF TRADE, [1924] A. C. 133; 93 L. J. K. B. 81; 130 L. T. 354; 40 T. L. R. 137; 68 Sol. Jo. 184; 16 Asp. M. L. C. 250, H. L.

*Annotations:*—**Apld.** Black *v.* Admiralty Comrs., [1924] 1 K. B. 661. **Refd.** Brocklebank *v.* R., [1925] 1 K. B. 52.

**8744.** —— —— **Assessment of compensation.**]—ELLIOTT STEAM TUG CO. *v.* SHIPPING CONTROLLER, No. 8740, *ante*.

**8745.** —— —— **Arbitration proceedings.**]—EAGLE OIL TRANSPORT CO., LTD. *v.* BOARD OF TRADE, No. 8757, *post*.

**8746. Amount of compensation—Increased cost of replacing ship.**]—Under a contract made in Dec. 1914, between a dock board & a firm of shipbuilders, the latter were to build for the former a hopper barge of special construction. In Feb. 1917, when the barge was nearing completion, the Admlty. requisitioned her, altering her construction for purposes of their own, & in Aug. of the same year they purchased her for the original contract price to be paid by them to the shipbuilders. If the barge had not been requisitioned, she would have been completed & delivered to the Board in Apr. 1917. Owing to difficulties arising from the war it was impossible for the Board to replace the barge by another of like construction in less than three years from the last-mentioned date, or at a cost less than three times the contract price of the original barge. In proceedings to determine the amount of the compensation which ought, in these circumstances, to be paid by the Admlty. to the Board:—*Held:* (1) the Board were entitled to recover the amount of the difference between the contract price of the original barge & the increased cost to them of replacing her; (2) the Board were not entitled to any compensation for the loss of the services of the barge during the above-mentioned period of three years, the damage thereby caused being too remote.—*Re* MERSEY DOCKS & HARBOUR BOARD & ADMIRALTY COMRS., [1920] 3 K. B. 223; 90 L. J. K. B. 148; *sub nom.* MERSEY DOCKS &

HARBOUR BOARD *v.* ADMIRALTY COMRS., 123 L. T. 462; 36 T. L. R. 547; 15 Asp. M. L. C. 24, D. C.

**8747. —— Allowance for loss of service.]**—*Re* MERSEY DOCKS & HARBOUR BOARD & ADMIRALTY COMRS., No. 8746, *ante*.

**8748. Transfer of jurisdiction of court—To Arbitration Board.]**—BROOKE *v.* R., No. 8741, *ante*.

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SECT. 3.—**EXCEPTED PERILS—WAR RISKS.**

*Compare* INSURANCE, Vol. XXIX., pp. 226–230, Nos. 1836–1861.

**8749. "Hostilities or warlike operations"—Collision—Navigation without lights.]**—In Mar. 1915, the steamship *St. Oswald* was requisitioned by the Director of Transports & taken into the service of the Admlty. on the terms of a charterparty which provided that "the Admlty. shall not be liable if the vessel be lost . . . in consequence of . . . any . . . cause arising as a sea risk," but the Admlty. took the risk of "all consequences of hostilities or warlike operations." On Dec. 31, 1915, in pursuance of instructions from the Admlty., the ship was steaming at full speed on a very dark night with her lights obscured, being engaged in the operation of evacuating troops from Gallipoli, when she sighted on her starboard bow a French battleship which was also steaming without lights, but almost immediately disclosed them. The *St. Oswald* ported her helm & disclosed her port light, & the battleship almost simultaneously starboarded her helm. The ships were thus brought on to courses forming intersecting circles, & a collision occurred which caused the *St. Oswald* to sink & become a total loss. It was admitted that neither vessel was to blame:—*Held:* the loss of the ship was a "consequence of warlike operations" within the meaning of the charterparty, & the Admlty. were liable.—BRITISH & FOREIGN S.S. CO., LTD. *v.* R., [1918] 2 K. B. 879; 87 L. J. K. B. 910; 118 L. T. 640; 34 T. L. R. 546; 62 Sol. Jo. 701; 14 Asp. M. L. C. 270, C. A.

*Annotations:*—**Consd.** A.-G. *v.* Ard Coasters, Liverpool & London War Risks Insce. Assocn. *v.* S.S. Richard de Larrinaga Marine Underwriters, [1921] 2 A. C. 141; Charente S.S. Co. *v.* Transports Director (1921), 38 T. L. R. 148; A.-G. *v.* Adelaide S.S. Co., [1923] A. C. 292. **Refd.** Atlantic Transport Co. *v.* Transports Director (1921), 38 T. L. R. 160; Harrisons *v.* Shipping Controller, [1921] 1 K. B. 122; Commonwealth Shipping Representative *v.* Peninsular & Oriental Branch Service, [1923] A. C. 191.

**8750. —— —— ——.]**—A steamship was requisitioned by the Admlty. on the terms of a charterparty which provided that the Admlty. should not be liable for the loss of the ship by any sea risk, but should take the risk of "all consequences of hostilities or warlike operations." On the night of Feb. 18, 1918, the steamship was lost by a collision with a British destroyer, which was patrolling an area of the North Sea for submarines. The vessels were proceeding on opposite & parallel courses. The destroyer, having come to the end of her beat, was turning on a starboard helm with a view to proceeding in the reverse direction &, in so doing, struck & sank the steamship. The night was dark & both vessels were sailing without lights. Neither vessel was to blame for the collision:—*Held:* the collision was the direct consequence of the warlike operation of patrolling the seas, & the Admlty. was liable for the loss.—A.-G. *v.* ARD COASTERS, LTD., LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCN., LTD. *v.* S.S. RICHARD DE LARRINAGA MARINE UNDERWRITERS, [1921] 2 A. C. 141; 91 L. J. K. B. 31; 125 L. T. 548; 37 T. L. R. 692; 15 Asp. M. L. C. 353; 26 Com. Cas. 352, H. L.; *affg.* S. C. *sub nom.* RICHARD DE LARRINAGA (OWNERS) *v.* ADMIRALTY COMRS., [1920] 3 K. B. 65, C. A.

*Annotations:*—**Distd.** Britain S.S. Co. *v.* R., Green *v.* British India Steam Navigation Co., British India Steam Navigation Co. *v.* Liverpool & London War Risks Insce. Assocn., [1921] 1 A. C. 99; Admiralty Comrs. *v.* Brynawell S.S. Co. (1923), 40 T. L. R. 78. **Refd.** S.S. Larchgrove *v.* R. (1919), 36 T. L. R. 108; Charente S.S. Co. *v.* Transports Director (1921), 38 T. L. R. 148; Harrisons *v.* Shipping Controller, [1921] 1 K. B. 122; A.-G. *v.* Adelaide S.S. Co., [1923] A. C. 292; Commonwealth Shipping Representative *v.* Peninsular & Oriental Branch Service, [1923] A. C. 191.

**8751. —— —— ——.]**—*Primâ facie* the transport by sea of war material in time of war from one war base to another war base is a warlike operation within the meaning of the usual f.c. & s. warranty in a marine policy.

Though the ct. may take judicial notice of the existence of a state of war between this country & another, it may not take judicial notice of the date of any particular military movement in the course of the war.

On Jan. 1, 1916, a collision occurred after dark in the Mediterranean between the *B.* & the *G.*, which resulted in the loss of the *G.* Both ships were sailing at full speed & without lights in accordance with Admlty. regulations, & no blame attached to either. The *G.* was requisitioned by the Govt. of the Commonwealth of Australia upon the terms of a charterparty which provided that the Govt. should accept war risks but not ordinary marine risks. The question whether the loss was due to a war risk was referred to an arbitrator, who found that at the time of the collision the *G.* was carrying a general cargo, & that the *B.* "was under requisition by the British Govt. & was carrying ambulance wagons & other Govt. stores from one war base (Mudros) to another war base (Alexandria)":—*Held:* on the latter finding the *B.* was engaged on a warlike operation, the loss of the *G.* was a direct consequence of that warlike operation, & the Commonwealth Govt. were liable under the charterparty.—COMMONWEALTH SHIPPING REPRESENTATIVE *v.* PENINSULAR & ORIENTAL BRANCH SERVICE, [1923] A. C. 191; 92 L. J. K. B. 142; 39 T. L. R. 133; 67 Sol. Jo. 182; 28 Com. Cas. 296, H. L.; *sub nom.* PENINSULAR & ORIENTAL BRANCH SERVICE *v.* COMMONWEALTH SHIPPING REPRESENTATIVE, 128 L. T. 546; 16 Asp. M. L. C. 33, H. L.; *affg.*, [1922] 1 K. B. 706, C. A. & (1921), 38 T. L. R. 93.

*Annotations:*—**Folld.** Atlantic Transport Co. *v.* Transports Director (1921), 38 T. L. R. 160; Adelaide S.S. Co. *v.* R., [1923] 1 K. B. 59. **Refd.** Charente S.S. Co. *v.* Transports Director (1921), 38 T. L. R. 148; A.-G. *v.* Adelaide S.S. Co., [1923] A. C. 292; Cayzer, Irvine *v.* Board of Trade, [1927] 1 K. B. 269.

**8752. —— —— ——.]**—ATLANTIC TRANSPORT CO., LTD. *v.* TRANSPORTS DIRECTOR (1921), 38 T. L. R. 160.

*Annotation:*—**Refd.** Adelaide S.S. Co. *v.* R., [1923] 1 K. B. 59.

**8753. —— —— ——.]**—A steamship was requisitioned by the Admlty. on the terms of a charterparty which provided that the Admlty. should not be liable for the loss of the ship by any sea risk, but should take the risk of "all consequences of hostilities or warlike operations." On May 6, 1918, the steamship, while on a voyage with a cargo of iron ore, was lost at night by collision with another ship also carrying cargo when both ships were, in compliance with Admlty regulations, being navigated without lights. No negligence was proved on the part of either vessel & the collision was proximately caused by the absence of lights. The Admlty. regulations were issued as a precaution against possible enemy action, but no submarines were known or suspected to be present at the time of the collision:—

*Held:* there were no warlike operations of which the loss of the ship could be a consequence, & the Admlty. were not liable.—BRITAIN S.S. Co. *v.* R., GREEN *v.* BRITISH INDIA STEAM NAVIGATION CO., BRITISH INDIA STEAM NAVIGATION CO. *v.* LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCN., [1921] 1 A. C. 99; 89 L. J. K. B. 881; 123 L. T. 721; 36 T. L. R. 791; 64 Sol. Jo. 737; 15 Asp. M. L. C. 58; 25 Com. Cas. 301, H. L.

*Annotations:*—**Apld.** A.-G. *v.* Ard Coasters, Liverpool & London War Risks Insce. Assocn. *v.* S.S. Richard de Larrinaga Marine Underwriters, [1921] 2 A. C. 141. **Folld.** Harrisons *v.* Shipping Controller, [1921] 1 K. B. 122. **Refd.** Charente S.S. Co. *v.* Transports Director (1921), 38 T. L. R. 148; A.-G. *v.* Adelaide S. S. Co., [1923] A. C. 292; Commonwealth Shipping Representative *v.* Peninsular & Oriental Branch Service, [1923] A. C. 191. **Mentd.** Board of Trade *v.* Cayzer, Irvine, [1927] A. C. 610.

**8754.** —— —— ——.]—CHARENTE S.S. Co., LTD. *v.* TRANSPORTS DIRECTOR (1922), 38 T. L. R. 434, C. A.

*Annotation:*—**Consd.** A.-G. *v.* Adelaide S.S. Co., [1923] A. C. 292.

**8755.** —— —— ——.]—The *Warilda*, a steamship, was requisitioned by the Govt. in 1916, upon the terms of charterparty T.99, under which the owners undertook marine risks & the Admlty. undertook war risks, including "all consequences of hostilities or warlike operations." She was used as an ambulance transport & was armed with a gun & had on board two or three Royal Navy men to work it, & her master was instructed that, if he were attacked by a submarine, he should take advantage of any exceptional opportunity of ramming the submarine. While carrying a number of wounded men with doctors & nurses from Havre to Southampton &, by order of the Admlty., proceeding at night at full speed & without lights, she came into collision with another vessel & was injured. The *Warilda* was alone to blame for the collision, which was due to the negligence of those in charge of her. In a petition of right by the owners of the *Warilda*, who claimed that their vessel had been damaged in consequence of a warlike operation:—*Held:* (1) the vessel was at the time of the accident engaged in a warlike operation; (2) in the circumstances the negligence of those in charge of her was immaterial.—ADELAIDE S.S. Co. *v.* R., [1923] 1 K. B. 59; 92 L. J. K. B. 102; 128 L. T. 258; 38 T. L. R. 864; 16 Asp. M. L. C. 57; 28 Com. Cas. 49, C. A.; *on appeal, sub nom.* A.-G. *v.* ADELAIDE S.S. Co., LTD., [1923] A. C. 292, H. L.

*Annotations:*—**Refd.** Adelaide S.S. Co. *v.* R. (1925), 95 L. J. K. B. 213; Cayzer, Irvine *v.* Board of Trade, [1927] 1 K. B. 269.

**8756.** —— —— **Coaling of minesweepers.**]—The Admlty. chartered a collier from the owners during the war under the charterparty known as T.99, which provided in effect that the Admlty. would be liable for the risks of war, including "all consequences of hostilities or warlike operations whether before or after declaration of war," but that ordinary sea risks should remain for the account of the owners. After the Armistice the collier was employed in carrying coal for minesweepers, which, in coming alongside, bumped against the collier & damaged her.—*Held:* in the circumstances the coaling of the minesweepers was not a warlike operation, & the owners could not claim against the Admlty.—ADMIRALTY COMRS. *v.* BRYNAWEL S.S. Co., LTD. (1923), 40 T. L. R. 78.

**8757.** —— —— **Negligence of requisitioned ship.**]—During the war a steamship which was on sub-time charter was requisitioned by the Govt. on the terms of the charterparty T.99. While so requisitioned the steamship was injured by collision with another steamer in circumstances which were alleged to constitute a warlike operation. Damages were claimed against the Crown in an arbn. both by the shipowners & by the sub-time charterers, the claim being based on s. 19 of T.99, but the Crown refused to pay on the ground that the shipowners were not a party to the contract, & could have claimed under Indemnity Act, 1920 (c. 48), & the sub-time charterers had not the steamer at their risk. Upon argument of a special case:—*Held:* (1) on the facts the damage occurred in the course of a warlike operation; (2) the Indemnity Act, 1920 (c. 43), did not apply to arbn. proceedings; (3) as the Crown had contracted with the sub-time charterers they must pay the sub-time charterers.—EAGLE OIL TRANSPORT CO., LTD. *v.* BOARD OF TRADE (1925), 42 T. L. R. 201.

**8758.** —— —— ——.]—*Re* HAIN S.S. Co. (TREVANION (OWNERS)) & BOARD OF TRADE, No. 8760, *post*.

**8759.** —— —— —— **Assessment of damages recoverable from Crown.**]—The steamship *Warilda* was taken over during the war by the Admlty. on the terms of charterparty T.99 for use as an ambulance transport. Whilst carrying wounded soldiers from Havre to Southampton the *Warilda* came into collision with another ship, & both ships were damaged. In an action arising out of the collision it was held that the collision was caused by the negligence of the master of the *Warilda*, & that the *Warilda* was liable to the other ship for damages. Charterparty T.99 provided (clause 19) that the Admlty. would take over war risks excluded from an ordinary marine policy by the f.c. & s. clause, which included all consequences of hostilities or warlike operations, & (clause 25) that if from deficiency of men or store breakdown of machinery, "or any other cause," the work of the steamer was at any time suspended, pay should cease for the whole of the period during which the vessel was inefficient. It was agreed that an ordinary marine policy incorporated the Institute Time Clauses, including the running down clause, which provided that, if the insured ship became liable to pay & paid damages to another ship in respect of a collision, the insurers would pay to the assured three-fourths of the sum so paid, & would also, if the liability of the insured ship had been contested with the consent of the insurers, pay a like proportion of the costs thereby incurred. Upon a petition of right by the owners of the *Warilda*, it was held by the House of Lords that the collision was a consequence of a warlike operation, & that the owners were entitled to recover from the Crown such sum as should be found due to them by the judge of the Commercial Ct. Upon the assessment of damages the owners of the *Warilda* claimed (*inter alia*) (*a*) three-fourths of the sum which they had been held liable to pay in the collision action; (*b*) three-fourths of the costs of defending that action; (*c*) compensation for loss of hire during the period when the *Warilda* was undergoing repair:—*Held:* (1) the liability undertaken by the running down clause was not a risk which would be excluded by the f.c. & s. clause, & the Crown was not liable to indemnify the *Warilda* wholly or in part against the liability which she had incurred to third parties in consequence of the negligence of her master; (2) the claim for costs failed, as the Crown had not consented to the liability of the *Warilda* being contested; (3) the claim for loss of hire was excluded by clause 25 of the charterparty & was not recoverable under clause 19.—ADELAIDE S.S. Co. *v.* A.-G., [1926] A. C. 172;

*Sect.* 3.—*Excepted perils—War risks. Part XXVI. Sects.* 1 & 2.]

95 L. J. K. B. 213; 134 L. T. 258; 42 T. L. R. 180; 16 Asp. M. L. C. 579; 31 Com. Cas. 145, H. L.

**8760. —— —— After cessation of hostilities.**]—During the war a steamer belonging to applts. was requisitioned by the Shipping Controller under a charterparty providing that the Crown should be liable for all consequences of warlike operations but that the owners were to bear the marine risks. After the Armistice the steamer, when still under requisition, was on a voyage with a mercantile cargo of oats & collided at night with another steamer which had been requisitioned by the United States Govt. & which was taking mines back to America, probably in the belief that they were no longer required for the purposes of the war. The collision was caused by the negligent navigation of both steamers, & applts.' steamer was off hire for ninety-nine days as the result of the damage which she suffered. An arbn. took place, & the arbitrator found that the collision was a consequence of warlike operations & that therefore the Crown was liable to compensate applts.:—*Held:* (1) there was evidence on which the arbitrator could find that the steamer requisitioned by the United States Govt. was at the time of the collision performing a warlike operation; (2) the fact that the negligent navigation of applts.' steamer contributed equally to the loss did not relieve the Crown from liability: & therefore the arbitrator's award must be affi med.—*Re* HAIN S.S. Co. (TREVANION (OWNERS)) & BOARD OF TRADE (1928), 97 L. J. K. B. 630; *sub nom.* HAIN S.S. Co., LTD. *v.* BOARD OF TRADE, 44 T. L. R. 624; 72 Sol. Jo. 399, C. A.

**8761. —— Ship torpedoed—Subsequent loss by storm.**]—The Admlty. requisitioned a ship on condition that they would pay for the loss of the ship if it was excluded from an ordinary marine policy with the f.c. & s. clause. The ship was torpedoed & was towed some distance but ultimately was driven ashore by a storm & became a total wreck:—*Held:* as the storm would not have caused the loss of the ship if she had not been torpedoed, the loss was excluded from a marine policy & fell on the Admlty.—LOBITOS OIL FIELDS, LTD. *v.* ADMIRALTY COMRS. (1918), 34 T. L. R. 466, D. C.

**8762. —— Salvage services—Ship being driven towards minefields.**]—The Lords Comrs. of the Admlty. requisitioned a steamship upon the terms of a charterparty, which provided that they should not be liable for any cause arising as a sea risk, but that the risks of war which were taken by them were those excluded by the following clause: "Warranted free of capture, seizure, & detention, & the consequences thereof . . . & also from all consequences of hostilities or warlike operations." On a voyage in the North Sea under this charter, while she was between two minefields, the vessel broke her propeller shaft in a gale of wind, & was being driven disabled towards one of the minefields six miles distant. Salvage services were rendered, & she was eventually towed into port. The owners paid one sum of £3,000, admittedly a fair sum, in settlement of a claim for salvage. The question whether the Admlty. should contribute towards this sum was referred to arbn. The arbitrator found that the vessel, besides being exposed to ordinary sea perils, was in danger of drifting on to a minefield; that the master accepted the salvage services to save the ship from both marine & war risks, the consequences of hostilities & warlike operations within the meaning of the charterparty; that £750 out of the £3,000 represented the sum by which the salvage reward was enhanced by reason of war risks & that £750 was a reasonable sum for the owners to have paid for rescuing their vessel from those risks. He awarded that the Admlty., as charterers, were liable to pay that sum:—*Held:* the £750, being the amount of salvage occasioned by the consequences of hostilities or warlike operations, was a loss from those causes, & payable as such by the Admlty. within the express terms of the charter.—PYMAN S.S. Co. *v.* ADMIRALTY COMRS., [1919] 1 K. B. 49; 88 L. J. K. B. 277; 119 L. T. 735; 35 T. L. R. 79; 14 Asp. M. L. C. 364, C. A.

**8763. —— Stranding — Navigation without lights.**]—The steamship *Inkonka* was chartered by the Admlty. on the terms of the charterparty T.99. under which the Admlty. were not liable for losses from ordinary marine risks, but undertook the risks of "all consequences of hostilities or warlike operations." The *Inkonka* sailed under Admlty. orders on a voyage from Salonica to Taranto, in Italy, having on board hospital stores for the British Government, & carrying a few British troops & officers. On approaching Taranto she was navigated without lights, being in the war zone, & was escorted by a British destroyer. No shore lights were to be seen, & the *Inkonka* was ordered by the commander of the destroyer to follow a pilot escort which came out of Taranto. She did so, though the master would not have attempted, without the destroyer's orders, to enter the port, & he only sought to do so in the darkness in reliance on the pilot escort. The *Inkonka* almost immediately after she was ordered to follow the pilot escort lost sight of her & ran ashore:—*Held:* though the *Inkonka* was stranded whilst being navigated under war conditions, the damage to her did not arise in consequence of warlike operations, & the Admlty. were not liable in damages for the loss.—HARRISONS, LTD. *v.* SHIPPING CONTROLLER, [1921] 1 K. B. 122; 90 L. J. K. B. 384; 124 L. T. 540; 36 T. L. R. 880; 15 Asp. M. L. C. 270.

*Annotation:*—**Refd.** Adelaide S.S. Co. *v.* R., [1923] 1 K. B. 59.

**8764. Act of King's enemies—Ship requisitioned for military purposes—Used as storehouse for provisions.**]—Goods were shipped from Australia to the United Kingdom on board a ship requisitioned by the Crown for military purposes, under a bill of lading which described the ship as "bound for London via ports subject to Govt. requirements" & contained an exception under which the Crown was not liable if the cargo was lost by the act of the King's enemies, & also very wide powers of deviation under orders or directions of the Govt.

On arriving in the Mediterranean the ship was ordered to a port out of the direct route to her destination in order to land frozen meat for the use of troops, & was detained there for a considerable time while the meat which she had on board, & other frozen meat which was put on board her, was landed as required by the troops. On her way from this port to her destination she was sunk by a hostile ship, & the goods were lost:—*Held:* that the use of the ship as a storeship for meat was not within the intent & object of the contract, & the Crown was not protected by the exception in the bill of lading.—A.-G. *v.* SMITH BENJAMIN) & Co. (1918), 87 L. J. K. B. 1045; 19 L. T. 252; 34 T. L. R. 566; 62 Sol. Jo. 701; 4 Asp. M. L. C. 334, H. L.; *affg.* S. C. *sub nom.* SMITH (BENJAMIN) & Co. *v.* R. (1917), 86 L. J. K. B. 1147, C. A.

*Annotation:*—**Refd.** Naylor, Benzon & Co. *v.* Krainische Industrie Gesellschaft (1918), 87 L. J. K. B. 1066.

# Part XXVI.—The Trinity Masters.

SECT. 1.—IN GENERAL.

**8765. When called in—Salvage cases—Both parties agreed.**]—THE EMMY (1848), 3 L. T. 123.

**8766.** —— —— ——.] —THE JAMES DIXON (1860), 2 L. T. 696.

**8767.** —— —— **Great nautical difficulties.**]—THE EMMY (1848), 3 L. T. 123.

**8768.** —— —— ——.]—THE JAMES DIXON (1860), 2 L. T. 696.

**8769.** —— **Collision case—Plea that story of collision impossible.**]—An application for the attendance of Trinity Masters as to the admissibility of a plea, namely, to show that as a matter of nautical experience the account of the collision pleaded was impossible, was refused.—THE VARGAS (1851), 3 L. T. 123; 15 Jur. 710.

**8770. When third assessor called in—Difference in opinion.**]—DALE *v.* HALL, THE LAUREL & THE HOUGHTON (1765), Burrell, 323; 167 E. R. 592.

**8771.** —— ——.] —*Semble:* where the two assessors disagree, the ct. can call in a third, &, after submitting the evidence already given to him, have the case reargued before the three assessors. The judgment is that the judge & he may decide in accordance with advice of one or more of the assessors or not as he thinks fit.—THE PHILOTAXE (1877), 37 L. T. 540; 3 Asp. M. L. C. 512.

*See, also*, No. 8787, *post*.

**8772. Inspection by assessors—Of vessel.**]—The ct. has power under Admiralty Court Act, 1861 (c. 10), s. 18, to order an inspection of a vessel by Trinity Masters, & will direct that they be attended by the proctors & a viewer on behalf of each party.—THE GERMANIA (1868), 37 L. J. Adm. 59; 19 L. T. 20; 3 Mar. L. C. 140; *on appeal* (1869), 21 L. T. 44, P. C.

*Annotation:*—**Mentd.** The Carlotta (1899), 80 L. T. 664.

**8773.** —— —— **What included in report.**]—Where Trinity Masters are desired to inspect & report to the ct., their report is not necessarily confined to those matters on which evidence has been given, but may include any circumstance in their opinion affecting the merits of the case.—THE MARATHON (1879), 40 L. T. 163; 4 Asp. M. L. C. 75.

**8774.** —— **Of lights—Application before hearing of action.**]—Before the hearing of an action an application was made under Admiralty Court Act, 1861 (c. 10), s. 18, by pltfs., that two Trinity masters should inspect the lights of defts.' ship:—*Held:* the application was premature & ought to be refused.—THE VICTOR COVACEVICH (1885), 10 P. D. 40; 54 L. J. P. 48; 52 L. T. 632; 5 Asp. M. L. C. 417.

**8775.** —— **To be made at night.**]—An inspection under Admiralty Court Act, 1861 (c. 10), s. 18, to ascertain whether the lights carried by a ship were such as the regulations require, ought to be made at night.—PAULINE CONSTANCE ELEONORE (OWNERS, ETC.) *v.* HAMBURGH AMERICAN STEAM PACKET CO., THE GERMANIA (OWNERS), THE GERMANIA (1869), 21 L. T. 44; 3 Mar. L. C. 269, P. C.

*Annotation:*—**Mentd.** The Carlotta (1899), 80 L. T. 664.

**8776. Assessors in Court of Appeal—Authority in relation to assessor in court of first instance.**]—AUSTRALIA (OWNERS) *v.* NAUTILUS (CARGO OWNERS), THE AUSTRALIA, No. 8788, *post*.

**8777. County court judgment in accordance with view of assessors—Judge dissenting from view—Whether appeal lies.**]—In a collision action brought in the county ct. the judge formed an opinion on the evidence in favour of pltfs., but the nautical assessors took the view that pltfs.' vessel was to blame for a wrong manœuvre. The judge felt himself bound to give judgment in accordance with the view of the assessors, expressing at the same time his dissent therefrom. Pltfs. appealed:—*Held:* on these facts, the ct. had no power to alter the decision of the learned judge.—THE FRED (1895), 72 L. T. 153; 7 Asp. M. L. C. 550, D. C.

SECT. 2.—DUTY OF COURT.

**8778. To decide case upon own opinion.**]—These [the Trinity] Masters are merely assessors of the judge [of Admlty. Ct.] & assist him with their advice; . . . the sentence is entirely his (PARKE, B.).—WILLIAMS *v.* CHAPMAN (1846), 4 Notes of Cases, 585, P. C.

**8779.** —— **Assessor's aid on nautical questions only.**]—THE VESPER *v.* THE PRINCE FREDERICK WILLIAM (1858), 8 L. T. 613.

**8780.** —— ——.] —THE EDWARD ALISON (1863), 8 L. T. 613.

**8781.** —— ——.]—The duty of Trinity Masters, sitting as assessors in the Admlty. Ct., is to assist the judge in questions of nautical skill. In case of a difference of opinion between the judge & the assessors, the judge is not at liberty to act upon any inferences which they may draw from the evidence, except they accord with his own. It is the duty of the judge to decide the case on his own responsibility.—THE MAGNA CHARTA (1871), 25 L. T. 512; 1 Asp. M. L. C. 153, P. C.

*Annotations:*—**Consd.** The Fred (1895), 72 L. T. 153; The City of Berlin, [1908] P. 110. **Reid.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145. **Mentd.** Glessing *v.* The Hansa (1872), 26 L. T. 169.

**8782.** —— ——.]—That is a pure question of fact, &, in view of the difference of opinion which has prevailed in the cts. below, & indeed in your Lordships' House in the advice given by the nautical assessors, I think it right to say that it does not appear to me to be a matter of nautical skill at all; indeed, if we may be supposed to understand the language & not to be misled by words the question has nothing to do with any particular technical skill on the subject. It is a question of the balance of testimony, of weighing testimony by certain known principles by which all questions of fact are weighed & considered in cts. of law, & although I myself should place considerable reliance on expert opinion with respect to technical manœuvres or something which had reference to what was or was not to be done for the purpose of avoiding some impending accident

**PART XXVI. SECT. 1.**

1. *Remuneration of nautical assessor.*]—Remuneration at the rate of five guineas *per diem* will be allowed to a nautical assessor sitting in the Ct. of Appeal.—THE RAMBLER *v.* THE KOTKA [1917] 2 I. R. 406.—IR.

**PART XXVI. SECT. 2.**

m. *Delegation of judicial functions*—*Whether new trial granted.*]—An action for damages caused by collision between two vessels was tried without a jury, & after the evidence had been taken the trial judge, with the consent of both parties, consulted two master

*Sect. 2.—Duty of court. Sects. 3 & 4.]*

by some nautical arrangement, I confess that dealing with mere questions of fact to be determined upon the weight & balance of evidence I will not surrender my own judgment to that of the gentlemen who are good enough to assist us with their nautical skill & experience (LORD HALSBURY, C.).—GANNET (OWNERS) *v.* ALGOA (OWNERS), THE GANNET, [1900] A. C. 234; 69 L. J. P. 49; 82 L. T. 329; 9 Asp. M. L. C. 43, H. L.

*Annotations:*—**Refd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145. **Mentd.** The Pitgaveney, [1910] P. 215.

**8783.** —— ——.]—The assessors in the Admlty. Ct., & in the Ct. of Appeal when trying Admlty. appeals do not constitute a part of the ct., & whatever the advice or opinion of the assessors may be the decision of the ct. both in fact & law is the decision of the judge alone, the assessors being only present to assist the ct. with advice on questions of nautical skill (LORD ALVERSTONE, C.J.).—THE CITY OF BERLIN, [1908] P. 110; 77 L. J. P. 76; 98 L. T. 298; 11 Asp. M. L. C. 4, C. A.

*Annotation:*—**Refd.** R. *v.* L. G. Board, *Ex p.* Arlidge (1913), 11 L. G. R. 1186.

**8784.** —— **Judge differing from assessors.**]—THE MAGNA CHARTA, No. 8781, *ante*.

**8785.** —— ——.]—Where the judge of a county ct. having Admlty. jurisdiction is assisted by nautical assessors he ought not to allow any advice given by them, but disagreed with by him, to influence the decision of the ct.—THE AID (1881), 6 P. D. 84; 50 L. J. P. 10; 44 L. T. 843; 29 W. R. 614; 4 Asp. M. L. C. 432, C. A.

*Annotation:*—**Refd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**8786.** —— ——.]—If the judge of the ct. below differs from his assessors he is bound to decide in accordance with his own opinion (BRETT, M.R.).—THE BERYL (1884), 9 P. D. 137; 53 L. J. P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. L. C. 321, C. A.

*Annotations:*—**Refd.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145. **Mentd.** The Dordogne (1884), 10 P. D. 6; The John McIntyre (1884), 9 P. D. 135; The Stanmore (1885), 54 L. J. P. 89; Baker *v.* Theodore H. Rand (Owners), The Theodore H. Rand (1887), 12 App. Cas. 247; S.S. Lebanon, *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670; Liverpool, Brazil & River Plate Steam Navigation Co. *v.* Campanhia Bahiana de Navegacio a Vapor, The Memnon (1889), 62 L. T. 84; The Oporto, [1897] P. 249; The Bellanoch, [1907] P. 170; S.S. Mendip Range *v.* Radcliffe, [1921] 1 A. C. 556.

**8787.** —— **Assessors differing in opinion.**]—THE VERNON (1842), as reported in 1 Notes of Cases, 277; 3 L. T. 123; 6 Jur. 67.

*Annotations:*—**Mentd.** The Canadian (1842), 1 Wm. Rob. 343; Hervey *v.* Fitzpatrick (1854), 2 Eq. Rep. 444; General Iron Screw Colliery Co. *v.* Schurmanns (1860), 1 John. & H. 180; R. *v.* Keyn (1876), 2 Ex. D. 63.

**8788.** —— ——.]—(1) The ct. is not bound to take the advice of its nautical assessors, but must make up its own mind on questions of nautical skill & seamanship.

(2) Nautical assessors advising the Ct. of Appeal have no higher authority than those advising the ct. of first instance, & where the two pairs of assessors differ the ct. must make its own choice. If the ct. is unable to decide whether the advice it receives is sound, the position is that the point is not proven & that the loss must fall upon the party who bears the burden of proof on that particular issue.—AUSTRALIA (OWNERS) *v.* NAUTILUS (CARGO OWNERS), THE AUSTRALIA, [1927] A. C. 145; 95 L. J. P. 145; 135 L. T. 576; 42 T. L. R. 614; 17 Asp. M. L. C. 86; 32 Com. Cas. 82, H. L.

**8789.** —— **Assessors reasons not satisfactory.**]—In invoking the assistance of the Trinity Masters the ct. merely requests them to state their opinions together with the reasons on which that opinion is founded, & if the opinion of the Trinity Masters is not satisfactory, the ct. does not adopt it (DR. LUSHINGTON).—THE ALFRED (1850), 3 Wm. Rob. 232; 7 Notes of Cases, 352; 14 Jur. 155; 166 E. R. 949.

*Annotations:*—**Apld.** The Fred (1895), 72 L. T. 153. **Consd.** The City of Berlin, [1908] P. 110. **Refd.** The Houthandel (1853), 1 Ecc. & Ad. 25. **Mentd.** The Princess (1885), 52 L. T. 932; S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145.

**8790.** —— **Assessor's opinions influenced by inadmissible evidence.**]—If the Trinity Masters seemed to form their opinion on parts of the evidence which were inadmissible, the ct. would not adopt their advice.—THE ACTÆON (1853), 1 Ecc. & Ad. 176; 164 E. R. 102.

SECT. 3.—**FUNCTIONS OF ASSESSORS.**

**8791. As expert advisers—Unusual accident.**]—An allegation that a collision was caused by the chains or any part of the furniture of a vessel getting out of order by accident, without the intervention of storms, & when the ship was sailing down the Thames with a fair wind, can never be considered by the ct. to be a good defence, unless so advised by the Trinity Masters (DR. LUSHINGTON).—THE CLUTHA (1846), 4 L. T. 774.

**8792.** —— **Interpretation of nautical phrases "meeting end on."**]—THE ST. CYRAN *v.* THE HENRY (1864), as reported in Holt, Adm. 72.

**8793.** —— **Questions of nautical law.**]—The Elder Brethren are here to advise on questions of nautical law (SIR ROBERT PHILLIMORE).—THE EARL SPENCER (1875), as reported in L. R. 4 A. & E. 431; 23 W. R. 661; *on appeal*, 33 L. T. 235, P. C.

*Annotation:*—**Mentd.** The City of Brooklyn (1876), 1 P. D. 276.

—— **To aid court on questions of nautical skill.**]—*See* Nos. 8779–8782, *ante*.

SECT. 4.—**EXCLUSION OF EXPERT EVIDENCE.**

**8794. Trinity Masters must be guided by own experience & skill.**]—It is my duty to inform you that you must be guided solely & entirely by your own science & knowledge, & not by the opinion of

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mariners, & adopted as his own their opinion, based on a consideration of conflicting testimony, as to the responsibility for the collision:—*Held:* this was a delegation of the judicial functions; & a new trial was ordered.—WRIGHT *v.* COLLIER (1892), 19 A. R. 298.—**CAN.**

**PART XXVI. SECT. 3.**

n. *To comment on trustworthiness of evidence.*]—Two ships collided on a very bad night. The collision was caused by the *Magnus*, which was light, dragging her anchors, & coming down on the *Rossetti*, which was holding to her moorings. When the *Magnus* was dragging her anchors she had steam up but did not use it, by which failure she omitted to take a reasonable measure which might have avoided the accident. In an action for damages by the *Rossetti* against the *Magnus* there was uncontradicted evidence to the effect that the steam had not been used because those in charge of the *Magnus* did not & could not know owing to the darkness & the weather that they were dragging their anchors. The Lord Ordinary, without expressing any opinion as to whether he credited that evidence or not, accepted an opinion expressed by the nautical assessor to the effect that it would not have been difficult for those on the *Magnus* to know that they were dragging their anchors:—*Held:* it was for the Lord Ordinary & not for the nautical assessor to pronounce upon the trustworthiness of that evidence, & to say whether or not the master of the *Magnus* ought to have known when his anchor began to drag, &, on the ground that the evidence did not establish the fault, the *Magnus* assoilzied.—CAMBO SHIPPING CO., LTD. *v.* DAMPSKIBSSELSKABET CARL OF COPENHAGEN, [1920] S. C. 26; 57 Sc. L. R. 59; [1919] 2 S. L. T. 224.—**SCOT.**

other nautical persons, however respectable or numerous such witnesses may be, swearing to a belief that this or that particular course was the proper course to have been adopted. If this were not so, your attendance in this ct. would be almost nugatory, & in the great majority of cases that might occur it would be impossible for the ct. to arrive at any certain or satisfactory determination (DR. LUSHINGTON).—THE GAZELLE (1842), 1 Wm. Rob. 471; 2 Notes of Cases, 39; 7 Jur. 497; 166 E. R. 648.

*Annotations:*—**Reld.** The Superior (1849), 6 Notes of Cases, 607; The Kirby Hall (1883), 8 P. D. 71.

**8795.** ——.]—It is true there may be cases where it may be desirable to have the affidavits of persons of great local knowledge, to instruct the mind of the ct. when Trinity Masters do not attend; when they do attend, all evidence of that kind is superseded by a reference to their opinion, because they are guided by their own knowledge & judgment (DR. LUSHINGTON).—THE NIMROD (1850), 7 Notes of Cases, 570; 14 Jur. 942.

**8796.** ——.]—THE MAGDALEN, No. 7486, *ante*.

**8797.** ——.]—Where the ct. is assisted by nautical assessors evidence of experts on questions of nautical science & skill may properly be rejected.—THE SIR ROBERT PEEL (1880), 43 L. T. 364; 4 Asp. M. L. C. 321, C. A.

*Annotations:*—**Reld.** S.S. Australia *v.* S.S. Nautilus, [1927] A. C. 145; S. S. Hontestroom *v.* S.S. Sagaporack, S.S. Hontestroom *v.* S.S. Durham Castle, [1927] A. C. 37.

**8798.** ——.]—It [the evidence in question] is evidence on a point on which it is the province of the Trinity Masters to advise the ct., & I do not think I ought to do anything which will go any way towards allowing the examination of expert witnesses on questions of nautical skill & seamanship in cases where the ct. is assisted by the Trinity Masters (SIR ROBERT PHILLIMORE).—THE KIRBY HALL (1883), 8 P. D. 71; 48 L. T. 797; 5 Asp. M. L. C. 90.

*Annotations:*—**Reld.** The Tynwald, [1895] P. 142. **Mentd.** The Dordogne (1884), 10 P. D. 6; S.S. Lebanon *v.* S.S. Ceto, The Ceto (1889), 14 App. Cas. 670.

# SHIP'S PAPERS.

*See* SHIPPING AND NAVIGATION.

# SHIPWRECK.

*See* ADMIRALTY; CRIMINAL LAW AND PROCEDURE; INSURANCE; SHIPPING AND NAVIGATION.

# SHOEBLACKS.

*See* STREET AND AERIAL TRAFFIC.

# SHOOTING.

*See* CRIMINAL LAW AND PROCEDURE; GAME; WATERS AND WATERCOURSES.

# SHOP ASSISTANTS.

*See* FACTORIES AND SHOPS.

# SHOP CLUBS.

*See* CLUBS.

# SHORE.

*See* BOUNDARIES, FENCES, AND PARTY-WALLS; CONSTITUTIONAL LAW; WATERS AND WATERCOURSES.

# SHOWS.

*See* THEATRES AND OTHER PLACES OF ENTERTAINMENT.

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# SIDINGS.

*See* CARRIERS; RAILWAYS AND CANALS; RATES AND RATING.

# SIGN MANUAL.

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# SIGNATURE.

*See* AUCTION AND AUCTIONEERS; ARBITRATION; BANKERS AND BANKING; BARRISTERS; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS; CONTRACT; DEEDS AND OTHER INSTRUMENTS; GUARANTEE AND INDEMNITY; SALE OF GOODS; WILLS; AND TITLES *passim.*

# SIMONY.

*See* ECCLESIASTICAL LAW.

## SINKING FUND.

*See* REVENUE.

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## SITTING AND PEW RENTS.

*See* ECCLESIASTICAL LAW.

## SITTINGS.

*See* TIME.

## SKIMMED MILK.

*See* FOOD AND DRUGS.

## SKY SIGNS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## SLANDER.

*See* LIBEL AND SLANDER.

## SLANDER OF GOODS.

*See* LIBEL AND SLANDER.

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## SLANDER OF TITLE.

*See* LIBEL AND SLANDER.

## SLANDER OF WOMEN.

*See* LIBEL AND SLANDER.

# SLATE CLUBS.

*See* FRIENDLY SOCIETIES.

# SLAUGHTER-HOUSES.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

# SLAVE TRADE.

*See* ADMIRALTY; CONFLICT OF LAWS; CRIMINAL LAW AND PROCEDURE; TRADE AND TRADE UNIONS.

# SMALL DWELLINGS.

*See* SMALL HOLDINGS AND SMALL DWELLINGS.

END OF VOL. XLI.

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